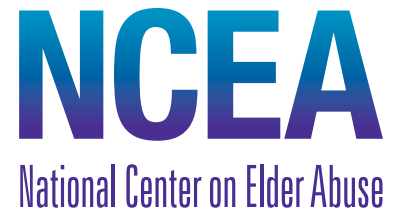


Role of Guardian Standards in Addressing Elder Abuse



What is guardianship?

Guardianship¹ is a relationship created by state law in which a court gives one person or entity (the guardian) the duty and power to make personal and/or property decisions for an individual, upon a finding that the individual is not able to do so.

Who are the guardians?

Many guardians are family members. Others may be willing friends, trained volunteers, professionals such as lawyers or professional guardians. Guardians also may be corporate or governmental agencies – banks or financial institutions, non-profit or for-profit private agencies, or state or local public guardianship programs.

Who is subject to guardianship?

Courts appoint guardians for elders who have lost or partially lost the ability to make decisions due to dementia or other cognitive impairment; younger individuals with intellectual disabilities; individuals with mental illness, brain injury or substance abuse – and frequently a combination of these conditions.

What kinds of decisions do guardians make?

Courts authorize guardians to make specific decisions. A court may appoint a “guardian of the person” to make health care and personal decisions, and/or a “guardian of property” to make financial decisions. Often these two functions are performed by the same person or agency. A court may appoint a “limited guardian” in which only certain decision-making powers are transferred to the guardian; or may appoint a “plenary guardian” in which all of the individual’s decision-making powers and rights are transferred to the guardian except any that may be retained by the person under state law.

Why is guardianship “a last resort”?

While guardianship aims to protect individuals at risk of harm, it removes fundamental rights, such as the right to contract, right to marry, right to control and manage assets, and the right to make medical and residential decisions – thus drastically eroding self-determination and personal choice. A well-known Associated Press report in 1987 stated that guardianship “unpersons” those it aims to protect. Less restrictive options may meet the decision-making needs without the same loss of rights, and thus should be considered and attempted first.

How does guardianship relate to elder abuse?

Guardianship can be both a safeguard against – and a source of – elder abuse. Guardianship may remove an alleged abuser, ensure a safe living arrangement, arrange services in cases of neglect or self-neglect, and put in place remedies against financial exploitation. However, some guardians may take advantage of their appointment, and may use the individual’s income or assets for their own purposes rather than for the individual’s needed care.

What is the extent of elder abuse in guardianship?

According to the U.S. Government Accountability Office, the extent of abuse in guardianship is unknown, due to data limitations. We know that many guardians are dedicated and perform their duties with integrity, yet some undetermined percentage engage in abuse, neglect or exploitation, which can surface in egregious cases and media stories – but we do not know the magnitude of the problem.

¹Terminology differs by state. In this Fact Sheet, the generic term “guardianship” refers to guardians of the person as well as guardians of property, frequently called “conservators,” unless otherwise indicated.

How can courts detect elder abuse?

Courts can detect abuse through regular review of guardian inventories, accountings, reports, plans, fee requests, and background checks. Courts also may detect abuse through information from third parties such as family members, outside auditors, guardian certification programs or bar association disciplinary actions – or communications from adult protective services or the long-term care ombudsman program.

Once detected, how can courts address elder abuse?

The court may appoint a visitor, investigator, or “guardian ad litem,” and upon sufficient evidence hold a hearing. The court may then sanction, fine or remove the guardian, appoint a co-guardian, or modify the guardian’s authority. The court may freeze or restrict accounts at risk of exploitation, or seek restitution through a bond to provide restitution to the individual. The court may refer a case to law enforcement for criminal charges.

Is court oversight sufficient?

All state laws require courts to exercise oversight once a guardian has been appointed, but oversight practices vary widely. National and state policy and practice recommendations over the past 25 years have recognized the need for stronger court monitoring, especially given the anticipated increase in populations that may be subject to guardianship. Courts need better guardianship databases, more review and investigative resources, sufficient staffing dedicated to monitoring – and the funding as well as the political will to regularly and assertively track guardianship cases.

What is a “fiduciary”?

A fiduciary is someone named to manage money or property for someone else, and in whom the law places special trust and confidence. For example, a fiduciary might be a lawyer, a trustee, an agent under a power of attorney, an executor – or a guardian. Fiduciaries have a very high duty of accountability, and must be trustworthy, honest, and act without conflict of interest or the perception of conflict of interest.

What training exists for family and other non-professional guardians?

Serving as guardian is one of society’s most challenging roles, yet in most states and localities, family and other non-professional guardians receive little or no instruction or assistance. They are unfamiliar with the court system and the guardianship role, and don’t know what is expected of them. They come to a demanding responsibility generally unprepared and often with nowhere to go for help. However, a growing number of state and local courts have developed training resources including online curricula, handbooks and videos. A few states such as Florida, New York and Ohio require training for non-professional as well as professional guardians.

The federal Consumer Financial Protection Bureau has developed a plain language guide for non-professional guardians of property called *Managing Someone Else’s Money: Help for Court-Appointed Guardians of Property and Conservators*. The National Guardianship Association has published *The Fundamentals of Guardianship: What Every Guardian Should Know* (2017).

What training or guidance exists for professional guardians?

Professional guardians may take special training and an examination to become a “certified guardian.” The Center for Guardian Certification certifies guardians nationally; and a growing number of states have instituted their own certification or licensing programs.

What do state laws provide about the role and responsibilities of guardians?

State laws generally provide an overall statement directing the guardian of the person to make decisions about the support, care, education, health and welfare of the individual; and a statement directing the guardian of property to make decisions about the property and financial affairs of the individual. Many state statutes further specify or clarify the guardian’s duties – for example to promote self-determination, to make decisions the guardian believes the adult would have made; and the guardian’s powers – for instance to apply for and receive money payable to the adult, to determine where the person will live, to consent to medical treatment and services, to apply for public benefits, collect and hold property, manage investments; and take actions to protect against abuse, neglect and exploitation. Some state laws require the guardian to get specific prior authority before taking certain actions—such as selling a home or making invasive medical decisions. The state guardianship code is the first place a guardian must look in seeking guidance.

What is the difference between state law and standards in setting out duties of guardians?

State statutes set out the duties and powers of guardians only in the most general terms. There is little or no specificity in weighing various options, seeking services, or making the tough decisions that arise in the real world. Standards aim to guide guardian conduct and decision-making in a more fine-tuned, practical way, fleshing out the broad brush mandates of the law and of fiduciary duty with instructions for everyday choices.

How can guardian standards be used in tandem with court oversight?

Guardians owe a duty both to the individual served and to the court. Guardians are “surrogates” who make decisions on behalf of someone else, and they are fiduciaries with a high duty of trust and accountability. In these roles, guardian standards can guide their actions. But guardians also must report to court and should be held accountable by court. Both solid standards and court oversight are needed.

What are the NGA Standards of Practice?²

The National Guardianship Association (NGA) – a membership organization for people involved with guardianship – has adopted standards of practice to promote a high quality of guardian performance. The standards originally were developed in 1991, and expanded and revised in 2000, 2002, and 2007. In 2013, the standards were further strengthened to include the results of the broad-based 2011 Third National Guardianship Summit sponsored jointly by the organizations of the National Guardianship Network. NGA also has produced a set of ethical principles. For the Standards and Ethical Principles, see www.guardianship.org/wp-content/uploads/2017/08/Standards_of_Practice_2017.pdf.

What do the NGA Standards say about making decisions?

The guardian stands in the individual’s shoes in making decisions. The guardian must seek a clear understanding of the issues and options at hand, encourage and support the individual in understanding the choices and maximize his/her participation. The guardian must identify and advocate for the individual’s goals, needs and preference. The guardian starts by asking the individual – and helping the individual to express – what he or she wants. Only when the individual’s goals, needs and preferences cannot be determined may the guardian make a decision in the individual’s “best interest.” This process, clearly outlined in the Standards, promotes self-determination.

What do the NGA Standards say about duties of guardian of the person?

The most basic duty of the guardian of the person is to see that provisions are made for the support, care, comfort, health and maintenance of the individual. The guardian must secure the services, training and education that will maximize the individual’s self-determination, choice and opportunities.

- The guardian must be alert to changes in the individual’s abilities or situation that might warrant a change in the court’s order, including termination of the guardianship and restoration of rights.
- The guardian must start by meeting with the individual and communicating in the mode the individual can best understand.
- The guardian must create a “person-centered” plan for how the guardian will meet the individual’s needs. The guardian must visit the individual at least once per month.
- The guardian must “promote social interaction and meaningful relationships” consistent with the individual’s preferences, and must encourage and support the individual in maintaining contact with family and friends, as defined by the individual, unless it would substantially harm the individual.
- The guardian must promptly report any abuse, neglect or exploitation.

²This Fact Sheet summarizes highlights from the NGA *Standards*, but does not include the full content. See the Standards for complete information guiding guardians in an array of situations and decisions.

What do the NGA Standards say about making medical decisions?

The guardian must “promote, monitor, and maintain the health and well-being” of the individual. The guardian must maximize the individual’s participation in medical decisions; seek a clear understanding of the medical facts, options, and the risks and benefits of each option – and must support the individual in such understanding.

