**Adult Guardianship**

**Eric Wood**

**III. Adult Guardianship Reform**

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**Judicial Determination of Capacity of Older Adults in Guardianship Proceedings, A Handbook for Judges**

ABA Commission on Law and Aging and American Psychological Association (2005)

pp. 3-14

**Overview of Capacity Assessment**

A comprehensive assessment of capacity for guardianship proceedings requires collecting information on six factors. In this book, these factors will be referred to as the “Six Pillars of Capacity Assessment.” Information about these factors may be obtained from healthcare professionals, court investigators, guardians ad litem, family members, adult protective service workers, and other involved parties. This book describes the six pillars of capacity assessment and how they inform each judicial action step in adult guardianship proceedings. Links to related model forms and resources are provided throughout the book.



**Six Pillars of Capacity**

1. **Medical Condition Producing Functional Disability**

• Historically, many state statutes included “physical illness” or “physical disability” as a sufficient disabling condition, and some opened a very wide door by including “advanced age” and the catch-all “or other cause.” Such amorphous and discriminatory labels invited overly subjective judicial determinations.

• Today, judges require information on the specific disorder causing diminished capacity. With aging, a wide range of neurological and psychiatric conditions may impact capacity.

• Some conditions are temporary and reversible.

1. **Cognitive Functioning Component**

• “Cognitive functioning” is a component of statutory standards for capacity in many states.

• The 1997 UGPPA defines an incapacitated person as an individual who … is **unable to receive and evaluate information or make or communicate decisions to such an extent** that the individual lacks the ability to meet essential requirements for physicalhealth, safety, or self-care, even with appropriate technological assistance.

• Cognitive functioning includes alertness or arousal, as well as memory, reasoning, language, visual-spatial ability, and insight. Neurological as well as psychiatric or mood disorders may impact information processing.

1. **Everyday Functioning Component**

• Until recent years, the everyday functioning tests found in state law were fairly vague and subjective, such as “incapable of taking care of himself”; “unable to provide for personal needs and/or property management”; or “incapable of taking proper care of the person’s self or property or fails to provide for the person’s family.”

• Vague standards invite judgments of incapacity based upon the court’s opinion of the reasonableness of one’s behavior—essentially, a subjective test.

• Many states now set a higher and more objective bar for weighing functional behavior by focusing only on one’s ability to provide for one’s “essential needs,” such as “inability to meet personal needs for medical care, nutrition, clothing, shelter, or safety.”

• Healthcare professionals divide everyday functioning into the “activities of daily living” or “ADLs” (grooming, toileting, eating, transferring, dressing) and the “instrumental activities of daily living” or “IADLs”—abilities to manage finances, health, and functioning in the home and community.

1. **Consistency of Choices with Values, Preferences, and Patterns**

• Capacity reflects the consistency of choices with the individual’s life patterns, expressed values, and preferences. Choices that are linked with lifetime values are rational for an individual even if outside the norm.

• Knowledge of values is not only important in determining capacity, but also in the guardianship plan. The UGPPA provides that a guardian must “consider the expressed desires and personal values of the [individual] to the extent known to the guardian.”

• Core values may affect the individual’s preference for who is named guardian, as well as preferences concerning medical decisions, financial decisions, and living arrangements.

1. **Risk of Harm and Level of Supervision Needed**

• Most state statutes require that the guardianship is necessary to provide for the essential needs of the individual (i.e., there are no other feasible options), or that the imposition of a guardianship is the least restrictive alternative for addressing the proven substantial risk of harm.

• The social and environmental supports may decrease the risk. Lack of supports may increase risk. In this manner, the degree of risk is not merely a consideration of the condition and its effects, but the consideration of these within the environmental supports and demands.

• The level of supervision determined by the judge must match the risk of harm to the individual and the corresponding level of supervision required to mitigate that risk.

• In some cases, the risk is low and the need can be addressed through a less restrictive alternative or limitation to guardianship. In other cases, less restrictive alternatives have failed or are inappropriate, and a plenary guardianship is necessary to protect the well being of the elder.

1. **Means to Enhance Capacity**

• The judge must be vigilant for means to enhance capacity through practical accommodations and medical, psychosocial, or educational interventions.

• The mere existence of a physical disability should not be a ground for guardianship, since most physical disabilities can be accommodated with appropriate medical, functional, and technological assistance directed by the individual.

• Information about enhancing capacity informs many judicial actions:

• **Hearing**. How to maximize capacity at the hearing.

• **Review Period**. What is the appropriate period for judicial review, especially if **restoration** of capacity through treatments is possible.

• **Plans**. What treatments, services, habilitation should be detailed in the guardianship plan.

**Judicial Determination of Capacity of Older Adults in Guardianship Proceedings**

**Step One: Screen the Case**

**1a. Review Trigger**

• *What is bringing this case to court now?*

• Identify the immediate issue or occurrences that brought the case to court at this time—for example, a question of institutional placement, sale of property, medical treatment, or financial exploitation.

• Ensure that the triggering issue concerns protection of the individual, and is not for the convenience or benefit of a third party, such as a family, heir, hospital, or nursing home. Judges may address the concerns of other parties, but “the interests of the incapacitated person should take precedence.”

**1b. Determine if Guardianship Is Potentially Appropriate**

• *Have all procedural requirements been met?*

• Is venue proper?

• Are notice and service proper?

• Has counsel been appointed if required or if needed?

• Has individual been informed of hearing rights?

• *Is guardianship necessary and helpful in this case?*

Put a mechanism in place to screen out cases that are inappropriate for guardianship. Some courts have designated staff to work with petitioners, ensuring that cases that come before the court for judicial intervention are necessary and that petitioning the court for guardianship is, in reality, a last resort. Seek to determine that:

► There are no **less restrictive alternatives**. Perhaps the individual has executed durable health care and financial powers of attorney, and there is no allegation of abuse of those powers. Perhaps the only issue is authority for medical treatment and the state has a default surrogate law allowing family members to make health care decisions. Perhaps a more supervised housing setting or intensive in-home services would abrogate the need for a guardian.

► A guardian **would solve the issue**. There are some situations where putting a guardian in place would not address the problem at hand. “Guardianship is not appropriate in some circumstances. A probate guardian cannot make a person reveal where assets, such as vehicles are hidden, cannot [in some instances] force mental health treatment, cannot provide personal services if the person is never at home, is threatening, locks caregivers out of the home, or is homeless by choice.”

**1c. Determine if Immediate Risk of Substantial Harm**

• *Is this a case of “emergency” guardianship?*

• A guardianship case may come before the judge as a petition for emergency guardianship. For example, there is need for an urgent medical procedure and no one to provide informed consent, or there is a family dispute and someone is seeking to “kidnap” the individual to an unknown location. Most states, as well as the UGPPAand the *National Probate Court Standards* have provisions for emergency guardianship.

• In some states, and in the *UGPPA*, the appointment of an emergency guardian is *not a finding of diminished capacity*, or evidence that a permanent guardian is needed.

• Because time is of the essence, procedural requirements for emergency guardianships are less than for permanent guardianship. Thus, it is important to exercise **caution**.

• Be sure the case presents a **true emergency** according to state law. That is, the individual’s health, safety, or welfare will be substantially harmed over the time it takes for compliance with regular guardianship procedures.

• Be sure the emergency guardianship does not become an **automatic doorway** to permanent guardianship that bypasses procedural safeguards.

**Step Two: Gather Information**

**2a. Receive Reports**

• Information about the case may be brought by many parties.

• A **Court Investigator Report** (a guardian ad litem or other court investigator or visitor—the use of these terms varies by jurisdiction) may be required or requested. As the eyes and ears of the court, the investigator can identify the triggering issue, less restrictive alternatives, risk of harm, whether there is a need for clinical evaluation, whether the individual requires counsel, the family situation, who might provide important testimony, and suggestions for limitations to guardianship and/or elements of a guardian plan, as well as evaluate the six pillars of capacity.

• A **Clinical Evaluation Report** may be required or requested. A comprehensive evaluation will cover all six pillars of capacity, namely: the medical condition, cognitive functioning, everyday functioning, values and preferences, risk and level of supervision needed (including social support), and means to enhance capacity at the hearing and later.

• Families and other lay persons may submit affidavits providing important information.

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**2b. Ascertain if More Information Is Necessary**

• After reviewing the information, further assessment or investigation may be necessary for the following reasons:

► **State statutory requirements**. State statutes set out the necessary elements of a clinical evaluation, which generally reflect the elements in the state definition of “incapacitated person.” For specific statutory requirements of clinical evaluations, see <http://www.abanet.org/aging/guardianship.html>.

