FROM IDIOTS AND LUNATICS TO INCAPACITED PERSONS AND RESPONDENTS—THE EVOLUTION OF GUARDIANSHIP LAW IN RHODE ISLAND

Introduction

With its iconic "1984" commercial, aired in the third quarter of the 1984 Super Bowl game, Apple announced the availability of the first Macintosh computer. With its graphical user interface replacing the "glowing greenish phosphor"[1] and "surly c:\> prompts"[2] of the IBM P.C. launched three years earlier, the first "Mac" introduced the intuitive user interface which we now take for granted.

At the same time a Rhode Islander might be opening his shiny new Mac, another Rhode Islander who was classified as an "idiot, lunatic, or person of unsound mind" could be stripped of her personal autonomy. Rhode Island law would have afforded a probate court no statutory standards to decide whether an individual would fall into one of these classifications – or others such as "a habitual drunkard" – which might cause a probate court to appoint a guardian for her. Apart from required personal service, the person who found herself on the wrong end of a guardianship proceeding was afforded no clear procedural rights, including evidentiary standards or right to counsel, under Rhode Island's guardianship statutes.

As this article will describe, the guardianship law in Rhode Island existing in 1984 was essentially the same that had existed since 1905. And the 1905 statutes in turn represented only a modest modernization of Rhode Island's guardianship laws that had existed since its colonial era.

It would take until 1985 – and more fully not until 1992 – before the breakthrough of the woman throwing a hammer through glass literally depicted in Apple's "1984" commercial would figuratively occur in Rhode Island's guardianship laws.

To highlight this evolution, this article will focus on provisions of Rhode Island's statutes pertaining to guardianship of adults.[3] For, as the Rhode Island Supreme Court pointed out in *Trustees of House of the Angel Guardian, Boston v. Donovan*, "in this state the probate court derives its jurisdiction wholly from the statute."[4]

The Dark Period 1742-1984

Grounds for Guardianship. As described by the Rhode Island Supreme Court in *Tillinghast v. Holbrook*, "[i]n 1742, the General Assembly, for the first time, legislated upon the subject of the appointment of guardians of the persons or estates of persons other than infants . . . ."[5] The court noted that "[t]he title of the act indicates its general purpose" –

---

[1] WALTER ISAACSON, STEVE JOBS 95 (2011).
[2] WALTER ISAACSON, THE INNOVATORS 363 (2014).
[3] Prior to R.I. Pub. Laws 1992 ch. 493, referred to later in this article as the "1992 Act," guardianships of minors and adults were dealt with in the same statute. Section 5 of R.I. Pub. Laws 1992 ch. 493 created a new Chapter 15.1 of Title 33 dealing exclusively with guardianships of minors. R.I. Pub. Laws 1946, ch. 1711 created a new Chapter 16 of Title 33 dealing with veterans guardianships. Both of these Chapters are outside the scope of this article.
[4] 71 R.I. 407, 410, 46 A.2d 717, 718 (R.I. 1946).
[5] 7 R.I. 230, 248 (R.I. 1862).

> "An act empowering several town councils of this colony to have the care and oversight of all persons who are delirious, distracted, or *non compos mentis*, and their estates." It enacts that "it shall be in the power of each town council in this government to take into their care all persons and their estates in each respective town, who are delirious, distracted, or *non compos mentis*, or such who, for want of discretion in managing their estates, are likely to bring themselves and their families to want in misery, and thereby render themselves and their families chargeable to the respective towns in which such person lives . . . ."[6]

In the Rhode Island Public Laws enacted by the General Assembly in 1822, the General Assembly refined the phrase "the persons or estates of persons other than infants" to empower "the courts of probate, in their respective towns . . . to approve of guardians chosen by minors of fourteen years of age and upward."[7] It also made more succinct and specific this power, namely "to appoint guardians of idiots, and all other persons who are non compos mentis or lunatic, or who for want in discretion in managing their estates are likely to bring themselves and families to want and thereby render themselves and families chargeable to such town."[8]