- The guardian must act in accordance with the individual’s expressed wishes, or otherwise with prior statements, actions, values and preferences to the extent known – and, only if unable to discern the individual’s wishes, act in the individual’s best interest.
- The guardian must seek to ensure that appropriate palliative care is a part of health care decisions (if in accordance with the individual’s values); and must keep people who are important to the individual reasonably informed of health care decisions.
- The guardian may be faced with decision-making about withholding and withdrawing medical treatment. If the individual’s current wishes are in conflict with wishes previously expressed, the guardian must seek review by an ethics committee or submit the issue to court.

What do the NGA Standards say about making residential decisions?

The guardian must see that the individual is living in “the most appropriate environment that addresses the person’s goals, needs and preferences,” and make home or other community-based settings a priority when not inconsistent with the individual’s goals, values and preferences. The guardian may move the individual to a more restrictive environment only after evaluating other options and determining that the move is the least restrictive option – and must report to court before such move.

What do the NGA Standards say about duties of guardian of property (conservator)?

A guardian of property (often called a “conservator”) is a fiduciary and must be trustworthy, honest, and must manage the individual’s affairs with confidentiality, great care, and for the benefit of the individual.

- The guardian must oversee any income and assets under the guardian’s authority, report to court, keep the individual’s accounts separate from the guardian’s own funds, and avoid any conflict of interest or appearance of conflict of interest.
- The guardian must “consider the current wishes, past practices, and reliable evidence of likely choices,” and if there is no evidence or if substantial harm will result, act in the individual’s best interest.

What do the NGA Standards say about conflict of interest?

A guardian “shall avoid all conflict of interest and self-dealing or the appearance of a conflict of interest and self-dealing.” Guardians must not take advantage of their position and act in their own interests rather than the individual’s interests. They must not commingle their own funds with those of the individual (with certain exceptions). A guardian must not sell or convey the individual’s property to the guardian, the guardian’s family, or any entity in which the guardian has an interest.

What do the NGA Standards say about guardian fees?

Guardians are entitled to “reasonable compensation” for their services from the individual’s estate. The Standards list factors to be considered in determining what is “reasonable.” This applies to both professional and non-professional/family guardians.

- The guardian has a responsibility to conserve the individual’s estate when making decisions about services and fees.
- Guardian fees must be reviewed and approved by the court. The guardian must keep records and document the fees charged.
- The guardian must disclose the basis for the fee and a projection of the annual fee at specified points early in the case.
- The guardian must report to court if the guardian believes the funds will be exhausted, and may not abandon the individual.

What do the NGA Standards say about management of multiple guardianship cases?

Guardians must limit their caseloads to allow for adequately supporting and protecting individuals, making one visit per month, and having regular contact with service providers. In evaluating caseload size, guardians must take into account the expected activities, time and demands involved, as well as the available support for each case.

How are guardian standards implemented?

The Center for Guardian Certification operates a national certification program that reflects the NGA Standards and that fosters best practices for guardianship services. In addition, some states have adopted or adapted the NGA Standards for state certification or licensing programs. Selected local courts may require guardians to meet the NGA Standards. Finally, the Standards serve, generally, as an aspirational benchmark for professional and non-professional guardians. It behooves all guardians to become familiar with the Standards and use on a day-to-day basis the guidance they offer.

RESOURCES

American Bar Association Commission on Law and Aging

www.americanbar.org/groups/law_aging/resources/guardianship_law_practice.html

Center for Elders and the Courts, National Center for State Courts, <http://eldersandcourts.org>

Center for Elders and the Courts, Conference of Chief Justices & Conference of State Court Administrators, *Adult Guardianship Court Data and Issues: Results From an Online Survey*, National Center for State Courts [2010].

Consumer Financial Protection Bureau, *Managing Someone Else's Money: Help for Court-Appointed Guardians of Property and Conservators*, www.consumerfinance.gov/managing-someone-elses-money

National Guardianship Association, www.guardianship.org

National Guardianship Association, *2013 Standards of Practice*, www.guardianship.org

National Guardianship Association, *Ethical Principles*, www.guardianship.org

National Guardianship Association, *The Fundamentals of Guardianship: What Every Guardian Should Know*, American Bar Association [2017].

National Guardianship Network, www.naela.org/NGN

Karp, N. & Wood, E., *Guarding the Guardians: Promising Practices for Court Monitoring*, AARP Public Policy Institute [2007]

Third National Guardianship Summit: Standards of Excellence, *Utah Law Review*, Volume 2012, Number 3.

U.S. Government Accountability Office, *Elder Abuse: The Extent of Abuse by Guardians Is Unknown, But Some Measures Exist to Help protect Older Adults*, GAO-17-33 [November 2016].

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Guardianship: Remedy vs. Enabler of Elder Abuse

INTRODUCTION

Guardianship plays two opposing roles in the world of elder abuse. Often guardians are heroes – preventing, detecting and remedying abuse, neglect and exploitation, and improving the quality of life of at-risk older adults. Yet at other times, as we know from shocking media exposes, guardians are the villains, taking advantage of those they were named to protect. We have very little data on the extent of such guardian abuse. To address both of these roles, courts, adult protective services, protection and advocacy agencies for persons with disabilities, law enforcement, and other entities must forge pathways of communication and collaboration.



How Abuse Allegations Can Trigger Guardianship

Adult protective services (APS) in every state receives and investigates reports of adult/elder abuse, neglect (including self-neglect) and exploitation by a wide range of family and non-family perpetrators. Sometimes these investigations prompt APS to petition the court for appointment of a guardian, as a means of protection. The petition might be for appointment of a guardian of the person, a guardian of property (called a “conservator” in many states), or both.* A guardianship petition also may be filed by a family member, advocate, service provider, or any person who is concerned about an adult’s welfare.

The court will set a hearing date, ensure notice and procedural due process according to state law, in some cases send out an investigator or court visitor, and may order additional clinical evaluation. The court will hear evidence of the need for appointment and select an individual or entity qualified and willing to serve as guardian. The court then may approve an order transferring some or all decision-making authority from the adult to the appointed guardian. The guardian may be a family member, friend, professional, or public or private agency – and in some cases APS may serve, at least in an emergency or for a limited time.



Guardians Can Prevent and Address Elder Abuse

Guardians often step in at crisis points – self-neglect verging on disaster, aggravated mental health problems, medical emergencies, evictions, family feuds with allegations of exploitation. Guardians are expected to “fix” the situation, ensure the adult is safe, and at the same time maximize the adult’s self-determination to the extent possible. It is a job for a super-hero, drawing on knowledge or contacts in health care, bioethics, housing, long-term care, public benefits, insurance, finances and investments, family dynamics, and law. During the initial months of the court order, guardians must inventory the assets and come up with a plan for the adult’s care either in community-based or congregate settings. To do this heavy lifting, guardians employ a set of legal, financial and social tools that can be quite successful in stopping any abuse and improving the adult’s life – although family guardians may be less equipped with such tools than professionals.

*State terminology varies. In this Brief, the generic term “guardianship” refers to guardians of the person as well as guardians of property, frequently called “conservators” unless otherwise indicated.

Consider these two cases of a New York City nonprofit guardianship program:

The program was appointed guardian for an older adult with congestive heart failure who lived in a basement apartment that she owned. Her reverse mortgage was in default, and foreclosure was pending because her niece had taken the proceeds and fled. There were unpaid utility bills and the apartment was in dire need of repair, but the woman wanted to remain in her home of many years. The program settled the foreclosure action, set up a utility payment plan, had repairs made, sought to recover the lost funds, and reported the theft to the district attorney [Teaster et al, 2019, profiled in Wood, “Adult Guardianship Pipeline,” 2019-2020].

The program was appointed guardian for a 104-year old woman with dementia. She lived in the basement apartment of someone who claimed to be her granddaughter. The “granddaughter” drained the woman’s bank account and took out a mortgage on the woman’s home in another state, using the proceeds for herself. Family members believed the woman was being financially exploited and even physically abused. The program obtained a restraining order protecting her from “the granddaughter,” and secured low-income senior housing and 24-hour home care. The program investigated the financial history, and brought it to the attention of the district attorney, collaborating in the case against the granddaughter [Vera Institute of Justice Guardianship Project].

Perhaps the most famous story of guardianship as savior in battling elder abuse was the much-publicized 2006 Brooke Astor case in New York City. The grandson of elderly socialite and philanthropist Brooke Astor brought a guardianship petition making serious allegations of her neglect and mistreatment at the hands of her son who was her primary care giver and agent under a financial power of attorney. The petition charged that the son “had not provided for his elderly mother and, instead, had allowed her to live in less than adequate living conditions in her Manhattan apartment and had cut back on necessary medication and doctor’s visits, while enriching himself from her assets” [Matter of Astor, 2006]. Settlement of this complex case resulted in the naming of permanent guardians to improve care and living conditions, and the return of valuable assets.

Whether the judge ultimately appoints a guardian or not, the court guardianship proceeding itself may uncover resources and options to support the individual. Little known family members may come forward. A clinical evaluation may result in new medical facts and treatment strategies. A court investigator may identify community resources or aspects of the adult’s living situation that could be improved. Court-based mediation may allow the adult to voice concerns and bring about collaboration among family members. It may turn out that a less restrictive legal option can be put in place and the guardianship is not needed. Sometimes, bringing the situation to light in a structured setting can clarify the problem, address any abuse, and prompt solutions that can preserve rights. But not all courts have the staff, training, funding, or judicial will for such a comprehensive assessment.

