APPENDIX II: Respondents and Responses to the Committee's Request for Proposals to Improve Guardianship for the Elderly

RESPONDENTS

AARP Public Policy Institute, Washington, DC
American Bar Association, Commission on Law and Aging, Washington, DC
American Medical Directors Association, Columbia, MD
Kathy Anderson, Rocklin, CA
Margaret K. Dore, P.S., Seattle WA
Elder Law Center of the Coalition of Wisconsin Aging Groups, Madison, WI
Wendy Ferrari
The Honorable Mel Grossman, 17th Judicial Circuit, Florida
Anne Trambarulo Haines, Englishtown, NJ
The Hebrew Home for the Aged at Riverdale, Riverdale, NY
Audrey Ingraham, Edmonds, WA
Larry Ingraham, Edmonds, WA
Tami Ingraham, Edmonds, WA
Judicial Council of California, Administrative Office of the Courts
Doris Kastanek, Palm Coast, FL
Paul D. LaBounty, Greeley, CO
Lane Council of Governments, Senior & Disabled Services, Eugene, OR
S. Beth Miller
Multnomah Country Adult Protective Services, Multnomah Country, OR
National Academy of Elder Law Attorneys, Inc., Tucson, AZ
National Adult Protective Services Association, Springfield, IL
National Association to STOP Guardian Abuse, Thousand Oaks, CA; Beech Grove, IN; Brighton, MA
National Center for State Courts, Williamsburg, VA
National College of Probate Judges, Williamsburg, VA
National Guardianship Association, State College, PA
National Guardianship Foundation, Harrisburg, PA
Oregon Department of Human Services, Salem, OR*
Elaine Renoire, Beech Grove, IN
Sylvia S. Rudek, Mount Prospect, IL
Stephen Wasserman, Cerrillos, NM

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* Recommendations from the Oregon Department of Human Services were received on 8/25/06 in preparation for the Committee's 9/7/06 hearing on guardianship.

## RESPONSES

## AARP Public Policy Institute, Washington, DC

December 22, 2006
The Honorable Gordon H. Smith, Chairman
Senate Special Committee on Aging
G31 Senate Dirksen Office Building
Washington D.C. 20510

The Honorable Herbert H. Kohl, Ranking
Senate Special Committee on Aging
628 Senate Hart Office Building
Washington D.C. 20510

Dear Senators:
AARP commends your leadership in seeking to improve the current guardianship system and prepare it to meet the needs of our nation's aging population. We support your efforts to find innovative ideas and more current information regarding how to best protect and improve care for our nation's elders who rely on adult guardianship. The double-edged nature of adult guardianship – for those who lack adequate decision-making capacity – reveals that it can be a tool to both prevent and enable elder abuse. AARP is pleased to submit the attached "White Paper" to offer ideas towards an improved guardianship system.
The White Paper expands on the following AARP policy book principles:

- Freedom from exploitation and abuse;
- Safeguards for individual rights;
- Coordinated comprehensive approaches to prevent and detect elder abuse;
- Less restrictive guardianship alternatives and improved guardianship process;
- Strong Federal-State Coordination; and
- Support for improved monitoring and data collection.

The White Paper addresses three proposed policy arenas for a federal role in detail:

- Enhanced coordination of Federal Fiduciary Programs and Guardianship;
- Federal level actions to strengthen and improve guardianship monitoring; and
- A comprehensive approach to elder justice issues to maximize coordination.

AARP believes that there are a number of ways for Congress, the Administration and both State and local governments to improve the current guardianship system and offer effective alternatives that protect our seniors from abuse, neglect and exploitation. We believe the efforts we outline would significantly enhance coordination between overlapping programs at all levels and reduce incidents of elder victimization.

We look forward to working with the Senate Special Committee on Aging and Congress, the Administration, State and local governments and the host of public and private groups that share our concerns in making these improvements. If you have any further questions, please feel free to call me, or have your staff contact Jo Reed or Larry White on our Federal Affairs staff. Information for contacting them is below:

Jo Reed jreed@aarp.org Larry White lwhite@aarp.org
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Thank you again for inviting AARP to submit policy proposals on this important topic.

Sincerely,
David P. Sloane
Senior Managing Director
Government Relations and Advocacy

**Federal Options to Improve America's Ailing Guardianship System**
***A White Paper for the Senate Special Committee on Aging***
***December, 2006***

Federal Options to Improve America's Ailing
Guardianship System
A White Paper for the Senate Special Committee on Aging
December, 2006

Naomi Karp, J.D.*
Strategic Policy Advisor, AARP Public Policy Institute

Adult guardianship is a two-edged sword – a mechanism that protects some of the most vulnerable in our society from abuse, and an instrument that removes fundamental rights and thereby may increase opportunities for abuse of those we strive to protect. Court-appointed guardians step into the shoes of at-risk elders, making judgments about medical care, property, living arrangements, lifestyle and potentially all personal and financial decisions. Guardianship can both prevent and promote elder abuse. On one hand, a guardian can protect an incapacitated person from abuse, neglect and exploitation. Conversely, without sufficient court monitoring, guardian education and standards, guardians may commit elder abuse, neglect or exploitation or fail to protect an incapacitated person from abuse or exploitation by others.

AARP has approved the following principles in support of exactly those goals.

*The author thanks Sally Balch Hurme of AARP Outreach and Services for her invaluable contributions to this White Paper.

- **Freedom from exploitation and abuse** – strong legal protections against, and effective protective services addressing, all forms of exploitation and abuse of incapacitated and vulnerable adults
- **Safeguarding rights** – strong procedural and substantive safeguards to protect individual rights.

To enhance these important rights and freedoms, AARP endorses the following policies:

- **Coordinated approach** – Comprehensive legislation should be enacted to implement a coordinated approach to the problems of elder abuse and neglect. The legislation should establish a federal infrastructure; develop a public awareness strategy; support research, training and technical assistance; fund services and coordinate the work of federal, state and local government and organizations.
- **Less restrictive alternatives and improved guardianship process** - The federal government should encourage the expansion of programs that provide alternative protective arrangements less restrictive than guardianship (such as representative payment); educational and support programs to assist guardians; and effective programs to monitor guardians and other fiduciaries to ensure that they utilize their authority and fulfill their responsibilities appropriately.
- **Strong federal-state coordination** - Federal-state coordination of guardianship [and federal representative payment programs] should be strengthened.
- **Support for improved monitoring and data collection** - Congress should support: demonstration projects on model guardianship monitoring practices; provision of authorized fiduciaries including public guardians; study of the roles and responsibilities of government entities regarding fiduciaries; and a uniform system of data collection on key aspects of the guardianship process.

AARP suggests three primary areas for intervention and change on the federal level. First, the federal government can enhance protections for incapacitated elders by improving coordination between federal fiduciary programs (e.g. Social Security representative payees, Department of Veterans Affairs fiduciaries) and state guardianship systems. Second, federal level actions can improve guardianship monitoring, which is critical to protect this vulnerable population. Finally, the Elder Justice Act can serve as a vehicle for improving the guardianship system and thereby preventing and redressing elder abuse.

Federal Fiduciary Programs and Guardianship: Enhancing Coordination

About seven million Social Security beneficiaries have representative payees appointed for them by the Social Security Administration (SSA) who manage over $43 billion in benefits—and other federal agencies such as the Department of Veterans Affairs (VA) have similar programs. In 2004, the Government Accountability Office (GAO) found that state courts and federal agencies “collaborate little in the protection of incapacitated elderly people and the protection of federal benefit payments from misuse” and recommended increased coordination among federal agencies, and between federal

agencies and state guardianship courts.[1] In its 2006 reexamination of the issue at the request of this Committee, the GAO stated that little had changed.[2] Noting the role for the federal government in the protection of incapacitated people, GAO said, "With few exceptions, courts and federal agencies don't systematically notify other courts or agencies when they identify someone who is incapacitated, nor do they notify them if they discover that a guardian or a representative payee is abusing the person. This lack of coordination may leave incapacitated people without the protection of responsible guardians and representative payees or, worse, with an identified abuser in charge of their benefit payments."

AARP recently examined these issues at a Roundtable on Representative Payees and Guardianship, where representatives of SSA and the VA engaged in a panel discussion with experienced state court judges, including the President of the National College of Probate Judges. This Roundtable generated a number of ideas for increasing coordination between and among state courts and federal agencies, including:

- *Requiring that Social Security representative payees and VA fiduciaries provide courts with copies of the monitoring reports they file* with their supervising federal agencies in cases where there is also a court-appointed guardian. This requirement would ensure that courts have all available information for monitoring when they share monitoring responsibilities for a particular incapacitated individual with federal agencies.
- *Removing barriers to information exchange between federal agencies and courts* regarding specific incapacitated individuals. Federal agencies should be able to inform courts when a representative payee fails to perform adequately or commits malfeasance, and vice versa. Even more basic, federal agencies should be able to reveal to a court whether an individual has a representative payee or other federal fiduciary. SSA has raised concerns that the Privacy Act prevents sharing of information about individual beneficiaries and their representative payees with courts. Congress could mandate a study of potential legal barriers to information sharing, or could propose legislation to remove such barriers, while still protecting individual privacy to the greatest degree possible.
- *Developing national, systemic approaches to promote collaboration and information sharing between federal agencies and courts* by establishing a working group to include SSA, VA, other federal agencies with fiduciary programs, state court judges and relevant national organizations (such as National College of Probate Judges, National Guardianship Association, National Academy of Elder Law Attorneys). To date, SSA has declined to take the lead in forming an interagency study group. Congressional action may be needed to spearhead this needed step towards protecting vulnerable elders.

## Strengthening Guardianship Monitoring

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**[1] U.S. Government Accountability Office. (2004, July). *Guardianships: Collaboration needed to protect incapacitated elderly people*. GAO-04-655. Washington, DC: GAO.**

**[2] U.S. Government Accountability Office. (2006). *Guardianships: Little progress in ensuring protection for incapacitated elderly people*. GAO-06-1086T. Washington, DC: GAO.**

Court monitoring of guardians is essential to ensure the welfare of incapacitated persons, identify abuses, and sanction guardians who demonstrate malfeasance. AARP's Public Policy Institute is engaged in a two-year national study of guardianship monitoring practices that will yield recommendations for best practices, to be published next year.

As part of this comprehensive study, a 2005 national survey[3] of 387 experts with frontline experience revealed striking gaps in current practices, including:

- Over one-third of respondents said no one is designated by their court to verify the information in reports and accountings filed by guardians, and only 16% said that someone verifies every report;
- Over 40% report that no one is assigned to visit individuals under guardianship, and only one-fourth said that someone visits regularly;
- Only 11% of respondents reported that the court collaborates with community groups on training for guardians;
- Technology is underutilized, with 22% reporting that their court does not use any computer technology in monitoring, only 4% stating that their court emails guardians about reporting status, and only 28% indicating that the court has a computerized data system to track the number of guardianship filings and dispositions; and
- 43% of respondents said that funding for monitoring is unavailable or insufficient.

Yet the Institute's research is identifying some bright spots. Some courts are moving towards harnessing existing technology for monitoring and data collection – for example, by setting up systems for e-filing of required monitoring reports and accountings; by developing software to screen these filings for red flags that may indicate financial abuse or exploitation by guardians; and, even more basic, by creating effective, user-friendly databases to track the numbers of cases filed, their current status, and characteristics of individuals under guardianship. A number of courts are making good use of supervised volunteers to visit individuals and their guardians, or are hiring staff social workers, lawyers, accountants or other highly trained personnel for systematic review of cases after guardians are appointed. These promising practices should be publicized and replicated.

The federal government can play a significant role in improving guardianship monitoring, thereby improving the quality of guardians' services and protecting older adults unable to make their own decisions from neglect and abuse. To that end, Congress and administrative agencies should:

- *Support the development and use of technology in guardianship monitoring.* Adults subject to guardianship have disabilities impairing their decision-making capacity. Therefore, the Assistive Technology Act of 1998 may be an existing vehicle to accomplish this technology goal, or may provide a model for the type of federal legislation that could enhance state courts' technical capacity to better monitor

[3] **Karp, Naomi & Wood, Erica. (2006). *Guardianship monitoring: A national survey of court practices*. Washington, DC: AARP.**

guardianships. The price tag for such assistance may well be low – adaptation of existing court databases appears feasible and cost-effective.

- *Support multidisciplinary training of all participants in the guardianship community* including judges, court personnel, law enforcement, prosecutors, Adult Protective Services (APS) agency personnel, guardians, attorneys and others. A re-introduced Elder Justice Act or similar legislation can serve as the vehicle for such monitoring support. Training could address the front-end of the guardianship process (before a finding of incapacity and appointment of a guardian) to ensure that guardianship is used sparingly and appropriately. Training also would shore up the process' back-end (post-appointment) to provide guardians with the necessary skills and an understanding of their reporting responsibilities, to help judges and court personnel to maximize monitoring, and to ensure that law enforcement, APS and prosecutors act appropriately and effectively when there is evidence of abuse by guardians or others.
- *Enhance the ability of local jurisdictions and states to compile uniform, consistent data on guardianship* such as age of the incapacitated person, type of guardian appointed, reason for appointment, status of required reports and accountings, involvement of elder abuse and other key factors that would aid in understanding the landscape and bolstering monitoring practices. A dedicated elder justice office in the Department of Health and Human Services and/or the Department of Justice could support the development of a model for guardianship data collection; support pilot data collection projects; and assist states and local jurisdictions in implementing data systems and assessing the lessons learned through data collection.

**Improving Guardianship as Part of a Comprehensive Approach to Elder Justice**

Since the original introduction of the Elder Justice Act in 2002, AARP has supported the enactment of a comprehensive federal approach to addressing elder abuse, neglect and exploitation. Protection from elder abuse and fraud is a key concern for AARP members, and the risk of harm grows as the number of people living into advanced age increases dramatically.

The federal government can most effectively improve the current guardianship system as part of a broad-based approach to elder justice. While some elements of the Elder Justice Act were enacted as part of the Older Americans Act Amendments of 2006, most key provisions did not make it out of the 109th Congress. AARP supports reintroduction of the Act, restoring important provisions from the original version that would improve the guardianship system, use it to better protect older persons against abuse, and eradicate abuse by fiduciaries. These provisions include:

- Establishment of *Centers of Excellence* that would research successful fiduciary practices and systems;
- Authorization of *legal advocacy grants* to provide court-appointed advocates and authorized fiduciaries including public guardians for unbefriended older persons without available surrogates;
- Provision of *training grants* to targeted disciplines, including fiduciaries such as guardians, conservators and agents under powers of attorney;

• A *mandated study* by the Secretary of the Department of Health and Human Services and the Attorney General of the roles and responsibilities of government or government-funded entities responsible for addressing elder abuse, including fiduciaries, judges and court personnel; and

• *Examination by the Attorney General of state fiduciary laws*, including guardianship and power of attorney laws.

In supporting and overseeing this combination of research, training and advocacy, the federal government can go a long way towards improving current guardianship practices and enhancing protection for vulnerable incapacitated adults at risk of abuse.

**Conclusion**

There are numerous ways in which Congress and the Executive branch can meet the challenge of improving guardianship and its alternatives to protect our seniors from abuse, neglect and exploitation. The federal efforts outlined above would go a long way towards enhancing coordination between overlapping fiduciary programs, improving guardianship monitoring, and addressing guardianship in the context of a comprehensive federal program to combat mistreatment of vulnerable older citizens. AARP looks forward to working with the Senate Special Committee on Aging to reach these goals.

The views expressed herein are for information, debate, and discussion, and do not necessarily represent official policies of AARP.

American Bar Association, Commission on Law and Aging, Washington, DC

**STATEMENT OF**
**CHARLES P. SABATINO, DIRECTOR**
**AND**
**ERICA F. WOOD, ASSISTANT DIRECTOR**
**of the**
**COMMISSION ON LAW AND AGING**
**on behalf of the**
**AMERICAN BAR ASSOCIATION**
**submitted to the**
**SPECIAL COMMITTEE ON AGING**
**of the**
**U.S. SENATE**
**on the subject of**
**"IMPROVING GUARIANSHIP FOR THE ELDERLY"**

**December 28, 2006**

**Mr. Chairman and Members of the Committee:**

The American Bar Association is pleased to present a statement on guardianship reform on behalf of the American Bar Association. We are Charles Sabatino and Erica Wood, Director and Assistant Director of the ABA Commission on Law and Aging. The Association is the world's largest voluntary professional organization with more than 400,000 members. The Association's Commission on Law and Aging has played a leadership role in adult guardianship reform for over 20 years, including convening or co-convening three national conferences, as well as working with the AARP Public Policy Institute on guardianship monitoring, with the University of Kentucky on public guardianship, and with the National Center on Elder Abuse on guardianship data. The ABA Section of Real Property, Probate and Trust Law is also a leader in the area. Both the Commission on Law and Aging and the Section of Real Property, Probate and Trust Law participate in the National Guardianship Network, which includes national organizations with a primary interest in good guardianship law and practice.

The Association has extensive policy on adult guardianship reform. (The ABA policy, dated August 1987, February 1989, August 1991 and August 2002, is available on the Commission's Web site at http://www.abanet.org/aging/commissionprojects/home.shtml ). The policy emphasizes the need for strong procedural due process in the appointment of a guardian, a functional determination of capacity, use of the least restrictive alternative in determining whether a guardian is required and in shaping the guardianship order, effective court oversight and monitoring, minimum standards of practice for guardians, and adequate staffing and funding for public guardianship programs.

Guardianship traditionally has been a creature of state law and the ABA adopted policy in August 1991 to the effect that federal guardianship legislation is unnecessary. However, because federal pensions and other funds may be managed by guardians/conservators, and because many aspects of guardianship suffer because of the Balkanization of laws, data, and procedures across state lines, there is a growing need for a federal role in offering resources and incentives for quality improvement and reform efforts. In 1992, the Senate Special Committee on Aging held a *Roundtable Discussion on Guardianship* to examine the need for a federal role. It has been almost 15 years since the 1992 Roundtable. As indicated in the 2004 report by the U.S. Government Accountability Office, *Guardianships: Collaboration Needed to Protect Incapacitated Elderly People*, some courts have developed innovative "promising practices." A federal

role in offering support, visibility and the opportunity for replication could jump-start local efforts and foster systems change. The ABA supports the following approaches for federal action.

**1. Support Monitoring Capacity of State Courts**. The American Bar Association policy on guardianship monitoring urges the regular filing and court review of guardian accounts and reports, effective sanctions for failure to comply, training and minimum standards for guardians, and maintenance of adequate court data systems on guardianship (August 1987, February 1989, August 1991, August 2002).

Despite recent press stories of abuse by guardians and oversight failures (*The Los Angeles Times*, November 2005; *The Seattle Times*, December 2006), the impetus for court monitoring is not an assumption that guardians are doing a poor job or abusing their appointments. On the contrary, although data is lacking, it appears that most individual and agency guardians meet the needs of at-risk, incapacitated persons, sometimes against great odds. However, oversight of guardians is an essential function of the court and a critical safeguard, given that guardianship can remove fundamental rights and liberties. Moreover, monitoring can be helpful to guardians as they fulfill one of society's most demanding roles. It also can be preventive, letting guardians know they are under they eye of the court and must meet the court's trust in appointing them. Finally, monitoring can allow the court to track guardianship practices, identify trends and make any necessary changes in procedure. All of these rationales for monitoring are underscored as our population ages, chronic illnesses including dementia become more prevalent, medical choices expand with new technologies, and the number of guardian agencies increases.

In 2005 the AARP Public Policy Institute and the ABA Commission on Law and Aging presented the findings of a national survey of court monitoring practices, drawing on the expertise and experience of judges, attorneys, court managers, guardians and disability advocates. The report (*Guardianship Monitoring: A National Survey of Court Practices*) shows that monitoring practices vary widely; and that while they have advanced over the past 15 years, there is a critical need for additional verification of guardian reports and accounts, visits to individuals under guardianship, use of technology in bolstering monitoring, guardian training, court-community collaboration and funding.

Good monitoring requires sufficient resources. Courts must have funds available for staff, investigations, volunteer management, computers, software, training and materials. Financing for guardianship monitoring, however, must compete with other court needs, as well as other county and state needs, in increasingly overstrained budgets. Jurisdictions may seek multiple funding sources to finance monitoring – including state appropriations, local monies, the estate of the incapacitated person, filing fees, and grants for special projects. Federal leadership and funding to encourage replication of effective monitoring techniques and pioneer new uses of technology – for instance through the State Justice Institute or the National Institute of Justice, or through provisions in a reintroduced Elder Justice Act – could enhance guardian accountability.

**2. Improve Coordination of SSA Representative Payment Program with State Court Guardianship Programs.** Closely related to state court guardianship systems is the much larger Social Security Representative Payment Program and other similar federal payee programs including the Department of Veterans Affairs fiduciary program. The 2004 GAO study notes that state courts and federal representative payment programs serve overlapping populations but coordinate little in oversight efforts, and that information collected by state courts is generally not systematically shared with federal agencies and vice versa. Very little data is available on cases involving both guardians and representative payees.

A 2001 ABA study on *State Guardianship and Representative Payment* funded by the State Justice Institute recommended "a better exchange of information, liaison, and continuing education opportunities between the state guardianship and SSA representative payment systems." The study identified specific practices that might aid both fiduciary systems to ensure better accountability and safeguard the rights and the funds of incapacitated persons and/or federal beneficiaries concerning: (1) determining whether a guardian is necessary; (2) limiting the guardianship order; (3) determining the suitability of the proposed guardian; (4) monitoring, including providing the court with copies of the SSA payee report; and (5) exchanging appropriate information and conducting joint or cross training. The ABA Commission has produced a model judicial education curriculum unit on the representative payment system. In 2006, the ABA Commission assisted the AARP Public Policy Institute in planning for and conducting an AARP National Policy Council Consumer and Housing Committee *Roundtable on Representative Payees and Guardianship*, which generated preliminary specific

suggestions for coordination among state courts, SSA and the Department of Veterans Affairs on fiduciary issues.

The American Bar Association has adopted policy related directly to fiduciary performance under the Social Security Representative Payment Program (February 2002). To advance coordination and exchange of information between the two fiduciary systems, ABA policy makes two specific recommendations for federal action (February 2002).

- First, the ABA urges the Social Security Administration to "recognize state and territorial courts with guardianship, juvenile, or family law jurisdiction as judicial entities entitled to access federal agency records relating to representative payees (with or without such fiduciaries' prior consent) within the statutory exception to the federal Privacy Act which permits disclosure of such information 'pursuant to the order of a court of competent jurisdiction' [5 U.S.C. §552a(b)(11)]."

- Second, the ABA supports a requirement that organizations that make application to serve as representative payee for an individual SSA beneficiary should "provide advance notice of their intention to family members (parents, siblings, children, and grandparents) of beneficiaries and to other legal representatives and, in so doing, advise such parties of SSA's general preference for appointment of individual payees with a demonstrated interest in the beneficiary over organizational payees [20 C.F.R. §§ 404.2021 & 416.635, 640 & 645]."

**3. Recognize Efforts to Address Guardianship Jurisdiction Issues.** The GAO study highlights complications that can arise when guardianship of an adult involves more than one state, and notes that this can affect a court's capacity to provide effective oversight. Indeed, as society becomes increasingly mobile, respondents frequently have ties to several states. Respondents, incapacitated individuals, family members, caregivers, and property may be located in several different jurisdictions. Sometimes family conflicts can trigger abrupt movement of an incapacitated person across state lines, making enforcement of guardianship orders difficult. Guardianship jurisdiction questions may arise as to: (1) the most appropriate state in which to file a petition; (2) the most effective process for transferring a guardianship from one state to another; and (3) the need for recognition of guardianship across state borders.

American Bar Association policy urges the adoption of "standard procedures to resolve interstate jurisdiction controversies and to facilitate transfers of guardianship cases among jurisdictions" (August 2002). The Association is participating on a Guardianship Jurisdiction Committee of the National Conference of Commissioners on Uniform State Laws to draft a *Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act.* The model act will address initial jurisdiction, transfer of jurisdiction and recognition of guardianship/conservatorship orders across state lines. Clearly, the Act will be most effective if adopted by all states. Senate Special Committee on Aging and other federal recognition of the importance of the Act will enhance the awareness of policymakers and the public, and this visibility could be helpful as state legislators consider the new model.

However, in today's global society, jurisdictional issues extend beyond interstate issues. Individuals with questionable or diminished capacity and their families may travel or live in several countries and may confront complicated problems involving recognition of a guardianship, recognition of a durable power of attorney, choice of law, and need for cooperation among countries of the world. Thus, a Hague Convention on the International Protection of Adults was adopted by the Hague Convention in October 1999. The Convention aims to provide an international solution to conflicting assertions of state authority over disputes involving incapacitated adults. ABA policy ((February 2000) urges that: (1) the U.S. Senate give its advice and consent to the ratification of the Hague Convention; and (2) the U.S. Congress enact legislation implementing the Convention's provisions.

**4. Encourage Development of Uniform Data.** Courts and the public have very little accurate, reliable data about guardianship -- and without this, policymakers and practitioners are working in the dark in assessing what exists and how to improve the system. We don't know the number of persons actually under adult guardianship in the country. The GAO study noted that a third or fewer of the courts in California, Florida and New York track the number of guardianships and few track the number of incapacitated individuals under guardianship. Moreover, even when courts keep guardianship data, it may get lost in the wide variety of other case files, be mixed with data on guardianship for minors, or be lumped in with more general probate or decedents' estates data. State differences in terminology also present an obstacle. There is no uniform method for data collection, or uniform data fields.

The 2004 GAO report highlighted a grave lack of hard data on guardianship of vulnerable adults. The report found that only one-third or fewer of the responding courts surveyed tracked the number of active guardianships for incapacitated adults, and concluded that the dearth of statistical data limits oversight and efforts to improve the guardianship system. The report maintained that "sufficient data are not available to determine the incidence of abuse of incapacitated people by guardians . . . nor the extent to which guardians . . . are protecting incapacitated people from abuse."

The GAO findings and conclusions reinforce earlier statements by the National "Wingspan" Guardianship Conference (*Stetson*, 2002; National Academy et al., 2004), the National Center for State Courts (Hannaford & Hafemeister, 1994), and other writings recognizing a troubling absence of statistics to evaluate the adult guardianship process and the reforms that have occurred, as described below. Nationally, we are looking at guardianship "through a glass, darkly," unable to make informed policy and practice choices without an adequate knowledge base of what exists and what trends are evident.

In 2006, the ABA Commission completed a report for the National Center on Elder Abuse, *State-Level Adult Guardianship Data: An Exploratory Survey*. The report presented the results of a survey of state and territorial court administrators. The report found that about one-third of responding state court administrative offices receive from trial courts reports on filings and dispositions of adult guardianship of the person and/or property but close to two-thirds do not. Additionally, data reported to state court administrative offices is limited to filings and dispositions – and thus does not indicate the size of the caseload or include a range of elements that would be critical for research and reform efforts – for example, age and condition of incapacitated individuals, categories of petitioners and guardians, reasons the case was initiated, number of limited guardianships, number of cases of elder abuse – and frequently number of reports and accounts not timely filed. The report concluded that major investment in technology, training and standardized definitions in necessary.

ABA policy supports systematic data collection on guardianship by courts (February 1989); and development and funding of a uniform system of data collection within all areas of the guardianship process (August 2002). Federal funding (such as through the National Institute of Justice, HHS agencies or the State Justice Institute – or

through specific provisions in reintroduction of the Elder Justice Act) of selected state-based projects to determine the number of adult guardianship cases for which the courts have oversight and to design an effective data collection system could help to transform our knowledge of the system and identify areas needing attention.

It is noteworthy that Congress just enacted legislation as part of the tax extension legislation (H.R. 6111) that calls for a study by DHHS on establishing a uniform national data base on elder abuse. Since some elder abuse cases may become guardianship cases and the same kind of data barriers afflict both elder abuse and guardianship, this study should include abuse within the guardianship system, and moreover Congress should consider the merit of an expanded or parallel effort to examine options for a uniform national data base on guardianship.

**5. Support Research to Evaluate Guardianship Practices and Programs.** During the past decade, only a handful of small projects have documented guardianship practices. Much of the criticism of guardianship proceedings stems from a few highly publicized, notorious examples of guardian abuse and neglect of wards. Whether these examples constitute the exceptions or the rule on how guardianships actually function is not known. The ABA Commission has tracked exactly what state laws have been passed see Annual Legislative Updates and State Legislative Charts at http://www.abanet.org/aging/legislativeupdates/home.shtml), but light could be shed on the implementation of these laws.

For example, a unique tri-state study lead by a psychologist of the Geriatric Mental Health Clinic, VA Boston (Moye et al, *Clinical Evidence in Guardianship of Older Adults is Inadequate*, article submitted for review) found that statutes with provisions that promote functional assessment are associated with increased quality of clinical testimony and use of limited guardianship orders. This small study should pave the way for larger investigations of the implementation of recent guardianship legislative changes, the effect of such changes and of the institution of guardianship on the care and lives of incapacitated individuals. For instance, a landmark report, *Wards of the State: A National Study of Public Guardianship*, by the University of Kentucky in collaboration with the ABA Commission, recommended in 2005 that "the effect of public guardianship services on wards over time merits study." The rationale was that guardianship is a drastic government intervention in the lives of vulnerable individuals, and states must

demonstrate benefits in providing for needs, improving or maintaining functioning and protecting assets of those unable to care for themselves.

ABA policy supports "undertaking research to measure successful practices and programs to examine how guardianship is enhancing the well-being of persons with diminished capacity" (August 2002). Federal research entities such as the National Institute on Aging, the Agency for Healthcare Research and Quality and the HHS Assistant Secretary for Planning and Evaluation could fund research designed to measure the effectiveness and outcome of guardianship services under various legal and programmatic scenarios.

**6. Support Enactment of the Elder Justice Act.** S. 2010, the bipartisan "Elder Justice Act," died at the end of the 109th Congress when Congress adjourned *sine die*. The Act would have created an infrastructure and provided resources for a nationally coordinated strategy in collaboration with the states to address issues of elder abuse. ABA policy "supports efforts to improve the response of the federal, state, territorial and local governments and of the criminal and civil justice systems to elder abuse, neglect and exploitation." The Act includes critical clearinghouse, technical assistance, training and data collection activities that bear on abuse within the guardianship system. Indeed, prior versions of the Act included provisions relating directly to fiduciary training, research, technical assistance and data collection, and these should be restored.

Thank you for the opportunity to offer this statement to the Special Committee. The ABA looks forward to continuing to assist the Committee on guardianship and other issues affecting the older population – and is especially a voice for those who are vulnerable, incapacitated, poor, isolated and often alone.

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Ms. Erica Wood
Assistant Director

AMERICAN MEDICAL DIRECTORS ASSOCIATION
HOUSE OF DELEGATES

Surrogate Decision-Making and Advance Care Planning in Long-Term Care

White Paper J03

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**Introduction**

Many residents of nursing facilities and other long-term care settings are cognitively impaired and thus may be incapable of making decisions about their medical care. Clinicians providing care for these residents must rely on previously specified advance directives or on other designated decision-makers, usually called surrogates, for guidance in medical decision-making. Because advance directives can explicitly address only a limited number of situations, and because for each incapacitated patient there are usually many decisions to make over time, continuing communication between the medical providers and surrogates is often necessary. Understanding the nature of advance care planning and surrogate decision-making is thus crucial for both health care providers and surrogates.

The terminology and laws pertaining to all aspects of surrogate decision-making vary greatly from state to state, and people involved in such decision-making must become familiar with their own state's statutes and language. What follows here is a general guide to surrogate decision-making, including that by guardians, and to the principles underlying it, along with recommendations on the subject from the American Medical Directors Association (AMDA). It is an overview of the subject, written with the understanding that some of the words used below may not be exactly those used in any individual's state of residence.

**Competence**

Although health care providers often use the terms 'competence' and 'decision-making capacity' interchangeably in conversation, these terms actually have different meanings. Competence (or competency) defines a legal status. A person is legally either competent or incompetent, with no gray areas in between. An adult is assumed to be competent unless he or she is determined by a court to lack the ability to make the decisions required for living safely, at which time the court deems that person incompetent.

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Laws in different states may specify domains of competence, such as competence to be a parent, be married, serve as a witness, stand trial, or make medical decisions. In determining a person's competence, courts may consider information provided by clinicians. The determination of incompetence changes a person's legal status, essentially removing the right to make decisions from him or her. The court transfers that right to someone else (termed a guardian in most states) whom it appoints. A guardian may be a family member, friend, or professional surrogate decision-maker.

**Decision-Making Capacity**

While courts alone determine competence, clinicians often assess what is usually termed the patient's decision-making capacity. Decision-making capacity implies the ability to understand the nature and consequences of different options, to make a choice among those options, and to communicate that choice. Decision-making capacity is thus required in order to give informed consent. When applied to medical decisions, this requires that a person understand a diagnostic or therapeutic intervention's significant benefits, risks, and alternatives.

