GUARDIANSHIP FOR THE ELDERLY: PROTECTING THE RIGHTS AND WELFARE OF SENIORS WITH REDUCED CAPACITY

Issued By:

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December 2007

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INTRODUCTION

Over the next several decades, the U.S. older population will experience unprecedented growth. By 2030, the population of people age 65 and over will have more than doubled from 35 million in 2000 to 71.5 million. As the number of seniors increase, so will the number of individuals with cognitive disabilities such as Alzheimer's disease and dementia. This trend will produce an increasing demand to invoke guardianship on behalf of incapacitated seniors. However, guardianship - a legal tool which gives one person or entity the power to make personal and/or property decisions for another - has the potential of harming older adults rather than protecting them if not carefully administered. The rising incidence of elder abuse in this country and continuing reports of the failure of courts and the states to prevent exploitation of incapacitated adults by their guardians have long been of concern to this Committee. (See Appendix I for a list of Committee hearings and forums on guardianship.)

The Senate Special Committee on Aging's most recent hearing on guardianship on September 7, 2006, convened by then Chairman Gordon H. Smith, shed light on the program's progress and challenges. During this hearing, it was suggested the Committee draw wider attention to the problems with the current guardianship system and offer recommendations for improvements. This report includes recommendations based on testimony from Committee hearings, interviews with experts in the guardianship community, literature reviews, and submissions from the community in response to the Committee's December 2006 request for proposals to improve the guardianship system.

Based on these efforts, we found that substantial progress has been made since 1987 when the Associated Press published its first indictment of court systems that were failing to protect older adults from neglect, abuse and exploitation at the hands of their guardians. For example, a number of states have enacted statutes regulating guardianship of incapacitated adults and developed standards of practice for guardians. Unfortunately, we also found that significant problems remain, including the underutilization of appropriate alternatives to guardianship, such as temporary guardianship and guardianship arrangements that recognize the ward's remaining

capacity. Moreover, many courts are unable or unwilling to adequately monitor the guardians they appoint or quickly remove them if they prove incompetent or untrustworthy.

This report is designed to help Members of Congress, congressional staff and others understand and respond to the needs of growing numbers of seniors with reduced capacity. It examines the issues surrounding guardianship, describes recent efforts aimed at improving the system, summarizes proposals for change and offers recommendations for action at all levels of government. The many responses to our request for proposals to improve guardianship, and the information and views otherwise provided to us by members of the guardianship community and others interested in this important topic, added markedly to our understanding of the problems and the solutions that hold promise for improvement.

Gordon H. Smith	Herb Kohl
Ranking Member	Chairman

GUARDIANSHIP: PURPOSE, PLAYERS AND PROCESS

In simplest terms, guardianship[1] 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 another (the ward or incapacitated person)."[2] In this country, a guardian is appointed when a judge determines that an adult lacks the capacity to make decisions regarding his or her own life or property. For a vulnerable older person, guardianship can be a valuable tool in securing his/her physical and financial safety. However, it is important to be aware that when full guardianships are imposed, all of one's fundamental rights are transferred to the guardian. Wards no longer have the right to manage their own finances, buy or sell property, make medical decisions for themselves, get married, vote in elections or enter into contracts. As a result, guardianship decisions must carefully balance rights to self-determination with the need to be protected.

When determining the protection of a ward, courts may order full or limited guardianship for incapacitated individuals. Under full guardianship, wards relinquish all rights to self-determination, and guardians have full authority over their wards' personal and financial affairs. Some of the guardian's responsibilities include ensuring the ward lives in the most appropriate location, making medical decisions, arranging for caregivers, protecting the ward's assets, and spending the ward's money only for the ward's care and needs. Under limited guardianship, the guardian's powers and duties are tailored to the level of capacity the ward retains and generally are listed explicitly in the guardianship order issued by the court.

Types of Guardians

Courts rely on a wide variety of private and professional individuals as well as private and public entities to serve as guardians. Usually, courts prefer to appoint a family member – a person to whom an incapacitated senior is related by blood or marriage – when there is one willing and

[1] As used in this report, the term "guardianship" is synonymous with "conservatorship" and refers to the responsibility for an incapacitated adult's person and/or property.
[2] Pamela B. Teaster, Erica F. Wood, Naomi Karp, Susan A. Lawrence, Winsor C. Schmidt, Jr., and Marta S. Mendiondo, *Wards of the State: A National Study of Public Guardianship*, (Research Retirement Foundation), April 2005, 1.

able to serve who has no conflicts of interest with the incapacitated person.[3] Similarly, friends or neighbors of a prospective ward may serve as guardian at the court's discretion when no other suitable candidate can be found.

In recent years, an entire service industry has grown out of the increasing demand for guardians. When there are no family members or friends available to take on this responsibility, private professional guardians, for-profit or not-for-profit professional guardianship entities may fill this void. Individual professional guardians often serve more than one incapacitated client at a time. Professional guardian entities may include, but are not limited to, banks and other financial institutions.

The attorney and court fees associated with filing for guardianship, as well as the expenses incurred by a guardian in managing an incapacitated adult's affairs, typically are covered by the incapacitated adult. Every state has some form of public guardianship program to serve incapacitated adults who do not have sufficient funds to cover all guardianship fees and expenses, or family members or friends willing and able to serve as their guardians.[4] This group often is referred to as the "unbefriended" incapacitated population.[5] Unlike private professional guardians, public guardians are funded by state or local governments.[6] These programs can operate out of a central office in a state or a network of local offices. They often are staffed, in part, by volunteers. A number of states contract for public guardianship services. Public guardians also may serve as an incapacitated person's representative payee overseeing a ward's Social Security or Veterans benefits, or as their surrogate decision maker.[7] They may take active part in the court proceedings associated with appointment of a guardian, also often serving as a guardian ad litem[8] or court investigator in these proceedings. Public guardianship programs may

[3] Currently, an estimated 44.4 million family caregivers provide services to older Americans with reduced capacity, enabling them to continue to live in their homes. According to the Census Bureau, however, a larger proportion of seniors in the future will live alone and fewer will have family caregivers available to them.
[4] Currently, the District of Columbia is considering creating a public guardianship program.
[5] Teaster and others, *Wards of the State*, 5.
[6] Fees wards can afford to pay also account for some portion of the funding public guardianship programs receive, but many in this population do not have the resources to pay fees to public guardians.
[7] Those given another person's power of attorney or health care proxy, for example, are sometimes referred to as that person's surrogate decision maker.
[8] A guardian ad litem is someone appointed by a court to represent the best interests of a minor or incapacitated adult.

provide social services, case management, adult protective services and public education. At times, public guardians may advise or assist private guardians, as well.

Establishing Guardianships

Guardianship is the purview of state court systems. State court guardianship proceedings are not regulated or directly funded by the federal government. In each state, the process of establishing a guardianship has what is commonly referred to as a "front end" consisting of the determination of incapacity and appointment of a guardian and a "back end" consisting of guardian accountability and court monitoring procedures. State laws govern many elements of this process; however, judges retain broad discretion in conducting these proceedings, determining incapacity, limiting a guardian's power and monitoring established guardianships. As a result, both front and back ends of this process can vary significantly from state to state, court to court, and judge to judge.

In general, state statutes governing the guardianship process address some or all of the provisions noted in the table below.

Table 1: Types of Guardianship Provisions in State Laws

Initiation of Guardianship Proceedings	• Definition of incapacity, • Who may initiate petitions, and • What petitions should contain.
Notice Regarding Guardianship Proceedings	• Who should receive hearing notice, • Notice timing and format, • Requirement to inform potential ward of rights or consequences, and • Right to waive notice.
Representation and Investigation in Guardianship Proceedings	• Alleged incapacitated person's right to counsel, • Role of counsel, • Involvement of a guardian ad litem, • Requirements to visit the alleged incapacitated person, and • Evaluation of capacity.
Conduct and Findings in Guardianship Proceedings	• Setting hearing date and location, • Prospective ward's right to attend the hearing and to a jury trial, • Standard of proof, • Required findings, and • Content of guardianship orders.
Oversight of Established Guardianships	• Requirements for and frequency of accountings and status reports, • Court review required, • Post-hearing investigations, and • Sanctions for guardians.

Source: Adapted from information on state guardianship laws compiled by the American Bar Association Commission on Law and Aging. (http://www.abanet.org/aging/legislativeupdates/)

Guardianship proceedings usually begin when family, friends, public agencies or other interested parties petition the court for appointment of guardians for alleged incapacitated adults. Petitions may be precipitated by incidents of suspected neglect or abuse or simply be in response to an interested party's concern for the safety and well-being of a vulnerable senior. The process in every state includes some procedures intended to ensure an alleged incapacitated person's right to due process and provisions for investigating and gauging the extent of alleged incapacity. The process usually culminates in a hearing where the judge presents his or her findings regarding the capacity of the potential ward and, if indicated, appoints a guardian and writes an order

describing the duration and scope of the guardian's powers and duties. Once a guardianship is established, courts have the responsibility to require and review periodic accounting and status reports from guardians to make sure they are carrying out their duties effectively and in the best interest of their wards.

