Comparative Perspectives on Adult Guardianship
Comparative Perspectives on Adult Guardianship

Edited by
A. Kimberley Dayton

Carolina Academic Press
Durham, North Carolina
# Contents

Acknowledgments .............................. xv

Introduction .................................. xvii

Chapter 1 · Roman Origins of Modern Guardianship Law, *Denzil Lush* 3

Introduction .................................... 3
Discernible Trends ............................ 3
The Diagnostic Threshold .................... 4
Family Control in Primitive Law .......... 5
Appointment of Curators by Magistrates ... 6
Procedure ..................................... 7
Security (*satisdatio*) ....................... 9
Other Safeguards ............................. 9
Functions of the Curator .................... 10
A Public Duty (*munus publicum*) ........ 11
Excuses (*excusationes*) .................... 12
Removal (*remotio*) ......................... 13
Incapacity .................................. 13
Fluctuating Capacity ....................... 14
Christianity .................................. 14
Conclusion .................................. 15

Chapter 2 · A Modern History of Guardianship Law, *A. Frank Johns* 17

Introduction .................................... 17
Colonial Guardianship Law in the United States 17
Parens Patriae and Concern for Property .... 17
Colonial U.S. Guardianship to the Mid-1800s 19
U.S. Guardianship to the Mid-1960s .......... 20
Guardianship in Other Countries Between the Nineteenth and Twentieth Centuries 24
Japan and China ............................. 24
Canada and Australia ......................... 24
U.S. Guardianship into the 2000s .......... 25
The Future of Guardianship ................. 28
Conclusion .................................. 32

Chapter 3 · The Journey Through Trans-National and Multi-State Guardianship Jurisdictions, *Sally Balch Hurme* 33

Introduction .................................. 33
Chapter 4 · Standards for Decision Making, Lawrence A. Frolik

Introduction
Fundamental Standards
Applying Substituted Judgment
Best Interest
Health Care and End-of-Life Decisions
Decisions Relating to the Property of the Ward
Expanded Substituted Judgment
Expanded Best Interest
Guardian Decision Making in Selected Countries
The Reality of Guardian Decision Making

Chapter 5 · Ethical Issues for Attorneys When Dealing with Clients Who May Have Diminished Capacity, Rebecca C. Morgan

Introduction
The United States
Australia
Canada
England and Wales
Ireland
Japan
Conclusion

Chapter 6 · Adult Guardianship and Tribal Nations in the U.S.
Sarah Deer and Colette Routel

Introduction
Jurisdictional Issues When the Protected Person Is a Tribal Member
Brief Overview of the Scope of Tribal Sovereignty
Guardianship Petitions Involving Tribal Members
Recognition of Guardianship Orders
Substantive Provisions of Tribal Guardianship Law
The Navajo Nation: Development Though Traditional and Customary Law
Muscogee (Creek) Nation: Borrowing from State Law
Shakopee Mdewakanton Sioux (Dakota) Community: Per Capita Distributions and Guardianships Over the Estate
Conclusion

Chapter Seven · Guardianship in Australia, Karen Williams and Sue Field

Introduction
The Australian Legal System
CONTENTS

Overview of Guardianship in Australia 84
Victoria 85
  Relevant Legislation in Victoria 85
New South Wales 88
  Relevant Legislation in New South Wales 88
Queensland 91
  Relevant Legislation in Queensland 91
South Australia 93
  Relevant Legislation in South Australia 93
Western Australia 95
  Relevant Legislation in Western Australia 95
Tasmania 97
  Relevant Legislation in Tasmania 97
Australian Capital Territory 99
  Relevant Legislation in Australian Capital Territory 99
Northern Territory 100
  Relevant Legislation in Northern Territory 100
Challenges of Guardianship in Australia 102
Guardianship Appointments in Australia 103
Advance Care/Health Decision Making in Australia 104
Enduring Power of Attorney in Australia 104
Accommodation in Australia 105
Aboriginal and Torres Strait Islander Issues in Australia 105
Disability Issues in Australia 106
Conclusion 106
Recommendations 106

