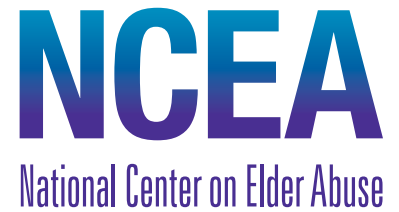


Role of Guardian Standards in Addressing Elder Abuse



What is guardianship?

Guardianship¹ is a relationship created by state law in which a court gives one person or entity (the guardian) the duty and power to make personal and/or property decisions for an individual, upon a finding that the individual is not able to do so.

Who are the guardians?

Many guardians are family members. Others may be willing friends, trained volunteers, professionals such as lawyers or professional guardians. Guardians also may be corporate or governmental agencies – banks or financial institutions, non-profit or for-profit private agencies, or state or local public guardianship programs.

Who is subject to guardianship?

Courts appoint guardians for elders who have lost or partially lost the ability to make decisions due to dementia or other cognitive impairment; younger individuals with intellectual disabilities; individuals with mental illness, brain injury or substance abuse – and frequently a combination of these conditions.

What kinds of decisions do guardians make?

Courts authorize guardians to make specific decisions. A court may appoint a “guardian of the person” to make health care and personal decisions, and/or a “guardian of property” to make financial decisions. Often these two functions are performed by the same person or agency. A court may appoint a “limited guardian” in which only certain decision-making powers are transferred to the guardian; or may appoint a “plenary guardian” in which all of the individual’s decision-making powers and rights are transferred to the guardian except any that may be retained by the person under state law.

Why is guardianship “a last resort”?

While guardianship aims to protect individuals at risk of harm, it removes fundamental rights, such as the right to contract, right to marry, right to control and manage assets, and the right to make medical and residential decisions – thus drastically eroding self-determination and personal choice. A well-known Associated Press report in 1987 stated that guardianship “unpersons” those it aims to protect. Less restrictive options may meet the decision-making needs without the same loss of rights, and thus should be considered and attempted first.

How does guardianship relate to elder abuse?

Guardianship can be both a safeguard against – and a source of – elder abuse. Guardianship may remove an alleged abuser, ensure a safe living arrangement, arrange services in cases of neglect or self-neglect, and put in place remedies against financial exploitation. However, some guardians may take advantage of their appointment, and may use the individual’s income or assets for their own purposes rather than for the individual’s needed care.

What is the extent of elder abuse in guardianship?

According to the U.S. Government Accountability Office, the extent of abuse in guardianship is unknown, due to data limitations. We know that many guardians are dedicated and perform their duties with integrity, yet some undetermined percentage engage in abuse, neglect or exploitation, which can surface in egregious cases and media stories – but we do not know the magnitude of the problem.

¹Terminology differs by state. In this Fact Sheet, the generic term “guardianship” refers to guardians of the person as well as guardians of property, frequently called “conservators,” unless otherwise indicated.

How can courts detect elder abuse?

Courts can detect abuse through regular review of guardian inventories, accountings, reports, plans, fee requests, and background checks. Courts also may detect abuse through information from third parties such as family members, outside auditors, guardian certification programs or bar association disciplinary actions – or communications from adult protective services or the long-term care ombudsman program.

Once detected, how can courts address elder abuse?

The court may appoint a visitor, investigator, or “guardian ad litem,” and upon sufficient evidence hold a hearing. The court may then sanction, fine or remove the guardian, appoint a co-guardian, or modify the guardian’s authority. The court may freeze or restrict accounts at risk of exploitation, or seek restitution through a bond to provide restitution to the individual. The court may refer a case to law enforcement for criminal charges.

Is court oversight sufficient?

All state laws require courts to exercise oversight once a guardian has been appointed, but oversight practices vary widely. National and state policy and practice recommendations over the past 25 years have recognized the need for stronger court monitoring, especially given the anticipated increase in populations that may be subject to guardianship. Courts need better guardianship databases, more review and investigative resources, sufficient staffing dedicated to monitoring – and the funding as well as the political will to regularly and assertively track guardianship cases.

What is a “fiduciary”?

A fiduciary is someone named to manage money or property for someone else, and in whom the law places special trust and confidence. For example, a fiduciary might be a lawyer, a trustee, an agent under a power of attorney, an executor – or a guardian. Fiduciaries have a very high duty of accountability, and must be trustworthy, honest, and act without conflict of interest or the perception of conflict of interest.

What training exists for family and other non-professional guardians?

