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July 19, 2018

Dear Special Committee on Aging:

The National Guardianship Association's (NGA) mission is to advance the nationally recognized standards of excellence in guardianship. NGA is a membership organization whose more than 1100 members serve as guardians, fiduciaries, conservators, advocates and friends of individuals under guardianship.

NGA cooperates with other organizations such as the National Academy of Elder Law Attorneys, The American Bar Association, The National College of Probate Judges and AARP, to create positive change in guardianship policy and issues that may affect the individuals they serve.

It is in this unified goal of concern for individuals we serve that NGA is providing comments to the issues addressed in the letter from June 20, 2018. Please see NGA's attached comments.

If you have any questions regarding these comments please contact me at the number below.

Sincerely,

Carleton Coleman  
2018 National Guardianship Association President  
Phone: 706-315-3275



**Response of the  
National Guardianship Association  
To the  
United State Senate Special Committee on Aging  
July 20, 2018**

The National Guardianship Association (NGA) is honored to respond to your invitation to offer comments and recommendations concerning how the most vulnerable of our citizens can best be served.

NGA was established in 1988 for the express purpose of promoting and supporting excellence in guardianship. NGA believes that those appointed to the care of guardians, conservators, and fiduciaries deserve quality services and that every person should be provided respect, due process, rights, and dignity in guardianship. NGA seeks to protect adults under guardianship by ensuring that their guardians receive quality education and access to resources. Through our education and advocacy we have established nationally recognized standards of practice for all guardians and conservators. Our ethical principles and educational programs guide fiduciaries to the highest levels of integrity and competency. We are committed to protecting the dignity and rights of those who need compassionate and competent surrogate decision-makers. NGA counts among our one thousand members individuals and entities who serve as private fiduciaries, family guardians, public guardians, court administrators, nonprofit agencies, volunteer surrogates, judges, lawyers, academics and others who are committed to quality guardianship policies, practices, and services. Since its inception NGA has led the discussion about each of the four issue areas addressed in the committee's June 20th invitation.

**Guardianship Data**

Among the earliest voices to call attention to the lack of reliable guardianship case data was that of Ingo Keilitz, then associated with the National Center of State Courts. In comments at the 1992 round table of this committee, Keilitz made the obvious point that neither the federal government, nor each state knows how many individuals are subject to guardianship proceedings annually, what guardianship caseloads correlate with population, whether they correlate with an elderly population and how

they compare when adjusted for the population in different states, different jurisdictions and according to different administrative structures.<sup>1</sup>

In 2001, NGA co-sponsored the national conference of guardianship experts commonly called the Wingspan Conference to address guardianship issues in need of reform. One of sixty-eight recommendations called for “a uniform system of data collection within all areas of the guardianship process be developed and funded.”<sup>2</sup> The conference participants noted that “although significant legislative revisions have been adopted [since the 1988 National Guardianship Symposium known as Wingspread], little data exists on the effectiveness of guardianship within each state or across the states, and less information is available about how the system actually affects the individuals involved.”

To advance the quest for comprehensive guardianship case data that answers the question “how many guardianships are there?,” NGA initiated a guardianship data project in 2007, recognizing the need to facilitate research on comparative aspects of who needs guardianship, why guardianship is sought, who is serving as guardian, how many guardians are required, and what guardianship provisions best address the need for protection and respect individual rights. Despite collaboration with the National Center for State Courts’ Court Data Project, we had to set aside our efforts due to the lack of resources to complete this complex task.

In the introduction to the results of the 2011 Third National Guardianship Symposium, Erica Wood and Sally Hurme [NGA members and symposium organizers], noted that “[w]e as a nation are essentially working in the dark when describing adult guardianship practice. Data and research are scant to nonexistent. Many courts and states do not know the number of adults under guardianship in their jurisdiction, let alone the demographics.... Anecdotal evidence suggests guardianship practice can range from quietly heroic, to satisfactory, to unknowingly deficient, to malfeasant, but the *proportions* are not clear.”<sup>3</sup>

The ongoing challenges in documenting the number of adult guardianship and conservatorship cases have been the subject of numerous reports and calls for action.

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<sup>1</sup> *Comments Before a Roundtable Discussion on Guardianship*, Special Committee on Aging, U.S. Senate (102d Cong. 2d Sess. 1992) (Serial Number 102-22), p. 34.

<sup>2</sup> Recommendation 4, *Wingspan-The Second National Guardianship Conference, Recommendations*, accessible at [https://www.americanbar.org/content/dam/aba/administrative/law\\_aging/guardianship\\_wingspan\\_recs.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/law_aging/guardianship_wingspan_recs.authcheckdam.pdf)

<sup>3</sup> Sally Hurme & Erica Wood, *Introduction, Symposium Third National Guardianship Summit: Standards of Excellence*, 2012 Utah L. Rev. 1157, 1162 [italics in the original].