Chapter 8 · The Guardianship of Incapable Adults and Their Property in Canada, Robert M. Gordon and Ann M. Soden 109
Obtaining Guardianship of the Person and/or the Estate 111
  Statutory Guardianship: The Certificate of Incapability 111
  Court-Ordered Guardianship 113
Conclusion 120

Chapter 9 · Adult Guardianship Law in China: Traditional Values and Modern International Developments, Cora Chan and Rebecca Lee 123
Introduction 123
Confucian Family-Oriented Features in Current Adult Guardianship Laws 125
  Creation of an Adult Guardianship Relationship 125
  The Adult Guardian 127
  Appointment and Qualifications of the Guardian 127
  Duties and Liabilities of the Guardian 128
  Termination of an Adult Guardianship Relationship 129
Challenges from Modern International Standards 129
  Protecting Adults with Diminished Capacity? 130
  Maximizing the Autonomy of the Individual? 132
Conclusion: Building an Adult Guardianship Law on Confucian Tradition 133

Chapter 10 · Guardianship in England and Wales, Denzil Lush 137
<table>
<thead>
<tr>
<th>CONTENTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
</tr>
<tr>
<td>History</td>
</tr>
<tr>
<td>Mental Capacity Act 2005</td>
</tr>
<tr>
<td>The Legislation and Other Sources of Law</td>
</tr>
<tr>
<td>The Principles</td>
</tr>
<tr>
<td>Definition of Incapacity</td>
</tr>
<tr>
<td>Best Interests’ Decision-Making</td>
</tr>
<tr>
<td>General Authority to Act Reasonably</td>
</tr>
<tr>
<td>Adult Guardianship Law, Practice, and Procedure</td>
</tr>
<tr>
<td>Court of Protection</td>
</tr>
<tr>
<td>Deputies</td>
</tr>
<tr>
<td>Security</td>
</tr>
<tr>
<td>Court of Protection Statistics</td>
</tr>
<tr>
<td>Office of the Public Guardian</td>
</tr>
<tr>
<td>Court of Protection Visitors</td>
</tr>
<tr>
<td>Codes of Practice</td>
</tr>
<tr>
<td>Alternatives to Adult Guardianship</td>
</tr>
<tr>
<td>Agency and Appointeeship</td>
</tr>
<tr>
<td>Powers of Attorney</td>
</tr>
<tr>
<td>Trust</td>
</tr>
<tr>
<td>Advance Decisions to Refuse Treatment</td>
</tr>
<tr>
<td>Guardianship Under the Mental Health Act 1983</td>
</tr>
<tr>
<td>Chapter 11 · Elder Guardianship in Israel, Israel (Issi) Doron and</td>
</tr>
<tr>
<td>Yael Waksman</td>
</tr>
<tr>
<td>Introduction</td>
</tr>
<tr>
<td>Older Persons in Israeli Society</td>
</tr>
<tr>
<td>The Legal Capacity and Guardianship Act of 1962</td>
</tr>
<tr>
<td>In General</td>
</tr>
<tr>
<td>Some Historical Background and the Aging Context</td>
</tr>
<tr>
<td>The Key Elements of the Israeli Legislation</td>
</tr>
<tr>
<td>Who May Apply for Guardianship?</td>
</tr>
<tr>
<td>Under What Conditions May a Guardian Be Appointed for an Adult Person in Israel?</td>
</tr>
<tr>
<td>Who Can Serve as a Guardian?</td>
</tr>
<tr>
<td>The Legal Standard of Decision Making by the Guardian</td>
</tr>
<tr>
<td>Limitations on the Guardian’s Authority to Act Independently</td>
</tr>
<tr>
<td>The Termination or Replacement of Guardianship</td>
</tr>
<tr>
<td>Jurisdiction and Key Procedural Due Process Elements in Israeli</td>
</tr>
<tr>
<td>Guardianship Law</td>
</tr>
<tr>
<td>Which Court Deals with Guardianship Proceeding?</td>
</tr>
<tr>
<td>What Documents Should Be Part of the Application?</td>
</tr>
<tr>
<td>How Is the Voice of the Incapable Person Heard?</td>
</tr>
<tr>
<td>Who Supervises Guardians and How?</td>
</tr>
<tr>
<td>A Critical View of Elder Guardianship in Israel</td>
</tr>
<tr>
<td>Data, Research and the Reality</td>
</tr>
<tr>
<td>The Lack of Legal Guidelines for Capacity Assessment</td>
</tr>
<tr>
<td>The Older Person’s Voice</td>
</tr>
<tr>
<td>From Plenary to Tailored Guardianship</td>
</tr>
</tbody>
</table>
CONTENTS

