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Court Review

Volume 53, Issue 2

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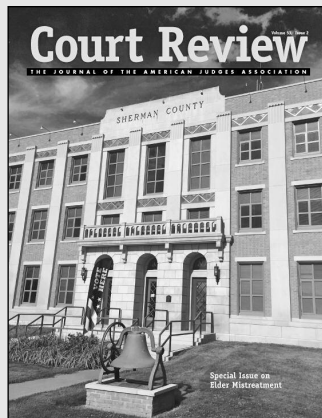
2017

EDITOR'S NOTE

We are pleased to bring you a special issue on elder mistreatment. This issue was largely organized by our special issue guest co-editor, Nina Kohn, J.D., Associate Dean for Research and David M. Levy Professor of Law at the Syracuse University College of Law. She is a well-published and respected expert in the area of elder law. Ms. Kohn recruited authors representing many facets of elder mistreatment and she details the articles and general area in her special issue introduction. You will have the opportunity to read articles from the perspective of a physician, judge, prosecutor, law professor, and guardian. Each author brings a unique viewpoint to the topic in a way that we hope will be useful to judges as they hear cases about elder mistreatment or simply hear cases involving older adults.

In addition to the articles that are part of our special issue, you will also find our usual features including the President's Column, Thoughts from Canada, and the crossword puzzle. As always, we are extremely grateful for these regular contributions and we hope you are enjoying them as much as we are.

Finally, on our Resource Page we provide information about two new publications. The first is a new book from the American Bar Association, *Enhancing Justice: Reducing Bias*. It surveys the rich research on implicit bias while focusing on the intersection of implicit bias in the court system. The second is a new offering from the National Center for State Courts' Center for Sentencing Initiatives. This time, the Center has produced a brief but well-researched summary of evidence-based practices for making offenders placed on probation more successful.—EB



Court Review, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States and Canada. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work. Guidelines for the submission of manuscripts for *Court Review* are set forth on page 85 of this issue. *Court Review* reserves the right to edit, condense, or reject material submitted for publication.

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The cover photo is of the Sherman County Courthouse in Goodland, Kansas. Cover photo by Steve Leben.

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President's Column

JUDGES HAVE A JOB TO DO

Russell J. Otter

In recent times, there has been a marked increase in attacks on the independence of the judiciary in democratic societies—Pakistan, Venezuela, Turkey, Canada, and the United States. These attacks are significantly more damaging when they emanate from the other branches of government—the legislative and the executive. In response, judges must speak out to preserve and protect judicial independence, a vital pillar in the architecture of healthy and vibrant democracy.

The concept of judicial independence can be traced back to 18th century England. At its simplest, it means that the judiciary needs to be separated from the other branches of government. Courts should not be subject to improper influence from the other branches of government or from private and partisan interests. Though not a huge fan of the judiciary, President Andrew Jackson did say that “all rights secured to the citizens under the Constitution are worth nothing, and a mere bubble, except guaranteed to them by an independent and virtuous judiciary.” I particularly enjoy the colorful phrasing of a 19th century British Prime Minister, Lord Salisbury: “The judicial salad requires both legal and political vinegar, but disastrous effects will follow if due preparation is not observed.”

Justice Neil Gorsuch, the most recent appointment to the U.S. Supreme Court, asserted during his Senate confirmation hearing that “[u]nder our Constitution, it is for this body, the people’s representatives, to make new laws. For the executive to ensure those laws are faithfully enforced and for neutral and independent judges to apply the law in people’s disputes.” When members of the other branches of government label a judge’s decision “ridiculous,” characterize a judge as “so-called,” or threaten to defund courts that struck down laws they found unconstitutional, judicial integrity and independence are needlessly harmed.

Accordingly, on April 29, 2017, the Board of Governors of the American Judges Association, acting in the AJA’s role as the Voice of the Judiciary®, issued this statement in a news release:

The late Chief Justice William Rehnquist once said that criticism of judges and their decisions “is as old as our Republic” and can be a healthy part of the balance of power between the branches of government. Today, however, recent attacks on judges have not only become unhealthy but threaten to undermine the public’s understanding of the role of judges in a democratic society.

In a democratic society, judges will inevitably make rulings that challenge the authority of the other two

branches or that protect the disadvantaged and those without political power.

Intemperate personal attacks on judges by political leaders are simply wrong. The political leaders of our country have an obligation to foster public understanding of the role of courts, even when they disagree with a court’s ruling.

Judges have historically been reluctant to respond to unfair attacks. But as far back as Chief Justice John Marshall, there have been times when judges have seen the need to speak up. This is one of those times.



The leaders of the American Judges Association will speak out in defense of judges who are unfairly attacked, and we encourage others to do so too. Unfair or unseemly attacks on individual judges are not merely an attack on that individual judge—they are an attack on the institution of the judiciary, an institution indispensable to our democracy.

All of us should use every opportunity to educate the public of the role of the judiciary in a democracy—who it is; what it does; and who the public is and why what it thinks matters. Schools, service clubs, public forums, and even written judgments are excellent mechanisms to do this “job.” A very effective initiative employed by at least two Canadian provincial chief judges was to participate in call-in talk-radio shows.

It is worth remembering that while both courts and legislatures are entitled to enforce rights, only the courts have the institutional characteristics that best offer the possibility of responsiveness to minority concerns in the face of majoritarian pressures, namely independence. Decisions in specific cases are made independent of the voters’ electoral judgment. Court decisions can and will attract controversy—free speech permits that. What should not be condoned are unwarranted ad hominem attacks on judges. Education by judges can be a very effective weapon to blunt these types of attacks.

There is no better way to prepare for such presentations than to attend judicial education programs like the ones being offered by the American Judges Association at its annual meeting, September 10-15, 2017, in Cleveland, Ohio. Sessions will include lectures on judicial independence, procedural fairness, and pretrial justice for both juveniles and adults.

You can prepare to educate the public on judicial independence. Hope to see you there.

The Evolution of the Admissibility of Hearsay Evidence in Canada

Wayne K. Gorman

As in all other common law jurisdictions, hearsay evidence—an out-of-court statement tendered for the truth of its contents—is presumptively inadmissible in Canada. In *R. v. Khelawon*,¹ the Supreme Court of Canada described the rationale for excluding hearsay evidence:

While no single rationale underlies its historical development, the central reason for the presumptive exclusion of hearsay statements is the general inability to test their reliability. Without the maker of the statement in court, it may be impossible to inquire into that person's perception, memory, narration or sincerity. The statement itself may not be accurately recorded. Mistakes, exaggerations or deliberate falsehoods may go undetected and lead to unjust verdicts. Hence, the rule against hearsay is intended to enhance the accuracy of the court's findings of fact, not impede its truth-seeking function.²

This general prohibition is, as elsewhere, subject to exceptions in Canada (such as, for instance, *res gestae*, dying declarations, etc.). However, through a series of judgments, the Supreme Court of Canada has dramatically altered the traditional common law prohibition. The Supreme Court of Canada has created what it has described as a “principled approach” to the admissibility of hearsay evidence. This has opened the door for the admissibility of such evidence in a broad context. The Law Reform Commission of Ireland recently considered the admissibility of hearsay evidence and summarized the Canadian approach in the following manner:

The stance adopted by the Canadian courts to the rule against hearsay and its exceptions involves a principle-based approach, i.e. the judging of cases with respect to general principles such as “necessity” and “reliability” rather than precise and pre-existing rules. The effect of these decisions by the Supreme Court of Canada is that hearsay evidence is admissible if the evidence meets two criteria: that the evidence is necessary and reliable; and that the probative value of the evidence is not outweighed by its prejudicial effect. Case law establishes that the necessity criteria will be satisfied if the hearsay

evidence is reasonably necessary to prove a fact in issue, the relevant direct evidence is not available, and that evidence of the same quality cannot be obtained from another source. The rationale for the new approach, as noted by Lamer CJC in *R v Smith*, is that reliable evidence ought not to be excluded simply because it cannot be tested by cross-examination. However, he qualified this by stating that the trial judge should have a residual discretion to exclude the evidence where its probative value is slight and it would thus be unfairly prejudicial to the accused for it to be admitted.³

In this column, I am going to review how Canadian law arrived at this point and illustrate by reference to two recent decisions of the Ontario Court of Appeal that the scope of hearsay is continuing to expand, but not without difficulties. Let us start at the beginning.

R. v. KHAN:

In *R. v. Khan*,⁴ the accused, a medical doctor, was charged with sexually assaulting a three-and-one-half-year-old child. At his trial, the Crown sought to introduce statements made by the child (T.) to her mother (Mrs. O.), approximately fifteen minutes after the alleged assault. The Crown argued that they were admissible under the spontaneous-declaration exception to the hearsay rule. The comments made by the child were as follows:

Mrs. O.: So you were talking to Dr. Khan, were you? What did he say?

T.: He asked me if I wanted a candy. I said “Yes.” And do you know what?

Mrs. O.: What?

T.: He said, “Open your mouth.” And do you know what? He put his birdie in my mouth, shook it and peed in my mouth.⁵

The trial judge refused to admit the statements on the basis that they were not contemporaneous with the event.⁶ The Supreme Court of Canada agreed. It held that “applying the traditional tests for spontaneous declarations, the trial judge correctly rejected the mother's statement.”⁷ However, the

Footnotes

1. [2006] 2 S.C.R. 787 (Can.).

2. *Id.* ¶ 2.

3. LAW COMMISSION OF IRELAND, CONSOLIDATION AND REFORM OF ASPECTS OF THE LAW OF EVIDENCE 112 (2017), http://www.lawreform.ie/_fileupload/Evidence%20Report%20Completed%20Revised%2018%20Jan.pdf.

4. [1990] 2 S.C.R. 531 (Can.).

5. *Id.* ¶ 4.

6. *Id.* ¶ 5.

7. *Id.* ¶ 19.

Supreme Court indicated that there was a “need for increased flexibility in the interpretation of the hearsay rule to permit the admission in evidence of statements made by children to others about sexual abuse.”⁸ The Supreme Court held that such evidence is admissible if it is “necessary” and “reliable.”

The first question should be whether reception of the hearsay statement is necessary. Necessity for these purposes must be interpreted as “reasonably necessary”. The inadmissibility of the child’s evidence might be one basis for a finding of necessity. But sound evidence based on psychological assessments that testimony in court might be traumatic for the child or harm the child might also serve. There may be other examples of circumstances which could establish the requirement of necessity.

The next question should be whether the evidence is reliable. Many considerations such as timing, demeanour, the personality of the child, the intelligence and understanding of the child, and the absence of any reason to expect fabrication in the statement may be relevant on the issue of reliability. I would not wish to draw up a strict list of considerations for reliability, nor to suggest that certain categories of evidence (for example the evidence of young children on sexual encounters) should be always regarded as reliable. The matters relevant to reliability will vary with the child and with the circumstances, and are best left to the trial judge.⁹

Though *Khan* could be interpreted as only applying to hearsay statements made by children in sexual assault cases, the Supreme Court of Canada quickly dissociated itself from such a limited interpretation. Two years after rendering its decision in *Khan*, the Supreme Court of Canada extended the principled approach set out in *Khan* to the admissibility of statements made by an adult victim in a murder case.

R. v. SMITH:

In *R. v. Smith*,¹⁰ the accused was charged with killing Ms. Aritha King. At the accused’s trial, the Crown sought to introduce a number of telephone calls made by the victim to her mother. The Crown argued that these calls established that the accused was with the victim immediately prior to her death.¹¹

The Supreme Court of Canada held that the contents of the deceased’s telephone calls to her mother were not admissible under the “present intentions” or “state of mind” exceptions to the prohibition against the admissibility of hearsay.¹² However, the Supreme Court indicated that *Khan* signaled “the triumph

of a principled analysis over a set of ossified judicially created categories.”¹³ The Court concluded that the hearsay evidence was “necessary” because the declarant was deceased. The Court held that the necessity criteria will be established when “direct evidence is not, for a variety of reasons, available.”¹⁴ The Court also held that in assessing reliability, the trial judge should determine whether a “circumstantial guarantee of trustworthiness” exists.¹⁵

PRIOR CONSISTENT STATEMENTS:

R. v. Smith was followed a year later by *R. v. B.(K.G.)*.¹⁶ In *B.(K.G.)*, the Supreme Court extended *Khan* to the introduction of prior consistent statements for the truth of their contents. Significantly, in *B.(K.G.)*, the declarants were available to testify. The difficulty was that although they had provided statements to the police incriminating the accused, they recanted these statements at trial. The issue became whether the Crown could introduce the witnesses’ police statements not simply to contradict the reluctant witnesses but for the truth of their contents. Relying on the common law rule which prohibited the use of such statements for such a purpose, the trial judge denied the Crown’s request and the accused was acquitted.¹⁷

On appeal, the Supreme Court of Canada held in *B.(K.G.)* that “the time has come for the orthodox rule to be replaced by a new rule recognizing the changed means and methods of proof in modern society.”¹⁸ The Supreme Court concluded that prior consistent statements could be admitted into evidence for the truth of their contents if (1) the prior statement was made under oath or solemn affirmation, (2) the entire statement was video-recorded, and (3) the opposing party had the opportunity to fully cross-examine the witness at trial respecting the statement.¹⁹ The Court held that the necessity criterion was met because “evidence of the same value” was not available from the recanting witness or other sources.²⁰

B.(K.G.) was followed by *R. v. U.(FJ.)*.²¹ Once again the issue of admissibility of a prior consistent statement was considered by the Supreme Court. However, this case involved a statement a complainant had provided to the police that had not been taken under oath or video-recorded.

In *U.(FJ.)*, the complainant provided a statement to the police in which she indicated that the accused, her father, was having sex with her “almost every day.”²² The interviewing police officer had attempted to tape the interview, but the tape recorder had malfunctioned. After interviewing the complainant, the officer interviewed the accused. The accused admitted to having sexual intercourse with his daughter “many times.”²³ He described similar sexual acts as were described by the complainant in her police statement. At trial,

8. *Id.* ¶ 26.

9. *Id.* ¶¶ 31-32.

10. [1992] 2 S.C.R. 915 (Can.).

11. *Id.* ¶¶ 4-8.

12. *Id.* ¶ 27-28.

13. *Id.* ¶ 30.

14. *Id.* ¶ 36.

15. *Id.* ¶ 30.

16. [1993] 1 S.C.R. 740 (Can.).

17. *Id.* ¶¶ 4-7.

18. *Id.* ¶ 1.

19. *Id.* ¶ 106.

20. *Id.* ¶ 112.

21. [1995] 3 S.C.R. 764 (Can.).

22. *Id.* ¶ 4.

23. *Id.* ¶ 5.

the complainant recanted the allegations of sexual abuse. The issue became whether the complainant's unrecorded statement was admissible for the truth of its contents.

The Supreme Court concluded in *U.(FJ.)* that the complainant's statement was "substantively admissible" because the "statements made by the accused and by his daughter contained both a significant number of similarities in detail and the strikingly similar assertion that the most recent sexual contact between the two had been the previous evening."²⁴

The Supreme Court indicated in *U.(FJ.)* that its earlier decisions were designed to ensure that the Canadian approach to the admissibility "of hearsay as evidence would be sufficiently flexible to adapt to new situations."²⁵

A FLEXIBLE APPROACH:

In *R. v. Starr*²⁶ and *R. v. Baldree*,²⁷ the Supreme Court of Canada affirmed its suggestion in *U.(FJ.)* that the principled approach should be sufficiently flexible to apply to a multitude of hearsay issues.²⁸

In *Starr*, the Supreme Court of Canada held that if the proposed hearsay evidence was admissible within a traditional hearsay exception, the evidence "may still be inadmissible if it is not sufficiently reliable and necessary. The traditional exception must therefore yield to comply with the principled approach."²⁹ In *Baldree*, the Supreme Court of Canada indicated that hearsay evidence is admissible if it falls under a traditional exception to the hearsay rule or if the principled framework of necessity and reliability is established.³⁰

SPOUSAL INCOMPETENCY:

In *R. v. Hawkins*,³¹ the Supreme Court applied *Khan* to the issue of spousal testimonial incompetence. The Court held that the principled approach made the introduction of hearsay

necessary in that case because the witness, the accused's spouse, was incompetent to testify.³² Subsequently, however, in *R. v. Couture*,³³ the Supreme Court rejected that proposition that the accused's confession to his spouse was admissible on the basis that it was necessary because of the spouse's incompetency to testify against the accused. The Supreme Court held that the confession was inadmissible because its admission under the principled exception to the hearsay rule would, in the circumstances of this case, undermine the spousal incompetency rule and its underlying rationales.³⁴ The Court concluded that the principled approach to the admissibility of hearsay evidence should be applied in a manner which preserves and reinforces the integrity of the traditional rules of evidence.³⁵

More recently, in *Baldree*, the Supreme Court considered the application of its principled approach to "drug purchase calls."³⁶ In the case, the accused was arrested and charged with the offence of possessing marijuana and cocaine for the purposes of trafficking. After the accused was arrested, an unknown and unidentified person telephoned his cell phone to arrange for a drug delivery. A police officer answered the call and agreed to deliver the drugs at the price the accused normally charged.³⁷ The Supreme Court concluded that none of the traditional exceptions applied and the principled exception was not established because of the lack of evidence concerning reliability. The Supreme Court of Canada noted that though the call received in this particular case was inadmissible, this did not mean that all "drug purchase calls" were inadmissible.³⁸

THE SUPREME COURT'S MOST RECENT CONSIDERATION OF KHAN:

The Supreme Court of Canada's most recent foray into the

24. *Id.* ¶ 55.

25. *Id.* ¶ 21.

26. [2000] 2 S.C.R. 144 (Can.).

27. [2013] 2 S.C.R. 520 (Can.).

28. As we have seen, the Canadian courts have adopted a broad and flexible approach to the admissibility of hearsay evidence based on reliability and necessity. The requirement of necessity has been found, for instance, to have been met in a multitude of scenarios:

- the witness is deceased (see *R. v. Khelawon*, [2006] 2 S.C.R. 787);
- the child witness would be "traumatized" if required to testify (see *R. v. Rocky*, [1996] 3 S.C.R. 829);
- a young child was unable to answer numerous questions asked of her while testifying (see *R. v. F.(W.J.)*, [1999] 3 S.C.R. 569);
- a witness who had provided an incriminating statement against the accused recanted while testifying (see *R. v. Devine*, [2008] 2 S.C.R. 283);
- a witness alleged that she could not remember the events described in a statement she provided to the police (see *R. v. Zaba*, 2016 ONCA 167 (Can. Ont.));
- a witness had previously given a fuller account of the events in question (see *R. v. B.(P.S.)*, [2004] N.S.J. No. 49 (Can. N.S.)); and
- the identity of the declarant could not be determined (see *R. v. Middleton*, 2012 ONCA 523 (Can. Ont.)).

29. *Starr*, [2000] 2 S.C.R. 144, ¶ 106.

30. See *Baldree*, [2013] 2 S.C.R. 520, ¶ 66.

31. [1996] 3 S.C.R. 1043 (Can.).

32. *Id.* ¶¶ 2-3.

33. [2007] 2 S.C.R. 517 (Can.).

34. *Id.* ¶ 63.

35. *Id.* In *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the accused was charged with assault and attempted murder. The State sought to introduce a recorded statement that his spouse had made during police interrogation as evidence that the stabbing was not in self-defense. The accused's spouse did not testify at the trial because of Washington State's marital privilege. The trial court admitted the statement. The State Supreme Court upheld the conviction, deeming the statement reliable because it was nearly identical to, i.e., interlocked with, petitioner's own statement to the police, in that both were ambiguous as to whether the victim had drawn a weapon before petitioner assaulted him. On appeal, the United States Supreme Court held that the use of the statement violated the Confrontation Clause because, where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is confrontation. 541 U.S. at 53-59.

36. [2013] 2 S.C.R. 520.

37. *Id.* ¶ 14.

38. *Id.* ¶¶ 68-73.

principled approach to the admission of hearsay is *R. v. Youvarajah*.³⁹

In *Youvarajah*, the accused was charged with murder. The co-accused (D.S.) pleaded guilty and signed an agreed statement of facts (ASF) implicating the accused. D.S. was called as a witness by the Crown at the accused's trial, but DS testified that he could not remember signing the ASF.⁴⁰ The trial judge rejected an application by the Crown to have the ASF entered as evidence. However, the Ontario Court of Appeal set aside the acquittal and ordered a new trial.⁴¹

On appeal to the Supreme Court of Canada, the acquittal was restored. The Supreme Court noted that the ASF had not been under oath nor videotaped. The Supreme Court also noted that though the ASF was against D.S.'s interests, "the underlying rationale for the admissibility of admissions as against the party making them falls away when they are sought to be used against a third party."⁴² The Court ultimately determined that the ASF was not reliable:

The circumstances identified by the trial judge raise significant concerns about the threshold reliability of the portions of the ASF upon which the Crown sought to rely at the appellant's trial, all of which minimized D.S.'s involvement in the murder. D.S. endorsed the ASF as part of a plea bargain for second degree murder and a sentence in youth court. In these circumstances, there was motivation to shift responsibility to his co-accused. D.S. was also assured that he would not have to make any further statements to police and he testified at the appellant's trial that this was one of the reasons that he had accepted the plea agreement. D.S. further testified that he agreed to some facts in the ASF that he said he did not or could not know and that he did not understand everything that he read before agreeing to the statement's contents. Those portions of the ASF that shifted responsibility for the murder to the appellant are inherently unreliable.⁴³

A SUMMARY:

In *R. v. Mapara*,⁴⁴ the Court summarized its conclusions on the admissibility of hearsay evidence through a principled approach:

- a. Hearsay evidence is presumptively inadmissible unless it falls under an exception to the hearsay rule. The traditional exceptions to the hearsay rule remain presumptively in place.
- b. A hearsay exception can be challenged to determine whether it is supported by indicia of necessity and

reliability, required by the principled approach. The exception can be modified as necessary to bring it into compliance.

- c. In "rare cases", evidence falling within an existing exception may be excluded because the indicia of necessity and reliability are lacking in the particular circumstances of the case.
- d. If hearsay evidence does not fall under a hearsay exception, it may still be admitted if indicia of reliability and necessity are established on a voir dire.⁴⁵

RECENT DEVELOPMENTS:

Two recent decisions from the Ontario Court of Appeal, *R. v. Zou*⁴⁶ and *R. v. Khan*,⁴⁷ illustrate the ongoing difficulties caused by the introduction of hearsay evidence and the enlarged scope for its introduction.

