

**Petitioning for Guardianship for  
Residents  
Summary Sheet  
September 2008**

**QUESTION:**

In your state, who petitions for guardianship for residents who are (or have become) incompetent and need a guardian? Who pays for the petitioning? Does the Ombudsman have any role? Has the ombudsman ever been the petitioner?

**RESPONSES:**

This issue of who petitions for guardianship varies greatly from state to state. Some states, including Delaware, Kansas, and Nevada, have public guardians that are responsible for petitioning. Other states have private and/or volunteer guardianship programs, and a number of states encourage facilities to petition on behalf of the resident. In states that have public guardians, the office of the public guardians often covers the costs of petitioning. In many cases, the states will pay for the petition through the use of pro bono or reduced-fee attorneys. In states that encourage facilities to petition for guardian, the facility is often expected to cover the costs with the idea that it will bring the facility guaranteed income in the future. In states such as Wisconsin where anyone may petition, the petitioner tradition covers the costs. Very rarely is the Ombudsman involved in this process and is only the petitioner for residents that have absolutely no other option. In a few states, the Ombudsmen have helped a resident petition to remove the guardian.

**California:**

In California, Section 1820 of the Probate Code says: (a) A petition for the appointment of a conservator may be filed by any of the following:

- (1) The proposed conservatee.
  - (2) The spouse or domestic partner of the proposed conservatee.
  - (3) A relative of the proposed conservatee.
  - (4) Any interested state or local entity or agency of this state or any interested public officer or employee of this state or of a local public entity of this state.
  - (5) Any other interested person or friend of the proposed conservatee
- (b) If the proposed conservatee is a minor, the petition may be filed during his or her minority so that the appointment of a conservator may be made effective immediately upon the minor's attaining the age of majority. An existing guardian of the minor may be appointed as conservator under this

part upon the minor's attaining the age of majority, whether or not the guardian's accounts have been settled.

(c) A creditor of the proposed conservatee may not file a petition for appointment of a conservator unless the creditor is a person described in paragraph (2), (3), or (4) of subdivision (a).

The petitioning is normally done by the Public Guardian, but we have private ones as well. Your Title III B Older Americans Act legal service provider may be able to assist. *For more information, contact Joe Rodrigues, State LTC Ombudsman, (916) 419-7510, [jrodrigu@aging.ca.gov](mailto:jrodrigu@aging.ca.gov).*

## **Delaware:**

The Office of the Public Guardian, the Ombudsman's office, and any legal office can petition (APS may petition as well). The Ombudsman has never been the petitioner. If the ombudsman were to petition, the Public Guardian becomes the guardian.

(a) If a Public Guardian has been appointed guardian of the person or of the property, administrative costs and all costs incurred in the appointment procedure shall not be charged against the income or estate of the disabled person. However, if at any time the Court determines that the income or the estate of the disabled person can support the payment of any part of those costs, the Court may enter an order charging that part of the payment of cost against the income or the estate.

(b) If a Public Guardian has been appointed guardian of the person or of the property, all administrative costs and all costs incurred in the appointment procedure shall be paid initially from the General Fund. If the Court enters an order charging any part of those costs against the income or estate of the disabled person, the Public Guardian shall reimburse the General Fund from the income or estate. (59 Del. Laws, c. 579, § 9; 60 Del. Laws, c. 511, § 50; 60 Del. Laws, c. 570, § 9; 60 Del. Laws, c. 722, § 3; 69 Del. Laws, c. 109, § 2.)

§ 3994. Court costs.

In any proceeding for appointment of a Public Guardian, or in any proceeding involving the estate of a disabled person for whom a Public Guardian has been appointed guardian of the person or of the property, the Court may waive any court costs or filing fees. (59 Del. Laws, c. 579, § 9; 60 Del. Laws, c. 511, § 50; 60 Del. Laws, c. 570, § 9; 60 Del. Laws, c. 722, § 3; 69 Del. Laws, c. 109, § 2.)