Once appointed, a guardian is not a panacea for every ill. But guardians are charged by court, by state law, and by professional standards with advocating for the adult's rights and wishes, or if these are not known, for the adult's best interest. A guardian is a "fiduciary" who must exercise "the utmost care and diligence, always with the idea of protecting the self-reliance, autonomy, independence, and rights of the person" [National Guardianship Association, Fundamentals, 2017]. While data on guardian actions are scarce, we know that guardians often serve as a critical support for an at-risk adult on both the property and personal sides.

Addressing Financial Abuse

Guardians [or "conservators" of property] often use multiple approaches to improve financial security and tackle exploitation.

A guardian may:

- **Inventory the adult's property**, develop a budget for management of income and assets, and use the property according to the adult's goals, needs and preferences [National Guardianship Association, *Standards of Practice*, Std 17 & 18, 2013]. The NGA *Standards* require guardians to "keep estate assets safe by keeping accurate records of all transactions" and being "able to fully account for all the assets in the estate."
- **Watch for signs** of past or present financial exploitation or scams by third parties [Consumer Financial Protection Bureau, 2019]
- **Seek restitution** of lost funds; file insurance claims
- **Ask the court to void a deed** or set aside a contract based on fraud or exploitation
- **Ask the court to revoke a power of attorney** if the agent was taking advantage of the adult
- **If the adult is facing eviction**, identify an attorney and/or state and local eviction protection programs – many of which were prompted or expanded during the pandemic. If needed, arrange for a rental payment plan
- **Take steps to obtain all public benefits** for which the adult is eligible – including any payments or debt reduction opportunities made available in response to the pandemic
- **Establish direct deposit** and automatic payment systems when appropriate
- Determine if any existing **Social Security representative payee** is trustworthy, or seek to become the payee if necessary

Addressing Personal Abuse and Neglect

Guardian financial tools go hand in hand with initiatives to protect the adult against abuse and neglect, while maximizing choice and self-determination.

Guardians often play key roles to:

- **Restrict harmful interactions with an abuser.** Guardians may ask the court for a protective order to prevent – or at least limit to a supervised setting – perpetrator contact with the adult. [Of course, the guardian could also use this authority inappropriately to unnecessarily isolate an adult, as noted below.] Keeping the person’s preferences in mind, the guardian also could support the person in a move to a safe venue such as assisted living or to live with trusted family members.
- **Promote contacts** that are meaningful to the adult. The pandemic taught us that connections to family, friends, and the community are essential to health and well-being [Karp & Wood, COVID-19 Lessons, 2021]. The *NGA Standards of Practice* require guardians to “encourage and support the person in maintaining contact with family and friends, as defined by the person, unless it will substantially harm the person.”
- **Facilitate technology** to reduce harmful isolation. Guardians can supplement in-person visits of friends and family members with remote access technologies. Guardians can ensure the adult has access to and is able to use or get help with phone calls, texts, video chats, email, and social media. This might entail buying computers or devices, making sure they are set up and accessible, securing internet access, getting help from nursing home or assisted living staff, and working with the adult to communicate digitally.
- **Identify and link with community resources.** To best meet the adult’s needs, guardians must maintain contacts with agencies on aging, centers for independent living, or local departments of human services. Guardians can arrange for home delivered meals, transportation, home care, home modification and repair, friendly visitors from companion programs, and more.
- **Promote access to medical care and housing.** Guardians routinely navigate the complex health care system, making choices about insurance plans and providers, and securing medications. Guardians investigate affordable, accessible housing options, and may assist in a move to a residential setting that best meets the person’s needs.
- **Support the adult’s choices in clinical settings.** At the heart of the guardian’s job is making decisions that align with the adult’s values, and seeking the adult’s participation – sometimes in wrenching choices about surgery, mental health interventions, and end of life care.
- **Monitor long-term care quality.** Good guardian practice goes far beyond arranging for institutional care if needed, to advocating for quality care that meets state and federal standards. The *NGA Standards of Practice* direct the guardian to “monitor the residential setting on an ongoing basis and take any necessary action when the setting does not meet the individual’s current goals, needs and preferences.”



Guardians May Be Perpetrators of Elder Abuse

While guardians have a high duty of trust, care, honesty, and confidentiality, some are in fact the perpetrators of abuse:

In June, 2021, the Acting US Attorney for the Eastern District of Pennsylvania announced that Gloria Byars, 60, and two Virginia co-conspirators were indicted for stealing over \$1 million dollars from older individuals subject to guardianship. Working as office manager for a private guardianship firm and then as a private guardian with her own company, Byars allegedly stole large sums from dozens of older adults under guardianship between 2012 and 2018 by writing unauthorized checks to accounts she controlled and by taking valuable gold coins. She was charged with conspiracy, bank fraud, wire fraud and money laundering [US Department of Justice, 2021].

Henrietta, 88, had physical disabilities as well as mental impairments that impacted her decision-making abilities. Her niece, Roberta, was appointed as Henrietta's guardian. Roberta visited Henrietta in her home a few times but then never came back and made no further arrangements for her care. A neighbor noticed the lack of activity at Henrietta's house. The neighbor knocked but couldn't get Henrietta to answer the door so she called law enforcement for a welfare check and notified Adult Protective Services [Department of Justice, 2021.]

Anyone appointed to serve as a guardian might mistreat the adult they are appointed to serve—family members, trusted others, non-profit or for-profit employees, professional guardians, and attorneys. Most reported cases of abuse by guardians involve financial exploitation, but the mistreatment also may be physical, emotional, or psychological abuse, or neglect. Consequences for victims include loss of savings, loss of a home, forced move to an institutional setting, and deterioration of physical and mental health.

Abusive acts by guardians may meet the definitions for various state and federal crimes, depending on the facts of the case. Guardians might be charged with such financial crimes as embezzlement, larceny, mail fraud, money laundering, and theft. Non-financial charges could include a broad array of crimes including elder abuse, neglect, assault, and forced labor.

Extent of Guardian Abuse

Abusive guardianships make news. A 2017 in-depth piece in the *New Yorker* featured dramatic and widespread financial exploitation and other mistreatment of individuals under guardianship in Clark County, Nevada [Aviv, 2017]. In 2021, most major news outlets covered events in the Britney Spears conservatorship, including her allegations that her father, who has served as her co-conservator for 13 years, profited hugely from her estate while she was forced to take inappropriate medications and treatments, and restricted in many aspects of her personal life. [New York Times, 2021; Wall Street Journal, 2021; Washington Post, 2021]. For every celebrity story, there are dozens of lesser known stories in which guardians are engaged in unethical or possibly criminal conduct.

While anecdotal information continues to grow, data are lacking on the extent of guardian abuse. But despite the scarcity of comprehensive data on guardian abuse—and guardianship cases generally—noted by the Government Accountability Office, the US Senate Special Committee on Aging, and the National Center for State Courts, these entities have flagged the dire problem of guardian malfeasance and the need to address it. [GAO, 2016; US Senate Special Committee on Aging, 2018; National Center for State Courts, 2018]

Red Flags for Mistreatment by Guardians

Signs that a guardian has mistreated the person for whom they serve as fiduciary often are the same as indicators for various types of elder abuse. The National Center on Elder Abuse defines the types of elder abuse and the [signs of each type](#). In addition, there are red flags specific to the guardianship itself. These signs, compiled by court personnel, public guardians and researchers [Pogach & Wood, 2019; Karp & Wood, 2007], include the following actions and lapses by guardians:

- Failure to file timely accountings, receipts, and reports with court
- Multiple unexplained ATM transactions
- Lack of automated record-keeping system
- Attorney representing guardian withdraws from case
- Failure to pay bills, especially rent or residential care bills, putting the person at risk of eviction
- Large expenditures not appropriate to the person's environment or condition
- Request for fees that are high and not well substantiated
- Draining estate and then seeking to terminate appointment
- Selling individual's home or moving the individual out of state without justification
- Hiring friends, family, or business associates to provide services
- Isolating the person or otherwise interfering with relationships with family, friends, and service providers



Remedies for Abuse by Guardians: Stakeholder Collaboration Needed

Courts with jurisdiction over the guardianship have an array of responses they can implement when there are signs of guardian malfeasance. In addition, concerned individuals and professionals can seek intervention from non-court organizations and agencies.

Court Monitoring

Courts that hear initial petitions for guardianship and appoint guardians should play an on-going role after the appointment of the guardian. State statutes and court rules lay out the court's monitoring requirements. Guardianship monitoring aims to protect the individual and ensure the guardian is accountable to the court [Hurme & Robinson, 2021]. The *National Probate Court Standards* [3.3.17] list necessary elements of monitoring:

- Ensure that plans, reports, inventories, and accountings are filed on time
- Review promptly the contents of all plans, reports, inventories, and accountings
- Independently investigate the well-being of the individual and the status of the estate as needed
- Improve the performance of the guardian and enforce the terms of the order
- Consider whether a less restrictive option would be appropriate [Commission on National Probate Court Standards, 2013].