USE OF NARRATIVE EVIDENCE AS CORROBORATION:

In *Zou*, the accused was convicted of the offence of sexual assault. The complainant (A.Y.) had sent an anonymous email to the police in which she said that she had been sexually assaulted by the accused. The Court of Appeal indicated that A.Y.'s "email to the police was introduced into evidence during her examination-in-chief. She read the document into the record in its entirety and it was made an exhibit."⁴⁸ Trial counsel for the accused did not object and there was "no indication by counsel or the trial judge of the purpose for which the email was tendered or any limitation on its use."⁴⁹ The Ontario Court of Appeal noted that the appeal raised "the often vexing question of the evidentiary use that can be made of a complainant's prior consistent statement."⁵⁰

In convicting the accused, the trial judge referred to the email: "I find A.Y.'s email, sent contemporaneously with the events, to be corroboration of her evidence."⁵¹

The accused appealed from conviction. The Ontario Court of Appeal set aside the conviction and ordered a new trial. It held that although the email "could be used to undermine the defence position as to the motive for A.Y.'s false accusation," it could not be used to corroborate the complainant's testimony.⁵² The Court of Appeal indicated that the trial judge's "use of the word 'corroboration' in the context of a prior consistent statement by a witness is troubling. That word, as commonly understood, refers to evidence from a source other than the witness whose evidence is challenged which is capable of confirming the veracity of the evidence of the challenged witness."⁵³

The Court of Appeal noted that the email "did not have either characteristic required for evidence to be corroborative. It was not from a source independent of A.Y. Nor could the email confirm the veracity of A.Y.'s trial testimony unless the

39. [2013] 2 S.C.R. 720 (Can.).

40. *Id.* ¶ 10.

41. *Id.* ¶ 16.

42. *Id.* ¶ 59.

43. *Id.* ¶ 69.

44. [2005] 1 S.C.R. 358 (Can.).

45. *Id.* ¶ 15.

46. 2017 ONCA 90 (Can. Ont.).

47. 2017 ONCA 114 (Can. Ont.).

48. *Zou*, 2017 ONCA 90, ¶ 26.

49. *Id.*

50. *Id.* ¶ 2.

51. *Id.* ¶ 33.

52. See *Id.* ¶¶ 35, 50.

53. *Id.* ¶ 40.

email was improperly used for the truth of its contents, or the consistency between the email and A.Y.'s testimony was improperly viewed as confirmatory of her trial testimony."⁵⁴

THE USE OF PRIOR STATEMENTS AS CIRCUMSTANTIAL EVIDENCE:

In *Khan*, the accused, a police officer, was convicted of the offence of sexual assault.⁵⁵ The complainant was a prisoner the accused was transporting to a police station. She alleged that the accused sexually assaulted her while performing searches of her in the back of a police cruiser. When the accused and the complainant arrived at the police station, a female police officer (Constable Flint) told the complainant that she would be searching her. The complainant became upset and said: "I've been searched three fucking times. How many times am I going to be searched?"⁵⁶ The trial judge ruled that this statement was admissible as "a spontaneous utterance and as a prior statement to assist the court with the ultimate credibility of [the complainant]."⁵⁷ The trial judge also indicated that the statement was admissible under the principled approach to the hearsay rule.⁵⁸

The Ontario Court of Appeal held that though "the necessity requirement under the principled approach does not require that the witness be absent or unable to give evidence,"⁵⁹ necessity was not met in the case:

I am of the view that necessity was not met, and thus the statement is not properly admitted under the principled approach. The complainant testified consistently about the essential parts of the allegations. Whatever lapses may have existed in her memory, they did not go to the essential details of the allegation that she had been previously searched numerous times. The record does not establish that the complainant was unable or unwilling to give a full account of events, or could not recall significant details of the event. The necessity component of the principled approach to hearsay is not satisfied.⁶⁰

The Court of Appeal noted that as "pure narrative, prior consistent statements carry no weight because they are tendered simply to give the background to explain how the complaint came to be before the court."⁶¹ However, the Court of Appeal also pointed out that if "the circumstances surrounding the making of the prior consistent statement are such that the statement assists in assessing the reliability and credibility of a witness's in-court testimony" this gives the "prior consistent statements admitted as 'narrative' a more substantive use. . . . This is referred to as narrative as circumstantial evidence."⁶²

The Ontario Court of Appeal concluded that the trial judge had "properly placed the prior consistent statement on the

scale in assessing the credibility of the complainant's in-court testimony by considering the circumstances in which she made her initial complaint to Constable Flint."⁶³

In my view, taking the reasons as a whole, the trial judge used the prior consistent statement for the permissible purpose of evaluating the context in which the initial complaint arose, in particular the fact and timing of the complaint, and the spontaneous nature in which it came out, in order to assist him in assessing the truthfulness of the complainant's in-court testimony. While some of the trial judge's language was not ideal, his phraseology must be put in context. In referring to the "consistency of her complaint" . . .

The trial judge properly placed the prior consistent statement on the scale in assessing the credibility of the complainant's in-court testimony by considering the circumstances in which she made her initial complaint to Constable Flint. To this extent, the prior consistent statement does add to the credibility of the complainant's in-court testimony and had probative value beyond mere repetition. It was evidence of the sequence and timing of events and the emotional state of the complainant at the time of the utterance, and assisted the trial judge in evaluating the credibility of the complainant's in-court testimony. The trial judge's use of the prior consistent statement was proper.⁶⁴

On June 29, 2017, as this issue of *Court Review* was headed to the printer, the Supreme Court of Canada issued its opinion in *R. v. Bradshaw*,⁶⁵ where it addressed this hearsay question: "When can a trial judge rely on corroborative evidence to conclude that the threshold reliability of a hearsay statement is established?"⁶⁶

The Court's answer:

[C]orroborative evidence may be used to assess threshold reliability if it overcomes the specific hearsay dangers presented by the statement. These dangers may be overcome on the basis of corroborative evidence if it shows, when considered as a whole and in the circumstances of the case, that the only likely explanation for the hearsay statement is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement. The material aspects are those relied on by the moving party for the truth of their contents.⁶⁷

(continued on page 86)

54. 2017 ONCA 90, ¶ 41.

55. 2017 ONCA 90, ¶ 1.

56. *Id.* ¶ 6.

57. *Id.* ¶ 7.

58. *Id.*

59. *Id.* ¶ 21.

60. *Id.* ¶ 23.

61. *Id.* ¶ 30.

62. *Id.* ¶ 31.

63. *Id.* ¶ 44.

64. *Id.* ¶¶ 43-44.

65. 2017 SCC 35 (Can.).

66. *Id.* ¶ 3.

67. *Id.* ¶ 4.

INTRODUCTION TO SPECIAL ISSUE

Nina A. Kohn

This special issue focuses on the courts' role in responding to elder mistreatment. Elder mistreatment is a phenomenon that includes not only physical, psychological, and sexual abuse, but also the financial exploitation and neglect of older adults.

This is an important topic as elder mistreatment is disturbingly common. Surveys suggest that well over 10% of older adults in the United States experience mistreatment each year. For example, in a 2009 survey of non-institutionalized persons age 60 and older in the continental United States, 11% reported that they had experienced neglect or physical, emotional, or sexual abuse in the past year, and 5% reported they had experienced financial exploitation by a family member during that period.¹

Elder mistreatment is an especially important concern for the courts because the issue of elder mistreatment enters the courtroom in a variety of postures.

The issue may be directly before the court, with the trier-of-fact tasked with determining whether mistreatment occurred or the legal consequences of that mistreatment. A variety of civil causes of action can be brought in response to elder mistreatment. Some forms of mistreatment give rise to a claim in that sounds in tort, such as a claim for battery (for a physical attack), intentional infliction of emotional distress (for psychological abuse), or negligence (for caregiver neglect). Other forms of mistreatment may give rise to a contract claim. For example, a care provider who fails to provide agreed-upon services may be liable for breach of contract. Similarly, financial exploitation cases may include claims for fraud or breach of fiduciary duty.

The issue of elder mistreatment may also be directly before the court in criminal cases in which the state seeks to hold defendant criminally liable for abuse or exploitation. Perpetrators of elder mistreatment can be prosecuted for traditional common-law crimes (e.g., battery, assault, rape, and manslaughter), for statutory crimes that apply to people across the age spectrum (e.g., fraud), or for specialized crimes designed to address elder abuse and neglect (e.g., abuse of a vulnerable adult).

Many times when the issue of elder mistreatment is in the courtroom, it is not explicit. Rather than being the immediate issue in the case, it is the part of the context in which the proceeding occurs. For example, a guardianship petition may be brought because a petitioner is concerned that the respondent is being exploited or by a petitioner who is exploiting the respondent and who seeks to use the guardianship process to gain greater control over the respondent's affairs. An older adult may face eviction proceedings as a result of losing savings to financial exploitation. An elderly party to an action may be pressured or misled into pursuing or dropping a claim, or a suit

may be brought in the name of the older adult without the adult's informed or voluntary consent.

Thus, courts have an important role to play not only in holding perpetrators of mistreatment responsible, but also in ensuring that courts and legal processes are not used to facilitate abuse. Indeed, if courts are not attuned to looking for mistreatment and its signs, they may unwittingly enter orders that facilitate that abuse.

Each of the articles in this special issue, therefore, addresses a challenge or concern faced by the courts in responding to the phenomenon of elder mistreatment.

Dr. Laura Mosqueda's article discusses the medical science of abuse and forensic markers of mistreatment. Drawing on her background as a geriatrician and one of the nation's foremost experts in elder abuse, Mosqueda provides valuable insight into how to detect mistreatment and differentiate injuries due to mistreatment from those of non-culpable origin.

Judge Patrica Banks's essay shares her experience creating a specialized elder court in Cook County, Illinois. Judge Banks draws on her experience to suggest how other court systems could follow this lead, and the potential advantages of doing so.

My own article explores the ethical obligations of attorneys when they represent someone for a surrogate decision maker (such as a guardian or agent under a power of attorney) has been appointed. It aims to inform courts about expectations for attorney behavior and to help courts to identify cases in which an attorney may be facilitating an agent's exploitation of a vulnerable person.

Prosecutor Page Ulrey's essay describes what she has learned as one of the nation's leading prosecutors of elder abuse about the successful prosecution of such abuse. It explores common misconceptions triers-of-fact have about mistreatment, and how prosecutors can overcome those misconceptions.

Finally, Professor Robert Dinerstein's essay looks at the responsibilities of a guardian, and the challenges guardians face in making decisions that respect the personhood of those subject to guardianship, by drawing on his personal experience as guardian for his sister. Dinerstein, a disability-rights scholar, explores how he puts "best practice" for empowerment of the person subject to guardianship into practice in a deeply personal context.

Together, these perspectives shed light on how courts, and those who come before them, can better meet the needs of victims of elder mistreatment.

Nina A. Kohn is the Associate Dean for Research and David Levy Professor of Law at the Syracuse University College of Law; she helped organize this special issue of Court Review. (For more complete biographical information about Professor Kohn, see page 69.)

Footnotes

1. See Ron Acierio et al., National Elder Abuse Mistreatment Study (2009) (the actual rate of mistreatment in the U.S. is likely higher than that reported in the study as the study did not include older

adults with significant cognitive impairment, a demographic at heightened risk for mistreatment).

Recognizing Elder Mistreatment:

A Guide for Courts

Laura Mosqueda, Theresa Sivers-Teixeira & Stacey Hirst

The crime of elder abuse takes many forms: financial, emotional, sexual, and physical abuse, as well as neglect. In many (perhaps most) circumstances, multiple forms coexist and this is referred to as polyvictimization. As in child abuse and domestic violence, people who are victimized tend to be vulnerable for a variety of reasons that span from physical to cognitive to psychological domains. This article outlines several aspects of age-related physical changes and highlights those features of aging that can make an older adult susceptible to elder abuse and neglect. We will go on to describe physical manifestations and laboratory markers, as well as the role of medication in abuse and neglect. Finally, we will address the topic of capacity. Throughout the article, we will indicate how knowledge in these areas can enhance the functions of the court in cases of suspected elder abuse and neglect.

I. INTRODUCTION

A. BACKGROUND

There are more than 41 million Americans currently over the age of 65, and with 10,000 people turning 65 every day, older adults comprise the fastest growing portion of the U.S. population. Recent studies have shown that at least one in ten Americans over the age of 60 has experienced abuse and many have experienced multiple forms of abuse.¹ Another study found that nearly half of people with dementia experience abuse.²

With this dramatic rise in the number of older adults coupled with ongoing efforts to identify, report, and prosecute elder abuse cases, our U.S. courtrooms will see an increase in the volume of cases involving some form of elder abuse or neglect. Although facts and evidence in an elder abuse case are usually complex, the decision of the court often rests on whether the injuries are caused by abuse or neglect versus a result of normal aging processes and/or an accident. Medical evidence including photos of injuries, laboratory reports, and medical documentation can be introduced as evidence. Understanding the difference between normal aging and markers for abuse and neglect is essential to recognizing abuse and evaluating the evidence that is presented.

Other functions of the court involve adjudicating cases that require guardianship and conservatorship decisions on behalf of older adults who perhaps are no longer capable of making decisions on their own behalf. Tests evaluating cognition, capacity, and functional ability are a mainstay of testimony and evidence in these cases and all may contribute to making a decision that best serves the older adult. There are a variety of

experts who may provide testimony in court. Familiarity with their training and areas of expertise can contribute to a better understanding of professional testimony and a discerning eye as to the appropriateness of a geriatric professional in addressing a particular question.

All of us make assumptions and have biases, be they conscious or unconscious. Our attitudes, experiences, backgrounds, assumptions, and fears about aging and older adults and family violence may lead to misconceptions that negatively impact an older adult during a trial. It is therefore important to be aware of our own predispositions and to be knowledgeable about the basics of aging so that we can understand common myths and misconceptions as such. Some common misconceptions are:

- Old people bruise easily therefore it's not possible to tell if someone hit them
- It's expected to get pressure sores when you're at the end of life
- People with dementia don't feel pain
- It's normal for old people to be confused

Example: A 92-year-old woman is pushed into the courtroom in a wheelchair. She is hunched over due to osteoporosis and is unable to look up. She looks a little disheveled and presents as a tiny body in a big chair. She gives the impression of being frail and weak. It does not seem possible to those around her that she actually is one of the sharpest people in the room. If accommodations to assure she can hear the proceedings, see the goings on, and be heard by people in the courtroom are not made, it may simply validate an assumption of her incompetence without questioning the initial perception.

B. TERMINOLOGY AND TYPES OF PROFESSIONALS

Frequently in cases that involve allegations of elder abuse or neglect, professionals with advanced training in the aging process are referenced in documents and called upon for their technical skills in court proceedings. Terminology and titles can be confusing; several disciplines have overlapping areas of expertise and a particular discipline or title without requisite experience does not guarantee appropriate proficiency. For example, several different specialties may have the background (training, skills, knowledge, experience) to make an evaluation of cognitive abilities. Physicians, including geriatricians, neurologists, and psychiatrists, may be able to make a determination, as well as psychologists who specialize in geropsych-

Footnotes

1. Edward O. Laumann, Sara A. Leitsch & Linda J. Waite, *Elder Mistreatment in the United States: Prevalence Estimates from a Nationally Representative Study*, 63 J. GERONTOLOGY SERIES B S248 (2008).

2. Aileen Wiglesworth et al., *Bruising as a Marker of Physical Elder Abuse*, 57 J. AM. GERIATRICS SOC'Y 1191 (2009).

chology or neuropsychology. Geriatric professionals involved in courtroom proceedings should have both the technical training and experience as a practitioner if they are going to be involved in the often life-altering decision that goes along with a capacity assessment.

Many scholarly and professional fields focus on older adults. *Gerontology* is the study of aging and older adults. It is a diverse field that includes the study of physical, mental, and social changes in people as they age, changes in society due to an aging population, and how this knowledge can be applied to policies and programs. People can get masters degrees and PhDs in gerontology. *Geriatrics* is the study of health and disease in later life. It includes the health care of older people, as well as the health and well-being of their caregivers. Many types of professional fields have advanced training in geriatrics. Of those, primary care physicians, psychiatrists, pharmacists, nurse practitioners, and psychologists are the most commonly involved in the evaluation and testimony in elder abuse cases.

While many primary care physicians who provide care for older adults may have expertise by virtue of their experience and independent study, only board-certified geriatricians have completed a fellowship and passed a certifying exam as experts in the assessment and medical care of older adults. Just as a pediatrician specializes in care of children because children are not simply small adults, a geriatrician specializes in care of older adults because of the unique health care needs of this population. One of the most important things that a geriatrician can contribute to an alleged elder abuse case is the ability to make both cognitive and physical assessments of alleged victims of abuse. Additionally, geriatricians are able to review prior medical records for signs of abuse or neglect, as well as screen for modifiable signs of cognitive impairment such as delirium or medication side effects.

Similarly, *geropsychiatrists* or *geriatric psychiatrists* have completed a fellowship and passed a certifying exam. They have special expertise in normal and pathologic changes in mental health and cognition that can occur with aging. Both geriatricians and geropsychiatrists have received special training to address the different health problems that older adults may face compared to younger people. These professionals may provide necessary evaluations for suspected elder abuse victims and offer expert testimony to assist in cases of suspected elder abuse.

In the field of psychology, there are two particularly relevant subspecialties. A *neuropsychologist* specializes in the applied science of brain-behavior relationships. A *geropsychologist* specializes in the cognitive, behavioral, and developmental changes that occur with aging. Neuropsychologists are usually board certified through the American Board of Clinical Neuropsychology. Board-certified geropsychologists must complete formal geropsychological training and pass a national board certification. Both a neuropsychologist and a geropsychologist are well-qualified to determine issues such as deci-

sion-making capacity and to assist with assessing and understanding an older person's cognitive function with relation to their ability to provide consent. Like their physician colleagues, a geropsychologist may have the ability to assess, retrospectively, cognition by reviewing past records and interviews.

Typically, geropsychologists conduct a cognitive assessment with a battery of validated tests to determine the degree of impairment in different cognitive domains, including executive functioning, attention, memory, and concentration, among others. This testing evaluates the alleged victim's relative strengths and weaknesses in these various cognitive domains. Understanding how other factors of mood and mental health may be impacting an older adult's functioning and cognition is another important part of evaluation performed by a geropsychologist.³

Because medication often plays an important role in the cognition and function of an older adult, a *geropharmacologist* may be engaged in evaluating medications used by an alleged victim of elder abuse. Through training geropharmacologists understand how age-related physiological changes affect medication therapy in older adults and evaluate for appropriate dosing and use of medication

II. NORMAL AGING AND ACCIDENTAL/INCIDENTAL INJURY VS. MARKERS OF ABUSE

Heterogeneity is the hallmark of aging; the older we get, the more different we become. The influence of environmental, genetic, and lifestyle factors accumulate in different ways for different people. Many older adults are healthy and active, while others are more frail and disabled by ill health. Yet all of us experience some physiological changes as we age. These factors combine and contribute to a slew of normal and common age-related changes that can make it difficult to detect or prove abuse and neglect. In fact, it is usually possible to find a reason *other* than abuse or neglect to explain a fracture, bruise, or pressure sore. Skin and bones become more fragile as the human body ages, making older adults more vulnerable to injury. Medications and declining functional abilities are additional variables that can contribute to increased susceptibility to injury. For example, medications known as "blood thinners" may cause older adults to bruise more easily (although some trauma is still required to rupture the blood vessel) and create more pronounced bruising. In addition, when older adults take skin-thinning medications, like steroids, tears can happen more easily. Changes in gait and balance make an older adult more likely to stumble or fall, which can result in a number of injuries like abrasions (scrapes) or lacerations (cuts), or even fractured bones.

The most common injuries of physical abuse are abrasions, bruises, skeletal fractures, and head injuries.

3. Erika Falk et al., *Geriatricians and Psychologists: Essential Ingredients in the Evaluation of Elder Abuse and Neglect*, 22 J. ELDER ABUSE

& NEGLECT 281 (2010).

A delay in seeking medical attention for severe injuries should trigger consideration of physical mistreatment.

The most common injuries of physical abuse are abrasions, bruises, skeletal fractures, and head injuries. Knowing the difference between a common age-related accidental or incidental injury and a marker for abuse or neglect requires being keenly aware of the subtle differences in the loca-

tion, pattern, and context of these injuries. Several of these injuries, like abrasions and bruising, can retain the pattern of an object used to inflict the injury and give insight into the cause of the injury. Injury location on the older adult's body is an important factor in determining the cause of injury. Any injury to the eyes, nose, or mouth are less likely to be accidental.⁴ Generally, injuries in areas of the body that are not commonly impacted during daily activities should arouse suspicion for abuse.⁵ For example, abrasions sustained through accidental or incidental injury are most often found on limbs. Similarly, skin tears are more likely to occur on forearms and less frequently on legs. Individuals generally have less than one or two of these injuries at a time when there is no abuse. Evidence of skin tears and abrasions in sites other than arms or legs or multiple tears should raise suspicion for potential mistreatment.

A. BRUISING

Likewise, accidental bruises occur in predictable places with over 90% found on the extremities.⁶ Despite popular perception, the color of a bruise is not an accurate predictor of its age.⁷ Size also matters. Frequently, larger bruises (> 5 cm) more commonly appear on older adults who have been abused. All older adults with at least one bruise larger than 5 cm or bruising on the head, neck, ears, lateral right arm, or posterior trunk, genitalia, buttocks, or the soles of the feet should trigger concerns for elder mistreatment.⁸ Other considerations of location and pattern include abrasions and or bruising around the wrists or ankles, which may signal the use of forcible restraint.⁹ Bruising patterns suggestive of defensive postures or related to grasping or squeezing should also

prompt suspicion.¹⁰ Judges will likely need expert testimony to make any conclusions, but awareness of what to look for may prompt appropriate questions to guardians or referral to an expert.¹¹

B. AGE-RELATED BONE CHANGES AND MARKERS FOR PHYSICAL ABUSE

Beginning around the age of 30, there is a steady decrease in bone density. For women there is accelerated loss around the time of menopause. If bone density declines beyond a certain point, defined using DEXA (dual energy x-ray absorptiometry) scanning, it is called osteopenia. A further decline may result in the disease known as osteoporosis. As bone density decreases, the ease with which a trauma can cause a fracture increases. A fall that might have resulted in nothing more than embarrassment at the age of 45 may result in a hip fracture at the age of 85. Frequently, an older adult is diagnosed with a fracture due to an accidental fall. The bone injuries most commonly sustained by older adults from accidental injury or fall include vertebral fractures and hip fractures for those over the age of 75 and wrist fractures for women under the age of 75.¹² Generally, fractures that are not hip, upper arm, or vertebral fractures should give pause to consider whether mistreatment played a role in the injury.¹³ Specifically, fractures anywhere on the face, including around the eyes, the nose, or jaw, can be a sign of blunt force trauma.¹⁴ Fractures of the skull, cervical spine, and ribs are more likely a result of physical assault than limb fractures. Although a spiral fracture, even of a large bone found in the limbs, may signal that the mechanism of the injury involved a twisting force, which is highly suggestive of abuse.¹⁵

Often, older adults that are victims of abuse will have multiple injuries in various stages of healing. A delay in seeking medical attention for severe injuries should trigger consideration of physical mistreatment.¹⁶

C. PRESSURE ULCERS

Pressure ulcers, also called "pressure sores" or "bed sores," are localized injuries to the skin and/or underlying tissue caused by pressure, or pressure combined with a shearing force, typically over a bony prominence.¹⁷ When establishing whether pressure ulcers are a result of neglect there are a num-

4. Kim A. Collins, *Elder Maltreatment: A Review*, 130 ARCHIVES PATHOLOGY & LABORATORY MED. 1290 (2006).

5. *Id.*

6. Laura Mosqueda, Kerry Burnight & Solomon Liao, *The Life Cycle of Bruises in Older Adults*, 53 J. AM. GERIATRICS SOC'Y 1339 (2005), available at http://www.centeronelderabuse.org/docs/LifeCycleBruisesOA_MosquedaBurnightLiao2005.pdf (last visited June 21, 2017).