The court has authority to expand or reduce guardianship orders, remove guardians for failing to fulfill their responsibilities, or terminate guardianships and restore the rights of wards who have regained their capacity. However, it is difficult for wards to prove capacity or even retain legal council without control over or access to their own financial resources.

ALTERNATIVES TO GUARDIANSHIP

While the purpose of guardianship is to protect incapacitated adults from neglect, abuse and financial exploitation, it comes at a cost. Therefore, it generally is considered to be the measure of last resort. In exchange for protection, wards relinquish fundamental rights such as the right to vote, marry, and decide where to live and to make their own health care decisions. Guardianship also can be an expensive proposition, with the potential to drain a ward's resources and expend public funds.[9] Moreover, if guardians are not qualified or committed to exercise the highest degree of trust with regard to their wards, or are not held accountable for their actions by the courts, guardianship can place wards at risk of the very mistreatment it is intended to prevent. At a U.S. Senate Special Committee on Aging hearing on guardianship for the elderly in 2003, then Chairman, Larry Craig, indicated that "Ironically, the imposition of guardianship without adequate protections and oversight may actually result in the loss of liberty and property for the very persons these arrangements are intended to protect."

There are a number of less restrictive planning tools and measures that can be used to delay or avoid guardianship. These alternatives to guardianship honor the known preferences of incapacitated adults without involving the courts, including their choice of who should act on

[9] According to Multnomah County Adult Protective Services, for example, total estimated attorney and court fees associated with guardianship in the Portland, Oregon area usually range from $2226 to $4162 but can be higher. These estimates include: $1800-$2500 in attorney fees for a non-emergency guardianship; $2000-$2800 in attorney fees for an emergency guardianship; $2800 or more in attorney fees if an objection to the guardianship is filed; $78-$729 court filing fee; $240-$480 court visit fee; and $30-$75 process server fee.

their behalf if they cannot make decisions for themselves. The following table lists some common alternatives to guardianship.

Table 2: Alternatives to Guardianship

Alternative	**Effects of Alternative**
Durable Power of Attorney (DPA)	A durable power of attorney allows a capable person to grant another person authority to act for him or her if incapacity occurs. DPAs usually affect property decision-making, but may also relate to health care.
Trust	A trust enables a person ("grantor") to transfer ownership of property into a trust that is managed by a trustee for the benefit of the grantor. Trusts allow a trustee to manage property in the event of the grantor's later incapacity.
Joint Ownership	Joint ownership of land or bank accounts may allow a co-owner to manage an incapacitated co-owner's property.
Voluntary Guardianship Over Property	Allowed by only a few states, this enables a person who is worried about losing capacity to plan for property management with court oversight.
Daily Money Management (DMM)	Daily money management services help people with their financial affairs, including check depositing and writing, checkbook balancing, bill paying, insurance claim preparation, tax preparation and counseling, and public benefit applications and counseling. DMM is voluntary; a person must be capable of asking for or accepting services.
Representative Payee	A representative payee is appointed by a government agency to receive, manage and spend government benefits for a beneficiary. A beneficiary may request a representative payee, but usually the agency requires one when a beneficiary is incapable of managing benefits. The representative payee's authority is limited to the government funds for which he or she is the payee.
Living Will	A living will gives directions about treatment desired if a person is terminally ill and near death or in a "persistent vegetative state," and cannot make or communicate health care decision. Generally, laws limit the directions to those about the use, withdrawal or withholding of life-sustaining or life-prolonging procedures.
Health Care Power of Attorney	A heath care power of attorney enables a person to name an agent or proxy to make health care decisions if he or she becomes unable to do so. It may address any type of health care decision, and may include guidance to the agent about the type and extent of health care desires.

Health Care Advance Directive	A health care advance directive combines the health care power of attorney and living will into one document.
Health Care Surrogate or Family Consent Laws	Health care surrogate or family consent laws provide legal authority for certain groups of persons (e.g., spouses, children or parents) to make health care decisions for an adult who cannot make or communicate such decision due to disability, illness or injury, and who has not authorized someone else to do so.

Source: *Facts about Law and the Elderly*, DC: American Bar Association, copyright 1998. Table reproduced here with permission from the American Bar Association.

The primary advantages of planning tools such as durable and health care powers of attorney and living wills are that they are easy to create, flexible and easy to revoke. There are disadvantages associated with these tools, as well. There is no assurance that agents will do what is required or follow the incapacitated person's wishes, and there is no court supervision of these agreements. Similarly, joint ownership of bank accounts, etc. are easy to establish, but there is risk associated with these approaches if joint owners prove untrustworthy.

GUARDIANSHIP ISSUES

Incidents of abuse, neglect and exploitation of incapacitated adults by their guardians have raised a number of controversial issues regarding the courts' administration and oversight of guardianships.[10] For example, the practice of installing an emergency guardian at the judge's discretion in cases that require immediate steps to secure an alleged incapacitated person's health and safety has been called into question by some state Long-Term Care Ombudsmen. Emergency appointments, by their nature, immediately deny prospective wards their right to due process. Moreover, there may be a tendency in some courts to use emergency guardianship to circumvent the requirements for comprehensive, longer and more costly investigations, although it is not clear how often this is occurring.[11]

[10] Studies conducted in the early 1970s, for example, concluded that guardianship and other adult protective proceedings were not of much benefit to wards. Guardianship petitions often were filed for the benefit of third parties or for motives that, although well-meaning, were of little help to the vulnerable. See G. Alexander and T. Lewin, *The Aged and the Need for Surrogate Management*, Syracuse, New York: Syracuse University Press, 1972.
[11] National Citizens' Coalition for Nursing Home Reform (NCCNHR), 31st Annual Conference and Meeting, from the discussion among attendees on use of emergency guardianship, session on Residents Rights and Self-Determination In Light of Guardianship, October 22, 2006.

Determining Capacity

Alleged incapacitated adults may retain some capacity for self-determination and, ideally, every effort should be made to tailor guardianship orders to whatever level of capacity prospective wards retain. However, crafting limited guardianship orders requires evaluation of capacity based on functionality, a more objective criterion than what many courts now commonly use.[12] Evaluation of capacity based on residual function also might take into account the situational and transient nature of capacity. Capacity is situational because different degrees of capacity are required for different tasks and transient because individuals can have both periods of relative lucidity and confusion. At any given point in time, capacity also may be influenced by external forces, such as lack of sleep or medication.

Shortage of Public Guardians

Many in the guardianship community have indicated that public guardianship programs are straining to serve all who need assistance.[13] A recent study concluded that there was "…significant unmet need for public guardianship and other surrogate decision-making services" in the states.[14] Although this study found that these programs serve a population that is younger than in the past and that most clients are institutionalized, it is not unreasonable to conclude that our growing elderly population will contribute to an increased demand for public guardians in the future. The growth in the number of low-income elderly over the next 20 years or so, as predicted by the U.S. Census Bureau, also provides some indication of the potential future growth in demand for public guardians. In 2002, 21 percent of people age 65 and over were living in poverty and an additional 10 percent were classified as low-income. If these rates remain steady, the number of poor or low-income elderly will increase from about 13.6 million in 2002 to over 27 million by 2030.[15]

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[12] For example, an AARP training module for guardians defines capacity as the ability to make and communicate informed and voluntary (free of coercion) decisions. The term "informed" is used to describe decisions rather than highly subjective terms such as "rational" or "reasonable."
[13] Virginia, Florida, and Massachusetts all have published statistics on the shortage of guardians in their states.
[14] Teaster and others, *Wards of the State*.
[15] Based on data reported in *Older Americans 2004: Key Indicators of Well-Being*, and *Older Americans 2006: Key Indicators of Well-Being*, Federal Interagency Forum on Aging Related Statistics.

Oversight of Guardianship by the Courts

Generally, it is accepted that guardianship cases should be monitored to ensure the welfare of wards, discourage and identify neglect, abuse, or exploitation of wards by guardians, and sanction guardians who demonstrate malfeasance. The lack of court oversight of guardians was recognized in 1982 when an investigation by a Dade County Florida Grand Jury found insufficient monitoring of guardianships by the courts.[16] In 1986, considerable public attention was drawn to the failure of guardianship to protect the well-being of the elderly when the Associated Press published the results of a nationwide study exposing the widespread failure of the courts to adequately oversee these arrangements.[17] Following this series, many states enacted laws reforming guardianship procedures. However, these statutes have not always been implemented by judges and the other players in guardianship,[18] and reports of courts' failures to prevent abuses of the elderly by their guardians have continued.