- In 2007 Senators Gordon Smith and Herb Kohl, chairs of the U.S. Senate Special Committee on Aging, issued a report on “Guardianship for the Elderly” that encouraged the collection and review of electronic case data.<sup>4</sup>
- In 2009 the Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA) passed Resolution 14, encouraging collection of data on adult guardianship, adult conservatorship, and elder abuse cases by all states.<sup>5</sup>
- In 2010 the CCJ-COSCA Joint Task Force on Elders and the Courts issued a report recommending that “each state court system should collect and report the number of guardianship, conservatorship, and elder abuse cases that are filed, pending, and concluded each year.”<sup>6</sup>
- In November 2016, the Government Accountability Office stated, “The extent of elder abuse by guardians nationally is unknown due to limited data on the numbers of guardians serving older adults, older adults in guardianships, and cases of elder abuse by a guardian. ...Court officials from the six selected states that we spoke to were not able to provide exact numbers of guardians for older adults or of older adults with guardians in their states.”<sup>7</sup>

The “best guess” on the number of open guardianship cases that has been developed comes from comprehensive research by the National Center for State Courts. NCSC estimated that there are 1.5 million active pending adult guardianship cases, but this number could, in fact range from fewer than one million to more than three million.<sup>8</sup> This 2011 report describes some of the difficulties the court data experts Uekert and Van Duizend had in extrapolating nationally comparative data. “Few states are able to report complete statewide adult-guardianship caseload data, because these cases are counted in a generic probate case type or otherwise blended into civil caseload statistics. A number of states cannot distinguish adult guardianships from adult conservatorships as distinct case types. Other states include both juvenile and adult guardianships in a single

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<sup>4</sup> Gordon H. Smith & Herbert Kohl, *Guardianship for the Elderly: Protecting the Rights and Welfare of Seniors with Reduced Capacity*, Report, United States Senate (December 2007).

<sup>5</sup> Conference of Chief Justices & Conference of State Court Administrators, *Resolution 14 Encouraging Collection of Data on Adult Guardianship, Adult Conservatorship, and Elder Abuse Cases by All States*, Appendix C of Brenda Uekert, *Adult Guardianship Court Data and Issues, Results from an Online Survey*, Center for Elders and Courts, (2010), assessible at [http://www.eldersandcourts.org/~media/Microsites/Files/cec/GuardianshipSurveyReport\\_FINAL.ashx](http://www.eldersandcourts.org/~media/Microsites/Files/cec/GuardianshipSurveyReport_FINAL.ashx).

<sup>6</sup> Brenda Uekert, *Adult Guardianship Court Data and Issues, Results from an Online Survey*, Center for Elders and Courts, (2010), assessible at [http://www.eldersandcourts.org/~media/Microsites/Files/cec/GuardianshipSurveyReport\\_FINAL.ashx](http://www.eldersandcourts.org/~media/Microsites/Files/cec/GuardianshipSurveyReport_FINAL.ashx)  
See also, Conference of State Court Administrators, *The Demographic Imperative: Guardianships and Conservatorships*, COSCA White Paper (2010) accessible at <http://www.eldersandcourts.org/~media/Microsites/Files/cec/cosca%20white%20paper%202010ashx.ashx>.

<sup>7</sup> Government, Accountability Office, *Elder Abuse: The Extent of Abuse by Guardians Is Unknown, but Some Measures Exist to Help Protect Older Adults*, GAO-17-33 (2017).

<sup>8</sup>Brenda K. Uekert & Richard Van Duizend, *Adult Guardianships: A “Best Guess” National Estimate and the Momentum for Reform*, in *Future Trends in State Courts 2011: Special Focus on Access to Justice* 107, 109 (2011).

“guardianship” case type. Thus, a complete picture of how many adult guardianship and adult conservatorship cases are filed, closed, and pending nationally is not available.”<sup>9</sup>

The need for data is as significant as the needed data is unavailable. Reliable national data is needed not only on the actual number of guardianship cases that are filed, pending, and closed each year, but also on such important background information as the relationship between parties to a guardianship proceeding; age of respondents; the level and nature of disabilities when a guardianship is imposed; the scope of the guardianship order (e.g., limited, plenary, temporary, conservatorship); the value of the estate; the amount of guardian expenses and guardian and attorney fees; the level of Social Security and federal assistance; whether counsel has been appointed for the respondent or ward; the basis for determining incapacity; and the completeness and accuracy of annual accountings. In addition to guiding reform efforts, this information could be used for developing national performance measures for guardianship cases.<sup>10</sup>

As this committee heard in 2004 from A. Frank Johns, a founding board member of the National Guardianship Association, “A database for each state and the federal government would provide empirical data by which caseloads could be more carefully forecasted and processed. If the number of wards is known, then necessary funding would provide for sufficient staff, and the cost of training and enforcement. A national database could provide consistency and uniformity in the data entry and retrieval forms of the courts, requiring the same kinds of facts and circumstances that would be gathered across the country.”<sup>11</sup>

In its 2018 *Beyond Guardianship* review of the history of guardianship, the National Council on Disability sums up the critical need for good data: “A comprehensive picture of guardianship trends is unlikely to become clear unless states begin regularly gathering and reporting accurate and comparable data.” ...” However, the fact that courts are not able to definitively report the number of open guardianship cases at a given point in time is indicative of what is widely acknowledged to be incredibly lax monitoring on their part, despite statutory reforms requiring guardians to provide courts with annual reports regarding the welfare of the individual and accountings detailing how their resources are being spent.”<sup>12</sup>

Steps are being taken by counties and states to find solutions to the lack of data using technology. Encouragingly, the Administrative Conference of the United States found in its 2014 survey of state courts that two-thirds of court respondents (67 percent) indicated they use an electronic case management system or database for guardianship cases and another 10 percent expect to use an electronic system in the next three years. Courts that use electronic case management systems in guardianship cases generally can record filing and disposition of guardianship cases; capture

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<sup>9</sup> *Id.*

<sup>10</sup> <sup>10</sup>Brenda K. Uekert & Richard Van Duizend, *Adult Guardianships: A “Best Guess” National Estimate and the Momentum for Reform*, in *Future Trends in State Courts 2011: Special Focus on Access to Justice* 107, 109 (2011)

<sup>11</sup> *Forum on Guardianship*, U.S. Special Committee on Aging, (statement of A. Frank Johns), July 22, 2004.