A person unable to make and communicate medical decisions is deemed incapacitated. He or she may also be unable to provide for basic needs, including medical care nutrition, clothing, shelter, or safety. Incapacity does not necessarily imply incompetence, as court proceedings are not undertaken for all incapacitated people. While competence denotes a legal status and is unambiguous, decision-making capacity, by contrast, can be partial and may have gray areas. Moreover, the standard for decision-making capacity varies with the complexity and consequences of the decision in question. The greater the complexity or the graver the consequences of the decision, the higher the standard, so that the same person may have the capacity to make one type of decision and not another. An individual's decision-making

capacity may also fluctuate over time, as a result of transient changes in a person's ability to comprehend or communicate. For example, a person may lose the ability to communicate while under general anesthesia but regain that ability after recovering from anesthesia.

Incompetence does not necessarily mean that an individual lacks the capacity to make decisions. For example, an individual may be declared incompetent in one domain such as in handling financial matters, but may still retain the ability to make medical decisions.

**A framework for assessing decision-making capacity**

The capacity to make decisions implies the ability to communicate choices, to understand relevant information, to appreciate the idea of consequences, and to manipulate information rationally.[1,2] To make medical decisions, a person must be able to understand the nature of the illness for which a particular treatment is offered, the probably course of the illness without the proposed treatment, and the nature and consequences of treatment options, including risks and benefits. This understanding need not be physiologically sophisticated, not should cognitively impaired patients or surrogate decision-makers be held to a higher standard than cognitively unimpaired patients who make decisions about their own medical care. When determining decision-making capacity, one should attempt to understand how the patient arrived at a decision and to recognize the influence of the patient's personal values.(3)

The ability of the cognitively impaired person to make decision may wax and wane because of the primary cognitive impairment or because of acute illness that may be superimposed upon underlying impairment. Decision-making capacity may be affected by medications, anxiety, or even time of day; it is often task-specific and situational and will depend on the complexity, as well as the risks and benefits, of the diagnostic procedure or treatment in question. A patient may possess the capacity to consent or refuse to have analgesics for pain, for example, yet may lack the capacity to consent to a complex chemotherapy regimen for cancer.

Decision-making capacity can be assessed through open-ended questions that take into account the gravity of the situation, the patient's cognitive status, and the complexity of the decision to be made. One might begin by asking a patient to describe his or her illness and likely result of specific treatment or treatment alternatives. Decision making capacity is suggested by consistent responses to questions that are phrased in different ways. Patient's performance may be improved by delaying the capacity decision, enhancing the disclosure of information with visual aids, addressing psychological issues, or facilitating family support. (*Grisso and Applebaum*) (Insert Table 1 here.)

Formal testing is not usually necessary to determine whether someone can understand the nature and consequences of a particular medical decision and to make and communicate that decision. No single test or instrument is adequate to determine decision-making capacity, and the results of any test need to be interpreted in the context of the whole clinical presentation. The mini-mental status exam (MMSE),[4] for example, though helpful as a screening tool for detecting cognitive impairment, is neither sensitive nor specific for evaluating decision-making capacity, especially in the middle range of its scoring.[5]

**Surrogate Decision-Making**

A surrogate, one who makes decision on behalf or another who is unable to make decisions for him- or herself, can be designated either informally or formally. State laws and terminology regarding surrogates, also called proxies or health care agents, and the scope of responsibilities and powers accorded to them, vary widely. Providers and surrogates working with incapacitated people should become familiar with their state's relevant laws and provisions.

In the most formal situations, surrogates are court-appointed; they are usually termed guardians or, in some states, conservators. Other formally designated surrogates, whose appointment does not require action by the courts, are those who have been named in advance directives prepared by the incapacitated person before becoming incapacitated. In situations in which there has been no court decision and when advance directives have not been specified, state laws may codify the order or hierarchy of people upon whom responsibility for surrogate decision-making devolves, usually family members or close friends of the incpapcitated person; these surrogates are not court-appointed and are thus considered informal.

**Advance Directives**

Advance directives are instructions given by persons to direct their health care in the event that they lose the ability to make and communicate medical decisions for themselves. The purpose of an advance directive is to define the medical care desired and to specify whom to ask for decision in the future, in order to make medical decision that are consonant with the wishes and values of the person who has become incapacitated.

Formal written advance directives may take the form of a living will, a durable power of attorney for healthcare (DPOAHC), or some combination of the two. The terminology, statues, and documents relating to advance directives vary from state to state. Nevertheless, an advance directive created in one state is valid in all other states and advance directive are thus portable from state to state. By law, health care facilities may not base admission on whether a person has or does not have an advance directive. (482 CFR section 489.102(a)(3)) In any health care facility, a copy of written advance directives should be placed in the patient's chart so that all caregivers are aware of its existence and contents.

A living will is a document in which a person specifies preferences for care or treatment in the event of future incapacity. A separate document designating a surrogate is called a durable power of attorney for health care (DPOAHC). Some states may require that a DPOANC be separate from the living will; others may combine the provisions of a living will and a DPOAHC. A person completing a living will or DPOAHC may rescind or change it at any time, provided he or she still possesses the capacity to make decisions. Neither a living will nor a DPOAHC becomes active unless the person becomes incapacitated. In some states, an individual may choose to activate a surrogate while he or she still has decision-making capacity.

Living wills may vary considerable in their degree of detail. They may simply specify general goals, comfort over aggressive treatment, for example, or discontinuation of treatment that appears to be futile. They may also specify types of care of treatment, such as attempted cardiopulmonary resuscitation, intubation, intravenous hydration or medication, hospitalization in the event of a serious illness, antibiotic therapy, or the use of feeding tubes.

A person completing an advance directive cannot foresee or address all the situations in which choices about treatment may be required. Choosing someone to make decision on one's behalf provides additional flexibility in dealing with unforeseen circumstances.

**Guardianship**

The court appointment of a guardian to make decision for someone who has been deemed incompetent typically requires substantial documentation, time, and expense. For medical decision-making, guardianship proceedings are unnecessary when the incapacitated person has completed an advance directive that formally designates a surrogate, or when the state recognizes the decision-making authority of informal surrogates, such as family members who appear to have the individual's best interests at heart.

Though laws about guardianship vary from state to state, in general, a guardian is appointed by the courts to exercise all of the powers and duties necessary for the care of an incompetent person, who is usually termed the 'ward.' Courts can appoint someone to be a 'guardian of the person' to make medical or personal decision, a 'guardian of the estate' to make financial decisions, or a 'plenary guardian' to make all necessary decisions on behalf of the ward.[6]

While the laws of many states grant guardians complete decision-making authority on behalf of their wards, other states specify limited forms of guardianship in which the ward retains some rights of self-determination or decision-making. Partial or limited guardianship is sometimes called 'conservatorship', and a limited guardian is then referred to as a conservator.

Courts often appoint as a guardian a family member or close friend of the ward. When an incompetent person is without family or friends, willing or able to serve as a guardian, or when there is unresolved conflict among family members, the court may appoint a 'public' guardian. Public guardians generally are expected to be familiar with the role and responsibilities of a guardian and willing to serve in that capacity. They are accountable both to the courts and to local administrative authorities.

The training, professional background, and scope of decision-making authority of public guardians varies. Some states require public guardians to undergo licensure, training, and supervision before their appointment, while others do not. Some states limit what a public guardian can decide on behalf of a ward. A public guardian may, for example, be prohibited from withholding or withdrawing specific treatment and from choosing that the ward forego attempted cardiopulmonary resuscitation without explicit court approval. Moreover, in some states, a public guardian is appointed to protect the specific interests of the state rather than of the ward.

**An Ethical Framework for Surrogate Decision-Making**

Because the health care of incapacitated people, including cognitively impaired residents of long-term care facilities, is medically and ethically complex, the decision-making required of surrogates can be conceptually and emotionally difficult.[7] The following framework is intended to help surrogate decision-makers, including public guardians, and health care providers make ethical decisions on behalf of incapacitated nursing facility residents.

Autonomy

The principle of patient autonomy affirms the right of people to make decisions about their own medical treatment. Individuals have a constitutionally protected right to refuse treatment, including life-sustaining nutrition or hydration. Individual autonomy does not universally assume the primacy that it does in the United States, and a realization of this can help clinicians avert misunderstandings with people of different ethnic and cultural backgrounds. Autonomy may be far less valued than other factors, such as consensus, in more traditional cultures where decision-making may reside with the whole family or with the head of the family. Family members may be subject to powerful role expectations that pertain to pursuing medical treatment or providing care. Learning about the family's belief system and communicating respectfully about options can help the provider navigate these waters.[8]

Substituted Judgment

The principle of "substituted judgment" denotes for tan incapacitated individual what he or she would have chosen had they been able to do so. It is difficult to know exactly what another person would have wanted, however, unless that person made his or her wishes known in advance, either by completing a written advance directive or by discussing preferences before becoming incapacitated.

Knowing what another person would want generally requires knowing that person well, though even that is often not sufficient. Public guardians, however, are often appointed specifically because no one else is available who knows the ward well. Without an advance directive, a public guardian has no clear information upon which to base substituted judgments on a ward's behalf. In some situations, public guardians and health care providers may try to ascertain what a person would have wanted by obtaining a "values history," which comprises examples of earlier decisions and statements a person has made and which may shed light on personal values and priorities.

Although substituted judgment is an important principle in ethical decision-making, many studies have shown that neither health care providers nor surrogates are generally very good at knowing or predicting patients' preferences about medical care.[9,10,11,12,13,14] Doctors, nurses, and surrogates identify care preferences only moderately better than would be predicted by chance. Family members and health care providers tend to underestimate both self-perceived quality of life[15] and the desire for aggressive care.[10] Advance care planning is effective in that surrogates who have discussed end-or-life issues with patients more accurately represent their wishes than those who have not.[16]

Medical care is frequently inconsistent with patients' preferences and is determined by factors other than prognosis or stated preferenced.[12] Given the relatively poor performance of family members, physicians, and nursing facility staff in making accurate substituted judgments, it is unrealistic to expect public guardians, who are often strangers to their wards, to do better.

Best Interest

The decision to carry out the previously stated wishes of the patient should be supported and is a manifestation of fidelity and respect for the individual. When an incapacitated patient has not indicated preferences about medical are, the surrogate's decisions should be based upon the "best interest' of the patient; the decision should be the same as a reasonable adult would make if faced with the same circumstances. Reasonable adults may disagree about specific treatment, especially when no single treatment exists that is clearly superior to the others. To determine which treatment option among several is in the best interest of the patient, a surrogate needs information about the risks and benefits of each option. Physicians and other health care providers are often in the best position to provide this information.

Surrogates may also ethically make the decision to withhold or withdraw treatment from an incapacitated person, though state laws about this vary.

The decision-making authority of surrogates is moderated by other ethical principles, such as 'beneficence' ('doing good') and non-malfeasance ('doing no harm'). For example, surrogates are not automatically authorized, on the incapacitated person's behalf, to elect medical treatments that are considered by medical providers to be futile or harmful.[6] In some situations, limitation of care may be preferable to further intervention. In the absence of other effective or desirable treatment, a palliative care approach, possibly including hospice care, may be appropriate for incapacitated or incompetent persons.

**Decision-making by mentally incapacitated long-term care facility residents**

Long-term care facility residents judged to be incompetent may still possess the capacity for making some decisions, particularly about such personally meaningful things as what to wear and what to eat. Thus, an incompetent person may possess the capacity to make meaningful personal decisions and yet lack the legal authority to do so.

Among the major losses experienced by people admitted to nursing facilities are loss of independence loss of control over daily schedules, and often loss of the ability to perform basic activities of daily living. Consequently, the decisions that nursing home residents remain about to make loom large, representing the last vestiges of person control. Thus, it may be advantageous, for the sake of their q2uality of life, to ensure that even those residents who are incompetent, and those mentally incapacitated residents who simple lack the ability to make complex reasoned decisions, are encouraged to make those decisions they are able to make for themselves. The idea of providing choices to incapacitated people in the spirit of preserving and respecting their dignity has been described as part of 'everyday ethics.'[17] The choices offered to mentally incapacitated people should not involved risks to their health if they make unwise choices. The goal is to balance the risks inherent in poor decisions against the loss of autonomy.[1]

The hierarchy of medical decision-making for incapacitated nursing home residents

The Patient Self-Determination Act, enacted as federal law in 1991, grants all persons or their surrogates the right to refuse or discontinue treatment, and it makes advance directives completed in any state legal and portable. This law also requires all medical facilities receiving federal funds to ask, at the time of admission, whether a prospective patient has completed a written advance directive, which usually includes the naming of a surrogate decision-makes. Nursing facilities must document at regular intervals whether a resident has an advance directive or has designated a surrogate decision-maker.

In most states, the decisions of court-appointed guardians prevail over the directives of all others, except when the ward has executed an advance directive before losing decision-making capacity. Advance directives supersede decisions by a guardian or other surrogate. When guardians appear to be disregarding advance directives, the advance directives should prevail, and it may even be necessary for medical providers to petition the court to appoint a new guardian. For incapacitated patients without a guardian, written advance directives still prevail, even over the contrary wishes of family members or other surrogates.

Providers should discuss the provisions of advance directives with surrogates, particularly when the advance directives are vague, contain inconsistent instructions, or reflect misconceptions, in an effort to interpret the directive in the context of the patient's earlier decisions or preferences when those are available. In a medical emergency, emergency responders cannot be held responsible for failing to honor an advance directive of which they are unaware.

When there is neither a guardian nor an advance directive that specifies a surrogate, the right to make decisions falls to family members, generally in following order: spouse, adult children, siblings, then other family members. The provisions of states differ; in some states, law specifies this order; in others, no order is specified. While some states recognize common-law spouses and grant them decision-making power, other do not; similarly, some recognize the category of "friend," which may apply to a longtime companion or partner. In some states, all adult children or siblings must unanimously make decision as a "class". (Insert Table 2 here) Some states have rejected rigid hierarchies, recognizing instead that personal involvement and knowledge, as well as having the patient's best interests at heart supersedes such hierarchies.

When there is disagreement among family and friends about what a patient would have wanted or about which interventions are in the best interest of the patient, it is helpful for clinicians to spend the extra time required to reach consensus, even when only one person is technically authorized to make decisions. In rare cases, it may be necessary to petition the court for a guardian to act on the patient's behalf.

Many long-term care facility residents have no involved family members. The number of mentally incapacitated people in nursing homes for whom there is no designated surrogate decision-maker greatly outnumbers those for whom courts have appointed guardians. This puts health care providers in the circumstance of acting as *de facto* decision makers.[18] Only a few states specify a procedure, which guides the care team's decision making on behalf of an incapacitated patient without a surrogate.

**Guidance for guardians and other surrogates about medical decision-making**

Guardians may come to their role from a variety of different backgrounds. A public guardian is a government employee with experience in the role, but no prior knowledge of the individual. A private guardian may be a family member of friend knowledgeable about their ward but unfamiliar about the task assigned a hired professional such as a social worker or geriatric care manager, an attorney familiar with legal and financial matters. Thus, guardians may differ with

regard to their knowledge of the ward, as well as their knowledge of medical or legal affairs. Communication between the guardian and the attending physician is therefore necessary.

Guardianship can result in decision-making that is cumbersome and slow, which itself can have adverse consequences fo4r patients. Laws affecting guardians' decision-making vary from state to state and may be ambiguous. Administrative policies of long-term care facilities may also affect or restrict the decisions that surrogates can make, especially those that involve withdrawing or withholding life-sustaining treatment. It is helpful for the guardian or other surrogate, with the assistance of the health care provider, to plan for the likely contingencies by making advance care plans on behalf of the patient. (Volicer JAGS 2002)

Perhaps the clearest way for surrogate decision-makers to begin formulating advance care plans is by thinking not about specific medical interventions but rather about the overall goals of care.[19,3] These goals should be based both on the principle of best interest of the patient and on realistic assessment of the patient's medical, functional and cognitive status, life expectance, and prognosis. Such goals of care might include prolonging life, maximizing function, or ensuring comfort. Because of medical intervention that would further one goal might compromise another, it is helpful to prioritize goals; that way, health care providers have a sense of which interventions would be most appropriate for a given patient. Prioritizing goals of care provides a framework that is highly flexible and can serve as a guideline in unanticipated situation.[19] Setting goals of care in advance can help avoid delays in the initiation of desired treatment, prevent the initiation of treatment that is not consistent with the goals of care, and prevent miscommunication at times of crises.

Advance care planning by the guardian or other surrogate should also, in states where it is legal, result in a written advance directive, signed by the surrogate. Some states have standardized forms—such as Oregon's Physician's Order for Life-Sustaining Treatment (POLST)[20] and California's Physician Documentation of Preferred Intensity of Treatment—that ensure portability from facility to facility, e.g., from long-term care facility to hospital, of specific directives such as DNR orders. Surrogates should be familiar with the regulations in their particular state.

Clear decisions about whether to use or forego specific diagnostic and therapeutic interventions are crucial to advance care planning in long-term care facilities. Such interventions include cardiopulmonary resuscitation, mechanical ventilation, artificial feeding, intravenous fluids, antibiotics, hospitalization, and dialysis. Surrogates should decide in advance in the event of acute illness whether it is appropriate, given the goals of care, to use these interventions, or opt for other approaches such as palliative care in the long-term care facility.

Health care providers should notify surrogates when a patient has had a significant change in health status or is deemed terminally ill. Surrogates should also be informed that there may be no specific and recognizable turning point chronic conditions such as dementia, chronic obstructive pulmonary disease, or congestive heart failure. In the presence of these conditions, it is especially important to specify goals of care in advance and reevaluate these goals as a patient's condition worsens.

Although ethicists and courts have held that there is no difference between withholding and removing life support,[7] there is often a perceived difference between these actions that can be especially painful for surrogates and caregivers. Advance care planning may help avoid the initiation of unwanted treatment, thus preventing the need to discontinue it later.

**What surrogates and health care providers should expect from each other**

Clinicians providing care for an incapacitated patient should discuss medical care with the patient's surrogate. Health care providers have responsibility for providing adequate information, as well as their own informed opinions, to surrogates. (Insert Table 3 here)

Surrogates who do not know what the patient would have wanted should be guided by the principle of best interest of the patient, which in turn is based upon clinical evidence, concern for the patient's comfort and dignity, and an understanding of the risks, benefits, and burdens of each option for treatment. Understanding the patient's prognosis, including his or her life expectancy, may help guide decisions about treatment.

Surrogates should expect health care providers to discuss the options for treatment, including the benefits and burdens of each. Discussion should include a description of the natural course of the illness if untreated. Providers should also describe the medical reasoning underlying their recommendations, which should take into account the patient's prognosis, cognitive function, comfort, and well-being. Provision of written materials can be especially helpful for surrogates. Some jurisdictions may require that guardians obtain written documentation from a clinician before granting a request to withhold or withdraw life-saving treatment.

Health care providers should expect surrogates to understand their role, to be available for discussions, to respond promptly to requests for decision-making, and to be willing to formulate goals of care to avoid delays in appropriate treatment and to prevent initiation of undesired procedures and treatments. Health care providers and surrogates should be willing to avail themselves as necessary of ethics committees, ombudsmen, and other community resources that may help them to arrive at the best possible decisions. Ideally, clinicians and guardians are expected to make and communicate decisions with the same care that they would bring to decisions about a close family member of their own. (Insert Table 4 here)

**Some Important Clinical Issues**

Understanding of the evidence about outcomes of specific treatments can help guardians to make decisions. A brief summary of research about some specific medical interventions in incapacitated long-term care facility residents here follows. It is important to note that in most instances the outcome data and other information presented is in the context of caring for incapacitated elderly long-term care facility residents, particularly those with dementia, and may or may not be applicable to children or younger adults in long-term care.

Cardiopulmonary Resuscitation (CPR)

Current federal law mandates that long-term care facilities must ask resident (or their surrogates) whether they wish to receive CPR in the event of a cardiac or respiratory arrest. Research on CPR performed on elderly nursing home residents consistently shows very poor outcomes. Survival following CPR is less than 5% in this population, with most studies showing 0% survival[21,22] The poor outcome of CPR in nursing home residents is more likely a result of the irreversibility of the underlying diseases that end in cardiopulmonary arrest in such patients.

The way in which treatments processes and outcomes are described strongly influences the decisions of patients and surrogates with regard to those treatments.[23] When presented with information about the actual likelihood of surviving CPR, for example, older patients who have previously expressed a wish to undergo CPR generally decide not to.[23,24,25]

Despite consistent evidence of its ineffectiveness, CPR continues to be offered and performed in long-term care facilities, by either facility staff or emergency medical technicians.[26] Nursing facilities are prevented from implementing facility-wide “do not resuscitate” (DNR) policies and procedures,[27] and are required instead to ensure that decisions about resuscitation be expressed by individual residents or their surrogates.

In the case of CPR performed in the long-term care facility, the level of discordance between outcome data and national policy, or between evidence and practice, is extreme. This highlights the importance of educating patients, surrogates, and health care providers about the outcomes of specific medical interventions. The issue of CPR may also reflect our society’s unrealistic expectations of technological interventions, even in situations in which they are likely to fail. Moreover, lawmakers and regulators may be averse to system-wide or facility-wide policies that might be viewed by some as denying choice or care to patients. Based on the best available evidence, however, it is recommended that CPR not be performed in mentally incapacitated elderly long-term care facility residents unless they have clearly indicated their desire for such treatment before becoming incapacitated.

Tube feeding

Enteral (nasogastric, gastrostomy or jejunostomy) tube feeding has recognized benefits in specific clinical situations, for example, in the treatment of acute stroke when swallowing is impaired. In the setting of severe dementia, however, its benefits are questionable.

The natural history of dementia often results in loss of ability to swallow without a significant risk of aspiration. At this stage of dementia, some clinicians initiate tube feeding in an attempt to prevent aspiration pneumonia, malnutrition and its consequences, pressure ulcers, provide comfort or prolong life. The published research about tube feeding in nursing facility residents with advanced dementia has been extensively reviewed.[28,29] There is no good evidence that tube feeding succeeds at avoiding or reversing any of these poor outcomes.[28] Furthermore, the leading cause of death in tube-fed patients with dementia is aspiration pneumonia. (28) Nasogastric tubes violate the gastroesophageal sphincter and, like gastrostomy tubes, provide a ready source of material in the stomach for reflux and aspiration. Nor is jejunostomy associated with lower rates of pheumonia that gastrostomy, as neither procedure eliminates aspiration of nasopharyngeal secretions.

To date, there is no evidence that tube feeding prolongs survival among older nursing home residents. One-year mortality among tube-fed older nursing home residents with severe cognitive impairment is significantly higher than that of those not treated with tube feeding.[30,31,28] There is no published evidence to indicate that tube feeding improves the outcomes of pressure sores in this older population.[28]

The decision to initiate tube feeding in severely demented or terminally ill long-term care facility residents is generally based on a desire to provide adequate nutrition and to prevent suffering and inexorable deterioration. Many people consider it unethical to do otherwise. Unfortunately, the use of feeding tubes in the terminally ill (such as those with end-stage malignancies) may prolong suffering, and their use in the severely demented may be counterproductive. Initiation of tube feeding in a cognitively-impaired long-term care facility resident often has adverse outcomes aside from aspiration pneumonia. Placement of the feeding tube itself has associated morbidity. Cognitively impaired residents may inadvertently or intentionally remove feeding tubes, requiring subsequent reinsertion. Physical and chemical restraints are sometimes used under such circumstances to prevent patients from removing their feeding tubes, however, physical and chemical restraints have their own adverse consequences, including discomfort, aspiration, pressure sores, and reduced quality of life. Tube feeding deprives patients the enjoyment of tasting food as well as contact with caregivers during the feeding process.

Tube feeding is not necessary to prevent suffering during the dying process. Terminally ill patients often stop eating or drinking in the days or weeks before death. Those who are cognitively intact and able to communicate frequently indicate that they do not experience hunger, thirst, or discomfort as a result of having stopped eating or drinking. Symptoms related to dry mouth can effectively be relieved with sips of water or periodic swabbing of the mouth. While patients with severe dementia may be unable to report whether they experience pain, hunger or thirst from not eating or drinking, observational studies have not shown any physical or physiologic signs of distress among those in whom tube feeding is not provided. There is no evidence that voluntary cessation of eating and drinking makes terminally ill persons physically uncomfortable.[29]

Based on the best available evidence, therefore, it is recommended that tube feeding not be initiated in severely demented patients unless they have clearly indicated their desire for such treatment before becoming incapacitated.

Hospitalization

In patients with severe dementia, hospitalization for treatment of acute illness entails serious risks. Even cognitively intact elders when hospitalized have an increased incidence of confusion, anorexia, incontinence, falls, deconditioning and inactivity.[32] These conditions can result in such medical interventions as the use of psychotropic medications, restraints, nasogastric tubes and urinary catheters, all of which carry their own risks such as thrombophlebitis, pulmonary emobolus, aspiration pneumonia, urinary tract infection, falls and sepsis.

Hospitalization is not always the best method for managing infections or other acute conditions in nursing home residents.[35] For example, hospitalization is not always necessary for optimal treatment of nursing home-acquired pneumonia. Immediate survival and mortality rates are comparable between patients treated in the long-term care facility and those treated in the hospital.[36,37,38] and 2-month survival is higher in patients treated in the nursing home compared with those treated in hospital (Fried JAGS 1997).

Hospitalization itself is associated with additional loss of some functional ability, such as the ability to transfer, toilet, feed or self-groom. These functional losses do not improve significantly by discharge, and they resolve more slowly than the acute illness that precipitated the hospitalization.[33] A large percentage of long-term care facility residents are older adults with preexisting pressure sores, cognitive impairment, decreased physical or social activity, and are thus at added risk for these complications.[34] Hospitalization of many long-term care facility residents thus exposes them to substantial risks that require important consideration before deciding upon hospital transfer. Emergency room or hospital transfer should be used only when it is consistent with the overall goals of care, and not as a default option when an unexpected acute illness arises.

Antibiotic Therapy

In older patients with acute infections such as pneumonia, treatment with antibiotics administered orally is often just as effective as antibiotics administered parenterally.40 Intravenous therapy is difficult to administer to cognitively impaired patients, as they may not understand its rationale but may experience discomfort from it and try to remove the intravenous access catheter. In patients for whom parenteral antibiotics are indicated by the severity of the illness, once-daily cephalosporin therapy administered intramuscularly may offer a reasonable alternative to intravenous therapy for many infections.

In patients with advanced dementia, the effectiveness of antibiotic therapy may be limited by the recurrent nature of their infections, because the underlying causes of the infections, such as impaired swallowing, aspiration, and decreased immune function, persist after treatment of each acute episode.[41] Use of antibiotic therapy for infections does not prolong survival in patients whose cognitive impairment is advanced, in those who are unable to walk unassisted, or in those who are mute as a result of severe dementia.[42] Antibiotics do not prolong survival in patients with advanced

dementia and fever.[42] Antibiotics may not necessarily even provide comfort in patients with dementia who develop acute infection. In a study of patients with dementia treated with antibiotics for acute infection, no difference was found in patient discomfort compared to similar patients not receiving antibiotic therapy.[43,44] Analgesics, antipyretics, and oxygen can provide adequate comfort in the absence of antibiotics.

Antibiotic therapy is associated with numerous adverse effects, such as gastrointestinal upset, *c. difficile* infection, diarrhea, allergic reaction, hyperkalemia and agranulocytosis. While diarrhea may be a temporary annoyance to younger patients, in immobile patients and those with dementia, it can result in fecal incontinence that may lead to problematic skin breakdown. In addition, procedures that are often performed in order to diagnose or treat infections (i.e. blood-drawing, sputum suctioning) are associated with at least moderate discomfort. These procedures may also increase agitation in cognitively impaired patients who cannot understand or remember the reasons for them. Moreover, diagnostic procedures frequently fail to indicate the source of fever in these patients.[42] Treatment is therefore often empiric. The decision to use antibiotics in long-term care facility residents with advanced dementia should take into account the recurrent nature of these infections in such patients, the adverse effects of antibiotics, the discomfort produced by accompanying diagnostic and therapeutic procedures, and the absence of evidence that these measures enhance some patients' comfort.

Summary and Conclusions

Surrogate decision-making for long-term care facility residents will increase in frequency as the population ages. Decisions made by guardians and other surrogates should be ethically sound and based upon the best available clinical evidence. Health care providers have a responsibility to keep surrogates informed, to communicate information about prognosis and changes in condition, to provide guidance, and to work closely together with surrogates to foster decision-making in the best interest of the patient. Using all the available information from all involved persons, surrogates should be available to make decisions promptly, be willing to accept that treatment of some conditions may be ineffective of futile, be willing for forego ineffective treatments, and engage in advance care planning. Advance care planning may help to prevent delays in decision-making, and prevent undesired or futile treatments. Health care providers should familiarize themselves with the statutes and regulations pertaining to surrogate decision-making in their states.

Before patients become incapacitated, health care providers should encourage the completion of advance directives, including a living will and the naming of a surrogate decision maker (as in a DPOAHC), and should encourage patients to discuss their preferences and goals of care with whomever they have designated as surrogates. Health care providers, regulatory agencies, and public guardians should work together to clarify these issues and sponsor joint educational efforts. Because the legal framework for surrogate decision-making varies state by state, state-specific collaborations will be necessary to improve decision-making and outcomes for these vulnerable populations.

**Table 1**

**A Framework for Assessing Capacity to Made Medical Decisions**[1,6]

Can a person made and express personal preferences at all?

Can the person give reasons for the alternatives selected?

Are the supporting reasons rational in the sense that the person begins with a plausible idea and reasons logically from that premise to a result?

Can the person comprehend the personal implications, namely the probably risks and benefits, of the various choices presented and selected?

**Table 2**

**Hierarchy of Medical Decision-Making for Incapacitated Patients**

Advance directives specified by the patient before (s)he became incapacitated prevail, even over the contrary wishes of guardians and other surrogate decision-makers

The decisions of the guardian or of the surrogate designated in an advance directive prevail over all others except in the presence of a written advance directive

Decisions of surrogates, including guardians, should be guided by:

Substituted judgment (if the incapacitated person's wishes were known but not formalized in an advance directive)

Best interest of the patient, based on clinical evidence, prognosis, life expectancy, risk and benefit of proposed treatments, comfort and dignity

Family members and friends take precedence next, usually in the following order

Spouse

Adult children

Siblings

Other family members

Friend

Health care providers follow, in the absence of other decision-makers (not optimal)

**Table 3**

**What Surrogates Should Expect From Health Care Providers**

Accessibility

Communication about diagnosis, prognosis, available treatment options, and life expectancy

Description of the benefits and burdens of each treatment

Recommendations for treatment and discussion of the reasoning underlying the recommendations

Access to pertinent written education materials or journal articles

Written communication of recommendations about treatment and their justification, when requested

Access to ethics committees

Emotional support

**Table 4**

**What Health Care Providers Should Expect of Surrogates**

Basic comprehension of the surrogate's role

Availability for discussion

Prompt response to requests for decision-making

Willingness to discuss overall goals of care

Willingness to collaborate in care planning

Willingness to make use of available community resources including ethics committees and ombudsmen when necessary.

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RESULTS: Passed by HOD
March 2003 passed by BoD.

Kathy Anderson, Rocklin, CA

The issue of Guardianship of Developmentally Disabled Adults needs to be addressed as the developmentally disabled share many of the same issues with the elderly under guardianship. I will not set forth here the personal circumstances of my daughter's case. Instead, I wish to offer my recommendations as to a few of the reforms I would like to see in place.

**What I would like to see emphasized:** Because there is so much negligence and fraud -- and the guardians especially the Public Guardians because my experience reflects they have absolute power and no accountability – within the legal system. I believe that **the most important legal reform that I advocate** is a constitutional amendment according to which

#1: **Everyone**, without exception, with evidence of injury due to negligence and wrongdoing by anyone else, without exception, would be guaranteed the opportunity to freely and fully present their evidence to an impartial jury that is empowered and obligated to investigate, judge and remedy legitimate complaints in a timely manner,

#2: **Anyone**, without exception, who obstructs or fails to uphold this right would be held accountable;

#3: **Immunity** will not be granted to any official, including judges, or quasi-officials, including attorneys, in cases alleging their misconduct. The misconduct of officials and quasi-officials will be addressed by a jury like any other complaint.

#4: Complaints of negligence and fraud will not be barred by any procedural consideration such as **time**.

#5: A jury that identifies a specific deficiency in the law and recommends a remedy for that deficiency will have the authority to place its recommendation on the **next general election's ballot**.

These legal reforms do not specifically address elder abuse and neglect, but I think it is clear that these legal reforms would go a long way toward ensuring the impartial investigation and judgment of such complaints.