► **Red flags signaling need for more in-depth information**. If the individual has temporary or reversible causes of cognitive impairment or other mitigating factors that have not been addressed, a more sophisticated and in-depth evaluation is warranted.

► **Clinical statement appears one-sided**. A clinical evaluation secured by the petitioner is for the purpose of supporting the petition and may lack attention to the individual’s areas of strength, a prognosis for improvement, or important situational factors. An independent assessment can flesh out skeletal or purely one-sided information.

**2c. Obtain Additional Reports**

• If a review of the information reveals that information is not available on all six pillars of capacity assessment or has other shortcomings, then more information must be obtained from the clinician, court investigator, family, or other informants. a model order for independent evaluation.

• A judge may need to order an independent and more comprehensive evaluation by a clinical professional.

**Step Three: Conduct Hearing**

**3a. Take Judicial Note of Reports**

The judge by his or her own motion may recognize the report of the guardian ad litem, or physician’s report or other clinical statement, and admit them into evidence.

**3b. Receive Testimony**

The judge may receive testimony from witnesses, such as relatives, friends, neighbors, care providers, geriatric care managers, or others, called by the petitioner or the individual who is the subject of the petition. The individual, him or herself, may or may not speak. In some jurisdictions and in some cases, the guardian ad litem or court investigator makes a statement

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**3c. Accommodate, Observe, and/or Engage the Individual**

• The individual has **a right** to be present at the hearing.

• About half of the state laws and the UGPPA **require** that the individual be present unless good cause is shown.

• **The individual’s presence is encouraged as it:**

• Allows his or her involvement in the proceedings. Often, people may want their “day in court” and feel more satisfaction from the hearing if they are present and involved, whether a guardian is appointed or not.

• Allows the judge an opportunity to observe, personally, the individual.

• May shed a different light on the case.

• **The individual may not be present if:**

• A medical condition prevents it (e.g., person is in a coma).

• The individual does not wish to come.

• To determine if the individual can attend, obtain clinical or court investigative reports concerning the individual’s presence at the hearing. Assessments of whether attendance at the hearing would be harmful or not realistically possible may be included in the petition, clinical evaluation form, or court investigator report.

• **The following questions may guide this process:**

• Does the individual want to be present?

• Would it be harmful in any way?

• Would the individual understand at least some of the proceeding?

• Would the individual be able to communicate in court?

• What accommodations are needed (e.g., hearing amplifier, move location of hearing) to maximize participation?

The individual and his or her attorney will determine whether the person becomes a witness. However, in an uncontested case, the judge may gain insight and/or may make the person feel involved by engaging him or her with a few questions.

**Step Four: Make Determination**

**4a. Analyze Evidence in Relation to Elements of State Law**

**1. The Medical Condition**

*What is the medical cause of the individual’s alleged incapacities and will it improve, stay thesame, or get worse?* Based on up-to-date clinical reports, determine the cause of thediminished capacity. Depression and delirium are often mistaken for dementia and need to beruled out.

**2. Cognitive Functioning**

*In what areas is the individual’s decision-making and thinking impaired and to what extent?* Consider whether the individual is lucid or confused, alert or comatose, or can understandinformation, communicate, or can remember information over time. Consider areas of strengthand weakness and the severity of impairment.

**3. Everyday Functioning**

*What can the individual do and not do in terms of everyday activities? Does the individual have the insight and willingness to use assistance or adaptations in problem areas?* Can theperson:

**Care of Self**

• Maintain adequate hygiene, including bathing, dressing, toileting, dental

• Prepare meals and eat for adequate nutrition

• Identify abuse or neglect and protect self from harm

**Financial**

• Protect and spend small amounts of cash

• Manage and use checks

• Give gifts and donations

• Make or modify a will

• Buy or sell real property

• Deposit, withdraw, dispose, or invest monetary assets

• Establish and use credit

• Pay, settle, prosecute or contest any claim

• Enter into a contract, financial commitment, or lease arrangement

• Continue or participate in the operation of a business

• Resist exploitation, coercion, undue influence

**Medical**

• Make and communicate a healthcare decision or medical treatment

• Choose health facility

• Choose and direct caregivers

• Make an advance directive

• Manage medications

• Contact help if ill or in a medical emergency

**Home and Community Life**

• Maintain minimally safe and clean shelter

• Be left alone without danger

• Drive or use public transportation

• Make and communicate choices about roommates

• Initiate and follow a schedule of daily and leisure activities

• Travel

• Establish and maintain personal relationships with friends, relatives, co-workers

• Determine his or her degree of participation in religious activities

• Use telephone

• Use mail

• Avoid environmental dangers, such as the stove and poisons, and obtain appropriate emergency help

**Civil or Legal**

• Retain legal counsel

• Vote

• Make decisions about legal documents

• Other rights under state law

**4. Consistency of Choices with Values, Patterns, and Preferences**

*Are the person’s choices consistent with long-held patterns or values and preferences?* Each of the above factors must be weighed in view of the individual’s history of choices and expressed values and preferences. Do not mistake eccentricity for diminished capacity. Actions that may appear to stem from cognitive problems may in fact be rational if based on lifetime beliefs or values. Long-held choices must be respected, yet weighed in view of new medical information that could increase risk, such as a diagnosis of dementia. Key areas to consider include matters such as:

• Does the individual want a guardian?

• Does the individual prefer that decisions be made alone or with others?

• Whom does the individual prefer to be guardian/make decisions?

• What makes life good or meaningful for an individual?

• What have been the individual’s most valued relationships and activities?

• What over-arching concerns drive decisions—e.g., concern for the well-being of family, concern for preserving finances, concern for maintaining privacy, etc.?

• Are there important religious beliefs or cultural traditions?

• What are the individual’s strong likes, dislikes, hopes, and fears?

• Where does the individual want to live?

**5. Risk of Harm and Level of Supervision Needed**

*What is the level of supervision needed? How severe is the risk of harm to the individual?* Determine what degree of supervision will address the individual’s needs and mitigate the riskof harm.

**6. Means to Enhance Functioning**

*What treatments might enhance the individual’s functioning?* Consider if treatments for the underlying condition might improve functioning. Notice whether the individual might be able to use technological aids to maintain independence. Key interventions are:

• Education, training, or rehabilitation

• Mental health treatment

• Occupational, physical, or other therapy

• Home or social services

• Medical treatment, operation, or procedure

• Assistive devices or accommodation

**4b. Categorize Judgment and Make Findings**

• There is no simple formula that will help judges make the determination. The following broad classification could serve as an initial schema:

→ If **minimal or no** incapacities, petition not granted, use less restrictive alternative.

→ If **severely diminished** capacities in all areas, or if less restrictive interventions have failed, use plenary guardianship.

→ If **mixed strengths and weaknesses**, use limited guardianship.

• When appropriate (or if required by law), a concise written record of the key findings and rationale for the judge’s decision will serve as:

• the basis for any appeal;

• the basis for limiting the guardianship order; and

• the basis for an effective plan to serve the individual’s needs

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**4c. If Limited Order, Identify Rights Retained and/or Removed**

• The cases in which there are “mixed areas” of strengths and weaknesses present the greatest challenge—and the greatest opportunity—for the “judge as craftsman” to tailor a limited order to the specific needs and abilities of the individual.

**4d. Identify Statutory Limits of Guardian’s Authority**

• State guardianship statutes, honed by state case law, will set the start-point on which to base the scope of the court order. Statutes vary in the extent of rights and duties automatically transferred to the guardian.

• In many states, most or all rights are transferred to the guardian unless retained with the incapacitated person by court order.

• In other states, all rights are retained unless specifically transferred to the guardian by court order.

• Some statutes carve out basic rights that are retained by the individual unless the court orders otherwise—such as the right to vote or the right to make a will.

**Step Five: Ensure Court Oversight**

**5a. Monitor Changes in Capacity and Guardian Actions**

• Court monitoring of guardianships has many critical functions, one of which is monitoring changes to the individual’s level of capacity.

• **Short-term Review of Capacity**

If the individual’s level of capacity may improve soon with treatment (e.g., for subdural hematoma after a fall), the guardianship should be referred for review within a short time period.

