

**STATE ADULT GUARDIANSHIP SUMMARY:  
DIRECTIONS OF REFORM – 2017**

Commission on Law and Aging  
American Bar Association

This 2017 legislative summary includes information on 49 state enactments on adult guardianship from 25 states, as compared with 39 enactments from 22 states in 2016. An earlier version of this 2017 legislative summary [January – August] was published as part of the National Guardianship Association’s *2017 NGA Legal and Legislative Review*, presented at the October 2017 NGA National Conference.

States were active on a variety of fronts. Texas introduced 45 guardianship bills, and 15 were passed and signed by the Governor, shoring up its adult guardianship system. The session showed marked involvement by the state Office of Court Administration, and more scrutiny of less restrictive alternatives. The bills represent important steps ahead – but the Governor vetoed a forward-looking guardianship compliance bill. Nevada, in the wake of its Supreme Court Commission to Study the Administration of Guardianships, passed seven comprehensive measures to protect individuals from abuse and improve oversight. North Dakota passed major changes recommended by a Guardianship Workgroup created by the Chief Justice.

South Carolina overhauled its guardianship code, based on recommendations of a consensus-building task force. The amendments seek to promote uniformity and consistency in practice by state probate courts, ensure due process protections, promote limited guardianships, reduce costs, establish consistency between guardianship and conservatorship, and strengthen monitoring. Colorado enacted a pilot public guardianship program. Connecticut made significant advances in court monitoring and accountability of guardians. Montana became the first state to legislatively enact and fund a Working Interdisciplinary Network of Guardianship Stakeholders (WINGS).

In July, the Uniform Law Commission (ULC) approved an extensive revision of the former Uniform Guardianship and Protective Proceedings Act, now called the Uniform Guardianship, Conservatorship and Other Protective Arrangements Act (UGCOPAA). According to the ULC, the new Act is “a modern guardianship statute that better protects the individual rights of both minors and adults subject to a guardianship or conservatorship order. The Act encourages courts to use the least restrictive means

possible and includes a set of optional forms to help courts implement its provisions effectively.” The Act is ready for adoption by state legislatures.

Since 2011, states have enacted approximately 243 adult guardianship bills – ranging from a complete revamp of code provisions to minor changes in procedure. Most have been steps forward in safeguarding rights, addressing abuse, and promoting less restrictive options – but a few have taken steps back. The real challenge lies in turning good law into good practice.

Among those who contributed to or were helpful in the legislative summary were Hon. Cynthia Feland, Chair, North Dakota Guardianship Workgroup; Steve Fields, Court Administrator/Senior Attorney, Tarrant County Probate Court Two; Sally Holewa, North Dakota State Court Administrator; Diana Noel, Senior Legislative Representative, AARP State Advocacy and Strategy Integration; Ben Orzeske, Chief Counsel, Uniform Law Commission; and Sarah St. Onge, Attorney, South Carolina Protection and Advocacy for People with Disabilities

If you know of additional state adult guardianship legislation enacted in 2017, please contact [dari.pogach@americanbar.org](mailto:dari.pogach@americanbar.org) or [erica.wood@americanbar.org](mailto:erica.wood@americanbar.org). The views expressed in the legislative summary have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the policy of the American Bar Association.

## **I. Pre-Adjudication Issues**

Over the past 30 years, legislative changes have sought to bolster safeguards in proceedings for the appointment of a guardian or conservator. Additionally, states continue to make various procedural “tweaks” to clarify requirements, promote effective administration, or address inconsistencies.

**1. Counsel for Respondent.** Perhaps the most basic procedural right of respondents in guardianship proceedings is the right to counsel. Both the Uniform Guardianship, Conservatorship and Other Protective Arrangements Act and the National Probate Court Standards provide for appointment of counsel. State guardianship laws address the right to, and appointment of, counsel -- although the role of counsel differs substantially, with some states requiring counsel as vigorous advocate and others specifying that counsel should act as guardian ad litem. See the ABA Commission on Law

and Aging state-by-state chart updated to 2016 at: [http://www.americanbar.org/groups/law\\_aging/resources/guardianship\\_law\\_practice.html](http://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice.html)

- Nevada SB 433 states that upon the filing of a petition, the court must appoint an attorney to represent the individual alleged to need a guardian unless the individual wishes to retain or already has retained an attorney. The court must appoint a legal services attorney if there is a legal services program in the county where the individual lives that is able to accept the case. If not, the court must determine if the individual can pay attorney fees from his or her estate, and if so, order an attorney to represent the individual. If the individual is not able to pay the attorney fees, the court is authorized to use money set aside for this purpose. The bill also authorizes the county recorder to charge and collect a court fee to pay for this legal representation.
- South Carolina S 415 separated the role of the attorney and the guardian ad litem for the individual alleged to need a guardian. The attorney is charged with representing the expressed wishes of the individual. If the individual is unable to communicate with the attorney, the attorney must file a motion with the court documenting efforts to communicate, and the court must determine whether independent counsel is required to represent the individual's interests.

**2. Role of Guardian Ad Litem and/or Visitor.** Guardians ad litem are attorneys who play a critical part in the guardianship appointment process. Their duties differ by state, and there often is confusion about their roles as a court investigator, and as representing the “best interests” of the respondent – and how this should differ from representation by counsel. The Uniform Guardianship, Conservatorship and Other Protective Arrangements Act and the National Probate Court Standards require a court-appointed “visitor” to investigate and be the eyes and ears of the court. A visitor or guardian ad litem may be the only party with a clear view of the case from all sides, and the court may rely heavily on their report.

- Idaho HB 148 revises the duties and qualifications of the court-appointed visitor in guardianship proceedings, clarifying that a visitor may not serve as guardian ad litem and that the visitor and guardian ad litem may not be employed by or work in the

same entity. The bill references specific requirements in the Idaho Supreme Court rules.

- *North Dakota HB 1095* defines a court “visitor” as an individual who is in nursing or social work and who is an officer, employee or special court appointee with no personal interest in the proceedings. The bill clarifies the duties of the visitor, including to interview persons interested in the individual’s welfare; and specifies that the visitor’s report must include a recommendation as to whether the proposed guardian should be appointed, and if not, an alternative suggestion. The Workgroup that created the bill found that “the visitor is in the best position to gather information about the proposed guardian’s suitability” and if necessary to recommend someone else. (Feland testimony, February 2017).

The North Dakota bill also amends the duties of a guardian ad litem in both a guardianship and conservatorship proceeding to include reviewing the visitor’s report with the individual alleged to need a guardian

- *Texas SB 1016* authorizes judges exercising jurisdiction over guardianship in counties without a statutory probate court to appoint court investigators, with the salary set by the county commissioners court.
- *Nevada SB 433* allows the court to appoint a guardian ad litem for an individual who is or may be subject to guardianship if the court believes the appointment would help in determining “the action that will be the least restrictive and in the best interests” of the individual. The court may appoint a guardian ad litem who is not attorney and who has been trained as a volunteer to participate in a volunteer advocate program for guardians ad litem in the judicial district.
- *South Carolina S 415* sets out a detailed list of duties of the guardian ad litem for both guardianships and conservatorships. The guardian ad litem must ensure that the individual’s wishes are considered; and must investigate any less restrictive alternatives. The provisions combine the former guardian ad litem role and the visitor role; and remove the requirement that the guardian ad litem be an attorney. The guardian ad litem is to “act as the eyes and ears of the court to discern the best outcome for the alleged incapacitated individual and to advise the court thereof” (Reporters Comments).

**2. Procedural Changes.** Over the past 25 years, most states have made changes in pre-appointment requirements for the petition, notice, presence, and hearing procedures.

- Illinois SB 1319. An Illinois Notice of Rights of Respondent specifies that “if you are unable to attend the hearing in person or you will suffer harm if you attend, the Judge can decide to hold the hearing at a place that is convenient. The judge can also follow the rule of the Supreme Court or its local equivalent and decide if a video conference is appropriate.”

This bill allows the circuit courts to adopt rules consistent with rules of the Supreme Court that would permit videoconferencing in any guardianship proceeding, under certain circumstances.

- Texas SB 39 states that a person who is entitled to receive notice of a guardianship application is not required to file a motion to intervene in a guardianship proceeding.
- Oregon HB 2630 enhances the voice of an individual subject to guardianship (a “protected person”). It clarifies that while objections to a motion must be in writing, a protected person may object orally in person or by other means that are “intended to convey the protected person’s objections to the court.” The court must specify how oral objections can be made, to ensure that the individual’s objection is presented to the court.

The Oregon bill also elevates the concepts of less restrictive options and limited guardianship. It requires that the petition include “less restrictive alternatives . . . that have been considered and why the alternatives are inadequate.” The petition also must indicate whether it is asking for a plenary or limited order.