**Additional measures** are needed and have been proposed to address a variety of other specific deficiencies in our laws. Two measures that I advocate to address specific deficiencies in our laws governing **elder abuse and neglect** are

#1: the development and implementation of **interview protocols, standardized interview forms, and clinical checklists** for the purpose of detecting and responding to elder abuse/neglect.

Finally, an email from maman75@... recently observed that "**Iowa** is the ONLY state that

**requires conservators to be family members or volunteers** and their monthly expenses are limited to $20.00 dollars." If this is true, I would like to know the Iowa statute which establishes this. Meanwhile, this requirement seems consistent with the conviction which many have that anytime the state requires a professional guardian be appointed, THE STATE SHOULD PAY FROM THE STATE TREASURY all expenses incurred as a result of the appointment, including all fees charged by the guardian. This conviction is based upon the belief that a state which would require a guardian on the grounds that it is LOOKING OUT FOR THE WELFARE OF THE WARD should pay the resulting costs on that very same grounds ...

To put this another way, parents are supposed to look after their children without demanding the children pay for their own care. If the state is going to assert "**parens patriae**" (the term used by Diane Armstrong), then the state should be a good parent ...

Where does society get the money needed to provide such services? In order to realistically address this problem, I believe taxes need to be structured in such a way that we pay in advance for the assistance that we might need much in the way which many of us thought social security was structured. I also believe that we need to tax wealth, not just income, in order to avoid placing too great a tax burden on us while we are young and just beginning to accumulate that wealth.

Of course, policies like those which I have just mentioned require **safeguards** to prevent their exploitation. A task force like that which I have proposed could focus upon developing these safeguards ...

I hope you find the above remarks helpful while you prepare your article.

Sincerely.

Kathy Anderson

Margaret K. Dore, P.S., Seattle, WA

# Proposals to Improve Guardianship for the Elderly

## I. AN INTRODUCTION

My name is Margaret Dore. I am an attorney in private practice in Washington State. I have worked in the guardianship field since 1989. I am also Vice Chair of the Elder Law Committee of the ABA Family Law Section. I am a former chair of the King County Bar Elder Law Section (nna the Guardianship and Elder Law Section). I have worked as a guardian ad litem.

My published cases include Guardianship of Stamm, 91 P.3d 126 (Wash. App. 2004). I also represented the ward in Guardianship of Weed, which was recently reported in the Seattle Times.[1] My education includes an M.B.A. in Finance and a B.A. in Accounting. I passed the C.P.A. examination in 1982. Further information about me can be viewed at www.margaretdore.com.

## II. MAJOR PROBLEMS

In my view, there are multiple problems with the guardianship system. I will focus on two: (1) inadequate financial oversight by state courts; and (2) the trend to inappropriately "railroad" people into guardianship. I discuss possible solutions via federal legislation.

### A. Lack of Oversight

#### 1. State court oversight

Under current practice, state courts are the entities charged with guardianship oversight. There are also programs in which oversight is provided via state executive branches. California recently enacted SB 1550, which establishes the Professional Fiduciaries Bureau within the Department of Consumer Affairs.[2] Idaho has a pilot program in which conservator reports will be reviewed by the Idaho

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[1] Cheryl Phillips, Maureen O'Hagan and Justin Mayo, *Secrecy Hides Cozy Ties in Guardianship Cases*, Seattle Times, December 4, 2006.

[2] Office of the Governor Press Release, 9/27/06 ("Governor Schwarzenegger signs Legislation to Provide Safeguards for Vulnerable Californians under the Care of Conservators"). See: http://gov.ca.gov/index.php?/print-version/press-release/4121/.

Department of Financial Institutions.[3] However, and for the most part, state courts are the sole supervising body. This is the historical practice. The court is deemed the "superior guardian" with the guardian an "arm of the court." 39 Am Jur 2d, Guardian and Ward, §§ 1 and 94, (1999).

The rationale for court supervision is that because the court appoints the guardian, the court is required to oversee the guardianship's administration.[4] This rationale does not follow. A court sentences people to prison. Courts do not oversee prison administration. Rather, that function is handled under the executive branch, e.g., through a department of corrections.[5]

**2. Guardianship companies are financial institutions**

The larger guardianship companies function as financial institutions similar to banks or trust companies, i.e., they provide trust and wealth management services. For example, Guardianship Services of Seattle (GSS) describes its trust and wealth management services, as follows:

> * The following describes the more common trusts managed by Guardianship Services of Seattle. [Special needs trusts and Settlement trusts] . . .
>
> * Financial Management Assistance involves helping an individual . . .

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[3] *See*: Idaho Code § 31-3201G (establishing the Guardianship Pilot Project Fund under the Idaho Supreme Court); and Guardianship and Conservator Pilot Programs 2006 Annual Report to First Regular Session of the 59th Idaho Legislature Senate Judiciary and Rules Committee and House Judiciary, Rules and Administration Committee, to be submitted in January 2007 (describing that two counties will be submitting guardianship filings to the Idaho Department of Finance for a "third party review"). For further information, contact Robert Aldridge, Esq. (Bob@rlaldridgelaw.com).

[4] In Re Gaddis' Guardianship, 120 P.2d 849, 853 (Wash. 1942).

[5] See: http://www.doc.wa.gov/general/aboutus.htm (regarding Washington state's Department of Corrections).

> manage investment portfolios and real property. (Emphasis added).[6]

Like a bank or trust company, the larger companies also handle large sums of money. GSS manages in excess of $44 million.[7] The larger companies also typically manage assets located in multiple states. They are engaged in interstate commerce.

**3. Problems with court supervision of guardians**

There are several problems with court supervision of guardians.

First, the typical judge or commissioner has little relevant training. Accounting and finance are not required courses in law school. The typical judge is also unlikely to have time to perform the necessary inquiry. A recent Seattle Times article quotes a local commissioner, as follows:

> Commissioner Carlos Velategui, who handles guardian cases in King County, complained that he is expected to master complex accounting, investment strategies and what constitutes proper medical care – all while keeping cases moving. "I read them and I look for the outrageous," he said.[8]

There are also conflicts of interest for a court to engage in oversight of a guardian who is an "arm of the court." 39 Am Jur 2d, supra. A challenge to the guardian's actions can be perceived as a challenge to the

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[6] Website for Guardianship Services of Seattle, a Washington State Certified Professional Guardian (http://www.trustguard.org/Services/trusts.html; http://www.trustguard.org/Services/financial.htmland www.trustguard.org/services/gss_services.htm).

[7] See: GSS's website ("The aggregate market value of funds held in blocked accounts is $44,564,328.90"). (http://www.trustguard.org/Services/frequently_asked_questions.htm).

[8] Maureen O'Hagan, Cheryl Phillips and Justin Mayo, A Son Struggles to Reveal how Lawyer was Treating his Mother, Seattle Times, December 3, 2006.

court. The courts often give the guardians the benefit of the doubt.[9]

A related problem is that once a guardian's accounting is approved by the court, other entities that might investigate a guardian, e.g., a local fraud unit, are lulled into thinking that there has already been a full investigation. As described above, the truth is to the contrary. There has likely been essentially no investigation.

**Possible Federal Legislation**

A possible solution would be to subject the larger companies who engage in interstate commerce, to federal oversight under the Office of the Comptroller of the Currency (OCC) or the Office of Thrift Supervision (OTS).[10] These agencies already oversee financial institutions.[11] Unlike state court judges, the personnel who work for these agencies typically have training in accounting or finance.[12] This proposal http://www.occ.treas.gov/jobs/entry-level.htmcould also be revenue neutral, as is reported by OCC for national bank regulation. OCC's website states:

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[9] Cf. Margaret K. Dore, *The Case Against Court Certification of Guardians; the Case for Licensing and Regulation*, NAELA News, Vol 18, Issue 1, 2006.

[10] See e.g., Office of the Comptroller of the Currency (http://www.occ.treas.gov/aboutocc.htm); http://www.finance.idaho.gov/bankruptcyand Office of Thrift Supervision (http://www.ots.treas.gov/mission.cfm?catNumber=39).

[11] Id.

[12] The OCC web site requests the following qualifications for entry level bank examiners:

* Bachelors degree with major in accounting, banking, business administration, commercial or banking law, economics, finance, marketing, or another field closely related to the position, or

* Three years of work experience in accounting or auditing in a financial institution or in work related to a financial institution, or

* Equivalent combinations of education and experience, such as a CPA certificate.

http://www.occ.treas.gov/jobs/entry-level.htm

> The OCC does not receive any appropriations from Congress. Instead, its operations are funded primarily by assessments on national banks. National banks pay for their examinations, and they pay for the OCC's processing of their corporate applications. The OCC also receives revenue from its investment income, primarily from U.S. Treasury securities. (Emphasis added).[13]

## B. "Railroading"

People are sometimes inappropriately pushed into guardianship. This occurs for many reasons. I address two, as follows:

### 1. Vague, "Politically Correct" Statutes

In many states, persons subject to guardianship petitions were formerly deemed "incompetent." To eliminate the stigma, some state legislatures have passed statutes employing the word "incapacitated" instead.[14] This terminology is also contained in the Uniform Guardianship and Protective Proceedings Act (1998).[15] This change in terminology has caused an implicit lowering of the standard of proof. You might think twice about deeming someone "incompetent" to handle their affairs. But deeming someone "incapacitated" or as having "incapacities" is not that big a deal. We all have them.

So in my view, the new statutes facilitate putting someone under guardianship who should not be there. This does not, however, seem to be the intent. See e.g., Uniform Act § 311 (stating that the burden of proof to establish a guardianship is "clear and convincing evidence").

**Possible Legislation**:

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[13] http://www.occ.treas.gov/aboutocc.htm.

[14] See, e.g.: Wash. Rev. Code § 11.88.002; and Wash. Rev. Code § 11.88.010.

[15] See: Web site for the Uniform Act (http://www.law.upenn.edu/bll/ulc/ugppa/ugppa97.html).

Enact a federal statute that clarifies that guardianship is a last resort, and that the burden of proof requires clear and convincing evidence that the person is incompetent to handle his or her affairs. It would seem that this interpretation is constitutionally required. Cf. Matter of Hedin, 528 N.W.2d 567, 580-82 (Iowa 1995).

### 2. Petitions by professional guardians and "steerage"

Sometimes professional guardians petition to have themselves appointed guardians of persons with whom they have no prior relationship. This can be an extreme conflict of interest. The guardian is in effect investing in the guardianship to obtain an income stream, i.e., fees from the proposed ward. The proposed ward is in effect a commodity.

This practice has been referred to as "trolling for clients" or more derisively "bounty hunting for the elderly." The LA Times describes one version:

> Conservators find clients by sponsoring breakfasts at senior centers and networking at legal luncheons. Nursing homes call when residents become too addled to pay the rent, wanting a conservator to write checks for them. Hospitals call when patients have outlasted their insurance, hoping that a conservator will move them somewhere else.
>
> Once conservators identify a prospect, they can go to court and initiate a case without the client's approval.[16]

Another version is "steerage" by the guardian's attorney. The attorney, who represents the guardian, will instruct his other clients to nominate the guardian for themselves or their family member. This is also a conflict of interest. A recent Seattle Times article states:

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[16] Robin Fields, Evelyn Larrubia and Jack Leonard, *When a Family Matter Turns Into a Business*, LA Times, November 13, 2005.

> If [the lawyer] was regularly paid to represent a guardianship company, how could he be an effective advocate for family members if they became unhappy with that company?[17]

**Possible Legislation**

Enact a statute with a bright line rule that professional guardians cannot bring guardianship petitions. A similar rule could be imposed against their attorneys, i.e., a rule that a guardian's attorney cannot represent a family member or proposed ward who agrees to the guardian's appointment.

There also needs to be an actual penalty for violation, e.g., that the guardian would be required to forfeit all fees.

Possibly, there could be limited exceptions, for example, in the case of a professional guardian's family member, for example, his or her mother.

## III. CONCLUSION

The larger guardianship companies function as financial institutions, which are engaged in interstate commerce. Their oversight is more appropriately handled by agencies that provide oversight to other financial institutions, such as OCC and OTS. Federal statutes should also be enacted to prevent the inappropriate "railroading" of persons into guardianship.

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Seattle, WA

[17] Cheryl Phillips, Maureen O'Hagan and Justin Mayo, Secrecy hides cozy ties in guardianship cases, Seattle Times, December 4, 2006.

Elder Law Center of the Coalition of Wisconsin Aging Groups, Madison, WI

PROPOSAL TO IMPROVE GUARDIANSHIP OF THE ELDERLY
SENATE SPECIAL COMMITTEE ON AGING
ELLEN J. HENNINGSEN, J.D.
December 22, 2006

Thank you for this opportunity to respond to your December 6, 2006 request seeking ideas for an expanded federal role in addressing the needs of vulnerable adults under guardianship and/or at risk of abuse, neglect or exploitation in the country. I am an attorney with the Elder Law Center of the Coalition of Wisconsin Aging Groups. The Elder Law Center provides legal education and services to seniors throughout Wisconsin.[1]

I staff the Wisconsin Guardianship Support Center. Funded by a grant from the State of Wisconsin's Department of Health & Family Services, the Support Center provides case consultation and education on legal issues pertaining to guardianship, protective services and powers of attorney. Many of our publications are available at www.cwag.org/legal/guardian-support.

Wisconsin has recently revised its guardianship statute. Effective December 1, 2006, new Chapter 54 totally revises Wisconsin's guardianship statute.[2] Advocates believe that the many improvements in the new law will reduce guardianships being imposed inappropriately, safeguard the rights of proposed wards and wards, and prevent incidences of neglect and abuse by guardians. Although the vast majority of Wisconsin guardians[3] are caring,

[1] The CWAG Elder Law Center assists in obtaining public benefits, such as Medicare and Medicaid, as well as provides counseling on issues of guardianship, elder abuse prevention, victim services and pension rights. The Elder Law Center receives funding through several sources including the Administration on Aging, The Victim of Crimes Act, The Older Americans Act, the State of Wisconsin, and private foundations. The Elder Law Center is also a Title III legal service provider for 65 of Wisconsin's 72 Counties.

[2] http://www.legis.state.wi.us/statutes/Stat0054.pdf

[3] Wisconsin law provides for the appointment of a "guardian of the person" to make personal and medical decisions for adults whom the court determines to be incompetent. In addition, the law provides for the appointment of a "guardian of the estate" to make financial decisions for adults whom the court determines to be incompetent or to be a spendthrift. Wisconsin law also provides for the appointment of a "conservator" to make financial decisions on behalf of a "conservatee"; however, conservatorship is not the same as guardianship of the estate; a conservator is appointed at the request of the potential conservatee and there is no finding of incompetency of being a spendthrift. For purposes of this testimony, the discussion of guardianships and guardians will include conservatorships and conservators.

responsible individuals,[4] we know that some violate the trust placed in them by stealing from their wards, physically abusing them or failing to adequately advocate for their best interests. Wisconsin's new guardianship statute squarely faces the issue that some guardians abuse their positions.

However, no mechanism or funding was created to provide ongoing monitoring or assistance to guardians which would be the most effective way to prevent neglect and abuse. In this regard, federal financial assistance to state courts and local social service agencies to create monitoring programs would be of great help in reducing incidences of abuse and neglect. Passage of the Elder Justice Act is an important step to improving the guardianship system in other states and to assist Wisconsin to continue its efforts that have begun with the passage of its new guardianship law.

**Wisconsin's new Chapter 54, Wis. Stats., effective December 1, 2006, provides the following provisions to improve the guardianship system. The new law could be a model for federal leadership and legislation.**

1. **Guardianship may only be imposed after extensive notice to interested persons.**

   Wisconsin's new law requires that designated persons and agencies receive notice of the guardianship proceeding. Failure to provide notice deprives the court of jurisdiction. The notice requirements will ensure that designated family members, agents under Powers of Attorney, guardians previously appointed in other states or in Wisconsin, and other designated persons will have the opportunity to appear and raise issues before the court. Federal model legislation should do the same.

2. **Guardianship may only be imposed if the petitioner establishes and the court finds that guardianship is the least restrictive intervention consistent with the needs of the individual.**

   A finding of incompetency is the conventional requisite for imposition of a guardian. Wisconsin's pre-December law included such a requirement and the new law does as well. But in addition to incompetency, the new law also requires that guardianship be the least restrictive intervention consistent with the individual's

   This substantive requirement creates a high standard before guardianship can be imposed and will ensure that guardianships will not be imposed when less restrictive forms of intervention are appropriate. Federal law should do the same, to avoid unnecessary guardianships.

[4] Wisconsin law also provides that "corporate guardians" regulated by the State of Wisconsin may be appointed as guardians instead of individuals. Wisconsin does not have an office of public guardianship.

**3. Guardianship may only be imposed if the petitioner establishes and the court finds that any previously executed Powers of Attorney or other advance planning are inadequate.**

If the individual had executed any Powers of Attorney or other advance planning documents such as trusts, the court must determine that the advance planning is inadequate to meet the needs of the individual before guardianship can be imposed. This requirement will prevent family members and others from disregarding the prior planning done by elders to avoid guardianship.

**4. Proposed wards have clear and comprehensive due process rights.**

Pre-December Wisconsin law provided due process rights for proposed wards. The new law states these more clearly and also expands them. They are:

a. The right to counsel, upon request of the proposed ward or if recommended by the guardian ad litem[5] or if the court determines it is in the best interests of the proposed ward;
b. The right to a jury trial, upon request of the proposed ward or if requested by the proposed ward's attorney or by the guardian ad litem.
c. The right to present and cross-examine witnesses, including any physician or licensed psychologist who reports to the court concerning the proposed ward.
d. The right during the medical or psychological examination to refuse to participate in the exam unless ordered by the court to do so.
e. The right to an independent medical or psychological examination.
f. The right to be present at the hearing.
g. The right to have the hearing in an accessible location.
h. The right to petition the court every 180 days for a review of the guardianship, including restoration of particular rights or a termination of the guardianship.

These enumerated rights ensure that individuals will be able to effectively contest and, if appropriate, defeat petitions for guardianship. Federal leadership should ensure the same.

**5. A clear procedure for transferring foreign guardianships into Wisconsin is provided.**

[5] Pre-December law required the appointment of guardian ad litem (GAL) in all guardianship cases. A GAL must be an attorney licensed to practice law in Wisconsin who has completed required continuing legal education credits in areas relevant to representing adults in guardianship cases. The new law continues this requirement.

Wisconsin's new law provides a clear process for transferring a foreign guardianship into Wisconsin with notice to the foreign court and interested persons and an opportunity to object to the transfer. A federal portability standard that is consistent with Wisconsin law will help make for smoother transfers of foreign guardianships in and out of all states in our increasingly mobile society.

6. **The person nominated to be guardian must complete a sworn and notarized "Statement of Acts" to the court prior to his or her appointment.**

A proposed guardian must submit to the court a sworn and notarized statement at least 96 hours before the hearing indicating whether he or she:

a. is currently charged with or has been convicted of a crime,
b. has filed for or received bankruptcy protection,
c. has had certain professional licenses or certificates suspended or revoked, or
d. has been listed in the caregiver misconduct registry.

The guardian ad litem must review the statement, interview the nominated guardian, and made a recommendation to the court regarding the fitness of the nominee to serve. If the nominated guardian fails to answer these questions truthfully, he or she may be removed as guardian. This requirement, following the same philosophy of Senator Kohl's criminal background checks, is an important factor for court consideration in selecting a guardian and should be made part of a federal law as well.

7. **All wards *always* retain certain rights regardless of whether the guardianship is full or limited.** In particular, wards *always* retain the following rights:

a. Right to have access to and communicate privately with the court and with governmental representatives, including the rights to have input into plans for support services, the right to initiate grievances, and the right to participate in administrative hearings and court proceedings.
b. Right to have access to, communicate privately with, and retain legal counsel, with fees paid from the income and assets of the ward, subject to court approval.
c. Right to access to and communicate privately with the protection and advocacy agency and the state ombudsman.
d. Right to protest a residential placement, and review the need for guardianship and/or protective services.
e. Right to petition for court review of guardianship, protective services, protective placement, or commitment orders.

f. Right to exercise constitutional rights such as rights to free speech, freedom of association and the free exercise of religious expression.

These retained rights will permit individuals under guardianship or those acting on their behalf advocate for their interests in remaining free from abuse and neglect at the hands of their guardians. Federal law should so declare.

**8. The ward retains all rights except those that are specifically ordered to be transferred to the guardian.**

New Wisconsin law has now totally reversed the presumption that all guardianships will be full – that is, all rights will be removed from a ward on a finding of incompetency except for those that the court specifically determines that the ward should retain. For instance, under pre-December law, a ward loses the right to vote unless it is ordered to be retained. Under the new law, this presumption is reversed – that is, the ward will retain all rights except for those that the court specifically removes based on a determination that the ward lacks the evaluative capacity to exercise that particular right. So voting, to use one example, is presumed to be retained unless the court specifically determines that the ward lacks the evaluative capacity to vote.

This presumption in favor of limited guardianships ensures that individual's decision-making capacity will be respected, to the extent that he or she is capable. **Again, federal leadership should require the same presumptions, requiring deference to the least restrictions on guardianship and a presumption on retention of all rights except for those specifically found necessary to remove or transfer.**

**9. Clear limits must be placed on guardians.**

Federal law should follow Wisconsin's lead by limiting guardians accordingly:

a. The guardians' powers are limited to those that are authorized by statute or by court order and that are the least restrictive form of intervention.
b. In addition to the rights mentioned above, the ward retains all rights not assigned to the guardian or otherwise limited by statute.
c. The guardian must exercise the degree of care, diligence, and good faith when acting on behalf of a ward that an ordinarily prudent person exercises in his or her own affairs
d. The guardian is required to exhibit the utmost trustworthiness, loyalty and fidelity in relation to the ward.
e. Guardian's are prohibited from borrowing funds from the ward.
f. Guardians must obtain approval from the court before purchasing any property of the ward.

**10. Federal law should, similar to Wisconsin, clearly state the duties and power of the guardian of the person.**

a. A guardian of the person may exercise only those powers authorized by statute, rule, or court order.

b. Decisions on care or services must be based upon:
   - Regular in-person inspection of ward's condition, surroundings, and treatment;
   - Examination of ward's health care and treatment records;
   - Attendance at staffings,
   - Inquiry into the risks and benefits and alternatives to proposed treatments,
   - Consultation with providers of health care and social services in making all necessary treatment decisions.

**11. Federal law should, similar to Wisconsin, clearly state the duties and powers of the guardian of the estate.**

The duties and powers of the guardian of the estate are listed in detail and provide clear guidance on powers that require court approval and those that can be exercised without court approval.

In addition, if a temporary guardian of the estate is appointed, he or she may not expend more than $2,000 of the ward's assets without permission of the court or sell any real estate without permission of the court.

**12. Clear standards, procedures and penalties are provided for removal of a guardian.**

Wisconsin's new statute states that the court has continuing jurisdiction over the guardian, perhaps an obvious point but one that advocates felt should be expressly stated in order to ensure that there was no doubt. The new law also provides a listing of specific reasons the court may take action, including removal of a guardian for various acts of malfeasance. Due process is provided to the guardian and the court has broad powers to provide a remedy including imposing a forfeiture up to $10,000, requiring the guardian to personally pay any costs of the proceeding, requiring the guardian to reimburse the ward or the ward's estate for any losses, and removing the guardian.

Although under pre-December Wisconsin law, complaints about the conduct of guardians may be made to the court, the lack of clear standards, procedures and remedies means that few such complaints are ever filed or remedies provided. Indeed, most reforms in the country have resulted from

media inquiries and exposes, rather than individual challenges to a guardian's behavior. It is anticipated that the provisions of the Wisconsin statute will have a chilling effect on guardians who may be inclined to abuse their positions and will also quickly and appropriately deal with those who have abused their positions. Federal legislation should follow suit.

Thank you for the opportunity to highlight Wisconsin's efforts to improve the health of the guardianship system and to encourage federal leadership to do the same for the rest of the nation. We believe we have made meaningful steps toward safeguarding the autonomy of elders and vulnerable adults while at the same time protecting them from abuse, neglect, self-neglect and financial exploitation and that these changes can serve as a useful model for the rest of the country. We would be happy to expand on any of the reform ideas raised in this memo.

Wendy Ferrari

Senators, Congressmen and Congresswomen, Committee Members on Guardianships,

First I would like to call to your attention the Doctoral Dissertation of Dru SAMPSON from IOWA.

Iowa is the ONLY state that requires conservators to be family members or volunteers and their monthly expenses are limited to 20.00 dollars. It seems to me that this is the only way to STOP ATTORNEYS and CONSERVATORS from LOOTING from the elderly.

For example, Attorney Irene HOLMES of San Carlos, California charged her NEIGHBOR over 10,000.00 to write an advanced health care directive--these are available for FREE at most hospitals. Later Homes claimed that she was buying clothing and food for her neighbor--the neighbor ended up under conservatorship with UNWANTED FOREIGN help in her house--and last I saw they were putting Mrs. X on psychotropic meds. When I went to call on her to see if she was pleased with Holmes services, the help notified the conservator that I was there. The conservator sent the police out. Holmes, and the conservator proceeded to court to get restraining orders on me so that I could no longer visit this elderly lady who, incidentally, was enjoying my company and asking me to stay.

There is a SERIOUS VIOLATION OF THE CONSTITUTIONAL RIGHT OF THE FREEDOM TO ASSOCIATE common to ALL CALIFRONIA CONSERVATORSHIPS THAT I HAVE OBSERVED.

I was my own Mother's most devoted daughter. Her conservators got orders that I could not visit with Mom in her home. They DID NOT CARE ABOUT MY MOM. MOM got sent out in the rain and cold to visit with me. She was allowed to visit me in my apartment. The" help" provided in her home at a cost to her of 22,000.00 a month was often un-educated and unwelcome by my Mom.

I became certified as a CNA, Certified Nurse Assistant, and still neither the conservators nor Judge Rosemary Phieffer, San Mateo County Superior Court, would allow me to even visit my Mother freely. My Mother could speak clearly and concisely for herself. She repeatedly made it know to social workers, staff and her court appointed attorney Greg Rubens that she "wanted to be with her family."

Mrs. Hildegard Koch of Redwood City, California, was another victim of conservatorship. She owned three pieces of real property and was a retired chiropractor. Mrs. Koch was NOT allowed to retain the caretaker whom she had chosen. Neither was she allowed to remain at home which was her desire. The Public Guardian's Office would not disclose the whereabouts of Mrs. Koch to me.

By coincidence I located her and found her in a neglected state--a room devoid of her personal belongings and no telephone privileges. I put in a request to the public guardian to get a phone for Mrs. Koch. This, of course was ignored. I went to visit her on her birthday and brought her a telephone among other presents. Sashi BIR, RN, opened Mrs. Koch's file and I read with my own eyes what she read to me from Mrs. Koch's chart:

"Mrs. Koch is to have NO visitors, especially not Wendy Ferrari." Mrs. KOCH had been declared incompetent by the same psychologist as my Mother. The psychologist and JD is Abraham NIEVOD, from Berkeley, California. He charges 5,000.00 for his reports recommending conservatorship--gets appointment for the conservator who then is happy to pay him the 5,000.00 dollars for his report. Nievod continued to visit my Mom and generate reports which helped the conservator remain in power. He collected 11,000. dollars in one year.

In my Mom's case the attorneys PROFITTED the most with 588,000.00 dollars in fees in two and a half years. This continued even after I called it to the Court's attention. The pretext is that all Mom's children did not agree on everything. The SOLUTION was SIMPLE: RESPECT MOM'S WISHES as stated in her ADVANCED HEALTH CARE DIRECTIVE. DOCTORS WERE REQUIRED TO RESPECT HER WISHES--then WHY NOT ATTORNEYS AND HOUSEHOLD EMPLOYEES. It should be noted that when the court allowed 22,000.00 a month for household help--mother could dress, bathe and cook simple meals for herself and she could walk up and down stairs unassisted. She had never broken a bone. She could make telephone calls. She did used to complain about the household "help" putting things away in the wrong places.

Helen CAREFOOT, RN, school nurse at Ford County Day School for 35 years is another victim of conservatorship. The Santa Clara County, California court decided that her son and daughter-in-law should not be staying in Mrs. Carefoot's home. Mrs. Carefoot, who was ambulatory, went into a nursing home to recover from pneumonia and was never allowed to return home--I met her five or so years late. She was coherent and REQUESTING TO SEE HER TWO SONS, Lad and Tom. She may have needed to take one pill a day, but there was ABSOLUTELY NO RESON TO HAVE HER CONFINED IN A SKILLED NURSING HOME. Her home was sold to finance it. Last I saw Mrs. Carefoot, one year ago, she had been moved to a board and care home because she was running out of money. She was placed with a couple from the Philippines in San Jose, California---Mrs. Carefoot was requesting to be with her relatives.

I contacted the California Attorney General's Office. When I stated that the "attorneys are the biggest criminals in this country." The reply was, "Lady, we've known that for a long time." My reply was, "Then why hasn't somebody done something about it?"

Part of the problem is that Judges, most Judges or perhaps all Judges in California are attorneys.
There needs to be a separation of powers. I would say that a Registered Nurse could serve well as a Probate Judge--although I am aware that there is a shortage of nurses in

California--however, perhaps retired nurses could serve--they might appreciate a sit down job after many years of HARD WORK.

However, the most efficient solution, to begin with, is to RESPECT THE ELDERLY PERSON's WISHES to avoid the Circus Court.

The Honorable Mel Grossman, 17th Judicial Circuit Court, Florida

December 29, 2006

Dear Senators Smith and Kohl:

Thank you for including me in your committee's announcement of continuing activity in the area of guardianships and your solicitation of information on the subject.

Having had the opportunity to appear before your committee in September to discuss with the members and staff this increasingly important nationwide issue, I wish to reaffirm the need for better education for judges dealing with guardianships and for the importance of collecting reliable (i.e., not anecdotal) information in order to improve the effectiveness of court performance in guardianship cases. This will help insure that an alleged incapacitated person's due process rights are protected and that effective court oversight is afforded to those who are determined incapacitated. Guardianship is, case by case, a local and state issue. However, our aging population, the need to institute protections for some of our most vulnerable citizens and the increasing incidence of guardians performing their duties while situated in a different state from a ward, have made guardianship a national issue.

As you know, my circuit has developed a data dictionary (a copy of which has been provided to committee staff) and is developing a schema which will enable us to tag key data from electronically filed pleadings for placement into a data base. The goal, of course, is to obtain concrete information that will provide the tools to better protect the incapacitated and foster improved judicial accountability and productivity.

The Federal Government, through Congress, can play a decisive role in this area by assisting the implementation of accurate data collection through matching grants to states that employ such a system. Congress can also play a critical role in increasing the protection of incapacitated persons by limiting federal funding to state court systems whose courts provide continuing education to judges dealing with guardianships. Without such a national effort, little will be in place in 2018 when the first wave of 78 million baby boomers begins to impact the guardianship system.

Your committee is to be commended for the efforts it has taken and continues to take to improve the lives of older Americans. Please accept my sincere appreciation for your leadership.

Mel Grossman, Circuit Judge

17 th Judicial Circuit,Florida

Anne Trambarulo Haines, Englishtown, NJ

Our family's nightmare began in August 2004, when my mother fell and broke her hip. My parents, Ralph and Maydelle Trambarulo, had moved to Delaware to be near my brother Paul in August 2003, after living in Red Bank NJ for 47 years. Mom, now aged 76, suffers from Parkinson's disease and has since been diagnosed with related dementia. Dad, aged 81, suffers from normal pressure hydrocephalus, and has difficulty walking and breathing.

After Mom broke her hip, our cousin Teresa Sirico reappeared after an absence of 8-10 years. Teresa is the daughter of my father's sister Joan Sirico, and is a real estate broker in the New Haven, CT area. She explained that she had been involved in a legal battle with the family of her real estate mentor for several years, and that it had cost her close to a million dollars, but "it doesn't matter, because I won". We never suspected that this scenario was to be repeated with us!

Teresa told us that she knew of a place in CT which was a "top-notch facility affiliated with Yale University, with doctors from Yale" (my father's alma mater), where she could take Mom for treatment, and bring her back after "30-60 days". We agreed, wanting the best medical care for our wife and mother, and we trusted Teresa as a family member. Teresa obtained a POA for Mom just before she left Delaware with Mom, telling Paul she needed it to take Mom to CT. Once in CT, she told us Mom couldn't come back to DE.