To some extent, these elements are aspirational, as courts may lack the resources to carry out all of these steps, and procedures differ from state to state and from court to court. A recent survey by the National Center for State Courts found that despite improvements in monitoring practices, especially in use of technology, over the past 15 years, there are “continuing challenges” in judicial oversight [Robinson et al, 2021].

Court Responses to Guardian Malfeasance

Through monitoring, a court may uncover evidence of mistreatment by a guardian. If not, a concerned individual, an attorney, another professional, or a representative of a government agency may file a complaint with the court or petition the court to take action. Some states and courts have complaint procedures [Pogach & Wood, 2019]. The National Center for State Courts has developed a [judicial response protocol](#) for guardianship abuses [National Center for State Courts, 2021].

Courts with jurisdiction over guardianships can take an array of actions to respond to guardian malfeasance and protect the adult [Pogach & Wood, 2019]:

- **Freeze assets and/or restrict accounts** – Courts may take these actions to limit a guardian’s access to money and property while investigating a case or preparing to take another protective step.
- **Investigate allegations of malfeasance** – Once allegations of abuse have been made, courts can appoint a guardian ad litem, investigator or visitor to investigate. A court can also audit an individual’s assets or order an accounting by an external entity such as a certified public accountant.
- **Order repayment for lost assets or property** – Such orders might restore lost assets, but in many cases, the only way to recover funds is through a bond that the guardian obtained upon appointment. Sometimes courts do not require bonding when the guardian is appointed, making it more difficult to recover losses.
- **Enforce statutory rights to communication and visitation** – When abusive guardians use isolation tactics, family members and others can seek orders enforcing state laws that define the rights of people subject to guardianship to interact with others of their choosing.
- **Appoint a co-guardian or limit the powers of the guardian** – This strategy may help deter or stop mistreatment by a guardian.
- **Remove the guardian** – Removal may be the best way to stop guardian malfeasance, and petitioners might suggest a willing and suitable replacement.

- **Terminate the guardianship** – Less restrictive options or changed circumstances might lead a court to terminate the guardianship entirely and restore the adult’s rights.

To enhance the likelihood that court will detect and respond to abuse by guardians, the National Guardianship Network’s 2021 Fourth National Guardianship Summit produced recommendations about monitoring. The Summit urged states and courts to implement a post-appointment, person-centered monitoring system that includes periodic in-person visits, verification of guardians’ financial reports, status review of the appropriateness of the guardian, and an independent statewide entity to investigate the guardian’s conduct in appropriate cases [Recommendation 4.2, National Guardianship Network, 2021]. The Summit also recommended continuing representation by a qualified lawyer who was appointed to represent the person subject to guardianship at the outset of the case; a complaint process for response to guardian conduct; and an advocacy program for adults subject to guardianship using trained volunteers [Recommendation 4.3, National Guardianship Network, 2021].

Non-Judicial Responses

Swift and effective court action is necessary to support and assist good guardians and penalize or remove abusive guardians. But court action alone is not sufficient. Numerous federal, state, and local government entities and non-profit agencies can intervene if a guardianship “goes bad” [Anetzburger & Thurston, 2021]. These include:

- **Adult protective services** – Anyone suspecting mistreatment by a guardian should report to adult protective services. Find your state or local adult protective services agency through the [Eldercare Locator](#). Most states have laws making certain categories of people mandatory reporters of elder or vulnerable adult abuse. A challenge, however, is ensuring that APS consistently responds in these situations, despite the fact that an adult appears “protected” through the court’s appointment of a guardian.
- **Protection and advocacy systems** – Protection and Advocacy Systems are federally-mandated and funded, state-based organizations that work to protect the rights of people with disabilities, including guarding against abuse. Find your protection and advocacy agency [here](#).
- **Long-term care ombudsmen** – If the individual resides in a nursing home or assisted living (or, in some states, receives home- and community-based services), the long-term care ombudsman can investigate and resolve complaints about abuse, neglect, and exploitation, including complaints about guardians. Anyone can file a complaint, but the resident (or an appropriate representative) must consent in order for the ombudsman to investigate and share information. Learn about the ombudsman program [here](#) and [find](#) your local ombudsman.
- **Law enforcement** – A guardian’s breach of duty may violate criminal laws and warrant investigation and prosecution. In addition to reporting to Adult Protective Services, individuals suspecting guardian abuse should report it to law enforcement. Contact your local law enforcement agency, your state attorney general, or call 911. Some recent examples of guardianship fraud cases pursued by the United States Department of Justice include cases in [Pennsylvania](#) and [Florida](#).

- **Attorneys** – Separate from the guardianship system, there are various civil actions that may apply to abuse by guardians. Depending on state law, civil attorneys might bring cases alleging breach of fiduciary duty, breach of contract, fraud, undue influence or a private right of action for elder abuse. Remedies might include restitution (repaying money lost), voiding documents including deeds, or other monetary awards of damages. Some state statutes provide for enhanced damages when the defendant is a fiduciary such as a guardian or conservator.
- **Federal agencies** – If the guardian also serves as a Social Security representative payee or VA fiduciary and is misusing public benefits, individuals may report to the [Social Security Administration Office of the Inspector General](#) or the [VA Office of the Inspector General](#).
- **Professional licensing boards** – In some states, professional guardians may be certified, licensed or registered. State boards can investigate and may revoke a license or certification. If the guardian is a lawyer, the state has a committee that takes disciplinary action when a lawyer violates professional responsibilities.

The field of elder abuse has long recognized the need for a multidisciplinary or multi-systems approach. Multidisciplinary collaborations can be for either: [1] case review; or [2] systemic improvements. Using such elder justice collaborations for systemic improvements appears to have potential for addressing guardianship abuse. However, these multidisciplinary elder abuse or elder justice coalitions – where they exist – have not focused attention on guardianship abuse, and would require significant education and training to do so (Anetzberger & Thurston, 2021). Finally, a perception of conflict of interest may limit court involvement in multidisciplinary teams and coalitions, especially if there is not a clear line between individual case review and systems change.

The 2021 Fourth National Guardianship Summit recognized the need for stakeholder collaboration to address abuse by guardians and improvements in the guardianship system. A Summit recommendation seeks to “promote state and local collaborations at the policy level concerned about elder abuse or guardianship” in “developing protocols for case reporting and management that include the collection and recording of reports made, identification of the lead system responsible, and facilitation of cross-referrals as necessary” [Recommendation 4.4, National Guardianship Network, 2021]. Through such increased communication and coordination, courts and other guardianship stakeholders can support effective person-centered guardianship practices and quash abusive practices.

CONCLUSION

Celebrity cases and exposés of systemwide abuses bring guardianship to the attention of policy-makers and the public. Depending on the case, guardianship can put an end to the mistreatment of an older adult or can trigger abuse by giving overbroad or unnecessary authority – or giving authority to the wrong person – to make decisions on behalf of an adult. Better understanding of this multi-faceted issue can lead to improvements in policy and practice. Increased collaboration among key stakeholders can enhance the wellbeing and safety of adults who need support in making personal and financial decisions.

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Adult Guardianship and the COVID-19 Pandemic: Lessons Learned

INTRODUCTION

The COVID-19 pandemic sent ripples of change throughout the world of adult guardianship. Remote court hearings, facility lock-downs, soaring infection rates, and unexpected deaths drove changes for all guardianship stakeholders, with urgent questions such as:

- *What is or should be an emergency guardianship in the post-pandemic new normal?*
- *Can a guardian ad litem or court visitor fulfill the role virtually?*
- *To what extent have guardianship court proceedings been conducted remotely – and what are the costs and benefits of continuing these remote practices?*
- *Can the court accept virtual capacity assessments? What safeguards are needed?*
- *Is a virtual visit by the guardian an “in-person” visit? Does meeting with the adult remotely affect the nature of decision-making?*
- *Should guardians have plans for a back-up in case they become ill or die?*
- *Should guardians focus additional attention on their duties following death of the adult?*

The pandemic hit hard the populations subject to – or potentially subject to – guardianship. According to the Centers for Disease Control and Prevention, older adults and those with underlying chronic conditions have been far more likely than others to be hospitalized and to die from COVID-19, with adults age 65+ experiencing eight out of ten COVID-19 deaths reported in the U.S. [CDC Older Adults; CDC Medical Conditions, 2021]. Residents in congregate settings such as nursing homes, assisted living, and group homes were highly exposed. CDC reports that about 8% of residents of long-term-care facilities have died of COVID-19 – nearly one in 12. For nursing homes alone, the figure is nearly one in 10 [CDC Long-Term-Care COVID Tracker, 2021]. As of June 1, 2021, there were at least 184,000 deaths [31% of all U.S. deaths from COVID] in long-term care facilities [New York Times 2021].

Moreover, people with dementia have been more likely than others to get COVID, to need hospitalization, and to die from the illness [Wang et al, 2021]. CDC warned that people with limited mobility or who must be in close contact with others, people with difficulty understanding information or taking preventive measures, and people who cannot clearly communicate symptoms have been at increased risk [CDC Disabilities, 2021].