North Dakota HB 1095 makes several important procedural changes:

- ✓ Establishes a “clear and convincing” standard of proof needed for the appointment of a conservator for adults;
- ✓ Aligns the requirements for a conservatorship petition with those for a guardianship petition;
- ✓ Requires the individual alleged to need a conservator and the guardian ad litem to be present at the hearing unless good cause is shown;
- ✓ Requires the proposed conservator to attend the hearing;

- ✓ Makes other procedural changes in conservatorship proceedings, in part to maintain consistency with guardianship requirements.
- South Carolina S 415 makes many procedural changes throughout the guardianship and conservatorship process. For example, it:
  - ✓ Specifies information that must be in the petition;
  - ✓ Addresses service of notice, and presence at the hearing;
  - ✓ Allows an individual alleged to need a guardian to waive notice, attendance at the hearing, and in some cases the hearing itself; and
  - ✓ Makes many procedures applicable to both guardianship and conservatorship to create consistency;
- Michigan HB 4171 adds physician orders for scope of treatment (POST) to a list of less restrictive options that must be provided to any individual who intends to petition for a guardianship prior to submission of the petition. POST (physician order for life-sustaining treatment) is a form that gives seriously-ill patients more control over their end-of-life care, including medical treatment, extraordinary measures such as a ventilator or feeding tube, and CPR. (For a 2017 state-by-state POLST Program Legislative Comparison, see [https://www.americanbar.org/content/dam/aba/administrative/law\\_aging/POLST\\_Legislative\\_Chart.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/law_aging/POLST_Legislative_Chart.authcheckdam.pdf))
- Under the Michigan act, a guardian ad litem must inform the person alleged to need a guardian that a guardian may have the authority to execute a POST. If possible, the guardian ad litem must discern whether the individual would object to a POST and inform the court. The guardian ad litem must also consider whether a POST would suffice as an alternative to guardianship.

**3. Temporary/Emergency Guardianship Orders.** In emergency situations, state law statute, and eventually the court, must make a difficult balance between procedural safeguards and prevention of irreparable harm. An emergency guardianship, sometimes established without full procedural protections, may open the door for a plenary and permanent appointment. In the landmark 1991 case *Grant v. Johnson*, a federal district court declared the Oregon temporary guardianship statute unconstitutional in that it did not provide minimum due process protections. Following the *Grant* decision, some states

revised their temporary guardianship provisions, see [http://www.americanbar.org/groups/law\\_aging/resources/guardianship\\_law\\_practice.html](http://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice.html) for a 2014 chart.

- Idaho HB 148 states that the court may appoint a temporary guardian if a guardian has not yet been appointed, there is substantial evidence of incapacity, and a preponderance of the evidence shows that an emergency exists that will likely result in immediate and substantial harm to the individual – and there is no one else to act. The court also may appoint a temporary guardian if the individual already is subject to guardianship and the guardian is not performing his or her duties.

A temporary guardian may be appointed without notice and hearing if the court finds the person will be immediately and substantially harmed before notice can be given. However, the petitioner must give notice within 72 hours after appointment. Notice must inform interested persons of the right to request a hearing. The court must hold a hearing within 10 days of the request. The authority of a temporary guardian may not exceed 90 days, unless it is extended for good cause. Powers of the temporary guardian are limited to those specified in the order. The bill also sets out specific procedures for appointment of temporary guardians for individuals with developmental disabilities.

- South Carolina S 415 sets out the process for emergency orders without notice, emergency hearings, and duration. It distinguishes between emergency and temporary procedures. It clarifies that the court may exercise authority to act as temporary guardian in an emergency (under the Adult Health Care Consent Act); permits certain financial actions by a court-appointed fiduciary when authorized by court; and specifies that a hearing for a permanent guardianship is de novo, as if no emergency or temporary guardian had been appointed.
- Utah HB 214. Under Utah law, a court may, without notice, appoint an emergency guardian for a period not to exceed 30 days. Previously a hearing was required within 14 days of the emergency appointment. This bill states that the court must hold such a hearing *only upon request* by an interested person.

**4. Confidentiality of Documents.** Some states and some courts have laws or rules addressing the confidentiality of guardianship documents relating to a case. In some instances, all or specified parts of the case file are sealed from the public view.

- Texas SB 39 specifies that if an individual proposed to need a guardian is protected by a protective order, the person's address may be omitted on the application for guardianship.

**5. Youth Transition.** In many cases the parents of minors with intellectual disabilities file for guardianship upon (or in some states just before) the child turns 18 – but often may not consider other decision-making options or whether the scope of the order may be limited. The need for adult guardianship *should not be an assumption* and the transition year should offer opportunities to examine the choices.

- Oklahoma HB 2247 states that an interested person may initiate a guardianship proceeding concerning a youth at age 17 ½ and request that it take effect at age 18. The petitioner may ask the court to accept an evaluation conducted within 60 days prior to the filing.

## II. Multi-Jurisdictional Issues

In our increasingly mobile society, adult guardianships often involve more than one state, raising complex jurisdictional issues. For example, many older people own property in different states. Family members may be scattered across the country. Frail, at-risk individuals may need to be moved for medical or financial reasons. Thus, judges, guardians, and lawyers frequently are faced with problems about which state should have initial jurisdiction, how to transfer a guardianship to another state, and whether a guardianship in one state will be recognized in another.

**1. Background on Uniform Act.** To address these challenging problems, the Uniform Law Commission in 2007 approved the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA). The UAGPPJA seeks to clarify jurisdiction and provide a procedural roadmap for addressing dilemmas where more than one state is involved, and to enhance communication between courts in different states. Key features include:

- Determination of initial jurisdiction. The Act provides procedures to resolve controversies concerning initial guardianship jurisdiction by designating one state – and one state only – as the proper forum.
- Transfer. The Act specifies a two-state procedure for transferring a guardianship or conservatorship to another state, helping to reduce expenses and save time while protecting persons and their property from potential abuse.
- Recognition and enforcement of a guardianship or protective proceeding order. UAGPPJA facilitates enforcement of guardianship and protective orders in other states by authorizing a guardian or conservator to register orders in the second state.
- Communication and cooperation. The Act permits communication between courts and parties of other states, records of the communications, and jurisdiction to respond to requests for assistance from courts in other states.
- Emergency situations and other special cases. A court in the state where the individual is physically present can appoint a guardian in the case of an emergency. Also, if the individual has real or tangible property located in a certain state, the court in that jurisdiction can appoint a conservator for that property.

**2. Passage of Uniform Act by States.** As it is jurisdictional in nature, the UAGPPJA cannot work as intended – providing uniformity and reducing conflict – unless all or most states adopt it. See “Why States Should Adopt the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act,” <http://uniformlaws.org/Narrative.aspx?title=Why%20States%20Should%20Adopt%20UAGPPJA>. From 2008 through 2016, a total of 46 jurisdictions rapidly enacted the Act.

In 2017, only the Virgin Islands (Bill No. 31-0184) enacted the UAGPPJA, bringing the total to 47 jurisdictions – and leaving five states remaining – Florida, Kansas, Michigan, Texas, and Wisconsin.

**3. State Jurisdictional Enactments.** Aside from the Uniform Act, in 2017 three states passed bills affecting guardianship jurisdiction:

- Michigan SB 270 addresses the court’s jurisdiction over the appointment of a guardian or conservators if the person resides, is present and has a significant connection to the state. Michigan is one of the states that has not passed the Uniform Act. This bill addresses initial jurisdiction only, not the transfer or recognition and enforcement portions of the Act. Moreover, while some of the wording in factors determining “significant connection” is taken from the Act, there are notable differences from the Act, which is based on the concept of “home state” as well as “significant connection.”
- Texas SB 39 allows a court to transfer a pending guardianship to another Texas county where the individual resides, either on the court’s motion or on the filing of an application of a guardian or any other person.
- Hawaii SB 322 provides that the circuit court and family courts have concurrent jurisdiction in cases involving felonies endangering the welfare of an individual subject to guardianship.

### III. Choice of Guardian

Bills on choice of guardian target guardian certification and licensure; standards and training; requirements for court selection of guardians; and guardian background checks.

**1. Who May Serve?** Several states clarified what persons or entities may serve as guardian or conservator:

- Idaho HB 148 allows the court to appoint no more than two co-guardians if it will best serve the individual’s interest and if the co-guardians will work together cooperatively. Parents have preference as co-guardians unless they are unwilling or unsuitable. The court must determine whether the co-guardians may or must act independently or jointly, and in which specified areas, and must state its determination in the order.
- Texas SB 511 allows an individual to nominate a guardian by a declaration that is holographic or executed before a notary in lieu of two witnesses if it does not expressly disqualify anyone from serving. The bill aims to make it easier for

individuals to name a potential guardian in advance, allowing them to avoid the expense and inconvenience of witness attestations.

- *Nevada SB 229* encourages the nomination of potential guardians if the need arises by setting forth a model form that an individual may, but is not required to use; and directs the Secretary of State to make the form available on the agency's website. It also specifies that the nomination form may be included in the Nevada Lockbox, a registry authorized to be established and maintained by the Nevada Secretary of State; and includes additional provisions concerning access to the Lockbox.