Thus the 1822 enactment of the General Assembly replaced the terms "delirious and distracted" of its colonial era predecessor with the terms "idiot" and "lunatic." The General Assembly, however, hit its full stride in its enactment of the 1844 Public Laws:

> Whenever any idiot or lunatic, or person non-compos mentis, or any person who for want of discretion in managing his estate, shall be likely to bring himself and family to want, and thereby to render himself and family chargeable, shall reside or have a legal settlement in any town, the court of probate of such town shall have the right to appoint a guardian or person and estate of such person.[9]

It is perhaps not surprising an early or mid-nineteenth century General Assembly would classify someone as an "idiot or lunatic or person non-compos mentis," and further use that characterization as the basis for subjecting such an individual to a guardianship. It may be surprising, as this article will reveal, that these same classifications (with additions such as "habitual drunkard") would persist with only minor phrasing changes for the next 142 years.

In addition to "want of discretion in managing his estate," in 1872 the General Assembly added to the list of potential candidates for guardianship to include "any person who from excess drinking, gaming, idleness, or debauchery of any kind" might "render himself or his family chargeable."[10]

By what standards was an individual purported to be an "idiot or lunatic, or person non compos mentis"? The statute contains no definition of any of these three terms. A modern Rhode Island

---

[6] *Id.*
[7] R.I. PUB LAWS 1822, *An act respecting Guardians*, § 1.
[8] *Id.* § 2.
[9] R.I. PUB. LAWS 1844, *An act respecting Guardians*, § 3.
[10] General Statutes of the State of Rhode Island and Providence Plantations 1872 ch.154 § 7.

case notes that "[t]he 1623 James I act used the term '*non compos mentis'* – literally 'not master of one's mind' –in describing what has evolved into the term 'unsound mind' used in § 9-1-19."[11] As it did in the statute of limitations provisions of R.I. Gen. Laws 1956 § 9-1-19, cited by the *Roe v. Gelineau* court, the General Assembly replaced the term "non compos mentis" in the guardianship statutes with the phrase "person of unsound mind."[12]

Rhode Island's Supreme Court decisions are equally unhelpful regarding the other terms used in the statute. "The terms 'lunatic, idiot or person of unsound mind,' used in the statute in their natural and ordinary use, indicate a condition of mental disability and incapacity."[13] Looking outside of Rhode Island law for insight to the meaning of the terms "idiot and lunatic,"

> English common law distinguished between two types of individuals who suffer from mental incapacity: the idiot and the lunatic. Crudely put, the lunatic was someone who once possessed a sound mind and somehow lost it; the idiot never had one.[14]

Conservators. The Rhode Island Court Practices Act of 1905 introduced a new concept in a section entitled *Conservators of the Property of Aged Persons*, which provided that "[i]f a person by reason of advanced age or mental weakness is unable to properly care for his property the probate court of the town in which he resides, upon his petition or the petition of one or more of his relatives or friends, may appoint a conservator of his property."[15]

In enacting this section, the General Assembly introduced, at the beginning of the twentieth century, two concepts not previously existing in 18th or 19th century Rhode Island statutes. The first is a proceeding in which the court would supervise the "charge and management of the property" of an individual based solely on "advanced age or mental weakness."[16] Secondly, unlike the guardianship proceedings, such a conservatorship proceeding could be initiated upon the petition of the individual herself.[17]

Procedural Rights of the Intended Ward. The rights—or more accurately the lack thereof—provided to the subjects of guardianship petitions in 18th and 19th century Rhode Island is best exemplified by statutory and case law pertaining to notice.