7. *Id.*

8. See Wiglesworth et al. *supra* note 2.

9. Carmel Bitondo Dyer, Marie-Therese Connolly & Patricia McFeeley, *The Clinical and Medical Forensics of Elder Abuse and Neglect*, in *ELDER MISTREATMENT: ABUSE, NEGLECT, AND EXPLOITATION IN AN AGING AMERICA* 339 (Richard J. Bonnie & Robert B. Wallace eds., 2003).

10. BROGDON'S FORENSIC RADIOLOGY 322 (Michael J. Thali, Mark D. Viner & B.G. Brogdon eds., 2nd ed. 2010).

11. More information about bruising patterns, including diagrams of bruising patterns, can be found in Mosqueda et al., *supra* n. 6.

12. See Dyer et al. *supra* note 9.

13. See Collins, *supra* note 4.

14. *Id.*

15. Lisa M. Young, *Elder Physical Abuse*, 30 CLINICS GERIATRIC MED. 761 (2014).

16. See Thali et al. *supra* note 10.

17. Mary H. Palmer, *Pressure Ulcers: Practical Considerations in Prevention and Treatment*, in REICHEI'S CARE OF THE ELDERLY: CLINICAL ASPECTS OF AGING 509 (Jan Busby-Whitehead et al. eds., 7th ed. 2016).

ber of confounding factors. Conditions that affect one's mobility, such as advanced stage dementias, Parkinson's disease, stroke, frailty, and deconditioning, all increase the risk of a pressure sore. Other contributing factors include moisture, malnutrition, and impairment of the microcirculatory system due to acute or chronic illness.¹⁸

Pressure ulcers are categorized using four stages with stage 1 being the least severe and stage 4 being the most severe.¹⁹ At stage 1, a pressure ulcer is a nonblanchable and reddish section of intact skin. At stage 2, a pressure ulcer is a shallow open ulcer with a clean red wound base. At stage 3, a pressure ulcer appears as a deeper ulcer with subcutaneous fat and may include undermining and tunneling. At stage 4, the pressure ulcer is the deepest and may expose tendons, muscles, and even bone. Some ulcers may be unstageable due to superficial coverings of slough or eschar. This covering must be removed before an ulcer can be staged. In addition, suspected deep tissue injuries are categorized as a localized area of purple or maroon colored skin or blood-filled blister due to damage of underlying soft tissue. In this case, the injury begins at the bony prominence or deep tissue layer and spreads to the skin.²⁰

Pressure ulcers are more common in older adults who are immobile, but caregivers should assist in ulcer prevention by using good care management techniques, including repositioning pressure-sensitive areas of the body every 2-3 hours.

Markers of neglect include pressure ulcers associated with malnutrition and/or dehydration, which hasten skin breakdown. Another marker for neglect is an immobile older adult who is left alone for extended periods and is unable to get to the bathroom or reposition himself or herself. In these situations, the older adult often develops avoidable pressure ulcers due to skin breakdown from constant exposure to excess moisture and bacteria from urine and feces, as well as decreased circulation in the skin around bony prominences.

However, because pressure ulcers may develop regardless of adequate care management techniques, an expert should evaluate them to determine whether neglect could be a contributing factor.²¹

III. AGE-RELATED SENSORY CHANGES IN THE OLDER ADULT

Decreased visual and auditory acuity are common age-related occurrences and can present multiple challenges and vulnerabilities for the older adult. Age-related hearing loss, known as presbycusis, is experienced by more than 50% of people over 75 years old, and nearly all adults who are 90 years or older.²² Diminished hearing may make it difficult to follow conversations or directions. If an older adult does not

acknowledge his hearing loss or if it is not known to be a problem, he may seem to be cognitively impaired when, in fact, his apparent confusion is due to the hearing difficulty.

Common age-related conditions that reduce visual acuity include presbyopia, cataracts, glaucoma, and macular degeneration. Presbyopia is the term used to describe an inability to see clearly at an arm's length or closer. Without corrective lenses, this condition limits the ability for an older person to read a document. Cataracts are the gradual clouding of the lens, which, without intervention, over time can completely obscure vision. It is easily treatable through outpatient surgery with a very high likelihood of a successful outcome. Macular degeneration is a loss of central vision, making things look shadowy or fuzzy, and it can result in blindness over time although some forms are amenable to treatment. Glaucoma causes gradual vision loss over time due to elevated pressure inside the eye and, if not treated, can cause blindness.²³ A person with glaucoma may experience blank spots in their vision and eventually tunnel vision as the optic nerve becomes increasingly damaged. A compromise in visual acuity can cause the older adult to become more vulnerable to mistreatment due to a diminished functional ability in reading, driving, or other activities that are important for independent functioning. Significant loss in vision may compromise one's ability to identify an assailant or to read a legal document.

Special accommodations should be taken in the courtroom to help older people with vision or hearing loss to assist with more complete and accurate testimony. Providing more light or magnification, or having something read aloud, may assist a person with vision loss. For people with significant hearing loss people should speak as clearly as possible, allowing the older adult to see their lips. If personal hearing aids are not available or helpful, other amplification devices such as a Pocket Talker are small, simple, and inexpensive, and are readily available. In cases of extreme hearing loss, written communication may be best.

IV. FUNCTION

Frailty is recognized as a medical syndrome characterized by symptoms such as fatigue, weakness, slowed walking speed, weight loss, and a low level of physical activity. Older persons

Special accommodations should be taken in the courtroom to help older people with vision or hearing loss to assist with more complete and accurate testimony.

18. *Id.*; Lisa M. Gibbs, *Understanding the Medical Markers of Elder Abuse and Neglect: Physical Examination Findings*, 30 CLINICS GERIATRIC MED. 687 (2014).

19. For a set of color diagrams showing each stage of pressure ulcers, see *Stages of Pressure Sores*, WebMD, available at <http://www.webmd.com/skin-problems-and-treatments/four-stages-of-pressure-sores> (last visited June 21, 2017).

20. Gibbs, *supra* n. 18.

21. *Id.*

22. A.C. Davis, *Epidemiological Profile of Hearing Impairments: The Scale and Nature of the Problem with Special Reference to the Elderly*, 111 ACTA OTO-LARYNGOL (SUPP. 476) 23 (1990).

23. Rawan Tarawneh & James E. Galvin, *Neurologic Signs in the Elderly*, in BROCKLEHURST'S TEXTBOOK OF GERIATRIC MEDICINE AND GERONTOLOGY 101 (Howard M. Fillit, Kenneth Rockwood & Kenneth Woodhouse eds., 7th ed. 2010).

who are frail are also more vulnerable to abuse and less able to recover from illness and trauma.

When assessing for possible abuse or neglect, understanding a person's functional status is critically important. Clinicians who make these assessments often divide a person's functional activities into two categories: Instrumental Activities of Daily Living (IADLs) and Activities of Daily Living (ADLs). IADLs are those activities linked to independent living in the community. These include handling one's own finances, managing medications, driving or taking public transportation, and preparing meals. If a person requires assistance with some of these activities that can often be arranged through family, friends, or paid assistance.

ADLs are those activities needed to live independently in one's own home. Activities of daily living include feeding oneself, toileting, mobility, dressing, and bathing. People who are independent with ADLs may be able to remain in their own home with assistance with things such as meal preparation and transportation. However, if a person requires assistance with these basic activities of daily living, then in-person help is likely required for them to remain at home safely.

Activities of Daily Living (ADLs)	Instrumental Activities of Daily Living (IADLs)
Eating/feeding oneself	Meal preparation
Toileting	Housekeeping
Mobility	Laundry
Dressing	Shopping
Bathing	Managing personal finances
Continence	Managing medications
Grooming	Use of transportation
	Use the telephone or other communication devices

Example: An 81-year-old woman (Mrs. G) was brought to the emergency room with a swollen tender ankle. Radiographs showed a fracture of the distal tibia and fibula (the two bones in the lower leg, close to where they articulate with the foot). Mrs. G had advanced Alzheimer's disease and was unable to say how this injury happened. Her primary caregiver, a daughter, said that Mom fell out of bed yesterday and she rushed her to the hospital as soon as she noticed the injury this morning. Upon examination it was noted that she also had pressure sores on her buttocks and bruising on her upper arms.

When information regarding Mrs. G's functional status was obtained it was learned that she required assistance with almost all activities of daily living. How would somebody who is unable to get out of bed by herself fall and fracture her lower leg? Moreover, the presence of a pressure sore means that she has very limited mobility while in bed and so even falling out of bed would be a highly unlikely event. This is a circumstance in which we have an older adult who was unable to give a history due to her cognitive impair-

ment but in which physical findings do not correlate with the story provided by the caregiver. It is also easy to imagine that if she was brought to the emergency room the story of a confused older woman with osteoporosis and a broken bone might not raise any suspicion.

V. MEDICATION MISUSE

As we age the body's response to medication changes. Pharmacokinetics, the way in which the body absorbs and eliminates medication, and pharmacodynamics, the way in which medication is distributed and acts on our bodies, are both altered as a normal part of the aging process. Illnesses such as kidney disease and liver disease may further exacerbate these changes, making older adults exquisitely sensitive to side effects such as confusion, sedation, dizziness, unsteadiness, agitation, loss of appetite, and constipation. While medications play an important role in curing or treating disease, they become toxic and dangerous when dosed improperly. Seemingly small changes in medication management can have the potential to cause severe harm. Sometimes medication misuse happens unintentionally, which might be indicated by an isolated instance rather than an extended pattern of purposeful misuse.

Medication can be used as a weapon or tool of control. Overuse, underuse, and misuse of medication are all methods used in abuse or neglect. Overuse occurs when a medication is prescribed for an indicated purpose, but is purposely given in too high a dosage or too frequently to accomplish a goal such as causing confusion.

Example: Mrs. H was an 88-year-old woman with severe pain due to advanced rheumatoid arthritis. Her doctor had appropriately prescribed a narcotic pain medication (codeine) for use at times when the pain was very severe. Noting that the medication caused her to be confused, her daughter used this as a tool for financial abuse: she surreptitiously added the codeine to Mrs. H's food and then had her sign checks.

Withholding a medication (underuse) is another way to abuse an older adult.

Example: Mr. B had Parkinson's disease and required regular doses of a medication levodopa-carbidopa (Sinemet) to walk. Without that medication he was stiff and barely able to move. His daughter-in-law, who was unhappy about having him in her house, often withheld the medication so that he could not get around the house. Eventually Mr. B was unable to get out of bed and developed large, deep pressure sores as a result of this immobility and bone pain due to metastatic prostate cancer. He was bed-bound, on hospice, and was supposed to be receiving morphine on a regular basis to keep the pain controlled. His son would sometimes not provide the medication as a punishment when he felt his father was being too demanding or burdensome.

VI. DECISION-MAKING ABILITY: COGNITION AND CAPACITY

The concept of impaired decision making is a frequent issue in elder abuse cases. People who are impaired are at higher risk of being abused and in turn may be unable to understand or to report abuse. On the other hand, respecting and defending a person's autonomy is a cherished principle. The gray area of "everyone has a right to make a bad decision" becomes closer to black and white when a person is obviously demented. Cognition and capacity are important concepts related to decision-making ability. Psychosocial factors are also important to consider because depression, reduced feelings of well-being, lower levels of social support, or loneliness may also increase risk of elder abuse.²⁴

Cognition is a term that encompasses many brain functions, including complex attention, executive function, learning and memory, language, perceptual-motor skills, and social cognition. Normal aging is accompanied by structural and functional brain changes that may only become apparent under stressful circumstances such as highly technical or fast-paced environments or unfamiliar and stressful situations,²⁵ such as appearing in a courtroom.

Complex attention – The ability to pay attention or focus on a specific stimulus in an environment with multiple stimuli; the ability to recall new information, such as reporting what was just said.

Executive function – The ability to plan, make decisions, hold information briefly in memory to manipulate, respond to feedback, or demonstrate mental flexibility.

Learning – The acquisition of skills or knowledge.

Memory – The expression of learned skills or knowledge.

Language – The ability to speak or understand spoken or written language.

Perceptual-motor skills – The ability to interact with the environment by combining the use of senses and motor skills.

Social Cognition – The ability to recognize others' emotions or what they are thinking.

Capacity is related to but not the same thing as cognition. Capacity refers to a continuum of decision-making abilities.²⁶ Capacity is sometimes broken down into two main types: decisional capacity and executional capacity. *Decisional capacity* refers to a person's ability to complete a specific task or make a specific decision such as driving a car or refusing medical treatment.²⁷ *Executional capacity* refers to a person's ability to implement a decision such as the ability to manipulate money, pay bills, or maintain a checkbook.²⁸ Capacity may impact

decisions that older people make in regards to their health, finances, and other areas of their lives. Capacity is rarely an all-or-none phenomenon: while an older adult may lack capacity in one area, he or she may retain it in others.

When an older person's decision-making ability seems compromised, a medical evaluation to review their physical and psychological status should be conducted to reveal any conditions that may benefit from treatment. It is important to see if capacity can be restored rather than assume that it is a permanent condition. Sometimes capacity may not be fully restored but may be improved such that an older adult is able to participate in some decisions.

Dementia, called "major neurocognitive disorder" in the DSM 5, is a syndrome in which a person has difficulty in one or more cognitive domains such that he is unable to do his usual activities such as paying bills or preparing meals. While Alzheimer's disease is often used as the prototypical dementia, it is important to recognize there are many causes of dementing illnesses. Alzheimer's disease and vascular dementia (dementia due to strokes or chronic lack of adequate blood flow to the brain) are the most common causes of dementia. Both impair memory and executive function in the early stages. Another type of dementia called Frontotemporal lobe dementia causes profound changes in personality in the early stages along with memory loss. Lewy Body dementia is characterized by memory loss, visual hallucinations, and muscle rigidity in its early stages.

No matter the cause of the dementia, a variety of things can cause excess disability. These include untreated (or inadequately treated) illness such as thyroid disease, medication side effects, and/or metabolic abnormalities. A person with Alzheimer's disease who is hypothyroid (a low thyroid condition) and depressed may have a significant amount of decision-making capacity restored when both of those conditions are adequately treated even though the underlying dementia remains. Trained clinicians use standardized capacity interviews and cognitive assessment tools along with structured interviews to help determine a person's capacity to make a particular decision at a particular time. It is common to be asked to determine a person's capacity at a time several years before appearing in court based on a review of records and a present-day assessment. While this is not always possible to do, there are times when it can be accomplished with a high degree of accuracy. For example, the trajectory of Alzheimer's disease is such that a person with advanced dementia would not have had capacity to consent to a complicated financial transaction one year ago.

Decision-making ability fluctuates over time and with changing external factors.²⁹ With the help of trained clinicians,

24. R. Nathan Spreng, Jason Karlawish & Daniel C. Marson, *Cognitive, Social, and Neural Determinants of Diminished Decision-Making and Financial Exploitation Risk in Aging and Dementia: A Review and New Model*, 28 J. ELDER ABUSE & NEGLECT 320 (2016).

25. INST. OF MED., *COGNITIVE AGING: PROGRESS IN UNDERSTANDING AND OPPORTUNITIES FOR ACTION* (2015)

26. Jennifer Moye & Daniel C. Marson, *Assessment of Decision-Making Capacity in Older Adults: An Emerging Area of Practice and Research*, 62 J. GERONTOLOGY SERIES B P3 (2007).

27. Michelle Braun & Jennifer Moye, *Decisional Capacity Assessment: Optimizing Safety and Autonomy for Older Adults*, 34 GENERATIONS 102 (2010).

28. Patricia A. Boyle et al., *Cognitive Decline Impairs Financial and Health Literacy Among Community-Based Older Persons Without Dementia*, 28 PSYCHOL. & AGING 614 (2013).

29. Erika Falk & Nancy Hoffman, *The Role of Capacity Assessments in Elder Abuse Investigations and Guardianships*, 30 CLINICS GERIATRIC MED. 851 (2014).

For older adults who depend on a caregiver to administer medications, significantly abnormal laboratory values may be a marker of abuse or neglect.

judges should understand how cognition and capacity are relevant to decision making and be able to recognize signs of abuse while simultaneously promoting and maintaining autonomy.

Example: A 72-year-old man with end-stage prostate cancer is being cared for by his 38-year-old son. He is on hospice and has morphine available for pain control.

Another family member finds him at home alone one day and sees that he appears to be emaciated and in a great deal of pain. He is taken to the hospital where blood tests reveal severe dehydration and malnutrition. It was also noted that there were no detectable levels of morphine in his blood; however, there was regular resupply of morphine through the hospice agency. It was finally determined that his son was using and selling morphine rather than giving it to his father. When the father was fed and hydrated, and his pain was controlled, he regained his decision-making capacity.

VII. LABORATORY FINDINGS

There are a variety of conditions that can be discovered or suspected based on laboratory data, such as malnutrition and dehydration. It is important to interpret blood test results in the context of the person's medical conditions and medications.

Abnormal laboratory findings can be suggestive of mismanagement of chronic illnesses. For example, people with diabetes are expected to have their hemoglobin A1C within a certain range. If this test is markedly above an acceptable level, it suggests poor control of diabetes. Similarly, people who are on anti-coagulant medications such as warfarin should have a laboratory test to assure that they are receiving the correct amount of medication. For older adults who depend on a caregiver to administer medications, significantly abnormal laboratory values may be a marker of abuse or neglect. Overdosing or underdosing medications may also be picked up on the blood test.

VIII. SEXUAL ABUSE

Both men and women experience physical changes that can contribute to increased potential for injury during intercourse. A reduction in hormones can diminish erections in men and increase fragility of the vagina, which can lead to injury even

during consensual sex. As with other forms of abuse, it is important to distinguish between intentional injury and incidental minor trauma from a consensual sexual interaction due to physical changes of the aging body.

Older adults are sexually responsive and participate in a variety of consensual sexual activities. Society tends to view older adults as asexual, which contributes to the fact that sexual abuse is one of the least acknowledged, detected, and reported forms of elder abuse.³⁰ Cognitive decline, as well as diminished physical strength and ambulatory ability, can make an older adult more vulnerable to sexual abuse. As seen in younger populations, sexually abused older adults experience internalized shame and self-blame, which can contribute to a hesitancy to report abuse.³¹

Like other forms of physical abuse, there are markers that raise the suspicion of sexual abuse. Physical injuries to the mouth (hard and soft palate injuries), breasts, inner thighs, and anogenital regions, including lacerations, abrasions, and bruising, should evoke suspicion for sexual mistreatment. In cases of sexual abuse, it is common to find additional trauma in non-genital areas such as bite marks, blunt force trauma, and secondary injuries caused by the use of restraints or suffocation.³² Evidence of vaginal or ano-rectal bleeding should trigger further investigation to rule out sexual abuse. Lab tests that show evidence of semen may also contribute to evidence of sexual abuse.³³ The development of a sexually transmitted disease in an older adult who is unable to consent for sexual relations or denies participating in sexual relations also raises concern for abuse.³⁴ Not all sexual abuse will leave a physical marker. In fact, unwelcome sexualized kissing or fondling remain the most common form of sexual abuse.³⁵

Physical abuse, neglect, and sexual abuse can all create significant emotional and behavioral repercussions, as well as the resultant physical injuries in older adults. New onset changes in behavior such as agitation, withdrawal from social interactions, panic attacks, or signs of unexplained fear warrant further investigation. Sometimes victims of sexual abuse can display inappropriate aggressive or unusual sexual behavior as well.³⁶ Depression and suicidal ideation are very common in abuse survivors and sometimes so extreme that they can lead to suicide attempts in older adult victims.³⁷ When evaluating for evidence of abuse it is important to consider the unseen evidence in addition to identifying the physical and chemical forensic markers of physical abuse and neglect.

IX. CONCLUSION

A multitude of interacting physical, cognitive, emotional, and social factors make older adults susceptible to abuse and

30. Patricia M. Speck et al., *Case Series of Sexual Assault in Older Persons*, 30 CLINICS GERIATRIC MED. 779 (2014); J. Mickish, *Abuse and Neglect: The Adult and Elder*, in ADULT PROTECTIVE SERVICE: RESEARCH AND PRACTICE 33 (Bryan Byers & James Earnest Hendricks eds., 1993).

31. Speck et al., *supra* note 30.

32. Collins, *supra* note 4.

33. Ann W. Burgess, Nancy P. Hanrahan & Timothy Baker, *Forensic Makers in Elder Female Sexual Abuse Cases*, 21 CLINICS GERIATRIC

MED. 399 (2005).

34. Speck, *supra* note 30.

35. Pamela B. Teaster et al., *Sexual Abuse of Older Adults: Preliminary Findings of Cases in Virginia*, 12 J. ELDER ABUSE & NEGLECT 1 (2001).

36. Burgess et al., *supra* note 33.

37. Nancy J. Osgood & Ameda A. Manetta, *Abuse and Suicidal Issues in Older Women*, 42 OMEGA-J. DEATH & DYING 71 (2001).

neglect. Despite this complexity, it is possible to distinguish when injuries are due to abuse rather than due to benign or accidental causes. Figuring this out may require a variety of experts who are particularly knowledgeable about different aspects of the aging process. Forensic markers of abuse such as bruises, pressure sores, and fractures must be understood in the context in which they occurred. Medications may be misused in multiple ways that cause pain, suffering, and/or confusion. While abuse is categorized into specific types such as physical abuse, sexual abuse, financial abuse, neglect, etc., the reality is that polyvictimization is a common phenomenon. With the rapid growth of the aging population and the greater awareness of elder abuse as a crime, we can expect to see more cases coming through the court system. This presents an opportunity to create a more just society so that older adults may age with dignity and grace.