Additionally, the bill clarifies requirements concerning designation of a registered agent in Nevada for a nonresident guardian.

- *South Carolina S 415* clarifies the priority order of persons to be appointed as guardian or conservator, and states that the court may exercise discretion in the best interest of the individual.

**2. Guardian Standards and Training.** The National Guardianship Association has developed the 2013 *Standards of Practice* for guardians, [http://www.guardianship.org/documents/Standards\\_of\\_Practice.pdf](http://www.guardianship.org/documents/Standards_of_Practice.pdf) . Some states have created their own standards. Some require training for professional guardians, and a few are beginning to require training for non-professional guardians as well.

- *Connecticut SB 967* requires the probate court administrator, in consultation with the Connecticut Probate Assembly, to adopt standards of practice for conservators [the state term for guardians of person or property]; and provides that the conservator is to be guided by the standards.
- *Illinois HB 2665* directs the State Guardian to develop a Guardian Training Program. The program shall be offered to courts at no cost and outline the responsibilities of a guardian and rights of a person with a disability in a guardianship proceeding. In a county with a population less than three million, the guardianship order of appointment must include the requirement for the guardian to take the course and file a certificate of completion. Employees of the Office of State Guardian, county public guardians, attorneys, corporate fiduciaries, and persons certified by the Center for Guardianship Certifications are exempt from the requirement. The court

has discretion to order implementation of another, similar training program or to waive the requirement for good cause.

- Montana HB 70 includes judicial branch grants for training and guidance to family members serving as guardian, public defenders and district court judges handling guardianship cases, and to volunteer guardians of indigent individuals.
- Texas SB 1096 requires that all guardians undergo training before appointment. The Judicial Branch Certification Commission is to develop the training and make it available free on the Commission's website. The training is to educate proposed guardians about their responsibilities, alternatives to guardianships, supports and services, and the rights of individuals subject to guardianship. Excepted from the training requirement are attorneys, certified professional guardians, and temporary guardians. The court can waive training under Supreme Court rules. Confirmation of the completed training must be filed with the court at least ten days before the appointment hearing.

**3. Guardian Background Checks.** An increasing number of states have begun to enact criminal and other accountability background checks for prospective guardians. (See state law chart on criminal and credit background checks of guardians by S. Hurme, updated to 2016 at: [http://www.americanbar.org/groups/law\\_aging/resources/guardianship\\_law\\_practice.html](http://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice.html) ).

- Texas SB 1096 requires the Judicial Branch Certification Commission to conduct criminal background check for persons (other than private professional guardians for whom the Commission already has conducted a check and attorneys) seeking to become a guardian.
- Nevada AB 150. While Nevada law previously required a complete set of fingerprints as part of an application of guardianship licensure, ABA 150 specifies that each natural person who acts in any capacity within a private professional guardian company must submit such fingerprints not less than once every five years.

**4. Guardian Certification/Licensure.** The Center for Guardianship Certification (CGC) has a national certification process that requires applicants to pass a test, meet minimum eligibility requirements, pay a fee, and make attestations about their

background. In addition, CGC has state-specific testing in California, Florida, and Oregon. Beyond the CGC efforts, approximately 13 states have enacted their own guardian certification or licensure programs. Arizona was the first state to implement a state program.

- Texas SB 1096 requires the Texas Supreme Court to establish by rule a mandatory registration program whereby all Texas guardianships must be registered with the Office of Court Administration, and courts must notify the Office if a guardian is removed. The Office must establish a central database of all guardianships in Texas and make it accessible for law enforcement officials.
- Texas SB 36 -- Texas has an existing guardian certification program administered by the Judicial Branch Certification Commission, in consultation with the Health and Human Services Commission. SB 36 extends the requirement for certification to guardianship programs (except those under a contract with the Health and Human Services Commission). These programs must register with the Judicial Branch Certification Commission, which will develop standards. Guardianship programs must employ certified guardianship providers. The Commission must make available on its website a list of all registered guardianship programs. An unregistered, suspended or expired guardianship program may not be appointed as guardian.
- Texas SB 43 concerns registration and licensing fees for guardians; and reissuance of a license that has been revoked. It also addresses the filing of complaints against a certified guardian, and requires the Judicial Branch Certification Commission to provide a copy of the complaint to the certified guardian.
- Nevada AB 150 makes revisions in the state's requirements for licensure of private professional guardians. The new measure specifies that a private professional guardian must be (a) a person employed by a licensed entity and certified by the national Center for Guardianship Certification; or (b) a licensed entity.

**5. Public Guardianship.** The 2008 national public guardianship study found that 44 states have statutory provisions on public guardianship or guardianship of last resort. Of these, 27 states have "explicit schemes" that refer specifically to public guardianship and frequently establish a public guardianship program or office; while 18 states have "implicit schemes" (some state have more than one system) that address the role of guardian of last resort – for instance designating a governmental agency to serve if no

one else is available. Additional states have public guardianship functions in practice. (See Teaster et al, *Public Guardianship: In the Best Interest of Incapacitated People?* Praeger, 2010); also an earlier version of the study (2008) at [http://www.americanbar.org/content/dam/aba/migrated/aging/PublicDocuments/war\\_ds\\_state\\_full\\_rep\\_11\\_15\\_07.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/aging/PublicDocuments/war_ds_state_full_rep_11_15_07.authcheckdam.pdf). In 2017, three states passed public guardianship provisions.

- Colorado HB 1087 creates a pilot public guardianship program to be activated only with the provision of at least \$1,700,000 in gifts, grants and donations to an “office of public guardianship cash fund.” If the total is reached, a public Commission must appoint a director to establish and administer the office within the Judicial Department. The office is a pilot to continue until 2021, and during that period must gather data and prepare a report to help the legislature determine the need for and feasibility of a permanent statewide public guardianship program. The report must include:
  - The unmet need for public guardianship services;
  - The cost of providing services to incapacitated and indigent adults;
  - The benefits and savings to the state;
  - Possible funding models and sources;
  - Efficiencies and obstacles incurred; and
  - Whether an independent statewide office or a nonprofit agency is preferable for providing public guardianship services.
  
- Illinois HB 2665. Illinois law provides for two schemes for public guardianship – the Office of State Guardian, for individuals with estates under \$25,000; and a system of county guardians for those with estates of \$25,000 and over, appointed by the governor, with the advice and consent of the Senate. This bill authorizes the governor to appoint, without the advice and consent of the Senate, the Office of State Guardian as an interim public guardian should a vacancy occur in a county with a population of 500,000 or less, if the designation (1) is an interim appointment for less than one year or until the governor appoints, with the advice and consent of the Senate, a county public guardian to fill the vacancy; (2) requires the Office of State Guardian to affirm its availability to act in the county; and (3) expires in a pending case of a person with a disability in the county when the court appoints a qualified successor guardian.

- Montana HB 70 instructs the judicial branch to make grants to organizations that provide public guardianship services to indigent individuals through volunteer guardians, and appropriates \$120,000 for the grants, to be considered part of the ongoing budget for the next legislative session. The Montana Working Interdisciplinary Network of Guardianship Stakeholders (WINGS) created by the bill is to make recommendations to the Supreme Court Administrator concerning grants to be awarded.

#### **IV. Guardian Actions**

**1. Visitation by Family/Friends.** See below summary of bills restricting and/or authorizing guardians to take various actions concerning an individual's right to visitation/association and communication with family and friends, under Section VI on Rights of Individuals.

**2. Notification of Changes.** Some state bills addressing the right to visitation/association also include requirements for guardians to notify the court and specified parties of important changes concerning the individual. In jurisdictions where such notification is required, professional guardians might respond by preparing a form and triggering the notice to be sent in a timely manner to those required to receive it. The new Uniform Guardianship, Conservatorship and Other Protective Arrangements Act "allows the court to identify people who are to be given notice of certain key changes or suspect actions, and who can therefore serve as an extra set of eyes and ears for the court" (Prefatory Note). See. Sec. 116.

- Texas SB 1709 clarifies the duty of the guardian to inform relatives of specified changes and events. The bill sets out required language informing relatives that if they would like to receive notice about these specified changes, they must elect this option in writing. The changes include:
  - Change of residence
  - Admission to a medical facility for acute care for three days or more
  - Location other than residence for more than one week; or
  - Death, funeral arrangements and location of final resting place.
- Nevada SB 433 requires a guardian immediately to notify "all interested persons and persons of natural affection:" (1) if based on information from qualified persons, the individual is likely to die within 30 days; (2) the death occurs; and (3) upon obtaining

information about the burial or cremation. Notice of death must be in person or by telephone to family members or persons of natural affection (or by electronic communication upon their option), and in writing to other interested persons. (Also see new Nevada requirements for notice of a move below.)

- West Virginia HB 2674 applies to “relatives who have been granted access” to an individual subject to guardianship under the bill’s visitation provisions (see below section on visitation bills). The guardian must “as soon as practicable” inform such relatives (unless the relative has waived the notice in writing) if the individual dies, is admitted to a medical facility for three days or more, has a change of residence, or is staying at a place other than the residence for over two weeks. If the individual dies, the guardian must inform the relatives of any funeral arrangements and the location of the final resting place.

