

Elderly too easily can be stripped of civil liberties, assets

JAMES C. VAN DOREN

It has been my experience in providing psychiatric care to my geriatric patients that there are serious and frequent lapses in ethical practice with regard to guardianships and capacity determinations here in Pima County.

I often am befuddled by the tenacity and utter lack of ethical objectivity demonstrated by attorneys and the mental health professionals who provide so-called "expert opinion" in many of these cases.

All too often the outcome is determined long before any clinical evaluation is performed - and not surprisingly favors the party employing the attorney.

It is truly frightening just how easy it is for many of our elderly citizens to be stripped of their civil liberties and placed in restrictive and coercive custodianships that seize and control their assets and limit their recourse to appeal.

I have witnessed outright denial and direct contradictions between the facts of these cases and the brief and predictable summary statements that the person is determined to be demented and therefore "incompetent" in general.

The proverbial metaphor of a fox in the hen house does not quite capture the greed and dispassionate disregard for human suffering that ensues.

It seems readily apparent to me that there is an inherent conflict of interest in being both attorney and public fiduciary in these instances. After all, what better way to siphon away the wealth of their "clients" than to charge attorney's fees for every service rendered to their involuntary "clients" while at the same time control any access they might have to counsel or appeal.

Such determinations should be clinical and global in nature. They should involve a consensus of opinion from the treating physician(s) and other caregivers who can truly make a determination of capacity based on real-world observations.

Unfortunately, the standard that is almost universally applied is limited to a single neuropsychological evaluation that is performed by a psychologist with no real-world knowledge of the patient. The psychologist is hired by the attorney as an "expert witness" and is thereby biased to provide the desired opinion - "not competent."

The unsuspecting senior is usually caught off guard and often traumatized by the experience.

Many perfectly fit and sane individuals have been trapped by this design. They are overwhelmed by complex and confusing jargon and legal proceedings. They do not have ready access to their own counsel. They are pulled unwillingly into

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this struggle on unequal footing only to be squashed by the probate attorney leading the charge.

The people at greatest risk are naturally the elderly with any sizeable wealth in their coffers. Often it seems to begin with a disgruntled child or potential heir who hires the attorney to seize and "protect" his or her inheritance.

These efforts are almost always disguised a "genuine" effort to "heroically" protect their "beloved" victims. The aggressors seem comfortable in deluding themselves with the notion that they are somehow doing the greater good.

I do not mean to suggest that all guardianships are wrong or abusive. Many, if not most, are of absolute necessity. The best possible outcome is always to take the least restrictive and most benevolent of action necessary.

Hopefully there is a truly compassionate friend or family member who is capable of loving and protecting the incapacitated elder, much the way healthy parents would do for their own child.

When this is not the case, then a public fiduciary can fulfill this role. I have had the pleasure of working with many good and ethical fiduciaries.

But I am deeply troubled by far too many experiences with less than ethical attorneys, fiduciaries and mental health professionals in this business - a lucrative business that has the potential to corrupt even the best of intentions.

James C. Van Doren, M.D., is a board-certified psychiatrist in Tucson.