Recent Developments: Legal Alternatives to Guardianship 164
Conclusion: Time for Change 164

Chapter 12 · Guardianship in Japan Under the Adult Guardianship Law of 2000, Makoto Arai 167
Introduction 168
Problems with the Previous Guardianship Law 168
Progression of the Super-Aging Society 168
The Introduction of the Long-Term Care Insurance Act 168
The New Adult Guardianship Law 169
Overview 169
Continuing Power of Attorney and Statutory Guardianship 169
The Five Main Points 170
Results and Analysis 172
The Results After Ten Years of the Law 172
Analysis of These Results 172
Recommendations for Reform 174
Thoroughly Implement the “Socialization of Adult Guardianship” 174
Responding to Global Trends 174
Conclusion 175
Appendix 175
Yokohama Declaration 175

Chapter 13 · Guardianship Legislation in The Netherlands, Kees Blankman 181
Introduction 181
Continuing Powers 181
Informed Consent Under the Medical Treatment Act 182
Guardianship Provisions of the Civil Code 183
Overview 183
Procedure, Appointment and Dismissal of the Guardian, Termination of Guardianship 184
Legal Capacity of the Person Under Guardianship 186
Duties of the Guardian 187
Fees and Judicial Supervision 188
Guardianship Reform 189
Conclusion 190

Chapter 14 · Korean Guardianship, Je Cheol Ung 191
Introduction 191
Current Judicial Declaration of Legal Incapacity Regime and Its Alternatives 191
Judicial Declaration of Legal Incapacity Regime 192
Types of Legal Incapacity 192
Powers and Responsibilities of the Guardian 193
Legal Capacity of the Ward 194
Supervision of the Guardian 194
Alternatives to Statutory Guardianship 194
De Facto Guardians 195
Advance Directions to Refuse Medical Treatments Including Withdrawal of Life-Sustaining Treatments 196
CONTENTS

Future Directions: Guardianship under the Adult Guardianship Act 2011 196
  Background 196
  Principal Features of the 2011 Act 197
Types of Guardians 198
  Judicial Guardians 198
  Contractual Guardians 199
Relationship between Guardian and Ward 200
  Power and Responsibility of Guardian 200
  Capacity of Ward 200
  Supervision of Guardians 201
Implementation Issues for the 2011 Act 202
  Overview 202
  Modification of Procedural Rules Under the New Guardianship System 202
    Institutionalization of Roles of the New Players in Guardianship System 203
    General Provisions for the Protected Persons in the Area of Personal Care 204
Outlook: Is the 2011 Act Well Settled in the Legal Environment Long Time Accustomed to the Legal Incapacity Regime? 204
  Conclusion 205

Chapter 15 · Adult Guardianship in Sweden: A Chief Guardian’s Perspective, Christer Fjordevik 207
  Introduction 207
  History 207
  Sources of Law 209
  Procedural Matters 210
    Who Can Be Appointed as a Custodian or as a Trustee? 210
  An Inside Look at the Role of a Chief Guardian 211
  Reform Efforts 213
  Conclusion 214

