TESTIMONY BEFORE THE SENATE SPECIAL COMMITTEE ON AGING

PRESENTED BY

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I would like to express my appreciation to Chairman Smith, Ranking Member Kohl, and the Senate Special Committee on Aging for considering the views of the National Guardianship Association (NGA) on the incidence of guardianship in the aging and disabled population in America.

History of the National Guardianship Association

The NGA was created in 1988 in response to a withering report by the Associated Press that exposed inadequacies in state guardianship systems. There are 650 members of the NGA, mostly professional and family guardians, attorneys, judges, social workers, nurses, physicians, psychiatrists, and other allied professionals. Membership dues are $50.00 per year for family members and volunteers and $170.00 per year for professional guardians and allied professionals. The mission of the NGA is to establish and promote a recognized standard of excellence in the guardianship practice. The website for the NGA is www.guardianship.org.

Current State of Guardianship in America

Honored members, I am here to sound an alarm—there is a perfect storm brewing that, without appropriate and measured federal oversight, is guaranteed to result in continued personal tragedies and financial devastation to elderly Americans. As more Americans age, federal, state and county governments look to each other to meet the needs of a generation that has given its all and now is in need of supportive governmental services to survive. Simply put, we are not doing senior Americans justice.

This is a challenging time to be engaged in the guardianship process in America. In recent years, such high-profile cases as Molly Orshansky, Lillian Glasser, Rosa Parks, and Brooke Astor (the numbers of which are eclipsed by scores of Americans in each of our home towns) have directed the national spotlight on guardianship, often in an unflattering manner. Americans are typically terrified of losing their independence and autonomy, but are increasingly faced with the prospect of living longer and seeing their capacity to manage their affairs being diminished by age and infirmity. By failing to engage in proper estate planning, elderly Americans may find themselves before a guardianship court with a loved one or third party seeking appointment as guardian. If a qualified physician indicates there is a medical necessity for guardianship, the court may appoint a guardian, even over the objection of the elderly person. Often, there is evidence of abuse, neglect or exploitation prompting the consideration of the appointment of a guardian. The courts are increasingly turning to third-party professional guardians when there are no family members who are available or appropriate to serve.

At this time, no one knows how many guardianships there are in America. This is because guardianship is a uniquely local process, governed by state law and administered on a local level – often county by county. For example, in Texas there are 254 counties, each of which administers guardianships slightly differently.

There are no national standards for guardianship, other than the Standards of Practice for Guardians adopted by the National Guardianship Association. See Attachment "A"; also posted at www.guardianship.org.

There is no national certification process for guardians other than the Registered Guardian and Master Guardian certification testing process adopted and promoted by the National Guardianship Foundation. See Attachment "B"; also posted at www.certificationforguardians.org.

The NGA is seeking funding to build on the most recent study on guardianship, entitled "State-Level Adult Guardianship Data: An Exploratory Survey," conducted by the American Bar Association Commission on Law and Aging for the National Center on Elder Abuse. See Attachment "C"; also posted at www.elderabusecenter.org. This initial study concluded, "basic data on guardianship is scant, offering courts, policymakers, and practitioners little guidance for improving the system. Indeed, the U.S. Government Accountability Office found that the dearth of statistical data limits oversight and reform efforts."

Only a handful of state court systems are even interested in collecting data on guardianship cases.

Recent Initiatives by the National Guardianship Association to Improve the Guardianship Practice in America

The NGA has engaged in the following initiatives in recent years to, on a private level, improve the guardianship practice in America:

- Development of Standards of Practice and a Model Code of Ethics for guardians. *See* www.guardianship.org;
- Promotion of the adoption of the Standards of Practice by state legislatures;
- Promotion of adoption of the National Guardianship Foundation's Registered Guardian and Master Guardian certification process by state legislatures. *See* www.certificationforguardians.org.
- Education and training of guardians through national and state conferences;
- Collaboration with state affiliate guardianship organizations (currently 20 state affiliates);

- Increasing public awareness of good guardianship (recent coverage of NGA includes National Public Radio, *Money* Magazine, the Wall Street *Journal*, the New York *Times*, and the Los Angeles *Times*;
- Educating probate and other judges with guardianship jurisdiction on guardianship issues;
- Encouraging state legislatures to devote sufficient financial resources to public and private guardianship programs;
- Participating in drafting model interstate guardianship jurisdiction legislation in conjunction with the efforts by the National Conference of Commissioners on Uniform State Laws. *See* www.nccusl.org;
- Chairing the National Guardianship Network, which consists of the National Guardianship Association, the National College of Probate Judges, the National Academy of Elder Law Attorneys, the ABA Commission on Law and Aging, the ABA Section of Real Property, Probate and Trust Law, and the National Center for State Courts, in a collaborative and collegial effort to better understand guardianship in America through research and analysis of guardianship systems.
- Urging the utmost integrity in the guardianship system.