• **Annual Review of Capacity**

Unlike with probate of decedents’ estates, in guardianship there is a living being whose needs may change over time, may last for many years, and may include excruciatingly complex decisions about medical treatment, placement, and trade-offs between autonomy and beneficence. An initial assessment on which the court made an original order may no longer be valid and a re-assessment may be required. A limited order or guardianship plan may require revision. Annual reports should note changes in capacity.

**5b. Instruct Guardian**

• The guardian can be provided immediate instructions by the court, which may include the frequency of reporting and the requirement to submit a guardianship plan.

• A guardianship plan, required in some jurisdictions, is a forward-looking document in which the guardian describes to the court the proposed steps to be taken for care of the individual. A guardianship plan provides an avenue to promote individual autonomy and rights, as well as to strengthen accountability. Guardianship plans are useful because they:

► Establish a baseline against which subsequent reports can be measured.

► Reflect care-planning for nursing home residents under federal regulations.

► Allow for minor changes without consulting the court, but would require court approval for any substantial adjustments.

• Guardianship plans should involve the incapacitated person to the extent possible to outline the services and strategies that will be used to implement the order, including, most importantly, how those rights retained in limited orders will be ensured. Even where legal consent is not possible, the assent of the person should be sought.

• Guardianship plans can detail treatments and services and the values that should guide future decisions as have been discovered in the clinical and court investigative reports.

**In Brief, Guardianship Monitoring: A National Survey of Court Practices**

Naomi Karp and Erica Wood

AARP Pub. Policy Instit. (2006), pp. 1-2

This *In Brief* summarizes the findings of the AARP Public Policy Institute report, *Guardianship Monitoring: A National Survey of Court Practices*, by Naomi Karp of the Public Policy Institute and Erica Wood of the American Bar Association (ABA) Commission on Law and Aging.\* Guardianship is a powerful legal tool that can bring good or ill for an increasing number of vulnerable adults with cognitive impairments, affording needed protections, yet drastically reducing fundamental rights. A judge appoints a guardian upon finding that an adult lacks capacity to make decisions for him or herself.

Court monitoring of guardians is essential to ensure the welfare of incapacitated persons, identify abuses, and sanction guardians who demonstrate malfeasance. The need for effective court monitoring is heightened by ongoing demographic trends that will sharply boost the number of guardianships in coming years. These trends include: growing numbers of older people, individuals with Alzheimer’s disease and other dementias and people with intellectual disabilities; the rising incidence of elder abuse; and the increasing number of guardianship agencies that must make critical decisions about multiple wards, sometimes with high caseloads.

The purpose of this research report is to better understand how courts are monitoring the performance of guardians. It is the first detailed look at adult guardianship monitoring practices in over fifteen years. This paper reports the findings of a 2005 national survey of experts with frontline experience – 387 judges, court managers, guardians, elder law attorneys and legal representatives of people with disabilities. AARP and the ABA are continuing this research with site visits and intensive interviews in jurisdictions with exemplary monitoring practices. AARP will publish a follow-up report articulating recommended steps for replication around the country.

**KEY FINDINGS**

Reporting by Guardians

• 74% of respondents stated that their court requires annual reports on the ward’s personal status.

• 83% reported that their court requires annual accountings of the ward’s finances.

• Over 34% reported that their court requires guardians to file forward-looking plans, although only 10 state statutes require them.

• Almost 64% said the court has an effective notification system in place to alert guardians of report due dates.

Verification, Investigation and Sanctions

• Over one-third of respondents said no one is designated to verify the information in reports and accountings; only 16% reported that someone verifies every report.

• Over 40% report that no one is assigned to visit individuals under guardianship, and only one-fourth said that someone visits regularly.

• The most common sanction for guardian malfeasance, used by over 67% of respondents, is removing the guardian and appointment of a successor guardian.

Court-Community Interaction

• Only 11% of respondents reported that the court collaborates with community groups on training.

• Over one-fifth said that no guardian training resources are available.

Use of Technology

• 22% of respondents said their court does not use computer technology in monitoring.

• Only 4% said their court emails guardians about reporting status.

• Only 27.6% said the court has a computerized data system to track the number of adult guardianship filings and dispositions.

Funding

• 43% of respondents said funding for monitoring is unavailable or insufficient.

• 30% report that their court has no specific funding for monitoring.

**CONCLUSIONS**

Salient themes in the survey findings include the following:

• Guardianship monitoring practices show wide variation, as they did in a similar 1991 study.

• Reporting practices have advanced over the past 15 years in key aspects, including more frequent requirement of personal status reports, greater compliance with statutory reporting requirements, and greater use of guardianship plans.

• Verification of guardian reports and accounts, as well as visits to vulnerable individuals under guardianship, is frequently lacking.

• Use of technology in monitoring is minimal despite vast opportunities for web-based and email monitoring techniques as well as computerized data collection.

• Guardian training has increased but remains a compelling need.

• Courts and community groups rarely collaborate on guardianship monitoring.

• Funding for guardianship monitoring remains minimal.

**In Brief, Guarding the Guardians: Promising Practices for Court Monitoring**

Naomi Karp and Erica Wood

AARP Pub.Policy Instit. (2007), pp. 1-2

This *In Brief* summarizes the findings of the AARP Public Policy Institute report, *Guarding the Guardians: Promising Practices for Court Monitoring* by Naomi Karp of the Public Policy Institute and Erica Wood of the American Bar Association (ABA) Commission on Law and Aging.

This research report identifies methods for helping courts effectively monitor adult guardianships that protect some of the most vulnerable people in our society. Court-appointed guardians step into the shoes of at-risk adults with cognitive impairments, making judgments about medical care, property, living arrangements, lifestyle and potentially all personal and financial decisions. But, guardianship also removes fundamental rights, which may increase opportunities for abuse of those we strive to protect.

Court monitoring of guardians is essential to ensure the welfare of incapacitated persons, identify abuses, and sanction guardians who demonstrate malfeasance. Despite a dramatic strengthening of guardianship statutory standards in recent years, judicial monitoring practices vary substantially by jurisdiction. Bolstering oversight will become increasingly important with demographic trends sharply boosting the number of guardianships in the coming years.

**Promising Practices**

Through site visits and intensive interviews, AARP and the ABA have identified approaches for effective monitoring that can be adapted and replicated by courts around the country. These include:

* *Reports, Accounts and Plans*. Noteworthy practices include: requiring early first reports to ensure the guardian is on track; providing clear and web-accessible forms; and requiring prospective plans for personal decisions and estate management.
* *Court Actions to Facilitate Reporting*. Courts should provide ample support for guardians while rigorously enforcing responsibilities. E-filing, personal instruction by judges and staff, automated reminder notices, and scheduling compliance conferences all can help.
* *Practices to Protect Assets*. To ensure that guardians properly manage finances and to prevent financial abuse, courts can require a financial management plan, require supporting documentation with accountings, and use bonding and restricted accounts.
* *Court Review of Reports and Accounts*. Reports and accounts are of little use if courts don’t review them and respond to irregularities. Courts can use staff auditors and state administrative agencies to conduct a baseline review, and could perform more in-depth review in a random sample of cases.
* *Investigation, Verification and Sanctions*. Someone needs to visit the incapacitated person, and it can be a trained staff investigator, trained volunteer monitor or a court-appointed attorney or investigator. Sanctions such as fines, removal and calling in bonds address malfeasance.
* *Database and Other Technology*. Use of technology, such as an e-filing system with automatic capacity to flag problems, may be the most important trend for monitoring in an age when funds for staff are scarce.
* *Court Links with Community Groups and Government Agencies*. Working with community resources and agencies like adult protective services and long-term care ombudsmen can leverage training resources, enhance volunteer monitoring, and extend the court’s reach.
* *Guardian Training and Assistance.* Court handbooks, videos and other resources for guardians, as well as required training for professional fiduciaries are promising tools.
* *Funding for Monitoring*. Ideas for bolstering resources include: dedicating filing and investigation fees to monitoring, using volunteers well, raising the awareness of county councils, and doing “things that don’t cost a dime.”