The ombudsman may petition. The ombudsman has never been the petitioner, but has referred cases to the Public Guardian. *For more information, contact Victor Orija, State LTC Ombudsman, (302) 255-9390, [Victor.Orija@state.de.us](mailto:Victor.Orija@state.de.us).*

## **District of Columbia:**

First, the nursing home will be benefiting from obtaining a guardian/conservator because they will be getting paid, and they will be able to lean on the court appointed guardian to make legal, health, and financial decisions for the resident. Thus, we (DCLTCOP) believe that the nursing home administrator (whether they want to pay their attorney or not) is in the best position to petition the courts for a guardian/conservator.

If the nursing home administrator decides that he/she will not pay their attorney to protect the resident, lean on OBRA 87 and whatever your state law describes. In order to fulfill

OBRA 87 and uphold the residents' rights and quality of care, the nursing home administrator should be petitioning on those grounds alone. In addition, federal law does not require the family members to petition the courts for a guardian or conservator, or be responsible for the nursing home fees. So if the family wants to be out of the picture, it will still fall back on the nursing home administrator.

Either way, I would strongly urge the nursing home administrator to petition. If you find the resident is not being legally protected, lodge a complaint against the home and make sure that your complaint is lodged with the Medicaid Fraud Control Unit because I am assuming that your client is a Medicaid beneficiary. *For more information, contact Jerry Kasunic, State LTC Ombudsman, (202) 434-2140, [GKasunic@aarpp.org](mailto:GKasunic@aarpp.org).*

## **Georgia:**

This is a very difficult issue. The short answer is that in Georgia the long-term care Ombudsman does NOT petition for guardianship. Rationale: 1. Resident legal rights -- A guardianship takes away a resident's rights. The Ombudsman should never be in the position of requesting that a court does that. I think that this is the right answer legally and is likely another rationale that Hawaii's Legal Aid folks have (I know that is the position of legal services folks here in GA). 2. Resident wishes -- If the individual lacks capacity and needs a guardian, then that individual is also probably unable to give the Ombudsman guidance about their wishes. And since our focus is on resolving issues to the residents' satisfaction, how can we know what the resident would want? So what gives us authority to assume that the resident would want a guardian?

Having said that, there are definitely situations where appointment of a guardian is the only option to provide medical decision-making or a conservator (i.e. guardian of property) is needed to protect against financial exploitation. So when that happens, our stance of refusing to petition is more complicated ethically. In our state, we have the added problem of no public guardian. So even if a petition is made, there is often no one available to appoint to be the guardian. This is a serious issue and one we have been advocating about for several years. *For more information, contact Becky A. Kurtz, State LTC Ombudsman, (888) 454-5826, [bakurtz@dhr.state.ga.us](mailto:bakurtz@dhr.state.ga.us).*

## **Idaho:**

In Idaho, anyone can file the affidavit for a guardianship hearing. We unfortunately do not have a public guardianship office but are working on that now because we too have many residents needing guardians that end up not getting them. We have also established Community Boards of Volunteer Guardians where volunteers actually take on the responsibility. The boards are affiliated with our individual counties so have access to their attorneys who represent the petitioner. (The success and activity of these boards varies depending on the volunteers, etc. Not all of our counties have boards either). They then have developed a list of attorneys that represent the potential ward for free. As you might expect we have varying degrees of success with this, and many people looking for a volunteer experience are not looking for what can be a very time intensive experience.

Years ago I was pretty involved in the guardianship area but have since determined that it is not appropriate for Ombudsmen to be involved since the act of guardianship is pretty much the ultimate in taking away a person's rights. A lot of our cases go to the volunteer board through our Adult Protection system. We might very rarely and in very extreme circumstances have some interaction with the court visitor when they are preparing their report to the court.