In October 2004, we received a notice from the Probate Court of Woodbridge CT , telling us that Teresa had been appointed Temporary Conservator of Mom. This was done on an "ex parte" (emergency) basis, so we weren't notified until afterwards. At a hearing in November 2004, we were advised by our attorney, Peter Barrett, that we should agree to an "independent conservator", as none of us lived in CT, and because of the adversarial situation with Teresa. We agreed, envisioning a neutral party who would listen to our opinions and work with us. Attorney Mark DellaValle was appointed as the conservator of Mom's person and estate, Paul Whitaker as Mom's attorney and Robyn Berke as the guardian ad litem (GAL). As far as we can determine, none of these attorneys have any background or professional training in conservatorships. They have all treated us, Mom's immediate family, as adversaries, yet they, total strangers, advise the court on "what is best for Maydelle". Their opinions have been formed not through direct knowledge of us, but through information supplied by Teresa.

At a hearing before Judge Clifford Hoyle in June 2005, Paul and I were grilled by these attorneys and Donn Swift, Teresa's attorney, questioning us as if we were criminals. Evidence we presented regarding Teresa's actions (including attempted bribery of an aide) was ignored by the court. We then presented a motion disputing the CT court's jurisdiction of the case, as Mom has never been a CT resident, never voted in CT, and has never had a CT driver's license or paid taxes in CT. Ralph, her husband of 50 years, lives in New Jersey. (Two daughters, myself (Anne) and Margaret also live in NJ). This motion was denied by Judge Hoyle without any citations of case law. Judge Hoyle then decided that it was in Mom's "best interests" that she stay in CT. This means that my parent's marriage of 50 years is effectively ended by the court's decision , as Dad cannot travel to CT see his wife due to his poor health.

Judge Hoyle's decisions display callous disrespect for the rights of this couple to pass their remaining years together, along with blatant disregard for their constitutional right to "life, liberty and the pursuit of happiness." We are appealing Judge Hoyle's decision in Superior Court on the basis of jurisdiction. Our family, Dad, myself and my siblings, Alice, Margaret and Paul, is united in our wish that Mom return to NJ to be near us in her final years.

In addition, Dad has been denied access to his own money by Judge Hoyle. In order to purchase a residence he had to obtain a mortgage at age 80 because he could not access his own money in a joint account. In a proposed division of the estate, Judge Hoyle stated that he was being "generous" in allowing Dad 50% of the joint funds, when he was the principal contributor to that estate.

Despite our protests, Mom has now been moved to an assisted living facility 2.5 miles from Teresa's office/residence, with a live-in aide chosen by Teresa. Our wife and mother is now separated from us not only by distance, but also emotionally, after 2 years of brainwashing by Teresa and her allies.

This case displays a very obvious conflict of interest with the court and its officers. They are the ones who get to decide whether the source of their financial "gravy train" stays in CT or is allowed to leave the state! Clearly it is in THEIR best interests financially that Maydelle Trambarulo stay in Connecticut. The Probate Court's primary function in this case should be the reuniting of Maydelle with her FAMILY, and the true conservation of her person and financial estate, NOT the reallocation of her hard-earned assets to court officers' own bank accounts!

I would not wish our circumstances on anyone. A loving family has been torn apart by a self-serving legal system containing an insidious corruption of cronyism and greed, used to the utmost by someone who knows how to manipulate the system for her own perfidious ends. Unfortunately, we now know our family is not alone in this horrible situation. It is a nationwide disgrace which needs to be addressed, as more Americans approach what should be their "Golden Years".

What are the lessons here?

- The determination of incompetence should not be decided on an emergency basis. Decisions such as this, with life-altering consequences, should be subject to a hearing where opposing views may be voiced. Under the present system, due process is violated and constitutional protections are flagrantly disregarded, with decisions based on evidence presented by unqualified individuals.
- Courts should have to prove jurisdiction. It should be determined by strict definitions of domicile, not "residency".
- Families should be encouraged to negotiate, before resorting to an "independent" conservator or guardian. Once a conservator or guardian is appointed, families and wards lose autonomy.
- The family, not the court, should be the primary source of decisions. The court should act as a mediator, not the giver of irrevocable decisions based upon inadequate or inaccurate knowledge of the situation.
- Get monitoring out of the hands of the courts - courts are designed for litigation - not for monitoring. Courts send people to prison and rehab, which are monitored by outside agencies – conservators and guardians

should be monitored by an agency not connected to the courts but connected to the Attorney General's office - with financial experts to study those reports and stop the theft of assets.

Thank you for your time.

Anne Trambarulo Haines
Englishtown NJ

The Hebrew Home for the Aged at Riverdale, Riverdale, NY

December 29, 2006

Dear Senator Smith:

Thank you for this opportunity to present our program paper on elder abuse to assist you in improving guardianship for the elderly. It is not surprising that Senator Kohl's and your request for papers comes "…In the wake of Senate Special Committee on aging hearing last month: *Exploitation of Seniors*."

Our submission focuses on elder abuse, its epidemic proportion, and methods to address the issue through a successful and replicable model. As you wish to protect the elderly and devise strategies to ameliorate the exploitation of seniors, we present a successful program that does just that. The Harry & Jeanette Weinberg Center for Elder Abuse Prevention, Intervention and Research is a pioneering program for victims of elder abuse. It is the first and only comprehensive elder abuse shelter in the United States.

The Special Committee on Aging may be interested in reviewing our program based on its uniqueness, its success, and model for replication. Included in our paper is an action plan for a segment of care which you are exploring. Many are unfamiliar with the nomenclature of elder abuse. By all means, share "***A Program to Protect Seniors from Exploitation: A Regional, Non-Profit Center for Elder Abuse Prevention and Intervention***" with those on your Committee and beyond, so that elder abuse may be understood within the rubric of guardianship for the elderly and gracious aging.

This submission by the Hebrew Home for the Aged at Riverdale is to educate those on an integral aspect of prevention and care—what seems a logical precursor to your evolving work in elder-care and guardianship.

Thank you for your review.

Respectfully submitted,

Daniel Reingold, MSW, JD
President & CEO

DR:aml

# A PROGRAM TO PROTECT SENIORS FROM EXPLOITATION: A REGIONAL, NON-PROFIT CENTER FOR ELDER ABUSE PREVENTION AND INTERVENTION.

The Hebrew Home for the Aged at Riverdale

Riverdale, New York

December 2006

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# A PROGRAM TO PROTECT SENIORS FROM EXPLOITATION:

# A REGIONAL, NON-PROFIT CENTER FOR ELDER ABUSE PREVENTION, AND INTERVENTION


## ABSTRACT

Victims of elder abuse require emergency shelter and a wide range of civil and legal services including obtaining guardianships, orders of protection, divorce, banking and housing assistance as well as other remedies. Advocacy teams are requisite. There is a critical gap in direct services for victims of elder abuse. Community awareness needs to be heightened and successful programs replicated. Elder abuse is a phenomenon that has been little studied and under reported; it has reached epidemic proportions. Victims of elder abuse reside throughout our communities. Most remain hidden or isolated and subjected to domestic violence, physical, emotional, or financial mistreatment by their adult children or other caregivers. Many others are victims of neglect, which can be passive or active, depending on the intent of the caregiver. Still others may be vulnerable to the underhanded scams and con games of swindlers who prey on the elderly. They are ashamed or afraid to say anything about it or have some cognitive impairment and cannot self-report.


**Background:**

The Harry & Jeanette Weinberg Center for Elder Abuse Prevention, Intervention and Research (the Weinberg Center), a pioneering program for victims of elder abuse, sponsored by and located at The Hebrew Home for the Aged at Riverdale, is the first and only comprehensive elder abuse shelter in the United States.

Elder abuse is an insidious crime that crosses religious, socio-economic and gender barriers, and exposes older and dependent people to many forms of harm from their spouses, adult children or other caregivers. It encompasses physical, emotional and sexual abuse, financial exploitation, neglect or abandonment. Victims of elder abuse reside throughout our communities. Most remain hidden or isolated, ashamed, afraid or

unable to report their situation. There are limited resources and few protective programs to care for victims of elder abuse.

**Overview:**

For eight years, the Hebrew Home has partnered with the Westchester and Bronx District Attorneys' Offices, health care professionals, and other key service providers to develop an array of initiatives and community partnerships designed to educate, increase awareness and create and distribute training materials about the signs and symptoms of elder abuse.

Building upon the foundation of the Hebrew Home's existing community network, in 2004, the Weinberg Center formed a consortium of organizational affiliates and collaborative partners, whose knowledge, expertise and community contacts have been essential to the successful planning, start up and ongoing operations of the Center. They include:

The Pace Women's Justice Center, Offices of the Manhattan, Bronx and Westchester District Attorney, Joan & Sanford I. Weill Medical College-Cornell University-Division of Geriatrics and Gerontology, New York University College of Nursing, New York City Department for the Aging, New York City Human Resources Administration-Adult Protective Services, Westchester County Department of Senior Programs and Services, The Burden Center for the Aging and Jewish Association for Services for the Aged (JASA).

Representatives of some of these affiliates work directly with Weinberg Center staff and clients on a day-to-day basis. For example, Pace Women's Justice Center staff attorneys provide legal advocacy and representation in court for victims, the NYC Departments for the Aging and Adult Protective Services and the District Attorneys Offices and others provide referrals and help facilitate victim's safe return to the community. The group meets regularly and serves as an Advisory Board for the Center. Guardianship services can easily be added to this program and will assure strong legal oversight and advocacy on behalf of victims. Existing regulatory oversight and public involvement on non-profit boards will provide requisite public accountability, which does not adequately exist in current guardianship mechanisms.

**A Model to Replicate:**

An easily replicable model, the Weinberg Center utilizes an existing non-profit long-term care facility to provide a coordinated system of crisis intervention and residential and community based services for victims of elder abuse. Direct services include an emergency residential shelter at the nursing home that is staffed with an attorney to provide civil legal advocacy and representation for obtaining guardianships, orders of protection, divorce, banking and housing issues; a social worker and a nurse trained to meet the complex emotional needs, provide the substantial psychological support and counseling required by victims of elder abuse. Clients receive all medical, rehabilitation and other healthcare services that they may need and are encouraged to make full use of the Home's social and recreational programs. The Weinberg Center provides a sanctuary for victims of elder abuse with the goal of allowing the safe return of victims to their own homes or alternate housing. Home care and access to and information about the Weinberg Center is available 24/7 through the Hebrew Home's easily recognizable toll-free number (1-800-SENIOR) which is professionally staffed 24/7. Victims can be triaged and emergency shelter provided through the Home's overnight medical respite program. The Weinberg Center serves eligible seniors, 60 and over.

In order to make the Weinberg Center's resources and potential for replication known to organizations that serve the elderly, Daniel Reingold, MSW, JD the President & CEO of the Hebrew Home and Joy Solomon JD, the Director and Managing Attorney of the Center have recently presented at numerous professional meetings including The American Association of Homes and Services for the Aging (AAHSA), The New York Association for Homes and Services for the Aging, and The National Aging and Law Conference. They are scheduled to present at the Joint Conference of The American Society on Aging (ASA) and The National Council on Aging in March 2007. Similarly, Ms. Solomon has published an article on elder abuse and the Weinberg Center in the Journal of Jewish Communal Services and Mr. Reingold has written articles that were published in The Journal of Gerontological Social Work and Elder Abuse and Mistreatment, a compilation of new informational writings. The Weinberg Center this year received two prestigious national awards: From AAHSA and ASA.

The Weinberg Center is a groundbreaking model that can be replicated by non-profit long term care organizations committed to meeting the needs and improve the quality of life of victims of elder abuse in their communities. Such centers can easily add Guardian services, which can provide critical legal and care management while assuring public accountability through existing regulatory oversight and community involvement on non-profit boards of directors. The Weinberg Center has already hosted numerous professionals who are have heard about its activities and are considering starting up similar programs at their sites. The Hebrew Home has recently been awarded a grant to provide technical assistance for national replication of the Weinberg Center model. This grant will support the provision of training and materials including the Weinberg Center's policies and procedures, brochures and a "how to" manual, to non-profit long term care organizations throughout the country which are interested in developing a shelter or related elder abuse programs. The type, size and scope of new elder abuse programs can be individually determined by the mission, location and resources of the sponsoring organization and may range from a community outreach model, to the expansion of existing day programs or services at home, to the provision of shelter services directly or in partnership with other local community organizations. Adding guardianship services either directly or through consortium arrangements can be done relatively easily. Incorporating guardianship in the Weinberg Center model will assure effective legal oversight of the victim's rights, including decision-making which is in their best interests. As non-profit long term care organizations have existing regulatory scrutiny, and benefit from public participation on non-profit boards of directors, there will be effective public accountability.

Developing services to prevent or intervene in the lives victims of elder abuse is a critically important mission that provides a heretofore rarely available opportunity to promote healing and a future free of abuse for each victim cared for and increases the awareness of elder abuse in the community. It is the goal of The Hebrew Home at Riverdale and its Weinberg Center for Elder Abuse Prevention to help bring this crucially important opportunity to elder abuse victims in other communities by sharing our experiences, knowledge, and professional resources with organizations across the country.

**Research & Findings**

From its inception through July 31, 2006, over 90 victims of elder abuse, who would not otherwise had the opportunity to have access to essential services, received direct care and information from the Weinberg Center. The Center provided 1,822 shelter days for 19 victims. An additional 43 persons, who were assessed as appropriate for admission, declined services. (The shame of admitting to the abuse or "getting their family member in trouble" often results in the victim resisting services). Based upon this experience, the Weinberg Center's leadership is working with its partners to develop a new intervention to address this predicament. Referrals were made to community and legal services for another 30 victims during this period of time. Client's age range was 60-89. Length of stay ranged from 5-96 days. Of the 1,822 shelter days, 866 days were covered financially through Medicaid, while 956 were supported through Hebrew Home designated funds and supplemental program grant funding. Some of the individuals may not be eligible for Medicaid despite having been financially exploited and with no resources. Lack of ability to pay is not a barrier to admission at the Weinberg Center. While there is no discrete billing category for elder abuse, an advantage of establishing a shelter in or with a residential health care facility is that Medicaid coverage can sometimes be secured on behalf of victims. Medicaid eligibility for victims of abuse will make this program easier to replicate.

Types of abuse as reported most frequently by victims included financial exploitation or misappropriation, physical abuse and mistreatment, verbal, psychological, sexual abuse and neglect. Anecdotal accounts confirm that the Weinberg Center was significantly more than a just a safe haven for elder abuse victims. Clients report enjoying a measurably improved quality of life while at the Center and feeling empowered to self-protect with a new level of confidence and self-esteem upon their return to the community. Most clients returned home to a safe environment. Permanent orders of protection or vacate orders were secured when needed so that the abuser is no longer in the house. There has been no recidivism, though clients are informed that they can return.

Referrals to the Weinberg Center came from a wide range of community organizations including hospitals, Departments of Aging, Adult Protective Services, District Attorneys Offices, other elder service providers as well as a number of informal

sources, confirming the importance of developing a collaborative approach to addressing elder abuse in the community and the effectiveness of the outreach and training programs.

**Program Awareness**

A full spectrum of educational and training programs to heighten community awareness about elder abuse, identify at-risk older adults and disseminate information about available services and how to access them is provided by the Weinberg Center throughout its catchment area. The outreach teams have presented over 50 educational and training programs, reaching more than 1500 individuals and groups who may not otherwise have even been aware of the phenomenon of elder abuse and neglect. As victims are hidden from traditional service providers, a particularly unique component of the Weinberg Center is its partnership with Doorman's Union Local 32BJ in which Weinberg Center staff train New York City doormen to recognize elder abuse and refer cases to the Weinberg Center. The Center's outreach, education and training programs are also provided to traditional practitioners including nurses, social workers, attorneys and judges as well as community members, ambulance drivers, police officers and law enforcement associations.

A day-long elder abuse conference in June, 2006 sponsored by The Hebrew Home at Riverdale, the Jewish Association of Services for the Aging and Fordham University was held in New York City. This conference provided the latest information related to the medical, social, nursing and legal issues encountered when assisting elder abuse victims. Over 250 first responders, physicians, nurses, social workers and attorneys were in attendance. Presentations were also made to The New York State Psychological Association, The Metropolitan Council on Jewish Poverty, the 50$^{th}$ Police Precinct in the Bronx, the Yonkers Police Department. the Westchester Domestic Violence Council, the Legal Education Department of the New York State Bar Association and the Westchester End of Life Coalition. Outreach to disseminate legal and social information to areas where seniors congregate such as shopping centers, senior centers, places of worship has been initiated.

The Advocacy team continues to expand its geographic base, conducting outreach and training to social and legal service agencies, providing information about the Center and ways to identify and assist victims. The Weinberg Center has received wide coverage in the local, regional and national press, including the New York Times and as far away as the Los Angeles Times, bringing knowledge and information about the availability and services of this program to the broadest possible audience.

**Conclusion:**

In order to assure comprehensive services for victims of abuse and neglect, a safe harbor is requisite to provide emotional support, psychological counseling, legal and other healthcare services.

Clearly, the key for success remains as the consortium approach to care and service provision which brings professionals in a plethora of fields together, including the provision of guardianship services. The expansion and replication of this successful program is recommended and are the goals of the Hebrew Home for the Aged at Riverdale.

The Hebrew Home for the Aged at Riverdale and the Weinberg Center for Elder Abuse Prevention, Intervention and Research stand ready to work with you. We support The Respite Act of 2006 and encourage the authorization and appropriation of resources from this new legislation to support changes that will improve our nation's response to its senior citizens.

Audrey Ingraham, Edmonds, WA

Committee Chairman and Members:

Thank you for investigating the abuses which exist in the guardianship industry and seeking input from those whose lives have been adversely impacted.

In Washington State the Certified Guardianship Board currently self-disciplines it members who are guardians and guardianship attorneys. It is ineffective and does nothing more than give "a slap on the hand" for egregious and callous behavior that destroys families and their finances.

There is an urgent need to reform the procedures to establish a guardianship and strict enforceable laws governing the actions of the professional guardians.

Our family has experienced the devastation an unethical professional guardian created by exploiting the current system for its financial gain.

Please see the attached document which is just one example of this professional guardian's blatant deception. A Superior Court judge removed this guardian in our case for its poor treatment of my mother, a vulnerable ward. I am available as are other family members to provide additional written and/or oral testimony for the committee.

Thank you for your concern and efforts to improve the guardianship industry and stop the abuse of the elderly and their families.

Audrey Ingraham
Edmonds, WA

Larry Ingraham, Edmonds, WA

Committee Chairman and Members:

Thank you for your efforts to implement solutions to improve the care and enhance the dignity of our aged population who find themselves controlled by guardians. From our experience here in Washington State the industry "professional" guardians, attorneys, etc. can suck the dignity, liberty, happiness from the aged vulnerable while reaping enormous profits from their "clients" until they die or once their assets have been depleted consciously and systematically transfer the financial burden to the taxpayers.

Our insights are based on more than five years of an immensely difficult time attempting to fulfill the frequent and passionate requests of my wife's 90 year old mother not wanting to live in a nursing home once she was no longer able to live alone in her modest home. Despite our offer to have her live with us, a disgruntled family member encouraged by industry "professionals" filed a motion is Superior Court seeking the appointment of a specific professional guardian alleging his 90 year old mother was incapacitated. The disgruntled family member eventual and the guardianship company eventually sought to have her moved to a nursing home which the trial court characterized as "wanting to dump her into a nursing home". The "professionals" were paid regardless of the outcome of their advice and actions. The more they involved the court, the more they billed my mother-in-law's "estate."

The guardianship company thrust upon my mother-in-law operating under the guise of being a not for profit corporation for federal tax purposes told us we should not be concerned about the costs or their being enough money to provide for Mom's care as it routinely "spends down the estate" then transfers the financial responsibility of care to the taxpayers.

A rigorous evaluation is needed of Guardianship companies who are granted non profit status. When a not for profit guardianship corporation only officer's (president and founder) annual compensation has exceeded $400,000 while supposedly billing its wards at an hourly $75.00 rate and charging for other miscellaneous services, governmental including IRS scrutiny is needed.

My articulate and well educated wife and daughter who have also submitted material to the committee are available to provide additional written and/or oral testimony for the committee.

Again, thank you for investigating the abuses in the guardianship industry and seeking input from those whose lives have been adversely impacted.

Larry Ingraham, CCIM
Edmonds, WA

Tami Ingraham, Lynnwood, WA

To: Chairman Gordon H. Smith and Ranking Member Herb Kohl
Senate Special Committee on Aging (202.224.8660 fax,
guardianship@aging.senate.gov)

Cc: Senator Patty Murray, fax: 202-224-0238, Senator Maria Cantwell,
fax: 202-228-0514

From: Tami Ingraham (Lynnwood, WA)

Re: Exploitation of Seniors: America's Ailing Guardianship System
*Creating a Public Awareness Campaign – Prevent, Protect, Preserve*

Date: December 31, 2006

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Dear Senators,

Thank you for your efforts to promote nationwide guardianship reform. My grandmother was victim of a bad-faith guardianship. After numerous problems the professional certified guardian of her estate was asked to resign, but refused. The superior court then removed the professional guardian for cause despite its vigorous objections. This matter traumatized Grandma and our family. Despite her death in 2004, her case remains unsettled.

As our family struggled to understand how the guardianship industry – which was supposed to protect the vulnerable adults – was in fact exploiting them, I began to research dozens of other court cases and found others families had endured similar problems. We struggled to find even basic information about the guardian companies, attorneys, and the guardian ad litems in the industry. During the past six years I have spent hundreds of hours researching guardianship court records and learning about the industry, including attending the 2003 Washington State Certified Professional Guardianship Training (a mandatory two-day course for those wishing to be a professional guardian). While earning my master's degree in strategic communications and leadership, I developed a strategic communications plan, and decided to switch career fields to advocate for seniors. I currently work as a legal assistant in the fraud industry.

Guardianship reform is essential. Certainly, you will likely hear from numerous families who have encountered emotional and financial hardships as a result of misappropriate actions by the guardianship industry professionals. What our family quickly discovered during our horrible experience was how little we knew about the industry, and how hard it was to learn more information. From my personal experience and research, I believe increased public awareness is a vital, yet frequently overlooked element in protecting our nation's vulnerable adults. The Seattle Times recently assisted in increasing public awareness by a series of articles. Please consider the following (condensed)

communication plan and suggestions as you work to correct the guardianship system in America.

**GUARDIANSHIP REFORM:**
**PUBLIC AWARENESS CAMPAIGN**

**Objective 1: Equitable and Respectable Treatment of Seniors**
Treating seniors with the utmost of respect and fairness requires providing for their needs in the least restrictive manor, providing for due process of the law in guardianship proceedings, and creating alternative procedures for involuntary guardianships.

**Objective 2: Professional Integrity of the Guardianship Industry**
Professional integrity requires disclosure of relationships between parties and professionals and removing any and all conflict of interests of the guardian ad litem to provide impartiality as required by the court. The establishment of an acceptable scope of responsibilities and fee schedules at the onset of guardianships ensures professional behavior while providing prudent and valuable service to seniors.

**Objective 3: Oversight and Measurability of Effectiveness of Guardianships**
Just as businesses across the nation track their costs, sales, profits, and marketing effectiveness, the guardianship industry (through the court system and/or oversight boards) should a provide a documented means for tracking the results of guardianships and establish specific criteria for measuring the effectiveness of each. Enabling the public increased access to records must occur.

**KEY MESSAGES**

1. **Prevent:** Planning will *prevent* involuntary guardianships in many cases
2. **Protect:** Guardianship proceedings must *protect* seniors' rights
3. **Preserve:** Guardianship accountability will *preserve* freedoms and finances

**KEY MESSAGES EXPLAINED:**

| | |
|---|---|
| PREVENT | • Estate planning<br>• Alternative procedures |
| PROTECT | • Disclosure of relationships<br>• Scope of responsibility/fees |
| PRESERVE | • Measure of effectiveness<br>• Involvement and awareness |

## Message 1:
## Prevent: Planning Will Prevent Involuntary Guardianships in Many Cases

Objective: Ensure the equitable and respectable treatment of seniors.

**Supporting Messages**:
1. Estate planning will prevent involuntary guardianships in many cases.
2. Establishment of alternative procedures will prevent involuntary guardianships.

**Overview**:

Guardianships restrict personal freedom to maximum extent condoned under Washington State law. Proper planning *prior* to alleged incapacity allows individuals to take control of the decision-making process, rather than become forced into an unwanted situation with little or no legal right to be involved in making important personal choices. While age alone cannot serve as the determining factor for the establishment of guardianships, the public often stereotypes seniors as disabled, and therefore unable to make important life choices. A change in spending habits or being victim of a fraud may be used as reasons to justify a guardianship for a 80-year-old, though if this happened to a 40-year-olf, a guardianship would most likely not be considered.

Involuntary guardianships degrade the senior's self-worth, freedom, and autonomy. They become merely a number in the court record, in most cases, unable to ever regain control of their personal decision-making freedoms. Their printed name is no longer John Doe, but now "John Doe, an incapacitated person." The title reflects the lack of value some place on these seniors. Sadly, most people, young and old, do not recognize the impact involuntary guardianships would have on their lives until it is too late. However, in many cases, estate planning and the establishment of alternative procedures will help prevent involuntary guardianships for seniors.

## Message 1-A
## Estate Planning Will Prevent Involuntary Guardianships in Many Cases

Objective: Provide for needs of seniors in the least restrictive manner.

Intermediate Objectives:
1. Professional involvement by legal and medical communities to educate state citizens to include planning for incapacity in estate planning process
2. Decline in number of involuntary guardianships

Overview:

Each adult age 18 and older should research basic estate planning alternatives to prepare for the future, including unexpected emergencies, such as severe illness or inability to make personal decisions. Adults should consider and make detailed plans for what they wish to occur if and when they are unable to make decisions for themselves, or need assistance with life's daily activities, bill paying, home maintenance, correspondence, and activities of daily living, commonly referred to in the medical and geriatric fields as "ADSs".

While lawyers, whether general practice or elder law specialists, frequently encourage clients to complete a Health Care Power of Attorney and Durable General Power of Attorney, these steps alone prove insufficient to prevent involuntary guardianships or allow the individual to make decisions regarding the format of the guardianship if the court determines one is necessary. These documents allow the named agent(s) to act on behalf of the individual if he or she becomes incompetent. Ideally, this would be the only necessary step. But, these documents are revocable and at any time an individual could be coerced to discard the documents and re-issue the authority to another agency. If there is a family conflict or dispute, the lack of a guardianship clause can lead to the appointment of an unwanted expensive professional.

The time and costs to proactively plan for unforeseeable incapacity far outweigh the alternative of an involuntary guardianship – an expensive and preventable situation.

## Message 1-B
## Establishment of Alternative Procedures Will Help Prevent Involuntary Guardianships

Objective: Provide for due process of the law and fair, respectable treatment of seniors through the restructuring of involuntary guardianship proceedings.

Intermediate Objectives:

1. Identify the failure to provide due process of the law in some guardianship proceedings, especially involuntary guardianships and claims of "emergency" situations
2. Restructure guardianship court hearing process to be a more equitable, less-threatening environment, similar to mediation settings
3. Communicate the need to establish consistent criteria for the legal determination of capacity
4. Create a process to further investigate petitioner's motive, especially for involuntary guardianships.
5. Eliminate "ward pays all" assumption present in many involuntary guardianships

Overview: The guardianship process often takes seniors by surprise as they find themselves suddenly in a difficult relationship with someone perhaps previously trusted. Though maybe the senior need some assistance – perhaps a caregiver, property manger, or bookkeeper – that alone does not require the establishment of a guardianship. Though Washington State law requires "clear and convincing" evidence, when the petitioner submits claims, even absurd allegation, in many cases the vulnerable adult receives "guilty until proven innocent" rather than vice versa. The current procedures for involuntary guardianships humiliate and demoralize seniors. From using the terms "incapacitated person" or "ward" to embarrassing them in open court by broadcasting their private affairs and alleged problems in front of strangers, these procedures must change.

Court records and publicized cases around the country indicate the propensity of adult children or other interested family members seeking to gain control of the financial resources, such as homes and other real estate, family heirlooms, and liquid assets

including stocks, savings and cash. By seeking self-appointment as guardian, the decision-making power shifts to the family member from the senior. Also a likely cause of an involuntary guardianship, a disgruntled family member may become upset at the elderly person if he does not like his relative's decisions. The petitioner might have acted inappropriately toward the senior but does not want to be held accountable, so he may seek retaliation by filing a petition for guardianship to eliminate the senior's testamentary capacity, which eliminates the elder's possible recourse. In most situations the ward pays all professional fees of attorneys, guardians and guardians ad litem, regardless of the petitioner's motive or guardianship outcome.

The relationship between an attorney and his client establishes a legal obligation for the attorney to appropriately represent the client, including using carefulness in the accrual of charges to be billed to the client. But, what happens in guardianship cases when counsel for the petitioner knows he will most likely be paid by the estate of the alleged incapacitated person, not his own client? The petitioner's attorney has no obligation to use discretion in his activities or billings, though the elderly will most likely have the financial obligation to pay whatever bill the petitioner's counsel submits to the court. In some cases, the Petitioner's attorney fees may be almost double that of the AIP's GALs, or Counter-Petitioner's legal fees. Only in rare circumstances does the court reduce such fees, or order someone other than the senior to pay.

While state law prohibits physical impairment and age alone from determining incapacity the structure of the court hearings allows these factors to inhibit the elder's opportunity for a fair defense at the guardianship court hearing. A non-driving senior may have difficulty attending a court hearing; a wheel-chair bound person might not be able to sit for long-periods of time which is required in the open court hearing structure in which all cases are heard in a two hour window without specific appointment time. An individual with difficulty hearing may not understand what the attorneys and guardian ad litem tell the court since there are likely are no microphones and at times there is standing room only in the courtroom with people entering and leaving from a noisy hallway throughout the proceedings. Often, the Guardian ad litems recommend the court hold the proceedings without the senior present, Worse yet, a senior who considers these matters private may not forcefully oppose the guardianship proceedings in front of a group of strangers. Though considered potentially a vulnerable adult, a senior has no ability to provide private testimony before the Court Commissioner or Judge, yet the elder may be fearful of further family conflict, isolation, or retaliation from the petitioner if she testifies in his presence.

Though accrues of such vulnerability to be unable to make personal decisions about medical care, socializing, place of residence, handling of finances, and/or the ability to enter into a contract, the current statute implies the senior has the wherewithal to instruct the GAL Appropriately as to his or her need for legal representation. Court records show, however, that in circumstance where the GAL said the AIP does not wish counsel, the GAL also makes the personal recommendation that the AIP's right to attend the hearing be waived. Such recommendation must be made with "good cause" according to the statute. State law and court procedures must not deny the senior's due process of the law, which includes representation by the attorney.

<u>Potential Post-Initiative Assessment Elements</u>:

1. Implementation of alternative court hearing procedures for RCW Title 13 Vulnerable Adult Guardianships to allow meeting at alternative locations, such as a conference room or other private and less-threatening environment for vulnerable adults
2. Establishment of training program to provide consistent legal determination of incapacity rather than subjective opinion of courts
3. Increased accountability of petitioner by formulation of criteria to determine motive for filing for guardianship
4. Reduction in the percent of fees paid by AIP or Ward in involuntary guardianships

**Message 2:**
**Guardianship Proceedings Must Protect Senior Rights**

Objective: Professional integrity of the guardianship industry

Supporting Messages:
1. Required disclosure of relationships will protect senior rights
2. Establishment of scope or responsibility and fees will protect senior rights

Overview: Interlineated throughout Washington State's guardianship law, the term "protect" mandates the responsibility of the guardianship industry to look after the best interests of the incapacitated adults. A lack of familiarity with the guardianship process leaves alleged incapacitated adults and their families bewildered with how to contest the guardianship, and the rapid nature of the proceedings does not provide adequate time to learn.

Unfortunately, court files abound with accusations of inappropriate behavior of the guardianship industry (guardian and its counsel, guardian ad litem, court officials, counsel for the petitioner, etc.) Whether relating to a real or perceived conflict of interest, the industry's failure to disclose relationships fails to protect senior rights. Additionally, the lack of defined scope of responsibility in guardianships allows unilateral decision-making on the part of the guardian, increases the likelihood the autonomy of seniors will be minimized beyond what is necessary, and allows for unmonitored accrual of guardianship fees to be paid by the senior without recourse. Guardianship proceedings must protect senior rights.

**Message 2-A**
**Required Disclosure of Relationships Will Protect Senior Rights**

Objective: Protect the rights of seniors by alerting them to potential conflict of interests involving professionals in guardianship proceedings.