**3. Health Care Decision-Making.** Perhaps one of the most controversial or “hottest” topics in the guardianship arena is the authority of guardians to make health care decisions for incapacitated persons. Which decisions can guardians make independently and which require approval by the court? What standards are guardians to use? Where do guardians stand concerning mental health powers?

- North Dakota HB 1365 concerns a guardian’s authority to consent to forced medication. A few states have specific provisions allowing a court to authorize a guardianship to consent to psychotropic or other medications for mental health treatment – specifically Wisconsin (Wis. Stat. 54.25(2)(d)(2); and Massachusetts, where a court can authorize “Rogers” powers for a guardian, which include consent for medication.

This year North Dakota provided that “a grant of general authority to make medical decisions includes the authority to consent to involuntary treatment with prescribed medications – but a grant of limited authority does not include such powers. The guardian must have a clinical recommendation, which must state that the medication is the least restrictive form of intervention that meets the needs, and that the benefits of the treatment outweigh the risks.

- Texas SB 39 requires that a guardian of the person to immediately notify the supervising court of any application for emergency detention.

- Michigan HB 4171 confers the guardian’s power and duty to execute, reaffirm and revoke a physician order for scope of treatment (POST) on behalf of the individual. Not more than fourteen days prior to executing a POST, the guardian must visit the individual, and if possible, consult with the individual. The guardian must also consult directly with the person’s attending physician. If the guardian does execute a POST, the guardian must visit the person within a year, consult with the person about reaffirming the POST, and consult with the physician about specific medical indications that may warrant reaffirming the POST. The guardian must include any actions regarding the POST in the annual guardianship report.

**4. Residential Decision-Making.** Guardian decisions about where an individual will live have received increasing attention. See Karp, N. & Wood, E., “Choosing Home for Someone Else: Guardian Residential Decision-Making,” *Utah Law Review*, Vol. 2012, No. 3; and Karp & Wood, *Choosing Home for Someone Else: Guardian Decisions on Long-Term Services and Supports*, AARP Public Policy Institute, 2013. See also the National Guardianship Association *Standards of Practice*, 2013. State statutes vary on the need for court approval for changes in residential settings. The UGCOPAA approved in July 2017 requires (Sec. 314(e):

- ✓ The guardian must select a residential setting the individual would have wanted, or if this is not known or if the setting would unreasonably harm the individual, the setting consistent with the individual’s best interest.
  - ✓ The guardian must give priority to the setting that will allow interactions with persons important to the individual.
  - ✓ The guardian may move the individual to a nursing home or other restrictive facility only if the move is included in the guardian’s plan, the court authorizes the move, or notice of the move was given 14 days before the move and there were no objections.
  - ✓ Within 30 days after the move, the guardian must give notice of the change to the court, the adult and anyone entitled to notice in the court order.
- Oregon HB 2630 specifies procedures a guardian must take to change the “abode of the protected person,” and states that the court may remove a guardian who does not comply with those procedures. The guardian must give notice of the move 30 days in advance, or “with as much advance notice as possible.” The court must schedule a hearing on any objection to the move.

- Nevada SB 433 offers clear guidance and strong requirements for guardians concerning residential decisions. It explicitly states that every individual subject to guardianship “has the right, if possible, to (a) have his or her preferences followed; and (b) age in his or her own surroundings of, if not possible, in the least restrictive environment suitable to his or her unique needs and abilities.”

The bill requires a guardian to file notice with the court and to notify interested persons, not less than 10 days before: a move to a secured residential facility; a change in residence; or if the individual will reside at a location other than his or her residence for more than three days. If there is no objection, the guardian may then move the individual without court permission.

The bill sets out certain exceptions. If an emergency exists, the guardian may take temporary action and make the notifications as soon as possible. Other exceptions are if the court has previously granted such authority; or if interested persons have opted not to receive notification. (Existing provisions also specify that a guardian may move an individual to a secured residential facility within the state without notice to court if the move is pursuant to a written recommendation by a physician, licensed social worker or an employee of a protective services agency.

**5. Authority of Agents vs Guardians.** Financial and health care powers of attorney are important planning tools that can reduce or avoid the need for guardianship. If a guardian is nonetheless appointed, a key question is the extent to which, and under what circumstances, agent authority “trumps” that of a guardian. A 2015 ABA Commission article and chart explored the authority of guardians and health care agents, at: [http://www.americanbar.org/publications/bifocal/vol\\_36/issue\\_6\\_august2015/health-care-decision-making-authority-guardians-agents.html](http://www.americanbar.org/publications/bifocal/vol_36/issue_6_august2015/health-care-decision-making-authority-guardians-agents.html). For agents under financial powers of attorney, there may be considerations of abuse and exploitation.

- Texas SB 39 states that the appointment of a permanent guardian of the estate for the principal of a power of attorney *revokes* the power of attorney upon the guardian’s qualification; and the appointment of a temporary guardian of the estate for the principal *suspends* the power for the duration of the guardianship, unless the court’s order affirms the power and confirms the validity of the agent.

The bill also addresses removal of an agent under a financial power of attorney. If an individual proposed to need a guardian or already subject to guardianship is the

principal of a power of attorney, a successor agent or an interested person may file a petition in a guardianship proceeding to remove the current agent. The bill specifies grounds for removal. If the agent is removed, the court may authorize appointment of a successor.

- South Carolina S 415 states that appointment of a guardian *terminates* an agent's powers under a health care power of attorney or financial power of attorney for matters within the scope of the guardianship; but that the guardian must act consistently with the most recent advance directive.

**6. Guardian of Person vs Guardian of Estate.** Some states have grappled with the relationship between the roles of the guardian of the person and the guardian of the estate, or "conservator."

- Nevada SB 433 includes provisions delineating the role and relationship of guardian of person and guardian of the estate. It sets out circumstances in which a guardian of the person may receive and use money for the care of the individual if there is no guardian of the estate; a guardian of the person must account to the guardian of the estate; a guardian of the person may present a claim to the guardian of the estate for room and board needs, or to make payment for the person's care and maintenance.
- South Carolina S 415 aims throughout the new provisions to achieve greater consistency between the guardianship and conservatorship procedures.

The bill makes numerous changes in the role of the conservator, and sets out what actions a conservator may take without prior approval and when the conservator should file an application prior to acting. The conservator may seek instructions from the court for ratification. Additionally, the conservator must consider the individuals' estate plan in investing and distributing the estate assets. The conservator may create a special needs trust.

**7. Guardian Plan.** A growing number of states require guardians to submit forward looking care plans, and some require budgets or financial plans as well. The UGCOPAA requires a guardian to file a care plan no later than 60 days after appointment, when there is a significant change and when the guardian seeks to deviate significantly

from the plan. (Sec. 316); and has similar requirements for a conservator to file a plan for protecting and managing assets (Sec. 419).

- Florida HB 399 – Florida law requires that each guardian of the person file with the court an annual guardianship plan. This bill increases the time the guardian should file the annual plan and specifies that the latest plan approved by the court remains in effect until the court approves a subsequent plan.
- Nevada AB 130 requires that upon the filing of a petition, the court may require a proposed guardian to file a preliminary care plan and budget, the format and timing of which is to be specified by Supreme Court rule.
- South Carolina S 415 requires that guardian to file a plan of care, “based on the actual needs of the ward, taking into consideration the best interest of the ward.” The guardian must include in the plan steps to develop or restore the individual’s decision-making ability.

**8. Sale of Real Property.** Many states have specific requirements concerning the authority of the guardian/conservator authority in the sale of real property.

- Nevada AB 130 makes numerous changes to the guardian’s authority and required procedures for the sale of real property of an individual subject to guardianship, requiring court approval, notice to joint owners and interested persons, and making other amendments. The bill also addresses sale of personal property, specifying that the guardian may not sell or dispose of personal property until 30 days after an inventory of the property is filed with the court and a copy sent to the individual and interested persons. The guardian must offer first right of refusal to acquire the personal property at fair market value to family members and any interested persons. If the property is valued at less than \$10,000, a guardian may sell or dispose of it after notice to the individual, his or her attorney, and interested persons, if there is no objection within 15 days, with certain exceptions.

**9. Dissolution of Marriage.** Marriage and divorce generally are considered so personal in nature that authority concerning these actions may not transfer to a guardian.

- Florida HB 399 eliminates the requirement that a court must first find that an individual's spouse has consented to the dissolution of marriage before a court may grant the authority to the guardian.

**10. Guardian Access to Digital Assets.** The Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA) allows individuals to plan for the disposition of their digital assets in the same way they can make an estate plan for traditional assets. Digital assets include email, digital photographs, documents stored in electronic form, websites, and social media accounts. For conservators, access to certain private communications is restricted unless approved by the court or the protected person. RUFADAA was approved by the Uniform Law Commission in 2015 and passed in 16 states this year. So far, 36 states have enacted a RUFADAA law. (Summary by Ben Orzeske.)