<sup>12</sup> National Council on Disability: *Beyond Guardianship* (2018).

additional case-level data elements (such as type of guardianship, name or age of incapacitated person, nature of incapacity); generate reminders of upcoming due dates; and track filing status of financial accountings. Of those with case management systems, only thirty-one respondents indicated systems in use that have the capacity to flag anomalies, errors, or potential “red flags” in financial accountings.<sup>13</sup>

Minnesota with its e-filing system myMNconservator has led the way in developing predictive analytic software that requires conservators to file all inventories and accountings electronically and allows the courts to calculate total assets under conservatorship and to identify filings that need to be flagged for closer review. The Minnesota courts have been generous in assisting other states in developing similar systems.<sup>14</sup>

Texas has also undertaken extensive efforts to enhance its electronic case management system throughout its sprawling 254 counties. As David Slayton recently explained to this committee, at the request of the Texas Judicial Council, the legislature funded a pilot project at the Office of Court Administration (OCA) to assist courts in adequately monitoring guardianship cases. The project provided expert staff resources to review the cases to determine whether or not the guardians were in compliance with reporting requirements and to determine whether there were irregularities in the financial dealing of the estate. Texas now knows that as of August 31, 2017, “there are 50,478 active guardianships, with 5,186 new guardianship cases filed last fiscal year, a 7% increase over Fiscal Year 2016. Only 2,804 guardianship cases were closed during that period. The number of active guardianships has increased by 37% in the past five years and is one of the fastest growing case types in the state. We estimate that the value of the estates under guardianship in our state to be between \$4-\$5 billion.”<sup>15</sup>

The Clerk & Comptroller’s office in Palm Beach County, Florida began rolling out “Guardianship Inventory Reports & Accountings For Florida” (GIRAFF) to guardians and attorneys in Palm Beach County in June 2018. GIRAFF is a powerful, web-based, real-time data collection and mining tool that enables live monitoring, assessing, and evaluating of Palm Beach County’s guardianship system. GIRAFF is designed to be rapidly scalable to collect data for all of Florida’s 40,000 to 50,000 guardianship cases. Its use will streamline the process for guardians and attorneys, save money for persons under guardianship, and better protect incapacitated persons through efficient monitoring. GIRAFF will standardize and make uniform the reporting of financial information by guardians – eliminating customs, local practices, and accounting creativity.<sup>16</sup>

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<sup>13</sup> Administrative Conference of United States, *SSA Representative Payee: Survey of State Guardianship Laws and Court Practices* (2014), accessible at <https://www.acus.gov/report/ssa-representative-payee-survey-state-guardianship-laws-and-court-practices>.

<sup>14</sup> Government, Accountability Office, *Elder Abuse: The Extent of Abuse by Guardians Is Unknown, but Some Measures Exist to Help Protect Older Adults*, GAP-17-33 at 7, (2017).

<sup>15</sup> *Abuse of Power: Exploitation of Older Adults by Guardians and Others They Trust*, U.S. Senate Special Committee on Aging, April 18, 2018 (statement of David Slayton), accessible at [https://www.aging.senate.gov/hearings/abuse-of-power-exploitation-of-older-americans-by-guardians-and-others-they-trust\\_](https://www.aging.senate.gov/hearings/abuse-of-power-exploitation-of-older-americans-by-guardians-and-others-they-trust_).

<sup>16</sup> Personal communication with Anthony Palmeri, Chief Guardianship Inspector, Palm Beach, Florida, Clerk of Court, July 17, 2018.

## **Data Collection Recommendation**

The quarter of a century quest for better data on guardianship cases parallels the similar quest for better data on elder abuse cases. For decades, policy makers have recognized that this country could not effectively combat the problem of elder abuse without knowing more about the incidences and causes of this abuse. Despite extensive efforts, researchers struggled to come up with the information needed to develop effective policies to prevent and detect elder abuse and to allocate resources to address solutions. As with guardianship cases, the absence of data for research and best practice development has been cited by numerous entities, including the Government Accountability Office, as a significant barrier to improving Adult Protective Services (APS) programs.

With the development of the National Adult Maltreatment Reporting System (NAMRS), policy makers now have a comprehensive, national reporting system for adult protective services (APS) programs. It collects quantitative and qualitative data on APS practices and policies, providing consistent, accurate national data on the exploitation and abuse of older adults and adults with disabilities.<sup>17</sup>

Like state courts that administer guardianship cases, state entities, typically through the state's department of aging, administer elder abuse cases. Like state courts, APS programs have long been hampered in data collection efforts through lack of resources, lack of technological expertise, and lack of common vocabulary from state to state. The Administration on Community Living's support to develop the vocabulary, technology and resources necessary to equip state APS offices to collect and analyze its cases could be replicated to provide a comprehensive, national reporting system for adult guardianship cases. All the reasons NAMRS is necessary to develop quantitative and qualitative data on best practices and policies in elder abuse apply to the need for quantitative and qualitative data to develop best practices and policies in guardianship.

### **Guardian Oversight**

The National Guardianship Association in concert with other guardianship advocates has long sought and supported efforts to enhance guardianship monitoring. The 1988 National Conference on Guardianship [Wingspread] made six recommendations on the accountability of guardians. These can be briefly summarized as calling for more training of guardians, attorneys and judges; vigorously enforcing the filing of reports; increasing the frequency and quality of court review of all reports; and developing model performance standards and model guardianship plan forms.<sup>18</sup>

The second National Conference on Guardianship [Wingspan] took an in-depth look a decade later at how far the guardianship systems in the various

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<sup>17</sup> National Adult Maltreatment Reporting System, accessible at <https://www.acl.gov/index.php/programs/elder-justice/national-adult-maltreatment-reporting-system-namrs>.