Intermediate Objectives:
1. Development of disclosure form similar to form used in real estate industry
2. Reform of law to protect seniors from undisclosed and unwaived conflict of interest by professionals

Overview: The confusing and overwhelming nightmare of the guardianship process typically requires the involvement of legal counsel to assist the AIP, petitioner, counter-petitioner, and any interested part. Prior to agreeing to representation, a conscientious attorney questions a potential client to ensure no conflict of interest exists for the attorney who may have previously represented a family member, business associate, or other person which would appropriately disqualify the attorney from representation. Is this process reciprocated with the potential client thoroughly questioning the attorney? The professionals involved in the guardianships process – guardians, guardian ad litems, attorneys, psychologists, and petitioners – might fail to disclose what could be a real or perceived conflict of interest. Contrary to RCW requirements, these actions breach trust. To facilitate GAL impartiality, state requires "…consistent rotation…" from the County GAL list. Does this occur: Not always; further study may expose alarming statistics. According to state law, it is not the petitioner's but the *Court's* responsibility to "…choose as guardian ad litem a person whose name appears on the registry in a system of consistent rotation, except in extraordinary circumstances such as the need for particular expertise…In the even the court does not select the person next on the list, it shall include in the order of appointment a written reason for its decision." (*See RCW 11.88.090-4a*) However, this does not always occur. Many GALs are also attorneys and trained and approved Certified Professional Guardians. Some attorneys who chose to work as counsel for guardian companies also serve as GALs. Additionally, some lawyers who defend AIPs against guardianships simultaneously work as legal counsel for those guardian companies.

Potential Post-Initiative Assessment Elements:
1. County GAL Coordinator required distribution of "Protect Your Rights" to al AIPs by GALs
2. Support of senior advocacy groups to spread message
3. Reform of state law to require Professional Representation Declaration for all professionals in guardianship proceedings (law of agency form, similar to real estate industry)

**Message 2-B:**
**Establishment of scope of responsibility and fees will protect senior rights**

Objective: Require guardianship industry accountability for actions and fees to protect senior rights

Intermediate Objectives:
1. Provide clear guidance and unquestionable direction to the guardianship industry regarding acceptable actions based specifically on the need of the IP as determined through court procedures imploring due process of the law
2. Required fee schedule and budget of professional fees at onset of guardianship process for all cases, whether private pay or county-paid (have system for tracking adherence to budget)

Overview: Wise investors research banks, stockbrokers, and other industry professionals before deciding where to invest in order to best protect and grow the resources; seniors in involuntary guardianships are given no such opportunity. Not only do they lose control of their own resources, the court provides no opportunity for the seniors or their supportive families to learn about the potential fiduciary or performance records of the company or individual guardian. At best, the prospective guardian provides a statement of proposed fees, but this is not required in most cases, nor does the court follow up as needed. Despite poor past performance and repeated complaints in other cases, guardian companies continue to accept new cases of vulnerable adults – those in most need of protection from the guardians themselves, though often unable to protect themselves.

RCW 11.92.040 outlines the duties of the guardian or limited guardian of the estate for vulnerable adults. Responsibilities include filing an initial inventory of all estate assets within 90 days of appointment, submitting an annual report which accounts for all property in the estate, additional property received such as income by source, and all expenditures made during the account by major category. Additionally, any adjustments to the estate such as gains or losses, encumbrances against the estate, assessed value of the real property, and actions to invest and reinvest property shall be disclosed. Specifically, RCW 11.92.040 (4) requires the guardian to protect and preserve the guardianship estate. (*See Figure 14*).

While responsibilities include paying bills, is it within the scope of the guardian of the estate's court-ordered responsibility to spend 3.5 hours to go the grocery store for the client, then deliver the food and help put it in the cupboard at the rate of $60 per hour, or allocate funds for food and hire a chose worker to shop at $14/hour? A person unable to provide for his food and shelter may need a limited guardian of the person, but that must be determined by the court; a order. This same professional guardianship company in the above example charged $60 per hour to layer jelly beans in a jar by color as a gift for the woman's friend. Is this a prudent charge to protect and preserve the guardianship estate? However, as the court rarely defines the scope of responsibility for guardian activities, the court fails to protect the rights of seniors.

Potential Post-Initiative Assessment Elements:

1. Statistical results of the requirement that during the petition phase of the guardianship, all professionals involved must complete a Declaration of Proposed Fees indicating the hourly rate, fees and expenses for each activity and anticipated number of hours for court approval
2. Adherence to the requirement that mandates court authorization for exceeding the approved number of hours/total fees as approved in original order and Declaration of Proposed Fees.

**Message 3:**
**Guardian Accountability Will Preserve Freedoms and Finances**

Objective: Oversight and measurability of effectiveness of guardians

Supporting Messages:

1. Mandatory measurement will **preserve** freedoms and finances of seniors

2. Outsider involvement and awareness will **preserve** freedoms and financed

Overview: While regulation of the Washington State guardianship industry has increased in recent years, more must be accomplished to preserve the freedoms and finances of seniors. The Washington State Certified Professional Guardianship Board (CPGB) is made up of individuals who earn their living from the industry. It does not promote public trust to have the guardians self-regulate and self-supervise. For example, an elderly woman fell out a third-story window to her death while under the supervision of a guardian company. The guardian was on the state's certification board. As another example, a guardian company was removed for cause. When the matter went on appeal, the three largest guardian companies in the state together filed an Amicus Curiae in support of the guardian company. Executives of those three companies are or were on the CPGB committee who would decide if any disciplinary actions should be take against the removed guardian. This does not promote the appearance of fair, unbiased guardian accountability.

At the Superior Court level, the Guardianship Monitoring Program (GMP) has been added in many counties to increase accountability of guardians. Initiated through AARP and run primarily through volunteers, the focus includes guardianship delinquencies. As time allows, the GMP volunteers read through court records and will complete a brief questionnaire to add to the court file if the volunteer has a question or comment regarding the guardianship. While this is a step in the right direction, the limited time, training and resources of these groups must be corrected.

Together, the CPGB and GMP, in conjunction with concerned citizens and law makers have the potential to require mandatory measurement and increased awareness to help preserve senior freedoms and finances.

**Message 3-A:**
**Mandatory Measurement of Guardianship Effectiveness**
**Will Preserve Senior Freedoms and Finances**

Objective: Establish criteria for measuring effectiveness of guardianships

Intermediate Objectives:
1. Creation of a "best practices" procedural guide for the courts and guardians
2. Disclose case examples where excessive fees and unwarranted activities are justified as "contested cases" without regard to effectiveness and prudence of the professional guardian

Overview: Guardians, guardian ad litems, and legal counsel in these proceedings charge clients by the hour, not by the reasonable fee for each activity. Many of these professionals grossly under-utilize technology, with little or no apparent motivation to change. Why would a guardian company streamline its activities with the help of technology when the company charges hourly for services, regardless of results? The longer tasks take, the more guardians, attorneys, and GALs charge. In some cases, guardians could potentially lose up to perhaps thousands billable fees per year by simply

using online bill pay and/or online grocery shopping for one client. Guardians do not charge consistent rates at times.

Unlike normal business-customer relationships, guardianships provide no accountability about how funds are spent or what fees are incurred except annually. In some cases, the guardian and other professionals involved in the legal proceedings, such as the petitioner's attorney, AIP's attorney, GAL, and guardian's attorney may collectively charge $10,000 or $150,000 before the senior ever receives an itemized accounting of time and billing, or complete information of hourly charges and fee schedules. Full, timely disclosure should be required, and interested family members should be provided with copies of records to ensure accountability.

Guardianships are initiated as a result of allegations of a senior's inability to manage his own affairs or provide for his needs appropriately. But, are the financial and emotional costs of involuntary guardianships worth the price? Who determines if indeed the guardian appointed by the court actually makes appropriate decisions on behalf of the ward?

Potential post-initiative assessment elements include:

1. Establish mandatory measurement system approved by lawmakers and included in state law
2. Decrease in number of cases where guardians, attorneys, & guardian ad litems automatically receive fee requests, especially when their actions are of little, if any, benefit to ward
3. Change law to require monthly accountings by guardians (currently no accountability for at least 12 to 36 months in most cases)

**Message 3-B:**
**Involvement and Awareness Will Preserve Senior Freedoms and Finances**

Objective: Communicate urgent need for outside review/audit of guardianship records

Intermediate Objectives:

1. Create ability to search online records by guardianship topic, not just by ward name (difficult to research unless know ward name)
2. Require public disclosure of guardianship complaints and other consumer protection information upon receipt by Certified Professional Guardianship Board
3. Regular report of number of guardianships filed per county, case numbers, and results

Overview: Increased access to public records and information regarding guardians, guardian ad litems, and attorneys will help preserve senior freedoms and finances. The only information available typically includes the name, certified guardian number, address and telephone number. Those concerned with the actions regarding a Certified Professional Guardian or company may submit a Grievance to the CPGB. However, those wishing to research the reputation of guardianships prior to the appointment of a specific guardian have limited research methods. The CPGB will only release results of complaints that have been resolved by action taken against the guardian/company or the

signing a settlement agreement. Cases with dismissed allegations do not get released to the public; therefore, a company may have repeated complaints, but a researcher would not know unless the cases are settled.

Most prudent adults would research a business before engaging in a significant financial transaction or contract, but seniors in involuntary guardianships are provided little, if any, information about the guardian/company who will handle all financial and/or personal decisions (medical, residence, social) likely for the rest of the senior's life. Almost the only way to research guardian companies is through court records, which is time consuming and difficult since many guardians work in several different counties. Online access to information eliminates the geographical and time boundaries of research and helps protect seniors in guardianships by increasing public awareness. Some guardianship companies utilize websites, but they often do not include detailed information, price lists, or references. Sites such as the Better Business Bureau might list an organization in good standing when court records prove otherwise. Providing Superior Court case dockets and records online will encourage increased involvement and awareness by the public.

Potential post-initiative assessment elements include:

1. Increased participation by senior advocates in guardianship proceedings, including hearings
2. The planned (goal) versus actual number of published newspaper and journal articles, TV news stories, and other coverage providing public awareness

Thank you again for your commitment to nation-wide guardianship reform and the protection of seniors and other vulnerable adults. If there is additional information I may provide please let me know. I am happy to help in anyway possible.

Respectfully submitted,

Tami Ingraham
Lynnwood, Washington

Additional Resources:

http://archives.seattletimes.nwsource.com/cgi-bin/texis.cgi/web/vortex/display?slug=guardianship04m&date=20061204&query=guardianship

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Judicial Council of California, Administrative Office of the Courts

Judicial Council of California
Administrative Office of the Courts

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January 10, 2007

Hon. Gordon H. Smith
Chair
Hon. Herb Kohl
Ranking Member
Special Committee on Aging
United States Senate

Washington, D.C. 20510-6400

Dear Sirs:

On behalf of the Office of Court Research, a research unit of the California state Administrative Office of the Courts, I want to thank you for this opportunity to share with the Special Committee on Aging some of the work currently under way in California to better serve adults in need of conservatorships. I also want to thank you for allowing us additional time to prepare this report.

California courts perform important case processing functions in conservatorship cases including a number of evaluative processes in both the establishment and the monitoring of these cases. These case processing procedures are intended to achieve the legislative goals of protecting the rights and the quality of life of adults in conservatorships. Yet there is no clear, definite performance standard for these functions, and there is little precedent available for developing such a standard for this case type.

To help the courts improve case processing, the Office of Court Research developed a multimethod study that utilizes both quantitative and qualitative assessment protocols to collect data needed to identify appropriate standards of practice for the courts to exercise in establishing and monitoring these cases. These standards will then be evaluated relative to the resources needed to achieve them and the funding levels currently available to the courts to ensure the protection of the rights of some of California's most vulnerable citizens.

The Office of Court Research is only midway through the study, which will be concluded late in 2007 and presented to the California state Legislature in January 2008. Nonetheless, we have learned a great deal to date and hope that these observations will be useful to other states as they seek to identify the most effective practices for protecting the incapacitated elderly.

Again, thank you for this opportunity. If you have questions about this study, please contact us at 415-865-7660 or dag.maclead@jud.ca.gov.

Sincerely,
(signed)
Dag MacLeod
Manager, Office of Court Research

## Developing Conservatorship Performance Standards in the California Courts: Preliminary Observations


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**Executive Summary:**
In 2006, the California State Legislature enacted the Omnibus Conservatorship and Guardianship Reform Act of 2006. The Act imposes a number of new requirements for conservatorship case processing. These new laws, however, do not specify the *practices* or particular methods that courts must use in implementing the new requirements in a way that accords the best possible protection of due process rights. It is the role of the judicial branch to provide this direction regarding how to operationalize the spirit and intent of these new laws. The California State Judiciary's Conservatorship Performance Study is designed to identify measures of quality that the courts should achieve in processing conservatorship cases, and specify the resources necessary to reach these benchmarks. The study has identified several important issues to consider while developing performance standards, including:

- A multi-method design is necessary to evaluate both the quantitative and qualitative differences in how courts seek to provide appropriate oversight in these cases;

- Individual practices must then be broken down into operational components to facilitate implementation in other courts with an understanding that different implementation models may achieve the same goals;
- Resource requirements associated with implementing these practices must be specified including the number of staff, type of training and experience that staff should have; and

- Development of a consistent system to collect appropriate data on both a case-by-case and court-wide basis is necessary for ongoing internal and system-wide audits to evaluate the reasonableness and success of the implemented practices and performance standards.

**Introduction**

California law requires courts to make a number of determinations prior to establishing a conservatorship.[9] For example, the court must interview the proposed conservatee to ascertain whether he or she objects to the conservatorship or the proposed conservator. If the proposed conservatee desires to oppose the appointment, the court must decide whether he or she is sufficiently lacking in capacity to require appointment of a conservator. Once a conservatorship is established, the court must oversee its progress and periodically determine if some of the rights the conservatee lost in the initial establishment can be restored.

California courts employ a wide variety of case processing practices to achieve the legislative goal of protecting the rights and the quality of life of conservatees. It is unclear, however, which implementation practices both effectively protect due process rights and consistently ensure that the best interest of the conservatee will be served. In an effort to begin answering this question, the Office of Court Research, a research unit of the California State Administrative Office of the Courts, is conducting a study of performance standards in conservatorship case processing. The Conservatorship Performance Study has a number of objectives:

1. To create an appropriate performance standard for the courts to exercise in the establishment and monitoring of conservatorship cases;
2. To identify promising practices that courts employ to realize the standard;
3. To establish a baseline from which to evaluate funding levels available to the courts to ensure that sufficient resources are available to afford proper protection to conservatees in the system; and
4. To make recommendations for targeted, systematic data collection that will permit the courts to assess system efficiencies and monitor individual practices.

[9] In much of the country these cases are referred to as "Guardianships." Under California law, Guardianships refer to cases involving minors and Conservatorships refer to cases involving adults with incapacities.

A report on this study will be presented to the California State Legislature in January 2008. This paper provides preliminary observations and lessons learned from the first year of research on this topic.

## I. A clearly defined, uniformly accepted performance standard is needed to protect both due process rights and the best interests of the conservatee.

The courts in California perform two distinct case processing functions in conservatorship cases that involve: 1) evaluation in the establishment process and 2) monitoring the conservatorship after establishment. Yet there is no clear, definitive performance standard for these functions; and there is little precedent available for developing a standard for this case type.

To assist the courts, the Office of Court Research developed a multi-method study that utilizes both quantitative and qualitative assessment protocols in order to collect data from all sources needed to establish a well-informed, reasonable performance standard. Information drawn from three sources – case file review, staff interviews, and focus groups – is being used on a statewide and individual court basis to structure recommendations for improvements to the conservatorship system in California. The three sources of data will create a detailed picture not only of how the courts currently handle conservatorship cases, but also to identify areas where improvement is needed.

### *A. Case File Review*

Case file review is used to 1) ascertain whether courts are complying with procedural statutes - e.g., if courts conduct all the investigations required by law, or if counsel is appointed to protect the interests of the proposed conservatee when petitions to act on behalf of the conservatee are filed; 2) determine how courts interpret the law, especially those procedural requirements specifically meant to protect due process rights - e.g., if investigators interview only the proposed conservatee or relatives in the first degree in addition, or if accountings include bank statements and benefit disbursement statements; and 3) identify the practices that effectively protect the rights and property of the conservatee.

Three courts were selected for the case-file review. The total caseload from these courts accounts for approximately 32% of all conservatorships in California. The case file review found general compliance with the statutes, but also found that time standards were not always met. Further examination of time standards that had lapsed, however, revealed that delays sometimes reflected a higher level of performance rather than insufficient case processing. As will be explained in the section on staff interviews, below, adherence to time standards alone does not necessarily correlate with quality case processing in this case type. This insight, however, surfaces only through qualitative data collection.

Case file review also suggested that the best performance indicators for conservatorships might be identification of event bundles rather than examination of discrete data

elements. For example, following court approval of the sale of a conservatee's real property, there should be a subsequent increase of the bond in the amount of the capital gains from the sale. The increased bond reflects the increase in the conservatee's liquid assets. The law requires sufficient bond at all times, but not all courts monitor bonding adequacy as a regular practice. In some courts judicial officers will not sign orders confirming a sale until the conservator presents sufficient bond. The latter practice of coupling the two court procedures is both minimally burdensome to the court and easy to implement, but affords excellent protection of the conservatee's assets. The usefulness of these event bundles will be discussed further below.

*B. Staff Interviews*

The information gathered in the case file review provided a foundation upon which to discuss operations with the court management and conservatorship staff. The objective for the interview process is to determine what operational practices facilitate or hinder a court while overseeing conservatorship cases.
The observation that some delays reflect good oversight illustrates the value of conducting qualitative interviews. Through the interview process, it was found that one study court coordinates accounting reviews with review investigations. Simultaneous submissions of the two reports make it easier to spot anomalies in the filing. For instance, if an examiner of the accounting notices a large expenditure for clothes, he or she may then ask the investigator to confirm the purchase at the investigation review. Coordination of mandated reviews may result in scheduling the accounting outside of the statutory timeframe and/or a delay in performing the mandated investigation review, but may better serve to protect the conservatee's interest.

In another study court, the judicial officer regularly grants continuances for accountings if the conservator contacts the court and provides a reasonable basis for the extension. The reason behind this practice is the court's belief that a strong working relation between the court and the conservator better serves the need of the conservatee. The corollary to this accommodation, however, is the court does not hesitate to issue an Order to Show Cause for Removal of the Conservator if the conservator fails to file an accounting without contacting the court for an extension.

The interview process also revealed both the creative use of local resources and specific local challenges on case processing. For example, an active, volunteer mediation panel might assist the court with informal mediations resulting in fewer court hearings; a rural county may have a difficult time performing timely investigations because of weather conditions or the distance an investigator must travel to conduct an interview. These are just a few examples of the qualitative information about local practice variations that supplement the data collected through case file review and provide better understanding of the quality of care oversight in these cases.

*C. Focus Groups on Business Process Evaluation*

Focus groups supply information about individual tasks related to conservatorship case processing as well as the time required to complete each task. The goal of breaking down specific court functions, such as investigations, into individual tasks is two-fold:

1. Define the exact components of an effective practice in order to better facilitate widespread replication; and
2. Estimate the average amount of time necessary to complete an effective practice.

In addition, the focus groups explore variations in practice. Twelve courts were selected to participate in the focus group segment of the Conservatorship study, representing a variety of sizes and practices from which to garner a wide array of operations and local considerations. These courts will participate in two focus groups: one to determine tasks and time estimates; another to discuss operations and effective practices.

In preparation for the focus groups, the Office of Court Research sent out two data collection instruments. The first went to all courts in California and asked a number of questions about staffing levels and staff utilization. Primarily, it inquired into how many full-time staff each court has dedicated to conservatorship case processing and exactly what these staff members do.

In addition to the staffing questions, the courts were asked to identify operational areas in which the courts excel, as well as areas that they find challenging. This qualitative information serves dual purposes. First, it will be a resource when developing implementation strategies. Second, it alerted us to practices worthy of further exploration in the focus group time study. For instance, it appeared that courts with professional staff - investigators with Masters' degrees in social work or 5 years plus investigation experience - who performed reviews tended to be more thorough in their evaluations, but also took much longer than average to perform them.

*a. Time Study*

The staffing information gathered in the first survey was used to develop the second data collection instrument: a questionnaire designed to capture a detailed picture of all of the tasks performed in conservatorship case processing, including clerical, as well as time estimates for each task. The second instrument was sent to the twelve courts participating in the focus groups.

The median time per task was calculated based on court responses to the survey. This information was fed back to court staff for use as a reference in the subsequent focus group session. The Office of Court Research then brought together representatives from the twelve courts to discuss the reasonableness of the median times and make adjustments based on the consensus of the participants. This focus group discussion yielded a court-informed estimate of the time that goes into processing and management of conservatorship cases. This will be essential in later stages of the study when determining a more appropriate budget allocation for this case type.

*b. Local Operations Assessment*

The second focus group session on local operations is conducted in a conference call. The purpose of the conference call with focus group participants is to discuss variations in local practices and operations. This is necessary for several reasons.
Throughout the California judicial system, courts have developed novel policies and aggressive oversight practices. In defining performance standards, the most efficient strategy is to evaluate these models and identify hallmarks common to all or most of the variant county structures. Practices must then be broken down into operational components to facilitate implementation in other courts. The uniqueness of individual court operations is unlikely to result in identical replication elsewhere. However, by breaking down best practices into specific operational components, courts can better identify how to implement the pieces within their own operations to maximize performance and achieve a higher level of service.

Operational assessment of this kind also reveals innovations that cannot be replicated in all courts, but nonetheless effectively protect due process rights. For instance, one court relies on a pool of volunteer probate attorneys to advocate on behalf of the conservatee in contested matters. This court did not have the resources to appoint counsel in every situation, so it developed an external resource to provide this service outside of the court budget. This court's novel practice is feasible because the court is located in a metropolitan area with a cooperative local bar. On the other hand, smaller courts have found it feasible to draw upon already existing public agencies for assistance, a practice would be more difficult to implement in larger metropolitan areas.

Issues surrounding feasibility of implementation must be addressed when assessing which practices should be incorporated into specific performance standards, including recognizing implementation alternatives that will sufficiently satisfy the standard. Performance standards should not be interpreted to mean an inflexible set of procedures, and the use of focus groups can ensure that a proper balance is achieved.

**II. Courts require adequate resources in order to improve performance in processing conservatorship cases**.

It is always difficult to strike an acceptable balance between what should be done and what can be done. Available resources are a significant factor that will limit what is practicable in each court. When assessing what is workable, it is important to know the costs associated with the proposed changes in practice and procedure. The California court system is no stranger to research related to resource allocation.

With the advent of state funding of the trial courts in 1998, it became necessary for the California State Judiciary to address inequities resulting from the legacy of local funding. The Office of Court Research developed workload measures that provide a common methodology to measure both judicial and non-judicial workload in every court. Evaluation of trial court expenditures and filings data revealed that aggregate filings in the trial courts positively correlate with expenditures. This relationship provided the

foundation upon which to develop case weights that distinguish among case types that have different case processing workload requirements. These case weights were then applied to the filings data reported from each court and used as an allocation tool as branch leaders appraised the resource needs of the individual courts.

While this study, entitled the Resource Allocation Study, measured workload in the courts on the basis of current practice, from inception the Office of Court Research intended to expand the model to evaluate resource and staffing necessary for what courts should be doing to provide a higher level of service to the public. The Conservatorship Performance Study is one of a number of studies that the judiciary is undertaking to identify measures of quality that the courts should achieve, and specifying the resources necessary to reach these benchmarks.

The Conservatorship Performance Study uses the methodology developed in the Resource Allocation Study. As discussed above, staff representatives from twelve study courts were asked to consider tasks involved with conservatorship case processing, providing both time and frequency estimates for each task, as well as a breakdown of tasks by staff positions—clerical staff, examiners, attorneys, and investigators. The number of tasks detailed for the Conservatorship Performance Study exceeds the number collected in the original Resource Allocation Study model.

Specifically, the Conservatorship Performance Study analyses includes both the heightened requirements of the newly passed California laws, as well as uncodified practices that the courts identified as beneficial to ensuring the protection of adults in conservatorships. For instance, courts are currently required to interview only the proposed conservatee prior to establishment. The new laws require interviewing the petitioner (proposed conservator), as well as family members. In the Conservatorship Performance Study, investigator work is broken down into discreet sub-tasks including 'Planning and scheduling', 'Interviews', 'Preparing a report', 'Preparing probate notes', and 'Court attendance'. The expanded task list will allow the Office of Court Research to increase processing time and/or frequency rates based on individual statutory changes and practice recommendations from the courts. The expanded performance study will yield resource analysis of the "as-is" model of conservatorship case processing now, as well as predict staff necessary to implement the what "should be" performance standard for processing of this case type.

**III. Consistent collection of appropriate data on a case-by-case and court-wide basis will allow for internal and system-wide audits to evaluate the reasonableness and success of proposed performance standards.**

Upon completion of the study, Office of Court Research will report on the findings and make recommendations regarding performance standards in conservatorship case processing to the Judicial Council and the California Legislature. Should the Council decide to establish performance standards, it will be necessary to conduct periodic evaluations to evaluate how well the courts are implementing the standards. Evaluation of practice models requires collection of informative and properly defined data elements

regarding baseline caseload information, as well as internal case events. Availability of reliable data from this case type is essential when doing any evaluation.

*A. Baseline Data for System-wide Oversight*

First, it is essential to collect baseline data. On-going evaluation of the conservatorship system will, at minimum, begin with increasing the availability of descriptive baseline data. This necessitates the accurate collection of information such as, but not limited to:

1. The number of conservatorships currently under the court's jurisdiction,
2. The number of petitions for conservatorships and temporary conservatorship filed each year,
3. The number of petitions for conservatorships and temporary conservatorship granted each year, and
4. The number of conservatorships that terminate each year.

This type of baseline information is necessary to simply gauge the scope of the courts' workload, as well as to track changes in filing trends that will affect the courts. It also assists in identifying courts that are reporting anomalous numbers which may indicate deviation from the implemented models and standards. This will be useful in flagging courts that may need to go through a further detailed self-audit of internal operations.

In addition, a long-term reliable data collection system will allow for forecasting filing trends, expected court clearance rates, and caseload growth rates, among other things.

The lack of informative baseline data elements for conservatorship cases may be attributable to the unique nature of the case. Generally these cases cannot be evaluated using traditionally collected performance indicators useful for other case types. For example, "time to disposition" and "case age" are useful as proxies to evaluate efficiency of court performance in case types such as torts where a speedy disposition may be critical to offset further loss. However, this information is much less valuable for evaluating conservatorship case processing since a conservatorship is governed by the conservatee's need.

Thus, it will be necessary to design a statistical information system tailored to the specific demands of this case type, with the identified hallmarks of an effective performance standard in mind. This would decrease definitional confusion and increase the likelihood of reliable reporting.

*B. Diagnostic Data Tools for Individual Courts*

Individual courts must also have a means to periodically run self-audits of their internal operations. This type of self-audit will allow the court to analyze operations on a more detailed, case-by-case basis.

The Conservatorship Performance Study aims to identify relationships between internal case events that indicate an effective protective process. At the outset of the study, the Office of Court Research found that individual, discreet data elements within a case were not especially helpful for assessing the quality of performance in conservatorship case processing. For instance, a raw tally of the number of investigations, accountings, and petitions does little to inform the court about anything other than workload associated with a typical case. It does not speak to whether court operations are effectively protecting the conservatee. It became apparent that the proper diagnostic tool was an analysis of case events in relation to one another.

In the course of the statutory analysis and case file review, relationships became apparent between case events and court response that indicated effective case management and court oversight. As discussed above, conservatorships often involved the sale of real property, which infuses a large sum of money into the estate. In response, the court should soon after increase the conservator's bond requirement to protect these newly liquid assets from possible financial abuse. If the court has a means to properly collect these data elements, they can then query their own case management systems and calculate the frequency at which these events and filings happen together, on average. The information is useful as a diagnostic tool to assess the court's level of due process protection in circumstances that open the conservatee to possible financial abuse. It will also highlight an area for improvement should a court find that their operations are under-performing in this area.

Similar bundles of data may serve to identify effective protection of the conservatee from personal abuse. A conservator often files a Petition for Exclusive Medical Authority during the life of the conservatorship. This confers the power to make all medical decisions on behalf of the conservatee. The corollary to the granting of this petition is that the conservatee loses the ability to direct his or her medical care. The consequences of this petition, therefore, merit close court scrutiny.

The Conservatorship Performance Study revealed several promising practices that ensure the propriety of granting Petitions for Exclusive Medical Authority. At a minimum, these courts require that the conservator file a Capacity Declaration along with the Petition for Medical Authority. The Capacity Declaration is an extensive medical evaluation by the conservatee's physician with a full assessment of the conservatee's capacity to make informed, intelligent medical decisions. Going beyond this outside evaluation, some courts appoint independent counsel to represent the conservatee's interest during the course of the court's decision on the matter. Therefore, this bundle of protective relationships consists of the Petition, the Capacity Declaration, and an Order Appointing Counsel. Again, if these discreet data elements are properly collected in the case management system, courts can run a diagnostic frequency query to assess how often these appear together and, thus, how well they are responding to petitions that have a significant impact on the conservatee's personal rights.

These are just two examples of several relationships the Conservatorship Performance Study has identified that indicate effective protective practice. These are exemplary of the

discreet, informative data elements that will be recommended for inclusion in an updated case management system. These relationships may be unique to the California statutory and court system, but other, similar relationships will be present in court systems throughout the country based on individual statutory schema.

**Conclusion**

The California State Legislature enacted the Omnibus Conservatorship and Guardianship Reform Act of 2006 to provide for additional legal standards and requirements in conservatorship case processing, including more investigations and stricter standards for accountings. These laws, however, do not specify the methods of case processing that will be most effective in achieving the legislative goals of protecting the due process rights and the quality of life of conservatees. It is the role of the judicial branch to provide this direction regarding how to operationalize the spirit and intent of these new laws.

Achieving performance standards that provide the best possible protection of the rights of elderly individuals requires a number of evaluative processes. First, it is important to assess the success of current court practices throughout the system using case file reviews, operations analyses, and interviews with key staff. This identifies several effective and successful models and common hallmarks therein. Focus groups comprised of staff representing diverse courts can then assess (1) whether these identified practices can be effective universally, (2) define the exact components of an effective practice, and (3) provide reliable estimates of time and staff levels necessary to achieve these standards. Finally, consistent collection of appropriate data will allow for internal and court-wide audits to evaluate the reasonableness and success of the implemented performance standards based on these recommendations.

Courts play a crucial role in the lives of the elderly coming under conservatorships, but are limited in how much they can do. Increased funding, staffing, and statutory regulations will not eradicate the abuse of incapacitated adults in the system. Ultimately, the proper care and protection of the elderly is a global, social issue requiring the collaborative attention of social service agencies, non-profits, government, and the community as a whole.

Doris Kastanek, Palm Coast, FL

**Subject:** My Mother Died in 5 Hours Due to Inadequate Health Coverage, Abuse and Neglect

After 3 months in ICU at Orlando Regional Medical Center, my 73 year old mother overcame horrible trauma from a car accident. She had a tracheotomy and feeding tube and we thought that would never change. She was becoming stable and we prepared for her to go to a skilled nursing facility. After 5 days in Colonial Lakes, Winter Garden, where we suspect the care was not adequate; she pulled out her tracheotomy and was sent to Health Central in Ocoee. In the hospital, she was able to breath on her own and was able to talk and start to eat! We were so happy and relieved! She was finally able to eat and drink and talk to her family! After just 4 days the hospital released her to Keystone Health and Rehab in Kissimmee and less than 5 hours later she was 'found on the floor unresponsive'. This was 5 days before Christmas and they have told us nothing about her death. Her care or lack of it was due to health insurance restrictions because they couldn't wait to release her from the hospital (a social worker actually told me she had to 'get my mother out or be in big trouble'). The choices for nursing facilities were terrible because the insurance either turned down our choices or the nursing homes said ‘no’. My mother died because of the lack of ability to pay for the cost of elderly care. How sad this has been for our family and the reality that this goes on all the time is unacceptable. Our elderly are left to fend for themselves and our government does not do enough to ensure their protection. We tried all the recommended methods to choose quality care and used all the resources afforded by the Internet. I tried to be a voice for my mother and it did not matter. I plan to continue voicing and exposing horrible realities that should concern everyone regarding elderly care. Nursing homes have found a way to protect themselves leaving them liable for only 100,000 because they are owned by LLC corporations, yet they bill Medicare and Medicaid without providing adequate care and without regard to the mission of protecting our precious and sometimes helpless seniors. Please, please, please start exposing this horrible reality and spare others this unbearable experience. I know you can help!

Respectively submitted by,
Doris Kastanek

Paul D. LaBounty, Greeley, CO

TO: SPECIAL COMMITTEE ON AGING

FROM: PAUL D. LA BOUNTY

SUBJECT: PROPOSALS TO IMPROVE GUARDIANSHIP FOR THE ELDERLY

DATE: 12/21/2006

CC: N/A

FOLLOWING THIS MEMO ARE 9 PAGES FROM PAUL D. La BOUNTY TO THE SPECIAL COMMITTEE ON AGING REQUESTING PROPOSALS TO IMPROVE GUARDIANSHIP FOR THE ELDERLY.