**Courts Getting It Right**

The report includes up-close snapshots of the way visionary judges and court administrators approach particular problems, and tips from experienced public officials, such as “How to Spot a Guardianship Going Bad.” A few examples of exemplary courts:

* *Maricopa Country, Arizona*, seeks creatively to maximize staff and technological resources in the face of a growing caseload. Highlights include rigorous case management, staff investigators and accountants, trained volunteer monitors, use of bonding and restricted accounts to secure assets, and a database to track and flag key case event.
* *Tarrant Country, Texas*, has two probate courts with distinct forward-thinking approaches to oversight. One court relies heavily on legal staff and experienced volunteer visitors, while the other combines the skills of social workers (and social work students) with legal staff for detailed training and monitoring of every case each year.
* In *Suffolk County, New York*, the state’s Chief Judge supported the implementation of a “model guardianship court” that uses a “problem-solving restorative jurisprudence approach,” including mediation, a resource coordinator, volunteer advocates and the ability to integrate all pending cases involving the incapacitated person. The court uses compliance conferences to ensure that guardians are performing their duties.
* *Ada County, Idaho*’s vibrant volunteer monitoring program has 45 volunteers serving as records researchers, visitors and auditors; and an experienced, resourceful coordinator responsible for oversight and training.
* *Ramsey County, Minnesota* and the *17th Judicial Circuit, Florida* are beginning to use e-filing systems for accountings by guardians. Strong data management systems will help flag anomalies and respond efficiently to possible problems in individual cases.

# GUARDIANSHIPS: Collaboration Needed to Protect Incapacitated

**Elderly People**

U.S. Government Accountability Office (GAO) (2004), Report No. GAO-04-655

(available at http://www.gao.gov/new.items/d04655.pdf)

**What GAO Found**

All states have laws requiring courts to oversee guardianships, butt court implementation varies. Most require guardians to submit periodic reports, but do not specify court review of these reports. Interstate jurisdictional issues sometimes arise when states do not recognize guardianships originating in other states. Most courts responding to our survey did not track the number of active guardianships, and few indicated the number of

incapacitated elderly people under guardianship.

Four courts recognized by members of the National Guardianship Network as having exemplary guardianship programs devote staff to strong programs for guardianship training and oversight. Three of these courts offer training to guardians even though state law does not require it. Three also have programs in which volunteers or social work student interns visit people under guardianship and report on their condition.

Although state courts and federal agencies are responsible for protecting many of the same incapacitated elderly people, they generally work together only on a case-by-case basis. Some courts send notices of guardianship to the Department of Veterans Affairs and the Social Security Administration, but generally coordination among federal agencies and courts is not systematic. Federal agencies and courts do not systematically notify other agencies or courts when they identify someone as incapacitated, or when they discover that a guardian or a representative payee is abusing the incapacitated person. This lack of coordination may leave incapacitated people without the protection of responsible guardians and representative payees.

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# GUARDIANSHIPS: Cases of Financial Exploitation, Neglect, and Abuse of Seniors

U.S. Government Accountability Office (GAO) (2010), Report No. GAO-10-1046

(available at http://www.gao.gov/new.items/d101046.pdf)

**What GAO Found**

GAO could not determine whether allegations of abuse by guardians are widespread; however, GAO identified hundreds of allegations of physical abuse, neglect and financial exploitation by guardians in 45 states and the District of Columbia between 1990 and 2010. In 20 selected closed cases, GAO found that guardians stole or otherwise improperly obtained $5.4 million in assets from 158 incapacitated victims, many of whom were seniors. In some instances, guardians also physically neglected and abused their victims. The guardians in these cases came from diverse professional backgrounds and were overseen by local courts in 15 states and the District of Columbia. GAO found several common themes. In 6 of 20 cases, the courts failed to adequately screen potential guardians, appointing individuals with criminal convictions or significant financial problems to manage high-dollar estates. In 12 of 20 cases, the courts failed to oversee guardians once they were appointed, allowing the abuse of vulnerable seniors and their assets to continue. Lastly, in 11 of 20 cases, courts and federal agencies did not communicate effectively or at all with each other about abusive guardians, allowing the guardian to continue the abuse of the victim and/or others. The table below provides examples of guardianship abuse cases.

**Examples of Cases of Abuse by Guardians**

|  |  |  |
| --- | --- | --- |
| **Victim** | **Guardian/**  **state** | **Case details** |
|
| 87 year old  man with  Alzheimer's  Disease | Former taxi  cab driver */*  Missouri | • Guardian embezzled more than $640,000, which included the purchase of a Hummer and checks written to exotic dancers.  • County workers found the victim living in the guardian's filthy basement  wearing an old knit shirt and a diaper.  • Guardian was sentenced to 8 years in prison and ordered to pay $640,000 in  restitution . |
| At least 78  victims | Private  agency */*  Alaska | • Agency management stole at least $454,000 over 4 years.  • Executive director used wards' funds to pay for his credit card bills, medical  expenses, mortgage payments, and camp for his children.  • Victims received partial repayment, but no criminal charges were filed. |
| 20 victims of  various ages  with mental  incapacities | Licensed  social  worker,  registered  nurse */*  Kansas | • Guardian and his wife sexually and physically abused residents of their  unlicensed group home and billed Medicare for this ''therapy."  • Residents lived in a house described by the prosecutor as "dirty and bug-  infested" and were videotaped engaged in forced sexual activities.  • Guardian sentenced to 30 years in prison; wife sentenced to 15 years. |

Source: GAO summary of closed cases of abuse, neglect and financial exploitation by guardians.

Using two fictitious identities-one with bad credit and one with the Social Security number of a deceased person-GAO obtained guardianship certification or met certification requirements in the four states where we applied: Illinois, Nevada, New York, and North Carolina. Though certification is intended to provide assurance that guardians are qualified to fj1lfill their role, none of the courts or certification organizations utilized by these states checked the credit history or validated the Social Security number of the fictitious applicants. An individual who is financially overextended is at a higher risk of engaging in illegal acts to generate funds. In addition, people with criminal convictions could easily conceal their pasta by stealing a deceased person's identity. The tests raise questions about the effectiveness of these four state certification programs.

**INCAPACITATED ADULTS: Oversight of Federal Fiduciaries and Court-Appointed Guardians Needs Improvement**

U.S. Government Accountability Office (GAO) (2011), Report No. GAO-11-678

(available at http://www. gao.gov/new.items/d11678.pdf)

**What GAO Found**

SSA, VA, and state courts have screening procedures for ensuring that fiduciaries and guardians are suitable. SSA and VA strive to prevent individuals who have misused beneficiaries’ payments from serving again, and each is currently developing an automated system that will enhance its ability to compile and maintain information about misuse of benefits by fiduciaries. Similarly, according to the AARP Public Policy Institute, laws in most states require courts to follow certain procedures for screening guardians. However, only 13 states conduct criminal background checks on all potential guardians.

There are also statutes and regulations requiring SSA and VA to monitor fiduciary performance. Fiduciaries in each agency must periodically report on their responsibilities. Similarly, most states require courts to obtain annual reports from guardians. There is evidence that guardianship monitoring by state courts, however, needs improving, and promising practices have been proposed to strengthen it. Given limited resources for monitoring, courts may be reluctant to invest in these practices without evidence of their feasibility and effectiveness from projects designed to evaluate these practices.

Gaps in information sharing may adversely affect incapacitated adults. When VA and SSA have incapacitated beneficiaries in common, sharing certain information about them could enhance each agency’s ability to protect the interests of these beneficiaries. While SSA and VA do not systematically share such information, VA can obtain such information from SSA on a case-by-base basis. SSA officials indicated, however, that obtaining similar information from VA may not be cost-effective given the relatively small proportion of SSA beneficiaries who also collect VA benefits. It is also in the best interest of incapacitated beneficiaries for federal agencies to disclose certain information about these beneficiaries and their fiduciaries to state courts. National organizations representing elder law attorneys and advocating for elder rights have noted that courts have difficulty obtaining such information when it is needed, particularly from SSA.

The federal government has a history of funding technical assistance and training related to guardianship for state courts, primarily through the AoA within HHS. In 2008, AoA established the National Legal Resource Center (NLRC) to support improvements in legal assistance for older adults and to support elder rights protections. Among its other projects, NLRC has supported an evaluation of Utah’s public guardian program. Because of the federal government’s activities in this area, it is well positioned and has an opportunity to lead in ensuring the rights of incapacitated adults with court-appointed guardians by supporting evaluations of promising court monitoring practices.

# Third National Guardianship Summit

**GUARDIAN STANDARDS AND RECOMMENDATIONS (2011)**

Available at http://www.guardianshipsummit.org/wp-content/uploads/2011/11/summit-standards-and-recommendations-12-11.pdf

On October 13-15, the ten National Guardianship Network sponsoring organizations, with eleven diverse cosponsors, convened the Third National Guardianship Summit at the University of Utah S.J. Quinney College of Law in Salt Lake City. With 92 delegates, observers, authors, funders and facilitators participating, the Summit was a consensus conference on post-appointment guardian performance and decision-making for adults.