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Elder Protection Courts:

Responding to the Now, Anticipating the Future

Patricia Banks

In 2010, I became the presiding judge of the Cook County Elder Law Division. This short article chronicles my journey in taking the idea of an Elder Law Division and developing it into a workable unit of a multi-level court system.

THE CREATION OF THE ELDER LAW DIVISION

The Circuit Court of Cook County is the second largest unified court system in the world. The Hon. Timothy C. Evans, Chief Judge of the Circuit Court of Cook County, took a bold step when he made a decision to establish not just elder-protection courts, but an Elder Law Division, dedicated to responding holistically to the legal needs and issues of seniors. Changing demographics dictated that the court system be able to respond to the rising group of baby boomers attaining the age of 65. The 691,000 persons aged 65 and over in Cook County at that time represented 13% of the population.

In December 2010, Chief Judge Evans announced the establishment of the Elder Law Division and my appointment as its presiding judge. My staff consisted of me, a secretary, and law clerk. We were charged with laying the foundation and building the division.

A significant challenge in creating a new division is structuring it to be incorporated seamlessly into the fabric of the existing court system. The size of the jurisdiction will dictate the structure—a dedicated docket once weekly, a single elder-protection court, or a separate division are all potential options. For the Circuit Court of Cook County, the questions of shared jurisdiction, procedural rules, definitions, criteria for determining eligibility, and logistics required in-depth planning.

A second challenge when creating a new division is raising awareness and educating judges about the value of a separate division. In my case, this meant educating judges that some older adults require special treatment because of diminished capacity that may not be apparent in a brief court appearance. A dedicated docket or division would be more suited to address the issues of litigants with diminished capacity. The in-depth planning and the awareness components had to be conducted simultaneously for the blueprint for development to move forward.

To help accomplish this important work, I used a workgroup structure, recruiting 16 persons to form my first workgroup. I then created sub-workgroups made up of representatives from within and outside of the court to work on specific tasks. Members of the workgroup included State's Attorney, Attorney General, elder-law professors, Public Defender, staff of city and county Area Agencies on Aging, Probation Department personnel, elder-law practitioners, the Public Guardian, and law enforcement. Each brought to the group knowledge, research skills, familiarity with the subject matter, influence, and decision-making authority. Before the court's involvement, many of these same individuals had attempted to build coalitions to combat abuse, neglect, and financial exploitation of

older adults with moderate success. When the court assumed a leadership role, this energized the aging network. It was believed that access to justice for older adults was more attainable due to the court's ability to adjudicate the issues and to provide remedies.

One of the advantages of this workgroup approach was that it allowed me to address a significant external challenge to creating the Elder Law Division: the high expectations of the myriad groups and organizations that worked with older adults and who found the court system too unwieldy and unresponsive to the needs of older adults. Many in these groups brought hopes far greater than we could resolve on a short-term basis. My solution was to involve these groups in the workgroup for the planning and structure of the division.

One of the key issues the workgroup considered was how to define the eligibility criteria for the Elder Law Division. Illinois law defines an elder as age 60 or older. In crafting criteria for the Elder Law Division, the workgroup made the determination that judges should have the option to expand the eligibility definition when circumstances warranted it.

The workgroup approach continues to prove helpful even now that the division is more established. The planning and implementation of the division was enhanced by the status and influence wielded by each workgroup member. Each possessed substantive expertise that was critical to the overall success of the new division. Strongly motivated workgroups and task forces have addressed many of the hurdles that the new division has encountered. For example, a task force helped to develop the Elder Justice Center and continues to support it. The workgroup and task force members provided education and training, marketing opportunities, volunteers, translators, legal and social-service assistance, and educational materials (i.e., literature, brochures, and pamphlets). The Center has served more than 9,000 elderly residents since its opening in the fall of 2013.

KEY COMPONENTS AND ACHIEVEMENTS OF THE ELDER LAW DIVISION

From the division's inception to date, we have put flesh on the bones. We have achieved:

1. A General Order that sets forth jurisdiction of the division:
 - cases arising under the Illinois Elder Abuse and Neglect Act, 320 Ill. Comp. Stat. §§ 20/1, *et seq.*;
 - cases arising under the Illinois Power of Attorney Act, 755 Ill. Comp. Stat. §§ 45/1?1, *et seq.*;
 - domestic violence cases; and
 - criminal offenses in which the victim is an elderly person.
2. Rules and procedures to govern the division; this required the written approval of all the Circuit Court Judges.
3. Nine judges, presiding over civil and criminal matters

involving seniors, assigned five days a week.

4. An Elder Justice Center, with a staff of three, supported by 50 volunteers, including lawyers, social workers, and laypersons. Services are provided to residents of Cook County, ages 60 and over, five days a week from 8:30 a.m. to 4:00 p.m. The Center is located on the lower level of the Richard J. Daley Center.
5. An on-site legal clinic (a nonprofit organization under 29 U.S.C. §501(c)), serving an average of 250 seniors monthly and housed in the Elder Justice Center.
6. An Elder Mediation Program crafted by a committee of mediation experts (pending approval by the Illinois Supreme Court).
7. An Illinois Abuse and Neglect Bench Card, customized and distributed to all Circuit Court of Cook County judges.

GUIDANCE FOR OTHERS CREATING OR CONTEMPLATING AN ELDER-PROTECTION DOCKET

Others creating or contemplating the creation of an elder-protection docket, court, or division may find it helpful to follow the following principles, which I used in the development of Cook County's Elder Law Division and continue to employ:

1. Clearly define the intended beneficiaries of the division, its mission, and any unmet needs.
2. Assemble a committed core workgroup with the requisite expertise and skillsets to accomplish a set of goals, and set achievable goals for the group.
3. Invite all decision makers to be a part of the workgroup. This diversity guards against dilution of the workgroup's work product at a later date, and assures the final decision makers of the level of information, discussion, and research conducted by the workgroup.
4. Identify committee chairs and cochairs. All assignments must be meaningful and of a nature that committee members fully embrace and take ownership.
5. Create a timeline and avoid losing momentum. Keep moving on some level notwithstanding roadblocks and obstacles.
6. Create an elder-friendly environment throughout the court system. This may include the presence of assistive audio and visual aids; clearly marked directions; signs acknowledging seniors present; elder-justice banners; special accommodations at security points; workshops for seniors; brochures; explanatory literature and court documents in large fonts; senior peer-counselor assistance; and sensitization of court personnel (e.g., sheriff's deputies, clerical staff, court clerks, etc.).
7. Conduct exhaustive informational exchanges to include listening sessions, give-and-take discussions with judicial colleagues, individuals, small and large groups, bar associations, law enforcement, faith-based organizations, aging networks, and the community at large.
8. Develop an education initiative for the benefit of judicial colleagues, lawyers, and court personnel, aging networks, and community at large. This initiative includes a fact sheet as well as a bench card for broad dissemination.
9. Maximize use of media and external forces supportive of your goals.
10. Adjust goals and retool as necessary.

CHALLENGES AND NEXT STEPS

There may be many hurdles to forming an elder-friendly environment in the court system. Judicial colleagues, attorneys, and court personnel may be reluctant to modify or change their manner of interacting with elderly litigants. Some judicial colleagues may refuse to acknowledge the need to offer special accommodations to the elderly; others may refuse to acknowledge vulnerabilities associated with aging. Where there is an absence of laws protecting the elderly, it becomes difficult to set eligibility criteria and set the scope of protective services that can be provided. Finally, an absence of funding and lack of interest from desired partners may impede the development of a suitable model for serving the elderly.

Despite these challenges, the Cook County Elder Law Division has flourished. Looking forward, the Elder Law Division continues to develop. The training and assignment of judges to preside over civil and criminal abuse, neglect, and financial exploitation matters increased the awareness and sensitivity of law enforcement and adult protective-service agencies, the State's Attorney, and others in the aging network. Demonstrative of this increased sensitivity and awareness are the increased number of cases filed and charged since the inception of the Elder Law Division. There is a need to add more case types to the jurisdiction order; a need to amend procedural rules to provide more clarity now that the rules are being utilized; and a need to provide continuing training of judges on issues of capacity and the complexities of the aging brain. As the aging population grows, the issues of aging become more complex.



Judge Patricia Banks (JD, University of Wisconsin) engaged in the private practice of law for over 20 years before her 1994 election to a judgeship for the Circuit Court of Cook County, Illinois. She served as a trial judge in the Domestic Relations and Law Divisions before her appointment as Presiding Judge of the Elder Law and Miscellaneous Remedies (ELMR) Division in 2010. The ELMR Division is the only division of its kind in the United States and was established to improve access to justice for the elderly. Currently, Judge Banks chairs the 15-member American Bar Association Commission on Law & Aging, the Elder Law Committee of the National Association of Women Judges, and the Elder Abuse Committee of the American Judges Association. She continues to provide consultations to jurists and others on development of elder-protection courts and elder-justice centers, facilitate workshops, and publish articles on elder law and elder-care issues.

Whom Do You Represent?:

The Role of Attorneys Representing Individuals with Surrogate Decision Makers

Nina A. Kohn

Surrogate decision-making arrangements are ubiquitous. Surveys suggest that the majority of older Americans have a surrogate decision maker who is empowered to make decisions on their behalf, most commonly an agent appointed under a power of attorney (“POA”) for finances or for health care.¹ The result is that attorneys frequently represent clients who have a surrogate decision maker with the authority to make decisions on the matter underlying the representation.

From the perspective of the attorney, such representations raise several important questions. First, from whom should the attorney take direction? Should the attorney look to the surrogate or to the person for whom the surrogate has been appointed? Second, with whom should the attorney communicate? Should the attorney share information with the surrogate, the individual who appointed the surrogate, or both?

From the perspective of a court, such representations also raise important questions. If an attorney claims to represent a principal for whom a surrogate has been appointed, should the court expect the attorney to take direction from the principal and communicate with the principal? If the attorney is not doing so, should the court treat the principal as an unrepresented party? In addition, if the attorney is not doing so, should the attorney’s behavior be seen as a red flag suggesting exploitation?

This article seeks to provide guidance on the proper role of the attorney when representing an individual for whom a surrogate decision maker has been appointed. Specifically, it considers two types of surrogates: (1) agents appointed pursuant to a POA for finances,² and (2) guardians or conservators appointed by a court.³ In doing so, it seeks to inform the courts about expectations for attorney behavior. This is valuable not only so that judges can be confident that the attorneys appearing before them actually represent the persons whom they allege to represent. It is also valuable because it may empower judges to identify cases in which an attorney is either

consciously or unwittingly facilitating an agent’s exploitation of a vulnerable person.

I. CLIENTS WITH AGENTS APPOINTED UNDER POWERS OF ATTORNEY

A. THE CHALLENGE

Imagine that an individual comes to an attorney’s office and presents a document that, by all appearances, is a valid POA appointing that person as the agent (also called an “attorney-in-fact”) for the individual who executed the document (the “principal”). The individual asks the attorney to assist the agent in performing an act that appears to be fully authorized by the document. May the attorney assist? Does the attorney have any obligation to the principal to determine the validity of the document or to otherwise question the agent’s directions? Should and must the attorney alert the principal to the request? And to what extent should the attorney disclose information provided by the agent to the principal?

Similarly, imagine an attorney appears in court and identifies herself as counsel to the principal. Appearing with her is the agent appointed under the document and it is apparent that the attorney is taking direction from the agent. Should the court inquire as to whether the principal has been consulted or agrees to the course of action? Should the court require the principal’s presence? Does the answer depend on whether the attorney reports that the principal is incapacitated? Does the answer depend on whether the agent’s actions advantage the agent or the agent’s associates personally?

B. THE ATTORNEY’S ROLE

When an individual who has appointed an agent under a POA seeks representation, an attorney may look to the individual for direction as if no such document had been executed. This is because execution of a POA does not limit the powers of the person executing it. Rather, the principal retains all

The author thanks Mary Helen McNeal for her comments on an earlier version of this article, and Catherine Koss for her insight and research as part of earlier jointly authored work that informs this article.

Footnotes

1. See AARP Research Group, LEGAL DOCUMENTS AMONG THE 50+ POPULATION: FINDINGS FROM AN AARP SURVEY 5 (2000), <http://assets.aarp.org/rgcenter/econ/will.pdf> (reporting that 45% of Americans age 50 or older reported having a power of attorney for finances, with this rate increasing with age and 73% of those 80 and over having one). In addition, surveys suggest that the majority of older adults have appointed an agent to make health-care decisions for them in the event they cannot make such deci-

sions for themselves. See Jaya K. Rao et al., *Completion of Advance Directives Among U.S. Consumers*, 46 AM. J. PREV. MED. 65, 68 (2014) (finding, based on a national mail survey, that more than two-thirds of adults age 55 and over had an advance directive).

2. A durable power of attorney is increasingly referred to simply as a power of attorney (POA) and this article adopts this modern practice. Indeed, the Uniform Power of Attorney Act takes the position that all powers of attorney are durable unless they state otherwise and thus uses the term “power of attorney” only. See UNIF. POWER OF ATTORNEY ACT (UNIF. LAW COMM’N 2006).
3. While actual numbers are unknown, an estimated 1.5 million people in the United States are subject to guardianship or conservatorship.

rights he or she had before execution of the document, including the right to engage the services of an attorney.⁴

The challenging issue for the lawyer is not whether the lawyer *may* take direction from the principal, but whether the lawyer *must* take direction from the principal. Such a situation may arise where the agent seeks to engage the attorney to represent the principal, but seeks to limit the attorney's interactions with the principal. Here, the leading sources of ethical guidance fail to provide the level of clarity that might be expected given the frequency with which the issue arises.

The only time the issue is addressed in the Model Rules of Professional Conduct is in the comments to Rule 1.14, the rule that addresses attorneys' duties to clients with diminished capacity (a situation that only captures a subset of persons who have executed POAs). Comment 2 to Rule 1.14 instructs the attorney to "as far as possible accord the represented person the status of client, particularly in maintaining communication."⁵ By contrast, Comment 4 to Rule 1.14 states, "If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client."⁶ Thus, while one comment indicates that the attorney's default approach should be to act as the attorney would if no such surrogate had been appointed, the other suggests the opposite default.

While the Comments cannot be fully reconciled, the underlying text of the Model Rules suggests that one way to reduce the inconsistency is to read Comment 4 narrowly. That text directs attorneys to maintain a normal attorney-client relationship with limited exceptions, and taking direction from someone other than the client is not ordinary practice.

Recent court cases considering whether attorneys acted properly in refusing to take direction from an agent provide further support for the conclusion that Comment 4 should be read narrowly. In the 2015 case of *In re Runge*,⁷ the North Dakota Supreme Court took the position that Comment 4's direction to look to the agent for decisions was not applicable where an attorney had independently assessed the client's capacity and determined that the client had capacity to make the legal decision at issue. The same year, in *In re Szymowitz*,⁸ the D.C. Court of Appeals found that Comment 4's direction

did not apply to a situation where the surrogate transferred property to himself because such "self-dealing" was "not ordinary" practice.⁹ Together, these cases suggest that attorneys act appropriately in refusing to take direction from an agent when a principal with capacity wishes to provide that direction or when an agent is engaged in self-dealing (even absent a finding that the self-dealing constitutes a breach of the

agent's fiduciary duty). Thus, when an attorney is asked by an agent appointed under a POA to represent the principal, best practice will typically be to meet with the principal before undertaking the representation. This will allow the attorney to determine whether the principal has the ability to provide direction and wishes to do so, or whether the principal either lacks that ability or would prefer to delegate to the agent.¹⁰ It will also allow the attorney to determine the extent to which the principal wishes to receive communication about the representation.¹¹ In addition, such a meeting provides an opportunity for the attorney to assess whether, including by making the request for representation, the agent is acting in a manner consistent with the agent's fiduciary duty.

Best practice typically will involve such a meeting even if the agent represents to the attorney that the principal lacks the capacity to provide direction. Such representations by agents are not always truthful. In some cases, the agent may not appreciate the individual's abilities. In other cases, the agent may be deliberately misleading the attorney in an attempt to use the attorney's services to accomplish a task the agent knows to be inconsistent with the principal's wishes or interests. Indeed, it appears that a significant portion of financial exploitation is accomplished through the misuse of a POA,¹² sometimes with the assistance of an attorney who (presumably unwittingly) assists the agent with transactions that constitute impermissible self-dealing. Meeting with the principal at the outset of the representation, especially not in the presence of

The challenging issue for the lawyer is . . . whether the lawyer *must* take direction from the principal.

4. Cf. *In re Runge*, 858 N.W.2d 901, 907 (N.D. 2015) (holding that an attorney had no ethical duty to consult with an agent appointed pursuant to a POA for health care before assisting the principal in revoking the agent's authority because "no guardianship or conservatorship existed that withdrew [the principal's] authority to act for himself. Rather, [the principal] shared his authority to act and he remained free to withdraw the authority conferred under that power of attorney . . .").

5. MODEL RULES OF PROF'L CONDUCT r. 1.14 cmt. 2 (AM. BAR ASS'N 2002).

6. See MODEL RULES OF PROF'L CONDUCT r. 1.14 cmt. 4 (AM. BAR ASS'N 2002).

7. 858 N.W.2d at 907.

8. 124 A.3d 1078 (DC Ct. App. 2015).

9. 124 A.3d at 1087–88 (considering the propriety of an attorney taking action under the direction of an agent without consulting the principal).

10. In addition, if the attorney determines that the principal wishes to

provide direction, the attorney can also use the meeting to assess the extent to which the principal wishes to have information about the representation shared with the agent.

11. Communication may be beneficial to the principal even if the principal wishes to delegate provision of direction to the agent. Communication may empower principals who have the ability to monitor the agent and potentially to withdraw the agent's authority if the agent is acting in a matter that is inconsistent with the principal's wishes.

12. Reports of POA abuse are common and the elder protection community has identified POA abuse an important concern. See Nina A. Kohn, *Elder Empowerment as a Strategy for Curbing the Hidden Abuses of Durable Powers of Attorney*, 59 RUTGERS L. REV. 1, 5-7 (2006). It is estimated that in excess of 5% of older adults are subject to major financial exploitation, a category that includes POA abuse. See RON ACIERNO, MELBA HERNANDEZ-TEJADA, WENDY MUZZY & KENNETH STEVE, NATIONAL ELDER MISTREATMENT STUDY 6 (March 2009), available at <http://www.ncjrs.gov/pdffiles1/nij/>

Courts should be alert to the possibility that attorneys appearing . . . on behalf of a principal may be taking direction from an agent.

the agent, can thus help thwart such exploitation.

Should the agent seek to restrict interaction with the principal, best practice will typically be for the attorney to refuse to represent the principal under such circumstances. A request to restrict disclosures to the principal is a red flag that the agent may be attempting to abuse the agent's authority, and an attorney is well-advised to avoid situa-

tions in which the attorney's services may be used in furtherance of unlawful activity. In certain cases, if the attorney believes that the agent has good reasons for limiting disclosure, the attorney might reasonably agree to represent the agent in the agent's role as a fiduciary.¹³ Representing the agent instead of the principal has the potential to significantly reduce the need to involve the principal, although it may not obviate the need for disclosure. Even if the attorney merely represents the agent, the attorney has certain duties to the principal, which may include a duty to prevent the agent from misconduct or to disclose such misconduct.¹⁴

C. THE COURT'S ROLE

Courts should be alert to the possibility that attorneys appearing in front of them on behalf of a principal may be taking direction from the agent. In many cases, such an approach is perfectly appropriate. However, it is not enough for the court simply to review the appointing document to see that the agent's actions fall within the powers granted to the agent. Especially where the agent has a personal interest in the outcome of the matter before the court (e.g., where the transaction would benefit the agent or an associate of the agent), the court should consider the possibility that the representation may be

inconsistent with the agent's fiduciary duty. By being vigilant to such possibilities, the court may be able to avoid assisting the agent in accomplishing improper acts or exploitation of the principal.

Courts should also recognize that the principal who has the capacity to engage and direct an attorney is free to do so, and that the attorney need neither consult with nor defer to the agent in such situations. Likewise, when the principal has capacity and objects to the agent's actions, courts should insist that an attorney appearing on behalf of the principal take direction from the principal, not the agent.

II. CLIENTS WITH APPOINTED GUARDIANS OR CONSERVATORS

A. THE CHALLENGE

Challenging situations also arise for attorneys and for courts when attorneys represent a person subject to guardianship or conservatorship. Such representations may arise in a variety of contexts. An individual subject to guardianship or conservatorship may seek to challenge something related to that arrangement—ranging from its very existence, to the powers granted the guardian, to the appointment of a particular person as guardian or conservator. The individual may also seek representation to address an issue unrelated to the guardianship or conservatorship, including an issue with regard to which the person has retained rights. These rights may either be retained because they are retained as a matter of state law (e.g., are not removed even when an appointment is plenary)¹⁵ or because the court only partially removed rights (e.g., in the case of a limited guardianship).

B. THE ATTORNEY'S ROLE

From an attorney's perspective, two overarching issues arise when asked to represent an individual subject to guardianship or conservatorship: (1) may the attorney accept the represen-

grants/226456.pdf (last visited May 20, 2017). However, there is not currently a clear estimate of the rate of POA-specific abuse although attempts at estimation have been made. See, e.g., LINDA S. WHITTON, NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, NATIONAL DURABLE POWER OF ATTORNEY SURVEY RESULTS AND ANALYSIS (2002), available at http://www.uniformlaws.org/shared/docs/power_20of%20attorney/dpasurveyreport_102902.pdf (last visited May 20, 2017) (reporting that 64% of 371 attorneys surveyed by the National Conference of Commissioners on Uniform State Laws had encountered abuse by an agent acting under a POA and nearly a quarter had encountered more than ten instances of such abuse); Hans A. Lapping, *License to Steal: Implied Gift-Giving Authority and Powers of Attorney*, 4 ELDER L. J. 143, 167-68 (1996) (citing a student-conducted study by Albany Law School's Government Law Center).

13. A key issue for the attorney to determine at the outset of the representation, therefore, is whether the attorney is representing the principal or the agent. The American College of Trusts and Estates Counsel has taken the position that which role the attorney has depends on whether the attorney had a prior attorney-client relationship with the principal. If the attorney did, then the

principal is the client. If the lawyer did not, then the lawyer represents only the fiduciary. See AM. COLL. OF TRUSTS & ESTATE COUNSEL, COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT 162 (5th ed. 2016).