Chapter 16 · Turkish Adult Guardianship Law in Perspective, Ekrem Kurt and Sezgin Seymen Çebi 215
  Introduction 215
    The Nature and Scope of Turkish Guardianship Law 216
    Jurisdiction for Guardianship Affairs 216
    Fundamental Principles of Adult Guardianship Law 216
      The Proportionality Principle 216
      The Principle of Limited Types (numerus clausus) 217
    Grounds for Adult Guardianship 217
      Legal Restriction—In General 217
      Legal Restriction—Reasons for Interdiction 217
    Procedure 219
      Publication of the Decision of Interdiction 220
      Appointment of the Guardian 220
    Forms of Guardianship 221
      Private Guardianship 221
      Parental Guardianship 221
## CONTENTS

- The Procedure for Appointment
  - In General
  - Temporary Measures
- The Term of the Guardian
- Guardian Fees
- Execution of the Guardianship and Duties of the Guardian
  - General
  - Representation of the Ward
  - Forbidden Transactions
- Legal Autonomy and Liability of the Ward and Guardian
  - Respecting the Preferences of the Ward
- Individual Acts of the Ward
- Management of Assets of the Ward
  - Duty of Guardian to Account
- Duties of Guardianship Offices and the Audit Authority
  - Persons Entitled to Make Complaints and Objections
  - Appealing Decisions on Complaints and Objections
  - Consent of Guardianship Authority
  - Consequences of the Denial of Approval
  - Reviewing the Report and Accounts
- Dissolution of the Adult Guardianship
  - Dissolution Stemming From a Change in Circumstances
  - Dissolution of Guardianship by a Court Decision
  - Ending of the Duty of the Guardian
  - Consequences of the Termination of Guardianship
- Conclusion

### Chapter 17 · Guardianship in the U.S.: Themes and Commonalities
Across the States, A. Kimberley Dayton
- Introduction
- Terminology
- History
- Sources of Law and Practice
- Overview of Guardianship Proceedings
- Powers and Duties of Guardians
- Reporting and Monitoring
- Restoration; Termination of Guardianship
- Guardianship Reform Efforts
- Alternatives to Guardianship
- Conclusion

### Chapter 18 · Are Guardianship Laws and Practices Consistent with Human Rights Instruments?, Anita Smith
- Introduction
- Early Development of Human Rights Instruments in Relation to Disability
  - The Development of the Convention on the Rights of Persons with Disabilities
  - The Relationship between the Convention on the Rights of Persons with Disabilities and Guardianship Laws and Practices
- Conclusion
Article 12 of the Convention 253
Recognition as a Person Before the Law 254
Legal Capacity 254
Guardianship, Substitute Decision-Making and Legal Capacity 256
Enduring Instruments 260
Supported Decision-Making 261
Informal Decision-Making 266
Substitute Decision-Making (Guardianship) as a Reasonable Accommodation 267
Requirements for a UNCRPD-Compliant Decision-Making Scheme 268
Conclusion 271

Chapter 19 · Constructing Incapacity: Deconstructing Capacity in Adult Guardianship, Doug Surtees 273

Chapter 20 · Alternatives to Guardianship and Supported Decision-Making, James H. Pietsch 285
Introduction 285
Alternatives to Guardianship 286
Powers of Attorney 287
Trust 290
Representative Payees and Appointed Fiduciaries 291
Money Management and Informal Financial Arrangements 292
Health Care Decision-Making Alternatives to Guardianship 293
Co-Guardianship and Limited Guardianship 296
Supported Decision-Making 296
Conclusion 298