In 2002, a District of Columbia Court of Appeals overturned a lower court decision to place then 87 year old Mollie Orshansky, a DC resident, in the hands of a court-appointed guardian.[19] The appeals court ruled that the lower court abused its discretion by disregarding the elderly woman's advance directives and plans to live near her family in New York. This triggered a *Washington Post* investigation that concluded there was "chaotic record-keeping, lax oversight and low expectations in…" the D.C. Superior Court, which fostered a culture that rarely held guardians accountable for neglect, abuse, or exploitation of their wards.[20] Investigations producing similar findings were carried out in Texas by the *Dallas Morning News* in 2004[21] and in Los Angeles by the *Los Angeles Times* in 2005.[22] In 2006, the much publicized Brooke Astor case drew attention

[16] Dade County Grand Jury, *Final Report of the Grand Jury*, Miami, Florida: Office of the State Attorney, 1982.
[17] Associated Press, *Guardians of the Elderly: An Ailing System*, September 1987.
[18] Teaster and others, *Wards of the State*, 3.
[19] *In Re Mollie Orshansky*, 804 A.2d 1077(D.C. App. 2002).
[20] Carol D. Leonnig, Lena H. Sun, and Sarah Cohen, "Misplaced Trust/Guardians in the District: Under Court, Vulnerable Become Victims," *Washington Post*, June 15-16, 2003, and Sarah Cohen, Carol D. Leonnig, and April Witt, "Misplaced Trust: Guardians in Control," *Washington Post*, June 16, 2003.
[21] Lee Hancock, and Kim Horner, "State of Neglect: Old, Alone, and Invisible," *Dallas Morning News*, December 19, 2004, and "State of Neglect Courts: The Missing Link," *Dallas Morning News*, December 20-21, 2004.
[22] Robin Fields, Evelyn Larrubia, and Jack Leonard, "Guardians for Profit," *Los Angeles Times*, November 13-16, 2005.

to the plight of elderly wards yet again.[23] Research on guardianship monitoring practices published that year by AARP and the American Bar Association (ABA) Commission on Law and Aging further warned that "demographic and societal" shifts—increasing numbers of guardianship cases, elder abuse incidents, and public and private guardianship agencies with high caseloads—emphasize the importance of and need for effective court monitoring.[24] Consistent with other investigations by the press in recent years, this study concluded that although there have been some advances in court monitoring, there is room for improvement. It found that technology only is used minimally by the courts, guardian training and funding, in general, for monitoring generally is lacking, review of guardian reports and visits to wards are infrequent, volunteers are under-utilized, and courts do not take advantage of available community resources to assist with guardian oversight.

Data on Guardianship and Its Outcomes

In order to adequately oversee these cases and prevent elder abuse, few would dispute the importance of accurate and reliable data on guardianships. In 2004, the Government Accountability Office (GAO) reported a grave lack of hard data on guardianships involving incapacitated seniors.[25] In 2006, the ABA issued a report with similar findings.[26] Based on a survey of 56 state and territorial court administrators, ABA's report concluded that there is no state-level guardianship data in most states, no state-level guardianship data in any state that would be needed to improve the system and very little data on elder abuse in guardianship cases. While there are some promising practices related to compilation of data that is needed to effectively manage guardianship cases and prevent elder abuse, the cost and burden involved in replicating these practices is prohibitive.

[23] Serge F. Kovaleski, "Mrs. Astor's Son to Give Up Control of Her Estate," *New York Times*, October 14, 2006.
[24] Naomi Karp, and Erica Wood, *Guardianship Monitoring: A National Survey of Court Practices.* DC: AARP Public Policy Institute and ABA Commission on Law and Aging, Washington, D.C.: June 2006.
[25] GAO, *Guardianships: Collaboration Needed to Protect Incapacitated Elderly People*, GAO-04-655 (Washington, D.C.: July 13, 2004).
[26] Erica F. Wood, *State-Level Guardianship Data: An Exploratory Survey, American Bar Association Commission on Law and Aging*, Washington, D.C.: August 2006.

Federal Representative Payee Programs

Federal agencies that provide benefits to the elderly, such as the Social Security Administration (SSA) and the Department of Veterans Affairs (VA), identify and assign someone to handle the cash payments to beneficiaries who cannot manage those benefits on their own behalf. The person or organization that is assigned this duty is referred to as a representative payee, and federal agencies are responsible for overseeing representative payee performance. In 2004, over 700,000 Social Security and over 46,000 VA beneficiaries had a representative payee. Procedures for monitoring representative payees differ by federal agency.

Federal representative payee and state guardianship programs operate independently, although they often serve the same elderly incapacitated individuals. If a representative payee already has been assigned by a federal agency, state courts may determine an incapacitated person does not require a guardian as well. In these cases, state courts have no supervisory authority over representative payees. Federal agencies may rely on state courts' determinations of incapacity to justify assignment of a representative payee, but statements from lay people also are considered sufficient evidence of a beneficiary's inability to handle their own benefits. If a beneficiary already has a court-appointed guardian, federal agencies may choose to name the guardian representative payee, in which case the guardian would be subject to supervision by the federal agency.

IMPROVEMENTS IN GUARDIANSHIP PRACTICE

There have been a number of initiatives on the national and state levels in recent years aimed at improving guardianship for the elderly.

Wingspread and Wingspan Recommendations

In July 1988, ABA's Commission on Legal Problems of the Elderly and Commission on the Mentally Disabled convened the first of two national guardianship symposia aimed at improving the procedural rights of alleged incapacitated adults and otherwise meeting their needs. At the

first symposium, known as Wingspread (the name of the conference center at which it was held), a broad range of professionals working in the guardianship area agreed on 31 recommendations to improve guardianship covering topics such as procedural due process and incapacity determination. In late 2001, the second national symposium, known as Wingspan, once more brought together a multidisciplinary group of guardianship professionals. This time, the participants produced 68 recommendations spanning six broad topics:

- Overarching needs,
- Diversion and mediation,
- Due process,
- Agency guardianship and guardianship standards,
- Monitoring and accountability, and
- Lawyers as fiduciaries or counsel to fiduciaries.

In general, recommendations called for education and training for all those involved in the guardianship process, research to determine who guardianship programs serve and how well programs work, and funding for all types of reform. Following Wingspan, a number of the attendees formed the National Guardianship Network to further coordinate guardianship reform efforts nationwide and promote national awareness of guardianship issues.[27] In 2004, the National Academy of Elder Law Attorneys, National Guardianship Association and National College of Probate Judges met again at a Wingspan Implementation Session to continue to move guardianship policy and practice ahead. Their goal was to create a blueprint for national, state and local action. The action steps they produced fell into five categories:

- Interdisciplinary committees,
- Interstate jurisdiction, data collection and funding,
- Training certification and judicial specialization,
- Appropriate and least restrictive guardianships, and
- Guardianship monitoring.

[27] Members of the National Guardianship Network include the American Bar Association—Commission on Law and Aging, the American Bar Association—Section on Real Property, Probate and Trust Law, the American College of Trust and Estate Counsel, the National Academy of Elder Law Attorneys, the National Center for State Courts, the National College of Probate Judges, the National Guardianship Association, and the National Guardianship Foundation.

State Guardianship Laws

In 1997, the National Conference of Commissioners on Uniform State Laws (NCCUSL) updated its Uniform Guardianship and Protective Proceedings Act, originally approved by NCCUSL in 1982. The Act contains definitions and general provisions applicable to guardianship for adults and minors. It adds to the original Act's emphasis on limited guardianship, stating that guardianship should be viewed "as a last resort" and that, whenever making decisions, guardians should always consult with their wards, to the extent possible. It promotes adoption of a functional definition of incapacity, and use of less restrictive alternatives to guardianship if the ward retains some level of capacity. The Act also specifies certain procedural steps that should be taken before a guardian is appointed, including serving notice of the hearing, use of a court-appointed visitor to investigate the validity of the petition, allowing/requiring counsel for and professional evaluation of alleged incapacitated adults, and requiring prospective guardians and wards to attend the hearing. It requires a higher burden of proof for establishing a guardianship than restoring rights to wards. Finally, the Act requires courts to set up a system to monitor guardian performance and establishes certain reporting requirements for guardians.

This Act has served as a model to states as they have developed their guardianship statutes over recent years. The ABA has tracked these changes in state guardianship statutes over time. Based on their tables describing provisions of these statutes across all states and their annual updates of these tables, http://www.abanet.org/aging/legislativeupdates/, there is clear evidence of progress states have made with regard to establishment of guardianship, protection of individual rights and oversight and accounting.

Establishment of Guardianship: Guardianship proceedings typically begin with a petition for guardianship and a subsequent hearing to determine the validity of the petition. Most state laws simply call for clear and convincing evidence in the initial petition. A few states leave this determination to the judge, basing it on court satisfaction. All states have in place laws regarding when a hearing may take place. Some states specifically limit the time frames within which a hearing can take place once a petition has been filed, for example, 15 days or four months. Interestingly, certain states answer the question of "how" a hearing should be conducted rather

than the question of "when." For example, Kansas law states that a guardianship proceeding should be conducted in as "informal a manner as consistent with orderly procedure." Most states make no mention of location for a hearing or who is mandated to be present. However, many do provide an "opportunity to appear" for potential wards. Finally, a jury trial is usually granted "if requested."