The Summit delegates adopted a far-reaching set of recommendations for Guardian Standards, as well as additional Recommendations for action by courts, legislatures and other entitles. These documents from the Summit offer the groundwork for nationally recognized standards for guardians of adults.

Below are: (1) basic Definitions used in the Standards and Recommendations; (2) the Summit's "Guardian Standards;" and (3) the Summit's "Recommendations for Action." The Standards and Recommendations were adopted by vote of the plenary session based on recommendations of the Summit's seven interdisciplinary working groups.

# # #

**Definitions for Guardianship Summit Standards/Recommendations**

o Guardian = person or entity appointed by a court with the authority to make some or all personal decisions on behalf of an individual the court determines lacks capacity to make such decisions.

o Conservator = person or entity appointed by a court with the authority to make some or all financial decisions on behalf of an individual the court determines needs assistance in making such decisions.

o NOTE: The standards and recommendations use the term "guardian" to mean *guardian* and *conservator,* unless otherwise specifically indicated.

o Person under guardianship [or person under conservatorship], or simply "person" = a person the court has determined requires assistance in making some or all personal and/or financial decisions, and for whom the court has appointed a guardian and/or conservator.

o Person-centered planning process. A "person-centered planning process" is one which is led by the individual receiving services and (1) Includes people chosen by the individual; (2) Provides necessary support to ensure that the individual has a meaningful role in directing the process; (3) Occurs at times and locations of convenience to the individual; (4) Reflects cultural considerations of the individual; (5) Includes strategies for solving conflict or disagreement within the process, including any conflict of interest concerns; (6) Offers choices to the individual regarding the services and supports they receive and from whom; (7) Includes a method for the individual to request updates to the plan as needed. This process has been developed over the last few decades, and adopted by federal regulation in 42 U.S.C. §441.301.

**#1. Core Standards**

Standard #1.1

The guardian shall develop and implement a plan setting forth short-term and long-term goals for meeting the needs of the person.

• Plans shall emphasize a "person-centered philosophy".

Standard #1.2

The guardian shall treat the person with dignity.

Standard #1.3

The guardian shall make a good faith effort to cooperate with other surrogate decision-makers for the person.

• These include where applicable, any other guardian, conservator, agent under a power of attorney, health care proxy, trustee, VA fiduciary and representative payee.

Standard #1.4

The guardian shall promptly inform the court of any change in the capacity of the person that warrants an expansion or restriction of the guardian's authority.

Standard #1.5

The guardian shall promptly report to the appropriate authorities abuse, neglect, and/or exploitation, as defined by state statute.

**#2. Guardian's Relationship to the Court**

Standard #2.1

The guardian shall seek ongoing education concerning:

• Person-centered planning

• Surrogate decision-making

• Responsibilities and duties of guardians

• Legal processes of guardianship

• State certification of guardians.

Standard #2.2

The guardian and conservator shall keep the court informed about the well-being of the person and the status of the estate through personal care and financial plans, inventory and appraisals, and annual reports and accountings.

Standard #2.3

The guardian shall seek assistance as needed to fulfill responsibilities to the person.

Standard #2.4

The guardian shall use available technology to:

• File the general plan, inventory and appraisal, and annual reports and accountings

• Access responsible education and information about guardianships

• Assist in the administration of the estate.

**#3. Fees**

Standard #3.1

The guardian, as a fiduciary, shall:

• Disclose in writing the basis for fees (e.g., rate schedule) at the time of the guardian's first appearance in the action

• Disclose a projection of annual fiduciary fees within 90 days of appointment

• Disclose fee changes

• Seek authorization for fee-generating actions not contained in the fiduciary's appointment

• Disclose a detailed explanation for any claim for fiduciary fees.

Standard #3.2

A guardian shall report to the court any likelihood that funds will be exhausted and advise the court whether the guardian intends to seek removal when there are no longer funds to pay fees. A guardian may not abandon the person when funds are exhausted in cases in which the spend-down occurred over several reporting periods and the guardian failed to address the probability of exhaustion with the court and failed to make appropriate succession plans.

Standard #3.3

A guardian may seek payment of fiduciary fees from the income of a person receiving Medicaid services only after the deduction of the personal needs allowance, spousal allowance and health care insurance premiums.

**#4. Financial Decision-Making**

Standard # 4.1

The conservator, as a fiduciary, shall manage the financial affairs in a way that maximizes the dignity, autonomy, and self-determination of the person.

Standard # 4.2

The conservator shall consider current wishes, past practices, reliable evidence of likely choices, and best interests of the person.

Standard # 4.3

A conservator shall, consistent with court order and state statutes, promote the self-determination of the person and exercise authority only as necessitated by the limitations of the person.

Standard # 4.4

The conservator shall encourage and assist the person to act on his or her own behalf and to participate in decisions.

Standard # 4.5

When possible, the conservator shall assist the person to develop or regain the capacity to manage the person's financial affairs. The conservator's goal shall be to manage but not necessarily eliminate risk.

Standard # 4.6

The conservator shall value the well-being of the person over the preservation of the estate.

Standard # 4.7

The conservator shall avoid all conflicts of interest and self-dealing, and all appearances of conflicts of interests and self-dealing.

• The conservator shall become fully educated as to what constitutes a conflict of interest and self dealing, and why they should be avoided.

• The conservator may enter into a transaction that may be a conflict of interest or self-dealing only when necessary, or when there is a significant benefit to the person under the conservatorship, and shall disclose such transactions to interested parties and obtain prior court approval.

Standard# 4.8

The conservator shall, when making decisions regarding investing, spending, and management of the income and assets, including asset recovery:

• Give priority to the needs and preferences of the person

• Weigh the costs and benefits to the estate

• Apply state law regarding prudent investment practices.

Standard# 4.9

The conservator shall take all steps necessary to obtain a bond to protect the estate, including obtaining a court order.

Standard #4.10

The conservator shall use reasonable efforts to:

* Ascertain the income, assets, liabilities of the person
* Ascertain the needs and preferences of the person
* Coordinate with the guardian and consult with others close to the person
* Prepare a plan for the management of income and assets
* Provide oversight to any income and assets under the control of the person.

Standard # 4.11

The conservator shall obtain and maintain a current understanding of what is required and expected of the conservator, statutory and local court rule requirements, and necessary filings and reports.

Standard# 4.12

The conservator shall, as appropriate for the estate, implement best practices of a prudent conservator, including responsible consultation with and delegation to people with appropriate expertise.

Standard# 4.13

The conservator shall become educated about the nature of any incapacity, condition and functional capabilities of the person.

Standard# 4.14

The conservator shall consider mentoring new conservators.

**#5. Health Care Decision-Making**

Standard #5.1

The guardian, in making health care decisions or seeking court approval for a decision, shall maximize the participation of the person.

Standard #5.2

The guardian, in making health care decisions or seeking court approval for a decision, shall:

(a) Acquire a clear understanding of the medical facts

(b) Acquire a clear understanding of the health care options and risks and benefits of each

(c) Encourage and support the individual in understanding the facts and directing a decision.

Standard #5.3

To the extent the person cannot currently direct the decision, the guardian shall act in accordance with the person's prior directions, expressed desires, and opinions about health care to the extent actually known or ascertainable by the guardian; or, if unknown and unascertainable,

(a) Act in accordance with the person's prior general statements, actions, values and preferences to the extent actually known or ascertainable by the guardian; or, if unknown and unascertainable,

(b) Act in accordance with reasonable information received from professionals and persons who demonstrate sufficient interest in the person's welfare, to determine the person's best interests, which determination shall include consideration of consequences for others that an individual in the person's circumstances would consider.

In the event of an emergency, the guardian shall grant or deny authorization of emergency health care treatment based on a reasonable assessment of the criteria listed in Standard 5.2.

Standard #5.4

The guardian shall monitor, promote, and maintain the person's health and well-being and shall seek to ensure that the person receives appropriate health care consistent with person-centered health care decision­making.

Standard #5.5

The guardian shall seek to ensure that appropriate palliative care is incorporated into all health care.

Standard #5.6

The guardian shall keep persons who are important to the individual reasonably informed of important health care decisions.

**#6.** **Residential Decision-Making**

Standard #6.1

The guardian shall identify and advocate for the person's goals, needs, and preferences. Goals are what are important to the person about where he or she lives, whereas preferences are specific expressions of choice.

• First, the guardian shall ask the person what he or she wants.