**11. Post-Death Authority Concerning Disposition of Property.** In 2017, three states addressed the role of the guardian following the death of the individual:

- Florida HB 399 removes the cap (\$6,000) that a guardian may pay for funeral expenses.
- Indiana SB 516 allows the guardian, within 60 days of the date of death, to request and receive health records of the individual only if no personal representative of the estate has been appointed.
- Maine LD 135 authorizes the Department of Health and Human Services (which serves as public guardian for certain individuals) to disclose information to the personal representative of the estate of an individual who dies while under public guardianship or conservatorship.
- South Carolina S 415 specifies that upon the death of the individual, if there is no conservator, the guardian may apply to use the individual's funds for the final disposition of remains, and file an accounting of those funds. If a guardian cannot locate a will, the guardian must send the accounting to the last known address for a close relative.

## V. Fees for Guardians and Attorneys

Payment of guardian fees and attorney fees, as well as court fees and costs, is a significant factor in bringing a guardianship proceeding. Moreover, guardian fees can be substantial, and fee disputes have been frequent.

- GUARDIAN FEES – UGCOPAA provides that guardians and conservators are entitled to reasonable compensation, subject to court approval, or for a guardian who is not the conservator, with the approval of the conservator. The Act sets out factors for the court to consider in determining reasonable compensation, based on recommendations made by the 2011 Third National Guardianship Summit.

South Carolina S 415 allows for compensation as approved by the court, based on the former Uniform Guardianship and Protective Proceedings Act, which did not list factors in determining reasonable compensation.

Michigan S.B. 49 clarifies allowed compensation for a professional guardian or conservator. The Act is intended to allow professional guardians/conservators to collect a sufficient fee while maintaining transparency. The previous law specified a professional guardian/conservator could only collect a specific, codified amount. The act clarifies that the professional guardian/conservator may collect compensation from a source other than the estate of the individual, but file a written statement with the court and serve a copy to the individual.

- ATTORNEY FEES -- Nevada AB 130 states that any person who retains an attorney to represent a party in a guardianship proceeding is personally liable for any attorney's fees, but may petition the court to authorize payment from the estate of the individual subject to guardianship, after first filing written notice of intent to seek payment. The bill sets out the contents of the petition; as well as a lengthy and detailed list of factors for the court in determining whether an attorney's fees are "just, reasonable and necessary;" and circumstances in which the court may not approve compensation.
- GUARDIAN AD LITEM FEES -- Rhode Island SB 597 increases the guardian ad litem maximum fee from \$400 to \$800 in guardianship proceedings.

## **VI. Rights of Individuals**

Writings and enactments over the past 25 years have heightened awareness that guardianship removes or infringes on fundamental rights, that some basic rights should be retained statutorily, and that limited guardianship can allow the person to retain rights in areas in which he or she can make decisions.

**1. Right to Visitation/Association.** Visits by, and communication with, family members and friends are basic to quality of life of an individual subject to guardianship. Guardians stand in a position to either restrict or enhance such communication. Restrictions may result in harmful isolation, yet at the same time may be an effort to protect *against* harm and abuse. The complex cases in which visitation issues arise often are marked by family dysfunction, and may involve undue influence, neglect and financial exploitation. A fundamental question is: to what extent should decisions involving basic rights to visitation/association be in the hands of guardians or be required to be authorized by courts.

The NGA *Standards of Practice* state that “the guardian shall promote social interactions and meaningful relationships consistent with the preferences of the person,” and “the guardian shall encourage and support the person in maintaining contact with family and friends, as defined by the person, unless it will substantially harm the person” (Std #4). See [http://www.guardianship.org/documents/Standards\\_of\\_Practice.pdf](http://www.guardianship.org/documents/Standards_of_Practice.pdf) .

Federal nursing home regulations specify that the resident has the right to visitation, and the facility must provide immediate access to any resident by family members or other relatives, subject to the resident’s right to deny or withdraw consent at any time (42 CFR 483.10).

The *Uniform Guardianship, Conservatorship and Other Protective Arrangements Act* includes strong provisions on communication/visitation (§§ 311, 315, 316, 502, 503).

The Act:

- Requires that the individual receive notice of the right to communicate, visit or interact with others;
- Limits a guardian’s authority to restrict communication/visitation, prohibiting such a restriction, with three exceptions – (1) the restriction is authorized by court; (2) there is a protective order or protective arrangement that limits contact; OR (3) the guardian “has good cause to believe the restriction is necessary because

interactions with a specified person poses a risk of significant physical, psychological, or financial harm” AND the restriction is for no more than 7 business days if the person with whom contact is restricted has a family or pre-existing social relationship or for 60 days if a family or social relationship does not exist.

- Requires that the guardian include in the mandatory care plan (submitted to the court within 60 days of appointment, or if the guardian intends to make a significant change in care) information about any individual with whom the person plans to have regular visits, and the guardian’s plan for facilitating those visits.
- Allows the court to order a “protective arrangement” instead of a guardianship. Under this Article, court may direct a visitation or supervised visitation; or restrict access “by a person whose access places [the individual] at serious risk of physical or psychological harm” – or by a person who uses fraud, coercion, duress or deception and control.

For the past two years, the issue of right to communication/visitation has exploded in hotly contested guardianship cases and legislation. Adult children of celebrities Casey Kasem and Peter Falk have aimed to raise public awareness of the visitation/association issue, and have developed model bills introduced in a number of states. In 2015, varying bills concerning communication/visitation were passed in Texas, Iowa and California (and provisions in Florida and Ohio). In 2016, *ten* additional states passed communication/visitation bills (Arizona, Hawaii, Illinois, Indiana [study], Louisiana, New York, South Dakota, Tennessee, Utah, Virginia). These measures differ markedly in language, reach, and requirements. Each bill faced substantial controversy in passage, and went through significant amendments. (Some of the bills also include requirements for guardians to notify certain parties of specified changes, as described above in Section IV on Guardian Actions.)

In 2017, five communication/visitation bills passed, and several others were introduced. Three of the bills start from a focus on individual rights and are patterned after a model developed by the Catherine Falk organization; and two focus on the needs of family members:

- Nevada SB 433 prohibits a guardian from restricting the right of a person subject to guardianship to communicate, visit or interact with a relative or “person of natural affection” including by telephone, mail, or electronic communication, unless: the person does not wish such communication; there is an abuse investigation of the

relative or other person; the restriction is authorized by court order; or the guardians determines the individual would be harmed and the communication is not in his or her best interest. A guardian may petition the court for an order restricting the communication. The bill sets out considerations for the court in issuing such an order – including possible reasonable time, manner or place restrictions or supervised visitation. The bill sets out hearing procedures.

- *Rhode Island SB 711* prohibits a guardian from restricting the right of communication, visitation or interaction with others of a person subject to guardianship, including by telephone calls or personal mail. If the individual is not able to express consent, it may be presumed based on the prior relationship. A guardian may move the court to restrict communication/visitation for good cause, including: whether a protective order has been issued to protect the individual from the person seeking access; whether abuse, neglect or exploitation of the individual by the person seeking access has occurred or is likely to occur; and any documented wishes of the individual to reject the communication/visitation. The court may order the restriction for good cause. The bill sets out factors the court must consider, and hearing procedures.
- *Virgin Islands Amendment to Bill No. 31*. This bill from 2016 but signed by the Governor in January 2017 follows the same model as the Nevada and Rhode Island bills above, prohibiting a guardian from restricting the right of communication, visitation or interaction; presuming consent based on prior relations; allowing the court to restrict communication for good cause and setting out factors the court must consider, as well as hearing procedures.
- *Nebraska LB 122*. Unlike the bills above, Nebraska does not set out a right of communication/visitation. Instead, it is focused on the need to “allow family members to remain connected.” It states that “a caregiver may not arbitrarily deny visitation to a family member of a resident” (of a health care facility, or any home or other residential dwelling where the person is receiving care and services). A family member who is denied visitation may petition the court. If the individual has a guardian, the petition is to be filed in the county court with jurisdiction over the guardianship case. The court may not compel visitation if a resident “having the capacity to evaluate and communicate decisions regarding visitation” does not want the visitation; or it would not be in the individual’s best interest. If the individual’s health is in decline or death is imminent, the court must conduct an emergency hearing; and if the court finds a guardian or other person is knowingly isolating the

person, the court may order the payment of court costs, attorney's fees and other remedies.

- West Virginia HB 2674 permits a relative to file a petition in circuit court seeking access to and information about an individual subject to guardianship. The court must schedule a hearing within 60 days, or as soon as practicable if the individual's health is in decline or death is imminent. The court may deny the petition or order the guardian to allow access; and may order the disclosure of confidential information (defined in the bill). The bill also includes a duty of the guardian to notify relatives about the individual's health and residence (see above section on notification).