<sup>18</sup> American Bar Association, *Guardianship: Agenda for Reform* (1989), accessible at [https://www.americanbar.org/content/dam/aba/administrative/law\\_aging/2011/2011\\_aging\\_gship\\_agda\\_refrm.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/law_aging/2011/2011_aging_gship_agda_refrm.authcheckdam.pdf)

states had progressed since the Wingspread Conference. In the background paper prepared for the monitoring and accountability working group, Sally Hurme and Erica Wood noted that there is “no one silver bullet that solves the problem” of strengthened guardianship accountability. “Rather, effective monitoring and accountability requires a rich tapestry of systemic pieces, including high quality guardian orientation and training; standards, licensing, and certification for professional guardianship meaningful use of guardianship plans, periodic guardianship reports; meaningful review and audits of those reports; better judicial education; use of specialized judges; and greater public awareness” of the importance of guardianship monitoring<sup>19</sup>

The Wingspan participants envisioned more finely-tuned guardianship orders, supplemented by annual guardianship plans with clear goals, steps, and desired outcomes that would serve as the measures used in the monitoring process. They also recognized the main barriers to monitoring reform: judicial reluctance to take a proactive role in guardianship monitoring and lack of funding for the technology and resources required to initiate and maintain effective monitoring systems.<sup>20</sup>

The specific Wingspan recommendations include:

- Courts have adequate funding for investigation at the inception of the guardianship action and for oversight for the duration of the guardianship.
- There be mandatory annual reports of the person and annual financial accountings to determine the status of the person with diminished capacity. The report and the accounting should be audited as frequently as possible.
- To provide effective monitoring, the following are required: (a) a functional assessment of the abilities and limitations of the person with diminished capacity; (b) an order appropriate to meet the needs of the person with diminished capacity with preference given to as limited a guardianship if possible); (c) an annual plan based on the assessment and an annual report, appropriately updated, based on the plan; and (d) inclusion of any other mandated reports which are the guardian’s responsibility, such as reports to the Social Security Administration or the Department of Veterans Affairs.<sup>21</sup>

In response to the Wingspread and Wingspan recommendations to develop model performance standards and training programs, NGA has developed nationally recognized Ethical Principles as well as Standards of Practice that provide step-by-step guidance to guardians as to how they can ethically carry out their responsibilities.<sup>22</sup> Those standards and principles form the core of NGA’s extensive educational efforts, including annual conferences, advance practice colloquiums, webinars for both new and experienced guardians, online continuing education courses, the training manual *Fundamentals of Guardianship*, and presentations for court personnel,

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<sup>19</sup> A. Frank Johns & Charles P. Sabatino, *Introduction, Wingspan: The Second National Guardianship Conference*, 31 Stetson L. Rev. 573, 589 (2012).

<sup>20</sup> *Id.* at 591 summarizing Sally Hurme and Erica Wood, *Guardian Accountability Then and Now: Tracing Tenets for an Active Court Role*, 31 Stetson L. Rev. 867-929 (2012).

<sup>21</sup> *Wingspan: The Second National Guardianship Conference Recommendations*, 31 Stetson L. Rev. 595, 605-606 (2012).

<sup>22</sup> The NGA *Ethical Principles and Standards of Practice* can be downloaded at [www.guardianship.org](http://www.guardianship.org).



judges, attorneys, care providers, medical practitioners, and other stakeholders in the guardianship process. While several states or state guardianship associations have adopted in whole or in part these Standards of Practice, NGA advocates for widespread incorporation of these or state-developed Standards of Practice in all jurisdictions.<sup>23</sup>

With the support of the State Justice Institute, the American Bar Association conducted a comprehensive study of guardianship monitoring as it existed in 1991. Based on a national survey, intensive site visits, statutory and literature review, the report *Steps to Enhance Guardianship Monitoring* set out ten practical steps courts could take based on effective monitoring practices used in various jurisdictions.<sup>24</sup> The report also explains why such steps should be adopted and some of the difficulties in adopting them. Those ten steps, attached as Appendix A, remain viable today and have been incorporated into the practices of many jurisdictions.

The AARP Public Policy Institute took another look at guardianship monitoring practices in 2007. It found that most state legislatures had enacted provisions to reinforce guardian accountability, but that the quality of judicial practices continued to vary substantially. Based on observations in guardianship courts around the country, AARP developed a lengthy list of promising practices that courts could adopt throughout the continuum of steps that comprise oversight of the guardianship process.<sup>25</sup>

The Government Accountability Office, in its 2011 review of guardianship practices, relied extensively on the AARP report in recommending that “to help state courts more effectively monitor guardianships, ... the Secretary of Health and Human Services direct the Administration on Aging to consider supporting the development, implementation, and dissemination of a limited number of pilot projects to evaluate the feasibility, cost, and effectiveness of one or more generally accepted promising practices for improving court monitoring of guardians.<sup>26</sup> The recent enactment of the Elder Abuse Prevention and Prosecution Act puts into place the opportunity for demonstration grants to be awarded to the highest courts of states to assess adult guardianship and conservatorship proceedings and to implement necessary changes.<sup>27</sup> NGA recommends that funds be appropriated to carry out this important legislation.

Judges and court administrators recognize the imperative to enhance the courts’ ability to provide guardianship oversight. The recently revised National Probate Court Standards direct that probate courts should monitor the well-being of the respondent and the status of the estate on an on-going basis, including, but not limited to:

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<sup>23</sup> For example, in 2017 Connecticut passed Senate Bill 967 that requires the probate court administrator, in consultation with the Connecticut Probate Assembly, to adopt standards of practice for conservators and provides that the conservator is to be guided by the standards.