The Impact of the Federal Government on Guardianship Practice in America

Although guardianships are uniformly considered, granted, and administered on a local level, there are a number of areas in which the federal government's policies and practices impact on the administration of guardianship cases:

- The designations of representative payees by the Social Security Administration and/or the Department of Veteran's Affairs may compliment or impede the administration of

guardianships. It is the experience of many guardianship practitioners that these federal agencies often disregard orders appointing guardians, thereby causing guardians (2/3 of which are family members) to duplicate time, effort, and expense for the benefit of an elderly ward.

- The Social Security Administration and Department of Veteran's Affairs routinely appoint housing providers or other self-interested persons as representative payees, thereby creating conflicts that may inure to the detriment of the elderly or disabled beneficiary. *See* recent reports in the El Paso *Times*.
- Adult Protective Services (APS) agencies, which are funded with federal funds, are part of the guardianship continuum as these agencies are the first and most immediate line of defense against abuse, neglect and exploitation of the elderly and disabled. When APS systems fail, immense pressure may be placed on guardianship courts to intervene on emergency bases, often depriving the elderly or disabled person of basic due process rights. Perhaps the most thorough analysis of a failed APS system occurred when, after a series of high profile cases were highlighted in Texas courts in 2004, the Texas Governor issued Executive Order RP33 and called for the investigation of the Texas APS system.

  The report of the Texas Office of Inspector General revealed a total breakdown of the state's protective services, despite tens of millions of taxpayer dollars being appropriated for elderly protection. This disturbing report can be found at http://www.hhsc.state.tx.us/pubs/051904_PR_RP33.html.
- State and local governments often continue to struggle to find funding for indigent guardianship services. Some states do not provide any funding, relying on anyone who can be found to do the job for free. Other states attempt to maintain guardianship programs, but struggle to ensure proper caseloads for guardianship case managers. A recent interview with the director of the Office of Public Guardian in Hawaii revealed

caseloads of 100 or more per caseworker. A few states approximate a state or county funded network to ensure seniors who need guardians can receive one. Federal funding and recognition of standards of care would provide a roadmap for a reasoned response to the needs of the elderly and disabled in all states of the Union.

- Studies by the American Association for Retired Persons have repeatedly revealed that courts administering guardianship cases do not properly monitor cases. Unmonitored guardianships may and often do result in transgressions by those entrusted with managing the well-being and finances for seniors with diminished capacity. Federal funding to ensure proper monitoring of guardianship cases would also benefit the elderly and disabled in all states.
- Resolution of the ongoing interstate guardianship jurisdiction battles is essential. The interstate battle over Lillian Glasser alone has cost more than $3 million in legal fees. This forum-shopping by litigants in these cases can only be addressed by uniform legislation. The effort by the National Conference of Commissioners on Uniform State Laws should be monitored and encouraged by federal authorities and, in the event that this effort may somehow fail, federal authorities should be prepared to implement federal interstate guardianship jurisdiction legislation.
- Federal funding for promotion of alternatives to guardianship – proper estate planning, money management, and other less restrictive alternatives to guardianship – is the fastest and least expensive way to address this problem. The failure of Americans to plan for incapacity is the primary cause of court-imposed guardianships.

NGA Challenges and Initiatives

The National Guardianship Association has been challenged to improve the guardianship practice in America with funding coming only from membership dues and conference revenue. Even so, the NGA is committed to working with Congress, state legislatures, county governments, and other governmental and private entities to ensure that the guardianship process is used to the maximum benefit of Americans with diminished capacity. This committee is aware of the demographic bulge that will consume the guardianship court systems in the coming decades.

The NGA is seeking funding from any federal or state agency charged with protection of the elderly and disabled to initiate and see to a conclusion a study to first and foremost do something which no one has ever done: determine the number of guardianships in the United States of America. Once this figure is determined, we can only then begin to formulate the other questions that must be answered in order to ensure those who are assigned as guardians to protect the elderly and disabled in this country actually do so.

The members of the National Guardianship Association are collectively pleased that the Senate Special Committee on Aging invited me, as Executive Director, to testify before the Committee today. We hope this will be the beginning of a national dialogue that will lead to the assurance that each and every elderly or disabled person subjected to a diminution of his or her rights in a guardianship proceeding – regardless of which state or county may consider the case – will be afforded the dignity, respect, and civil rights to which all Americans are justly entitled.