In its 1857 Revised Statutes, the General Assembly mandated that "every court of probate shall, before proceeding, give notice to all parties, known to be interested" in particular proposed actions by the probate court, including guardianship proceedings.[18] Like Monty Hall giving game show contestants a choice of doors number 1, 2 or 3, the legislature provided that such notice "may be given in either of the following modes, at the discretion of the court," such

---

[11] Roe v. Gelineau, 794 A. 2d 476, 485 (R.I. 2002) (citation omitted).
[12] Public Statutes of the State of Rhode Island and Providence Plantations 1882 ch.168 § 7.
[13] Champlin v. Probate Court of Exeter, 37 R.I. 349, 351, 92 A. 982, 982 (R.I. 1915).
[14] Louise Harmon, *Failing Off the Vine: Legal Fictions and the Doctrine of Substituted Judgment*, 100 YALE L.J. 1, 16 (1990).
[15] The Rhode Island Court Practices Act 1905 ch. 50 § 1077.
[16] *Id.* § 1077,.
[17] *Id.* § 1077.
[18] Revised Statutes of the State of Rhode Island and Providence Plantations 1857 ch. 152 § 3.

"modes" being by (a) citation personally served or "by leaving an attested copy thereof at the last and usual place of abode," (b) newspaper advertisement, or (c) posting in the clerk's office or "at the place at which the court usually meets, and in one other public place within the town."[19]

In *Angell v. Angell*, the notice to the prospective ward "was by publication only."[20] The Probate Court of the Town of North Providence appointed a guardian for Vashti Angell, despite the lack of personal service on Ms. Angell.

Counsel for Ms. Angell contended that the statute itself "is unconstitutional because under it a person may be deprived of his liberty and property without due process of law by being put under guardianship without actual notice."[21] The *Angell* court was unmoved by Ms. Angell's argument.

> Undoubtedly a personal notice to the intended ward would be better and more consonant with the usual course of judicial procedure than notice by publication only . . . but nevertheless our conclusion is that the appointment of the appellant was valid notwithstanding the want of personal notice to the appellee notice having been given as authorized by the statute.[22]

The Court Practices Act of 1905 changed this by specifically requiring that "[n]o person shall be appointed guardian of the person of another, unless notice of the application for such appointment has been served upon the intended ward in person at least fourteen days prior to any action on said application . . . ."[23]

First Light 1985-1988

In 1985, the General Assembly altered the grounds by which a probate court could appoint a guardian. Gone were the grounds based on an individual's purported status as an "idiot, lunatic, or person of unsound mind." Gone also was the ability of a probate court to appoint a guardian based on categories of purported behavior (e.g., "excess drinking, gaming, idleness or debauchery"). Also eliminated was a potential guardianship based on "want of discretion in managing his estate" which might lead to the individual or his family being public charges.

Inserted in place was a functional standard. Specifically, probate courts could now appoint guardians for an individual "who is unable to manage his or her estate and is unable to provide for his or her personal help and safety as a result of mental/or physical disability . . . ."[24] Specifically, such "mental or physical disability as determined by the court on the basis of oral or written evidence under oath from a qualified physician . . . ."[25]

---

[19] *Id.* § 4.
[20] 14 R.I. 541, 545 (R.I. 1884).
[21] *Id.*
[22] *Id.* at 546.
[23] The Rhode Island Court Practices Act.
[24] R.I. PUB. LAWS 1985 ch. 156 § 1.
[25] *Id.*

In 1987, the General Assembly further modified the statute enabling probate courts to appoint conservators.[26] The changes, though seemingly superficial, were actually substantive. Specifically, previously an individual seeking the appointment of a conservator was required to be of "advanced age" or have a "mental disability." The 1987 legislation eliminated the adjective "mental" before disability as well as the requirement of "advanced age" in order to initiate a conservatorship.[27] Accordingly, an individual could seek the appointment of a conservator based on his or her own "disability" alone.[28]

While the General Assembly was providing some light on the horizon by these revisions to the guardianship statutes, nationally the dawn was beginning to break. The catalyst was a series of articles which appeared in 1987 produced by the Associated Press (the "AP") which resulted from a national study of state guardianship proceedings.[29] The AP's report entitled *Guardians of the Elderly: An Ailing System*, highlighted both procedural and substantive problems in state court guardianship proceedings.[30]