Serving as guardian is one of society’s most challenging roles, yet in most states and localities, family and other non-professional guardians receive little or no instruction or assistance. They are unfamiliar with the court system and the guardianship role, and don’t know what is expected of them. They come to a demanding responsibility generally unprepared and often with nowhere to go for help. However, a growing number of state and local courts have developed training resources including online curricula, handbooks and videos. A few states such as Florida, New York and Ohio require training for non-professional as well as professional guardians.

The federal Consumer Financial Protection Bureau has developed a plain language guide for non-professional guardians of property called *Managing Someone Else’s Money: Help for Court-Appointed Guardians of Property and Conservators*. The National Guardianship Association has published *The Fundamentals of Guardianship: What Every Guardian Should Know* (2017).

What training or guidance exists for professional guardians?

Professional guardians may take special training and an examination to become a “certified guardian.” The Center for Guardian Certification certifies guardians nationally; and a growing number of states have instituted their own certification or licensing programs.

What do state laws provide about the role and responsibilities of guardians?

State laws generally provide an overall statement directing the guardian of the person to make decisions about the support, care, education, health and welfare of the individual; and a statement directing the guardian of property to make decisions about the property and financial affairs of the individual. Many state statutes further specify or clarify the guardian’s duties – for example to promote self-determination, to make decisions the guardian believes the adult would have made; and the guardian’s powers – for instance to apply for and receive money payable to the adult, to determine where the person will live, to consent to medical treatment and services, to apply for public benefits, collect and hold property, manage investments; and take actions to protect against abuse, neglect and exploitation. Some state laws require the guardian to get specific prior authority before taking certain actions—such as selling a home or making invasive medical decisions. The state guardianship code is the first place a guardian must look in seeking guidance.

What is the difference between state law and standards in setting out duties of guardians?

State statutes set out the duties and powers of guardians only in the most general terms. There is little or no specificity in weighing various options, seeking services, or making the tough decisions that arise in the real world. Standards aim to guide guardian conduct and decision-making in a more fine-tuned, practical way, fleshing out the broad brush mandates of the law and of fiduciary duty with instructions for everyday choices.

How can guardian standards be used in tandem with court oversight?

Guardians owe a duty both to the individual served and to the court. Guardians are “surrogates” who make decisions on behalf of someone else, and they are fiduciaries with a high duty of trust and accountability. In these roles, guardian standards can guide their actions. But guardians also must report to court and should be held accountable by court. Both solid standards and court oversight are needed.

What are the NGA Standards of Practice?²

The National Guardianship Association (NGA) – a membership organization for people involved with guardianship – has adopted standards of practice to promote a high quality of guardian performance. The standards originally were developed in 1991, and expanded and revised in 2000, 2002, and 2007. In 2013, the standards were further strengthened to include the results of the broad-based 2011 Third National Guardianship Summit sponsored jointly by the organizations of the National Guardianship Network. NGA also has produced a set of ethical principles. For the Standards and Ethical Principles, see http://www.guardianship.org/guardianship_standards.aspx.

What do the NGA Standards say about making decisions?

The guardian stands in the individual’s shoes in making decisions. The guardian must seek a clear understanding of the issues and options at hand, encourage and support the individual in understanding the choices and maximize his/her participation. The guardian must identify and advocate for the individual’s goals, needs and preference. The guardian starts by asking the individual – and helping the individual to express – what he or she wants. Only when the individual’s goals, needs and preferences cannot be determined may the guardian make a decision in the individual’s “best interest.” This process, clearly outlined in the Standards, promotes self-determination.

What do the NGA Standards say about duties of guardian of the person?

The most basic duty of the guardian of the person is to see that provisions are made for the support, care, comfort, health and maintenance of the individual. The guardian must secure the services, training and education that will maximize the individual’s self-determination, choice and opportunities.

- The guardian must be alert to changes in the individual’s abilities or situation that might warrant a change in the court’s order, including termination of the guardianship and restoration of rights.
- The guardian must start by meeting with the individual and communicating in the mode the individual can best understand.
- The guardian must create a “person-centered” plan for how the guardian will meet the individual’s needs. The guardian must visit the individual at least once per month.
- The guardian must “promote social interaction and meaningful relationships” consistent with the individual’s preferences, and must encourage and support the individual in maintaining contact with family and friends, as defined by the individual, unless it would substantially harm the individual.
- The guardian must promptly report any abuse, neglect or exploitation.

²This Fact Sheet summarizes highlights from the NGA *Standards*, but does not include the full content. See the Standards for complete information guiding guardians in an array of situations and decisions.

What do the NGA Standards say about making medical decisions?

The guardian must “promote, monitor, and maintain the health and well-being” of the individual. The guardian must maximize the individual’s participation in medical decisions; seek a clear understanding of the medical facts, options, and the risks and benefits of each option – and must support the individual in such understanding.