14. The American College of Trusts and Estate Counsel contemplates that the lawyer for the fiduciary will owe duties to the "disabled person," including to "to disclose, to prevent, or to rectify the fiduciary's misconduct." *Id.* This is a more expansive position than that taken by Rule 1.6 of the Model Rules of Professional Conduct. See MODEL RULES OF PROF'L CONDUCT r. 1.6 (allowing an attorney to reveal "information relating to the representation . . . to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.").

15. For example, in a number of states, the right to vote is retained as a matter of law. See Sally Balch Hurme & Paul S. Appelbaum, *Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters*, 38 MCGEORGE L. REV. 931, 950 (2007).

tation, and (2) if the attorney accepts the representation, from whom does the attorney take direction and with whom does the attorney communicate?

1. Permissible Scope of Representation

Individuals subject to guardianship or conservatorship¹⁶ have been found by a court to be unable to make some decisions for themselves and have had the right to make those decisions delegated to a third party (alternatively called a “guardian” or “conservator”).¹⁷ This has led some to conclude that attorneys cannot represent such persons.¹⁸ This conclusion is understandable as attorneys generally can only represent those with capacity to contract to engage the attorney and to provide the attorney with direction as part of that representation. Nevertheless, it is erroneous.

There is no common-law prohibition on attorneys representing people subject to guardianship. Despite some suggestions to the contrary, as the author and a colleague explored in a prior article,¹⁹ neither contract law²⁰ nor agency law²¹ preclude such representations.

The conclusion that persons subject to guardianship cannot engage an attorney is also, moreover, inconsistent with state statutory law. Many states have adopted statutes that explicitly or implicitly require that persons subject to guardianship be permitted to engage counsel to represent their interests in certain conditions. In some states, there is an explicit right to counsel, for example, to seek restoration of rights. Even more states have adopted the “least restrictive alternative” standard that requires a similar result. Denying an individual subject to guardianship or conservatorship the ability to engage an attor-

ney to assist with matters related to retained rights (including the right to challenge the existence, terms, or conditions of the arrangement) violates the standard by denying the individual more rights than is necessary for the individual’s protection.²²

Most importantly, denying the right to counsel would violate the constitutional rights of individuals subject to guardianship and conservatorship. Such individuals retain substantial due-process rights, and exercising those rights may require representation.²³ These rights cannot be protected simply by allowing a guardian or court to engage an attorney to represent the individual. When the individual is challenging the existence, terms, or conditions of the appointment, the guardian or conservator has a conflict of interest and may even be the individual’s primary adversary.

Although individuals subject to guardianship or conservatorship thus can have a right to engage an attorney, the right is constrained. Consistent with the common-law agency principle that an agent can only do what the principal can do,²⁴ such persons only have a right to engage an attorney to represent them with regard to rights that are retained. However, retained rights are not simply those rights that a court does not strip from the particular individual. Retained rights are also rights that state or federal law render unaffected by the

[D]enying the right to counsel would violate the constitutional rights of individuals subject to guardianship and conservatorship.

16. Traditionally, such persons have been said to be found “incapacitated” and are called “wards.” The modern approach is to focus not on the person’s status but on whether the person’s needs can be met short of imposition of a guardianship, and to replace the stigmatizing word “ward” with person-centered language.

17. The term “guardian” is typically used to refer to a person appointed by a court to make decisions with respect to the personal affairs of an individual who has been adjudicated unable to make those decisions, and the term “conservator” is typically used to refer to a person who is appointed by a court to make decisions with respect to the property and financial affairs of an individual who has been adjudicated by a court to be unable to make those decisions. However, some states use the term “guardian” to refer to both types of appointees, and a few states use the term conservator to apply to both. See Nina A. Kohn, *Matched Preferences and Values: A New Approach to Selecting Legal Surrogates*, 52 SAN DIEGO L. REV. 399, 402 n.7 (2015) (discussing state differences in terminology).

18. See, e.g., *In re Guardianship of Zaltman*, 843 N.E.2d 663, 664 (Mass. App. Ct. 2006) (requiring an evidentiary hearing to determine whether a woman had capacity to retain counsel to challenge the guardianship before permitting her to engage such counsel).

19. See generally, Nina A. Kohn & Catheryn Koss, *Lawyers for Legal Ghosts: The Ethics and Legality of Representing Persons Subject to Guardianship*, 91 WASHINGTON L. REV. 581 (2016).

20. As courts have recognized, constitutional due-process guarantees prohibit such an interpretation. Moreover, the doctrine of necessities has been recognized as giving rise to a claim for fees by an

attorney who supplies legal services to an incapacitated individual, including those subject to guardianship seeking to terminate that guardianship. See *id.* at 591–97.

21. Agents are only prohibited from performing acts the principal cannot perform. See RESTATEMENT (THIRD) OF AGENCY § 3.04(1) (AM. LAW INST.2006). Individuals subject to guardianship retain many rights. These include those powers not delegated to the guardian because the appointment is limited or because state statutory law allows persons subject to guardianship to retain them. It also includes the right to challenge the terms and conditions of the guardianship as constitutional due-process protections render these retained rights as well. Thus, agency law does not bar attorney representation as to these issues. For further discussion of this point, see Kohn & Koss, *supra* note 19, at 589–91.

22. For further discussion of this issue, see Kohn & Koss, *supra* note 19, at 602–04.

23. See *In re Mark C.H.*, 906 N.Y.S.2d 419, 425 (Surr. Ct. 2010) (finding that an individual subject to guardianship had a due-process right to periodic review of the arrangement). Similarly, it is generally accepted that constitutional due-process guarantees require individuals for whom a guardian or conservator is sought have notice of those proceedings and an opportunity to be heard. See, e.g., Susan G. Haines & John J. Campbell, *Defects, Due Process, and Protective Proceedings*, 2 MARQ. ELDER’S ADVISOR 13, 15–16 (2000) (discussing due-process jurisprudence as applied to guardianship proceedings).

24. Notably, the durable POA is a statutory creation that was specifically designed to overcome this common-law rule. For a history of the POA, see Kohn, *supra* note 12, at 5–7.

It is critical that courts not interfere with the right of an individual subject to guardianship or conservatorship to engage counsel in such situations.

imposition of a guardianship or conservatorship.²⁵ Most importantly, they include the rights guaranteed as a matter of constitutional right to due process: the right to challenge the existence of the guardianship or the terms and conditions of that guardianship.

2. The Attorney's Role

An attorney representing a person subject to guardianship or conservatorship on an issue as to which the individual has a right to retain counsel (e.g., to challenge the existence of the arrangement or its terms or conditions, to exercise other retained rights, or to receive legal counsel about rights) has the same role and ethical responsibilities as an attorney representing a client who is not subject to guardianship. This includes the duty to provide competent representation, consult with the individual, and take direction from the individual. This is not to say the attorney can never deviate from the normal attorney-client relationship. Just as with clients who have never been adjudicated incapacitated, an attorney may—pursuant to Model Rule 1.14—deviate from the normal relationship to take “reasonably necessary protective action” when the lawyer reasonably believes that a client has diminished capacity, is at risk of substantial harm, and cannot act in her own interest.²⁶ In such situations, the attorney may reveal confidential information or act without the consent of the client to the extent it is “reasonably necessary to protect the client’s interests.”²⁷ Thus, even when protective action is appropriate, the client continues to be entitled to have her information kept confidential unless the risk to the client justifies a breach of confidentiality.²⁸

This approach is supported by state bar opinions and most court opinions on point,²⁹ as well as by the Restatement (Third) of Law Governing Lawyers. The Restatement states the general rule that an attorney should generally take direction from a guardian, but recognizes two significant exceptions: (1) for proceedings that are adversarial to the guardian, including a petition to terminate the guardianship or remove the

guardian,³⁰ and (2) in circumstances where the person subject to guardianship has authority to act without the guardian’s knowledge or permission (i.e., for retained rights).³¹

3. The Role of Courts

When faced with an attorney who purports to represent an individual subject to guardianship or conservatorship, courts should typically consider two questions: (1) does the individual have the authority to engage the attorney in this way, and (2) is the attorney acting in a manner consistent with the lawyer’s ethical duties.

As subsection B indicates, the answer to the first question turns on what the underlying representation is about. If the representation is to seek termination of the guardianship, remove the guardian, or otherwise challenge the terms of conditions of the guardianship, the individual has authority to engage the attorney. Likewise, if the representation is for the purpose of explaining his or her rights to the individual or providing assistance with regard to a retained right, the individual also has authority to engage the attorney. By contrast, the individual lacks authority to hire counsel to directly represent the person to accomplish a transaction or other objective that the person has been stripped of the right to pursue. Thus, by way of example, if the person has had the right to sell property removed, an attorney cannot represent the individual in the sale of the home, but may represent the person in a proceeding to restore the right to sell the property.

It is critical that courts not interfere with the right of an individual subject to guardianship or conservatorship to engage counsel in such situations.³² While all indications are that the vast majority of guardians perform their duties in good faith, this is not uniformly the case. Guardianships and conservatorships can, unfortunately, be a site of exploitation. Reports of guardians and conservators exploiting those for whom they are appointed abound.³³ Attorney representation of individuals subject to guardianship or conservatorship is one antidote to abuse. An attorney can help the individual understand her continuing rights, seek the removal of a guardian or conservator who is misusing authority, and petition for the termination of an unnecessary guardianship or conservatorship. Moreover, such representation is critical in situations in which individuals seek to restore their rights by either terminating a

25. Notably, these vary by state but may include fundamental rights such as the right to vote.

26. See MODEL RULES OF PROF’L CONDUCT r. 1.14(b).

27. See *id.* at r. 1.14(b)–(c).

28. For a decision tree outlining attorneys’ ethical duties in this regard, see Kohn & Koss, *supra* note 19, at 631.

29. For a comprehensive review and discussion of state bar opinions and court opinions on this matter, see Kohn & Koss, *supra* note 19, at 619–30.

30. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 24(3) (AM. LAW INST. 2000).

31. *Id. cmt. f* (“If the lawyer believes the guardian to be acting lawfully but inconsistently with the best interests of the client, the lawyer may remonstrate with the guardian or withdraw . . .”).

32. It is unfortunate that some courts have mistakenly concluded that

individuals subject to guardianship cannot retain counsel or that counsel might have to obtain court approval for engaging in such representations.

33. There is no credible national estimate of the rate of abuse by guardians, but reports of abuse are not uncommon. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-17-33, ELDER ABUSE: THE EXTENT OF ABUSE BY GUARDIANS IS UNKNOWN, BUT SOME MEASURES EXIST TO HELP PROTECT OLDER ADULTS, 6–11 (2016) (discussing the current state of knowledge); U.S. GOV’T ACCOUNTABILITY OFF., GAO-10-1046, GUARDIANSHIPS: CASES OF FINANCIAL EXPLOITATION, NEGLECT AND ABUSE OF SENIORS, (2010) (concluding that the GAO could not determine whether guardianship abuse is widespread, but identifying hundreds of allegations during a 20-year period).

guardianship or conservatorship or, at least, reducing the powers delegated to the guardian or conservator.³⁴

The answer to the second question, is the attorney acting consistent with his or her ethical responsibilities, is most likely to arise when there is reason to believe that the purported counsel for the individual subject to guardianship or conservatorship represents an interest of a person other than that individual. Unfortunately, many guardianships and conservatorships occur in the context of intense intra-family disputes. When the counsel has been arranged or paid for by a person other than the individual subject to guardianship or conservatorship,³⁵ a court may have a reasonable concern as to whether the counsel is truly taking direction from the individual or from someone else.

Where the court has reason to suspect the individual is not being truly represented by the attorney, the court may wish to appoint a guardian ad litem, visitor, or similar person to make further inquiries. In limited situations, the court may wish to go further and appoint counsel for the individual. Which approach is preferable will likely depend both on the rules of practice for the jurisdiction and on the nature of the matter before the court.

In short, while the notion that a person who has been stripped of legal capacity or adjudicated unable to make legal decisions would be able to hire an attorney may seem incongruous at first blush, it is imperative that courts facilitate—not impede—such representations. To be sure, courts should be vigilant to the possibility that purported counsel for the individual may be acting pursuant to the direction of someone else. But where the attorney is truly taking direction from the person on a matter which the person has a right to pursue, counsel should be treated as would any other lawyer before the court.

III. CONCLUSION

It is critical for courts to understand the appropriate role of attorneys who represent individuals with appointed surrogates. While all indications are that most surrogates are faithful and act in a manner consistent with their fiduciary duties, the unfortunate reality is that many do not. Being alert to the possibility that attorneys appearing on behalf of a person for whom a surrogate is appointed may not actually be acting at that person's direction or in that person's interest allows courts to potentially prevent certain forms of exploitation. Likewise, by recognizing that attorneys can represent those with appointed surrogates—including those subject to plenary guardianship or conservatorship—courts can play a role in rectifying abuse, when it does occur, by ensuring that such persons have access to the judicial system.



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34. See Jenica Cassidy, *Restoration of Rights in the Termination of Adult Guardianship*, 23 ELDER L.J. 83, 121 (2015) ("one of the greatest barriers to restoration is the ability of the protected individual to hire counsel").

35. Such payments are permitted by the Model Rules of Professional Conduct, but are suspect. See MODEL RULES OF PROF'L CONDUCT r.

1.8(f) ("A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client gives informed consent; (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (3) information relating to representation of a client is protected as required by Rule 1.6.").

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Prosecuting Elder Abuse:

A First-Hand Account

Page Ulrey

I didn't know what elder abuse was when I agreed to become our office's first dedicated elder-abuse prosecutor. It was 2001 and Norm Maleng, my boss and the elected prosecutor for King County, Washington, had decided it was time for our office to respond to this growing issue. He had seen Paul Greenwood, San Diego County's elder-abuse prosecutor and a passionate advocate for abused elders, speak on the subject and was inspired to create a similar position here. At that time, there were only a handful of dedicated elder-abuse prosecutors in the country, most of them in California.

Maleng had the foresight to know that my job would involve more than simply prosecuting cases. My duties were threefold: to prosecute cases, to train first responders and other professionals to better recognize and report abuse, and to work on improving the coordination between the county agencies who respond to it.

Elder abuse from a criminal-justice perspective is physical or sexual abuse, neglect, or financial exploitation of an elder by a trusted other. The trusted other may be a stranger who targets the elder and develops a trust relationship with them, or it may be someone who takes advantage of a preexisting relationship and perpetrates a crime against them. The results, even when the crime is financial exploitation, are devastating. According to a recent study, any form of even modest elder abuse increases the elder's risk of premature death by 300%.¹

As I educated myself on the subject, I began to look around the office for cases to handle. I found them scattered throughout our various units: financial exploitation was being handled by our fraud unit, physical abuse by our domestic-violence and mainstream trial units, and sexual assault by our special-assault unit. The one form of abuse, I found, that none of the units seemed to be prosecuting was neglect. So it was on that issue that I chose to focus my new practice. Neglect was the second most common type of referral received by Adult Protective Services (APS), so I thought there shouldn't be an issue with getting the cases.

I began to do outreach to the larger police agencies in the county, to APS, and to local hospitals. But despite my efforts, the number of neglect cases that came in was frustratingly low. Tracing them upstream, I found that few reports of neglect were being made to law enforcement. Even when they were reported, the police were rarely, if ever, investigating the cases. This, I came to learn, was due to the fact that these cases were extremely complicated, involving medical, financial, and cognitive-capacity issues. For law enforcement to respond to them properly, they needed both substantial training and access to experts with whom they could consult—they had neither. Further, law enforcement rightfully felt that there was no point in investigating these cases because they would not result in prosecution. Adult neglect had historically resided in a land of civil

lawsuits and administrative sanctions, not criminal charges. Despite the fairly robust criminal-neglect statutes in Washington State, no one was treating these cases as criminal.

I soldiered on. I began to conduct trainings of law enforcement and other first responders on how to identify and respond to neglect and other forms of elder abuse. With the assistance of our Medical Examiner, I formed the King County Elder Abuse Council, a group of stakeholders in the community who came together every month to discuss the many systemic changes that were needed in our county in order for us to begin to prevent and properly respond to elder and vulnerable-adult abuse. I developed working relationships with a handful of nurses and doctors, in particular Laura Mosqueda, M.D., a wonderful geriatrician at the Keck School of Medicine and one of the leading experts on the medical aspects of elder abuse and neglect. Very slowly, the cases began to trickle in.

As I acquainted myself with actual cases of neglect, the barriers to prosecuting them quickly came into view. In most of my early cases, there were serious failures not only of the individual caregivers, but of the system as a whole. Rather than one person being responsible for the neglect, there were numerous people or agencies who had contributed to it. In one death case I handled, the state agency that oversaw the quadriplegic victim's care failed to take action despite clear signs he was no longer leaving the house, was severely underweight, and had a foster mother who herself appeared to be ailing. In that case, the victim's doctors had also done nothing when his foster mother stopped taking him to his appointments. He died weighing fewer than 40 pounds. In another case, the nurse hired by the state to examine the bedbound quadriplegic victim simply asked the caregivers how she was doing rather than examining the victim herself. When the caregivers said she was doing fine, the nurse simply checked the boxes on her form as if she had examined the patient herself. A few weeks later, the victim ended up in the emergency room with massive pressure sores on her knees; she died a few months later. In another case, APS had closed their case after the alleged victim of neglect, an elderly woman with probable dementia, refused to be evaluated. She was later found dead, lying in filth, with maggots consuming her lower extremities. Because these early cases involved such significant failures of the system as well as the individual caregivers, rarely could I file charges. Besides being unethical, such prosecutions would likely have resulted in not-guilty verdicts.

As the months passed, law enforcement, APS, and the public became more aware of my office's interest in these cases. Reports increased and investigations improved. I eventually expanded my practice to bring in cases of financial exploitation, a form of elder abuse with which we have much greater success in prosecuting. Eventually, my current boss, King

Footnotes

1. i Xinqi Dong, et al., *Elder Self-Neglect and Abuse and Mortality Risk*

in a Community-Dwelling Population, 302(5) J. AMER. MED. ASS'N. 517-26 (2009).

County Prosecuting Attorney Dan Satterberg, appointed a second prosecutor to handle the office's elder-abuse cases. Now, 16 years later, we have never been busier.

Over the years, I have come to learn that what makes a case of serious physical neglect potentially criminal: multiple, severe untreated or improperly treated pressure sores combined with other physical signs of poor care; a treating physician or medical expert who is of the clear opinion that the victim's symptoms are due to neglect versus underlying disease; a caregiver, whether paid or unpaid, who is unambiguously responsible for the victim's care; and a financial motive for the caregiver to neglect the victim, such as hastening the victim's death to speed up an inheritance or keeping the victim in the home to continue to have access to her income.

At the heart of most cases of elder abuse is the issue of cognitive capacity. The defense most often raised is consent—that the victim wanted to give her money to the suspect, agreed to the sexual act, or, in the case of neglect, refused medical care. For us to determine whether the victim truly did consent, we must answer the question of whether he or she had capacity to do so. Obviously, if so, and if the consent was knowingly and freely given, then, no matter how much we don't like the decision to consent, we have no criminal case.

Our first task in a case where consent is likely to be raised is to look at what evidence we have of the victim's mental capacity at the time of the incident. This can be challenging, because we often don't receive these cases until months or even years after the crime has occurred—often, the victim is severely demented or dead. Records from the victim's primary-care provider are essential. Sometimes these records show a well-documented history of dementia with thorough testing to back it up. More often, however, they don't.

This is true for a number of reasons. One is that most people suffering from dementia don't know it and thus don't complain about it to their doctor. Even when patients do complain of memory loss, health-care providers often conduct insufficient screening for it. The most common screening tool we see implemented by doctors is the Mini-Mental State Examination, a short test that assesses for memory loss but not for the loss of judgment that so often accompanies early dementia. In many of our cases, victims of financial exploitation who have given away their life savings to someone they barely know have scored well on this test. Only when they were given other tests that include assessment of executive function, such as the St. Louis University Mental Status test (SLUMS), the Montreal Cognitive Assessment (MOCA), or the Frontal Assessment Battery, was their impairment revealed. Perhaps another disincentive for doctors to conduct thorough testing is the lack of viable treatment and cure for this awful disease. Whatever the explanation, it's a rare case we receive where a primary-care provider has done a thorough work-up of the victim's cognitive impairment.

When we are without good medical evidence, we instruct law enforcement to obtain a capacity evaluation of the victim.

In Seattle, we are blessed with geriatric psychologists and social workers with experience in conducting capacity evaluations at a reasonable cost. However, prosecutors in many—if not most—other jurisdictions have no one to turn to for such an evaluation. Often, they will rely entirely on the records of the primary-care provider. So if that provider has failed to recognize that a patient is suffering from dementia, the prosecutor is likely to interpret those records to mean that the patient had cognitive capacity and, thus, that he or she consented to the act that's at issue.

Cases of elder abuse almost always require a multidisciplinary response. Capacity evaluators are crucial partners to the criminal-justice system, as are APS workers, advocates, civil attorneys, forensic accountants, and geriatricians. We need APS and advocates to address the victim's many service needs after the abuse, neglect, or exploitation is uncovered and civil attorneys to help them with their legal needs. We need forensic accountants to help us sort through and analyze the stacks of financial records that often make up these cases. This is true even in some of the neglect and abuse cases we bring, as financial exploitation is often co-occurring or financial gain is the perpetrator's motive. We need geriatricians to help us determine whether the victim's injuries were due to the intentional actions of a perpetrator versus a fall or underlying disease process.

Even in my relatively resource-rich jurisdiction, it is the unusual case of elder abuse that is actually reported, investigated, and prosecuted. One recent study found that for every one case of abuse that comes to light, another 23 do not.² Financial exploitation is reported even less often, and neglect even less than that. I am not an advocate of prosecution for every one of these cases. Some of the less serious ones may be better handled by APS or family members through the use of civil legal tools like protection orders or powers of attorney, by offering treatment to the perpetrator, or simply by reducing the elder's isolation, connecting him or her with social services or financial monitoring or both. This is particularly true in cases of financial exploitation when the victim wasn't substantially harmed and the perpetrator is a family member, someone with whom the victim wants to continue to have a relationship. In so many of our cases, the victim is widowed with few if any friends or family members left, so cutting the perpetrator completely out of the victim's life could isolate and traumatize him or her even further.

But because we handle felonies, the cases of mild abuse, neglect, and exploitation are ones we rarely see. Our neglect cases are serious, the victim usually dead. Our financial cases most often involve a victim who is depressed and deeply ashamed, having lost an entire life savings to someone who was deeply trusted. Our physical-abuse cases involve serious injuries, sometimes homicides. And our sexual abuse cases are usually rapes, most often involving victims with advanced dementia. The victims are male and female, from all ethnicities and socioeconomic brackets. The qualities they tend to share are dementia and social isolation.