The pandemic left a lasting impact on adult guardianship law, policy and practice – including important adaptations that ultimately could make the system operate more fairly and effectively. In some aspects, the COVID crisis was a creative opportunity for future change. What did we learn? What “resets” are needed in guardianship practice?

One of the biggest lessons learned was about social isolation. The pandemic taught us that connections to family, friends, and the community are essential to health and well-being [Consumer Voice, 2021]. Research shows potentially serious mental health and physical health consequences of loneliness and social isolation [Hwang et al, 2020; Holt-Lunstad, 2020].

The take-away for guardianship is the need for a heightened priority on social connections. Maintaining and building social networks may directly affect financial, residential, and other personal decisions. Court orders, guardian plans, and guardian reports should all reflect this new-found emphasis on social connections as a critical determinant of health.

The pandemic also taught other lessons, as described below. First, because nothing is certain and illness can intervene at any time, it recharged the urgency of using legal tools for advance planning to avoid guardianship if possible. Second, it forced changes in court procedures with both possible pros and cons. Finally, it highlighted guardian practices to better confront crises such as COVID-19 outbreaks.



Spotlight on Advance Planning

Because guardianship can drastically remove an individual’s rights, it should always be a last resort. Less restrictive options enhance personal choice and control. The best alternatives to guardianship are those put in place by an individual who is planning in advance for the possibility that they may someday need help with personal or financial decision-making. COVID-19 made it clear that everyone is vulnerable to unexpected severe illness and death. Many COVID patients became incapacitated and unable to make decisions about healthcare and other personal and financial issues, for days, weeks or months. While many adults still don’t engage in advance planning [Federal Reserve Board, 2013], the pandemic should be a wake-up call to consider planning tools such as the following:

- **Health care advance directives:** These documents explain how a person wants medical decisions made if they are too ill or otherwise unable to make them. A **health care proxy** [also known as a health care power of attorney], one type of advance directive, names someone to make health care decisions if the person cannot. A **living will** explains what treatment a person does or doesn’t want if their life is threatened, including treatments like resuscitation, dialysis, feeding or breathing tubes, and ventilators.

- **Power of attorney:** This legal document allows someone else to manage money and property on a person's behalf. It is a tool for planning for future incapacity because a trusted person [the agent] can stand in for an individual [the principal] who can no longer make or communicate financial decisions. Generally, powers of attorney remain effective after the person loses the ability to make financial decisions. Powers of attorney list the actions that the agent can take, according to the needs of the individual.
- **Living trust:** This is a legal document used by an individual to give someone else legal authority to make decisions about money or property in a trust. In order for a trust to take effect, the individual must put money or property in the name of the trust. The trustee then manages the money or property in the trust if the individual who set up the trust cannot. The trust also says who gets the money or property after the person who created it dies.
- **Supported decision-making agreement.** The more support an adult has with decision-making, the less likely a guardian will be needed. An adult and a trusted supporter may have a written agreement in which the adult makes their own decisions with the supporter's help in: getting needed information; considering options; understanding risks; and communicating their decisions to others [Dinerstein, 2012]. A growing number of state laws provide for recognition of supported decision-making agreements [Pogach, 2020].

In addition, there are ways to influence who a government agency might appoint as decision-maker for benefits if the need arises. For example, people can designate someone in advance to become their Social Security Representative Payee, in case the agency determines in the future that they cannot manage their own benefits [Social Security Administration, 2021].



Changes in Role of the Court

As the pandemic caused shutdowns in almost every aspect of daily life—workplaces, government institutions, schools, retail establishments, medical offices, transportation—courts began to face daunting questions on how to continue their vital role in the face of the public health disaster. State governors issued broad executive orders impacting how the courts would function [Council of State Governments, 2021] and state supreme courts likewise issued orders [National Center for State Courts, 2021], but judges and court administrators had to determine how to handle both initial petitions for guardianship and the ongoing monitoring and decision-making needed for these cases. Examining the challenges courts faced provides an opportunity to strengthen guardianship systems and practices moving forward.

Remote Hearings

With the onset of the pandemic, most state court systems severely limited the types and numbers of proceedings held in person, and even the number of matters heard remotely by necessity decreased substantially. Many guardianship petitions were put on hold and courts held remote hearings in cases that were deemed essential.

Reports from judges, court administrators and others indicated that their courts heard petitions for temporary or emergency guardianship remotely [National Center for State Courts, 2020]. Not surprisingly, many of the circumstances giving rise to these petitions were healthcare-related. Hospitals filed petitions for guardianship to remove life support, discharge patients to make beds available for acutely sick patients, and place hospital patients in nursing facilities. Judges and court personnel needed training on using videoconferencing, protocols to enable the public to observe proceedings, and processes for receiving and sharing exhibits.

As the public health emergency subsides, in-person hearings will undoubtedly resume to a substantial extent. But the courts' experience with remote hearings will likely encourage more widespread remote participation in guardianship cases and have other advantages, as long as there are appropriate safeguards. Probate judges reported that:

- Respondents, including those in nursing facilities, have been able to participate on-screen in videoconference hearings, perhaps in greater numbers than had previously participated in in-person hearings
- Technology problems and delays were minimal, once systems were put in place
- Videoconferencing encouraged some efficiencies, such as submitting and sharing exhibits in advance, which saved time during the hearings
- Remote hearings reduced potential exposure to COVID and other transmissible diseases
- Appointment of counsel in all cases where respondents have not already retained their own attorneys was crucial to ensure that remote hearings are fair and to maximize respondents' participation in hearings [National Center for State Courts, 2020].

Challenges remain. Courts will need to be sensitive to the possibility that third parties in the presence of an individual influence testimony or demeanor without the awareness of the court. Determining the credibility of witnesses by videoconference is harder than in person. But as in so much of post-pandemic life, courts are likely to have hybrid processes. Data collection and evaluation of these new procedures will be crucial to integrate remote processes in ways that are fair and enhance procedural rights.

Changes in the Role of Guardian ad Litem and Court Visitor

Many courts with jurisdiction to hear and oversee guardianship cases rely on individuals to be their “eyes and ears” regarding the general well-being of people subject to or potentially subject to guardianship. A guardian ad litem (GAL) is a person – generally an attorney – appointed by the court to make an impartial inquiry, often in the initial adjudication phase of the case but sometimes at a later point after a guardian has been appointed. A court visitor, also called a monitor or investigator, is someone – often with social work or similar skills – appointed to provide the court with information about a person or guardian.

Typically, a GAL or a court visitor will visit the individual and the proposed guardian in person before a guardianship hearing, but they also may visit after the guardian is appointed, to check on the individual's welfare. During the pandemic, these live visits became impossible for long periods of time, especially when the individual resided in a nursing facility or other congregate setting. Court visitors reported that "window visits" were insufficient and that virtual visits, even when logistically possible, were less than ideal [National Center for State Courts, 2020]. They became more reliant on tangential information, which might undermine the weight of their reports to the court.

As congregate facilities become better at supplying residents with needed technology and assistance, GALs and court visitors may have an easier time performing thorough and sensitive investigations when in-person visits are impossible. While it is essential that GALs and court visitors resume in-person visits, the pandemic taught us that videoconferencing can go a long way to bridge distance and reach isolated individuals when visits are unsafe. GALs and court visitors should continue to use technology to supplement in-person visitation. They should implement strategies to supply individuals with the necessary devices and assistance to make technology viable.

Remote Capacity Assessments

Before a guardian can be appointed, the petitioner must present evidence that the individual lacks capacity to make personal and/or financial decisions. A functional assessment by a qualified professional is an important step in providing the court with the information it needs to make a determination on capacity [National Guardianship Association, 2017]. The court may order an evaluation prior to the hearing. Capacity assessments can also be critical for the court in determining whether to restore an individual's rights by limiting or ending a guardianship.

The pandemic has shown us that public health emergencies can disrupt access to medical and psychological assessment and treatment. Service delivery rapidly shifted to telehealth, and while telehealth has been surprisingly robust, it isn't yet clear that telemedicine can fill all of the gaps – especially for older people and people with disabilities who may lack connectivity, technology and are able to access services remotely.

There's some evidence that clinicians can successfully conduct cognitive testing and other elements of capacity assessments remotely. A geriatric team in Texas began partnering with Adult Protective Services (APS) to conduct remote capacity assessments before the onset of the pandemic. In a large state with massive rural areas, videoconferencing enabled APS and its clinical partners to reach older adults subject to mistreatment and self-neglect, and ascertain whether they had the capacity to consent to or refuse services as well as whether guardianship might be appropriate [Halphen et al., 2020]. Attending physicians at congregate living facilities also have utilized platforms such as Zoom to remotely evaluate the cognitive health of residents [Syre, 2020]. These models do tend to require some personal assistance at the patient's location. For example, in the Texas model, APS staff are on-site with the individual to assess things like the condition of the residence, hygiene of the individual and other things that can't be observed remotely.

Courts and clinicians may never go back to all in-person services. Undoubtedly courts will more often rely on capacity assessments that have been conducted using videoconferencing and other remote techniques. Researchers should investigate the efficacy and reliability of remote capacity assessments, focusing on issues such as:

- whether clinicians can sufficiently observe the patient's demeanor, communication skills, and affect;
- whether others who may be in the presence of the patient might exert influence that distorts findings; and
- whether the evaluator can adequately assess the patient's environment.