Protection of Individual Rights: Most states consider and define legal status of the potential ward, right to counsel and hearing notice. The majority of states use the term "incapacitated" or "incompetent" to refer to a person who is lacking sufficient understanding or capacity to make or communicate responsible decisions. Forty-two states use "functionality" to describe the capacity of the potential ward. Forty-two states, though not necessarily the same ones that use functionality, require a medical evaluation on which to base the legal status of the ward and subsequent need for guardianship. Further, the majority of states offer to provide for a court-appointed attorney. Roughly, 27 states require an attorney, hence appointing one through the court, while 19 vaguely allow counsel. Fewer states factor in a guardian ad litem as a replacement for an attorney, court appointed or otherwise.

Hearing notice requirements vary among the states. It is generally accepted that all potential wards and guardians receive notice of any proceeding and for the vast majority of states, notice to family members and spouses may be required. Some states specifically mention petitioners and heirs to estates as individuals to receive notice.

Oversight and Accounting: State law provides several oversight mechanisms once a guardianship is established. Several states require an accounting from one month to six months following the appointment of a guardian, while most states call for an annual account. These accounts contain status reports, which include information ranging from "condition of ward and estate" to "status, condition, living arrangement, activities, address and contacts, services, actions [and] guardianship implementation report 90 days after appointment." States with this type of oversight in place designate various individuals to provide these reviews for the court. These

appointed individuals include visitors, curators, clerks of the court and investigators. Approximately half the states require a post-hearing investigation for evaluation of status. The frequency of these status reports varies among states. Additionally, some states require periodic post-hearing investigations. Finally, most courts have the authority to levy appropriate sanctions, among them, removal of a guardian for best interest or good cause, fines, and recovery of assets.

Federal Laws Pertaining to Guardianship for the Elderly

The federal role in guardianship for the incapacitated elderly is primarily defined by the Older Americans Act (OAA). Over the past several years federal legislation to prevent elder abuse also has been introduced, which could influence the administration of guardianship for the elderly.

The Older Americans Act: The OAA originally was signed into law in 1965. The Act provides a wide range of social services and programs for our nation's elderly that include: support services, congregate and home-delivered nutrition services, community service employment, the long-term ombudsman program, and some services intended to prevent the abuse, neglect and exploitation of older persons. The OAA and its programs were reauthorized in 2006 for five years.[28]

For Fiscal Year (FY) 2008, the President's budget requests a total of $1.685 billion for OAA, a six percent reduction from the FY 2007 level[29] of $1.795 billion.[30] The OAA includes the following grant programs that provide funding to states and would be funded at the following levels by the President's FY 2008 budget:

- Title II, the Administration on Aging ($31.829 million),
- Title III, Grants for State and Community Programs on Aging ($1.216 billion),[31]
- Title IV, Activities of Health, Independence and Longevity ($35.485 million),

[28] The Older Americans Act Amendments of 2006, S. 3570 (introduced 06/27/06).
[29] Angela Napili, Congressional Research Service, *Older Americans Act: FY2007 Funding and FY2008 Funding Proposals*, Washington, D.C.: August 27, 2007.
[30] Angela Napili, Congressional Research Service, *Older Americans Act: FY2007 Funding and FY2008 Funding Proposals*, Washington, D.C.: August 27, 2007.
[31] P.L. 109-365, the Older Americans Act Amendments of 2006, changed the Title III formula for supportive services, congregate nutrition services, home-delivered nutrition services, and disease prevention and health promotion services to ensure that every state receives at least its FY2006 amount, while phasing out the provision that guarantees every state a share of any increase in total funding above FY2006.

- Title V, Community Service Seniors Opportunities Act ($350 million),
- Title VI, Grants to Native Americans ($32.375 million), and
- Title VII, Vulnerable Elder Rights Protection Activities ($19.166 million).

For FY 2008 the U.S. Senate and House of Representatives will determine the actual funding levels for OAA through the annual appropriations process. At the time of this report, the following allocations have been recommended by the House and Senate in a conference agreement for FY 2008:

The House and Senate have recommended $1.98 billion for OAA for FY 2008, a $185 million increase over FY 2007.

- Title II, the Administration on Aging ($68.110 million),
- Title III, Grants for State and Community Programs on Aging ($1.31 billion),
- Title IV, Activities of Health, Independence and Longevity ($15.1 million),
- Title V, Community Service Seniors Opportunities Act ($530.9 million),
- Title VI, Grants to Native Americans ($33.804 million), and
- Title VII, Vulnerable Elder Rights Protection Activities ($21 million).

The only source of federal funding for senior guardianship programs is through the OAA. While there is no direct federal funding for guardianship programs, individual states can choose to use federal grants from the OAA for these programs. However, this funding is very limited. According to the Congressional Research Service most states use funding for guardianship programs from Title VII B, *Elder Abuse Prevention*, but the total amount for all states is a meager $5.146 million (FY 2007). Additionally, states can choose to use federal funding from OAA Title III A, *Supportive Services and Centers*, which the President's budget requests $350.595 million for FY 2008 and is level funding as compared to FY 2007. As a result, most states cannot and do not rely on federal dollars to fund a significant proportion of their senior guardianship programs.

National Elder Abuse Prevention Legislation: Older Americans are abused, neglected or exploited every day in every part of the country, yet it goes often undetected and unreported. Studies of the prevalence of elder abuse have varied greatly. It has been estimated that anywhere between 500,000 and five million older Americans are abused every year. Based on the Iceberg

Theory,[32] up to 84 percent of elder abuse cases may go unreported. Victims of elder abuse not only are subject to injury from mistreatment and neglect, they also are 3.1 times at greater risk of dying.

The federal government has been slow to respond to the needs of elder abuse victims. For over 20 years, Congress has been presented with facts and testimony calling for a coordinated federal effort to combat elder abuse. Hearings have been held and reports have been issued, yet no legislation has been enacted. Most experts agree the federal effort against elder abuse is 40 years behind the work addressing child abuse and two decades behind that of domestic violence.

The most definitive study on elder abuse entitled, "The National Elder Abuse Incidence Study" (NEAIS) was released in 1998.[33] The study was based on 1996 data and found that 449,924 persons aged 60 and older experienced abuse and/or neglect in domestic settings. Of this total, 70,942 (16 percent) of these incidents were reported to and substantiated by Adult Protective Services (APS) agencies, but the remaining 378,982 (84 percent) were not reported to APS. The study estimated that over five times as many new incidents of abuse and neglect went unreported than those that were reported to and substantiated by APS agencies.

The study concluded that elder abuse is even more difficult to detect than child abuse, as the social isolation of some elderly persons may increase both the risk of abuse and neglect, and the ability for outsiders to detect it. The report also noted that approximately 90 percent of alleged abusers were related to victims. Of the almost 450,000 substantiated reports of all types of elder abuse, approximately 40 percent, or 220,400, involved some form of financial abuse. Persons over age 50 control at least 70 percent of the nation's household net worth. Accordingly, it is no wonder that the elderly are targets of financial crimes that only will increase as the large Baby Boom generation ages.

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[32] Referring to the large number of elder abuse cases that go unreported each year. See., e.,g., National Center on Elder Abuse, American Public Human Services Association, and Westat, Inc. *The National Elder Abuse Incidence Study: Final Report*, Washington, D.C.: September 1998.

[33] National Center on Elder Abuse, American Public Human Services Association, and Westat, Inc. *The National Elder Abuse Incidence Study: Final Report*, Washington, D.C.: September 1998.

Against this backdrop, the Elder Justice Act was first introduced in 2002. It has been re-introduced in subsequent Congresses, most recently in 2007, and remains the first comprehensive piece of legislation endeavoring to address all forms of elder abuse, neglect and exploitation. The Elder Justice Act recently was re-introduced in the 110th Congress (S.1070). If passed into law, the Act will take a number of steps to prevent and treat elder abuse, including those surrounding our guardianship system. First, it will provide federal leadership on issues of elder justice through a Coordinating Council of federal agencies and an Advisory Board on Elder Abuse. Second, it will improve collaboration by bringing together a variety of federal, state, local and private entities to address elder abuse. The bill will require that health officials, social services, law enforcement, long-term care facilities, consumer advocates and families are all working together to confront this problem. Third, it will develop expertise to better detect elder abuse, neglect and exploitation by training health professionals in both forensic pathology and geriatrics. Finally, it will increase research and training related to elder abuse, neglect and exploitation.

Ethics and Standards for Guardians and the Courts

The National Guardianship Association (NGA)[34] has developed a Code of Ethics to guide the decisions both family and professional guardians make. It also has adopted Standards of Practice for guardians to apply in their day-to-day practice that often go beyond what state laws require of a guardian. Since incapacitated individuals must relinquish their fundamental rights to a guardian, the code of ethics requires guardians to exercise the highest degree of trust, loyalty and fidelity in making decisions on behalf of the ward. The code consists of rules pertaining to decision-making and general principles, relationship between guardian and ward, establishing a place of abode, consent to care, treatment and services, management of the estate, and termination and limitation of the guardianship.