The AP report sparked the convening of the National Guardianship Symposium in July, 1988 at the Johnson Foundation's Wingspread Conference Center.[31] Wingspread produced 31 recommendations "intended to better safeguard the rights of adult disabled wards and proposed wards [and] . . . to provide for the ward's needs by maximizing individual autonomy."[32]

The Dawn 1990-1996

Rhode Island's guardianship laws were transformed by the General Assembly's enactment of R.I. Pub. Laws 1992 ch. 493 (the "1992 Act"), beginning with mandating the use of a seventeen page "Functional Assessment Tool" (FAT), in place of the potentially one-paragraph physician's letter as the basis for a probate court's determination of whether or not an individual required guardianship.[33] Gone was the potential that someone could be made the subject of a guardianship proceeding based merely on his alleged status as an "idiot, lunatic, person of unsound mind," "habitual drunkard," or some other purported classification. Instead, the individual's functional abilities and "capacity to make decisions" would be determinative.[34]

The 1992 Act also mandated procedural protections for a respondent such as enhanced notice requirements,[35] the ability to compel the attendance of and to confront and cross-examine witnesses,[36] and a "clear and convincing" evidentiary standard in determining whether a guardian should be appointed.[37] The 1992 Act also required the appointment of a guardian ad

[26] R.I. PUB LAWS 1987 ch. 122 § 1.
[27] *Id.*
[28] *Id.*
[29] ROBERT FLEMING & LISA DAVIS, ELDER LAW ANSWER BOOK 11-3 (3d ed. YEAR).
[30] THE AMERICAN BAR ASSOCIATION, RECOMMENDATIONS OF THE NATIONAL GUARDIANSHIP SYMPOSIUM iii ().
[31] *Id.* at iv.
[32] *Id.*
[33] R.I. PUB LAWS 1992 ch. 493 § 4.
[34] *Id.*
[35] *Id.* § 3.
[36] *Id.* § 4.
[37] *Id.*

litem, who would have both an investigatory and reporting function, in every petition for the appointment of a guardian.[38]

In 1994, the General Assembly replaced the seventeen-page FAT with a six-page Decision-Making Assessment Tool (DMAT).[39] In addition to its virtue of relative brevity, the DMAT focused on the extent to which an individual possesses decision-making capacity.[40]

By mandating the use of a DMAT and by substantially enhancing the procedural protections to a respondent, the General Assembly necessarily increased the adversarial nature and concomitant expense of a guardianship proceeding. But what if an individual *herself* wished to have the supervision of a probate court in the management of her financial affairs?[41] To accommodate such self-initiated proceedings, the 1992 Act and subsequent revisions to Chapter 15 of Title 33 left intact Section 44 allowing for such an individual to initiate, and a probate court to administer, a conservatorship for such an individual.

In the Probate Uniformity Act of 1996 (the "1996 Act"),[42] the legislature continued to refine its work begun with the 1992 Act. For example, the 1996 Act required that the DMAT be completed by "a physician who has examined the respondent."[43] This legislation also expanded the investigatory and reporting duties of the guardian ad litem,[44] as well as created a statutory form of guardian ad litem report.[45]

In order to ensure a forum for ongoing study and development of proposed legislation to continue the modernization of Rhode Island's probate laws, the 1996 Act included a statutorily created commission titled "A Legislative Commission to Study the Feasibility of Modernizing Probate Law and Procedure and to Make Recommendations Therefor" (the "Probate Commission").[46]

After the Dawn 1997-2015

The assimilation by courts and practitioners of the virtual re-writing of Rhode Island's guardianship laws by the General Assembly in the 1992 Act, begun with the 1994 and 1996 legislation, continued thereafter.