Clinicians and court staff should develop practical guidance for attorneys, family members, professionals conducting evaluations and others to enable remote adults to access technology and to enhance the reliability of remote assessments. This guidance should emphasize the importance of using options less restrictive than guardianship and providing decision supports.

Emergency Guardianships

Emergency guardianships are intended for situations in which there would be irreparable harm to a person's health or estate if a guardian is not appointed immediately. Generally, courts hold hearings within a few days of the filing of the emergency petition, and many of the mandated due process procedures are waived due to the need for urgent action. State laws typically provide that emergency appointments are for a limited number of days with limited extensions. If there is a need for the guardianship to continue, courts must ensure that individuals receive the full due process protections articulated in the statute and a full hearing.

While data are lacking, anecdotal evidence suggests that courts saw an uptick in emergency guardianship petitions during the COVID-19 pandemic. This could have been because many courts were only hearing cases involving emergency petitions [so a petition would have to be framed as an emergency to receive action] and because COVID-related health crises required immediate decisions about treatment and placement.

The pandemic's focus on emergency guardianship provides an opportunity to address the threat that emergency guardianship petitions and appointments can pose. Due process protections such as notice to the subject of the petition and family members, and the ability to be represented by an attorney, are vital because guardianship removes such basic human rights. A temporary emergency appointment can result in the imposition or withdrawal of life-sustaining treatment and placement in a nursing home or other institutional setting. The person subject to the petition might not actually be incapacitated, and the person appointed to serve as guardian, even temporarily, might not be the best choice. The emergency guardianship process is often triggered by situations that aren't true emergencies, such as delinquent nursing home bills. Experience has shown that once an emergency petition is granted, a more permanent order is more likely to follow [Hirschel and Smetanka, 2021].

Now is a good time to take steps—involving education, legal and judicial practice, and legislation if necessary—to ensure that emergency guardianships are only granted in true emergencies, that their duration is brief, that the guardian’s powers are tailored to the specific emergency, and that due process is granted as quickly as possible after the order.



Changes in Role of the Guardian

The guardian’s duties and powers are set out in state code, state case law, the National Guardianship Association *Standards of Practices* [NGA, 2017], and any state guardianship standards. The pandemic spotlighted the need for some key shifts in focus in the guardian’s role. Many of these changes are simply good practices that should extend beyond COVID.

Maintain the Adult’s Family and Social Connections

With facility lock-downs, quarantines, and social distancing, guardians have directly witnessed the high costs of social isolation. Guardians have seen adults they were named to protect separated from family and friends – by nursing home and assisted living walls, stay at home orders, and closures of common community meeting places. Society’s precautions to avoid infection at the same time caused devastating loneliness, anxiety, and mental health issues for many thousands of older adults and persons with disabilities. Looking ahead, guardians must heighten their efforts to nurture the individual’s connections to people and groups important to them.

The NGA *Standards of Practice* direct guardians to “promote social interactions and meaningful relationships consistent with the preferences of the person under guardianship.” Further, the *Standards* charge guardians to “encourage and support the person in maintaining contact with family and friends, as defined by the person, unless it will substantially harm the person” [Standard #4].

Guardians can support these contacts through a robust mix of in-person and remote visits. While in-person visits generally are preferable for personal connections, virtual visits can supplement between in-person meetings, and can make long-distance visits possible, extending the circle of contacts.

If the adult subject to guardianship has hearing loss, vision loss or dementia, and is unfamiliar with technology, remote communication may be a challenge. Speaking slowly and clearly, using plain language, and covering only one topic at a time may help the adult to be more comfortable with the on-screen image [NGA et al, FAQs, 2020].

Maintain Guardian Contact with the Adult

All guardians have a clear duty to maintain contact with the adult they are named to support, and to be as up-to-date as possible on the adult's condition, needs, values, and preferences. While state laws and standards vary, the NGA *Standards of Practice* require the guardian to visit the adult “no less than monthly” [Standard #13[IV]].

During the pandemic, many guardians could not visit in person, but sought to remain connected through remote access technology – using laptops, I-pads, Facetime, video chats, text, and other virtual platforms to learn about the adult's current wishes and needs. These devices also can allow the guardian to visually assess the person's condition, connect with care providers, and participate in residential facility care plan meetings. Having forged these technological paths under crisis, guardians should continue using them – to supplement but not supplant – a guardian's in-person visits. This may require the guardian to secure needed technology and internet access for the adult, and to ensure they have necessary help in using it.

Using technology for guardian communications with the adult has clear benefits but may have downsides as well. First, remote visits may not give the guardian the complete picture of the person's needs and circumstances. Seeing the person physically and in their daily environment can make the guardian more aware of health and mobility problems, as well as needed accommodations in the home. Second, using technology for remote contacts may compromise confidentiality. For instance, a nursing home resident may need staff to help in setting up a remote video meeting. Guardians could ask for some private time to talk with the resident; and could use the remote meetings simply to keep in touch between more confidential in-person meetings.

Monitor Residential Settings

The NGA *Standards of Practice* require the guardian to “monitor the residential setting on an ongoing basis and take any necessary action” [Standard #13 [IV] G]. During the pandemic, it was a challenge for guardians to assess long-term care facility infection prevention and control measures as well as overall provision of care in the face of rising COVID cases.

As facilities began to open up and guardians have been allowed back in, there is a continuing responsibility to observe facility practices, ask questions, and identify any critical care gaps. Maintaining a relationship with the facility director and other staff, as well as the local long-term care ombudsman will help. Having the guardian's eyes on the facility will encourage good care.

Respond to Evolving Medical, Social and Financial Developments

The pandemic has brought about new approaches to delivery of services. Medical professionals increasingly are using telehealth consultations. Care managers and social services providers are more frequently connecting with clients via remote access. Guardians must be alert to these approaches. In what circumstance will telehealth work for the adult subject to guardianship, given the adult's condition? Is the adult at a disadvantage in lacking broadband access or computer technology? Does the adult need assistance in linking with providers? Might the adult be subject to frauds or scams in accepting services virtually?

The pandemic also has brought economic tumult and devastation to many. In the midst of soaring evictions, CDC instituted an eviction moratorium, and many states bolstered eviction safeguards. Both federal and state enactments and funding sought to provide wrap-around eviction services and protections. [O’Connell, 2021; Consumer Financial Protection Bureau, 2021]. Guardians must be vigilant as to whether the adult is at risk of eviction, and what resources are available.

Finally, in response to the pandemic, the federal government provided Economic Impact Payments [or “stimulus checks”] and made other benefits and short-term debt relief available to many in need [NGA et al, Frequently Asked Questions, 2020]. Guardians have an obligation to take steps to ensure any such benefits reach those adults subject to guardianship that are eligible to receive them. The NGA *Standards of Practice* require the guardian to “obtain all public and insurance benefits for which the person is eligible” [Standard #18[V].

Identify Back-Up Guardian

Guardians too have been at risk of contracting COVID-19, and the pandemic highlighted the need for guardians to have a back-up plan for who will assume responsibilities if the guardian becomes unable to do so.

A model act, the Uniform Guardianship, Conservatorship and Other Protective Arrangements Act, allows for the “Judicial Appointment of a Successor Guardian or Successor Conservator” [Uniform Law Commission, Sec. 111, 2017]. With a successor guardian, someone would be appointed by the court who will step in to take the place of an existing guardian if the existing guardian dies or is unable to serve. A successor guardian has the predecessor’s powers unless otherwise provided.

State laws vary. Some states provide for the court’s appointment of a “stand-by” guardian to step in when a guardian can no longer serve. For example, Florida law provides for the court to “appoint any standby guardian or preneed guardian, unless the court determines that appointing such person is contrary to the [person’s] best interests.” The Virginia Code allows a petition by a parent, child or guardian of the adult for the court to appoint a standby guardian or conservator, which must be affirmed biennially with the court. The standby guardian or conservator is then authorized to act upon the death or incapacity of the guardian, subject to confirmation by the court.

If the state does not have a stand-by provision, guardians should be prepared to notify the court promptly so the judge can order a temporary substitute.

Exercise Post-Death Authority

While there is no specific data, we know that many adults with guardians died from COVID-19, often unexpectedly – and that these guardians promptly had to assume post-death duties. The lesson learned is that from the time of appointment, guardians need to understand their post-death authority and duties, and be prepared to act immediately following the death of the adult subject to guardianship.

The NGA *Standards of Practice* provide that on the death of the adult, the guardian should “facilitate the appropriate closing of the estate and submit a final accounting to the court” [Standard #18(X)]. Specific guardian duties following the death, in closing the estate, include:

- informing family and friends who are entitled to know, and informing the family about any pre-need funeral planning arranged;
- checking state laws and any directive from the person about the disposition of the body and the funeral arrangements;
- notifying the court of the death;
- filing the final personal status report and/or the final accounting;
- petitioning the court to terminate the guardianship; and
- following state law as to disbursing the estate to the personal representative.

State laws differ as to the guardian’s role in disposition of the body and funeral arrangements. For example, recent legislation in Indiana included the guardian in the list of persons with the right to serve as an authorizing agent in funeral planning [SB 276]. It is always important to contact any family members prior to these arrangements.