<sup>24</sup> Sally Hurme, *Steps to Enhance Guardianship Monitoring* (ABA 1991).

<sup>25</sup> Naomi Karp and Erica Wood, *Guarding the Guardians, Promising Practices for Guardianship Monitoring* (AARP 2007).

<sup>26</sup> Government Accountability Office, *Incapacitated Adults: Oversight of Federal Fiduciaries and Court-Appointed Guardians Needs Improvement*, GAO 11-678 (2011), accessible at <https://www.gao.gov/new.items/d11678.pdf>.

<sup>27</sup> Elder Abuse Prevention and Prosecution Act, Pub. L. 115-70, §501.

- Determining whether a less intrusive alternative may suffice.
- Ensuring that plans, reports, inventories, and accountings are filed on time.
- Reviewing promptly the contents of all plans, reports, inventories, and accountings.
- Independently investigating the well-being of the respondent and the status of the estate, as needed.
- Assuring the well-being of the respondent and the proper management of the estate, improving the performance of the guardian/conservator, and enforcing the terms of the guardianship/conservatorship order.<sup>28</sup>

National Association for Court Management has developed very comprehensive guidelines for courts to use in implementing National Probate Court Standard 3.3.17. Its *Guide to Plan, Develop and Sustain a Comprehensive Court Guardianship and Conservatorship Program* is replete with practical examples of how courts can and do augment the full spectrum of monitoring procedures.<sup>29</sup>

The National Center for State Courts' Center for Elders and the Courts in its 2016 Strategic Action Plan sets out the following strategies for the courts to follow to enhance court processes and oversight:

- Supporting implementation of the National Probate Court Standards
- Training judges and court staff on reviewing and auditing annual reports
- Encouraging the allocation of resources, including court visitors, auditors, and volunteer monitors, that will improve the oversight capacity of the courts
- Developing innovative approaches and partnerships with community groups that can provide resources to protected persons and their families
- Establishing resources for guardians/conservators that will help them meet their responsibilities and provide assistance and encouragement
- Requiring bonds and background checks for proposed guardians/conservators
- Promoting technology to standardize submissions and facilitate the review process
- Developing model investigative, auditing and monitoring practices that can be replicated
- Proactively and timely responding to allegations of abuse, neglect or exploitation of a person placed under a guardianship or conservatorship.<sup>30</sup>

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<sup>28</sup> National College of Probate Judges, National Probate Court Standards 3.3.17 (2013).

<sup>29</sup> National Association for Court Management: *Adult Guardianship: A Guide to Plan, Develop and Sustain a Comprehensive Court Guardianship and Conservatorship Program* (2013-14), accessible at [nacmnet.org/sites/default/files/publications/AdultGuardianshipGuide\\_withCover.pdf](http://nacmnet.org/sites/default/files/publications/AdultGuardianshipGuide_withCover.pdf).

<sup>30</sup> National Center for State Courts, Center for Elders and the Courts, *Adult Guardianship Initiative, Strategic Action Plan* (2016), accessible at <http://www.eldersandcourts.org/~media/Microsites/Files/cec/Guardianship%20Strategic%20Action%20Plan%202016.ashx>.

This committee and the Secretary of Health and Human Services, as they move forward in identifying ways the federal government can assist state courts to enhance their oversight responsibilities, can rely on the extensive body of reports, research, and recommendations already in place, including the Wingspan and Wingspread recommendations, the ABA and AARP research, National Probate Court Standards, and the research and policy recommendations of the National Center for State Courts' Center for Elders and the Courts.

### **Inappropriate Use of Guardianship**

As Professor Nina Kohn explained to this committee just three months ago, "some people who are subject to guardianship should not be, ... many—indeed, probably most—people subject to guardianship are subject to more restrictive arrangements than they need."<sup>31</sup> The National Guardianship Association agrees with her observation.

NGA through its advocacy efforts has long recognized the need for the constellation of provisions or actions that would limit guardianships to only those areas in which there is a demonstrated need to delegate decision making to the guardian or conservator for the safety and protection of the individual. Among the steps that various guardianship stakeholders can take to make the guardianship less intrusive are the following:

- Individuals need to be encouraged to initiate advance planning for possible incapacity through advance directives and powers of attorney. Those documents in which individuals select their own surrogate decision maker should be honored by the court unless there is clear evidence of misuse by the selected surrogate.
- The public needs broader awareness that guardianship is truly the last resort when all other alternatives have been tried and failed to meet the needs of the individual. Families, hospitals, and nursing homes especially need training to recognize that petitioning for guardianship is not the first alternative to consider when someone may need assistance with personal or financial decisions.
- Attorneys when counseling family concerned about the possible need to petition for guardianship should use the PRACTICAL tool developed by the American Bar Association Commission on Law and Aging. "PRACTICAL" is an acronym for nine steps lawyers can use in case analysis to identify legal and practical approaches to heighten self-determination before moving ahead with guardianship.<sup>32</sup>
- Medical providers need an effective assessment tool they can use to thoroughly inform the court of the functional and decision-making abilities, as well as limitations. Without a fulsome evaluation judges are hampered in their ability to craft an order tailored to the needs of the individual.