2. MARK LACHS, ET AL., UNDER THE RADAR: NEW YORK STATE ELDER ABUSE PREVALENCE STUDY (LIFESPAN OF GREATER ROCHESTER, INC., WEILL CORNELL MEDICAL CENTER & NEW YORK CITY DEPT. FOR THE

AGING 2011), available at <http://ocfs.ny.gov/main/reports/Under%20the%20Radar%2005%2012%2011%20final%20report.pdf> (last visited June 12, 2017).

I have been working on elder-abuse issues for 15 years now. Though the grimness of the cases remains the same, we have made some progress. Thanks to a small grant program of the Office of Violence Against Women, there are now dozens of dedicated elder-abuse prosecutors and detectives across the country. The program funds a national prosecutor's course and a judicial training on elder abuse, not to mention local trainings for law enforcement and direct service providers. Federal funding for research and assistance to local prosecutors and law enforcement is increasing somewhat. There is more and better media coverage and public awareness of the issue, resulting in increased reporting, and, in some jurisdictions, better responses to those reports.

With any luck, judges across jurisdictions will see an increasing number of these cases in the coming years. It's crucial that judges learn about dementia and cognitive impairment, including the fact that older adults whose memories are fairly intact and who may be competent to testify may nevertheless suffer from significant deficits in their executive function, which controls their ability to make good decisions for themselves—their judgment. Judges need to know about the various capacity-screening tools and what they can—and cannot—tell us about a person's cognitive status.

It's similarly crucial that judges be made aware of the damage that can be done to these cases—and to these victims—when cases are allowed to languish. It's important for judges to be given information on how much is at stake for elder-abuse victims themselves—the shame they may feel at the fact of their victimization, their legitimate fear that its airing could result in loss of their independence or their home, their frequent belief that cooperating with the justice system against someone they love will result in that relationship forever being severed. Elder abuse needs to become a standard part of judicial training.

We are finally making a small degree of headway on this

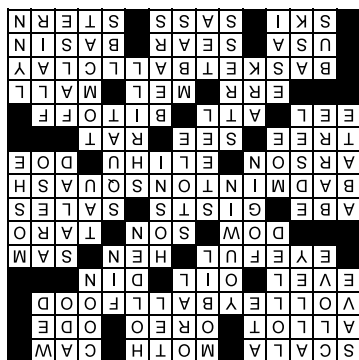
complex and devastating problem, but we need to make so much more. We need to fund more research, prevention, training, multidisciplinary teams, dedicated detectives and prosecutors, public-awareness campaigns, and services to protect elders and reduce social isolation. If we continue at our current pace, we will be entirely ill-equipped to handle the tsunami of cases that is steadily making its way toward us as our population ages.



Page Ulrey is a Senior Deputy Prosecuting Attorney at the King County Prosecutor's Office. She graduated from Amherst College and Northeastern University School of Law. Page was appointed to the newly created position of elder-abuse prosecutor in the Criminal Division of her office in 2001. In that position, she prosecuted cases of elder and vulnerable-adult neglect, financial exploitation, sexual assault, physical assault, and homicide. She also founded and chaired the King County Elder Abuse Council and Criminal Mistreatment Review Panel. Since September 2007, Page has been working as an elder-abuse prosecutor in her office's Economic Crimes Unit, where she specializes in the prosecution of cases of elder financial abuse and neglect. For the past seven years, she has worked on protocol development and been a member of the national training team on elder-abuse investigation and prosecution for the Office on Violence Against Women. She has conducted trainings for the National District Attorneys Association, the Office for Victims of Crime, and the National Institute of Justice. She has testified before the U.S. Senate Special Committee on Aging, has spoken twice at White House conferences on elder justice, and is currently involved in the production of videos on elder-abuse prosecution for the Department of Justice.

Answers to Crossword

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Tales from a Supportive Guardianship

Robert D. Dinerstein

For a number of years now, I have been a committed advocate of supported decision making as an alternative to guardianship for people with intellectual disabilities. In writings, presentations, classes, and meetings,¹ I have argued that supported decision making is not only less restrictive than guardianship but more consistent with principles of client-centered counseling and person-centered planning that animate approaches to lawyering and the delivery of services to people with intellectual disabilities. Even the most humane and limited forms of guardianship shift decision-making focus from the individual with a disability to his or her guardian or other surrogate decision maker. In contrast, although the person with an intellectual disability may get significant support from one or more supporters, that person remains the primary decision maker in his or her life.

In a prior article, I defined supportive decision making as follows:

Supported decision-making can be defined as a series of relationships, practices, arrangements, and agreements, of more or less formality and intensity, designed to assist an individual with a disability to make and communicate to others decisions about the individual's life. . . . [S]upported decision-making [relies] on peer support (for example, ex-users of psychiatric services for people with psycho-social disabilities), community support networks and personal assistance, so-called natural supports (family, friends), or representatives (pursuant to a representation agreement) to speak with, rather than for, the individual with a disability.²

Supported decision making in one form or another has been around for over 20 years in areas of the world such as British Columbia, Canada, Sweden, parts of Australia, and Germany. It has received a major boost from the adoption of the United Nations Convention on the Right of Persons with Disabilities (CRPD), which the U.N. General Assembly adopted in December 2006 and entered into force on May 3, 2008.³ Article 12 of the CRPD, "Equal recognition before the law," provides that all people with disabilities enjoy legal capacity, and that states "shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity."⁴

But even though the U.N. Committee on the Rights of Persons with Disabilities has taken the position that any form of guardianship is inconsistent with Article 12 of the CRPD,⁵ almost all countries in the world, and all states in the United States, continue to authorize it. To be sure, guardianship law and practice have evolved to emphasize the importance of exploring less-restrictive alternatives to guardianship (such as supported decision making, powers of attorney, health-care proxies, and advance directives), as well as less-restrictive alternatives *within* guardianship (preferring limited over general or plenary guardianship), and to stress that the role of the guardian is to seek to maximize the autonomy and self-determination of the person under guardianship.⁶ Not all of these reforms have taken hold, however, and guardianship remains a subject of intense interest for people with disabilities, older persons, allies of both groups, academics, courts, and lawmakers, among others.

Whether one views guardianship as performing an important and even admirable function for society, or as a necessary evil, guardianship is here to stay, at least for now. In my view,

Footnotes

1. See, e.g., Robert D. Dinerstein, Esme Grant Grewal & Jonathan Martinis, *Emerging International Practices in Guardianship Law for People with Disabilities*, 22 ILSA J. INT'L & COMPARATIVE LAW 435-60 (Winter 2016); Robert D. Dinerstein, *On Torture, Ill-Treatment and People with Psychosocial and Intellectual Disabilities: Some Thoughts About the Report of the Special Rapporteur*, in TORTURE IN HEALTHCARE SETTINGS: REFLECTIONS ON THE SPECIAL RAPporteur ON TORTURE'S 2013 THEMATIC REPORT 219-26 (Center for Human Rights & Humanitarian Law Anti-Torture Initiative) (2014); Robert D. Dinerstein, *Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road from Guardianship to Supported Decision-Making*, 19(2) HUMAN RIGHTS BRIEF 8 (Winter 2012).
2. Dinerstein, *Implementing Legal Capacity*, *supra* note 1, at 10 (Winter 2012).
3. CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES, G.A. RES. 61/106 (Dec. 13, 2006) (hereinafter "CRPD"). President Obama signed the CRPD in July 2009, but the U.S. Senate has not yet ratified the treaty. As of May 30, 2017, 172 countries (and the Euro-

pean Union) had done so. See <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html> (last visited May 30, 2017).

4. CRPD, Art. 12, ¶ 3.
5. See Committee on the Rights of Persons with Disabilities, General Comment No. 1 (2014), Article 12: Equal recognition before the law. U.N. Doc. CRPD/C/GC/1 (adopted April 11, 2014), available at <https://documents-dd-ny.un.org/doc/UNDOC/GEbn/G14/031/20/PDF/G1403120.pdf?OpenElement>, and the Committee's Concluding Observations for a number of states that have appeared before it, cited in Dinerstein, et al., *Emerging International Practices*, *supra* note 1, at nn. 58-64 and accompanying text.
6. See, e.g., the proposed National Conference of Commissioners on Uniform State Laws, Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (March 2017 draft), § 301(b). The proposed draft uniform law, which amends the existing Uniform Guardianship and Protective Proceedings Act (1997), is due to be presented to the Uniform Law Commission in July 2017.

those who seek to reform guardianship make a big mistake if they see it as a lost cause and put all of their eggs in the basket of supported decision making and other alternatives to guardianship.

My perspective on this issue is affected significantly by the fact that I am the guardian for my younger sister A.D.⁷ (two and one-half years younger than me), who is a person with an intellectual disability. Her level of intellectual disability is considered in the moderate range. In addition, she has mild cerebral palsy, which affects her coordination and gait, and has difficulties in articulation that can make her speech difficult to understand. In her early 20s she had the first of several incidences of psychiatric distress, and later was diagnosed with schizo-affective disorder, which continues to flare up from time to time. Although these diagnostic categories provide some information about her, they do not come close to capturing who she is as a person. They do not—and cannot—convey that she has an excellent sense of humor and a remarkable memory (which sometimes gets her into trouble, as she thinks of incidents from 40 years ago as if they happened yesterday). She also is extremely gullible, obsessive, and always seeking the approval of peers and staff. She can be extraordinarily thoughtful and empathetic one moment, and highly focused on herself to the exclusion of others the next. As is characteristic of many people with intellectual disabilities, her thinking can be highly concrete, though within the limited sphere of her daily concerns she can be remarkably logical and clear-thinking. Over the years I have learned never to take for granted what she knows nor what she does not.

We grew up together in the family home on Long Island⁸ from the mid-1950s until I went away to college in the fall of 1970. My sister was in special classes in regular public schools until age 16, when, because the high school did not have a class for those in need of special education, she switched to the Rosemary Kennedy Center, a special school within New York's Board of Cooperative Educational Services system. My sister was keenly aware of being separated from non-disabled students⁹ and, indeed, would bring home notices from school having crossed out the word "Center" on the school's letterhead because to her "Center" meant "Separate School for Children with Intellectual Disabilities."¹⁰ My parents raised my sis-

ter in as "normal" a way as they knew how.¹¹ We took family vacations (including a cross-country car trip when we were 13 and 11, respectively), went out to dinner every Sunday night, and, in general, lived the conventional life of a middle-class family in 1950s and 1960s suburban America. My sister and I watched the classic 1960s sitcoms (Andy Griffith, Danny Thomas, Lucille Ball, *The Flying Nun*) and listened to the Beatles, the Rolling Stones, the Beach Boys, and all of the rock-and-roll music that WABC-AM and, later, WNEW-FM, played. In those benighted days, when educators thought that a 16-year-old with a "mental age" of eight should be treated as a chronological eight-year-old, my mother marched into the school one day to complain that playing "Here Comes Peter Cotton Tail" to my sister's class was rather absurd when she (and presumably at least some of her classmates) were listening to The Beatles' *Sgt. Pepper's Lonely Hearts Club Band* album at home. That was the end of "Here Comes Peter Cotton Tail" at the Rosemary Kennedy Center.

My sister and I were very close growing up. We certainly fell into some of the patterns of older brother-younger sister relationships: she may have had an intellectual disability (for which I not only felt sympathy but, if I am honest, some guilt for not having a disability myself) but she could be as annoying as any younger sister. Still, I know she looked up to me and consistently sought my approval. As I prepared to leave for college, I wondered how my sister would adapt to my absence. But it was I who had tears in my eyes, not her, as I got into the car to go to school.¹²

Once my sister graduated from the Rosemary Kennedy Center, in 1977 (the same year that I graduated from Yale Law School), the rhythms of her daily life changed significantly. During the day, rather than attend school, she went to a sheltered workshop in a neighboring town. For a variety of reasons, the workshop was a stressful experience for her. Increasingly, my sister became emotionally dependent on my parents, especially my mother. She had few friends and craved attention

I am the guardian for my younger sister A.D., who is a person with an intellectual disability.

7. Because some of the stories I recount in this essay are rather personal, I am using initials in lieu of my sister's full name.

8. As was not uncommon in the 1950s, the neurologist who treated my sister when she was a toddler advised my parents to institutionalize her, believing that it would be too hard on the rest of the family to raise a child with an intellectual disability in the community. Fortunately for all of us, my parents disregarded this advice and raised my sister and me together in the family home.

9. She moved to the Rosemary Kennedy Center in 1971, four years before enactment of the then-called Education for All Handicapped Children Act (now the Individuals with Disabilities Education Act, or IDEA). IDEA requires that students with disabilities receive a free appropriate public education in the least restrictive environment. Were she in school today, she almost certainly would have been in a special class in the public high school.

10. In this essay, I use the current usage of "intellectual disability" in lieu of the terminology of the time, "mental retardation" or "the

mentally retarded." People with intellectual disabilities and their allies objected to the term "mental retardation" because of the stigma associated with it. My sister is very aware of that stigma, and when she loses her temper, or is angry with her housemates or day-program companions, she is not above using it as an epithet.

11. One phrase my mother said to my sister during this period that continues to resonate with my sister to this day was "Nobody's Perfect." The phrase has allowed my sister to recognize that although she may have problems (indeed, her variation of the phrase is "Everyone has problems"), so does everyone else.

12. During my freshman year at Cornell University, I wrote an essay about growing up with my sister for my Psychology 101 class. As I recall, the assignment was open-ended, and my choice of topic undoubtedly reflected the importance I ascribed to my relationship with my sister.

She did not understand why she could not continue to live at home with my parents.

from my parents. After two years, my parents were concerned that my sister would never develop the independence and confidence she would need in adulthood if she continued to live at home. Having her at home was also beginning to take a toll on their health as they were aging. In 1980, they moved her to a rela-

tively new program in Loch Sheldrake, New York, called New Hope Rehabilitation Center. The New Hope facility was on the grounds of the former Green Acres Hotel in the Catskill Mountains;¹³ the main living area was the former main hotel building, and the residents lived in single or double bedrooms. Over time, New Hope (now known as New Hope Community), led for many years by a charismatic executive director, Daniel Berkowitz, evolved along with the field of intellectual disabilities, and changed from a private residential school to a community residential program. Residents like my sister moved from the main facility to houses and apartments in the local community. Since the late 1980s, she has lived in four different group homes, and currently lives with five other people with intellectual disabilities on a cul-de-sac in a nearby town. Direct-care staff provide 24-hour/7-day-a-week coverage of the home.

AD has always been somewhat ambivalent about living in New Hope and the surrounding community. She still talks about not having liked living in the main building, which she saw as institutional in nature. She was very aware of the difference between living at home with her parents and brother and living with 90 other people with intellectual disabilities in a congregate setting. Indeed, she took some pride in not having come to New Hope from Willowbrook and Letchworth Village, two notorious New York institutions for people with intellectual disabilities (now, fortunately, closed), as a number of New Hope residents (including her long-time boyfriend) had. She did not understand why she could not continue to live at home with my parents. It was always important to her that she still had a home outside of New Hope. Even though she visited home often, and my parents came to visit her frequently (New Hope was about two and one-half hours by car from their home), she expressed her ambivalence by, among

other things, insisting that she keep her extensive record collection in the family home, as if bringing the records up to New Hope would somehow communicate her abandonment of home.¹⁴

In 1985, about five years after my parents placed my sister in New Hope, they consulted a lawyer about the steps they needed to take to protect my sister's personal and financial interests. Among other things,¹⁵ the lawyer suggested that my parents become my sister's co-guardians, pursuant to Surrogate's Court Procedure Act, Article 17-A.¹⁶ I was named my sister's standby guardian in case my parents were unable to serve as her guardians. The transition from being parents of a minor child to being guardians for an adult with an intellectual disability did not seem difficult for them (though her continued expressions of wanting to come home certainly tore at them emotionally). It was rather a continuation of the relationship with my sister that they always had. Indeed, from the time my sister went to New Hope until my mother's death, my mother (and often my father) and sister spoke by telephone approximately five days a week.

Because this is an essay about being a supportive guardian, and not a biography of my sister, I will pass over the years between 1985, when she became subject to guardianship, and 2007, when our mother passed away suddenly. Our father was still alive but was suffering from advanced dementia, so he was in no condition to function as my sister's guardian. I took over as standby guardian and then, after our father's death in 2008, retained a lawyer who represented me in my petition to become my sister's guardian. I discussed the nature of the proceedings with my sister (who was represented by her own counsel), explaining that I was seeking to become her guardian so that I could help her make decisions. I was very proud of her when, at the conclusion of the rather pro forma hearing, the judge asked her if she had anything to say, and she said, "I want my brother to help me make decisions." The court granted the petition and I became my sister's guardian in 2009.

I did not seriously consider refraining from petitioning to become my sister's guardian. My lawyer recommended that I become her guardian (it seemed to her to be an almost automatic decision) but I knew enough to know that I could have sought an alternative such as supported decision making. But because my sister had been under my parents' guardianship for almost 25 years, and I had already functioned as a standby

13. New Hope Community's programs are described at newhopecommunity.org. New Hope's history, from its opening in 1975 to the present, is presented at <http://newhopecommunity.org/our-family/a-legacy-of-trust/>. My family had, over the years, taken several vacations in the Catskills, so the area was familiar to my parents and my sister.

14. My parents were consistent contributors to New Hope and eventually joined the board of the New Hope Foundation, the fundraising arm of New Hope Community, Inc. I joined the New Hope Community, Inc. Board of Directors in March 2015 and remain on the board currently.

15. My parents also set up a special-needs trust for my sister, at a time when it was far from clear that such trusts would be effective in allowing the beneficiary to continue to receive Supplemental Security Income, Medicaid, and other governmental benefits.

16. Article 17-A guardianships, designed specifically for people with intellectual disabilities, are accompanied by many fewer safeguards for the person for whom guardianship is sought than exist under the general guardianship statute, N.Y. MENTAL HYG. L. § 81 (Article 81). Article 17-A has come under criticism for its lack of due process and failure to keep up with changing practices regarding the rights of people with intellectual disabilities. (The statute was enacted in 1969.) See Rose Mary Bailly & Charis B. Nick-Torok, *Should We Be Talking?—Beginning a Dialogue on Guardianship for the Developmentally Disabled in New York*, 75 ALB. L. REV. 807 (2012); *Revisiting S.C.P.A. 17-A: Guardianship for People with Intellectual and Developmental Disabilities: A Report of the Mental Health Law Committee and the Disability Law Committee of the New York City Bar Association*, 18 CUNY L. REV. 287 (2015).

guardian, I thought that continuing the guardianship was the right option. I also knew, or hoped, that I would not function as an overbearing guardian but rather as a supportive one.

As our parents' health had deteriorated in the years before their deaths, I took more of an "official" role in my sister's life at New Hope. I made sure I attended New Hope's annual family barbeque, even though its timing frequently conflicted with my law-teaching schedule. I had always reviewed my sister's annual individual habilitation or support plans (the names have changed over the years) but started attending her semi-annual meetings. But although my parents had often consulted with me over the years regarding my sister's situation,¹⁷ I was not legally responsible for her decisions until I became her guardian. I had to consider what kind of guardian I wanted to be, and, more importantly, what kind of guardian my sister needed for me to be.

In the stories that follow, I want to illustrate some of the ways in which my sister and I interact and how that affects the way I see my role as her guardian. To be honest, it is very difficult for me to distinguish my role as her older brother from my role as her guardian. Other than signing off on her annual flu shots, and approving her yearly behavioral support and programming plans, I am not sure that my status as her guardian makes any difference in her day-to-day life. Because I do not live with my sister and cannot visit easily (she lives about a six-hour car ride away from me), I could not exercise control over her day-to-day life¹⁸ even if I wanted to, which I do not.

I also have thought a great deal about how my relationship with my sister differs from that of my parents with her. My parents were not shy about telling my sister what to do when she had questions, or even when she did not. (They sometimes tried to do this with me, but with less success.) That is not my style. Consistent with my commitment to client-centered counseling,¹⁹ I do not believe in telling my sister what to do, but rather try to help her understand her choices and their consequences. Some of the most interesting interchanges I have had with my sister involve her telling me that our mother thought something in particular and my telling my sister that she could make a different decision.²⁰ Her response in these

situations—"Really?"—reflects how difficult it can be for people with intellectual disabilities to really believe they have the right to make their own choices, no matter what others have said to them.

I have organized the stories that follow around a series of themes that I hope will illustrate some of the challenges (and joys) of serving as my sister's guardian.

What I have learned as my sister's guardian is to listen not only to what she says, but what she does not.

1. The importance of listening—what does the person under guardianship really want or mean?

Listening carefully to someone—whether a client or a loved one—is not only an important interpersonal quality but a critical lawyering skill.²¹ Listening is no less an important skill for a guardian. What I have learned as my sister's guardian is to listen not only to what she says, but to what she does not.

Several years ago, A.D. told me over the telephone²² that a friend had invited her to a birthday party but that she was not sure she should go. My sister can have challenges in relating to other peers so I thought it was a good sign that a friend had invited her to her party. I asked her why she did not think she should go, and at first she said, "I don't know." After I asked again, she said, "Well, I am not sure she really invited me." I pursued the matter and asked her how she had been invited (the friend had asked her) and tried to reassure her that unless the friend had withdrawn the invitation, she could assume that the invitation still stood. My sister still was skeptical. Some instinct made me ask her, "Is there some other reason why you don't want to go?" She answered, "Well, yes. Linda lives on the second floor of her house." I said, "So you are concerned that you would have to go up the stairs to get to her apartment?" She said yes. Even though my sister can climb stairs, the unsteadiness of her gait makes her lack confidence when climbing or descending stairs. I reassured her that (1) she could in fact climb the stairs if she took her time; (2) staff would assist her, so that she would not fall; and (3) because it

17. I have worked in the field of disability-rights law since 1977. After serving as a trial lawyer in the U.S. Department of Justice, Civil Rights Division, Special Litigation Section, from 1977 to 1982, I left for a clinical teaching position at American University, Washington College of Law, where I still teach. I have taught a disability-rights seminar since 1985 and, since 2005, have directed the law school's Disability Rights Law Clinic, which I founded. From 1994 to 2000, I served on the President's Committee on Mental Retardation, now called the President's Committee on People with Intellectual Disabilities.