• Second, if the person has difficulty expressing what he or she wants, the guardian shall do everything possible to help the person express his or her goals, needs, and preferences.

• Third, only when the person, even with assistance, cannot express his or her goals and preferences, the guardian shall seek input from others familiar with the person to determine what the individual would have wanted.

• Finally, only when the person's goals and preferences cannot be ascertained, the guardian shall make a decision in the person's best interest.

Standard #6.2

The guardian shall fully identify, examine, and continue to seek information regarding options that will fulfill the person's goals, needs, and preferences.

• Guardians shall take full advantage of professional assistance in identifying all available options.

• These include but are not limited to area agencies on aging, centers for independent living, protection and advocacy agencies, long-term care ombudsmen, and developmental disabilities councils, aging and disability resource centers, and community mental health agencies.

Standard #6.3

The guardian shall have a strong priority for home or other community-based settings, when not inconsistent with the person's goals and preferences.

Standard #6.4

The guardian shall make and implement a person-centered plan that seeks to fulfill the person's goals, needs, and preferences. The plan shall emphasize the person's strengths, skills, and abilities to the fullest extent in order to favor the least restrictive setting.

Standard #6.5

The guardian shall wherever possible, seek to ensure that the person leads the residential planning process; and at a minimum to ensure that the person participates in the process.

Standard #6.6

The guardian shall attempt to maximize the self-reliance and independence of the person.

Standard #6.7

The guardian shall seek review by a court or other court-designated third party with no conflict of interest before a move to a more restrictive setting.

Standard #6.8

The guardian shall monitor the residential setting on an ongoing basis and take any necessary action when the setting does not meet the individual's current goals, preferences, and needs including but not limited to:

• Evaluating the plan; enforcing residents' rights, legal and civil rights; ensuring quality of care and appropriateness of the setting in light of the feelings and attitudes of the person; and

• Exploring alternative opportunities for long-term services and supports where necessary to better fulfill the person's goals and preferences.

Standard #6.9

The guardian shall promote social interactions and meaningful relationships consistent with the preferences of the person.

• The guardian shall encourage and support the person in maintaining contact with family and friends as defined by the person unless it will substantially harm the person.

• The guardian shall not interfere with established relationships unless necessary to protect the person from substantial harm.

Standard #6.10

The guardian shall consider the proximity of the setting to those people and activities that are important to the person when choosing a residential setting.

Standard #6.11

The guardian shall make reasonable efforts to maintain the person's established social and support networks during the person's brief absences from the primary residence.

**#1. Overview of Guardian Standards**

Recommendation #1.1

State statutes should set forth the mandatory duties of guardians. Court or administrative rules should set forth guardian standards.

Recommendation #1.2

The National Guardianship Association, in conjunction with state guardianship associations and state WINGS (Working Interdisciplinary Networks of Guardianship Stakeholders) should promote standards to improve guardian practices and enhance public confidence in guardianship.

• Materials should be developed to educate guardians about statutory duties, court rules, aspirational codes of conduct, and best practices.

Recommendation #1.3

State statutes should clearly express guardian duties and apply the duties to all guardians.

• These duties should be enumerated in a clear and succinct statement supplied to guardians at time of appointment.

• These duties should be enumerated in guardian training materials.

• The guardian must acknowledge, in writing, receipt of the information.

Recommendation # 1.4

Every guardian should be held to the same standards, regardless of familial relationship, except a guardian with a higher level of relevant skills shall be held to the use of those skills.

Recommendation #1.5

States should adopt by statute a decision-making standard that provides guidance for using substituted judgment and best interest principles in guardian decisions.

• These standards should emphasize self-determination and the preference for substituted judgment.

• The Uniform Guardianship and Protective Proceedings Act should be revised to embody these objectives.

Recommendation #1.6

A template should be created for developing a person-centered plan.

Recommendation #1.7

Where possible, the term person under guardianship should replace terms such as incapacitated person, ward, or disabled person.

**#2. Guardian's Relationship to the Court**

Recommendation #2.1

The court or responsible entity should ensure that guardians, court and court staff, evaluators, and others involved in the guardianship process receive sufficient ongoing, multi-faceted education to achieve the highest quality of guardianship possible.

Recommendation #2.2

The court should issue orders that implement the least restrictive alternative and maximize the person's right to self-determination and autonomy.

• The court should develop a protocol to obtain an accurate and detailed assessment of the person's functional limitations.

• The court should conduct a factual investigation and review the assessment to determine the rights to be retained by the person and the powers to be granted to the guardian.

• The factual investigation may include contact with the person, interviews with interested persons and family members, and discussions with court-appointed attorneys and court evaluators or any other court representative.

Recommendation #2.3

The court should monitor the well-being of the person and status of the estate on an on-going basis, including, but not limited to:

• Determining whether less restrictive alternatives will suffice

• Monitoring the filing of plans, reports, inventories and accountings

• Reviewing the contents of plans, reports, inventories and accounting

• Independently investigating the well being of the person and status of the estate

• Ensuring the well-being of the person and status of the estate, improving the performance of the guardian, and enforcing the terms of the guardianship order.

Recommendation #2.4

The court should provide continuing assistance to the guardian about guardianship law and procedures, the guardian's duties and responsibilities, community resources and the rights of the person. This may include assistance in:

• Completion of guardianship plan and reports

• Guidance on facility transfer or placement

• Providing for care at home

• Financial and health care decision-making

• What to do when the person dies or disappears

• Burial and funeral planning

• Mental health services

• Government benefits eligibility.

Recommendation #2.5

The court should use available technology to:

• Assist in monitoring guardianships

• Develop a database of guardianship elements, including indicators of potential problems

• Schedule required reports

• Produce minutes from court hearings

• Generate statistical reports

• Develop online forms and/or e-filing

• Provide public access to identified non-confidential, filed documents.

**#3. Fees**

Recommendation #3.1

The court should promote sound administrative practices relating to guardianship fees by:

• Encouraging the continuity of judicial experience and expertise on the probate bench, and encouraging specialization of probate courts in accordance with the National Probate Court Standards

• Actively monitoring the reasonableness of fiduciary fees

• Creating and maintaining training programs for participants in the guardianship process

• Collecting data regarding fiduciary fees and costs

• Promoting timely review and approval of fees

• Promoting electronic filing.

Recommendation #3.2

Guardians should be entitled to reasonable compensation for their services. The court should consider these factors in determining the reasonableness of guardian fees:

• Powers and responsibilities under the court appointment

• Necessity of the services

• The request for compensation in comparison to a previously disclosed basis for fees, and the amount authorized in the approved budget, including any legal presumption of reasonableness or necessity

• The guardian's expertise, training, education, experience, professional standing, and skill, including whether an appointment in a particular matter precluded other employment

• The character of the work to be done, including difficulty, intricacy, importance, time, skill, or license required, or responsibility undertaken

• The conditions or circumstances of the work, including emergency matters requiring urgent attention, services provided outside of regular business hours, potential danger (e.g., hazardous materials, contaminated real property, or dangerous persons), or other extraordinary conditions

• The work actually performed, including the time actually expended, and the attention and skill­ level required for each task, including whether a different person could have better, cheaper or faster rendered the service

• The result, specifically whether the guardian was successful, what benefits to the person were derived from the efforts, and whether probable benefits exceeded costs

• Whether the guardian timely disclosed that a projected cost was likely to exceed the probable benefit, affording the court an opportunity to modify its order in furtherance of the best interest of the estate

• The fees customarily paid, and time customarily expended, for performing like services in the community, including whether the court has previously approved similar fees in another comparable matter

• The degree of financial or professional risk and responsibility assumed

• The fidelity and loyalty displayed by the guardian, including whether the guardian put the best interests of the estate before the economic interest of the guardian to continue the engagement

• The need for and local availability of specialized knowledge and the need for retaining outside fiduciaries to avoid conflict of interest.

Recommendation #3.3

To ensure the right of access to guardianship services, states should provide public funding for:

• Guardianship services for those unable to pay

• Services to coordinate alternatives to guardianship, and the obligation to make such services available to all vulnerable persons.

Recommendation #3.4

In the event estate funds are exhausted and the guardian has failed to address the anticipated exhaustion, the court is justified in requiring the guardian to remain serving at least until a succession plan is in place.

Recommendation #3.5

The court and court-appointed counsel should actively and timely monitor fiduciary fees.

Recommendation #3.6

The court should support any rejection or reduction of fees with a statement of explanation.