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<sup>31</sup> *Abuse of Power: Exploitation of Older Adults by Guardians and Others They Trust*, U.S. Senate Special Committee on Aging, April 18, 2018 (statement of Nina Kohn), accessible at [https://www.aging.senate.gov/hearings/abuse-of-power-exploitation-of-older-americans-by-guardians-and-others-they-trust\\_](https://www.aging.senate.gov/hearings/abuse-of-power-exploitation-of-older-americans-by-guardians-and-others-they-trust_) .

<sup>32</sup> American Bar Association, *PRACTICAL Tool and Guide*, accessible at [https://www.americanbar.org/groups/law\\_aging/resources/guardianship\\_law\\_practice/practical\\_tool.html](https://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice/practical_tool.html)

- Visitors, examiners, guardians ad litem or any of the other parties involved in the information gathering before the judge hears the petition should be trained to identify alternatives to the guardianship or to propose to the court the minimum of rights to be delegated to the guardian.
- As set out in the National Probate Court Standards, judges should encourage the use of lesser intrusive arrangements and train staff so they can properly screen and divert inappropriate petitions.<sup>33</sup>
- Judges should be incentivized to craft specific guardianship orders and only order full guardianships after finding on the record that no lesser intervention is available. The Uniform Guardianship, Conservatorship and Other Protective Arrangements Act makes it easier to petition for a limited guardianship or conservatorship than a full one and requires courts to do more to justify full orders. Instead of the typical plenary order, under UGCOPAA judges must include a specific finding that clear-and-convincing evidence established that the identified needs of the respondent cannot be met by a protective arrangement instead of guardianship or other less restrictive alternative<sup>34</sup>
- In the same vein, the National Probate Court Standards states: “Probate courts should always consider, and utilize, where appropriate, limited guardianships and conservatorships, or protective orders.”<sup>35</sup> The Center for Elders and the Courts recommends in its Guardianship Initiative that courts craft “individualized limited guardianship/conservatorship orders based on the capabilities and desires of the protected person.”<sup>36</sup>

NGA endorses the preference for limited guardianship of the person and of the estate over plenary guardianships.<sup>37</sup> Further, if the court deems an appointment necessary, guardians must know the limitations of authority granted and make all decisions consistent with that court order.<sup>38</sup>

Another alternative to guardianship that has emerged recently is Supported Decision-Making (SDM). The National Resource Center for Supported Decision-Making defines it as the process where people use trusted friends, family members, and professionals to help them understand the situations and choices they face, so they may make their own decisions. It is a means for increasing self-determination by encouraging and empowering people to make their own decisions about their lives to the maximum extent possible. The practice of supported decision-making takes many forms from recognition of organic decision-making networks to formal, written supported decision-making agreements. Four states, including Delaware, District of Columbia, Texas and Wisconsin, have enacted specific statutes recognizing SDM arrangements

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<sup>33</sup> National College of Probate Judges, National Probate Court Standards, 3.3.2.

<sup>34</sup> Uniform Guardianship, Conservatorship and Other Protective Arrangements Act §310(a).

<sup>35</sup> National College of Probate Judges, *National Probate Court Standards*, 3.3.10(b).

<sup>36</sup> *Adult Guardianship Initiative: An Initiative of the NCSC's Center for Elders and the Courts and the CCJ/COSCA Joint Committee on Elders and the Courts* (December 1, 2016), accessible at <http://www.eldersandcourts.org/~media/Microsites/Files/cec/Guardianship%20Strategic%20Action%20Plan%202016.ashx>.

<sup>37</sup> National Guardianship Association, *Standards of Practice* 21.I.

<sup>38</sup> National Guardianship Association, *Standards of Practice* 2.I.

as alternatives to guardianship. NGA recommends continued support by the Administration of Community Living of the National Recourse Center for Supported Decision-Making.<sup>39</sup>

### **Modification of Orders**

According to NGA Standards, once a guardianship has been put in place, guardians must seek termination or limitation of the guardianship when the person has developed or regained capacity, when less restrictive alternatives exist, when the individual expresses the desire to challenge the necessity of all or part of the guardianship, or when the guardianship no longer benefits the individual.<sup>40</sup>

Under the Uniform Guardianship, Conservatorship and Other Protective Arrangements Act the guardian is to promptly notify the court if the individual's condition has changed.

As with other issues in guardianship, there is extremely limited data to determine how frequently restoration of rights or modification of guardianship orders occurs, and under what circumstances restoration or modification comes about. The American Bar Association Commission on Law and Aging conducted comprehensive research into this "backwater" using data from two states and two public guardianship programs and found at:

- Four-fifths of the cases involved younger individuals with disabilities, and one-fifth involved older individuals.
- A majority of the individuals restored lived at home and had estates under \$50,000.
- The most prominent trigger for the guardianship was mental illness, followed by intellectual disability.
- Over half of the guardians were family members.
- Generally, the individual subject to guardianship or a family member petitioned for restoration of rights, after an average of almost five years.
- In close to the cases, the individual had no legal representation, but in the vast majority of cases, the restoration was not contested.<sup>41</sup>

The ABA's thorough research into the need for and issues that need to be addressed in making restoration of rights much more accessible and utilized is summed as follows:

The time is ripe for restoration of rights to become a viable option for people subject to guardianship. In the context of the emergent paradigm of supported decision-making, restoration can be a path to self-determination and choice. For courts, attention to restoration can weed out unnecessary cases from dockets, allowing a stronger focus on problems needing judicial intervention, and saving administrative costs of carrying unnecessary cases. To make restoration work:

- State legislation must ensure sufficient notice that the option exists, provide for regular court review of the continuing need for guardianship, afford the right to counsel, and set workable evidentiary standards.