18. Compare the very detailed and restrictive rules for visitation adopted by the parent and step-parent of Jenny Hatch (who were serving as temporary guardians) in *Ross & Ross v. Hatch*, Case No. CWF-120000-426-P-03 (Va. Cir. Ct. 2013). I testified as an expert witness in the case in favor of supported decision making as an alternative to guardianship for Ms. Hatch. The court rejected the parent and step-parent's petition for guardianship and instead appointed two friends of Jenny's as temporary co-guardians for

one year with the explicit goal of preparing Jenny for supported decision making after one year. The Jenny Hatch case has spurred much commentary and was instrumental in establishing the National Resource Center for Supported Decision-Making, <http://www.supporteddecisionmaking.org/>.

19. I have written about client-centered counseling in Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501 (1990), and other publications.

20. One of several examples: my sister has told me she does not like to drink milk because, as she puts it, "Mom says it doesn't agree with her." I can hear my mother saying that. I tell my sister that our mother was a wonderful woman but that my sister can make her own choices. She has not taken up drinking milk, however.

21. STEPHEN ELLMANN, ROBERT D. DINERSTEIN, ISABELLE R. GUNNING, KATHERINE R. KRUSE, & ANN C. SHALLECK, *LAWYERS AND CLIENTS: CRITICAL ISSUES IN INTERVIEWING AND COUNSELING* 23 (2009).

22. Unlike my parents, I am unable to speak daily with my sister but I do speak to her about two or three times a week.

[O]nce given more information, she was able to make a reasoned decision.

was the summer time, it was possible that the party would be outside and would not involve her having to climb the stairs. At that point, my sister said she would go to the party.

Someone with greater cognitive capacity might have been

able to say from the beginning why she was uncomfortable going to the party. But that was not—and generally is not—my sister's way. It may be that she is not adept at weighing the pros and cons of a particular decision without being prompted. Or she may have thought at some level that her reason for not attending the party would not stand up to scrutiny. Either way, if I had just taken her answer at face value, she might well have not attended the party and missed out on a pleasurable experience.

Shortly after our mother's death, one of the first medical consent issues that arose with respect to my sister concerned whether she should have a colonoscopy. When my sister turned 50, New Hope staff approached our mother about consenting to the procedure, which was being proposed as standard preventive treatment. Mom declined to give consent, apparently because she did not believe the procedure was necessary and might be difficult for my sister. I was aware of my mother's decision, and urged her to reconsider, but she did not change her mind. After I became guardian, the staff approached me about approving the procedure. My perspective differed from that of my mother: I had had a colonoscopy at 50 (which in fact revealed a condition that now requires more frequent follow-up) and thought it made sense for my sister to have one as well. But even though I had the authority simply to approve the procedure, I did not want to do so without discussing it with my sister.

I first explained that the doctor wanted to perform a colonoscopy. As I wrote earlier, my sister can have difficulty with articulation,²³ and "colonoscopy" can be a difficult word to pronounce for people with typical pronunciation ability. More challenging was trying to explain what the procedure was. As is my practice, I tried to be accurate without being too technical in my language. I told her that it was a procedure where the doctor looked inside to see how her intestines—where food goes after leaving the stomach—were doing. She said, "I don't want to have it." Shamelessly playing the older brother card, I told her that I had had a colonoscopy and that it was not too bad. Still she resisted. Again I asked her, "Is there some reason you don't want a colonoscopy?" She said, "I just don't like needles." She apparently associated visits to the doctor with injections, and she was not about to put herself through that unless she was required to do so.

Well, now I had my opening. The dialogue went something like the following:

Robert²⁴: OK. So there's some good news and some bad news. Which do you want to hear first?

A.D.: The good news.

Robert: OK, the good news is that there is no needle in the procedure. And it is not painful at all, especially on the day you have it.

A.D.: Good.

Robert: Now for the bad news.

A.D.: OK.

Robert: The day before the colonoscopy, you won't be able to eat your regular meals. You'll only be able to have liquids and you are going to have to go to the bathroom a lot to clean yourself out. You'll be miserable, but it won't hurt.

A.D.: OK, I'll do it.

And, indeed, she had the colonoscopy.

As with attending the party, my sister was not about to disclose at first the underlying premise of her thinking. But as was true in that case, once given more information, she was able to make a reasoned decision. I was prepared to forgo the procedure had she continued to object; absent an emergency or serious medical situation, I would not exercise my authority as her guardian to override her decision.

I have written that my sister and I speak frequently on the telephone. Our conversations (from her end) are mostly about what she had to eat, whether she had gone to either the Dollar Tree Store or Walmart, whether she had seen her boyfriend, what movie she saw at her day program, and similar issues. She will ask me how I am doing, how my wife and grown sons are doing, and when I will next be coming up to visit her. The subject matter of the conversations is unremarkable but they allow her (and me) to maintain an important connection. My sister is uncomfortable ending the conversation, no matter how repetitive it might become. What I learned, though, is that when she asks, "What else do you want to talk about?," it is her signal that she has no more to say. But it is up to me to say, "Well, maybe we should say good-bye and we'll talk again next time." She never objects, but if I did not take the initiative we would probably still be on the telephone.

What these interactions suggest, I submit, is that the guardian has to know the person for whom he is serving as guardian extraordinarily well. He or she has to listen to the person carefully and focus on what is not said as well as what is said. I do not pretend to be able to understand perfectly my sister's true desires or choices. But if I approach her in a true mode of inquiry and humility, I can get it right most of the time.

23. My sister is quite aware that she can be difficult to understand. Although I can figure out almost all of her speech, there are some times when I cannot. She has a remarkable capacity to provide an analogy or alternative terminology that will assist me in understanding her. For example, one time she was trying to tell me something about someone named Lawrence, but I could not understand her. She tried a few more times and then said, "You

know, Lawrence, like Steve Lawrence and Eydie Gormé." It helps to know what her cultural references are.

24. Most of my friends and colleagues call me Bob. When my sister was very young and had trouble pronouncing my name she called me Bobby but as she got older she switched to Robert, which is what my parents called me. It can be a bit confusing for staff when I call because AD's boyfriend is also named Robert.

2. The power of a person's will—agreement is not always what it seems

People with disabilities are often in situations in which they believe they have to agree to something for fear of displeasing someone with power over them, whether it is a staff person or a family member (or a guardian). I have learned that my sister sometimes appears to agree to a course of action only to undermine it, or take advantage of a chink in the armor of the decision-making process.

A.D. loves drinking soda. It is one of the supreme pleasures in her life. Some years ago, staff persuaded her to drink diet soda, but they still try to get her to limit her intake. Over the years, they have tried to come up with different rules about how much soda she should drink. The staff tries to negotiate these rules with my sister, who appears to agree with them. She will call me and say something like, "New Hope says I can have one diet soda a day. Is that OK with you?" I don't really care whether this particular rule is the best one for her, but if the staff have proposed it and she has agreed, I am happy to go along with it. (I certainly would intervene if I thought the proposed rule or guideline was unreasonable or overly restrictive.) What I do know is that my sister (apparently) likes rules and that a response such as "You can do what you want," would not satisfy her.

But the human will is powerful and my sister is quite capable of undermining the rules, or her prior acquiescence to them, when it suits her. I recall the time that we were having dinner at the Liberty Diner, her favorite restaurant. The dinner occurred during a period when she was trying to limit herself to drink no more than one diet soda a day. Earlier that day she had had a diet soda at lunch so as we sat down in the booth, and before we ordered, we discussed whether she should have a diet soda with dinner. She volunteered that since she had had a diet soda at lunch she would not have one at dinner. I was pleased that she was able to understand "the rules" and plan her behavior to conform to them.

The waitress came to our table to take our drink orders. To be honest, I would have liked to have a diet soda myself, but I was not going to order one when my sister was abstaining. So I told the waitress that water would be fine for me. The waitress, who knew my sister, turned to her, and, without waiting for her order, said "Do you want a diet Coke, hon?" My sister's eyes lit up as if she had just been released from custody—she immediately answered yes, and then looked over at me, triumphantly, as if to say, "Just try to enforce the rule now." We laughed at what was now clearly an amendment to the rule: no more than one diet soda per day unless the waiter or waitress offers you one.²⁵

More recently, and more seriously, at her annual meeting A.D. expressed concerns about the day program she attends. Her service coordinator suggested that she might like a different program, and proposed that she might visit that program to see if she preferred it. As the meeting proceeded, A.D. seemed

to back off of her criticisms of the existing program. She said she might not like the new program. She didn't want to disappoint the people in the current program. She clearly had some ambivalence, even though the team (including me) assured her that visiting the program did not mean that she had to move if she did not want to do so. She agreed to visit the new proposed program.

Not two days later, however, she told her house manager in no uncertain terms that she did not want to visit the new program and would stay at the existing program. For all of her criticisms (including of past programs or her residence), she is averse to making changes in her life. As noted, she does not want to disappoint people, even when they reassure her that no one will criticize her if she makes the proposed change. But it also might be that because she has difficulty articulating, let alone weighing, the pros and cons of a particular situation (e.g., "I like aspect x of the workshop but do not like aspect y"), it is only when a change becomes concrete that she really examines whether, all things considered, a change is what she wants. For now, she remains in the current program.

My sister can be very insightful but is not above taking advantage of a situation when it suits her. At one of the first annual meetings I attended, when she had just moved to a new house (not the one in which she currently lives), the staff person leading the meeting asked her a series of questions about her experience at the home. We all sat around a long dining-room table. Other than A.D. and me, everyone else at the meeting was a staff person: direct care staff, house manager, nurse, service coordinator, and clinician. There were about 20 people around the table, and I wondered whether A.D. would be intimidated by their being so many staff there. I need not have worried. The service coordinator initiated the following dialogue with her:

Service

coordinator: A.D., you can choose the clothes you wear each day. Are you doing that?

A.D.: No, the staff does that for me.

Service

coordinator: A.D., you can make your lunch each day before you go to your program. Are you doing that?

A.D.: No, the staff does that for me.

[I look around the room and notice that the direct-care staff is looking somewhat uncomfortable]

**I have learned
that my sister
sometimes
appears to agree
to a course of
action only to
undermine it**

25. Another quality of my sister is that, although she is not above making up things when it serves her interests, she is almost a compulsive truth-teller. A more strategic person might have kept from the staff that she had had a second diet soda that day. (I was

not about to rat her out.) However, as soon as we arrived at her home, she told the staff on duty that she had a second soda. The staff assured her that it was OK that she had had the second soda (at least in the company of her family).

[T]he bifurcation of decision making between guardian and person under guardianship does not always capture the actual decision-making process at work.

Service coordinator: A.D., you can gather your laundry and put it in the washing machine. Are you doing that?

A.D.: No, the staff does that.

Service coordinator: But A.D., you were

doing all of these things at your prior house. Why aren't you doing them here?

A.D.: [Smiling and looking triumphant]: Because I am a guest here.

The group cracked up (as did A.D., who appreciated the apparent absurdity of the situation). But although the staff was appropriately trying to foster her independence, and while I was fully in support of this goal, A.D. was not above getting other people to do things for her if they were willing to do them. I am sure the service coordinator had a conversation with the direct-care staff after the meeting, but for one moment, at least, A.D. was able to assert her independence, ironically by being willing to take advantage of her dependency. Was it in her best interest not to do things for herself when she could do so? I don't know, but the sense of agency she had by being defiant was priceless.

3. Seeking validation rather than a decision: difficult—and not so difficult—conversations

Guardians struggle (or should) with what criteria they should use in making decisions for the person for whom they serve as guardian. Many guardianship statutes urge or even require the guardian to use the substituted-judgment standard: that is, the guardian should make the decision the person under guardianship would make if he or she was able to decide (or was able to communicate his or her decision).²⁶ The standard of decision making for supporters in a supported decision-making regime, when the person is unable to communicate a decision, is to give the best interpretation of the person's will and preferences.²⁷ Both standards require the decision maker to ascertain what the person would want to do and then seek to implement the decision.

In my experience with my sister, the bifurcation of decision making between guardian and person under guardianship does not always capture the actual decision-making process at work. Sometimes my sister wants me to make a decision for her (no matter how much I emphasize that it is her decision to make). Other times, she is not looking to me so much for a decision as validation for a decision she wants to make, or, in

fact, has already made. One story illustrates this point.

I've already noted that the Liberty Diner is my sister's favorite restaurant. Left to her own devices, I believe she would almost always choose to eat there whenever my wife and I, or I alone, come up to visit her. She also often chooses to go there for lunch or dinner with her boyfriend, accompanied by staff who, I have learned, are not always so eager to eat there. I am happy to eat at the Liberty Diner but I also am happy to eat elsewhere if she wants to go to another restaurant.

More than once, as we've prepared to go to lunch after one of her meetings, she will ask me, "Where do you want to go to eat?" I will respond, "Wherever you want. It's your choice." Most times she will answer, "Let's go to Liberty Diner," and we will go there. But every once in a while she will say, "Maybe we should go somewhere else." I will say, "That's fine with me. Where do you want to go?" She'll say, "How about Pizza Hut (which is right next to the Liberty Diner)?" and I will say "OK. Let's go to Pizza Hut." But as we are on our way to Pizza Hut, she'll start reconsidering her decision. "Maybe we should go to Liberty Diner." I will say, "We can go wherever you want to go." She will then say, "Where do you want to go?" and I am likely to respond, "It's your choice." We could go on like this for a long time, and sometimes have.

What I have come to realize, though, is that sometimes she wants me to make the decision for her. I think if I made a decision with which she did not agree, she would certainly express her disagreement or otherwise resist the choice. But if I say to her something like, "We can go anywhere you like, but I am thinking that you want to go to Liberty Diner. We can go there," she will readily agree, especially if I add, "We can go to Pizza Hut next time if you like." That seems to satisfy her need to keep options open while at the same time going to the restaurant at which she really wants to eat. If I make the decision for her in this way, am I overstepping my bounds and undermining her autonomy? Or am I in fact honoring her autonomous choice to let someone else (someone she trusts) make a decision for her, as long as she can object?

4. Helping my sister figure out what others mean and serving as her advocate

Often my role as guardian/brother is to help my sister understand language or situations to which she is exposed. I do not always know what she understands, and I have learned that a combination of questions and clarifications can assist her in living her life more or less the way she wants.

As I have noted, my sister likes to talk, and often is frustrated when others are not interested in talking with her. She loves to talk about the food she had at prior meals, but does not understand why others may not be that interested in what she has eaten. Over time, I have suggested some topics she might raise with her peers or with staff—she could ask them about their families, what staff do on weekends, what sports or music they like, which presidential candidate they like, or about other issues that appear on the news. Sometimes these

26. As defined in D.C. CODE § 21-2011 (25A): "Substituted judgment' means making a decision that conforms as closely as possible with the decision that the individual would have made based upon the

knowledge of the beliefs, values, and preferences of the individual."
27. See Committee on Rights of Persons with Disabilities, General Comment No. 1, *supra* note 5, at 5, ¶21.

suggestions are successful but she still complains that not everyone wants to talk about these topics.²⁸

One time I tried a different tack with her. I explained that in successful conversations, the person asks the other person in the conversation what he or she is interested in. My sister thought for a moment and said, “But I am not interested in what they want to talk about.” “Well, that may be your problem—unless you show interest in what the other person wants to talk about, the other person probably will not be interested in your topics.” That seemed like such a basic point but her reaction to my statement suggested that she did not really know the “rules” of conversation and now had to consider a different approach to interacting with others.

A.D. has a keen ear for language and sometimes has strong reactions to terms that she thinks are pejorative, even when they may not necessarily be intended negatively. But I have learned that sometimes her instinct about the negative intent is pretty close to the mark.

For example, one of her housemates, noting A.D.’s desire to talk a lot, called her a “chatterbox.” I know this housemate is very fond of A.D. and is always looking out for her. I don’t think she meant “chatterbox” to be a negative description. But apparently my sister thought that she was being criticized for being too talkative, and she resented the use of the term. No amount of discussion about the relative harmlessness of the term has satisfied her, though she continues to have a good relationship with this housemate—as long as she does not use the term again. She also objects to the use of the word “behavior.” I have explained that behavior can be a neutral word describing how one is acting, but she associates it with “negative behaviors” or with actions that need to be addressed. In this case, her insight seems correct, and because she associates the term with a negative judgment about her, she reacts viscerally to it, even when it is not being used negatively.²⁹

One of the reasons I think it is important that I attend every semi-annual meeting of my sister’s interdisciplinary team is that I see my role as her advocate as well as wanting to help her understand why things are the way they are. One time, we were at a meeting and the nurse was recounting for my sister all of the medical visits she had had in the prior six months. The language was fairly technical; the nurse would say, “You went to see your psychiatrist and she reviewed your medications. You saw the neurologist and he conducted x, y, and z tests. You went to the cardiologist and he conducted an electrocardiogram.”

At this point, I intervened and said that I was having some difficulty in understanding all of these technical terms and I

was pretty sure A.D. did not understand them either. I turned to her and asked her if she was following the conversation, and she said cheerfully, “No.” I then said to the nurse that if she used less technical language my sister might be able to understand her and participate more fully in the meeting. So rather than describing

the above visit to the cardiologist as she had, if the nurse had said, “AD, you went to the heart doctor and he connected all these wires to you, which were connected to a machine that made squiggly lines,” she would remember the visit.

The nurse thanked me for the intervention and promised to use less technical language. Things improved for a bit, but, sure enough, she lapsed back into medical jargon, indicating that my sister had seen the OB/GYN who had indicated that she was beginning to develop signs of osteoporosis. I was just about to intervene again and ask that she use plain language when my sister perked up and said, “Oh, you mean like Sally Field?” My sister, an inveterate consumer of television shows and commercials, recalled that the actress had been on a commercial dealing with a product that addressed osteoporosis. If nothing else, her ability to make this connection showed that she really was listening and trying to follow the conversation.

As I noted above, it is within the medical sphere that my role as guardian, as opposed to brother, seems clearest, and being my sister’s guardian makes it easier for medical professionals to speak with me about her care. Here, I try to approach medical decisions as I would when inquiring about my own medical needs or those of a loved one (which, of course, she is). For example, a few years ago, the house staff told me that my sister’s gastroenterologist wanted to perform another colonoscopy and needed my consent. I told the staff that I was surprised the doctor was seeking to perform this procedure since my sister’s prior one had been only five years earlier, and as I understood the protocol she would not be due for another for another five years. It took a few days but the gastroenterologist finally reached me and explained what he wanted to do. I asked him why he was asking to do a colonoscopy on my sister after only five years. He said that when they do not have a history they like to do the procedure sooner than ten years apart. I asked why the New Hope staff had not provided him with a history, or, if they had not, why

... I see my role as an advocate as well as wanting to help her understand why things are the way they are.

28. Some staff do not like talking with her about their private lives, seeking to limit their interactions to those related to their job. Although this desire is understandable on their part, it is frustrating to my sister who thinks of the staff as her friends, at least for certain purposes.

29. For many years, I served on the board of directors of the Quality Trust for Individuals with Disabilities, Inc., in Washington, D.C. One of our board members was a self-advocate (a person with an intellectual disability) who periodically would complain about others’ use of the word “individual” to describe people with dis-

abilities. One time I asked him why he reacted so negatively to a word that most people saw as at least neutral if not respectful when used to describe someone. He said that in his experience, when staff from the local developmental disabilities services agency interacted with him and others they only used the word “individual” to refer to people with disabilities receiving services, whereas they used different words to describe others. For this colleague, “individual” connoted a person who receives services, and he was offended by the term. Context is everything.

I have learned that my sister can take disappointment, as we all must, as long as she can continue to raise an issue of concern.

he or someone on his staff had not contacted me to provide the necessary family history. I asked him whether my sister's prior colonoscopy had turned up any problems that would have suggested the need for an early colonoscopy and, after reviewing her records, he said there were none. We agreed that she did not need a colonoscopy for another five years.

It would have been an easy matter to approve the colonoscopy, which, while unpleasant (as discussed above), was not a dangerous procedure. But just as I would not accept uncritically my own doctor's suggestion of such a procedure for myself, I was not about to consent to it for my sister. More recently, my sister's psychiatrist wanted to change one of her psychotropic medications. Again, as my sister's guardian, my consent was needed. Because it was, I was able to speak with the psychiatrist and satisfy myself that he had thought through his recommendation carefully.

5. A person under guardianship does not always get to have things her way—we all live within constraints

As noted above, the substituted-judgment standard, while an important principle of decision making, cannot provide answers to all of the situations that guardians and the people under guardianship face. If you asked my sister where she would like to live, her choice would be to live with my wife and me. We probably have the conversation about once every month or two. If I saw my role as implementing her decision about where she wants to live, I would have her move in with me. I understand emotionally why she wants to live with me; now that our parents have passed away, my home is really the only other home she has. Even though on balance she is happy where she lives, she gets frustrated with not having other options if she were to decide she did not like New Hope any more.

I always try to be straight with my sister, and not give her false hope or suggest she has choices when she does not. I have learned that she can take disappointment, as we all must, as long as she can continue to raise an issue of concern.

One of our conversations about her desire to live with me reflects both her ongoing desire and, notwithstanding her intellectual disability, her intelligence:

A.D.: Robert, can I come live with you?
Robert: A.D., you know that's not realistic.

A.D.: Why not?
Robert: Well, for one thing, I work all day and couldn't take care of you.
A.D.: What about Joan [my wife]?
Robert: She works too.
A.D.: Oh. . . . When are you going to retire?
Robert: Not for a while. But even when I do, I don't think I could take care of you as well as they do at New Hope. Don't you like it there?
A.D.: It's alright. But I miss you.
Robert: I miss you too.
A.D.: I wish you lived closer.
Robert: I do too. But we do talk a lot and I come up to visit you pretty often.
A.D.: I know.³⁰

Probably the most difficult thing I have had to do since becoming my sister's guardian—though, again, the difficulty had little to do with my being her guardian and more about being her older brother—was to talk to my sister about our parents' deaths, especially our mother's. Death is a difficult concept for people of typical intelligence to understand and accept; for a person with an intellectual disability, the abstract concept of death can be especially ineffable.

Although my sister in time came to accept our mother's death, at first she could not understand why she had died. Our mother, who was 89, had a massive heart attack on a Friday evening and died the following Monday. The suddenness of her death was difficult for my sister to understand. She would ask me why everyone had to die. I told her everyone had not died. She then said, "Milton Berle died. Jack Benny died. George Burns died." She was channeling all of the cultural figures of her childhood, a childhood she spent with our mother watching these iconic entertainers.

How should I respond? She was, of course, correct that these comedians had died³¹ but I wanted to reassure her that others' deaths were not imminent. I told her, "These men died a long time ago. They were very old. No one close to you is going to die soon." She asked, "Why do people have to die?" I said death is a part of life, and that everyone who is born will die. She asked, "Are you going to die?" I said, "I don't plan to die any time soon." After one of these conversations, when she was dealing much better with our mother's death, she declared, "Well, I don't want to die. I am not going to die." I told her, "If you don't die, you will be the only person ever born who didn't die." At that, she laughed, recognizing perhaps that her desire for eternal life might not be possible to satisfy.