State laws also vary as to the guardian’s final duties in distributing the estate to any beneficiaries. The Uniform Act requires the conservator to “deliver to the court for safekeeping any will of the individual in the conservator’s possession and inform the personal representative named in the will if feasible, or if not feasible, a beneficiary named in the will, of the delivery” [Uniform Act Sec. 427]. If after 40 days from the date of death no one has been appointed as personal representative, and no application has been filed with the court, the conservator may apply to exercise the powers and duties of a personal representative and to administer and distribute the estate.

Many states track these Uniform Act provisions, requiring the conservator to deliver the will to the court for safekeeping, and allowing the conservator to administer the distribution if no one else comes forward in a given period. Some states have no such provision, and guardians or conservators should seek guidance from the court.

CONCLUSION

Tragic as it was, the pandemic drove changes in adult guardianship policy and practice that have the potential for improvements for courts, stakeholders and for the lives of vulnerable individuals. Now is the time to evaluate those changes carefully, refine them with any needed safeguards, and incorporate them toward a more just, fair and person-centered process.

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Ten Ways to Reduce Guardianship Abuse

Through Enactment of the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA)

INTRODUCTION

What guardianship laws could states adopt to best address guardianship abuse? Can a model state guardianship law make a difference?

Guardianship is the appointment by a court of one person or entity to make personal and/or property decisions on behalf of another whom the court determines is unable to make such decisions. Guardians make important life choices for at-risk adults with diminished decision-making capacity. Courts appoint guardians for the adult's protection, yet at the same time, the appointment strips the person of fundamental rights.

Guardianship is governed by state statutes, which may be modified by state legislation from year to year [American Bar Association Commission on Law and Aging]. The Uniform Law Commission [ULC], established in 1892, "provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law" [Uniform Law Commission]. The ULC published its first uniform law on guardianship in 1969 and approved the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act [UGCOPAA, or "the Act"] in 2017. The Act improves upon most current state guardianship laws with strong protections for adults subject to guardianship. It is available now for adoption by state legislatures. In fact, the Act has already been enacted in two states – Maine and Washington [Uniform Law Commission], and five other states have adopted parts of the Act.

One key theme throughout the Act is the targeting of guardianship abuse. While many guardians are dedicated fiduciaries, an unknown number take advantage of those they were named to protect [Karp & Wood, 2021]. We have very little data on the extent of such abuse, but abusive guardians have been profiled in numerous media stories over the past three decades. The Act offers a set of tools to reduce opportunities for abuse, and better protect the rights and needs of individuals subject to guardianship.*

*State terminology varies. In this Brief, the generic term "guardianship" refers to guardians of the person as well as guardians of property, frequently called "conservators" unless otherwise indicated. In UGCOPAA, the term "guardian" refers to a person appointed to make decisions about personal affairs whereas "conservator" refers to a person appointed to make decisions about property or financial affairs [UGCOPAA Section 102]. Some of the UGCOPAA provisions cited in this Brief relating to guardianship have counterparts for conservatorship.

1

Grievance Procedure

How can an adult subject to guardianship communicate to court their concerns about the guardian's conduct?

A number of states have enacted guardianship complaint procedures. The National Probate Court Standards urge courts to establish “a clear and easy-to-use process for communicating concerns...” [Van Duizend & Uekert, 2013].

The Uniform Act's Section 127 creates a process for anyone interested in the welfare of an adult subject to guardianship to bring grievances about a guardian to the attention of the court without a formal petition or motion. The grievance could be based on a guardian's breach of fiduciary duty, or could be seeking termination of the guardianship and restoration of the adult's rights. For instance, in one case, the person subject to guardianship sent a handwritten note to the court saying “I feel very competent to take care of myself. I request that all my civil rights be restored” [Wood, Teaster, Cassidy, 2017].

Under Section 127 of the Act, the court, after receiving a written grievance about a guardian, must review the grievance and any related court records, and schedule a hearing if “the grievance supports a reasonable belief” that removal of the guardian or termination of the guardianship may be appropriate. The court may take action supported by the evidence including ordering the guardian to provide a report or other information, appointing a guardian ad litem, appointing an attorney for the individual, or holding a hearing. Notably, to avoid unnecessary burdens on the court, if the same or similar grievance was filed within the preceding six months and the court followed the Act's procedures, the court may decline to act.

2

Notice of Key Changes in the Case

How can courts remain informed about the needs of an adult subject to guardianship, and whether there is any risk of abuse?

Most states require guardians to file annual reports. While annual reports can bring certain concerns to light, they may not always be timely filed, may not include key information –and much can happen in the year between report filings. Often family members and friends will have more timely information about the person's changing condition and needs – and may be able to report to the court about any abuse by guardians. They can provide the court with valuable information if they are regularly notified of key case events. The Act includes an innovative provision that, as explained in the Prefatory Note, allows certain named persons such as family members to “serve as an extra set of eyes and ears for the court.”

Section 310(e) requires the court appointing a guardian to name anyone who cares about the adult's welfare to receive copies of essential documents such as the notice of rights of the adult and notice of a change in the adult's primary dwelling. Those identified are also entitled to a copy of the guardian's plan, access to court records about the case, notice of the adult's death or significant change in health, notice that the court has modified the guardian's powers, and notice of the guardian's removal. For little or no cost to the court, this new approach will enable the court to better monitor the guardian and determine at an early stage whether the guardian is abusing, neglecting or exploiting the adult.

3

Selection of Residential Setting

How should a guardian decide where the adult subject to guardianship will live? What safeguards should target a move to a nursing home or other restrictive setting, or a move across state lines?

One important power that a guardian has is the authority to make choices about where the person will live. Decisions about moving to a nursing home are particularly fraught, since a nursing home may isolate the person from family and friends, increase exposure to infectious diseases such as COVID, and may provide poor quality care. Moreover, living in an institution may be counter to the person's wishes [Hirschel & Smetanka, 2021].

Section 314(e) of the Act instructs guardians to choose the residential setting that the adult would select if able. If the guardian cannot determine what the person would want, or if the individual's choice would cause the adult unreasonable harm, the guardian may choose a setting based on the adult's best interest. The guardian must give priority to living situations that will allow the individual to continue important social relationships and that won't impose any unnecessary restrictions. Also, the guardian must give notice of any change in residence to the court, the individual adult, and anyone else required by the court, within 30 days after the change. These provisions work to protect the adult from isolation and overly restrictive settings, and ensure that the court and other important people know where the person is living.

For permanent moves to particularly restrictive settings such as nursing homes and mental health facilities, the Act allows the guardian to make the change only if the move was in the guardian's plan, was specifically authorized by the court, or the individual and certain others received advance notice and did not object. Similar criteria are required before the guardian may sell the person's home or give up the person's residential lease. These provisions can help guard against unduly restrictive and potentially harmful changes in residence.

Finally, a guardian may not move the individual out of state unless the court authorizes the move and it was disclosed in the guardian's plan. This provides further protection against isolation from family, friends and community – and efforts to hide the guardian's actions from watchful eyes.

4

Precedence of Powers of Attorney

How can an adult's prior choice of a health or financial decision-maker be honored once the court appoints a guardian?

Advance planning for needed health care and/or financial decision-making enables an adult to have a trusted surrogate who is familiar with their values and preferences. Individuals may execute advance planning documents such as health care powers of attorney and financial powers of attorney. Ideally, such documents could make guardianship unnecessary, but sometimes a court nonetheless appoints a guardian.

Section 315(a) of the Act provides that if the individual subject to guardianship has previously executed a power of attorney for health care or finances, the guardian cannot revoke it without a court order. Moreover, the decisions of an agent under a valid power of attorney take precedence over the decisions of a guardian unless a court orders otherwise. The Act requires guardians to cooperate with agents under powers of attorney to the extent feasible.

This provision helps protect adults in several ways. First, it helps ensure that the individual's choice of a trusted surrogate decision-maker is respected – which in turn could enhance quality of life and protect against detrimental health or financial decisions. In addition, this section discourages people from filing a guardianship petition for the sole purpose of displacing a fiduciary who is carrying out the individual's wishes. Such conflicts, often among siblings or other family members, can be damaging to a person who has made prior choices and, who sought to preserve autonomy. Finally, since powers of attorney can be misused, the provision includes a safety valve against abuse by agents under a power of attorney. If the court believes the agent's conduct is abusive, the court can empower the guardian to override the agent's authority.



Limitations on Communication and Visitation

How can an adult subject to guardianship safely retain the right to interact with family and friends if they want to do so?

COVID brought to the fore the devastating effects of isolation. Social isolation and loneliness can cause psychological and emotional harm, impact physical health, and may even increase mortality [Holt-Lunstad et al., 2015]. There have been growing concerns about guardians improperly isolating adults subject to guardianship and keeping them from interacting with family, friends and others who are important to them. States have wrestled with this controversial issue, highlighted in several key celebrity cases [Pogach, 2018].

Section 315(c) of the Act strongly limits a guardian's ability to restrict the adult's interaction with others. It recognizes that adults subject to guardianship have a right to these interactions. This right can only be curtailed in extremely limited circumstances. The person retains the right to communicate, visit and interact with others unless the guardian is authorized to restrict these interactions in a specific court order concerning a particular person or a very specific category of persons. Short of a court order, a guardian who has good cause to believe that interaction with a specific person poses a risk of significant physical, psychological or financial harm may restrict contact only: (a) for no more than seven days if there is a family or pre-existing social relationship; or (b) for no more than 60 days if there is no family or pre-existing relationship.