Chapter 21 · LGBT Issues and Adult Guardianship, Nancy J. Knauer 299
Introduction 299
In Re Guardianship of Atkins 299
Mapping a Comparative Perspective: A Two-Force Model 300
Socio-Legal Status of LGBT Individuals 301
Relationship Recognition 302
Equality Guarantees 303
Transgender-Specific Concerns 303
Older LGBT Individuals 304
Next of Kin and “Chosen Family” 305
Anti-LGBT Bias and the Closet 305
Older LGBT Persons and Social Isolation 306
Guardianship Systems 307
 Determination of Capacity and Undue Influence 308
Choice of Guardian 308
Decision-Making Standards 310
Best Interests 310
Substituted Judgment 310
Supported Decision-Making 311
Alternatives to Guardianship 311
Conclusion 311
## Chapter 22 · Guardian Accountability: Key Questions and Promising Practices, *Erica Wood*

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>313</td>
</tr>
<tr>
<td>Selection and Screening of Guardians</td>
<td>314</td>
</tr>
<tr>
<td>Guardian's Role as Agent, Fiduciary and Surrogate Decision-Maker</td>
<td>315</td>
</tr>
<tr>
<td>Guardian as Agent and Fiduciary</td>
<td>315</td>
</tr>
<tr>
<td>Guardian as Surrogate Decision-Maker</td>
<td>317</td>
</tr>
<tr>
<td>Guardian Standards and Certification</td>
<td>318</td>
</tr>
<tr>
<td>Yokohama Declaration Standards</td>
<td>318</td>
</tr>
<tr>
<td>Third National Guardianship Summit Standards</td>
<td>319</td>
</tr>
<tr>
<td>Court Oversight of Guardians in the U.S.</td>
<td>320</td>
</tr>
<tr>
<td>Where Do We Stand?</td>
<td>321</td>
</tr>
<tr>
<td>Promising U.S. Practices for Court Oversight</td>
<td>323</td>
</tr>
<tr>
<td>International Approaches to Guardian Oversight</td>
<td>325</td>
</tr>
<tr>
<td>Conclusion</td>
<td>327</td>
</tr>
</tbody>
</table>

## Chapter 23 · State-of-the-Art Problem-Solving: How Guardianship Mediation Can Protect Elders While Strengthening Families, *Kate Mewhinney*

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>329</td>
</tr>
<tr>
<td>Overview of Mediation</td>
<td>331</td>
</tr>
<tr>
<td>The Process</td>
<td>331</td>
</tr>
<tr>
<td>Mediation at What Stage?</td>
<td>332</td>
</tr>
<tr>
<td>When the Ultimate Issue is the Threshold Issue: The Respondent's Capacity</td>
<td>333</td>
</tr>
<tr>
<td>Avoiding the Issue of Capacity</td>
<td>335</td>
</tr>
<tr>
<td>Typical Issues in Guardianship Mediation</td>
<td>335</td>
</tr>
<tr>
<td>Guardianship Mediation Programs and Alternatives</td>
<td>336</td>
</tr>
<tr>
<td>Professional and Ethical Standards</td>
<td>338</td>
</tr>
<tr>
<td>Mediator Standards</td>
<td>339</td>
</tr>
<tr>
<td>Standards for Elder Mediation and for Mediators Assisting Parties with Diminished Capacity</td>
<td>339</td>
</tr>
<tr>
<td>Standards for Guardians</td>
<td>340</td>
</tr>
<tr>
<td>Standards for Lawyers</td>
<td>340</td>
</tr>
<tr>
<td>Standards Developed in Related Areas</td>
<td>341</td>
</tr>
<tr>
<td>Challenges for Guardianship Mediation Programs</td>
<td>342</td>
</tr>
<tr>
<td>Recommendations and Conclusions</td>
<td>344</td>
</tr>
</tbody>
</table>