As far as standards of practice for guardians are concerned, the NGA goal has been to "…strike a consistent balance between standards that represent an ideal and those that recognize practical

[34] NGA was created in 1988 to establish and promote a standard of excellence in guardianship practice. Its 650 members include professional and family guardians, attorneys, judges, social workers, nurses, physicians, psychiatrists, and other allied professionals.

limitation, whether for a family guardian or for a professional guardian."[35] NGA standards for guardians cover:

1) Applicable Law
2) The Guardian's Relationship to the Court
3) The Guardian's Professional Relationship with the Ward
4) The Guardian's Relationship with Family Members and Friends of the Ward
5) The Guardian's Relationship with Other Professionals and Providers of Service to the Ward
6) Informed Consent
7) Standards for Decision-Making
8) Least Restrictive Alternative
9) Self-Determination of the Ward
10) The Guardian's Duties Regarding Diversity and Personal Preference of the Ward
11) Confidentiality
12) Duties of the Guardian of the Person
13) Guardian of the Person: Initial and Ongoing Responsibilities
14) Decision-Making About Medical Treatment
15) Decision-Making About Withholding and Withdrawal of Medical Treatment
16) Conflict of Interest: Ancillary and Support Services
17) Duties of the Guardian of the Estate
18) Guardian of the Estate: Initial and Ongoing Responsibilities
19) Property Management
20) Conflict of Interest: Estate, Financial and Business Services
21) Termination and Limitation of the Guardianship/Conservatorship
22) Guardianship Service Fees
23) Management of Multiple Guardianship Cases
24) Quality Assurance
25) Sale or Purchase of a Guardianship Practice

There also is a national registered guardian certification program administered by the National Guardianship Foundation (NGF), an allied foundation of NGA. To become a NGF-certified guardian, at a minimum, a candidate must:

- Be at least 21 years of age,[36]
- Be a high school graduate or equivalent,
- Have at least one year of relevant work experience, a degree in a field related to guardianship, or have completed NGF-approved training related to guardianship,
- Never have been convicted of or pled no contest to a felony,

[35] National Guardianship Association, *Standards of Practice*, Bellefonte, Pennsylvania: 2000.
[36] In Florida, a candidate must be at least 18.

- Never have been liable in an civil action involving fraud, misrepresentation, material omission, misappropriation, moral turpitude, theft or conversion,
- Be bonded,
- Never have been found liable in a subrogation action by an insurance or bonding agent,
- Establish competency in guardianship by completing a test administered by NGF, and
- Be re-certified periodically.

There also exist NGF criteria that dictate the circumstances that call for removal, revocation or suspension of certification as well as a disciplinary process in concordance with court action against a guardian.

A number of states require professional guardians to be certified as a way to regulate the growing professional guardian industry. In January 2007, there were 1,277 certified guardians in the United States. The table below provides the number of certified guardians by state.

Table 3: Number of Nationally Certified Guardians by State as of January 15, 2007

State	Number
Alabama (AL)	0
Alaska (AK)	21
Arizona (AZ)	39
Arkansas (AR)	0
California (CA)	118
Colorado (CO)	10
Connecticut (CT)	0
Delaware (DE)	5
District of Columbia (DC)	0
Florida (FL)	404
Georgia (GA)	1
Hawaii (HI)	1
Idaho (ID)	4
Illinois (IL)	81
Indiana (IN)	17
Iowa (IA)	3
Kansas (KA)	5
Kentucky (KY)	5
Louisiana (LA)	7
Maine (ME)	0
Maryland (MA)	13
Massachusetts (MA)	6
Michigan (MI)	58
Minnesota (MN)	23
Mississippi (MS)	1
Missouri (MO)	25
Montana (MT)	0
Nebraska (NE)	1
Nevada (NV)	43
New Hampshire (NH)	16
New Jersey (NJ)	23

New Mexico (NM)	31
New York (NY)	3
North Carolina (NC)	10
North Dakota (ND)	7
Ohio (OH)	25
Oklahoma (OK)	0
Oregon (OR)	35
Pennsylvania (PA)	18
Rhode Island (RI)	0
South Carolina (SC)	2
South Dakota (SD)	0
Tennessee (TN)	19
Texas (TX)	152
Utah (UT)	7
Vermont (VT)	0
Virginia (VA)	2
Washington (WA)	5
West Virginia (WV)	0
Wisconsin (WI)	29
Wyoming (WY)	2
TOTAL	1277

Source: National Guardianship Foundation, "Registered Guardianship Listing."

To promote uniformity in probate court practices and procedures nationwide, in 1993 the National College of Probate Judges and the National Center of State Courts published standards to help guide procedures and practices in courts with probate jurisdiction. [37] These include standards specifically applying to guardianship that cover procedural protections, limited guardianship, use of less restrictive guardianship alternatives and court monitoring of guardianships.

Mediation in Guardianship Cases

Mediation—"a facilitated, non-adversarial negotiation in guardianship settings that takes place in addition to, or in lieu of, formal legal proceedings,"[38] has shown promise for reducing the economic and emotional costs of disputed guardianship cases.[39] Typically, these disputes involve differences of opinion regarding how powers of attorney have been used, whether a guardian is needed or who should be appointed, or whether a guardian should be removed. Underlying issues

[37] The National Probate Court Standards were updated in 1999.
[38] Susan J. Butterwick, Penelope A. Hommel, and Ingo Keilitz, *Evaluating Mediation as a Means of Resolving Adult Guardianship Cases*, Center for Social Gerontology, Inc., Ann Arbor, Michigan: October 2001, 1.
[39] Kate Mewhinney, "North Carolina Tries Mediation for Estate and Guardianship Disputes," *Bifocal*, vol. 28, no. 3, (February 2007).

in these cases may involve control over money, the person's ability to choose his or her own surrogate decision maker, or simply the need to convince the person to move to a safer living arrangement. Participants in mediation usually include the alleged incapacitated adult and family members, but others with relevant information about that person also can attend. The mediator may be chosen by the parties or appointed by the court. Mediators might have a background in aging issues and, among other things, should be familiar with concepts that arise in guardianship disputes and criteria for evaluating capacity. Mediation usually is held in an informal setting.

The Center for Social Gerontology has long supported statutory reform of guardianship for incapacitated adults, but recognizes that adversarial judicial proceedings are not always the best approach, particularly in cases involving disagreements among family members. In such cases, it found judicial proceedings magnified rather than resolved these disputes. Consequently, the Center has spearheaded the introduction of mediation into the guardianship process. It has staged pilots in several locations nationwide to test its usefulness as an alternative to traditional adversarial court proceedings. The Center's study of adult guardianship mediation in four states found mediation helped parties resolve disputes in three out of four guardianship cases. Further, participants, program administrators and mediators believed this approach reduced the number of cases where guardians were needed. Mediation also increased the use of limited versus full guardianship. However, the study also found that: 1) mediation was used infrequently and almost never used prior to the initiation of formal guardianship proceedings, 2) mediation programs were not well integrated with court guardianship proceedings, and 3) judges, attorneys and social service agencies lacked understanding of mediation.

In the broadest sense, mediation provides a counterbalance to the strict due process protections that make hearings formal and adversarial. As the Center for Social Gerontology found, mediation can reduce court guardianship caseloads by keeping disputed cases out of courts, which are not designed to resolve them, and reducing the risk that disputed cases will return to court. By helping to resolve disputes that otherwise could discourage family members from serving as guardians, mediation also can lower demand for public guardians. Moreover, mediation can better enable alleged incapacitated adults who retain some capacity to avoid full guardianship and opt for some less restrictive alternatives.

Court Monitoring of Guardianship Cases

Court monitoring of guardianship cases has received substantial attention over the past several years. Research in this area not only has provided first-hand evidence of the extent and failure of monitoring in guardianship cases, but also has served as an impetus for improvement of the system.

In 1990, the Legal Counsel for the Elderly at AARP began the National Guardianship Monitoring Project, which created volunteer monitoring projects in 53 courts nationwide.[40] This initiative used trained volunteers (AARP member) as guardianship monitors—the "eyes and ears" of the court. The courts that participated in this project demonstrated improved capacity for monitoring. The project ended in 1997. To determine how many of the original 53 volunteer monitor projects are still in operation and how effective they have been, AARP Foundation and the ABA Commission on Law and Aging conducted a survey of the original projects. Survey results are due to be published December 2007 in a report entitled *Volunteer Guardianship Monitoring Programs: A Win-Win Solution*.