THANK YOU,
(signed)
PAUL D. La BOUNTY

Intervention in Court-appointed Guardianships

I would like to address the issue of **interpretation of the federally funded Ombudsman Program regulations by various states**. The program is intended to provide intervention in cases of suspected abuse or neglect in long term care facilities in this nation. **Federal regulations state that "all complaints should be investigated, regardless of the source."** Refer to the attached correspondence regarding the Illinois interpretation of the program's regulations.

I am an only child who lost his Mother in probate court in Illinois. Mother was forced to enter long term care when my father suffered a heart attack. Upon admission, a "Do Not Resuscitate" order was placed on Mother illegally and witnessed by long term care staff. It was signed by my father who did **not** have Power of Attorney, was in a critical state of health and had a VA mental health disability rated at 50% since WWII. In addition, he had survived cancer of the ear extending into the sinus cavities along with multiple heart attacks in the last two years of life. After admission, Mother was drugged with the anti-psychotic, Zyprexa and "given" the "right" to refuse to eat. Zyprexa is not recommended for off-label use with elderly dementia. It has been shown to cause increased rate of stroke and death among that patient population. Mother entered the facility walking, talking, eating and going to the bathroom by herself. She ate breakfast out daily with friends who enjoyed her company. While Mother did have early stage dementia as documented by facility records, she enjoyed walking with a companion and was able to share affection with friends and family.

In the first five weeks of institutionalization, Mother lost 20# and **all** abilities (walking, talking, eating, drinking and control of bowels) with no intervening treatment. After complaining to friends of sexual threats which are documented as mental aberrations, her hospital admission for rehydration documents a pubic area wound. It was

not investigated but local police verified that they have responded to the facility previously regarding sexual assaults. Illinois Department of Public Health found another complaint of sexual assault in the same facility "valid" but chose not to cite a finding of violation.

Mother never recovered her abilities and was not able to speak on her own behalf at the guardianship hearing. I contacted the guardian ad litum , Judge, every possible bureaucracy, including the Illinois Human Rights Authority, and the Ombudsman Program pleading for a 2nd medical opinion. Mother had lost her abilities to speak on her own behalf in the first five weeks of long term care with no intervention. **The federally funded Ombudsman Program is the only agency which allows for quick and timely intervention.** The Human Rights Authority responded after Mother's death two and ½ years after my pleas. The report determined that Mother "entered" the facility with a "DNR" in place. Technically, she did cross the threshold with a "DNR". It was placed on her illegally upon admission from my father's hospital room, (Mother was far from terminal). I received a phone call as I was in the process of purchasing flight tickets to return to Illinois for the care intervention meeting. **Intervention had been cancelled because the court-appointed guardian was "happy with the care".** While guardianship always results in a loss of human rights, care intervention in any case of alleged abuse or neglect should never be sacrificed. Refer to attached correspondence regarding the Illinois interpretation of Ombudsman regulations. **My wealthy Mother was not allowed to receive a second medical opinion or a review of care. She could no longer speak on her own behalf and had no valid spokesperson.** Protection is supposedly the purpose of court-appointed guardianships and the goal of the Ombudsman Program. The court-appointed guardian stood to benefit greatly by her death with the practice of estate conservation. I truly do not know the court-appointed guardian, a half-aunt who I hadn't seen in over forty years. She did not attend either of parent's funerals and has not been cooperative in estate proceedings.

Illinois currently does not have limits on state campaign contributions which allows for political influence by fund raisers. **However, this should not affect federally funded programs designed for protection of vulnerable elderly but there is obviously the potential within state bureaucracies.** It appears the primary owner of the facility has been cited for improper federal campaign contributions in the past. Senator Grassley has recognized the oversight system of long term care is a national problem stating the system is broken. He has also recognized there is demonstration of need for judicial oversight. The Federal Nursing Home Reform Act, while still on the books as valid legislation, is no longer enforced to any reasonable degree. Some probate courts in this country do not provide court recorders to document the bartering of human lives. **With the current situation of oversight in dir need of examination, the importance of a valid Ombudsman Program cannot be stressed enough.**

**Ombudsman records are denied access by families due to "confidentiality"**. As an only child and designated executor, I have obtained medical records but the Ombudsman records are denied. **I am currently attempting to subpoena the records**. Mother's guardianship was a nightmare from the financial aspect, also. Funds are still missing and despite Illinois Probate Code clearly allowing for discovery in cases of suspect financial abuse of the vulnerable elderly, it does not happen automatically or easily. Illinois has long been a tolerant home for conspiracy and racketeering. It is

approaching four years since my father's death and I originally reported files missing when I entered the home to prepare for his funeral, including tax returns, wills, life insurance policies, a trust document, banking documentation and a large CD which my father showed me five weeks before his death. I am continuing to research the missing funds and Mother's neglect.

I agreed to a Bank & Trust as financial guardian but was not told that their attorney also represented the court-appointed guardian of the person. Mother was failed, not only did she not receive a second opinion, any benefit from either the testamentary trust or the living trust, she did not receive the spousal allowance granted by Illinois law. The Bank & Trust, as financial guardian allowed my father's medical and estate expense to be paid from Mother's guardianship funds while the attorney billed to exhaust Father's estate. **Guardianships are too fast and much to permanent with apparently no resource for intervention, even in long term care facilities.**

**Paul D. La Bounty**

Lane Council of Governments, Senior & Disabled Services, Eugene, OR

I have spearheaded three, collaborative, research projects on this topic for Lane County during the past 10 years. In each of the studies, public guardianship was viewed as an action of last resort, to be utilized only after all less restrictive alternatives have been ruled out. There remains overwhelming consensus among Lane County agencies that a public guardianship program is needed in our county to protect our most vulnerable residents. My studies further suggests that many other counties share similar concerns.

The research indicates that public guardianship programs provide more oversight and program longevity than those of private guardianship programs. As you may know, there is currently very little guardianship oversight in Oregon or the nation for that matter. At a minimum, program oversight should be established statewide.

Another need which has remained constant during the 10 years of research is the need for program revenue. Without a steady revenue source, it is difficult to start up and or sustain guardianship programs.

I'm attaching a copy of the draft of our most recent research project, as well as, a copy of a previous request seeking the State of Oregon to authorize a blue ribbon commission to study guardianship oversight.-- I hope you can overlook the length of the recent draft study-- and glean useful information from it.

I thank you for seeking input on a subject which affects many Oregonians. Please feel free to contact me should you have any questions regarding the attached material. I would also like to volunteer myself and Becky Strickland, S&DS Adult Protective Supervisor, for any workgroups you might establish on this topic in the future.

Patti Little
Contract Manager/Planner
Senior & Disabled Services, a division of Lane Council of Governments
Eugene, OR

S. Beth Miller

January 11, 2007

Dear Committee on Aging:

I am writing this letter to you because I perceive an urgency for legislation to mandate when guardianships should or should not be overturned. Currently, whether or not a Guardianship should be overturned is strictly left up to the judge's own opinion!

My mother was hospitalized in a Tulsa, Oklahoma hospital in 2002, and upon discharging her, the doctors said she should go to a nursing home. Every nursing home within the city limits of Tulsa turned my mother down because she had a trach which required suctioning every two hours and because she was on high levels of oxygen which required professional regulation. I was informed by several nursing homes that my mother required respiratory therapists to attend her; therefore, I enrolled my mother in a Medicare program that would place her in a facility that employed respiratory therapists. The medical group assigned to my mother insisted they could find a nursing home outside of Tulsa that would accept my mother and told me that if I did not like the idea of a nursing home that they would arrange to have me removed as my mother's Guardian!

Upon going to court, I explained to the judge that I had enrolled my mother in a specialized facility that would provide respiratory therapists. The judge said she would go along with whatever discharge plan the doctors had and that since I was not in agreement that the adult protection service would now be my mother's Guardian instead of me! When the gavel went down, I realized I would no longer be able to oversee my mother's care and was in a state of shock! I, like most Americans, thought that since I was my mother's daughter, and possessed legal Guardianship, that no one could remove me if I acted in good faith towards my mother.

My mother went to a nursing home and was rushed to the emergency room several times over the first seven days because the trach had not been suctioned properly. The nursing home phoned the emergency number for the adult protection service Guardian numerous times, but there was no reply. On the eighth day at the nursing home, my mother died from suffocation because the trach was not suctioned properly.

The nursing home had to obtain permission from the adult protection service to give me my mother's dead body! The overturning of my Guardianship and my mother's subsequent untimely death were tow of the most horrendous events in my life. I hope you will all concur that the overturning of my Guardianship was totally unwarranted and that a law regulating when Guardianships should or should not be overturned is crucial to the families of the United States.

Cordially and Emphatically Yours,
(signed)
Ms. S. Beth Miller

Multnomah Country Adult Protective Services, Multnomah Country, Oregon

I work for Adult Protective Services in Multnomah County (Portland) and have for many years. There are always ways to improve and problems you observe when you are in the field working on a specific case but there are a few things that arise over and over and those are what I will share with you.

One thing that makes guardianship a burden or an impossibility for many families is the cost. There are many families who would be willing to take on the responsibility for making difficult decisions for their relatives but they simply cannot afford it. A rough figure for the cost of a guardianship in Multnomah County is $3000-$4500, and that is out of reach for many who may already be caring for or supporting a person who needs ongoing assistance. On occasion, there is funding to assist with those costs but it is limited and hard to access. There are many vulnerable and aged persons living in abusive or neglectful situations at least in part because there is no one else who has the authority to intervene.

A second concern is the ability of the court to review those cases that are already approved. The court will review cases as concerns are brought to their attention but I wonder if a routine review would make it more likely that guardians and conservators would be scrupulous in keeping their client's interests at heart.

One final concern is the licensing of professional guardians and conservators. Family members and friends are obviously going to take on this responsibility simply because it's the right thing to do but for those who choose this as a profession, it seems this might be a field where a license, a code of ethics and a professional review board would be useful and appropriate.

Thanks for looking into this issue.

Wendy Hillman
Multnomah County Adult Protective Services

National Academy of Elder Law Attorneys, Inc., Tucson, AZ

Dear Senators Smith and Kohl:

The National Academy of Elder Law Attorneys (NAELA) is a professional association of attorneys dedicated to improving the quality of legal services to the elderly and disabled. Our membership is comprised of over 5,000 attorneys. We are dedicated to solving the problems of older adults, people with disabilities and those who care about them.

Many of our members are involved with guardianship matters in their practices. Our organization has enacted professional aspirations that require the best interests of the client to be central to protective actions. Although recognizing the need for protective action, guardianship is a last resort. Guardianships should be tailored to a person's incapacity while maximizing the person's capacity. A "duty of care" is owed to the incapacitated person.

As the Senate Committee has found, in the United States, "duty of care" can be deficient or abused. Because courts appoint the substitute decision maker, every malfeasance by the substitute in guardianships connects to government action. The federal government does have a compelling role in strengthening and correcting deficiencies in the guardianship system.

NAELA recommends the following:

1. **Congress should fully enact and fund the Elder Justice Act**. The Act combines research, training and advocacy that can enhance protection for vulnerable incapacitated adults. Passage of the Act will strengthen protection to vulnerable populations.

2. **Strengthen court monitoring of guardians**. Monitoring is appropriate regardless of who is the guardian: family member, professional guardian, or agency guardian. Congress and administrative agencies should support and develop multidisciplinary training, uniform and consistent data collection, and enhancement of technological resources for all states.

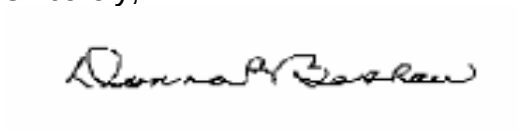
3. **Congress should assist states in enhancing public guardianship services.** When no qualified fiduciary is available states must seek qualified substitute decision makers. State resources are insufficient in fulfilling the need. Congress should assist states in funding independent state agencies, or contracts with private agencies. However, all states receiving such funds

should require the adoption of minimum standards of practice for such guardians by using the National Guardianship Association *Standards of Practice.*

4. **Support the resolution of guardianship jurisdiction issues.** In our mobile society guardianship conflicts extend beyond state borders. This results in costly litigation depleting the incapacitated person's limited resources. NAELA has participated in a national conference to draft a Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act. To be effective, the Act will need to be adopted by all states. The Senate Special Committee on Aging should recognize the importance of the Act and advise policymakers and state legislators of the new model.

Family members, state agencies and courts look to the elder law attorney to ensure justice in cases of abuse, neglect and exploitation. The National Academy of Elder Law Attorneys commends the committee for focusing national attention on the deficiencies of the guardianship system. We look forward to working with the Senate Special Committee on Aging on finding solutions to improve the quality of care to our aging population.

Sincerely,



Donna R. Bashaw, CELA
NAELA President

National Adult Protective Services Association, Springfield, IL

**NAPSA STATEMENT FOR THE**

**U.S. SENATE SPECIAL COMMITTEE ON AGING**

**ON**

**ADULT PROTECTIVE SERVICES AND GUARDIANSHIP**

**DECEMBER 22, 2006**

**Kathleen M. Quinn, Executive Director**
**National Adult Protective Services Association**
**920 Spring Street Suite 1200**
**Springfield, Illinois 62704**

**Organizational Background**

The National Adult Protective Services Association (NAPSA) is a national non-profit organization, formed in 1989, with members in all fifty states, the District of Columbia and Guam. The goal of NAPSA is to strengthen and improve the state and local Adult Protective Services (APS) Programs. APS Programs are responsible for responding to and investigating reports of abuse, neglect and exploitation of elders and adults with disabilities, and protecting and providing services to these victims.

NAPSA enhances the ability of APS Programs to respond effectively through:

- offering the only annual national conference on adult protective services/elder and vulnerable adult abuse,
- providing extensive technical assistance to state and local programs,
- developing, evaluating and presenting numerous training sessions on various aspects of elder abuse and protective services,
- conducting and publishing research on elder abuse and adult protective services
- coordinating with other national organizations to educate their members about the needs of APS clients and programs
- working to promote and fashion appropriate legislation and policies to protect older persons and adults with disabilities.

NAPSA is a partner in the National Center on Elder Abuse (NCEA) funded by the U. S. Administration on Aging.

**APS Clients and the Need for Guardians**

APS clients are by definition either unable to care for themselves, or unable to protect themselves from people harming them. This means that APS clients are very often the adults most in need of guardians, the most likely to be made wards, and the most likely to suffer from the current poorly resourced, organized and monitored guardianship system in most parts of the U.S. It is unacceptable that the legal tool designed to protect persons who cannot protect themselves is so often and so easily used to take advantage of them by the court appointed guardian.

**Concerns Regarding Current Guardianship Practices and Resources**

There are several problems with current guardianship services that have a very serious and deleterious effect on elders and persons with disabilities:

- There is an extreme dearth of responsible persons available and willing to serve as guardians for older persons and persons with disabilities
- There is a lack of agreed upon standards for awarding guardianships; in many cases only very cursory evaluations are done of the prospective ward and of the potential guardian.
- The guardians that do serve are provided very little, or in many cases, no training or guidance on carrying out their responsibilities.
- Guardians are usually very loosely monitored by the courts, making it easy and very low risk for the guardian to financially exploit, abuse and neglect his or her ward.

- Public guardian programs are not available in many areas of the country, and even where they are, they are generally very under-funded compared to the need.
- APS caseworkers are often in the position of trying to find guardians for at risk or abused elders and adults with disabilities who need protection from predators, or who are simply unable to meet even their most basic needs and must have someone to make decisions, not infrequently involving life and death, on their behalf. Finding responsible family members or friends is often impossible, and in some states the APS worker becomes the guardian of last resort because someone must. This, however, creates a clear conflict of interest.

**NAPSA Recommendations**

To provide more effective, essential protection for elders and persons with disabilities, NAPSA recommends the development of national guidelines for guardianship, created and reviewed by a wide variety of legal, social service and health care professionals, including APS, to include:

- Standards for awarding guardianships, based on medical and other criteria that can be applied with some level of consistency in every jurisdiction, and training for probate judges on applying those standards.
- The development and dissemination of training and informational materials for guardians to inform them of their responsibilities to the ward, including recommendations for handling and accounting for the ward's funds, for making medical, placement and end of life decisions, for the minimum number of times the guardian should visit the ward, etc.

- A comprehensive, national plan for the development of adequate guardianship services in every locale.
- National guidelines for courts on developing and implementing workable systems to monitor the actions of guardians and to hold them accountable.

**Conclusion**

These recommendations are neither easy nor inexpensive. With millions of Baby Boomers moving into their vulnerable years, however, and millions more persons with disabilities at risk, it is urgent that the federal government address the lack of desperately needed guardianship services, and the poor quality of many of the services that are available.

As the system of last resort for vulnerable adults, Adult Protective Services Programs needs to be included in the development and implementation of a national initiative to address guardianship services. NAPSA is more than willing to participate and lend APS expertise to this effort.

NAPSA also wants to commend the Senate Special Committee on Aging and the leadership of Senators Gordon Smith and Herb Kohl on addressing the difficult, complex but extremely important issue of guardianship, and for the opportunity to submit this statement.

National Association to STOP Guardian Abuse, Thousand Oaks, CA; Beech Grove, IN; Brighton, MA

## PROPOSAL TO IMPROVE GUARDIANSHIP FOR THE ELDERLY

To The Honorable Chairman and Committee Members:

This proposal is respectfully submitted by NASGA, the National Association to Stop Guardian Abuse. I am writing on behalf of my organization to request consideration of NASGA'S proposed reforms that our organization has extensively studied in the course of our advocacy efforts.

### ***The interest of NASGA***

NASGA was formed this year as a national advocacy and self-help civil rights organization dedicated to the protection of elderly and disabled adults from exploitation by unlawful and abusive court-appointed fiduciaries in private and public guardianship/conservatorship care. NASGA is based in California with offices in Indiana and Massachusetts. Our membership is comprised of guardianship victims and their families from more than 17 states across the country who have watched their loved ones suffer as they were exploited and injured while under guardianship control. NASGA encourages reform of the guardianship and conservatorship legal system and seeks to raise awareness of the current epidemic of abuse and exploitation in senior and adult dependent care. New theories of law are in most cases not needed. All that we recommend is to revitalize traditional and sacred forms that have become eroded in recent times, with tragic results.

NASGA members as victims of the present conservatorship system have direct firsthand and very personal knowledge of the inexcusable ills of the present guardianship system with insights into what went wrong and how it could have been corrected we wish to share with this committee. It is hard for the average person to comprehend the incredible influence and power that may be exerted by an entrenched public guardian on the lives of a ward or his family, until they experience it themselves. That is why our experience is valuable, and why the members of this committee will hear a radically different viewpoint from our organization than of others testifying before you.

### ***Characteristics of Guardianship Fraud***

NASGA has documented disturbingly similar patterns of fraud, abuse of both elders and incapacitated adults in hundreds of cases across the country with alarming regularity, still largely underreported in the media. NASGA is working to correct this lack of awareness. Some of the features of this systematic abuse that are almost always present are:

1. financial exploitation by the private or public conservator,

2. elimination of family members from their protective roles and maligning by public or private guardians of family members to discredit, defame, stigmatize and neutralize anyone who tries to intervene or interfere to stop the abuse,

3. removal of the ward from his or her home, usually to place in secured nursing facilities where they can become virtual prisoners and chattel of the guardians; the Ward's life, property and liberty is under the complete control of the court appointed guardian,

4. extreme double standards or institutional bias against family vs. guardian, i.e., the family can do no right - the guardian or state can do no wrong, in the eyes of the courts,

5. isolation of the ward from his or her family by misuse of probate court processes, often including denial of telephone or writing privileges,

6. all of the ward's assets and property are converted to cash, and income taken and sold to benefit the guardian and their allies including attorneys, judges, caregivers, nursing home operators and others,

7. abuse and neglect often lead to death of the ward through neglect when the ward's money runs out,

8. imposition of burdensome, unnecessary and restrictive supervised visitation against the will of the ward or no contact requirements by guardians - interfering with relationships between lifelong intimate family members,

9. unscrupulous retaliation against the victims - supposedly in the ward's "best interests", both family and wards, for attempts to expose abuse or interfere to aid the abused wards

10. victimization thereby spreads from the ward to their families, incapacitating them in futile legal struggles for years, draining any remaining assets and causing years of emotional distress to everyone related to the victim, including children and grandchildren.

Recent groundbreaking investigative studies in the LA Times four-part series, "Guardians for Profit"[1], as well as a new AARP study "Who is Guarding the Guardians"[2] and many others, have recently drawn public attention to the problems of abuse by private and public conservators leading to increased legislative action and several criminal indictments, but it is only a band-aid resolution to a bleeding artery problem. NASGA has documented the same *modus operandi* of this national nightmare, which is posted on our website: http://stopguardianabuse.org.

In many states, there is no licensing control, oversight or penalties for statutory violations other than the probate courts, which have proven ineffective in managing and overseeing these conservatorship cases[3]. Recent reforms in California through the passage of a series of seven bills in 2006[4], spurred by the LA Times series[5] and the Probate ConservatorshipTask Force, are certainly starting in the right direction for the future here in California. NASGA believes from our surveys there is much more to do, and it is premature to congratulate ourselves on the legislation. SB 1550, for example, can do little to aid the widespread victims of *public* conservators that we are documenting here and now. No one can license them, because they *are* the system, and yet public conservators are key abusers. These public guardians are, in too many cases, more dangerous to elders and dependent adults than private ones, because they can entrench themselves to a greater degree in our judicial system and state agencies, thereby evading review. It is these public guardians that we wish to devote the majority of our attention to, because of their relative lack of exposure to date.

NASGA seeks to raise public awareness of this problem and is making significant inroads. We applaud with great interest the recent exposures of scandals in the public conservator's office in Ventura County, bringing indictments by the Grand Jury and prosecutions by the District Attorney[6] for fraud and theft, which have helped bring increasing public attention to underreported problems in the *public* sector. District Attorneys are starting to take note of these crimes. We welcome this long-overdue attention needed to spur even more effective conservatorship reforms.

White-collar criminals have found and ingratiated their way into the weak chinks in our guardianship laws and courts. Guardianship fraud is to the 2000's what the Savings and Loan scandals were to the 1980's. The racket of wrongly institutionalizing wealthy elderly females is incredibly lucrative by itself, but our organization is now receiving unverified reports that these guardianships are offering disturbing new opportunities to criminals for a wide spectrum of white-collar crime including identity-theft, embezzlement, money laundering, compromising of public officials, and shady escrow and real estate deals, because of the inability of inquirers to exert oversight due to alleged privacy concerns, isolation of the conservatee and control of records. Hollywood's 1974 semi-fictional depiction in "Chinatown", of private detective Jake Gitte's (Jack Nicholson's character) discovery that the elderly residents of a nursing home were being innocently exploited to cover a shady land and water deal in the 1930's by making them proxy owners of San Fernando Valley, has a potential modern real-life manifestation. By positioning a few team members at strategic target points in each local public network, we have found it is possible for them to assure their desired outcome. Their team always follows the same profile as the abuse *prevention* team in many venues. It includes elder abuse specialists in law enforcement, public defenders, judges, protective service workers, district attorneys, public guardians, nursing home operators, and psychologists. This

would explain the entrenched resistance to releasing the wards from their involuntary incarceration to their families, because of risk of exposure.

## ***The problem of due process***

Guardianship or conservatorship is the most profound deprivation of civil liberties that our society tolerates and inflicts on members of our citizenry. It is a problem of constitutional proportions[7]. Its use has been tragically abused, under circumstances affecting too many numbers of elders, disabled adults and minor children. While certainly well intended and necessary in many cases, its abuses have grown to proportions resembling in some ways an organized criminal enterprise of wide reaching proportions. Not since the end of slavery or the Thirteenth Amendment in the 1860's has there been a similar lawful delegation of the rights of one individual over another. Wrongful deprivation of personal liberty in a statist notion of individual rights violates our most fundamental precepts as a nation that our families and we have striven for over history. Therefore, NASGA's first concern is to keep unnecessary involuntary commitments and conservatorships difficult and rare.

NASGA's victims have documented thousands of cases in which our most affluent and able-bodied elders, pillars of our communities, have been wrongly deprived of all their liberties.

The average victim of a conservatorship is not a disadvantaged, disabled or destitute member of our society, ones that most deserve the protections that a conservatorship is intended to provide. They are some of the most valued members of our society, ones that have worked the hardest and contributed most, lived the American dream and done everything our society encourages them to do. They have scrimped and saved for their retirement, served as stewards of the hard won wealth of their families, and striven to avoid becoming a burden on society in their later years. In many cases they have followed all the rules, filing powers of attorneys and living wills with relatives, to prevent their falling prey. In case after case, we find lucid and independent able bodied elders who are merely elderly being stereotyped as requiring a conservator, based on very squishy evidence, their most basic rights crushed by self-anointed protectors who have very little concept of independence and individualism.

We are endangered by our supposed protectors. As Justice Brandeis cautioned three quarters of a century ago, "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." (*Olmstead v. United States* (1928) 277 U.S. 438, 479 [72 L.Ed. 944, 957, 48 S.Ct. 564, 66 A.L.R. 376] (dis. opn. of Brandeis, J.).)

But the motivation for guardianship in most cases is not really beneficent. The veil of beneficence is easily penetrated as an artifice intended to cover true pecuniary purposes. Conservatees and wards are not abandoned persons without family to care for them. On the contrary, those less fortunate individuals who really would benefit from conservatorship are more frequently neglected on the streets. The usual victim of a conservatorship is one with something of value to steal, with an extended family able to care for them. Family members are usually shunted aside and ignored in our courts as caregivers, in favor of the public guardians, in direct contradiction to clearly stated purposes of our statutory safeguards. Victims are also some of our most vulnerable members of society, the handicapped, developmentally disabled and dependent adults, who have loving and caring families.

As reported in the Oakland Tribune[8], "San Mateo County Judge Rosemary Pfeiffer said she grants most conservatorships that come before her because, by that time, cases have been fully vetted to determine that such a drastic step is necessary". This quoted statement by Judge Pfeiffer represents a triumph of expediency over accuracy, of Kafkaesque trial-by-bureaucracy over trial-by-jury. This represents a fundamental problem of constitutional proportions, requiring sweeping legal reforms. Our courts have become unfettered from any semblance of their Constitutional moorings, and have drifted away due to the lack of Congressional leadership. Our Constitution was ingeniously designed out of centuries of experience to avoid just this sort of deprivation of liberty and we erode it at our peril. We must return to its bedrock principles before we and our families all become victims in our waning years, yielding to a statist notion of our democracy. NASGA's most important proposed reform is to severely reduce the frequency of wrongful conservatorships from the first instance.

In a blink of an eye, probate courts routinely strip elderly and disabled victims for the rest of their lives of their liberty, their savings and their families, with alarming regularity. Too many times, a wealthy and absolutely mentally competent person like Helen Ferrari who one of our members had the privilege of meeting in secret, in the example featured by this *Tribune* article, winds up being imprisoned in a locked nursing home ward, abused, denied contacts with her most cherished family members, debilitated, pillaged and robbed of her assets and eventually killed through neglect and abuse.

## ***Sixth Amendment Rights***

Our constitution provides for two systems of justice, civil and criminal. Criminal defendants have the full panoply of protection of the Sixth Amendment; civil defendants do not. The Sixth Amendment guarantees all criminal defendants the right to effective counsel, right to a jury of their peers, right to confrontation and cross examination of witnesses[9], free transcripts on appeal, unanimous jury verdict and a standard of proof beyond a reasonable doubt.

Our judicial system has toyed from time to time with the noteworthy theory that civil detainees require the same constitutional protections as criminal defendants, since both face sometimes-permanent loss of their liberty. In California, since the high water mark of *Conservatorship of Roulet*, (1979) 590 P.2d 1 (Cal. 1979), holding that civil detainees deserved to have the same jury rights as a criminal defendants, rights of those facing civil commitment have eroded (33 USFLR 59, *Eroding Roulet: How the Courts Ignore a Landmark In California*, by Paul Bernstein**,** University of San Francisco Law Review, Fall 1998). Our Supreme Court, in *In re Gault* 387 U.S. 1 (1967), and *In re Winship*, 397 U.S. 358 (1970), held to similar principles. *"…commitment is a deprivation of liberty. It is incarceration against one's will, whether it is called 'criminal' or 'civil." (Gault, supra, at 50).* In *Waltz v. Zumwalt*, 167 Cal.App.3d 835, 213 Cal.Rptr. 529, Cal.App. (4 Dist.,1985), California's 4th Appellate District held indigent civil detainees had the same rights as an indigent criminal defendants to a right to a free transcript on appeal.

But the application of these theories has been intermittent, due to the lack of clear congressional direction. *Crawford v Washington's*[9] reinvigorated Sixth Amendment rights of confrontation of witnesses, so crucial in avoiding hearsay errors and protecting due process safeguards, while now invokable for criminal proceedings, are still not available to persons facing total loss of liberty in *civil* commitment proceedings[10]. In the context of wrongful civil commitment it means that a person can be committed simply on the strength of a psychologist's or social worker's report, without that expert having to appear before a jury for confrontation and cross examination by the defendant or allegedly incompetent person. It is impossible to cross-examine a report when probate courts allow a written report to trump live testimony.

In *Crawford*, the Supreme Court further failed by mistakenly leaving untouched certain kinds of hearsay from the new confrontation rule, the most important of which for guardianship purposes is the business records hearsay rule (in California, Cal. Evid. C. §1270), which is considered to include hospital and medical records. The mistaken assumption in the Crawford opinion was that business records should be above suspicion due to underpinning by the indicia of presumed reliability rule of the Court's *former* holding in *Ohio v. Roberts,* 448 U.S. 56, 62-66 (1980) overruled by *Crawford.*

Thus even the Supreme Court's 2004 watershed holding in *Crawford* still will not extend to elders and dependent adults detained in civil proceedings, and erroneous probate commitments will continue to prevail on the strength of unreliable medical or psychological record evidence. This bears directly on these types of cases, because we find medical records just as likely to contain unqualified opinion, confusion and tainted hearsay as any other kind of evidence, contrary to the naive dicta of *Crawford*. In the majority of the cases we documented, the wrongful deprivation of liberty would most likely have been avoided by application of Sixth Amendment rights to due process, which were

denied by the Courts. Congress must express its legislative intent clearly and unequivocally to reform constitutional safeguards, consistent with the full intent of the Sixth Amendment, for *all* persons facing loss of personal liberty.

***Fourth Amendment Rights***

The right to security against unreasonable personal seizures has also been breached in many of the cases we have studied. Allegedly incapacitated persons are often merely swept up off the streets because of frivolous causes, and because of insidious ageist prejudice they face from younger generations, which all elders experience eventually.

One elderly retired man in San Jose was seized merely because he nodded off on a sunny day on a park bench, and was thus considered homeless and incapable of caring for himself. On the contrary, he owned a nice home of his own which he had labored for many years to pay off. The public guardian, while at the same time inconsistently alleging the man was indigent, took possession of the house supposedly to pay for their services and legal fees, and brought in several other conservatees to live with him as roommates in his former home. The conservatorship proceeding was merely a formality that took place in five minutes in probate court. His family and friends are now afraid to go visit him at his house for fear the same thing will happen to them; and as a result he can no longer see his family.

A number of others of our members have had their elderly relatives involuntarily abducted from their home state, or had to defend them from agents of protective services operating in other states, like the early bounty hunters of runaway slaves, to be placed in secure nursing homes and isolated from their families against their and their family's interests.

Relatives that attempt to rescue their family members from abusive or exploitive incarceration at nursing homes often face federal kidnapping charges for fleeing across state lines, even though the relative desperately wishes to leave with them because she wants and needs to be rescued from an abusive situation. This is not right. An elderly man in Michigan recently was reported in the news as being arrested for rescuing his wife in Florida from a nursing home in which she did not want to be. Ordinarily, kidnapping under federal law means taking someone somewhere he/she does not want to go. Federal codes must be clarified to settle this distinction.

Probable cause, the Fourth Amendment and the right to privacy including the Ninth Amendment right to simply be left alone[11] were casulties. Strong Congressional leadership to make sweeping reforms in our laws to restore constitutional safeguards to our courts is the only meaningful remedy, to prevent guardianship abuse in the first place.