My father was still alive at the time of my mother's death, but his dementia had progressed to the point that he did not

30. Sometimes we will speak by phone on a Thursday and she will ask me, "Can you come over tomorrow?" When she first asked me that question I would point out that, as she knew, I lived about six hours away from her and could not just come over to see her as if I lived nearby. I wondered whether she did not realize that I lived far away. Over time, though, I came to realize that her question was another way of saying that she missed me and wished that I

lived closer to her, knowing very well that I did not.
31. Over the course of several months, she would ask me whether x or y celebrity was still alive. These actors or singers were often people who were performing in the 1960s. Sometimes I knew the person was dead or alive, and I would tell her what I knew. Other times, my wife would check the Internet while I was speaking with my sister so I could give her accurate information.

recognize anyone.³² It seemed cruel to tell him that his wife of 60 years had died, even if he could have understood the information, and I declined to do so. My sister, who always thought of my parents as a twosome, could not comprehend how he could not know she had died.

But if my sister had trouble at first accepting our mother's death, she was from the first in touch with the emotional side of her loss and mine. She would talk about missing our mother,³³ and, after our father died nine months later, missing him as well. She particularly missed telling them what she had done each day, and transferred that reporting function to her conversations with me. I told her that I also missed them, and missed telling them about important things in my life as well. I found that talking with her about my parents' deaths allowed me to be in touch with my own emotions.

And that leads me to my final conclusion about the relationship between guardian and person under guardianship. The relationship need not be a one-way street from guardian to the person under guardianship. The guardian can learn from the person under guardianship as well. I have learned a lot about people with intellectual disabilities from my sister, even as I recognize that she does not represent all such people. I also have learned about the complexities of decision making and how challenging it can be to determine what a person's authentic interests and desires are. At its best, we might treat the guardianship relationship less as a top-down relationship and more as a form of partnership.

SOME LESSONS FOR GUARDIANSHIP

Though it might be a bit presumptuous, I believe the above stories can provide some valuable lessons for judges who preside over guardianships.

1. More care should be taken at the time of appointment of the guardian to clarify the guardian's role

Even though I knew a lot about guardianship before applying to be my sister's guardian, including abuses, neglect, and conflicts of interest that can exist in the relationship, I was struck by how little information is communicated to prospective guardians about what is involved in becoming a guardian and how one should behave in the role. While the court may assume that the petitioner's attorney will explain the duties of

the guardian, in my experience lawyers do not always perform this function well. Lawyers can be expected to explain to their clients whether they have to make reports to the court and how often they need to do so. But it is less clear that they spend sufficient time discussing how the guardian should make decisions for (or with) the person under guardianship. Many statutes require the guardian to give

the person under guardianship as much independence as possible.³⁴ I think too many guardians believe that the person under guardianship is to be protected in all respects, which is inconsistent with supporting the person's autonomy to the maximum extent feasible.

2. The standard of decision making guardians use needs to be more nuanced than substituted judgment or best interest

As some of the above examples reflect, determining the appropriate standard of decision making the guardian should use is no easy matter. The substituted-judgment standard is a useful corrective to the best-interest standard, which can be overly paternalistic, or the decision that the guardian would make for himself or herself. But taken literally, the substituted-judgment standard could lead a guardian to make unrealistic or unwise decisions, or to make decisions that, while conforming to the wishes of the person, do not take into account the constraints that all decision makers face.³⁵

I don't have a convenient name for the decision-making standard I have tried to use with my sister, but it is a mix of shared decision making and supported decision making. Although as a formal matter I have made certain decisions for her—such as authorizing certain medical treatments or medications—I have done so only after consultation with her. On many matters, she has made decisions on her own, without consulting me. On others, I have executed a decision of hers for which she has sought validation and reinforcement.

I don't have a name for the decision-making standard I have tried to use with my sister, but it is a mix of shared . . . and supported decision making.

32. Before he lost all awareness, my wife and I went to visit him at his assisted living facility. He spoke to me for a while and seemed to recognize me. He started talking about my sister, and somehow had concluded that she was a wonderful person because "she did such good work with handicapped people." My wife said, "Your son is pretty wonderful, too." My father looked at her quizzically and said, "I don't know him very well." I told my sister this story and she was tickled that my father remembered her (however imperfectly) and not me.

33. From time to time, my sister has told me that she talks to our mother before she goes to bed. She will ask me if it is alright to do that. After I suggest that she do it before going to bed, and that it's a private matter that she should probably not do when others are around, she seems satisfied. But sometimes, to confirm that it is acceptable behavior, she will ask me again if it is OK to speak with our mother. I tell her that as long as Mom doesn't answer, it's fine.

She laughs.

34. See, e.g., D.C. CODE § 21-2047(a): "[A] general or limited guardian shall: . . . (7) Include the ward in decision-making process to the maximum extent of the ward's ability; and (8) Encourage the ward to act on his or her own behalf whenever he or she is able to do so, and to develop or regain capacity to make decisions in those areas in which he or she is in need of decision-making assistance, to the maximum extent possible."; D.C. CODE 21-2047(b): "A general or limited guardian may: . . . (6) If reasonable under all of the circumstances, delegate to the ward certain responsibilities for decisions affecting the ward's well-being."

35. For a criticism of both the substituted-judgment and best-interest standards, see Linda S. Whitton & Laurence A. Frolik, *Surrogate Decision-Making Standards for Guardians: Theory and Reality*, 2012 UTAH L. REV. 1491.

The standard for imposing guardianship . . . is vague enough that people with quite different abilities can come within its purview.

Guardianship statutes require a guardian to know the person for whom he or she is making decisions,³⁶ but even with my having a lifetime of experience with her, my sister continues to surprise me. Many family members serve as guardians for love not money. But good intentions are insufficient, and guardians need constantly to be aware of their proper role and be prepared to provide the right level of support

for the person they are serving.

3. Not all guardianships are the same—even for people who have the same diagnosis

Guardianship is not a one-size-fits-all proposition. Even within the same category of guardianship—e.g., guardianship for a person with an intellectual disability—there are significant differences between being a parent guardian versus a sibling guardian, being a guardian over a person living with the guardian versus being one for someone living hours away, and being a guardian for a person who is verbal and communicative versus being a guardian for one who is not. As I noted earlier, I could not begin to control many aspects of my sister's life even if I wanted to because she lives far away from me. I would hope I would support her autonomy and self-determination to a similar extent even if she lived close by and I had the capacity to intervene in her life more.

The standard for imposing guardianship, roughly that the person lacks capacity to manage her affairs,³⁷ is vague enough that people with quite different abilities can come within its purview. Many statutes have provisions for limited guardianships,³⁸ but commentators have noted the significant under-usage of this less-restrictive alternative to general or plenary guardianship.³⁹ Even the imposition of a limited guardianship should be subjected to the least-restrictive-alternative principle, and a court should not order it if arrangements short of guardianship, such as supported decision making, are available.⁴⁰

Ironically, the statute under which I was appointed guardian for my sister, a person with a developmental disability, does not provide for limited guardianship, unlike the more general New York statute, Article 81.⁴¹ Insofar as my guardianship in fact functions as a limited guardianship, in that my sister makes many of her own decisions, it is not because the statute requires it but because I choose to define my powers more narrowly than the law would permit. Enhancing the autonomy of the person under guardianship should not be left to the whim of the guardian.

4. Nothing is—or should be—forever, including guardianship

Guardianship is a powerful decision-making tool, one that may be more powerful than needed. But even if the order appointing a guardian is valid at the time of initial entry, circumstances can change, especially for people under guardianship not suffering from dementia. While nothing prevents a guardian from assisting the person under guardianship in seeking restoration of some or all of that person's decision-making rights, meaningful court-supervised periodic review would provide needed oversight over the process. A more thoroughgoing reform would provide a time limitation on guardianships (perhaps with an exception for those people with dementia) so that the burden of persuasion was on the guardian to demonstrate that guardianship in its then current form continued to be needed.

CONCLUSION

Every parent of a child with an intellectual disability worries about what will happen to the child when the parent is no longer around. When the child has a sibling, there is at least the possibility that the sibling will step up and continue to be a presence in the life of the person with a disability. I have met many siblings who have accepted this responsibility willingly and without question. In becoming my sister's guardian, I have sought to carry out this responsibility faithfully and to do so in a way that recognizes my sister's individuality and desire to live her own life in her own way.

An intellectual disability is not a tragedy. People with intellectual disabilities, such as my sister, can bring great joy into

36. See, e.g., D.C. CODE § 21-2047 (a): “[A] general or limited guardian shall: (1) Become or remain personally acquainted with the ward and maintain sufficient contact with the ward to know of the ward's capacities, limitations, needs, opportunities, and physical and mental health[.]”

37. See, e.g., D.C. CODE § 21-2011(11), which defines an incapacitated individual as “an adult whose ability to receive and evaluate information effectively or to communicate decisions is impaired to such an extent that he or she lacks the capacity to manage all or some of his or her financial resources or to meet all or some essential requirements for his or her physical health, safety, habilitation, or therapeutic needs without court-ordered assistance or the appointment of a guardian or conservator.”

38. See, e.g., D.C. CODE § 21-2044(c), which authorizes a court to appoint a limited guardian in lieu of a general guardian. Section 21-2044 (a) requires the court to exercise its authority “so as to encourage the development of maximum self-reliance and inde-

pendence of the incapacitated individual” and to order the type of guardianship that is least restrictive of the incapacitated individual in scope and duration.

39. See Lawrence A. Frolik, *Promoting Judicial Acceptance and Use of Limited Guardianship*, 31 STETSON L. REV. 735, 741 (2002).

40. In August 2017, the American Bar Association House of Delegates is expected to consider a resolution urging it to recognize that, consistent with the principle of the least-restrictive alternative, courts should not order guardianships without first considering supported decision-making arrangements. The resolution is being proposed by the ABA Commission on Disability Rights, Section of Civil Rights and Social Justice, Section of Real Property, Trust and Estate Law, and the Commission on Law and Aging. I have been working with an ad hoc group of academics and practitioners in drafting the resolution and an accompanying report.

41. See sources cited in note 16, *supra*.

the life of their families and generate laughter far more often than sorrow. I don't know that my involvement in my sister's life would be much different if I were not her guardian, but since the roles of brother and guardian are inevitably intertwined, I embrace my dual roles in all of their contradictions and complexity.



Robert D. Dinerstein is Professor of Law and Associate Dean for Experiential Education and the Director of the Disability Rights Law Clinic at American University's Washington College of Law in Washington, D.C. Dinerstein specializes in disability law, especially mental disabilities (including issues of consent, choice, capacity, and guardianship), the Americans with Disabilities Act, the United Nations Convention on the Rights of Persons with Disabilities, legal representation of clients with mental disabilities, and disability and international human rights. He has taught at the Washington College of Law since 1983. He has an A.B. degree from Cornell University and a J.D. degree from Yale Law School.

Court Review Author Submission Guidelines

Court Review, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States and Canada. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work.

Court Review is received by the 2,000 members of the American Judges Association (AJA), as well as many law libraries. About 40 percent of the members of the AJA are general-jurisdiction, state trial judges. Another 40 percent are limited-jurisdiction judges, including municipal court and other specialized court judges. The remainder include federal trial judges, state and federal appellate judges, and administrative-law judges.

Articles: Articles should be submitted in double-spaced text with footnotes in Microsoft Word format. The suggested article length for *Court Review* is between 18 and 36 pages of double-spaced text (including the footnotes). Footnotes should conform to the current edition of *The Bluebook: A Uniform System of Citation*. Articles should be of a quality consistent with better state-bar-association law journals and/or other law reviews.

Essays: Essays should be submitted in the same format as articles. Suggested length is between 6 and 12 pages of double-spaced text (including any footnotes).

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Pre-commitment: For previously published authors, we will consider making a tentative publication commitment based upon an article outline. In addition to the outline, a comment about the specific ways in which the submission will be useful to judges and/or advance scholarly discourse on the subject matter would be appreciated. Final acceptance for publication cannot be given until a completed article, essay, or book review has been received and reviewed by the *Court Review* editor or board of editors.

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SOME SERIOUS COURTING by Judge Victor Fleming

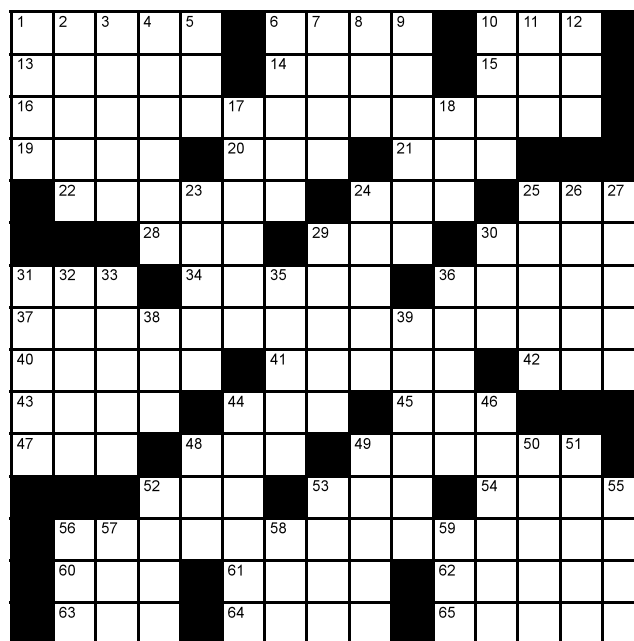
Across

- 1 Milan opera house, with "La"
- 6 The ___ Radio Hour
- 10 Crow call
- 13 Divvy up
- 14 Sandwichy cookie
- 15 "To a Mouse," e.g.
- 16 Snacks for the dig-set-spike crowd? (2 courts)
- 19 Stuntman Knievel
- 20 Cottonseed product
- 21 Disruptive noise
- 22 Got an ___ (saw a lot)
- 24 Barnyard scratcher
- 25 Actor Waterston
- 28 Part of DJIA
- 29 Arlo, to Woody
- 30 Plant used to make poi
- 31 1960s justice Fortas
- 34 Main thrusts
- 36 Merchandizing events
- 37 Gourd veggie for the shuttlecock crowd? (2 courts)
- 40 Insurance investigator's concern
- 41 American statesman Root
- 42 Bambi's mother, for example
- 43 Shoe insert
- 44 "What did I tell you?"
- 45 Fink (on)
- 47 "Electric" fish
- 48 Hone of the Braves, briefly
- 49 "... ___ more than he could chew"
- 52 Hit the wrong button, say
- 53 Brooks who has won an Oscar, Emmy, Grammy and Tony

- 54 Collection of shops
- 56 Moldable mud for the hoops crowd? (2 courts)
- 60 "___ Today"
- 61 Scorch on a grill
- 62 Yacht club site
- 63 Make use of snowy slopes
- 64 Answer with attitude
- 65 Rudder's place

Down

- 1 Not squander
- 2 Garlic piece
- 3 See 46-Down
- 4 Dangled
- 5 Partook of
- 6 It merged with Exxon
- 7 Dentist's kind of surgery
- 8 ___ Aviv
- 9 William of "Stalag 17" and "Network"
- 10 Ring-tailed critter
- 11 ___ Annie ("Oklahoma!" character)
- 12 Hitched
- 17 "I concede"
- 18 Five-dollar bill, in slang
- 23 Surround a with dense mist
- 24 Egypt's Mubarak
- 25 Healthy lunch choice
- 26 Comeback to "Am not!"
- 27 Dayan or Arens
- 29 Ripped off
- 30 Fraternity letter
- 31 Taper off



- 32 Ballerina's support
- 33 The "Ishtar" of cars
- 35 Superman's makeup?
- 36 Diddly-___
- 38 Cohort of Curly and Larry
- 39 Unpleasantly penetrating
- 44 Accentuate
- 46 3-Down feline
- 48 Genesis vessel
- 49 Market pessimists
- 50 "... bear ___ witness against ..."
- 51 Natural ability
- 52 Morales of "The Burning Season"

- 53 Degs. held by Romney and Bush
- 55 "Coal Miner's Daughter" singer Loretta
- 56 Clean tables
- 57 Put a question to
- 58 Crumpets go-with
- 59 Weigh-in abbr.

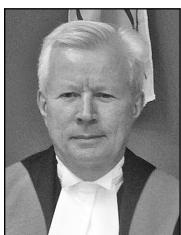
Vic Fleming is a district judge in Little Rock, Arkansas.

Answers are found on page 72.

(continued from page 52)

CONCLUSION

As can be seen, the principled approach to the admissibility of hearsay evidence, as formulated by the Supreme Court of Canada, allows for the introduction of hearsay evidence in a potentially broad context. The recent decision of the Ontario Court of Appeal in *Khan*, in which reference was made to narrative evidence as circumstantial evidence, illustrates this point. However, the same Court's decision in *Zou* illustrates that despite the Supreme Court of Canada's willingness to allow for prior consistent statements to be admitted; great caution in their use is still warranted.



Wayne Gorman is a judge of the Provincial Court of Newfoundland and Labrador. His blog (*Keeping Up Is Hard to Do: A Trial Judge's Reading Blog*) can be found on the web page of the Canadian Association of Provincial Court Judges. He also writes a regular column (*Of Particular Interest to Provincial Court Judges*) for the Canadian Provincial

Judges' Journal. Judge Gorman's work has been widely published. Comments or suggestions to Judge Gorman may be sent to wgorman@provincial.court.nl.ca.

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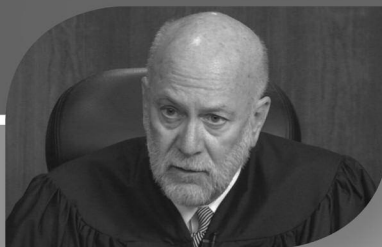
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The Resource Page



NEW PUBLICATIONS

ENHANCING JUSTICE: REDUCING BIAS (Sarah E. Redfield, ed.). American Bar Ass'n, 2017. 400 pp. (\$79.95). <https://goo.gl/WTxW7X>

The American Bar Association has published a new book on the intersection of implicit bias and the justice system. It's a multi-author effort, with different authors for each of 15 chapters.

Several of the chapters are by nationally recognized scholars who have provided an up-to-date summary of the latest research on implicit bias as it relates to the court system. For example:

- Professors Justin D. Levinson, Danielle M. Young, and Laurie A. Rudman take on what is perhaps the book's biggest lift—an overview of the social science about implicit bias. They explain research suggesting that when implicit stereotypes are activated in the human mind, we are prone to making critical mistakes. They also provide detailed examples and evidence showing how implicit bias leads to a variety of discriminatory outcomes, including legal ones.
- Professor Jeffrey J. Rachlinski and U.S. District Magistrate Judge Andrew Wistrich take on a more focused look at how implicit bias affects judicial decision making. Along with Vanderbilt Law Dean Chris Guthrie (and sometimes additional researchers), Rachlinski and Wistrich have been studying what can lead to cognitive errors among judges for more than a decade. In their chapter, they bring together the research about how implicit bias affects judges; they also discuss practical steps judges can take to reduce the risk that implicit bias may taint judicial decisions.

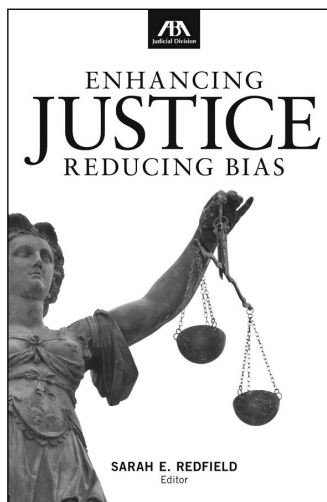
In addition, several judges explore these issues from a judicial perspective:

U.S. District Judge Mark W. Bennett, a thought leader on the federal bench, talks about a number of innovative approaches he has tried in his courtroom to overcome implicit bias. He also discusses how he has

seen evidence of bias in his more than two decades on the federal bench.

Cook County (Illinois) Circuit Judge Sophia H. Hall, a state-court judge with more than three decades on the bench, provides suggestions for judicial leadership aimed at combatting implicit bias. She gives specific suggestions for managing meetings with diverse participants to discuss these hot-button topics.

Kansas Court of Appeals Chief Judge Karen Arnold-Burger, consultant Jean Mavrelis and attorney Phyllis B. Pickett discuss opportunities for community outreach that would open dialog between judges and community members about perceptions of justice. They also suggest training approaches that would make implicit-bias training for judges and court staff more effective.



Judge Bernice Donald of the U.S. Court of Appeals for the Sixth Circuit and Professor Sarah Redfield, the book's editor, frame the book's other chapters with an early chapter defining and providing an overview of basic concepts, including implicit bias, "ingroup" and "outgroup" responses, and "micromessaging." They also explain their own personal journeys of discovery about implicit bias.

The book also includes an overview of procedural fairness (also known as procedural justice) written by former American Judges Association presidents Kevin Burke and Steve Leben. Burke and Leben suggest that adherence to procedural-fairness principles may help to lessen the effects of implicit bias in the courtroom.

Most of the book's chapters also provide places a reader may go to learn more about the topic.

PAMELA CASEY, JENNIFER ELEK & ROGER WARREN, AN EVIDENCE-BASED APPROACH TO PROMOTING & ENFORCING COMPLIANCE WITH CONDITIONS OF PROBATION & SUPERVISION. National Center for State Courts, Center for Sentencing Initiatives, 2017. 5 pp. <https://goo.gl/41z3Mh>

The National Center for State Courts' Center for Sentencing Initiatives periodically issues short reports—aimed at the judicial audience—on key questions involved in criminal sentencing. These reports are highly readable and contain conclusions that are backed up by extensive research that's cited in footnotes (usually with links where the underlying reports can be found on the Internet).

The latest report covers how to best set up probation terms and supervision to gain offender success on probation. The brief report gives research-based answers to eight key questions:

- What are the overall goals of effective probation supervision?
- What works to promote compliance with the terms and conditions of probation?
- What works in sanctioning violations?
- What are administrative sanctions?
- Is the availability of risk-and-needs-assessment (RNA) information helpful in responding to violation?
- How do probation agencies ensure that the system of rewards and sanctions is administered with consistency, transparency, and fairness?
- What are the specific factors that should be considered in determining an appropriate response to a violation in an individual case?
- When is revocation an appropriate response to a violation?

If these questions seem relevant to your daily work—and you'd like to read some research-based answers—head over to the Internet link listed above to take a look at the report. The Center for Sentencing Initiatives is funded in part by The Pew Charitable Trusts.