Our Legal Aid attorneys do take these cases in some instances and have been a great help. *For more information, contact Cathy Hart, State LTC Ombudsman, (208) 334-3833, [chart@aging.idaho.gov](mailto:chart@aging.idaho.gov).*

### **Kansas:**

We have a great program in Kansas called the Kansas Guardianship Program (KGP). The director's name is Jean Krahn.

In Kansas: A person in a LTC facility that needs a guardian but has no confirmed case of abuse cannot receive resources from Social Rehabilitation Services (SRS) – Adult Protective Services (APS). Typically, the doctor or facility is a default decision maker. Sometimes the facility will pay for the guardianship process, but not always.

The KLTCO program and KGP is teaming up on a grant awarded to us by Kansas Department On Aging to develop a process “toolkit” to address this specific situation. The hope is to challenge lawyers of the community to eventually do the work pro bono with the help of the toolkit for them. It is possible that the SLTCO could be the petitioner, something we have not done before. I take great pause in this process as we also have assisted individuals to remove their guardianship. However, doing nothing has not worked in Kansas. In the past, Kansas covered the legal fees for this situation but stopped approximately 8 years ago.

The Guardian project group is finalizing the process in the next few weeks. *For more information, contact Gilbert Cruz, State LTC Ombudsman, (785) 296-3017, [Gilbert.Cruz@da.ks.gov](mailto:Gilbert.Cruz@da.ks.gov).*

### **Massachusetts:**

In Massachusetts, we maintain that the facility has the obligation to petition for guardianship in situations such as is presented. The argument is that the facility has the responsibility to ensure that the resident receives the care needed and if they lack the capacity to make decisions then a surrogate decision maker needs to be in place. We do not have a public guardianship program here, so generally there is a local attorney or a private guardianship agency named (the facility is never named), but the facility is the one to start the process. We have had this backed up with survey deficiencies for failure to have appropriate decision makers in place for residents who lack capacity.

We have also been able to have reasonable costs covered by Medicaid (the amount allowed is set by the Medicaid office). It is reflected as a non-reimbursed medical expense, which for the month it is incurred increases the amount Medicaid reimburses. *For more information, contact Mary McKenna, State LTC Ombudsman, (617) 222-7457, [mary.e.mckenna@state.ma.us](mailto:mary.e.mckenna@state.ma.us).*

### **Minnesota:**

In Minnesota, we have systems in place where adult protection works with our county social service system – a lot of good, a lot of challenges. We happen to have a state guardianship taskforce right now, which will come forth with some legislative proposals to make system stronger. *For more information, contact Deb Holtz, State LTC Ombudsman, (800) 309-3282, [Deb.A.Holtz@state.mn.us](mailto:Deb.A.Holtz@state.mn.us).*

### **Missouri:**

We too have difficulty in finding someone to petition for guardianship. If the person has been, at any time, an APS client or received home- and community-based services paid for by the state, then the Department of Health and Senior Services would petition.

Each county in Missouri is supposed to have funds for this kind of legal activity, so if we can find someone to petition, the petitioner does not necessarily have to pay the bill. Each county also has an elected official who serves as guardian. These Public Administrators may or may not petition, depending on their own preference. Personally, I believe this is a conflict of interest if the Public Administrator petitions and then becomes the guardian.

The LTCOP does not have a role in petitioning. We will get involved if the resident is objecting to the guardianship. We have also been active in getting guardianships overturned. *For more information, contact Carol Scott, LTC Ombudsman, (800) 309-3282, [Carol.Scott@dhss.mo.gov](mailto:Carol.Scott@dhss.mo.gov).*