In the early 1990s the ABA undertook a comprehensive review of guardianship monitoring, surveying professionals involved in the process, and identifying best monitoring practices.[41] About 15 years later, the AARP Public Policy Institute and the ABA Commission on Law and Aging collaborated on another study of court guardianship practices.[42] Based on a national survey of experts, the study found that there continue to be significant deficiencies in court monitoring of guardians. In addition to their report on this survey, in September 2007, AARP and ABA plan to issue the results of site visits and interviews conducted in selected jurisdictions with exemplary monitoring practices. In conjunction with this research, AARP also sponsored a Guardianship Monitoring Symposium in February 2007, bringing together probate court judges, attorneys and other court personnel to share and discuss best practices in monitoring and to

[40] Legal Counsel for the Elderly, Inc., *The National Guardianship Monitoring Program: Program Handbook*. Washington, DC: AARP, 1992.
[41] S Hurme, *Steps to Enhance Guardianship Monitoring*, Washington, D.C.: American Bar Association Commission on the Mentally Disabled and Commission on Legal Problems of the Elderly, 1991.
[42] Naomi Karp, and Erica Wood, *Guardianship Monitoring: A National Survey of Court Practices*, AARP Public Policy Institute and ABA Commission on Law and Aging, Washington, D.C.: June 2006.

generate ideas for implementing and replicating these approaches more widely. In April 2006, the National Center for State Courts' (NCSC) multidisciplinary Elder Abuse and the Courts Working Group also met and developed strategies probate courts could use to improve their identification of and response to neglect and abuse of the elderly. NCSC published a policy paper outlining the recommendations generated at this meeting.[43]

Public Guardians

Following up on the first comprehensive study on public guardianship in the U.S., published in 1981,[44] the University of Kentucky, in collaboration with the ABA Commission on Law and Aging, examined the operation and effect of state public guardianship programs.[45] Based primarily on a national survey of these programs and practices and in-depth interviews with program staff in several states the researchers provided information and recommendations regarding:

- Types of individuals served by public guardians,
- Characteristics and functions of public guardians programs,
- How programs are funded and staffed, and
- How courts use and oversee them.

They also developed "hallmarks" of model guardianship programs.

Resolving Jurisdictional Issues

In its 2004 report on guardianship, GAO found that variations in laws pertaining to guardianship lead to interstate jurisdictional complications in these cases—complications that arise when courts in more than one state are asked to appoint a guardian for an alleged incapacitated person. GAO concluded that even when states have adopted provisions of the Uniform Guardianship and

[43] Brenda Uekert, Denise Dancy, Tracy Peters, and Madelynn Herman, *Policy Paper: A Report from the First National Meeting of the Elder Abuse and the Courts Working Group Meeting*, National Center for State Courts, Williamsburg, Virginia: June 12, 2006.
[44] W. Schmidt, K. Miller, and E. New, *Public Guardianship and the Elderly*, Cambridge, Massachusetts: Ballinger Publishing Company, 1981.
[45] Teaster and others, *Wards of the State*.

Protective Services Act (UGPSA), these provisions may not be sufficient to avoid complications. Because problems determining jurisdiction in guardianship cases are frequent, the National Conference of Commissioners on Uniform State Laws (NCCUSL) drafted the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA), to fill this gap. The new Act addresses primarily jurisdictional, transfer and enforcement issues relating to adult guardianships and protective proceedings. The Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act received its final approval at the NCCUSL 2007 annual meeting.[46]

Coordination between Federal and State Programs

In 2004, GAO found that there is little systematic coordination or collaboration between federal representative payee and state court guardianship programs. GAO further found that the lack of coordination undermines efforts to protect incapacitated seniors and prevent misuse of their federal benefits and other resources. Moreover, neither federal representative payee nor court guardianship programs compile statistical data on the number of incapacitated individuals or how well they are served by these programs, i.e., the extent to which they are at risk of or have been neglected, abused or financially exploited. GAO concluded that without this data, it is difficult to determine what should be done to effectively protect the incapacitated elderly in these programs.

In its report, GAO recommended SSA convene a study group consisting of a number of federal agencies and state courts interested in participating to examine options it specified for improving federal-state cooperation in protecting the incapacitated elderly. SSA disagreed with this recommendation and has not implemented it because, in part, it believed the Privacy Act precludes the kind of information sharing GAO indicated was needed. GAO also recommended the Department of Health and Human Services (HHS) work with national organizations in the guardianship community to promote specific state efforts to oversee guardianships and assist guardians. Although HHS has made some effort to respond to GAO's recommendations, the Department has taken no systematic steps to implement them.

[46] See http://www.nccusl.org/Update/ActSearchResults.aspx.

Although SSA disagreed with GAO's 2004 recommendation that it bring together federal agencies and state courts to improve cooperation in protecting the incapacitated elderly, others continue to explore ways to improve federal-state cooperation in guardianship cases. In November 2006, AARP sponsored a roundtable on representative payees and guardianship, attended by representatives from a number of national organizations with an interest in guardianship and officials from SSA, VA and GAO. Although characterized as an "exploratory" rather than policy-making event, it produced a number of suggestions regarding:

- Types of information that would be useful for federal fiduciary programs and state courts to share,
- Ways federal agencies and state courts might collaborate in guardianship proceedings,
- Methods for federal agencies and state courts to communicate,
- Development of a working relationship between court personnel and federal field office staff,
- Options for addressing barriers to information sharing, including the Privacy Act, and
- Continuing the dialogue between organizations in the guardianship community and federal fiduciary agencies on these issues.

SSA also contracted with The National Academies to study the SSA representative payee program. The study, which was released July 30, 2007, assessed SSA representative payees' performance, examined the practicality and appropriateness of representative payee policies, identified types of payees at highest risk of misusing benefits, and made recommendations for changes to improve operation of the SSA representative payee program.[47]

PROPOSALS FOR CHANGE

In response to its December 2006 call for proposals, the Committee received a number of submissions recommending ways to improve guardianship for the elderly.[48] Respondents included private citizens, judges and attorneys, advocates for the aging, public agencies serving seniors, professional organizations, and elder care providers. Their proposals covered a wide range of issues including:

[47] See http://www7.nationalacademies.org/ocga/briefings/Social_Security_Representative_Payee_Program.asp.
[48] See Appendix II for a list of respondents and their submissions.

- Educating and setting standards for those involved in guardianship for the elderly,
- Improving guardianship procedures and oversight,
- Safeguarding the rights of the elderly,
- Promoting public awareness of guardianship for the elderly and its alternatives,
- Expanding public guardianship programs,
- Resolving jurisdictional issues,
- Improving coordination between programs,
- Support for data collection and research, and
- Developing new models for guardianship.

The following sections briefly summarize the major proposals the Committee received in each of these areas. Unless otherwise noted, the following observations and recommendations are those of the respondents and do not represent the position of the Committee.

Educating and Setting Standards for Those Involved in Guardianship for the Elderly

To improve the performance of courts and guardians in guardianship cases, court adherence to the National College of Probate Judges, National Probate Court Standards was called for. Many respondents also proposed better education for judges, guardians and others involved in the process, as well as utilization of state licensing requirements for professional guardians. Respondents noted that judges receive little education that would enable them to address the many complicated issues associated with guardianship for the elderly. As a result, judges typically award guardians full rights over elderly wards when only limited oversight is needed. Courts also may not be equipped to effectively monitor guardian performance and may be slow to replace poor performing guardians. Furthermore, respondents indicated that little training or guidance is available to better inform guardians of their responsibilities to the ward, obligations to the court and the resources available to assist them with these duties. Often resources are not available to guardians dealing with difficult situations, and this lack of adequate training and guidance can result in otherwise well-intentioned guardians unknowingly overstepping their authority or misjudging appropriate action.

Proposals specified who should receive training, what training topics should be offered, and recommended federal incentives to encourage development and dissemination of training and informational materials. Multidisciplinary training was recommended for judges, attorneys who

represent guardians, court personnel, APS workers, law enforcement officials and others in the guardianship community. Respondents felt that judges and others should receive information about the "physiological, cognitive, emotional, and social conditions" that can result in a petition for guardianship, and guardians also should receive training that would enable them to make good decisions regarding their wards' finances and placement, as well as medical and end of life care. Many also recognized a critical role for the federal government in educating judges and providing support for programs. Respondents suggested federal support to develop training materials for guardians and to encourage states to offer continuing education to judges.

In addition to educating participants in the guardianship process, many believed that requiring guardians to be nationally certified and licensed by the state would help ensure the quality of care for elderly wards and generally enrich the pool of qualified guardians. Respondents also stressed the importance of a code of ethics and professional review boards for guardians, federal support for expansion of guardian certification and federal incentives to encourage states to license guardians. Moreover, they called for regulation of private guardianship entities that conduct interstate business because such entities in effect operate as financial institutions.

Improving Guardianship Procedures and Oversight

Respondents noted that courts often only cursorily evaluate elderly individuals and prospective guardians, and recommended practice and performance standards for guardians appointed to care for elderly wards. Many pointed out the absence of monitoring of guardians and the lack of guardianship data. The Committee also received a number of suggestions for actions the federal government should take to promote better performance by the courts and guardians.