Recommendation #3.7

The court and all parties should respect the privacy and dignity of the person when disclosing information regarding fees.

Recommendation #3.8

The court should resolve fee disputes through a process that is fair, expeditious, and economical, for example, through:

• A court-ordered alternative dispute resolution or mediation process;

• A referral to a regulatory body responsible for reviewing fees; or

• A master or a special judicial resolution process.

**#4. Health Care Decision-Making**

Recommendation #4.1

State guardianship statutes should provide that valid health care directives that appoint a health care agent shall remain in effect unless the court determines that the agent is unable, unwilling, or unsuitable to perform the agent's duties under the directive.

**#5. State Interdisciplinary Guardianship and Alternatives Committees**

Recommendation #5.1

State courts and National Guardianship Network organizations should collaborate to establish Working Interdisciplinary Networks of Guardianship Stakeholders (WINGS) to advance adult guardianship reform and implement the recommendations adopted by the Third National Guardianship Summit.

Recommendation #5.2

A state steering committee should establish the scope, goals and mission of WINGS. The steering committee should:

• Conduct needs assessments

• Review the guardianship process, court rules and statutes

• Identify, recruit and include stakeholders with sufficient expertise and authority. Stakeholders may include, but are not limited to, judges, court administrators, agencies on aging, adult protective services, Attorneys General, state mental health association, state hospital associations, legal service providers, AARP, state guardianship associations and agencies, Alzheimer's Association, financial institutions, service providers, disability advocates, long-term care ombudsman programs, medical professionals and associations, bar associations, family members of persons under guardianship, and members of the public who have experienced the guardianship process

• Encourage inclusivity considering local realities, non-traditional partners, and underserved populations

• Establish a clear process for setting priorities and developing feasible timelines.

Recommendation #5.3

WINGS should develop an agenda to accomplish its goals and objectives. The agenda should include implementation of the standards and recommendations adopted by the Third National Guardianship Summit. Additional projects may:

• Encourage and support court monitoring and data collection

• Evaluate court procedures

• Expand the use of technology, standardized forms, and web site development

• Conduct education and cross-training

• Recommend improvements and best practices

• Advocate for funds to support court systems and guardianship programs.

Recommendation #5.4

WINGS should aim to procure tangible and in-kind resources necessary to achieve its mission.

• Financial resources may include budgetary allocations, donations and grants.

• Human resources may include administrative, logistical, research and technical support provided by paid staff or volunteers.

Recommendation #5.5

WINGS should develop a plan to ensure sustainability, including:

• Leadership development and committee member terms

• Recruitment and orientation of new members

• Measurable outcomes with ongoing self-evaluation

• Maintenance and development of resources.

**#6. Steps to Implement the Recommendations of the Third National Guardianship Summit**

The National Guardianship Network organizations should work to match desired changes in policy and practice with the best possible implementation strategy.

• Strategies include statutory change, amendments to the Uniform Guardianship and Protective Proceedings Act, administrative rules/regulations, court rules, best practice promotion and education.

• A campaign to build awareness of the need for adoption of the Summit recommendations and standards should build on alliances with entities such as volunteer guardianship programs, the disability community, and public guardians.

• The campaign should use case statements to create public awareness of the need for reform while offering examples of integrity, and emphasizing existing standards.

The National Guardianship Network should work with the Uniform Law Commission as a core strategy to implement the standards and recommendations from the Third National Guardianship Summit.

The National Center for State Courts should take the standards and recommendations from the Third National Guardianship Summit to the probate court standards revision process.

# 112TH CONGRESS

**S.1744**

1ST SESSION

To provide funding for State courts to assess and improve the handling of proceedings relating to adult guardianship and conservatorship, to authorize the Attorney General to carry out a pilot program for the conduct of background checks on individuals to be appointed as guardians or conservators, and to promote the widespread adoption of information technology to better monitor, report, and audit conservatorships of protected persons.

IN THE SENATE OF THE UNITED STATES

OCTOBER 20, 2011

Ms. KLOBUCHAR (for herself and Mr. NELSON of Florida) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To provide funding for State courts to assess and improve the handling of proceedings relating to adult guardianship and conservatorship, to authorize the Attorney General to carry out a pilot program for the conduct of background checks on individuals to be appointed as guardians or conservators, and to promote the widespread adoption of information technology to better monitor, report, and audit conservatorships of protected persons.

*Be it enacted by the Senate and House of Representatives of the United*

*States of America in Congress assembled,*

SECTION 1. SHORT TITLE.

This Act may be cited as the "Guardian Accountability and Senior

Protection Act".

TITLE I-STATE COURT IMPROVEMENT

SEC. 101. FUNDING FOR STATE COURTS TO ASSESS AND IMPROVE HANDLING OF PROCEEDINGS RELATING TO ADULT GUARDIANSHIP AND CONSERVATORSHIP.

Part A of title IV of the Older Americans Act of 1964 (42 U.S.C. 3032 et seq.) is amended-

(1) in section 4ll(a)-

(A) in the matter preceding paragraph (1), by inserting

"(including the highest court of each State)" after "with States";

(B) in paragraph (12), by striking "; and" and inserting a semicolon;

(C) by redesignating paragraph (13) as paragraph (14); and

(D) by inserting after paragraph (12) the following:

"(13) assessing the fairness, effectiveness, timeliness, and accessibility of adult guardianship and conservatorship proceedings, implementing changes deemed necessary as a result of the assessments, and collecting necessary data regarding those proceedings and the impact of the necessary changes; and"; and

(2) by inserting at the end the following:

"SEC. 423. FUNDING FOR STATE COURTS TO ASSESS AND IMPROVE HANDLING OF PROCEEDINGS RELATING TO ADULT GUARDIANSHIP AND CONSERVATORSHIP.

"(a) IN GENERAL-The Assistant Secretary, in consultation with the Attorney General, shall make grants, in accordance with this section, to the highest court of a State for the purpose of enabling such a court, in collaboration with the State unit on aging-

"(1) to conduct assessments, in accordance with such requirements as the Secretary shall publish, of the role, responsibilities, and effectiveness of State courts in carrying out State laws requiring proceedings (conducted by or under the supervision of the courts)-

"(A) that determine whether to impose a full, limited, or temporary adult guardianship or conservatorship;

"(B) that select a guardian of a person or conservator of an estate;

"(C) that review the continued need for a full, limited, or temporary guardianship or conservatorship of an adult; and

"(D) that review the performance of a person appointed as guardian or conservator for an adult;

"(2) to implement changes deemed necessary as a result of the assessments; and

"(3) to collect data regarding those proceedings and the impact of the necessary changes.

"(b) APPLICATIONS.-In order to be eligible for a grant under this section, a highest State court shall submit to the Assistant Secretary an application at such time, in such form, and including such information and assurances as the Assistant Secretary shall require.

"(c) ALLOTMENTS.-Each highest State court which has an application approved under subsection (b), and is conducting assessment activities in accordance with this section, may receive a grant from the Assistant Secretary, for each of fiscal years 2012 through 2015, from amounts appropriated to carry out section 411, in an amount to be determined appropriate by the Assistant Secretary.

"(d) USE OF GRANT FUNDS.-Each highest State court which receives funds under this section may use such funds to pay-

"(1) any or all costs of activities under this section in fiscal year

2012;and

"(2) not more than 75 percent of the cost of activities under this section in each of fiscal years 2013, 2014, and 2015.".

**TITLE II-BACKGROUND CHECKS**

SEC. 201. DEFINITIONS.

In this title:

(1) ADVERSE INFORMATION.-The term "adverse information" means-

(A) information from a criminal history background check that indicates that the individual has been convicted of a relevant cnme;

(B) information that the individual has been judicially determined to have committed abuse, abandonment, neglect, or financial or sexual exploitation of a child, spouse, or other adult; and

(C) information from an adult or child abuse registry that indicates that the individual is included in an adult or child abuse registry.

(2) CONSERVATOR.-The term "conservator" means an individual who is appointed by a court under applicable State law to manage the estate of a protected person. Such definition shall not apply to--

(A) a bank with trust powers, bank and trust company, or trust company organized under the laws of any State or of the United States and which is regulated by the commissioner of commerce or a Federal regulator; or

(B) a credit union, savings and loan, or other financial institution.

(3) GUARDIAN.-The term "guardian" means an individual who is appointed by a court to protect an incapacitated individual's personal or financial welfare.

(4) PROTECTED PERSON.-The term "protected person" means an adult whom the court determines in a guardian or conservatorship proceeding is unable to manage property and accounts.