- The guardian must act in accordance with the individual’s expressed wishes, or otherwise with prior statements, actions, values and preferences to the extent known – and, only if unable to discern the individual’s wishes, act in the individual’s best interest.
- The guardian must seek to ensure that appropriate palliative care is a part of health care decisions (if in accordance with the individual’s values); and must keep people who are important to the individual reasonably informed of health care decisions.
- The guardian may be faced with decision-making about withholding and withdrawing medical treatment. If the individual’s current wishes are in conflict with wishes previously expressed, the guardian must seek review by an ethics committee or submit the issue to court.

What do the NGA Standards say about making residential decisions?

The guardian must see that the individual is living in “the most appropriate environment that addresses the person’s goals, needs and preferences,” and make home or other community-based settings a priority when not inconsistent with the individual’s goals, values and preferences. The guardian may move the individual to a more restrictive environment only after evaluating other options and determining that the move is the least restrictive option – and must report to court before such move.

What do the NGA Standards say about duties of guardian of property (conservator)?

A guardian of property (often called a “conservator”) is a fiduciary and must be trustworthy, honest, and must manage the individual’s affairs with confidentiality, great care, and for the benefit of the individual.

- The guardian must oversee any income and assets under the guardian’s authority, report to court, keep the individual’s accounts separate from the guardian’s own funds, and avoid any conflict of interest or appearance of conflict of interest.
- The guardian must “consider the current wishes, past practices, and reliable evidence of likely choices,” and if there is no evidence or if substantial harm will result, act in the individual’s best interest.

What do the NGA Standards say about conflict of interest?

A guardian “shall avoid all conflict of interest and self-dealing or the appearance of a conflict of interest and self-dealing.” Guardians must not take advantage of their position and act in their own interests rather than the individual’s interests. They must not commingle their own funds with those of the individual (with certain exceptions). A guardian must not sell or convey the individual’s property to the guardian, the guardian’s family, or any entity in which the guardian has an interest.

What do the NGA Standards say about guardian fees?

Guardians are entitled to “reasonable compensation” for their services from the individual’s estate. The Standards list factors to be considered in determining what is “reasonable.” This applies to both professional and non-professional/family guardians.

- The guardian has a responsibility to conserve the individual’s estate when making decisions about services and fees.
- Guardian fees must be reviewed and approved by the court. The guardian must keep records and document the fees charged.
- The guardian must disclose the basis for the fee and a projection of the annual fee at specified points early in the case.
- The guardian must report to court if the guardian believes the funds will be exhausted, and may not abandon the individual.

What do the NGA Standards say about management of multiple guardianship cases?

Guardians must limit their caseloads to allow for adequately supporting and protecting individuals, making one visit per month, and having regular contact with service providers. In evaluating caseload size, guardians must take into account the expected activities, time and demands involved, as well as the available support for each case.

How are guardian standards implemented?

The Center for Guardian Certification operates a national certification program that reflects the NGA Standards and that fosters best practices for guardianship services. In addition, some states have adopted or adapted the NGA Standards for state certification or licensing programs. Selected local courts may require guardians to meet the NGA Standards. Finally, the Standards serve, generally, as an aspirational benchmark for professional and non-professional guardians. It behooves all guardians to become familiar with the Standards and use on a day-to-day basis the guidance they offer.

RESOURCES

American Bar Association Commission on Law and Aging

http://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice.html

Center for Elders and the Courts, National Center for State Courts, <http://eldersandcourts.org>

Center for Elders and the Courts, Conference of Chief Justices & Conference of State Court Administrators, *Adult Guardianship Court Data and Issues: Results From an Online Survey*, National Center for State Courts [2010].

Consumer Financial Protection Bureau, *Managing Someone Else's Money: Help for Court-Appointed Guardians of Property and Conservators*, <http://www.consumerfinance.gov/managing-someone-elses-money>

National Guardianship Association, <http://guardianship.org>

National Guardianship Association, *2013 Standards of Practice*, www.guardianship.org

National Guardianship Association, *Ethical Principles*, www.guardianship.org

National Guardianship Association, *The Fundamentals of Guardianship: What Every Guardian Should Know*, American Bar Association [2017].

National Guardianship Network, <http://www.naela.org/NGN>

Karp, N. & Wood, E., *Guarding the Guardians: Promising Practices for Court Monitoring*, AARP Public Policy Institute [2007]

Third National Guardianship Summit: Standards of Excellence, *Utah Law Review*, Volume 2012, Number 3.

U.S. 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 [November 2016].