**2. Bill of Rights.** At least four states have statutory provisions listing rights of individuals with guardians. Florida sets out basic rights at *Fla. Stat. Sec. 744.3215*. Minnesota has a statutory "bill of rights for wards and protected persons" at *Minn. Stat. 524.5-120*, which provides that "the ward/protected person retains all rights not restricted by court order and these rights must be enforced by the court," and enumerates 14 specific rights. Michigan in 2012 created a new provision summarizing and reiterating within a single section the basic rights of individuals at *M.C.L.A. 700.5306a*. In 2015, Texas enacted a new subchapter (1151.351 of the Estates Code) on "Rights of Ward," setting out a total of 24 *distinct rights*. The person retains all rights under law "except where specifically limited by a court-ordered guardianship. Additionally, the Uniform Guardianship, Conservatorship and Other Protective Arrangements Act requires a notice of rights to individuals subject to guardianship and conservatorship (§§ 311 & 412).

This year Nevada adopted a "Ward's Bill of Rights" (although the term "ward" was replaced in another bill, see below); and South Carolina required the court order to specify from a detailed list the rights specifically removed and the rights vested in the guardian.

- Nevada SB 360 creates a bill of rights for individuals subject to guardianship, listing 19 specific rights, beginning with the rights to have an attorney, and including a wide range of additional rights such as the right to a copy of all documents filed in a guardianship proceeding, participate in developing a care plan, have due consideration given to his or her personal desires (and preferences for health care and religious beliefs), be granted the greatest degree of freedom possible, be treated

with respect and dignity, receive timely and effective health care, receive prudent financial management, and ask the court to review the need for the guardianship – and more! The court must make the Bill of Rights readily available to the public and post it in a conspicuous place in the courthouse and on the internet.

The bill also sets out requirements for any long-term care contract that includes an arbitration clause.

- *South Carolina S 415* requires that the court order set forth “the rights and powers removed from the ward. To the extent rights are not removed, they are retained by the ward.” The bill lists 16 specific rights, beginning with the right to marry or divorce, reside in a place of one’s choosing, and travel without the consent of the guardian – and including rights of medical decision-making, driving, voting, contracting, and buying or selling real estate. The bill then requires that the court order set forth the rights and powers specifically vested in the guardian – and includes a similar list of rights/powers, without those rights that cannot be vested in the guardian (right to marry, vote, participate in social /religious/political activity, and drive. These provisions are critical in promoting the concept of limited orders.

**3. Other Provisions Concerning Rights.** The new North Dakota provisions focus on proposed restrictions to certain rights:

- *North Dakota 1095* requires the petition to state any proposed restrictions on the individual’s rights to vote, to seek a change in marital status or to get or retain a driver’s license. The court must make specific findings to deprive an individual of these rights. The Workgroup drafting the bill determined that “a restriction sought by the petitioner should be included in the original petition to the court as the restrictions may have bearing on whether the proposed ward seeks legal counsel” (Feland testimony, February 2017). The bill removed from the list the right to testify in a judicial or administrative proceeding.

**4. Changes in Terminology.** Many states are making changes in language to reflect preferred terminology more in line with individual self-determination and rights.

- *Nevada SB 433* substitutes “protected person” for “ward.”

- Connecticut SB 1502 replaces statutory references to “guardian of a person with an intellectual disability” to “legal representative” (Conn. Gen. Stat. Ann. §§ 17a-210; 46a-11). Legal representative is defined as a limited or plenary guardian or a conservator.

## VII. Capacity Issues

Fundamental to guardianship law is the “trigger point” that states use to determine when an individual’s rights can be removed and in some cases transferred to a court-appointed surrogate – a guardian or conservator. State statutes have a definition of “incapacity” or some similar term, to direct judges in their determination. These definitions generally combine or select from four elements: medical condition, cognitive ability, functional ability, and potential harm without a surrogate appointment.

The Uniform Guardianship and Protective Proceedings Act of 1997 used a functional and cognitive test. The recently approved UGCOPAA uses similar language but: (1) adds supports and supported decision-making; and (2) does not use the term “capacity” or “incapacity” – instead the language sets out the “basis for appointment” of a guardian, which is a finding by clear and convincing evidence that the respondent:

“lacks the ability to meet essential requirements for physical health, safety, or self care because:(A) the respondent is unable to receive and evaluate information or make or communicate decisions, even with appropriate supportive services, technological assistance, or supported decision making; and (B) the respondent’s identified needs cannot be met by a protective arrangement instead of guardianship or other less restrictive alternatives.” (Sec. 301).

**1. Determination of Capacity.** States use a variety of definitional elements and a variety of experts to assist the judge in making the difficult determination of whether an individual needs a guardian or conservator.

- Florida HB 399 – current Florida law requires that each individual alleged to need a guardian be assessed by an “examining committee.” HB 399 specifies that the clerk must serve the examining committee’s report on the petitioner and the attorney for the individual alleged to need a guardian at least 10 days before the hearing. The petitioner and the individual may object to the introduction of all or part of the report into evidence.

- Maryland HB 81 makes revisions in the definition of “incapacity” to manage property or financial affairs. It repeals “confinement” as one of the conditions for which a court may appoint a guardian of the property; and also repeals “confinement” as an element of the definition of incapacity under the state’s guardianship code.
- North Dakota HB 1095 broadens the clinical experts qualified to examine an individual and report to the court. The new term “expert examiner” includes a licensed physician, psychiatrist, licensed clinical psychologist, advanced practice RN who is a certified nurse practitioner or clinical nurse specialist, or a physician assistant. The Guardianship Workgroup that prepared the bill stated that broadening the qualified examiners would address the difficulty of locating clinicians in a rural area; and would encourage examination by medical professionals who have the most contact with the individual.
- Idaho HB 148 states that the evaluation committee’s report must be under oath or affirmation, and must comply with Idaho Supreme Court rules (whereas previously the code listed the required elements of the report).
- Nevada AB 130 replaces the term “incompetent” with the term “incapacitated,” and defines an incapacitated person as unable to “receive and evaluate information or make or communicate decisions to such an extent that the person lacks the ability to meet essential requirement for physical health, safety or self-care without appropriate assistance.” The language derives from the 1997 Uniform Guardianship and Protective Proceedings Act, now revised as the UGCOPAA, which adds language concerning supports and supportive services, and does not use the term “incapacitated person.”
- South Carolina S 415 defines “incapacity” as “the inability to effectively receive, evaluate, and respond to information or make or communicate decisions such that t person, even with appropriate, reasonably available support and assistance, cannot meet the essential requirements for his physical health, safety, or self-care, necessitating the need for a guardian” [or property or financial affairs, for appointment of a conservator]. The bill also defines “supports and assistance.”

Additionally, S 415 requires only one examiner, who must be a physician. However, upon the court’s own motion or a request of the examiner, the individual, or the

guardian ad litem, the court may appoint a second examiner who must be a physician, nurse, social worker or psychologist.

**2. Supported Decision-Making.** A recent shift in the decision-making landscape is the advent of “supported decision-making.” The United Nations Convention on the Rights of Persons with Disabilities recognizes in Article 12 that persons with disabilities have the “legal capacity” and the right to make their own decisions, and that governments have the obligation to support them in doing so. For people with cognitive, intellectual or psychosocial disabilities, Article 12 is critical to self-determination and equality. For more on supported decision-making, see the National Resource Center on Supported Decision-Making, <http://www.supporteddecisionmaking.org> .

In 2015, Texas became the first state to recognize supported decision-making agreements. The groundbreaking bill stated that its purpose was to “recognize a less restrictive alternative to guardianship” for adults who need assistance but are not “incapacitated persons.” The bill allowed an adult with a disability to “voluntarily, without undue influence or coercion, enter into a supported decision-making agreement with a supporter” and it set out the scope of the agreement. In 2016, Delaware enacted a bill recognizing supported decision-making agreements. This year Texas enacted safeguards against abuse by the supporter, and sought to inform transition age youth about alternatives including supported decision-making:

- Texas SB 39 states that the supporter under a supported decision-making agreement owes the adult with a disability a fiduciary duty to act in good faith, within the granted authority, loyally and without self-interest, and to avoid conflicts of interest. The relationship between the supporter and the adult is one of trust and confidence and does not undermine the decision-making authority of the adult. Additionally, the agreement is terminated by the appointment of a guardian of the person or estate. Finally, if the adult pays the supporter for services, the adult may amend the agreement to designate an alternate supporter to monitor the payment
- Texas SB 748 provides that within one year of the eighteenth birthday of a student with a disability, the school district must provide the student and the student’s parents with information and resources about guardianship and less restrictive alternatives including supported decision-making, and other supports and services that may enable the student to live independently.

**3. Restoration to Capacity.** While it is most common for a guardianship to end with the death of the individual, all state statutes provide for termination of a guardianship upon a finding that: (1) the person has sufficient capacity to manage personal and/or financial affairs; (2) the person has gained sufficient supports; or (3) new evidence is identified to show the individual does not meet the definition of “an incapacitated person” or a similar definition.