(5) RELEVANT CRIME.-The term "Relevant crime" includes any felony or misdemeanor conviction for abuse, neglect, fraud, misappropriation, misrepresentation, theft, conversion, or other financial crime, or such other types of offenses as a participating highest court of a State may specify for purposes of conducting the pilot program in such State.

SEC. 202. PILOT PROGRAM FOR NATIONAL AND STATE BACKGROUND CHECKS OF GUARDIANS AND CONSERVATORS.

(a) AUTHORITY TO CONDUCT PROGRAM.-The Attorney General, shall establish a pilot program to identify efficient, effective, and economical procedures for State courts to conduct background checks on prospective guardians and conservators.

(b) REQUIREMENTS.-

(1) REQUIREMENT TO CONDUCT BACKGROUND CHECKS.­ Under the pilot program under subsection (a), a State court, prior to appointing a prospective guardian or conservator on or after the commencement date of the State pilot program, shall conduct a background check on the guardian or conservator in accordance with such procedures as the participating State shall establish pursuant to paragraph (2).

(2) PROCEDURES.-The procedures established by a participating highest State court under paragraph (1) shall be designed to-

(A) provide a prospective guardian or conservator with notice that the appointing court is required to perform background checks with respect to prospective guardians or conservators;

(B) require, as a condition of appointment, that the prospective guardian or conservator-

(i) provide a statement signed by the prospective guardian or conservator authorizing the appointing court to request national and State criminal history background checks;

(ii) provide the appomtmg court with a set of the prospective guardian's or conservator's fingerprints; and

(iii) provide information as to whether the individual has been suspended or disbarred from law, accounting, or other professional licensing for misconduct involving financial matters that affect the ability of the individual to provide the services of a guardian or conservator safely and competently;

(C) permit the courts to check any available State and national registries that would be likely to contain adverse information concerning a prospective guardian or conservator; and

(D) permit the courts hearing guardian or conservatorship matters to obtain State and national criminal history background checks on the prospective guardian or conservator.

(3) CONSIDERATION OF INFORMATION.-Prior to appointing an

individual with respect to whom adverse information is available as a guardian or conservator under a program under this title, the appointing court shall consider the nature of the information or offense involved, the date of any offense, and evidence of the proposed guardian's or conservator's rehabilitation and determine whether the individual's appointment is in the best interest of the protected person.

(4) USE OF INFORMATION; IMMUNITY FROM LIABILITY.-A participating highest State court shall ensure that information obtained about the prospective guardian or conservator pursuant to a b3;ckground check conducted under the State supreme court pilot program is used only for the purpose of determining the suitability of the prospective guardian or conservator for appointment.

(c) PARTICIPATING STATES.-

(1) IN GENERAL.-The Attorney General shall enter into agreements with not more than 5 States to conduct the pilot program under this section in such States.

(2) REQUIREMENTS.-An agreement entered into under paragraph (1) shall require that a participating highest State court-

(A) be responsible for monitoring compliance with the requirements of the pilot program;

(B) have procedures by which a prospective guardian or conservator may appeal or dispute the accuracy of the information obtained in a background check, including consideration of the nature of the information or offense involved, the date of offense, and the evidence of the prospective guardian's or conservator's rehabilitation;

(C) establish procedures reqmnng the courts hearing guardian or conservatorship matters to request criminal history background checks of prospective guardians or conservators and review the results of any State or national criminal history background check regarding a prospective guardian or conservator to determine whether the prospective guardian or conservator has any conviction for a relevant crime;

(D) keep data on the background checks performed to be readily accessible for the evaluation; and

(E) agree to obtain from the State, non-Federal contributions,

in cash or in-kind, toward the costs of carrying out the pilot program in an amount equal to not less than $1 for each $4 of Federal funds provided to the court under this section.

(3) APPLICATION AND SELECTION CRITERIA.-

(A) APPLICATION.-The highest State court seeking to participate in the pilot program established under this section, shall submit an application to the Attorney General containing such information and at such time as the Attorney General may specify.

(B) SELECTION CRITERIA.-

(i) IN GENERAL.-In selecting highest State court to participate in the pilot program under this section, the Attorney General shall establish criteria to ensure-

(I) geographic diversity;

(II) the consideration of a variety of payment mechanisms for covering the costs of conducting the background checks required under the pilot program; and

(III) that at least one participating highest State court includes protected person abuse prevention training for prospective guardians or conservators as part of the pilot program conducted in that State.

(ii) INCLUSION OF STATES WITH EXISTING PROGRAMS.-Nothing in this section shall be construed as prohibiting any State which, as of the date of the enactment of this Act, has procedures for conducting background checks with respect to the appointment of guardians or conservators from being selected to participate in the pilot program conducted under this section.

(d) PA YMENTS.-Of the amounts made available under subsection (f) to conduct the pilot program under this section, the Attorney General shall-

(1) make payments to participating highest State courts for the costs of conducting the pilot program in such States which may include the administration of the pilot program, staffing, the cost of

background checks, and other purposes as determined by the

Attorney General; and

(2) reserve up to 4 percent of such amounts to conduct the

.evaluation required under subsection (e).

(e) EVALUATION.-The Attorney General shall, through grant, contract, or interagency agreement, conduct an evaluation of the pilot program conducted under this section. Such evaluation should-

(1) review the various procedures implemented by participating highest State courts for the conduct of background checks of prospective guardians or conservators and identify the most efficient, effective, and economical procedures for conducting such background checks;

(2) assess the costs of conducting such background checks

(including start-up and administrative costs);

(3) consider the benefits and disadvantages associated with requiring prospective guardians or conservators to pay the costs of conducting such background checks;

(4) determine the extent to which conducting such background checks leads to any unintended consequences, including a reduction in the available guardians or conservators or delay and backlogs in processing appointments;

(5) to the extent feasible, seek to determine the efficacy of the pilot program in reducing abuse of protected persons and their estate by guardians or conservators; and

(6) include other elements that would bear on the usefulness and effectiveness of the program.

(f) FUNDING.-There are authorized to be appropriated to the Attorney General to carry out the pilot program under this section, such sums as may be necessary for the period of fiscal years 2012 through 2015.

**TITLE 111-E-FILE**

SEC. 301. DEFINITIONS.

In this title:

(1) ADULT.-The term "adult" means an individual who is 18 years of age or older.

(2) CONSERVATOR.-The term "conservator" means an individual who is appointed by a court under applicable State law to manage the estate of a protected person.

(3) EXPLOITATION.-The term "exploitation" means the fraudulent or otherwise illegal, unauthorized, or improper act or process of a conservator that uses the resources of a protected person for the conservator's monetary or personal benefit, profit, or gain, or that results in depriving a protected person of rightful access to, or use of, benefits, resources, belongings, services or assets.

(4) GUARDIAN.-The term "guardian" means an individual who is appointed by a court to protect an incapacitated individual's personal or financial welfare.

(5) HIGHEST STATE COURT.-The term "highest State court" means the highest appellate court within a State.

(6) PROTECTED PERSON.-The term "protected person" means an adult whom the court determines in a guardian or conservatorship proceeding is unable to manage property and accounts.

SEC. 302. CONSERVATOR MONITORING GRANT PROGRAM.

(a) GRANTS.-

(1) IN GENERAL.-The State Justice Institute, pursuant to the authority provided in the State Justice Institute Act of 1984 (42 U.S.C.

10701 et seq.), may award grants to eligible highest State courts to assist in improving conservator monitoring efforts through electronic filing.

(2) DURATION.-Grants awarded under paragraph (1) shall be for a period of not to exceed 3 years.

(b) USE OF FUNDS.-

(1) IN GENERAL.-Amounts received under a grant awarded under subsection (a) shall be used to implement and evaluate the impact of systems enabling the annual accountings and other required conservatorship filings to be completed, filed, reviewed, and analyzed

electronically in order to simplify the filing process for conservators and better enable the courts to identify discrepancies and detect fraud and exploitation of protected persons.

(2) ALLOCATION.-A highest State court that receives a grant under this section shall prioritize the use of the grant funds so as to assist the greatest number of conservators and protect the greatest number of protected persons.

(c) APPLICATION.-A highest State court desiring a grant under subsection (a)(1) shall submit an application to the State Justice Institute at such time, in such manner, and accompanied by such information as the State Justice Institute may require.

SEC. 303. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated to the State Justice Institute to carry out the activities under this title, such sums as may be necessary for the period of fiscal years 2012 through 2015.