In addition to reducing the impacts of isolation, this provision enables family and friends to serve as “eyes and ears” on the person subject to guardianship, protecting them from possible mistreatment by the guardian or others in their environment. At the same time, it allows the guardian to protect the individual from harmful contacts by imposing short-term limits on specific interactions when absolutely necessary, and seeking a court order where a more permanent ban is warranted. In essence, the Act offers a workable balance that respects an adult's right to social interaction while it protects from the risk of possible harm.

6

Submission of Reports and Accounts, and Court Monitoring

What information must the guardian share with the court, the person subject to guardianship, and other interested parties? What responsibilities does the court have to monitor the guardian's conduct?

Court monitoring of guardianship cases is crucial to ensure that the guardian does not mistreat the person, mishandle the money and property, or otherwise fail to carry out their fiduciary duties—and to take action if abuse takes place [Hurme & Robinson, 2021]. Monitoring includes a spectrum of post-appointment events such as:

- Ensuring that plans, reports, inventories, and accountings are filed on time
- Reviewing promptly the contents of all plans, reports, inventories, and accountings
- Independently investigating the well-being of the individual and the status of the finances as needed
- Improving the performance of the guardian and enforcing the terms of the order, and
- Considering whether a less restrictive option would be appropriate [Van Duizend & Uekert, 2013].

Section 317 of the Act lays out a series of responsibilities of the guardian and the court. Within 60 days of appointment and annually thereafter, the guardian must file reports with the court on the condition of the person, as well as their funds and other property within the guardian's control. The Section includes a detailed description of 14 elements the report must include. The adult subject to guardianship and others designated by the court have the right to receive a copy of the report no later than 14 days after it is filed.

The court must establish procedures for monitoring reports and must review each report at least annually. If the court determines that the guardian may have failed to comply with their duties, the court must notify the adult and others, may appoint a “visitor” (investigator) to interview the parties and investigate other matters. The court may hold a hearing on whether the guardian should be removed, the guardianship terminated, or other changes made. The court can also determine whether to adjust the fees requested by the guardian.

Section 317's reporting requirements enable the court to oversee the guardian's activities in a meaningful way. They also allow the adult and key third parties to get a detailed picture of how the guardian is carrying out their responsibilities and determine whether there is any abuse, neglect or exploitation. The goal is to make the guardian's conduct as transparent as possible. This section also places specific responsibilities on the court to oversee the guardian's conduct and states that the court must act if the guardian hasn't complied with statutory mandates. It gives the court tools for investigating any suspected wrongdoing and for taking action if there is evidence of malfeasance, including removing the guardian or ending the guardianship.

7

Court Removal of Guardian

How does the court determine whether to remove a guardian for failure to perform the guardian's duties?

To protect individuals subject to guardianship, courts must have the power to remove a guardian and appoint a new one if the guardian abuses the adult under their care or otherwise fails to perform required duties. It is important for the adult –and others with knowledge of the guardian's performance – to have a clear route to bring evidence of malfeasance to the attention of the court and to trigger a hearing.

Section 318 empowers the court to remove a guardian for dereliction of duty or other good cause. It states that the court must hold a hearing to determine whether to remove a guardian and appoint a successor guardian under three specified circumstances:

1. If the individual, the guardian or another person interested in the welfare of the person petitions for removal and makes allegations that, if true, would support removal;
2. If any person communicates to the court information that would support a reasonable belief that removal is in order: or
3. If the court determines that a hearing would be in the best interests of the individual.

These provisions allow multiple parties to bring relevant information to the court's attention and ensure that a hearing will be held once someone communicates information that would form a basis for removal if true. Section 318 also gives the adult subject to guardianship the right to choose an attorney to represent them in the matter of removal, which may increase the likelihood that evidence of mistreatment is presented to the court. The court must award reasonable fees to the attorney.

8

Conservator Bond

How can the court protect an individual subject to conservatorship* against financial exploitation by the conservator?

One way to protect an individual against conservator exploitation is by requiring the conservator to furnish a bond. A bond functions somewhat like an insurance policy: if the conservator financially exploits the individual, the court can call in the bond and the individual can be repaid for funds lost.

Section 416 of the Act mandates that the court either: [a] require a conservator to furnish a bond; or [b] make an alternative asset-protection arrangement such as restricting conservator access to an account above a specified amount. The court can only waive this requirement if it finds that a bond or other arrangement is not necessary to protect the individual's interests. The court can never waive the bond if the person is in the business of serving as a conservator and is being paid. The provision specifies a formula for determining the amount of the bond.

Mandating a bond or alternative arrangement protects the person under conservatorship by providing a remedy in case the conservator subsequently misappropriates funds or engages in exploitation. Allowing an alternative asset-protection arrangement enables the court to appoint as conservator a family member or friend who is unable economically to obtain bond [such as someone with a poor credit rating] but who the court believes is nonetheless best suited to serve.



Determination of Reasonable Guardian Fees

What is a fair guardian’s fee? How can we reduce the chances of guardians overcharging the estate?

According to state statutes, guardians are entitled to reasonable fees, subject to the court’s approval. Often these fees are paid from the estate of the person subject to guardianship. But what is a “reasonable fee” and what services fall within the scope of payment? Sometimes guardians “[run] up their fees in ways large and small, eating into seniors’ assets”

[Heisz, 2021]. Press headlines such as “Rights and Funds Can Evaporate Quickly” tell sad tales of exploitation through inappropriate charges for guardianship services.

Section 120 of the Act sets out seven factors for the court to consider in determining whether a fee is reasonable – beginning with “the necessity and quality of the services provided” and “the experience, training, professional standing, and skills of the guardian or conservator.” One important factor is “the effect of the services on the individual subject to guardianship or conservatorship.”

There are two especially notable features of Section 120. First, it addresses the scenario in which the guardian is an attorney and charges their standard rate for legal services, generally higher than rates normally charged by guardians. One of the factors the court must consider is “the fees customarily paid to a person that performs a like service in the community.” The Act’s Commentary points out that pursuant to this provision, when an attorney guardian performs a function that does not require legal expertise, the hourly fee generally should be lower. “For example, attorneys should not receive their standard hourly rate to accompany an individual subject to guardianship on a routine personal care appointment or to grocery shop for the individual.”

Second, the section addresses situations in which the guardian opposes a modification or termination of the guardianship and restoration of rights to the individual, and the guardian charges a fee for the time spent in opposition. Under Section 120, the court may not order compensation for this time unless “the court determines the opposition was reasonably necessary to protect the interest of the individual...”



Protective Arrangements

What if an older adult needs a court order for a specific protective action, but doesn’t need an ongoing guardianship that strips them of rights, often for the rest of their lives?

Article 5 of the Uniform Act creates an alternative to guardianship and conservatorship called a “protective arrangement.” This allows the court to craft a specific order tailored to the particular needs of the individual – generally narrower in scope and shorter in time than an ongoing guardianship or conservatorship order. To use a protective arrangement instead of a guardianship or conservatorship, the court must first find that the adult is unable to make or communicate decisions even with appropriate supportive services, technological assistance or supported decision making, just as with guardianship –but the adults needs can be met by authorizing a specific action rather than a continuing guardianship.

Such specific court authorizations may target possible abuse or exploitation. For example, the court may order visitation or supervised visitation to be allowed with a family member, friend or other individual the person wants to see – or may restrict visitation by a specified individual who could put the person at risk of harm. The court may also, instead of conservatorship, direct a range of financial transactions, some of which could target exploitation. For instance, the court could ratify or invalidate a contract, trust or will, or restrict access to estate property by a specified person whose access may cause financial harm.

Additionally, Section 503(d) of the Act includes a special provision aimed at “undue influence” (although the term is not used in the Act’s provision). Undue influence is “a process that occurs when one person [influencer] uses his or her role and power to exploit the trust, dependency, and fears of another person [victim] in order to gain control of that person’s decision making” (American Bar Association Commission on Law and Aging & American Psychological Association, 2021). Diminished capacity is not an element of undue influence. Any adult can be unduly influenced, although diminished capacity may make a person more susceptible.

Under Section 503(d), the court may issue an order to restrict access to the person’s property by a specified individual, *without* a finding of need for a conservator, if the court determines that “through fraud, coercion, duress, or the use of deception and control” the individual caused or tried to cause financial harm or poses a risk of substantial financial harm to the person. This allows the court to design tailored remedies for a situation in which a person may be unduly influenced. For example, the court could authorize application for public benefits, change title to an account, or order automatic online payment of bills – without the restriction of rights entailed with a conservatorship.

CONCLUSION

There are many reasons why a state might adopt provisions of the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act. The Act is built on person-centered principles. It protects rights. It sets out clear guidance to guardians and courts. It puts a strong emphasis on use of less restrictive options. It also targets guardianship abuse, through the ten provisions described in this brief. Enacting and fully implementing one or more of these provisions should help trigger a reduction in abuse or exploitation by guardians – and passage of the Act as a whole, with enforcement, could bring about real change.

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