***Revitalize Habeas Corpus for Civil Commitment Cases***

Once a ward is conserved by state agents, the problem of getting him/her released can be massive. The ancient and honorable writ of habeas corpus, (28 U.S.C. §2254) intended to gain release of all persons whose liberty has been wrongfully removed, has become for all purposes a dead letter for civil commitment proceedings[12], especially in the wake of AEDPA. In enacting AEDPA, Congress only neglected to consider the rights of persons other than terrorists and death row inmates, intending to "reform" Habeas Corpus in light of perceived abuses and repeated petitions. Petitions to release wrongly incarcerated victims of guardians have to submit to the same harsh procedures and rules as death row convicts now. This makes it almost impossible to address custody issues by all persons subject to wrongful deprivation of their liberty, the historic purpose of Habeas Corpus. In case after case we have found the federal courts unwilling to accept jurisdiction over conservatorship cases. In addition, since *Browne v. Superior Court of San Francisco County,* 43 Cal.App.3d 758 (1940), generations of habeas courts have upheld the principle that the jurisdiction over habeas review lies with the probate courts that conserved the person in the first place, even if those courts are infected with local and institutional bias, or had abandoned their supervisory jurisdiction, as normally happens. Thus to be freed, a ward would have to return to the very court where wrongfully conserved in the first place - making it an uphill battle. One advantage of civil review is that it extends venue provisions to other courts, for example, where some or all of the defendants reside. Freeing Habeas safeguards from local probate courts and their local influences by widening the scope of venue would give a new life to this Great Writ.

***Draining the Money Pond***

Guardianship fraud is an immensely lucrative racket, leading to a feeding frenzy of lawyers, judges, psychologists, and nursing home operators. This is what keeps it going. The money lure needs to be drained from the public system. One great way to chill the attraction is to put caps on fees for probate attorneys and others involved in guardianships, as they do in Kansas[13], by limiting attorneys fees for conservatorships to $20.

**Conclusion**

Respectfully submitted,

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Robin C. Westmiller, President
National Association to Stop Guardian Abuse

ENDNOTES:

[1] "Guardians for Profit," Los Angeles Times, by Robin Fields, Evelyn Larrubia and Jack Leonard, four part series, November 13-16, 2005.

[2] "Guardianship Monitoring: A National Survey of Court Practices," AARP Report #2006-14, June 2006, by
Naomi Karp, AARP Public Policy Institute, and Erica Wood, ABA Commission on Law and Aging. See also press release, "In Brief: Guardianship Monitoring: A National Survey of Court Practices, Research Report," Naomi Karp, ABA Commission on Law and Aging, Erica F. Wood, American Bar Association, June 2006, Public Policy Institute, AARP, 601 E Street, NW, Washington, DC 20049, available online at
http://www.aarp.org/research/legal/guardianships/inb126_guardianship.html.
[3] "Justice Sleeps While Seniors Suffer," Los Angeles Times, by Robin Fields, Evelyn Larrubia and Jack Leonard, November 14, 2005.
[4] California Assembly Bill, AB 1363 (Jones) (private conservator oversight), AB 2494 (Ridley-Thomas), AB 3048 (Dymally), : Omnibus Conservatorship and Guardianship Reform, California Senate Bills; SB 1116 (Scott) (sale of homes), SB 1550 (Figueroa) (private licensing), SB 1716 (Bowen) (court review), AB 2836 (Karnette) (fire extinguishers).
[5] "Task Force Urges Reform of State's Guardian System," Los Angeles Times, Jack Leonard, February 4, 2006, "Conservator Panel Will Hear From the Public," Los Angeles Times, Robin Fields, March 17, 2006, http://www.latimes.com/news/local/la-me-conservator17mar17,0,6642323.story
[6] News Release by Ventura County Office of the District Attorney, November 20, 2006, Release No. 06-115, available online at http://da.countyofventura.org/06-115.htm.
[7] 5 Elder L.J. 75, "The Elderly in Guardianship: A Crisis of Constitutional Proportions", by Mark D. Andrews, Elder Law Journal, Spring 1997.
[8] "Who will make decisions for you when you are old", by Laura Ernde, Oakland Tribune, June 22, 2006.
[9] Recently revitalized by the Supreme Court in *Crawford v. Washington, 541 U.S. 36* (2004).
[10] *Adjusting to Crawford: High Court Decision Restores Confrontation Clause Protection, Crawford v. Washington, "* Criminal Justice Summer, 2004 Feature, Richard D. Friedman, 19 SUM CRIM JUST, [11] *Griswold v. Connecticut*, 381 U.S. 479 (1965).
[12] *The Continuing Diminished Availability of Federal Habeas Corpus Review to Challenge State Court Judgments: Lehman v. Lycoming County Children's Services Agency*", Ira P. Robbins and Susan M. Newell, 33 Am. U. L. Rev. 271 (1984)See *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965)
[13] Elder Abuse - Financial Exploitation by a Conservator", Dru Sampson, J.D. Kansas, May 1996

Dear Senate Special Committee on Aging

While I applaud Senator Smith and Senator Kohl's diligence in requesting proposals to improve the current disastrous guardianship system, the committee hearing on September 7, 2006 was a complete farce. With the exception of one lone voice, Carol Scott of Missouri, who was more ridiculed over the pronunciation of her state's name than taken seriously by the members of your committee, the testimony given was filled with rose-colored rhetoric. The Senate Special Committee on Aging should be listening to the voices of the victims and their families, and not those who are committing the very atrocities we're trying to stop.

If anyone who didn't know the reality of this nightmare first hand listened to and believed the testimony given at this hearing, they would think that Florida has solved all the problems with their guardianship programs, New York has the situation well in control, guardians have a difficult job which will only be solved by government financial subsidies and except for a few minor incidences here and there, guardianships are the "final solution" to the *problem* of our aging population. Nothing could be further from the truth.

Imagine this scenario. You're a decorated war veteran who fought for the freedoms this country stands for. You've worked your entire life to build financial security for yourself and your family. You're a bit forgetful, perhaps your home is a bit untidy, but you like it that way. You eat what you want, when you want and are enjoying life in your golden years and the freedom you fought so hard to secure for our country.

Then, one day there's a knock at your door. A stranger you've never met from Adult "Protective" Services has decided you're not making the right decisions "necessary to care for yourself "and within a few days has decided FOR YOU that you need a "guardian".

They produce a court order, signed and sealed that strips you of your basic constitutional rights to your property and your liberty. You're relocated to a nursing home, denied access to your family and your friends. You're cut off from all communications with the outside world because the "guardian" is now in complete control over every aspect of your life. You're put on anti-psychotic medication, your cries for help fall on deaf ears. You die alone while some stranger sells your home, all of your possessions and keeps the proceeds for themselves and you end up buried in an unmarked grave. Alone and forgotten.
This is not some horror story, nor a history of events which occurred in Nazi Germany. These are the true facts of what is occurring in almost every state in our country!

The National Association to Stop Guardian Abuse was formed in the spring of 2006 by myself after my father, Ruby Cohen of Ellenville, New York was victimized by a Florida guardian who cost our family their entire life savings and nearly my father's life. Our membership is now comprised of victims and their families from more than 25 states across the country who have watched their loved ones suffer as they were exploited,

injured and murdered while under guardianship control.

Those of us who have been victimized by the guardianship system first hand know the frustrations we've experienced in our efforts to find assistance and obtain justice in a seemingly unjust legal system. Legislative statutes are totally ineffective when judges and law enforcement agencies ignore them. Government organizations are understaffed and underpaid and the majority of Elder Law attorneys are inexperienced in this fairly new area of law. Most are unable or unwilling to take on a futile endeavor especially when the client has little or no money to pay their fees while the guardian is draining the same family's assets to pay for their own legal representation.

State Bar Associations defend the attorneys. Elected officials seize the opportunity for a new campaign issue to appeal to voters by signing their names to ineffective legislation. Judges turn a deaf ear to the pleas of elderly victims who are being "legally" robbed of their life savings, their dignity and sometimes their very lives. Loving sons, daughters and other family members exhaust themselves emotionally and financially trying to fight a legal system which is supposed to protect the very people it's destroying.

While it is true that Florida does have the best guardianship statutes of any state, there is little recourse for families when these statutes are violated and ignored by government agencies and the judiciary. My parent's entire life savings was depleted in less than 2 years by a West Palm Beach court appointed guardian and their attorneys. Not one agency, not one government official, could or would do a thing to stop them, in spite of the fact my father was never a resident of Florida. Details of this abuse are documented in my recently published memoir *Blood Tastes Lousy With Scotch*. Our member's stories are posted on our website: http://stopguardianabuse.org.

The legislature can enact additional statutes, families can pre-plan for the future by creating living wills, appoint their designated power of attorney and think they're safe, but it only takes one judge, and sometimes even just a judicial clerk, to ignore all of the person's wishes and order a guardian who then has complete control over the individual and their property. They can even come into your home in one state, move your mother into a nursing home in another state, and prohibit you from ever seeing her again. (See Linda Carol's story on our website)

This is legalized, court sanctioned abduction and in many cases the sons, daughters, and grandchildren have no recourse available to them except to hire their own attorney, pay huge legal fees, and in the end, they lose everything.

The Black Letter definition of an incapacitated person is "A person who is impaired by an intoxicant, by mental illness or deficiency, or by physical illness or disability to the extent that personal decision-making is *impossible*. In most cases, a person is declared incapacitated and stripped of all decision making rights due to a slight case of dementia, which might make decisions a bit difficult, but nowhere near the qualifications of "impossible". The medical diagnosis of dementia is the first step to a ruling of total

incapacitation, even though the person may only be suffering from a slight case of age-related memory loss. Is there anyone on the Senate floor who has not asked themselves, "Where did I put my car keys?" Ask that enough times, and you'll have APS in your face.
We are all at risk.

Although there are several decent private and public guardians, our organization is only concerned with those who abuse the system. Like many social service government agencies such as Medicare and Welfare which started out as good ideas to help the less fortunate, guardianship has become a cesspool of predators who prey on the most vulnerable citizens of our country. Even in the few states where regulations exist, there are few who are doing the job and no, or very ineffective penalties for violators who seldom, if ever, are prosecuted.

The only elderly who are protected from guardian abuse are the low-income individuals your panelist spoke of, because they don't have any assets worth stealing. Yet, they too can be picked up and thrown into an institution to die while the guardian cashes their monthly social security checks, and other federal and state benefits, and uses this "income" for their own desires. And there is not *one* government agency, family member or organization who can stop them, because the court gave them carte blanche.

Guardianship abuse not only affects the individual "incapacitated" person, but also becomes an all consuming twenty-four hour living hell for the families of the victims. The insurmountable emotional and financial stress to free an abducted parent becomes an obsession not one person of our generation ever thought possible.
The solution is fairly simple:

1. A guardianship *cannot* be appointed *unless* every immediate family member; spouse and children of the victim signs an agreement authorizing the guardianship, *before* it goes before a judge. This notice has often been waived if the guardian suspects abuse by the family member, however the family member being accused is hardly ever in court, nor has the opportunity to disprove the allegations until *after* the guardianship has been ordered. Trying to challenge this accusation after the fact is yet another time, money and emotional drain on the family member.

   In addition, this agreement *must* include full disclosure as to the duties of the guardian, all of the fees charged for the guardianship and how and when the guardianship will end.

2. Unless the accused incapacitated person *personally appears* in court at their own hearing, a guardian *cannot* be appointed. If the person states they *do not want* a guardian, then *none* will be appointed.

3. If no member of a family wishes to be appointed legal guardian, the *family* has a

choice to pay for this service, the same way they pay for an assisted living facility or specialized care. The *family* and *not* the "guardian" makes the final decisions, and the guardian can be fired and removed, not by the judge or the courts, but by the family who hired them.

4. A special department of the U.S. Attorney General's Office *must* be organized to represent victims at no charge for violations of due process under the civil rights statute: 43 USC Sec. 1983. Civil action for deprivation of rights:

   "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

5. Any complaint filed by a victim's family *must* be fully investigated by local police and when necessary, prosecuted to the full extent of the law. While under investigation, the guardian *must* suspend their guardianship immediately. Violations of *any* state guardianship statute *must* be considered a *Felony*, punishable by prison, fine, or both.

Unless given *written* permission, a guardian *cannot*, among other restrictions;

1. Use the victim's assets to pay for the guardian's attorney or accountant fees.

2. Sell *any* property owned by the victim .

3. Drain the victim's assets in order to put them on welfare; medicaid/medical.

4. Prohibit visitations by family members.

We have already seen and heard over and over the whining of government employees for more staff and more money, yet volunteer organizations such as NASGA whose members spend hours of their time fighting for justice are *not* compensated one dime, yet we can and do accomplish what our government bureaucracies can not or will not even make the slightest effort to do.

In the 60's people of our generation fought and won civil rights for millions of minorities. In the early 70's people of our generation fought and won equal rights for women and the right for 18 year olds to vote. People of our generation continue to fight for equal rights in the gay community, and now people of our generation have a new fight on our hands. Our fight is not against discrimination and prejudice. This is not a fight against ignorance, religious intolerance or bigotry. It is a fight against the basic human frailties of greed and an injustice against innocent, vulnerable citizens of our country never before seen since Nazi Germany abducted, enslaved and destroyed millions of individuals with their country's court orders and their government's blessing.

It is our organization's commitment, and our goal to see that *all* judges, *all* guardians and *all* of their attorneys who have been abusing their power to destroy the people of the "Greatest Generation" are held accountable by the People of *all* generation, so that all future generations will be protected from these evil predators.

NEVER underestimate the POWER the People of OUR generation!

Sincerely,

Robin C. Westmiller
President,
National Association to Stop Guardian Abuse

For additional information, including true stories by our members, please visit our website at http://stopguardianabuse.org

National Center for State Courts, Williamsburg, VA

Dear Senators Smith and Kohl:

While a number of state probate courts have diligently sought to protect the fundamental rights, well-being, and property of incapacitated persons, many others have lacked the resources, information, tools, and staffing needed to prevent abuse, neglect, and exploitation in the guardianship process. The problems that have plagued guardianships and practical approaches to alleviating many of them have been well-documented by the Government Accountability Office,[1] the media,[2] and national organizations and conferences of judges and other guardianship experts.[3] Guardianship remains primarily a state responsibility, but, given that many persons subject to guardianship are recipients of federal SSA, SSI, VA, and other benefits, there is a federal role in ensuring that the needed resources, information, tools, and staffing are available. Accordingly, the National Center for State Courts encourages the Special Committee to work with appropriate oversight and appropriations sub-committees to add guardianship and elder issues as funding priorities and support federal funding for the following:

1. On-going collection of accurate national data on guardianships including, but not limited to, the number of guardianship cases filed, the number of active guardianships[4], the number of persons under guardianship, and the number of persons under guardianship for whom a federal representative payee has been designated.

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[1] US Government Accountability Office, *Guardianships: Collaboration Needed to Protect Incapacitated Elderly People*
*GAO-04-655* (Washington, DC: GPO 2004);

[2] See e.g., *Guardians of the Elderly: An Ailing System* (Bayles and McCartney, Associated Press, 1987); J. Leonard, R.
Fields, and E. Larrubia, "Justice Sleeps While Seniors Suffer," *Los Angeles Times*, November 14, 2005.

[3] See e.g., Commission on National Probate Court Standards, *National Probate Court Standards* (Williamsburg, VA:
NCSC 1993); National Guardianship Association, *Standards of Practice* (Tucson, AZ: NGA, 2000); Wingspan – The
Second National Guardianship Conference Consensus Recommendations (December 2, 2001) 31 *Stetson Law Review*
595 (2002); S.B. Hurme & E. Wood, "Guardian Accountability Then and Now: Tracing Tenets for an Active Court Role,"
XXXI *Stetson Law Review* 867 (2002); American Bar Association and National Judicial College, *Court-Related Needs of*
*the Elderly and Persons with Disabilities – A Blueprint for the Future* (Washington, DC: ABA 1991).

[4] The use of the term guardianship is intended to include conservatorships of property as well.

2. Development of practical tools to assist courts in properly monitoring guardianships, including, but not limited to, checklists of items to watch for when reviewing annual reports and accountings, model guidelines on the fees that guardians may reasonably charge, and automated audit programs that can flag possible improper or inadequate expenditures on behalf of an incapacitated person.

3. Creation and implementation of court performance standards for guardianship cases.

4. Incentives to states to implement effective certification or licensing plans for Professional guardians or conservators.

5. Preparation of training materials and programs that can be used by states to better inform;

a. Judges and court staff about, *inter alia,* physiological, cognitive, emotional, and social conditions that may lead to a petition for guardianship; the practical alternatives to and forms of limited guardianship that are available; the importance of and means for careful monitoring; and the interplay of federal and state programs to assist incapacitated persons (including the use of representative payees and
b. Guardians about their responsibilities toward their ward(s); their obligations to the court; the skills needed to carry out their responsibilities; and the resources available to assist them and their wards.

6. Development of workload standards for guiding proper court staffing.

7. Guardianship monitoring programs that effectively use volunteers to supplement court staff.[5]

8. Research to identify the strengths and challenges of elder justice centers and develop a model that can be implemented in a variety of court settings nationwide.

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[5] See e.g., R. Van Duizend, *Georgia Probate Court Volunteer Program – An Implementation Handbook* (Williamsburg, VA: NCSC 2005); Legal Counsel for the Elderly, Inc. *The National Guardianship Monitoring Program – Program Handbook* (Washington, DC: American Association of Retired Persons,1992).

To date, guardianship has not been a priority for the various federal agencies charged with assisting state courts to better administer justice. While some agencies have called for solicitations in response to elder abuse, the types of grants awarded tend to be epidemiological in nature. Federal support of efforts to improve court handling of guardianships can be contrasted with federal support that has overhauled the nation's response to child abuse and neglect. In the child dependency area, the Adoption and Safe Families Act, combined with substantial federal funding made through the Court Improvement Program, have led to dramatic improvements in the way courts are able to respond to child abuse and neglect. In contrast, adult guardianships have received virtually no attention from the federal government, and most state courts have not been able to make critical improvements in this area.

The National Center for State Courts (NCSC) has taken a leadership role in addressing guardianships and elder abuse. In April 2005, NCSC gathered a group of the nation's experts for the first meeting of the Elder Abuse and the Courts Working Group. The NCSC encourages the United States Senate Special Committee on Aging to work with the appropriate oversight and appropriations sub-committees to add guardianship and elder issues as funding priorities to agencies such as the National Institute of Justice, the Bureau of Justice Assistance, the Office on Violence Against Women, the Administration on Aging, and the State Justice Institute.

Federal funding support for these recommendations would provide the courts with the information, practical guides, and assistance in documenting the need for resources required to provide the accountability, professionalism, and consistency that has too often been absent in the past. They will also help to ensure coordination and appropriate use of federal benefits. Most importantly, they will offer necessary assurance for incapacitated persons and their families that their rights, well-being, and property will be properly protected.

NCSC would be pleased to provide additional information regarding any of the items suggested above, if it would be helpful to the Special Committee.

Sincerely,

Mary C. McQueen
President

National College of Probate Judges, Williamsburg, VA

The Honorable Gordon H. Smith, Chairman
Senate Special Committee on Aging
G31 Senate Dirksen Office Building
Washington D.C. 20510

The Honorable Herbert H. Kohl, Ranking
Senate Special Committee on Aging
628 Senate Hart Office Building
Washington D.C. 20510

Dear Senators:

On behalf of the National College of Probate Judges, I commend your leadership in seeking to improve the current guardianship system and prepare it to meet the needs of our nation's aging population.

The National College of Probate Judges (NCPJ) was organized in 1968 to improve the administration of justice in courts with probate jurisdiction. It is the only national organization exclusively dedicated to improving probate law and probate courts. Probate courts are responsible for equitably handling many kinds of problems in our society. Though they deal primarily with the estates of deceased persons, probate courts also play an important role in protecting the rights of people with special needs -- the mentally ill, alcoholics, orphaned children, the aged, and developmentally disabled persons. In many states, the Probate Courts have jurisdiction over adult guardianship cases.

Although guardianship is governed by state law and cases are heard in state courts, there are three key areas in which the federal government can play an important role in improving the system.

**Improving Coordination of Federal Fiduciary Programs with State Court Guardianship.** As indicated in the 2004 report by the U.S. Government Accountability Office (GAO), *Guardianships: Collaboration Needed to Protect Incapacitated Elderly People,* state courts and federal representative payment programs serve overlapping populations but coordinate little in oversight efforts, and information collected by state courts is generally not systematically shared with federal agencies and vice versa. The federal government can play a leadership role in enhancing coordination to better serve vulnerable incapacitated adults and in removing barriers to information sharing between these systems.

NCPJ leaders recently participated in a roundtable with managers of the Social Security Administration (SSA) representative payment program and the Department of Veterans Affairs (VA) fiduciary program to address this important topic. Many constructive ideas were generated at this meeting, particularly with regard to providing guardianship courts with copies of federal fiduciaries' reports to SSA and VA so courts and agencies can effectively monitor the performance of surrogates. In addition, federal agencies agreed to share with NCPJ the contact information for key regional and national staff members to enable judges to tell SSA and VA about problematic guardians who may also serve as federal fiduciaries. Since that meeting, SSA has given NCPJ a list and NCPJ will publicize it among its members. NCPJ hopes to continue this dialogue with federal agencies to enhance collaboration among fiduciary systems.

Federal leadership should encourage ongoing working groups and other efforts to improve fiduciary services and prevent abuse of vulnerable elders by fiduciaries.

**Addressing Guardianship Jurisdiction Issues.** The GAO study highlights complications that can arise when guardianship of an adult involves more than one state, and notes that this can affect a court's capacity to provide effective oversight. Probate judges are all too familiar with the complications that arise when incapacitated individuals, family members, and property are located in different states, and courts must sort out the most appropriate state for hearing an initial guardianship petition, the most effective process for transferring a guardianship from one state to another, and recognition of guardianship across state borders. The National Conference of Commissioners on Uniform State Laws is completing the draft of a *Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act.* For optimal effectiveness, all states should enact this model law. Senate Special Committee on Aging and other federal recognition of the Act will enhance the awareness of policymakers and the public, and this visibility could be helpful as state legislators consider the new model.

**Enhancing Guardianship Monitoring.** Probate judges are committed to effectively monitoring guardianships to protect incapacitated older persons. They are hampered by a significant lack of resources. The federal government can help by authorizing and funding efforts to improve monitoring through guardian training, judicial education, enhanced technology, uniform data collection and innovative practices. The Elder Justice Act, if reintroduced, may serve as a vehicle for these federal efforts.

Thank you for the opportunity to comment on this important topic.

Very truly yours

John N. Kirkendall
President
National College of Probate Judges

*Copies to: Executive Committee*
*National College of Probate Judges*
*Naomi Karp, Sally Hurme, American Association of Retired Persons*

National Guardianship Association, State College, PA

December 31, 2006

The Hon. Gordon H. Smith
The Hon. Herb Kohl
U.S. Senate Special Committee on Aging
Washington, D.C. 20510-6400

Dear Senators Smith and Kohl,

Thank you for your very kind invitation of December 6, 2006, in which the Senate Special Committee on Aging sought additional comment from the National Guardianship Network and other interested organizations on the state of guardianship in America. The National Guardianship Association (NGA) presented written comment and oral testimony to the Committee on September 7, 2006. As a result of your invitation of December 6, I am aware of additional statements that have now been provided by the National Guardianship Foundation, National College of Probate Judges, the ABA Commission on Law and Aging, and the AARP, all of which are prominently involved with the National Guardianship Network currently being chaired by the NGA.

The NGA vigorously supports the concepts and positions outlined in each of these statements. In addition to reiterating the comments the NGA presented in September, we would stress the following:

- The National Guardianship Foundation is the leading guardianship credentialing entity in the United States as indicated in its statement to the Committee. The NGA has provided education and training to guardianship practitioners and registered/master guardian examinees around the country for nearly 20 years. The NGA fully supports increased funding for and expansion of certification for guardians.

- The ABA Commission on Law and Aging has systematically maintained its commitment to research and analysis of guardianship issues in America. The ABA Commission's response reiterates the importance of improved guardianship monitoring, improvement in coordination between federal payee systems and state courts, resolution of interstate guardianship jurisdiction disputes by adoption of the *Uniform Adult Guardianship and Protective Proceedings Jurisdiction* Act currently nearing completion by the National Conference of Commissioners on Uniform State Laws, generating funding for collection of guardianship data, generating additional research to evaluate guardianship practices and programs, and enactment of the Elder Justice Act.

- The National College of Probate Judges (NCPJ) have provided needed leadership in the judiciary by adopting the National Probate Court Standards and striving to improve the competence of judges adjudicating guardianship cases. The NCPJ's response stresses the need to improve coordination of federal fiduciary programs with state courts, to resolve interstate guardianship jurisdiction disputes, and to improve guardianship monitoring (all central themes in every response sent to the Committee).

- The AARP Public Policy Institute's white paper comprehensively recommends improvements necessary to accomplish coordination between federal payeeship

systems and probate courts, improving monitoring of guardians by probate courts (which seldom have resources to do the job properly), and passage of the Elder Justice Act.

The National Guardianship Association joins its colleagues in these and other organizations in specifically targeting those particular areas in which the Federal government can assist the thousands of good and talented guardians, judges, attorneys and allied professionals who strive every day to make life better for those who need our help.

Again, we also reiterate that our collective efforts should accomplish a resolution that ensures quality and consistency in the national guardianship process so that each and every American who requires the assistance of a guardian, regardless of which state or county in which that person may live, will receive all rights and privileges guaranteed by the United States Constitution and federal and state statutory law.

Respectfully Submitted,

*Terry W. Hammond*

Terry W. Hammond, Esq., RG
Executive Director
National Guardianship Association

National Guardianship Foundation, Harrisburg, PA

December 21, 2006

The Hon. Gordon H. Smith
The Hon. Herb Kohl
U.S. Senate Special Committee on Aging
Washington, DC 20510-6400

Dear Senators Smith and Kohl:

The National Guardianship Foundation (NGF) writes in support and endorsement of the paper presented to this committee by our affiliate organization, the National Guardianship Association (NGA). The National Guardianship Foundation was created in 1997 as an allied foundation of the National Guardianship Association to enhance the caliber of guardianship services provided to vulnerable adults by providing national credentialing of guardians. It is also a participant in the National Guardianship Network. The Foundation views certification as a means to demonstrate to the courts, public and wards that the certified guardian has sufficient skill, knowledge and understanding of guardianship principals and laws to be worthy of the responsibility entrusted to him or her.

NGF certification entitles the guardian to represent to the courts and to the public that he or she is eligible to be appointed, is not disqualified by prior misconduct, agrees to abide by specific ethical standards governing a person with fiduciary responsibilities, submits to a disciplinary process that supplements judicial supervision and monitoring, and can demonstrate through a written test an understanding of basic guardianship principals, as well as state laws and procedures.

While testing distinguishes certification from court registration, passing the examination is just one component of the certification process. The complete process includes acquiring a basic floor of necessary education, experience and knowledge (eligibility), demonstrating proficiency in core competencies (examination), enhancing skills and understanding (continuing education), maintaining ethical conduct (re-certification), and avoiding malfeasance (decertification). Certification establishes the baseline of what a guardian must know to obtain certification, as well as the on-going conduct necessary to maintain the credential.

The need for qualified guardians has been a constant refrain since the 1987 Associated Press report on *Guardians of the Elderly: An Ailing System* stimulated attention to deficiencies within the guardianship system. Certification of guardians is recognized as an essential step in enriching the pool of qualified guardians to meet the needs of a growing elderly population. One of the recommendations of the “Wingspan” National Guardianship Conference, held at Stetson University College of Law in 2001, is that all professional guardians “should be licensed, certified, or registered.” (Recommendation

46) The sole purpose, commitment and experience of NGF are to that end: to foster, develop and maintain quality guardianship through national certification.

NGF has developed a two-tiered certification process, certifying Registered Guardians (RG) at the entry level and Master Guardians (MG) who must demonstrate a higher level of experience and responsibility. The Registered Guardian certification examination is designed to identify guardians who demonstrate basic proficiency and understanding of universal guardianship principals by answering questions that a guardians in any part of the country should be able to answer. The questions are primarily based on the NGA *Code of Ethics* and *Standards of Practice*. They cover issues of guardianship of person and of property; of aging, disability, mental illness and developmental disabilities; of placement, medical consent and financial management; conflict of interest, confidentiality and fiduciary responsibility; and relationships with courts, attorneys, clients, and family members. To date, NGF has certified over 1220 Registered Guardians representing 43 states, and 43 Master Guardians from 18 states.

A significant trend in the states is to recognize the importance of requiring certification before the guardian is eligible for appointment. Arizona, Washington, Alaska, Florida, Nevada, California and Texas have adopted laws or regulations mandating that professional guardians obtain and maintain certification, either through a state-specific process or through NGF. The Foundation envisions that all states will require professional guardians to be certified through the NGF certification process. NGF can include a state law-specific component to the national exam similar to the bar examination process for lawyers, with multi-state and state-specific items.

We commend this committee for raising national awareness of the deficiencies in the guardianship system and for seeking solutions that will better protect our vulnerable citizens from abuse, neglect and exploitation. The National Guardianship Foundation is honored to bring to this committee's attention the positive strides that the guardianship community is taking in expanding professional certification. Professional guardians, by seeking and maintaining certification, demonstrate that they are personally committed to being a part of the solution. NGF urges this committee to support the national expansion of certification as one of the steps to improving the quality of care to our aging population.

Sincerely,

*Rhonda Williams*

Rhonda Williams
Chair, National Guardianship Foundation
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Oregon Department of Human Services, Salem, OR

After a discussion here at DHS/SPD Central Office we have developed a list of ongoing issues that continue to be a problems in Oregon in order of importance:

1. There is a lack of training for guardian and conservators (G/Cs). This can lead to good intentioned G/Cs overstepping their authority. As an example, guardians may step in when the person enters into a consensual intimate relationship. Additionally, there is no where for G/Cs to turn if they need help with complicated situations.
2. There is no public funding to set up guardianships and conservatorships. This means that many people with limited incomes, who do not meet the state's very restrictive policy for payment, are often unable to afford to have a guardianship or conservatorship put in place. Costs can run from $1,500 for simple, uncontested cases all the way up to 10s of $1000 for contested complicated cases. We believe the average is around $5,000 with court and attorney fees. Another cost can be the ongoing hourly fee that professional G/Cs charge. These is no funding for these costs.

We would recommend that you check on the attorney fees and other costs if this is an issue you want to focus on because we know that there can be wide variation depending on the law firm and the area of the state.
3. There is a dearth of qualified, competent and appropriate individuals willing to be G/Cs. This means that even if the individuals could afford the pay the fees, they may not be able to find someone to be the G/Cs.
4. There is no ongoing oversite of private guardians and conservators. At the initial onset court visitors are involved but they are no longer available after the guardianship or conservatorship is approved. G/Cs are supposed to report regularly to the court but their reports are not independently audited unless there are complaints.
5. Judges are often not trained to effectively address all the complicated issues in guardianships and conservatorships. They often lean towards complete guardianships and conservatorships when more limited oversite would be appropriate. They are often slow to get rid of abusive, controlling and other inappropriate G/Cs.

I hope this is helpful. Please feel free to contact me directly if there are other senior and disability related issues you would like to discuss.

Jane-ellen Weidanz
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Elaine Renoire, Beech Grove, IN

December 27, 2006

Dear Esteemed Members of the Senate Aging Committee:

I thank you and welcome the opportunity to submit this paper in response to your request to hear from the guardianship community.

Prior to my Grandmother's massive stroke, she did everything within her power to protect herself legally. She gave my Mother all the tools necessary to take care of her when needed: durable power of attorney, my Mother's name on her checking and charge accounts, her living will. But, none of that mattered because the judge rolled right over the power of attorney in favor of a forced guardianship with Old National Bank of Vincennes, IN as guardian of my Grandmother's estate. Old National Bank literally charged right in seizing all my Grandmother's assets and undoing all her careful estate planning. They did sloppy and even fraudulent work, charging premium prices and helping themselves to my Grandmother's money while denying her own funds for her comfort and needs. The judge, Joseph Howell, must have had to special order a rubber stamp big enough to authorize Old National Trust's and three attorneys their exorbitant, unnecessary and unworthy fees without so much of a glance at them or a consideration for my Grandmother. Throughout the years of plunder and exploitation of my defenseless Grandmother, I was powerless to help her despite my best efforts. The wolves had her.

I discovered a predatory and unlawful sub culture thriving in America consisting of guardians and their attorneys conveniently operating within a legal loophole of the law and with no accountability nor oversight. Judges, rather than ruling for the benefit of the Ward as the law dictates, instead have chosen to be enablers and promoters of legalized and sanctioned theft.

You ask for suggestions to improve the current guardianship system to prepare for the needs of the nation's aging population. My first and foremost suggestion is to acknowledge that the theft and plundering is not done accidentally nor by incompetence but by deliberate efforts of unscrupulous people who may look entirely like the rest of us, but who are not. They stand in courtrooms and announce their efforts are for "the benefit of the protected person" and use buzz words that make it so easy for judges to ink up their rubber stamps and approve their fees and every wish without care or concern for the innocent and helpless victim who has been stripped of all rights, including the right to complain. First, acknowledge the greed, the thirst for power, and lack of conscience that motivates and feeds guardianships.