In order to improve procedures in guardianship cases for the elderly, many respondents proposed instituting uniform standards for awarding guardianship as well as for removing guardians who do not serve the best interests of their wards. They called for use of mediation before resorting to guardianship when there are disputes among family members as well as strict limits on the powers of emergency guardians or the elimination of emergency guardians entirely. They emphasized that judges should avoid determinations of capacity based on subjective criteria and

employ a "…functional determination of capacity" when evaluating seniors. The rule should be to resort to guardianship for those with diminished functional capacity only after less restrictive measures, such as power of attorney, are ruled out. Some respondents cautioned against appointing guardians without in-depth investigation into their character and qualifications, including criminal and credit background checks, and recommended that guardian candidates provide a sworn statement to the court attesting to their fitness to serve prior to their appointment. Others believed only family members or volunteers should serve as guardians and there should be strict limits on the amount guardians may claim for expenses. Respondents also called for clearly defined, uniformly accepted performance standards for guardians, as well as for passage of laws or development of regulations to enforce these standards for professional, public and private guardians.

The Committee received many recommendations to improve court oversight of guardianship cases. Respondents believed that courts have a responsibility to ensure the well-being of elderly wards by holding guardians accountable for reports and accountings, and reviewing these documents. Many recognized that lack of uniform and consistent automated data on guardianship cases presents a significant barrier to monitoring. They recommended courts set up electronic systems to collect and maintain information on all guardianship cases. Court data systems would improve court performance in guardianship cases, improve court review and audit of guardianship accounts, promote independent audit of guardianship cases by entities outside the courts, such as the State's Attorney General. This outside review could be combined with the authority to license guardians and impose penalties or sanctions for failure to comply with monitoring statutes. Uniform court guardianship data systems also would facilitate federal audit of otherwise "closed" court guardianship files.

In general, respondents believed there is a role for the federal government in ensuring the quality of guardianship services for the elderly throughout the country. Many felt the federal government should encourage replication of successful monitoring systems and support development of the technology courts need to collect consistent data on guardianship cases. Respondents also supported federal funding for promotion of guardianship standards and for development of administrative tools such as review checklists, model guidelines for guardianship fees and

automated audit programs. Furthermore, some felt the U.S. Congress should pass legislation regulating guardianship appointments as well as those organizations in the professional guardian industry that conduct business in more than one state. Respondents also indicated that these organizations should be subject to independent review and oversight by federal agencies with the experience in accounting and finance that state courts lack.

Safeguarding the Rights of the Elderly

Procedural due process historically is based on the concept of "fundamental fairness" and has been construed to generally protect the individual so that the law or judicial actions ensure that no one is deprived of "life, liberty, or property" without a fair opportunity to affect the judgment or result. A variety of recommendations were made to safeguard the due process rights of all seniors nationwide during guardianship proceedings and thereafter. First and foremost, a guardianship should be put into place only after extensive notice to the potential ward and all interested parties including family members. Further, if at all possible, the individual being placed into guardianship should appear at any or all proceedings addressing his or her status. Some felt that professional guardians should never be permitted to petition the court and that all guardianship proceedings should be officially documented and open to the public. Therefore, a court reporter should be present at all hearings, meetings and conferences related to a guardianship case.

The Committee also received proposals to expand due process rights of alleged incapacitated adults to always include the right to counsel and a jury trial, independent medical and psychological examinations, and the right to petition the court periodically for review or termination of the guardianship or restoration of particular rights. Respondents stressed the importance of protecting due process throughout the entire period of guardianship, and thus the need for continued monitoring of guardianships by the courts.

The Committee received many proposals calling for the reintroduction and enactment of a comprehensive federal elder abuse prevention law, recognizing this as the most effective means by which Congress can support improvements in the guardianship system. This law could

include specific provisions to address shortcomings in our guardianship system, clearly establish and place limits on the duties and powers of a guardian, emphasize the need for compliance with the guardianship order and due process in guardianship cases, and establish guardianship as the measure of last resort for seniors with reduced capacity. It also was proposed that the U.S. Congress consider including increased penalties for crimes specifically targeting seniors in any elder justice legislation. Finally, one recommendation called for changing federal bankruptcy laws to make it possible to recover funds embezzled from the elderly by their guardians.

Promoting Public Awareness of Guardianship for the Elderly and its Alternatives

One respondent observed that public awareness of guardianship, its potential for abuse, and its alternatives are vital yet often overlooked elements in protecting the incapacitated elderly in this country. It was recommended that complaints against guardians received by Certified Professional Guardian Boards of Review (CPGBR) be made public, similar to other consumer protection information. Many believed that guardianship frequently is used to address the needs of these seniors even when there are less restrictive services or interventions that would work to protect them. To better ensure that the least restrictive measures possible are used to care for incapacitated seniors, the Committee received recommendations to educate the public about abuse and exploitation of the elderly by guardians and to encourage use and expansion of programs (such as representative payment) that provide less restrictive “alternative protective arrangements” for the elderly who require assistance.

Expanding Public Guardianship Programs

Many incapacitated seniors do not have the assets needed to pay for the court costs associated with having a guardianship established for them or to compensate professional guardians for their services. In these cases, it frequently is impossible to find responsible family members or friends who can afford the costs involved. Respondents indicated that public guardians are not available everywhere, and when funding is available, public guardians are limited and difficult to access. This shortage of public guardians leaves incapacitated seniors vulnerable to neglect, abuse and exploitation.

In order to improve the current guardianship system, many respondents proposed expansion of public guardianship programs to serve incapacitated seniors when no one else is available, or for when individuals cannot pay for a professional guardian. To make sure the costs are justified and reasonable, it was recommended that the Committee examine the cost of guardianship for the elderly because there is wide variation in legal fees charged in these cases. A comprehensive, national plan was called for to develop adequate guardianship services in every jurisdiction, but federal funding for this effort should be linked to adoption of the National Guardianship Association's minimal standards of practice for guardians.

Resolving Jurisdictional Issues

Today, many seniors routinely spend their time living in multiple locations throughout the year. Although our population is more mobile, some of our legal instruments are not as portable. This clearly is the case with guardianship for the elderly. Questions regularly arise in courts regarding the applicability and validity of guardianships established in other states. For example, with each state having different standards, is a guardianship established in New York State valid in Washington, D.C.?

The Committee received many recommendations to resolve these jurisdictional issues. Of note is the call for and adoption of a model uniform guardianship law by all states. Most organizations submitting recommendations espouse adoption of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act. According to an American Bar Association report in 2002, the adoption of this model law would assist in the development of, "standard procedures to resolve interstate jurisdiction controversies and facilitate transfers of guardianship cases among jurisdictions."

It is important to note that jurisdictional issues are not limited to the United States. As we have become a global society, guardianship issues have crossed international boundaries. In an effort to avoid conflicts of this nature, it was recommended that the United States ratify and adopt the provisions of the October 1999 Hague Convention on the International Protection of Adults. The

convention's intent is to resolve conflicting assertions of state authority involving incapacitated adults.

Improving Coordination between Programs

It is clear that in order to protect the rights, property and the federal benefits of those placed into guardianship, coordination amongst all levels of government with a stake in protecting the safety or assets of incapacitated adults is essential, and the Committee received a number of recommendations in this area. First and foremost, appropriate information sharing must be established between federal fiduciary programs, state courts and guardians. To accomplish this, the federal government was encouraged to act on the proposals for coordination put forth at the AARP roundtable on this topic in November 2004. Further, respondents expected the federal government to play a leadership role in enhancing coordination between states and service programs for the elderly. Finally, in an effort to reduce every form of guardianship abuse, they expressed a need to improve programs for the elderly that overlap with guardianship at the state and local level. More specifically, recognizing a connection between substandard nursing home care and abuse of the elderly by their guardians, one respondent recommended developing better models for elder care to eliminate this opportunity for guardianship abuse.

Other aspects of coordination to be considered and improved upon include local law enforcement's efforts to identify and report guardianship abuse, state judicial systems' commitment to prosecute alleged abuse of the elderly by guardians, guardianship oversight by state Attorneys General, and efforts between Adult Protective Services and Long Term Care Ombudsman programs. Finally, financial institutions were encouraged to work hard to detect and report appropriately, within the law, fraudulent or potential abusive activities with respect to guardianships for the elderly.

Support for Data Collection and Research

Many acknowledged that it is difficult to establish a means for action or improvement in the guardianship system when there is little or no data to suggest directions for change. As noted

earlier, many respondents were concerned with the lack of national data on the number of guardianships for the elderly, the number of guardianship cases for wards that also have a federal representative payee, and the incidence of guardianship abuse. They addressed the need for a uniform, systematic process for collecting data pertaining to guardianship on both local and state levels. To make this happen, one respondent suggested the federal government aid in data collection by matching grants to states that currently have a functioning system. Others suggested federal funding for these efforts through the National Institute of Justice, HHS, or the State Justice Institute, or through provisions in an Elder Justice Act. One respondent suggested that "a dedicated elderly justice office in HHS be created to work with the department of Justice to support the development of a model for the collection of guardianship data, to support pilot data collection projects, and to assist states and local courts in implementing data systems and assessing the lessons learned through data collection."