### **Montana:**

In Montana, we have limited services through the legal aid (Montana Legal Services program). Through the State Bar Association, we have some Communities in which the petitioner can be linked to pro bono legal services/modest means or reduced-fee lawyers. The referrals are made to the State Bar Association, who in turn has someone assigned to attempt to find an attorney. For those individuals who have no family (the MT laws identify a preference for guardian - with APS being the guardian of last resort) we have had limited success in getting Adult Protective Services to petition and serve as the guardian. APS uses a state funded attorney to file the petition; APS becomes the guardian. In no cases has the Montana Ombudsman program filed to be the petitioner. *For more information, contact Kelly Moorse, State LTC Ombudsman, (406) 444-7785, [kmoorse@mt.gov](mailto:kmoorse@mt.gov).*

### **Nevada:**

In Nevada, we refer cases such as this to the Office of the Public Guardian and the cost is figured out and paid by the estate or absorbed by the Public Guardian's office. As far as I know, no Ombudsman has ever been the petitioner. *For more information, contact Teresa Stricker, State LTC Ombudsman, (702)486-3081, [tstricker@aging.nv.gov](mailto:tstricker@aging.nv.gov).*

### **New Jersey:**

In New Jersey, guardianship for the un-befriended is an issue as well. While our statute allows us to file petition for guardianship on behalf of an incapacitated resident, lack of funds and manpower prevents us from doing so. In a situation like the one you mentioned below, when the resident is private pay, we have been successful in convincing the nursing home to file petition for guardianship. When they are told that in NJ they can request attorney fees and court costs, they usually follow through because it puts them in a better position in the future. It becomes much more difficult to convince a facility to absorb the costs of filing a petition for guardianship for a Medicaid resident. *For more information, contact Debra Branch, State LTC Ombudsman, (877) 582-6995, [Debra.Branch@advocate.state.nj.us](mailto:Debra.Branch@advocate.state.nj.us).*

### **North Dakota:**

In North Dakota, the Ombudsman has petitioned for guardianship when no one else is available. ND was also allotted a small amount of money from the legislative assembly

that enables us to pay for some petitions when the need for guardianship is established and no other money is available.

Aging Services Division, of which I am employed, has an individual that can approve our paying for petitions if a least restrictive alternative is not available. Interestingly, that duty will soon be mine. I'm not sure if this is related to ombudsman issues or not, but then I'm new to this position. The money we have available is small, but the guardian association will likely try to do something to increase this amount at our legislative session that convenes in January. *For more information, contact Joan Ehrhardt, State LTC Ombudsman, (701) 328-4617, [jehrhardt@nd.gov](mailto:jehrhardt@nd.gov).*

## **Ohio:**

In Ohio, it often depends on the relationships within the county. For example, a nursing home might contact the probate court and say that a resident needs a guardian, and if the court has some attorneys who will do indigent guardianships, one of those attorneys would file for guardianship. Sometimes those work out and sometimes they don't. In some areas, there are guardianship agencies that are contacted, and they do the application. We're working on guardianship reform in Ohio, and this is one of the issues being discussed, but we aren't to the point of resolution. Ombudsmen never petition for guardianship, and I've "talked to" a couple of our local ombudsmen who suggested guardianship. (We think it conflicts with our role to promote self-determination. There are good guardians, but once someone is in that box and labeled incompetent, it's hard to break the seal. I don't want LTCO to have a part in that. In Ohio, there just aren't enough protections for residents who are "wards"). We try to spend more time on those cases talking with providers about using substituted judgment based on what is known about the person's history. We've also testified in guardianship hearings in favor of getting rid of guardians or expressing problems with how guardians are using their authority (or not). *For more information, contact Beverley Laubert, State LTC Ombudsman, (800) 282-1206, [BLaubert@age.state.oh.us](mailto:BLaubert@age.state.oh.us).*

## **South Dakota:**

This is kind of a gray area - on a rare occasion when our Ombudsman Program has a situation involving a very vulnerable nursing home resident who is being financially exploited by family, and there is NO other person to become the guardian - our Department of Social Services will become the guardian. Our ombudsman program is within the DSS but does not become the guardian. Our Division of Adult Services and Aging is within our Department of Social Services. Our Division of Legal Services, also within our Department of Social Services, would do the petitioning/legal work. *For more information, contact Jeff Askew, State LTC Ombudsman, (605) 773-3656, [jeff.askew@state.sd.us](mailto:jeff.askew@state.sd.us).*

## **Texas:**

Texas has no guardian of last resort. Typically, a person petitions a local probate court or county court for guardianship. I am unaware of a facility petitioning for guardianship, but it may make a "referral" to the local court. Instead, the facility provides services without guardianship papers and tends to make their best judgment about what the resident needs.