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<sup>39</sup> See *NGA Position Statement on Guardianship, Surrogate Decision Making, and Supported Decision Making*, accessible at <https://www.guardianship.org/wp-content/uploads/2017/07/SDM-Position-Statement-9-20-17.pdf>.

<sup>40</sup> National Guardianship Association, Standards of Practice 21.III.

<sup>41</sup> Erica Wood, Pamela Teaster & Jenica Cassidy, *Restoration of Rights in Adult Guardianships: Research and Recommendations* (2017), accessible at [https://www.americanbar.org/content/dam/aba/administrative/law\\_aging/restoration%20report.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/law_aging/restoration%20report.authcheckdam.pdf).

- Courts must assess cases for possible restoration, find ways to make individuals and families more aware of the option, make the process more accessible, take into account available supports in making determinations, and track data on restoration.
- Guardians must perceive their role as enhancing self-determination and working toward termination of guardianship with sufficient support – more as “supporters” guided by the person’s expressed wishes if possible. There must be sufficient legal decision-making tools, family supports, technological supports, and community supports readily available to bolster functional abilities.
- Lawyers must recognize and act on the potential of restoration in guardianship cases.<sup>42</sup>

### **Best Practices and Policies**

For the past twenty-five years, NGA and other stakeholders from judges, court administrators, attorneys, and academicians have researched and recommended numerous policies and practices to enhance the administration and delivery of guardianship and conservatorship services. State statutes have been revised to incorporate the best thinking of the guardianship community. A refreshed uniform law includes provisions that address solutions to the most pressing issues. Training of all constituents in the guardianship process has increased many fold. NGA’s *Standards of Practice* have received wider recognition and application. The Center for Guardianship continues to aid courts in their monitoring responsibilities by screening guardians for prior unethical conduct and criminal behavior as well as providing a forum for complaints of unethical conduct by certified guardians to be heard.<sup>43</sup>

Yet, headlines of unscrupulous guardians and conservators continue to appear in media. Too many individuals may have more rights taken away than necessary because of the lack of due diligence on the part of the full cast of characters involved pre-hearing who should be seeking lesser interventions. Guardianship may last longer than necessary but barriers remain, raising significant access to justice questions. With better data, all stakeholders and policy makers will be better able to gain a true picture of the who, why and how of guardianship.

Best practices abound and good intentions by all stakeholders are prevalent. However, implementation of even the best intentions takes commitment and resources.

Just as solutions to the guardianship data problem could be found through a NAMRS-like infusion of federal assistance, many of the best practices presented to this committee could find implementation with an Adult Guardianship Court Improvement Project (AGCIP).

The guardianship process can be likened to the child welfare process, as the guardianship court is responsible for the on-going well-being and welfare of the adults placed under its watch. The handling of child welfare cases is well-recognized as having greatly benefited from the 1993 Child Welfare Court Improvement Project (CIP). This program has been effective in reducing judicial delay; enhancing the ability of judges and attorneys to handle the complexity of these cases; and strengthening the review and monitoring of these cases, while respecting the independence of the state judiciaries. CIP grants are used to assess the handling of child-abuse-and-neglect cases and make needed improvements; train judges, legal personnel, and attorneys in handling these cases; strengthen the capacity of states to collect relevant data for performance measurement; and improve timeliness of decisions regarding safety, permanency, and well-being of children.

The Conference of State Court Administrators recommends the establishment of a Guardianship Court Improvement Program to assist courts throughout the nation to improve consideration of petitions for guardianship and/or conservatorship of adults and monitoring the performance of guardians and conservators and the well-being of incapacitated and vulnerable persons<sup>44</sup>. The Conference of Chief Justices is in accord with the

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<sup>42</sup> *Id.* at 69.

<sup>43</sup> Center for Guardianship Certification, *Rules and Regulations*, accessible at [www.guardianshipcert.org](http://www.guardianshipcert.org).

<sup>44</sup> Conference of State Court Administrators, *The Demographic Imperative: Guardianships and Conservatorships*, COSCA White Paper (2010) accessible at

recommendation. The concurrence of the state judicial branches lowers a potential barrier to federal involvement in civil family issues traditionally entrenched solidly as a state prerogative.

The National Guardianship Association joins other guardianship advocates and stakeholders in asking this committee to carefully study the parallels between guardianship data and elder abuse data and support a NAMRS-like assistance to state courts and the parallels between guardianship cases and child abuse cases and support a Guardianship Court Improvement Project.

NGA also thanks this committee for its commitment to examining the issues so relevant to the needs of all vulnerable adults. Members of our board and association welcome the opportunity to provide these comments and stand ready to assist the committee as it moves forward to come up with action steps.

## Steps to Enhance Guardianship Monitoring (1991)

By Sally Balch Hurme

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American Bar Association

Commission on the Mentally Disabled and Commission on Legal Problems of the Elderly

### Overview

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In attempting to organize the many facets of effective monitoring practices we observed, we have identified ten steps in the monitoring process. Although these steps overlap somewhat, each represents an important segment in a continuum of recommended practices. Monitoring is more than requiring guardians to file financial and personal status reports. It also includes the steps of determining what should be included in the reports, how to encourage and enforce filing, who is to look at the reports, what they are to look for, what to do if a problem develops during the guardianship and when to re-examine the need for the guardianship. Other steps include establishing adequate funding, setting clear attorney roles and being aware of community monitoring efforts. In this report we separately examine these ten monitoring steps and recommend that jurisdictions incorporate them into their monitoring process.