Restoration proceedings are under increasing focus -- especially for younger individuals with intellectual disabilities, mental illness or head injuries who may be able to make decisions on their own with adequate family and community support. In 2017, the ABA Commission on Law and Aging, with the Virginia Tech Center for Gerontology, completed a pioneering research project on restoration including a review of court files in four states and a roundtable discussion resulting in recommendations. See *Restoration of Rights in Adult Guardianship: Research & Recommendations*, [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) . In 2017, four states made changes in their procedure for restoration of rights:

- *Arkansas SB 268* enacts a higher bar for termination of guardianship and restoration of rights, requiring a finding by the court that the order is no longer necessary *and* is no longer in the individual’s best interest. Previously only one of these findings was required. This will make it more difficult for individuals to have their rights restored.
- *Washington SB 5691* requires the court to modify or terminate a guardianship when a less restrictive alternative will adequately provide for the needs (listing considerations the court should take into account). The court must hear motions for such modifications or terminations within 60 days of the motion.
- *North Dakota HB 1095* enacts a notice of the right to termination in conservatorship cases, which the conservator must send along with the annual report.
- *Nevada SB 433* requires the court to appoint an attorney for the individual in restoration proceedings if the individual is unable to retain an attorney; or the court determines that the appointment is necessary.
- *Texas SB 1710*. Texas law allows an individual subject to guardianship to request restoration or modification of the order by informal letter. The bill clarifies that if

the individual files such an informal application and the guardian has been removed, has died or has resigned, the court may not delay considering the application to first designate a successor guardian (thus overturning a ruling in *In Re Guardianship of Ryan Keith Tonner*, 2016 WL 7030814). The bill also clarifies that it is not necessary to get a physician's certificate before appointing a court investigator or guardian ad litem to investigate a restoration request under an informal application. The court must send the individual a letter within 30 days advising of the date on which a guardian ad litem or court investigator was appointed and giving the individual their contact information. The court must send the individual the investigative findings and conclusions.

- *South Carolina S 415* allows the individual subject to guardianship or another person to make an informal request to the court "for relief," which could include modification or termination of the guardianship order. The court may dismiss the request, in which case a formal request must be filed. The evidentiary standard required to prove the individual is no longer "incapacitated" is preponderance of the evidence.

#### **VIII. Medicaid/Public Benefits**

No enactments.

#### **IX. Guardian and Fiduciary Misconduct**

The 2010 Government Accountability Office report entitled *Guardianships: Cases of Financial Exploitation, Neglect, and Abuse of Seniors* (<http://www.gao.gov/Products/GAO-10-1046>) "could not determine whether allegations of abuse by guardians are widespread," but the report identified hundreds of such allegations by guardians in 45 states and DC between 1990 and 2010. In 2016, a GAO report entitled *Elder Abuse: The Extent of Abuse by Guardians Is Unknown, but Some Measures Exist to Help Protect Older Adults* (<https://www.gao.gov/assets/690/681877.pdf>) found that the extent of abuse nationally by guardians is unknown due to limited data, but profiled exploitation cases from six states. In October, *The New Yorker* magazine featured a chilling article entitled "How the Elderly Lose Their Rights" describing fraudulent actions by guardians in Clark County Nevada.

This year Nevada bills include clear and hard-hitting sanctions against guardians who commit fiduciary misconduct.

- Nevada SB 433 expands the reasons a court may remove a guardian, including that the guardian has violated any right of the individual subject to guardianship – and specifically that the guardian has violated the communications/visitation provisions in the act (see above).
- Nevada SB 433 also sets out specific sanctions for guardians who are “guilty of gross impropriety in handling the property” of the individual; make substantial misstatements in reports or accounts filed with the court, or willfully fail to file a required report after receiving notice.

Additionally, the bill states that if a guardian violates any of the rights of an individual subject to guardianship set out in its provisions, the court may take action, including:

- Ordering that actions be taken or discontinued;
  - Disallowing fees;
  - Ordering compensation for an individual or the individual’s estate for injury, death or loss of money or property caused by the guardian;
  - Removing the guardian; or taking any other appropriate action.
  - If a guardian action is found to be deliberately harmful or fraudulent, the court may impose twice the actual damages and attorney’s fees and costs.
- Nevada AB 150 requires the Commissioner of Financial Institutions to conduct an investigation if the Commission receives a verified complaint that a person who does not meet the requirements for serving as a private professional guardian is engaging in such services.
  - South Carolina S 415 explicitly sets forth the obligation of the guardian to ensure the individual is receiving appropriate care.

## **X. Post-Adjudication/Monitoring Issues**

During the past 15 years, many states have sought to strengthen the court’s tools for oversight of guardians (See *Guarding the Guardians: Promising Practices for Court Monitoring*, [http://assets.aarp.org/rgcenter/il/2007\\_21\\_guardians.pdf](http://assets.aarp.org/rgcenter/il/2007_21_guardians.pdf).) Several 2015 bills addressed court oversight tools.

**1. Bond Requirements.** Approximately 20 state statutes require a guardian of property/conservator to post a bond, and the remainder allow courts some or complete

discretion. See ABA Commission chart on bond requirements (2014) at: [https://www.americanbar.org/content/dam/aba/administrative/law\\_aging/2014\\_guardian\\_bond\\_chart.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/law_aging/2014_guardian_bond_chart.authcheckdam.pdf) The UGCOPAA makes bond a default option for courts in the appointment of conservators, providing that “The court shall require a conservator to furnish a bond with a surety the court specifies, or require an alternative asset-protection arrangement. . .” (Sec. 416).

- Texas SB 40 requires judges presiding in guardian proceedings to execute a bond, with the amount depending on the county population size. Statutory probate judges are required to post a bond of \$500,000. Alternatively, the county may obtain insurance against losses caused by gross negligence of a county judge or a statutory court court. The bill states that judges must perform the duties required by the Estates Code.
- Nevada AB 150 requires that a private professional guardian company must have fidelity bonds of \$25,000 on each natural person who acts in any capacity within the company.

**2. Guardian Report.** One function of required guardian reports is to regularly assess the continuing need for the guardianship. The UGCOPAA requires the guardian’s annual report to include “a recommendation as to the need for continued guardianship and any recommended changes in the scope of the guardianship” (Sec. 317(a)). A number of states require such a statement (see state by state chart, ABA Commission on Law and Aging & Hurme, S, “Monitoring Following Guardianship Proceedings,” <http://ambar.org/guardianship> (2016)).

- Oregon HB 2630 adds to the guardian’s report a statement of “facts that support the conclusion that the person is incapacitated.”
- Nevada SB 433 specifies the content of a guardian’s report, including the individual’s physical condition, place of residence, names of others living with him or her, and other information required by court.
- Nevada AB 130 requires the guardian to serve notice of the filing of guardian’s inventory, as well as a copy of the inventory, on the individual subject to guardianship, his or her attorney and any guardian ad litem representing the individual. It also requires that the guardian’s report be served on the individual and any attorney representing the individual.

- North Dakota HB 1095 establishes a five-year expiration for orders appointing or reappointing a conservator and provides a procedure for the reappointment. This establishes a regular review process for conservatorship that parallels that for guardianship. The bill also clarifies and expands the requirements for the conservator's annual report. The bill requires the conservator to provide copies of the annual report to the individual and other interested persons. The bill's Workgroup concluded that allowing interested parties to request copies of the report at the time of the appointment could "enhance the detection of any malfeasance by the conservator" (Feland testimony, February 2017).
- Utah HB 214 specifies that in addition to a guardian who is the parent of the individual subject to guardianship, a co-guardian who is such a parent is not required to file an annual report and accounting.

**3. Court Auditing of Accounts.** Once the guardian/conservator files the reports and accounts, the court must examine and audit them. The UGCOPAA requires the court to "establish a system for monitoring reports submitted. . . and review the reports at least annually . . . (Sec 317; also Sec. 423). The National Probate Court Standards states that courts should "[review] promptly the contents of all plans, reports, inventories, and accountings." In practice, many courts lack the staff and expertise for effectively auditing accounts.

- Nevada AB 130 establishes a State Guardianship Compliance Office, with an Officer appointed by the Supreme Court. The Office may hire two accountants and two investigators to provide auditing and investigative services to the district courts in the administration of guardian proceedings. The bill includes an appropriation to pay the costs of the Office.
- Connecticut SB 967 authorizes the probate court administrator to audit conservator [the state term for guardian of person or property] accounts, and establishes processes for such audits.
- Texas SB 667 would have authorized the Office of Court Administration to establish a Guardianship Compliance Program to provide resources and assistance to guardianship courts including an electronic database to monitor filings and guardianship services compliance specialists to review and audit cases. The bill

passed the House and Senate, but was vetoed by the Governor in June. The *Texas Observer* reported that the Governor “effectively canceled a statewide program to inspect guardianship cases for signs of fraud or abuse against vulnerable Texans who are under court protection.”