Many respondents also proposed increasing the overall support for research on a national level, in order to evaluate guardianship practices and programs, how laws affect guardianships, and the effect that public guardianship has on wards. It also was proposed that Congress undertake research in one area in particular—measurement of successful practices and programs in order to examine how guardianship enhances the well-being of seniors with diminished capacity.

Developing New Models for Guardianship

Data collection and research ultimately should lead to the development of promising new models for guardianship for the elderly, which would serve to improve guardianship programs on many levels. For example, one proposal recommends giving more decision making authority in guardianship proceedings to family members, relying on judges to mediate between interested parties.

Respondents in general believed the federal government should provide resources and incentives to improve and reform guardianship for the elderly and to develop model guardianship programs for courts. Respondents specifically recommended the federal government:

- Support demonstration projects to develop a national uniform system for collecting data on key aspects of the guardianship process,
- Work to increase access for the elderly to public guardians and other fiduciaries,
- Examine the roles and responsibilities of social service agencies with regard to guardianship for the elderly,
- Provide guidance to courts on how to design and implement workable methods for monitoring and holding guardians accountable for their actions,
- Develop national guidelines for court guardianship workloads and adequate staffing, and
- Publicize or otherwise promote replication of successful procedures, practices and models.

CONCLUSIONS AND RECOMMENDATIONS

Substantial progress has been made since 1987 when the Associated Press published its indictment of court systems that were failing to protect the elderly from neglect, abuse and exploitation at the hands of their guardians. States have enacted statutes to ensure the due process rights of incapacitated adults in these proceedings, define the duties and responsibilities of guardians and the courts regarding wards, and hold guardians accountable for their treatment of wards. There now exists a model state law addressing multi-jurisdictional issues, a model code of ethics, standards of practice and a voluntary professional certification program for guardians, as well as model standards of practice regarding guardianship procedures for the courts. A committed group of advocates has come together to recommend and encourage further reform. And valuable research continues to contribute to our knowledge of guardianship procedures and practices.

However, much work remains to ensure that the growing numbers of incapacitated seniors are cared for appropriately by competent, trustworthy surrogate decision makers—whether these be family members, friends or other agents chosen the elderly to act on their behalf, or guardians appointed by the courts. Although guardianship is an important tool for protecting the safety and property of incapacitated seniors, it is imperative that it be the option of last resort—used only when other measures do not adequately meet a senior's needs—because it strips the elderly of fundamental rights, drains the resources of potential wards and public programs that serve as guardians for the indigent, and is time-consuming and expensive for the courts. When appropriate, priority should be given to use of less restrictive and less costly alternatives to

guardianship. And when guardianship is imposed, court orders should be tailored to the specific level of capacity retained by the ward, thereby protecting rights of self-determination. Courts also should recognize that incapacity is not always permanent; therefore, orders should contain provisions for re-evaluating wards and more easily suspending the guardianship if it no longer is necessary. Finally, courts should closely monitor and hold accountable guardians for the care they provide and quickly remove incompetent and/or malfeasant guardians. To adequately and efficiently monitor guardianships, a concerted effort must be made to electronically collect and review case data.

It will take collaboration by local and state courts, agencies and governments, along with leadership from the federal government, to achieve these objectives. At the local and state levels:

- Courts should strive to minimize the use of full guardianship,
- Courts should use mediation, when possible and appropriate, to help divert guardianship cases to alternative surrogate decision making measures and to resolve disagreements between family members of incapacitated seniors that otherwise lead to the appointment of independent parties or public entities as guardians,
- All states should require use of a functional definition of capacity in guardianship proceedings,
- All states should adopt the NCCUSL Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act,
- The Conference of State Supreme Court Justices should take a more active role in addressing guardianship issues; for example, by encouraging states to invest in systematic collection of guardianship case data by the courts, as well as providing additional leadership in improving this system, and
- To avoid unnecessary guardianship, states should encourage their residents to plan ahead, anticipating possible incapacity in old age by, for example, choosing agents to exercise power of attorney on their behalf.

Strengthening and correcting deficiencies in the guardianship system also calls for federal leadership. To accomplish this:

- Congress should pass federal elder abuse prevention legislation, which should help deter mistreatment of incapacitated elderly by their guardians,
- Congress should mandate collection of data on guardianship cases by the states,
- The Administration on Aging should conduct a survey of a representative sample of counties, to generate nationwide estimates of basic characteristics and outcomes of guardianship cases and encourage collection of data by states,

- The Administration on Aging also should encourage development of local data systems on guardianship cases by supporting research to identify and publicize successful systems already in place and by hosting conferences to disseminate information on how to develop such systems,
- The Social Security Administration should implement GAO's recommendations regarding coordination with the courts on guardianship cases and determine what changes are needed to the Privacy Act, other federal laws and regulations that would allow the agency to share information, such as a ward's location, with the courts, and
- GAO should inventory the recipients and objectives of all federal funding directed at elder abuse, to assist Congress in ensuring federal funding is directed to where it would have the greatest impact on court diversion and oversight of guardianship for the elderly.

Appendix I: Hearings and Forums on Guardianship Held by the Senate Special Committee on Aging

September 7, 2006	"Exploitation of Seniors: America's Ailing Guardianship System"
July 22, 2004	"Forum on Protecting Older Americans Under Guardianship: Who is Watching the Guardian?"
February 11, 2003	"Guardianship Over the Elderly: Security Provided or Freedoms Denied?"
April 16, 1993	Workshop on "Innovative Approaches to Guardianship"
June 2, 1992	"Roundtable Discussion on Guardianship"

At these hearings and forums the Committee heard from:

- Individuals who had been the subject of guardianship proceedings, and family members involved in these cases,
- The Chief Justice of the Connecticut State Supreme Court, probate court judges from Florida and the Connecticut Office of Probate Court Administrator,
- Elder law attorneys from North Carolina, Texas, Idaho, New York and Arkansas,
- Representatives from AARP, the American Bar Association, American College of Trust and Estate Counsel, Association for Persons with Disabilities, Center for Social Gerontology, Elder Law Center of the Coalition of Wisconsin Aging Groups, Illinois Alliance for Aging, National Center for State Courts, National Guardianship Association and National Senior Citizens Law Center,
- Officials from state programs, including the East Arkansas Area Agency on Aging, Missouri long term care ombudsman, New Mexico Aging and Long Term Services Department, public guardian programs in Arkansas, Florida and New Hampshire, volunteer guardian training programs in California and Illinois, and the Vermont Senior Citizens Law Project,
- Federal officials from the Administration on Aging within the Department of Health and Human Services, and the Government Accountability Office,
- Attorneys from Hoffstra University, the University of Pittsburgh School of Law, the University of Nevada National Judicial College and Wright State University.

Appendix II: Respondents and Responses to the Committee's Request for Proposals to Improve Guardianship for the Elderly

RESPONDENTS

AARP Public Policy Institute, Washington, DC
American Bar Association, Commission on Law and Aging, Washington, DC
American Medical Directors Association, Columbia, MD
Kathy Anderson, Rocklin, CA
Margaret K. Dore, P.S., Seattle WA
Elder Law Center of the Coalition of Wisconsin Aging Groups, Madison, WI
Wendy Ferrari
The Honorable Mel Grossman, 17th Judicial Circuit, Florida
Anne Trambarulo Haines, Englishtown, NJ
The Hebrew Home for the Aged at Riverdale, Riverdale, NY
Audrey Ingraham, Edmonds, WA
Larry Ingraham, Edmonds, WA
Tami Ingraham, Edmonds, WA
Judicial Council of California, Administrative Office of the Courts
Doris Kastanek, Palm Coast, FL
Paul D. LaBounty, Greeley, CO
Lane Council of Governments, Senior & Disabled Services, Eugene, OR
S. Beth Miller
Multnomah Country Adult Protective Services, Multnomah Country, OR
National Academy of Elder Law Attorneys, Inc., Tucson, AZ
National Adult Protective Services Association, Springfield, IL
National Association to STOP Guardian Abuse, Thousand Oaks, CA; Beech Grove, IN; Brighton, MA
National Center for State Courts, Williamsburg, VA
National College of Probate Judges, Williamsburg, VA
National Guardianship Association, State College, PA
National Guardianship Foundation, Harrisburg, PA
Oregon Department of Human Services, Salem, OR*
Elaine Renoire, Beech Grove, IN
Sylvia S. Rudek, Mount Prospect, IL
Stephen Wasserman, Cerrillos, NM

Responses available online at http://aging.senate.gov/minority or upon request from the Committee at 202-224-5364.

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* Recommendations from the Oregon Department of Human Services were received on 8/25/06 in preparation for the Committee's 9/7/06 hearing on guardianship.

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