With each of these ten steps we have identified practical ways to implement them and discussed the reasons why such steps should be adopted and some of the difficulties in adopting them. We also have provided examples of how other jurisdictions have incorporated these steps into their local practices. By illustrating what other jurisdictions have done, we hope to show what these practices can accomplish and encourage other jurisdictions to implement them. The recommended steps have not been dreamed up out of a utopian desire to "do some good" but represent actual practices currently in place in other jurisdictions throughout the country. In using this continuum of steps to develop effective monitoring systems, a jurisdiction can identify which steps they are presently using, determine which of the current steps need modification and consider adding steps.

We have also referenced applicable statutory language so jurisdictions can compare their own statutory provisions to determine whether legislative changes will be necessary to accomplish these steps. While some states may find that legislative amendments will be required, other states may only require adjustments in local rules or practices. Based on our examination of current guardianship codes, many of these steps can be implemented under existing statutes.

These steps cannot be accomplished single-handedly by the judiciary. Any necessary statutory amendments would require the assistance of legislative committees, bar associations and other groups interested in the rights and needs of the elderly and persons with disabilities. Several of the steps can only be accomplished through the cooperation of the bar, court administrators and state and local agencies. Obtaining increased funding will



require cooperative efforts of all persons committed to serving those in our communities who are vulnerable.

Ideally these recommended steps will instigate discussion among the bench, bar, court staff, legislature, state and local agencies that serve the elderly and persons with disabilities about what monitoring is being done and how to enhance it. The process of reviewing existing procedures should heighten awareness and unify perceptions as to how all parties can most effectively fulfill their responsibilities to wards. How the recommended steps are implemented will depend on existing practices and resources. Another critical factor will be the number of guardianship cases the court handles. Smaller jurisdictions may not need, or may find it difficult, to implement some of these steps.

We encourage those jurisdictions that consider or implement any of these recommendations to fill out the survey at the back of this report. In this way we will be able to determine the effectiveness of the recommendations and track how local jurisdictions have improved their monitoring practices. We welcome learning of other effective practices and successful, or failed, efforts to enhance the protective services provided to persons with disabilities.

#### Recommended Steps\_\_\_\_\_

##### I. Guardians should be required to report periodically on the ward's status.

- The guardian should be required to report to the court [or other judicially designated monitoring component] on the ward's personal status and finances no less than once a year.
- Guardians of the estate should be required to report to the court [or other judicially designated monitoring component] on the ward's personal status as well as financial matters no less than once a year.
- The guardian's written report on the ward's personal status should be designed to encourage some narrative responses that will provide the reviewer with a concise explanation of the ward's circumstances, the care the guardian is providing and the need to continue the guardianship.

##### II. Guardians should be required to file a written plan of how the guardian proposes to enhance the ward's well-being.

- The guardian should be required to file with the court [or other judicially designated monitoring component] a written statement within 60 days of appointment [or within the same period as filing an inventory] setting forth future plans to provide for the ward's care and to allocate resources.
- In the annual report to the court [or other judicially designated monitoring component] the-guardian Should explain deviations from and amendments to the plan.

##### III. Courts can facilitate the guardian's reporting and other fiduciary responsibilities by

- Stating the guardian's responsibility to report and account to the court in the initial guardianship order;

- Providing the guardian with reporting and accounting forms [along with the letters of guardianship];
- Making available to the guardian samples of what the court considers to be satisfactorily prepared status reports and accountings;
- Providing the guardian with written instructions, training sessions and/or videos explaining the guardian's responsibilities.

IV. Courts can enforce the statutory reporting requirements by

- Establishing computer or tickler systems so the court knows when the guardian's personal status reports and accountings are due or are late;
- Notifying the guardian promptly when a personal status report or accounting is not filed on time;
- Entering a show cause order if the guardian has not responded promptly to the notice to file;
- Routinely imposing monetary penalties for late filings of personal status reports or accountings, payable from the guardian's funds;
- Sending the state bar grievance committee a copy of any delinquency notice sent to an attorney who serves as a guardian.

V. Courts can establish procedures to conduct effective review of personal status reports and accountings by

- Designating certain judges to be responsible for guardianship hearings and review procedures;
- Designating someone to audit accountings;
- Designating someone to review personal status reports;
- Establishing criteria to review personal status reports and accountings.

VI. Courts can establish procedures to verify reports and accountings and investigate guardianship problems by

- Designating someone to investigate complaints, verify information in personal status reports and accountings and periodically visit the ward;
- Using volunteers to monitor the ward's personal condition;
- Sending personal status reports and accountings to interested persons so they have the opportunity to verify or object to the information the guardian provides to the court.

VII. Courts [or other judicially approved panel] can hold periodic hearings on the need to continue the guardianship.

- The court can establish a time when an in-court hearing will be held on the need to continue the guardianship.
- The court can review the ward's personal well-being at any time the court reviews accounts.
- A community-based board can review the ward's personal well-being.

- VIII. State and local funding agencies should provide the court with sufficient funds or revenues so the court will be able to monitor guardianship cases adequately.
- State appropriations specifically for monitoring will ease disparity between counties uneven in resources or populations.
  - The court can use fines for late filing to fund monitoring costs.
  - The court can use increased filing fees to establish a monitoring fund.
- IX. Bars should establish clear ethical guidelines for the attorney representing the petitioner, guardian and ward.
- The attorney for a client who is seeking to file a guardianship petition should fully inform the client of a guardian's responsibilities and duties, including the duty to report and account to the court.
  - The attorney for a guardian should assist the guardian in fulfilling the guardian's reporting requirements.
  - The attorney for the ward should assist the court in monitoring the ward's well-being throughout the guardianship or until dismissed by the court.
- X. Courts should be aware of and encourage the efforts of other community, groups and agencies that monitor wards' well-being.