Specifically, as a result of the experience by courts, particularly in contested guardianships, the requirements for the physician completing the DMAT, revised in the 1996 Act, was again

---

[38] *Id.*
[39] R.I. PUB. LAWS 1994 ch. 359 § 1.
[40] *Id.*
[41] But why would a person subject herself to oversight of her financial affairs by a probate court? Why not simply appoint someone to act as agent under a durable financial power of attorney? One reason might be that the person whom the individual has selected as her fiduciary is only willing to serve in that capacity with the imprimatur and supervision of a court, perhaps due to a contentious family circumstance. Another is that the establishment of certain special needs trusts under 42 U.S.C. § 1396(d)(4)(A) requires the involvement of a court.
[42] R.I. PUB. LAWS 1996 ch. 110.
[43] *Id.* § 9.
[44] *Id.*
[45] *Id.*
[46] *Id.*

revised in 2004[47] and in 2007.[48] The General Assembly also in 2007 refined statutes pertaining to the selection of guardians ad litem,[49] as well clarifying their roles in guardianship proceedings.[50]

The Probate Commission authorized by the 1996 Act was formed and became active shortly thereafter.[51] For example, the 2004 and 2007 legislation referenced above were derived from deliberations of the Probate Commission. In 2014, the Probate Commission suggested revisions to the General Assembly of its proposed enactment of the Uniform Adult Guardianship and Protection Proceedings Jurisdiction Act (UAGPPJA).[52] The General Assembly, considering the Probate Commission's recommendations, adopted a modified version of the UAGPPJA the following year.[53]

Conclusion

The 1992 Act virtually gutted and modernized the anachronistic substantive and procedural requirements for instituting and administering guardianships in Rhode Island that had existed for two centuries. The General Assembly's continued refinements to the statute in the 1990s, 2000s and to the present, and the work of its statutory Probate Commission, is perceived by some as having effected the goal of the reformers.

Another view is that lack of further substantial changes to Rhode Island's guardianship laws in the 25 years since the 1992 Act is the result of complacency. For example, since the Wingspread conference in 1988, whose recommendations inspired and informed the reforms of the 1992 Act, the National Guardianship Conference has convened again twice, in each instance producing further recommendations.[54] In addition, the National Guardianship Association (NGA), which adopted the first *NGA Standards of Practice for Guardians* in 2000, has produced new editions of its *Standards of Practice* in 2003, 2007, and in 2013.[55]

The legislative commission[56] formed by the General Assembly in 1990, which produced the initial draft of the 1992 Act, incorporated the diversity of stakeholders[57] required for such a process to be successful. Reform is a challenging and arduous process requiring significant political will and energy. And such will and energy in turn often require a crisis atmosphere, like that sparked by the AP reports which was the catalysis for the Wingspread Conference, which in

[47] R.I. PUB. LAWS 2004 ch. 573 § 1.
[48] R.I. PUB. LAWS 2007 ch. 417 § 1.
[49] *Id.*
[50] *Id.*
[51] The author, in his capacity as a then State Representative, served as the first Chair of the Probate Commission, and subsequently, including to the writing of this article, as its Vice-Chair.
[52] H.R. 7687, 141th Gen. Assemb., Reg. Sess. (R.I. 2014); S. 2548, 141th Gen. Assemb., Reg. Sess. (R.I. 2014).
[53] R.I. PUB. LAWS 2015 ch. 210 § 1; ch. 241, § 1.
[54] Symposium Third National Guardianship Summit: Standards of Excellence, *Third National Guardianship Summit Standards and Recommendations*, 2012 UTAH L. REV. 1191 (2012); Wingspan—The Second National Guardianship Conference, *Recommendations*, 31 STETSON L. REV. 595 (2002).
[55] THE NATIONAL GUARDIANSHIP ASSOCIATION, STANDARDS OF PRACTICE 2 (2013).

turn informed the work of the Guardianship Commission in creating, and the General Assembly in enacting, the 1992 Act.

Reports of serious abuse and neglect by guardians arise periodically in Rhode Island, as they do in other states. However, without a critical mass of such cases or analogue to the AP report, it is unlikely that the political will which resulted in the systemic reforms of the 1992 Act will be mustered.

Some consider the reforms of the early 1990s, with their continual review by the Probate Commission and periodic revisions by the General Assembly, to be adequate. For those who believe that a more systemic change is again needed, it is not.