If a client needs placement in a LTC facility, lacks capacity, and has no one to act on their behalf, a referral can be made to our Adult Protective Services who can then refer a client to a guardianship program operated at my state office (The Dept. of Aging and Disability Services). It is not a guarantee of guardianship appointment or services, but

catches some of the people in need. *For more information, contact Patty Ducayet, State LTC Ombudsman, (512) 438-4356, [patty.ducayet@dads.state.tx.us](mailto:patty.ducayet@dads.state.tx.us).*

## **Wisconsin:**

Wisconsin law provides that "any person may petition for guardianship of an individual." s. 54.34(1). This has been loosely interpreted by courts to require at least some knowledge of the situation and the person involved on the part of the petitioner. Relatives are usually not questioned when petitioning, and there are examples of neighbors or long-time friends initiating the process. Facilities, individual health-care providers, and social service agencies, including county human services workers, have been petitioners.

As a general rule, the petitioner is responsible for the costs of initiating and pursuing the petition, although there may be some expenses, such as the fees for an "adversary counsel" to directly represent the proposed ward which are borne by the ward or by the county. In some circumstances, a representative of the public defender's office is appointed as adversary counsel, and those costs are borne by the state.

When it is requested by the petitioner or occasionally by the proposed ward and a subpoena is issued by the court, the Ombudsman has been called to testify at hearing on specific information which the Ombudsman is privy to. This, of course, falls within the "order of a court" exception to the Ombudsman's strict confidentiality rule.

In my term as agency counsel covering nearly 15 years, there has been a single case in which I represented the Ombudsman Program as the petitioner in a guardianship case. This event, some 10 years ago, involved a monumentally dysfunctional family and a nursing home that was unable to manage their mother's care while still yielding to the conflicting demands of all five children. We petitioned for and were successful in having a "corporate guardian" (a non-related, professional guardian) appointed to safeguard mom's interests. *For more information, contact William Donaldson, State LTC Ombudsman, (608) 246-7018, [bill.donaldson@wisconsin.gov](mailto:bill.donaldson@wisconsin.gov).*

## **Washington:**

We routinely encourage facilities to petition for guardianship - they may have to put some money out initially but can get it back later. They are taking a greater risk if the resident can't make health care decisions and there is not decision maker for the resident; also in John's case he's exactly right re: penny wise and pound foolish. Our Attorney General's office will also as a last resort petition for guardianship at the recommendation of Adult Protective Services (this is rare).

We educate facilities on the process and remind them that they can't put themselves in the position of making health care decisions for a resident, and ombudsman has not been the petitioner. That would be a big no-no. *For more information, contact Louise Ryan, State LTC Ombudsman, (800) 422-1384, [lousier@multi-servicecenter.com](mailto:lousier@multi-servicecenter.com).*

Summary sheets are compilations of responses received from an informal survey of State Ombudsmen originating from inquiries made by other state and sometimes local ombudsmen. Summary sheets are not formal documents and therefore are not for public distribution. The contents should be used as information for State Ombudsman Programs to include in decision making but are not to be regarded as a definitive study of a particular topic. These sheets are compiled quickly in order to get the information out; there is little to no additional verification work. However, care is taken to accurately reflect the responses given by State Ombudsmen.

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For more information contact the National Long Term Care Ombudsman Resource Center, at (202) 332-2275 or [ombudcenter@nccnhr.org](mailto:ombudcenter@nccnhr.org).