## Select Bibliography, Compiled by A. Kimberley Dayton, Brenna Galvin, and Kia Thrasher

<table>
<thead>
<tr>
<th>Category</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Books and Book Chapters</td>
<td>347</td>
</tr>
<tr>
<td>Articles</td>
<td>348</td>
</tr>
<tr>
<td>International Conventions</td>
<td>351</td>
</tr>
<tr>
<td>Government/Commission/NGO Reports</td>
<td>351</td>
</tr>
<tr>
<td>Multinational</td>
<td>351</td>
</tr>
<tr>
<td>Australia</td>
<td>351</td>
</tr>
<tr>
<td>Canada</td>
<td>352</td>
</tr>
<tr>
<td>Japan</td>
<td>352</td>
</tr>
<tr>
<td>Korea</td>
<td>352</td>
</tr>
<tr>
<td>New Zealand</td>
<td>352</td>
</tr>
</tbody>
</table>
CONTENTS

Scotland 353
United States 353
Statutes and Model Statutes 354
International Congresses 354
Miscellaneous 354

Editor Bio 357
Contributor Bios 357
Index 365
Acknowledgments

For the past two years, I have been fortunate to work with an incredible group of scholars and professionals who made this book possible. This group includes the authors who generously agreed to contribute chapters to the book, my editors at Carolina Academic Press (Scott Sipe, Tasha Pippin, and Joellen Craft), and my colleagues who have helped me to think through many of the issues and ideas presented in the book. Their work has made this book what it is, and I cannot thank these individuals enough. I would also like to extend special thanks to my research assistants Brenna Galvin (J.D., William Mitchell College of Law, 2013) and Kia Thrasher (J.D. William Mitchell College of Law, 2012) whose extraordinary commitment and diligence allowed me to complete my obligations in more-or-less timely fashion. It was a privilege to work with all those involved in the book’s production. Finally, I am grateful to Laurie Hanson for her love, support, and occasional strong armed encouragement.

I dedicate this book to my son Colin Dayton Stacy.

Kim Dayton, Minneapolis, Minnesota
November 2013
Introduction

Modern societies around the globe are confronting an increasing incidence of disability associated with an aging population, and growing acknowledgment of mental health issues, developmental disabilities, and the consequences of brain injuries. Adult guardianship is no longer merely a local concern. It has been suggested that more than 1% of the adult population 18 years and older in industrialized nations is under formal legal guardianship. In Germany, more than 1.2 million adults are under guardianship pursuant to the provisions of German Act 1896 ff (Civil Code) due to illness or disability. The number of persons in need of guardianship, and guardianship caseloads, can be expected to grow exponentially in the next few decades. This reality raises a number of questions: How can we address the needs of persons who need protection, while preserving their autonomy and personal dignity? How can adult guardianship systems accommodate these competing concerns?

In many nations, the United Nations Convention on Rights of Persons with Disabilities (2006) (the Convention) has served as a catalyst for guardianship reform. The 1st World Congress on Adult Guardianship in Yokohama, Japan in October 2010 showed us the importance of an international exchange of knowledge, experiences, and ideas. The Yokohama Declaration, which reflected the work and shared goals and values of professional and volunteer guardians, academics, lawyers, and judges, was a milestone on the road to achieving greater international communication and cooperation. In October 2012, the 2nd World Congress on Adult Guardianship in Melbourne, Victoria, Australia in October 2012 focused on the influence of the Convention on Australian and international adult guardianship systems. This international exchange of experiences will be continued at the 3rd World Congress on Adult Guardianship, to take place in Arlington, Virginia, United States, in May 2014.

Guardianship experts from all over the world have attended these first two congresses; many more will come to the third congress next year. Professor Kim Dayton has brought together a great many of world’s leading experts, researchers, and judges from the international adult guardianship area to achieve this wonderful book.

I would like to thank all authors, especially Professor Dayton, for their commitment, passion and hard work over the course of the many months that it took to produce this book. It offers an excellent overview of the history and state of guardianship law around the world, insights into best practices, and perspectives on a variety of national legal initiatives and reforms. I hope this book will inspire readers to consider new strategies and solutions to the reality of adult guardianship.

Jochen Exler-König, Chairperson of the International Guardianship Network
Berlin, September 2013