#### **4. Court Database and Registry**

- *Texas SB 1096* directs the Supreme Court to establish, through the Office of Court Administration, a mandatory registration program for all guardianships in the state and maintain a central database. The Office must make certain information from the database available to law enforcement (so that law enforcement can notify the court about a detention or arrest). The information in the database will be confidential, and will be used only to determine whether a detained or arrested person has a guardian. Additionally, courts with jurisdiction over a guardianship must immediately notify the Judicial Branch Certification Committee of the removal of a guardian. [see above]

**5. Court Jurisdiction of Trust.** Two Nevada bills address instances in which an individual subject to guardianship is a beneficiary of a trust.

- *Nevada SB 433* specifies that the individual is entitled to copies of accountings relating to trust created by or for his or her benefit, and sets out circumstances in which the individual may submit a trust to the court.
- *Nevada AB 254* authorizes a court to assume jurisdiction of a trust of which the individual is a beneficiary in certain circumstances.

#### **6. Other Post-Adjudication/Monitoring Issues**

- Notice of Arrest of Individual -- *Texas SB 1096* specifies that a peace officer who detains or arrests an individual subject to guardianship must notify the court that has jurisdiction within one working day.
- Closing Upon ABLE Account -*Texas SB 1764* specifies that the court may order the closure of a guardianship of the estate when all of the estate assets have been placed in an ABLE (Achieving a Better Life Experience) account for which the individual subject to the guardianship is designated as the beneficiary.

**7. WINGS.** An important guardianship reform approach is to have stakeholders work together consistently and collaboratively in an ongoing court-community problem-solving group. This growing initiative is known as “Working Interdisciplinary Networks of Guardianship Stakeholders” (WINGS). WINGS brings together judicial, legal, aging, disability and mental health networks to identify strengths and weaknesses in a state’s guardianship law and practice, and pursue common objectives for change through an ongoing consensus-building partnership. Currently 25 states have either a court-initiated WINGS or a similar stakeholder guardianship reform group. See <http://ambar.org/wings>.

Montana HB 70 made the state the first to create WINGS legislatively, and makes it one of 23 currently operating state WINGS. The bill establishes WINGS to consist of nine members (with entity slots listed) appointed by the chief justice to serve two years terms. The bill requires WINGS to meet at least four times a year and specifies objectives including identifying strengths and weaknesses in the state’s current system of adult guardianship and conservator ship, and serving as an ongoing problem-solving mechanism.

**Table: State Adult Guardianship Legislation at a Glance: 2017**

State	Legislation	Code Section Amended	Provisions
AR	SB 268	Ark. Code Ann. §28-65-401(b)(3)	Concerns termination of guardianship & restoration of rights.
CO	HB 1087	Colo. Rev. Stat. Title 13, Article 94	Creates a pilot public guardianship program.
CT	SB 1502	Conn. Gen. Stat. Ann. §§ 17a-210 (c) – (f); 46a-11	Changes statutory terminology.
CT	SB 976	Conn. Gen. Stat. §§45a-77, 45a-655, 45a-656	Establishes court auditing system and requires development of guardian standards.
FL	HB 399	Fla. Stat. Ann. §§744.331, 367, 441 & 3215	Revises deadline for guardianship plan; concerns dissolution of marriage; revises requirements concerning examining committee.
HI	HB 322	Haw. Rev. Stat. 603-21.5	Concerns jurisdiction in cases involving felonies endangering individual subject to guardianship.
ID	HB 148	Idaho Code §§ 15-5-303, 304, 308 & 310; §66-404	Revises duties and qualifications of court-appointed visitor; concerns

			temporary guardianship; role of co-guardians.
IL	HB 2665	20 ILCS §3955/33.5; 755 ILCS §§ 5-11a-5 & 21; 5-13.1 & 1.2	Concerns guardian training and public guardianship.
IL	SB 1319	755 ILCS §§5/11a-10 & 11.5	Concerns videoconferencing in guardianship proceedings.
IN	SB 516	Ind. Code Ann §§16-39-1-3; 29-3-12-1; 29-3-12-5	Concerns guardian post-death request for health records.
ME	LD 135	22 MRSA §3474	Concerns post-death disclosure of information re individual subject to public guardianship.
MD	HB 81	Md. Code Ann. [Estates & Trusts] §§13-201 & 14.5-103	Revises definition of “incapacity” to manage property or financial affairs.
MI	HB 4171	M.C.L. §§700.1106, 700.5303, 700.5305, 700.5314	Addresses role of guardian ad litem and authority of guardian concerning POST
MI	SB 49	M.C.L. §700.5106	Addresses guardian compensation.
MI	SB 270	Mich. Comp. Laws Ann. §700.5301b & §700.5402a	Concerns guardianship jurisdiction.
MT	HB 70		Establishes Working Interdisciplinary Network of Guardianship Stakeholders; establishes grant program for public guardianship services.
NE	LB 122	42 Neb. Rev. Stat. §§ 1301 - 1304	Provides for family member visitation petitions.
NV	AB 22	NRS Chapter 372	Removes provisions relating to Office of Veterans Services serving as guardian of states of certain veterans.
NV	AB 130	NRS Chapter 159, various sections.	Concerns attorney’s fees, sale of real property, requirements for care plans and budgets, more; establishes a State Guardianship Compliance Office.
NV	AB 150	NRS Chapter 159, various sections	Concerns requirements for private professional guardians.
NV	AB 254	NRS Chapter 159	Concerns court assumption of jurisdiction of a trust.

NV	SB 229	NRS Chapter 159	Creates a model form for nomination of guardian; clarifies provisions concerning resident agents for nonresident guardians.
NV	SB 360	NRS Chapter 159, §§5, 6 & 7	Creates a “Ward’s Bill of Rights”
NV	SB 433	NRS Chapter 159, multiple sections	Addresses right to communication/visitation and guardian authority to petition court for restrictions; appointment of guardians ad litem and counsel; guardian residential decisions; more.
ND	HB 1095	ND Cent. Code, multiple sections	Makes changes in petition, expert examiners, duties of visitor and guardian ad litem, conservatorship proceedings, more.
ND	HB 1365	ND Cent. Code §§25-03.1; 30.1-28-04; 30.1-28-12	Allows a court to authorize guardian to consent to forced medication.
OK	HB 2247	30 Okla. Stat. Ann. §3-102.1	Concerns petitioning for guardianship of youth age 17.
OR	HB 2630	ORS §§125.055, 125.075, 125.225, 125.320	Requires petition elements concerning less restrictive options & limited guardianship; specifies procedures for change of abode; makes addition to guardian report.
RI	SB 597		Increases guardian ad litem fees.
RI	SB 711	RI Gen. Laws. §33-15-18.1	Addresses right to communication/visitation and guardian authority to petition court for restrictions.
SC	S 415	S.C. Code, multiple sections	Enacts new guardianship code.
TN	HB 882		Removes word “Campbell” from the title of last year’s bill on the right to communication & visitation.
TX	SB 36	Tex Gov. Code §§155 & 154; Tex Estate Code §1104	Requires registration of guardianship programs.
TX	SB 39	Tex. Estate Code §§1357, 1055, 751, & 753	Addresses relationship between power of attorney and appointment of guardian; states procedures for

			removal of agent; makes changes concerning supported decision-making agreements; addresses transfer of a guardianship to another county.
TX	SB 40	Tex. Gov. Code §25 & 26	Requires bonds for judges with guardianship jurisdiction.
TX	SB 43	Tex Gov. Code §152 & 153	Concerns fees and penalties relating to registration, certification and licensing.
TX	SB 511	Tex. Estates Code §1104	Concerns declarations of potential guardian.
TX	SB 748	Tex. Education Code 29.017	Requires information and resources to youth in transition about less restrictive alternatives including supported decision-making.
TX	SB 1016	Tex Estates Code §§1002 & 1054	Authorizes judges of non-statutory probate courts to appoint court investigators.
TX	SB 1096	Tex. Estate Code §1104; & Gov. Code §§155 & 156; CCP Code §14 & 15; Health & Safety Code 573	Concerns guardian training; also states duty of law enforcement officers to notify court upon detainment or arrest of individual subject to guardianship.
TX	SB 1193	Tex. Estates Code §2001	Enacts Revised Uniform Fiduciary Access to Digital Assets Act.
TX	SB 1709	Tex. Estates Code §1151	Requires guardian to notify relatives of certain changes
TX	SB 1710	Tex. Estates Code §1202	Concerns guardianship restoration of rights.
TX	SB 1764	Tex. Estates Code §§1161, 1202	Addresses relationship of ABLE account to guardianship.
UT	HB 214	Utah Code Ann. §§75-5-310 & 312	Concerns emergency orders; and reporting requirements.
VI	Bill No. 31-0184	15 Virgin Islands Code § 5-441	Enacts Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act
VI	Amendment to Bill No. 31	34 Virgin Islands Code, §662	Concerns right of communication/visitation, and guardian's duty to inform family members of changes.
WA	SB 5691	RCW 11.88.120	Concerns termination of a guardianship order and restoration of

			rights when there is a less restrictive option.
WV	HB 2674	W. Va. Code §§44A-3-17 & 18	Addresses petition by family members for access; and guardian's duty to inform relatives of changes.