Second, I would ask you to not merely read these papers, nor have meetings, nor put out press releases, but to ACT to bring about change. In the 2003 Senate hearings, Diane Armstrong mentioned Mary Connors' case (PA). Mary's Mother was held captive

in a nursing home by the public guardian because her Mother, Grace, had long term health insurance – she was a cash cow for the county. The guardian, a particularly brutal type, also isolated Grace from her daughter for Grace's "benefit" and Mary was powerless to do anything about it despite the injustice of it all. Grace was told Mary had abandoned her. Some of you may remember Mary's story; it's is particularly tragic because there was no legal reason whatsoever for the county to take Grace let alone torture her by isolating her from her family. After the Senate hearings, an aide for Senator Craig interviewed Mary for about an hour and a half. You would think with Mary's story before the Senate, something would have been done. But no, Grace Connors died September 13, 2006 --- tortured for five long years, and only freed by her dying. Why wasn't something done?

I ask you to not read, drink your coffee, have lunch, and then go on with your lives. I ask you shine a light on guardian abuse, expose it, and put all guardian/attorney tag teams on notice that their free reign at the expense of innocent and helpless people is coming to an end.

My suggestions to accomplish the end of guardian abuse:

- Prosecute those guardians who employ the isolation technique for elder abuse
- Classify guardian abuse as a crime and hold abusers (guardians, attorneys, judges) accountable
- Force guardian thieves to repay the money they've stolen --- with interest and penalty
- Disbar lawyers who participate in guardian/attorney tag teams
- Disbar judges who do not follow the law and due process in favor of guardians
- Take all monitoring of guardianships out of the in competency and corruption of the courts
- Take the "profit" out of guardianships
- Allow guardianship hearings, especially initial hearing of incapacitation to be before a jury of peers (in other words, real people) rather than a judge
- Set up a monitoring board at all states but don't let the fox be a member of the board
- Audit accountings for content as well as accuracy
- Force the court to listen to the Ward's family rather than dismiss them
- Treat Wards (and their families) as guardian's customers, giving them the right to fire guardians for poor performance or not following the Ward's wishes
- Prohibit guardians from defending themselves with the Ward's funds
- Prohibit courts to hide their dirty laundry by sealing the files
- Enforce the laws to protect the Ward – not the guardian

In FL, 86 year old WWII veteran Henry Dienema found himself out on the street and homeless after he hired a caregiver to help with his companion of 30 years (they never married) without checking the caregiver's background prior to hiring her. Turns out she had a long history of drugs, prostitution, alcohol abuse, etc. Soon APS charged in and seized Henry's companion, the house, all the assets etc, and sent Henry packing, saying Henry abused his companion. Henry is not allowed to see her at all and the guardian refuses to give him any information about her condition. When Henry's friends tried to help him, the guardian threatened to sue them so naturally, they backed off. Henry is beset with worry – and the court records are sealed. Very convenient for the guardian.

I live in Indiana and I wanted to help Henry, so I wrote a letter to the Judge on Henry's behalf. Before writing the letter, I researched the FL statutes so I could quote the statue stating Henry's companion has a right to receive visitors. I found what I thought might be just the ticket --- a statute stating if someone suspects impropriety with a guardianship, he/she can file a notice with the court and ask for a full review of the guardianship. I thought I should do that for Henry as looked like an appropriate way to have Henry's concerns addressed.

However, I then found another statute stating if the court does the full investigation and finds no impropriety, then the person who filed the complaint has to pay ALL attorney and court costs. Hmmmm, think the judge is going to find anything wrong with how he's handling the case? Especially if he rolled over the alleged incapacitated person's power of attorney and stomped all over due process in the very formation of the guardianship? And sealed the records?

The laws have to be enforced to benefit the protected person rather than be manipulated by the professional manipulators: attorneys and judges.

Bankrupting the family thru litigation is proven technique of guardian success. The family spends its life savings in legal fees fighting guardians/attorney tag teams manipulating the system and the law for their benefit and the ultimate bankruptcy wins the guardian the right to proclaim, "But, your honor, this family in indigent. The Ward can't possibly live with a family who can't provide for themselves let alone the Ward."

Families have been silenced in our courts and treated as second-class citizens or less by Judges protecting guardians rather than their Wards. Judges allow guardians to assassinate the character of the victim's family and support system, knowing full well this devious, malevolent technique is without foundation and yet the first thing a guardian does to ensure victory. When it comes to stopping guardian abuse, the buck stops at the bench. Judges can say no; they choose instead to say yes. Big law firms working for guardians contribute to both candidates running for judge. So, when the firm sends their boy in, the judge is beholding. Campaign contributions to judges must be monitored and made public knowledge.

To clean up guardian abuse and effect change to benefit the nation's elderly, the judiciary must be cleaned up as first. Articles run daily about judicial corruption --- judges taking bribes, judges driving drunk, judges making their bias apparent by calling the defendants names and unbelievably, one judge who threw down his glasses, tore off his robe, stormed off the bench, yelling "you want a piece of me?" These atrocities happen day in and day out and yet the judicial commissions rarely hold the judges accountable and even in those times when they do hand out some justice, they never mess with the offending judge's pension. Judges are lawyers in robes and they all stick together. They may look the same as the rest of us in their underwear; but with their robes on, they have elevated themselves above the law and are untouchable. True reform will never happen until the judiciary is reformed.

If the Pope and our President could not save Terri Schiavo from Judge Greer, then Judge Greer has too much power. Terri Schiavo was executed, because of an extreme and deadly case of guardian abuse. This same abuse occurs nationwide every day but doesn't get the press Terri Schiavo's case got. Mary Connors' Mother died because the guardian killed her Mother's spirit, her Mother gave up, quit eating, and the guardian would not allow Mary to see her Mother freely to encourage her to eat and regain her health.

Judges need to be brought down to earth, made to do their job and held accountable when they disrespect the law and the judiciary. Do that and guardian abuse is on its way out.

There is far too much profit in guardianships. Guardians and attorneys are pirating lives and life savings and we all know when there is great profit, the dregs of society are there to capitalize on it. This is what's happened here. Guardianships bring billions of dollars of legally stolen money to guardians and attorneys nationwide and the guardian/attorneys are salivating at the prospect of the *trillions* coming their way when the Baby Boomers fall prey. Trillions of dollars legally from helpless and voiceless victims. How sad a statement that is for our integrity as human beings.

Guardian abuse lives and thrives in the darkness. It's a dirty little legal secret long protected and nurtured by the thieves themselves and the laws they have created to exploit their victims and protect their actions. To stop the abuse, we have to give the victims a voice. The law currently strips the Wards of all rights including the right to complain. There is something dreadfully wrong when a convicted murder has more rights than our vulnerable citizens. There is something dreadfully wrong when Wards are forced into nursing homes against their will so the guardians can sell the home and personal property to convert to cash to feed their greed. There is something dreadfully wrong that the Wards, who prior to falling victim to guardian abuse, had accumulated a healthy nest egg to pay for home care if needed in their final years, instead, find themselves penniless and a tax payer burden.

The profit has to be taken out of guardianships to make it less attractive as a means of easy wealth for the greedy and conscienceless. A cap has to be placed on guardian

fees, perhaps $100 a month. And the cap cannot be with the convenient loophole that any additional fees over the cap require court approval before being paid to the guardian. That's just asking for judges to ink up their rubber stamp again. There are too many loopholes for unsavory and unscrupulous lawyers and judges to capitalize upon and use for their personal benefit at their Ward's expense.

Monitoring has to be taken out of the courts – away from the enablers. A monitoring board should be created for each state and the fox can't be a board member. Instead, have families on the board. Families will see to it that the figures don't just add up, but they make sense. Families have a right to a say in what happens with their loved ones and deserve the respect of the court. The problem is the courts and guardians have effectively cut the family completely out by deliberate character assassination so the guardian will have easier and quicker access to the money.

I want to bring up a couple more vital points and then thank you for your patience in reading my paper. Especially since the Terri Schiavo execution, all we hear in the press is to protect ourselves by giving a durable power of attorney and advance directives. This should be true but it isn't. Judges routinely just roll over the power of attorney in favor of imposing a guardianship. The rolling over of due process then gets covered up by sealing the records. Again, this in indicative of the greed, corruption and the special loophole of the law that allows this legalized theft. And, it's also indicative of the problem with the judiciary.

When a person gives a power of attorney, he/she is telling the judge directly who and what he/she wants. Judges who roll over somebody's wishes (given to the court as a durable power of attorney) should be disbarred. It's that simple. Judges get by with this lawless act because guardianships not only rob the victim of all their life savings, but they rob the victim's family of the same. Litigation, as we all know, is a rich man's game. Guardians take care of that by driving the family into bankruptcy. Few abusive guardianships are ever appealed; the guardians see to that.

Guardianships abuse not only devastates the victim and the family but also society as the guardians get rich and the victims end up on Medicaid and a taxpayer burden --- something that would mortify most of them, especially when he/she had more than enough money to cover their old age needs before falling victim to greedy guardians. And the law, again, helps the guardians by allowing them to withdraw when there is no longer any money to "protect" --- moving on to their next victim and their next steak dinner. Taxpayers unwittingly pick up the growing tab for this legalized theft. It's not just the victims needing protection from these life predators, taxpayers must be protected as well.

Finally, I would like to ask each of you to speak to your colleagues and ask them to get involved. When I was going thru the guardianship nightmare of my helpless Grandmother, I tried every resource I could think of and the story was always the same, "I'm sorry, but this is a matter for the court, I wish I could help you but my hands are tied…" I contacted every elected representative I could and got the same story and

same sympathy. Sympathy is nice but no help and I needed *help*. Finally, Senator Lugar's office said they'd send an inquiry to the Comptroller of the Currency (as the Comptroller of the Currency regulates banks). I thought surely we'd finally found some help. I sent evidence and spreadsheets and could hardly wait for the response. When it came, it was the same disappointment… sorry, but they couldn't get involved because the case was in litigation.

We're tired of our elected representatives eating steak and feeding us baloney.

Untie your hands and the hands of our government and do something to help its innocent and vulnerable citizens. Help the families victimized by the predators who so enjoy the theft. Help the taxpayers who unknowingly pick up the tab for the criminals plundering the vulnerable for profit. Spread the word and talk about it in the press so the word gets out to average citizens - those who will fall prey next.

It is what we taxpayers have elected and pay you to do.

Respectfully submitted,

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Sylvia S. Rudek, Mount Prospect, IL

Dear Senators of the Senate's Special Committee on Aging:

Thank you for the opportunity to submit our experiences related to our proposals for actions that are needed to begin to strengthen and improve the broken guardianship system. Unfortunately, our experience is another grim statistic in the failure of Probate Court; 100% failure of the entire Guardianship system. I am writing on behalf of our beloved family member, the late Helen Fabis, Edgerton, 87, Edgerton, Wisconsin, a victim of financial exploitation and elder abuse at the hands of her Temporary Guardian, her grand niece, Kathleen Simane. RE: Rock County WI Case No: 01GN35

Our family's Temporary Guardianship nightmare began suddenly in an emergency situation when Aunt Helen, 87, was transported by ambulance to the critical care unit of Memorial Community Hospital on March 2, 2001, in Rock County, Wisconsin. Aunt Helen (a widow with no children) needed someone to make immediate *medical decisions*; she was in critical condition, afraid and very confused, suffering from malnutrition and other serious illnesses caused by carbon monoxide poisoning. The furnace in her rented house was emitting Carbon Monoxide Gas: 2000 PPM. RE: Dane County WI Case No.: 2002CV003962

1) Question: Who is watching and monitoring the Temporary Guardian or Guardian?
Answer: Nobody.

The failures in the broken Guardianship system and some examples our case will show:

Absolute 100% failure of the guardianship system supposedly in place to protect and respect the vulnerable adult, the "incompetent" adult, the elderly, the Ward, and the assets and the property of the Ward.

That Temporary Guardianship is a very powerful, unmonitored position; a court awarded license to steal, while feeding their greed. The Temporary Letters of Guardianship filed on March 8, 2001 allowed the Temporary Guardian to disregard her position of trust, her fiduciary duty to Probate Court, to the State of Wisconsin, to her Ward and to the Estate, while betraying all who had faith and trust in the Guardian, Probate Court, the guardianship system and State Statutes. RE: Rock County WI Case No.: STATE of WISCONSIN vs Kathleen A. Simane 2005CF000301

How fast and easy it is for a Temporary Guardian (or Guardian) to abuse her powers by immediately beginning to steal her Wards personal property and cash; draining all assets from all sources of investments, including Bank One CDs and checking accounts. How fast and easy it is for a Temporary Guardian to spend all of their Wards life savings in excess of $75,000.00 in less than 54 days on personal extravagances for herself and for her dogs, leaving unpaid bills and $00.00 for the estate after Aunt Helen died. RE: Dane County WI Case No.: 2001PR1252

That a WILL does not protect the assets or the property of the Ward. A WILL can be located and destroyed by the Guardian or any person in a position of trust. While at Aunt Helen's house, Simane located Aunt Helen's handwritten WILL and her directives addressed to specific family members. Simane's name is not included, anywhere, in the WILL or in Aunt Helen's directives. Simane intentionally concealed and continues to conceal Aunt Helen's original handwritten WILL and directives (at her last known MN address) from the family and from Probate Court, with no recourse or consequences for her actions.

Without reason and without conscience, a Temporary Guardian or Guardian has the power and authority to speed up the dying process of her Ward for personal profit. Without our knowledge, Simane had the power and authority to force upon her Ward, the daily administration of anti-psychotic drugs, leading to loss of appetite, endless lethargy and loss of hope, which is known to hasten death. RE: Medical and Hospital records from Memorial Community Hospital and Lee Manor Health Care

Contained in the Petition for Temporary Guardianship filed on March 8, 2001 in Rock County Circuit Court, Simane's declarations to all financial questions relating to Helen Fabis is listed as…."Unknown". Simane's repeated declarations of "unknown" were not contested or questioned by anyone in the Rock County WI guardianship system to this date.

Temporary Guardianship and Guardianship positions are based solely on a strangers perceived character at the moment; the honesty and truthfulness of the person petitioning the court. A person's word is not nearly enough for a stranger to assess a stranger or to prevent a person in a position of trust from taking everything from their Ward that the Guardian can get their hands on and into their own pockets, within a matter of days.

How fast and easy it was for Simane, a Temporary Guardian, in a position of trust on March 8, 2001 to immediately access and seize for herself, her Wards personal property and financial documents, her WILL (including jewelry), cash, assets and income, including proceeds from the sale of her Wards stocks and her Wards monthly Social Security checks, without SS approval or being declared a SS representative payee of the Ward.

How easy it was for Simane, a Temporary Guardian, to use the Bank One (temporary) guardianship checking account, created by Simane, to issue a check for $10,000.00 to Z Frank Chevrolet, Chicago, IL as a deposit to purchase a new vehicle, not in the name of her Ward, Helen Fabis, but in the name of the Temporary Guardian, Kathleen Simane.

How fast Simane, a greedy Temporary Guardian with a criminal mind, accessed, seized and started to drain (beginning March 10, 2001) all of her Wards bank accounts. Issuing more than 40 checks to pay for personal expenses for herself and for her dogs in less than 54 days on the guardianship checking account without being ordered into

court or monitored or noticed by the bank or by Probate Court or by the lawyers who were retained by Simane to represent her in Probate Court or by the Guardian ad litem.

A few examples of the many checks Simane issued for her own personal expenses in less than 54 days, ( 38 days before the Guardianship hearing scheduled for April 18, 2001) on the Bank One guardian checking account:

- Personal Auto Loan in excess of $15,000.00
- Elective Cosmetic breast enlargement procedures and surgery
- Dog food and supplies
- Rent in Chicago, IL
- Utilities (phone, gas, electric) Chicago IL
- $10,000.00 Deposit on a brand new, fully loaded 2001 Chevrolet Suburban Z Frank Chevrolet, Chicago IL
- Check(s) issued in excess of $15,000.00 deposited into Simanes personal checking account
- Checks (3) issued to her mother and sister to repay old personal loans
- $100.00 for drilling open Aunt Helen's safe deposit box at Bank One while the co-owner of the safe deposit box did not give written permission to drill the box. Statement from Simane: Safe Deposit Box was empty.

How our Aunt Helen was left to die blind and in agony, in a barren medicare room without the benefit of any effective antibiotics needed to relieve some of her pain. The effective antibiotics were on a self-pay basis; the prescriptions were not approved by Medicare, therefore, any relief or any comfort care for Aunt Helen that was not covered by Medicare, would be on a self-pay basis was rejected by the Temporary Guardian, Kathleen Simane, against the strong protests from me and my sister regarding the ongoing inhumane treatment of Aunt Helen. Simane left while my sister and I were making arrangements to try to get some authority to assume financial responsibility for Aunt Helen's self-pay medications, estimated at approximately $800.00.

During Aunt Helen's final days of life, her Temporary Guardian was only interested in herself; her greed and vanity, while preparing for her scheduled elective cosmetic surgery for breast enlargement procedures, paid for entirely with Aunt Helen's life savings.

During Aunt Helen's final hours of life, Simane announced to me that any funeral arrangements would be on hold, until Simane recovered from her surgery. Simane lied, again, to me and the family. She told the family that she had been undergoing extensive testing, she was seriously ill, under doctors care and needed "female" surgery. The family suspected breast cancer and Simane went along with that conclusion.

While the Temporary Guardian was draining Aunt Helen's bank accounts for her own personal expenses and the care of her dogs, Aunt Helen was left impoverished and destitute on the Medicare floor, waiting to apply for State Public Aid and assistance on May 1st 2001 for her nursing home expenses, medical bills, drugs and related living

expenses, while depending on charity from me, my husband, my sister and my mother, Aunt Helen's sister.

There were no funds for a Funeral Mass or a respectful burial. Simane repeatedly pursued the family for donations to cover Aunt Helen's expenses. Simane, as Temporary Guardian, collected and kept large sums of money for herself that was donated from the family for Aunt Helen's cremation and internment. Simane directed me to pay for all of Aunt Helen's personal expenses, while she concealed the existence of all of Aunt Helen's funds from the family and from the "closed" Guardian file and Probate Court in Rock County.

Simane, Temporary Guardian, wanted Aunt Helen's last dollar and her last cent for herself; she wanted Aunt Helen to die, as soon as possible, without dignity and in pain. Simane, as Temporary Guardian walked away and left Aunt Helen, dying and slumped over in her wheelchair. Simane, as Temporary Guardian, denied Aunt Helen the right to have any relief from her pain or the comfort care of Hospice. At death's door, Aunt Helen was pleading and begging for water; she was suffering from dehydration; she was denied fluids and nourishment. She was emaciated when she died on April 30, 2001 weighing a mere 76 lbs.

More attorney fees, legal fees and traveling expenses; the hurdles and hoops that we had to jump through to have Simane removed as Personal Representative of the Estate of Helen Fabis ( August 18, 2003) as the only way to allow the heirs of Aunt Helen an opportunity to vote to appoint a new Personal Representative of the Estate.

My Domiciiliary Letters of Informal Administration were filed in Dane County Court on August 22, 2003 enabling me to begin to access Aunt Helen's Bank One banking records and statements and other financial records in order to find any missing funds.

Rock County Probate Court did nothing about Simane. Rock County Probate Court did not pursue Simane in any matter at any time for her to fulfill her responsibilities as Temporary Guardian by providing Guardian Accounting and Guardian Inventory as mandated by Wisconsin State Statutes.

I discovered several sources of missing assets and income, without the benefit of any of Aunt Helen's personal files and without any bank statements or financial documents. Simane refused to release any documents; she refused to co-operate and then disappeared. I had nothing to go on but prayers. I worked very hard morning, noon and night for many months conferring with family locating and gathering more information, requesting financial documents from financial institutions. I had the proof that was necessary to prove embezzlement. I was not about to give up on our Aunt Helen. I refused to walk away from our search for the truth without giving this effort everything that I had, knowing full well that the clock was ticking on the statute of limitations.

The physical and emotional toll and the growing financial burden was overwhelming. The frustrations, deep depression and the daily struggle to keep at it is more than anyone should have to endure.

The outrageous, excessive, ongoing attorney fees and related expenses incurred by me and my husband during the past 6 years and counting:

- including more than 25 days and more than 200 hours of lost wages and
- traveling and lodging expenses and,
- deposition expenses and,
- court reporters fees and expenses and,
- transcript fees and,
- court transcript copy fees and,
- numerous process servers fees and,
- surveillance expenses in Illinois and Minnesota and
- years of double and triple telephone bills and faxing expenses
- a mountain of mailing and shipping expenses and copies at Kinkos, and
- the necessary office equipment and supplies are in excess of $60,000.00 and counting.

In the Fall of 2003, our Madison attorney, on behalf of the family and heirs, spoke with a Wisconsin District Attorney to begin to investigate and prosecute Kathleen Simane for concealing and stealing Aunt Helen's money. The District Attorney, in a few words, told our lawyer to get lost, without any assistance or referrals. The District Attorney considered theft of funds in a Guardianship case to be a civil matter, a family matter, that needed to be decided in civil court. The District Attorney was very clear that he did not consider our situation his concern or a criminal matter. The District Attorney had the final word; he was not interested in the missing money or anything that we had to say about the matter.

How many other complainants and complaints are being turned away and rejected by local law enforcement authorities and the County District Attorneys?

I discovered the State of Wisconsin Elder Abuse Unit and the statewide Anti-Financial Exploitation Coordinating Committee that was established by Wisconsin Attorney General Peg Lautenschlager. In early December 2003, our lawyer met with the Special Agents of the State of Wisconsin Department of Justice Division of Criminal Investigation, Financial Investigations Unit.

The Special Agents and representatives from the Attorney General's Office quickly determined that the actions and inactions by the Temporary Guardian, Kathleen Simane were criminal activities, as well as civil issues. An intense and thorough criminal investigation of Kathleen Simane by the Department of Justice Special Agents

had begun. Assistant Attorney General Barbara Oswald, prosecutor for the State, charged Simane with five (5) felonies.

The statute of limitations is 3 years in the civil arena and time was running out. As the court appointed Personal Representative of the Estate (with no assets), on behalf of the Heirs of the Estate, I was responsible to make a decision if we should try to recover some of Aunt Helen's stolen funds. A civil summons and complaint against Bank One and Simane was filed in court. RE: Rock County Case No.: 2004CV000375

The enormous effort, mounting expenses and the time invested became a full time job to constantly track Simane, who regularly disappeared, moving from apartment to apartment in Chicago every few months with no forwarding address or listed telephone number to trace.

Dane County Probate Commissioner Daniel Breunig repeatedly ordered Simane into court. I was responsible for retaining the process servers in Chicago to serve Simane her Orders To Appear. After several scheduled and re-scheduled hearing dates and failure to appear notices, Simane was finally served in person. On May 12, 2004, Simane appeared at the Probate Hearing with counsel to submit her declarations in the Estate's Final Inventory and Final Account.

During the May 12th Probate Hearing, Simane produced the Guardian Inventory and Accounting. Simane claimed that soon after Aunt Helen was hospitalized, Aunt Helen "gifted" her, Simane, with all of her money from all sources of assets: bank accounts, stocks and income from Social Security to use and spend as she wished.

Simane moved again, from Chicago late June 2004. I had to start from square one, once again. We tracked her to St. Paul Park, Minnesota. Simane was served her Summons and Complaint by a local process server, who almost lost his life that winter night when Simane's boyfriend put the barrel of his loaded gun into the process server's face, while he was sitting in his vehicle. RE: Rock County Case No.: 2004CV000375

Federal Bankruptcy protection laws are written to aide and assist the criminals and crooks, the thieves and the embezzlers who use bankruptcy protection to avoid consequences and responsibilities for their actions. Simane filed for Bankruptcy protection in Minnesota two (2) days before her Answer to our Summons and Complaint was due. RE: US Bankruptcy Court District of MN case no.: 4-37370

More attorney fees and legal expenses in the state of Minnesota to try to keep the Estate's claim from being discharged by the Federal Bankruptcy Judge in charge of Simane's case. Adversarial complaint: RE: case no.: 5-3083

On July 20, 2006, after Simane plead guilty to two counts of theft by bailee, Judge James P. Daley admonished the defendant, Kathleen Simane:

*"The funds should have been used for her (Helen Fabis) benefit, but you used them for your benefit,"……"You took money from someone who could not protect herself. You*

*were supposed to protect her"......"We as a people will be judged by how we treat the least in our society and those who cannot help themselves".*

Count One Theft By Bailee: Judge Daley sentenced Simane to prison for two years, followed by eight years of extended supervision and,

Count Two Theft By Bailee: Five years in prison, followed by 10 years extended supervision as a consecutive sentence. Judge Daley stayed the second sentence in favor of 10 years probation.

Judge Daley ordered Simane to pay restitution: $78,289.81, (this amount does not represent the total amount of stolen funds of her Ward, Helen Fabis). Simane was ordered to pay fines in the amount of $7,828.98. RE: Rock County WI Criminal case no: 2005CF000301 Kathleen Simane was taken into custody. Inmate # 00499337

Aunt Helen was and still is a very important person in our lives. She was a role model to many of her nieces and nephews. Aunt Helen worked all of her adult life as a seamstress and clothing designer in Chicago, Illinois. Helen and Walter Fabis lived frugal lives, responsibly saving and investing their money for their retirement and old age, ensuring that they would remain independent and not be a burden to society. Aunt Helen was a widow for over 20 years, in 1983, when she retired she wanted to leave the crime in Chicago. She rented a house next door to her sister, Jean, in rural Edgerton, Wisconsin, not knowing that she would have had a better ending to her life, if she had been living on the streets in Chicago.

Some suggestions to begin to strengthen and improve the Guardianship system pertain to positions of trust of Temporary Guardians, Guardians and Conservators:

The primary focus of my specific suggestions pertain to the position of Temporary Guardians, but fit permanent Guardian and Conservator position.

* The existing federal and state and county laws governing Temporary Guardians or Guardians and Wards must be monitored and enforced by the State's Attorney General's Offices, with severe and swift criminal consequences for non-compliance. Failure to comply must result in fines and time in jail or prison for all listed suggestions.

* A full and thorough investigation and audit of Guardian/Conservator files in Probate Courts, nationwide, by Federal authorities would open the "closed" closet door, finally, exposing mountains of America's very dirty secrets. This action would immediately get the attention of the individuals who are engaged in criminal activities. This action would begin to show that we mean business. This action would highlight the seriousness of these crimes.

* I respectfully request that The Senators and the Senate's Special Committee on Aging consider using their elected positions to alert the media and the press as a means to educate and warn the senior citizens and their families, as well as the appropriate agencies about the greedy predators, the growing enemy within our boundaries.

* Criminal background checks, credit checks, civil judgment docket searches and even Google type searches should be used as a useful tool as part of the petition process.

* All persons convicted of any form of elder abuse, (including inhumane acts and/or inhumane treatment of their Ward) guardian abuse, financial exploitation, embezzled funds, "gifted" funds, must be investigated and charged as felonies, with mandatory incarceration with a stiff prison sentence (no probation and no jail time) and mandatory restitution (specifics below #10) to the Ward, if the Ward/Victim is still living. If the Ward is deceased, the restitution must be paid in full to the Heirs of their Estate.

1) In Wisconsin, Guardian files are "closed" / sealed not subject to open records laws or open records request. Guardian files must be made available to persons (with or without legal representation) who have cause; who suspect fraud, false declarations, embezzled funds, incomplete files mandated by laws governing Guardians and Wards.

2) All Temporary Guardian and Guardian or Conservator hearings, meetings and conferences must be in the presence of a court reporter. Any hearings or meetings or conferences cannot proceed without a written transcript by a court reporter.

3) A Temporary Guardian is appointed in an emergency situation to authorize medical treatment, temporary and long term placement. A Temporary Guardian cannot, at any time, be given full powers and authority of a Guardian, under any circumstances.

4) A Temporary Guardian cannot have authority, at any time, to access any of the Wards financial accounts or make any financial transactions or transfer funds or withdraw funds on any accounts, under any circumstances.

5) A Temporary Guardian or Guardian cannot keep, dispose of or sell any personal property of their Ward. A full inventory of personal property must be provided to the court or be fined and spend time in jail.

6) A Temporary Guardian or Guardian cannot sell any real estate, developed or undeveloped land, under any circumstances.

7) A Temporary Guardian or Guardian must submit a full and complete Inventory and Accounting in accordance with the laws. Failure to comply must have severe consequences, including a daily fine and jail time, until the documents are produced.

8) Monetary "Gifts" is considered theft and gifts of personal property of the Wards to any persons, including the persons who are in positions of Temporary Guardian, Guardian or Conservator must not be allowed at any time, under any circumstances.

9) Local law enforcement (police, county sheriff) and the County District Attorney or County State's Attorney or State Attorney General cannot dismiss or disregard

complaints by the family or of the victim. All complaints of elder abuse or financial exploitation or embezzlement by a Temporary Guardian or Guardian must include a corresponding Incident Report and must be investigated with a decision to prosecute the offender in a timely manner, well within the statutes of limitations.

10) Restitution: All embezzled funds must be paid back three (3) fold. All related expenses including all attorney and legal fees must be paid in full; part of the Order of restitution or the offender goes back to prison.

Banks and Financial Institutions must be put on notice:

11) Banks and Financial Institutions must become actively involved in detecting elder abuse in all forms. It is time for the banking community to wake up and to be put on notice that they do have a responsibility to their account holders, especially as they age.

When a persons bank account is experiencing unusual activity or when an account is being drained or any other suspicious, unusual activity, that is a "red flag" moment and the bank, like it or not, is on the front lines. We need their cooperation and their extra efforts to notice. Being on the front lines, the banks need to train their employees and take immediate and appropriate action by contacting local law enforcement or other appropriate agencies.

Note: Credit card companies routinely contact their credit card customers in short order when they notice that there is unusual activity or questionable charges or even charges on the same day in different states. I personally have been contacted several times about charge card transactions that were not our usual pattern; the charges seemed different, unusual, and suspicious and raised red flags.

12) Banks and financial institutions must recognize the fact that they are the #1 target for criminal Guardians and persons in positions of trust. The Banks must cooperate with person or persons contacting them suspecting embezzled or stolen funds from guardian bank accounts. Bank representatives cannot intentionally lie or use intentional misleading information (there are no bank records; bank records "disappear" or "evaporate" in a couple of years) to try to get rid of persons requesting reasonable documentation, such as bank statements.

13) Bankruptcy protection for the criminals.

There must be a complete halt whereby a thief, persons in positions of trust, Temporary Guardians, Guardians, Conservators, POA s or Personal Representatives or Executors of Estates can run and hide under Federal Bankruptcy protection to avoid all responsibilities by having their civil judgments discharged or reduced by a Federal Bankruptcy Judge. The attorney fees and court costs and efforts needed to fight in bankruptcy court is the only option to try to keep civil judgments from being discharged. This is a travesty; it is outrageous and this must be addressed and stopped, immediately.

14) Statute of Limitations needs reform. The limitations need to be uniform and extended. The current statutes of limitations varies from state to state. The statute of limitations always works for the benefit of the offender, the crook, while working against the victim and the complainant's quest for justice in a court of law.

Most states have 3 years statute of limitations on financial crimes, which is not nearly enough time for a person to first discover the theft, then to be able to prove the theft to an investigator in order to begin their investigation. 3 years is not enough time to file a complaint in civil or criminal court. Most non-violent criminal complaints do not make it to the phase of a case or the investigation phase. Many cases that find their way to a prosecutors desk, can collect dust for a long time. Many cases die on the vine, thereby aiding the offender, who depends on the expiration of statute of limitations to help him/her escape facing justice for his/her crimes.

Related Court cases:

1) Rock County Probate Case 01GN35 ("closed" with no accounting or inventory by Temporary Guardian Kathleen Simane);

2) Dane County Probate Case No.: 2001PR1252 "open" assets: $00.00;

3) Dane County Case No.: 2002CV003962 Estate of Helen Fabis vs William Skibbe

4) Rock County Case No.: 2004CV000375 Estate of Helen Fabis et al vs BankOne / Kathleen Simane case "open/bankruptcy";

5) US Bankruptcy Court District of MN case no.: 4-37370 Petitioner: Kathleen Simane

6) Rock County Criminal case no: 2005CF000301 STATE OF WISCONSIN vs KATHLEEN SIMANE

7) US Bankruptcy Court District of MN adversarial case no.: 5-3083 Estate et al vs Kathleen Simane, case "open".

Some Related Internet Links:
RE: Wisconsin Circuit Court Access: http://wcca.wicourts.gov

RE: National Association to Stop Guardian Abuse: http://stopguardianabuse.org

RE: TV news Woman Convicted of stealing $75,000 from elderly great-aunt / April 24, 2006: http://www.wbay.com/global/story.asp?s=4814574&ClientType=Printable

RE: Attorney General Lautenschlager Announces Minnesota Woman Convicted in Elder Financial Abuse Case / April 24, 2006:
http://www.doj.state.wi.us/news/2006/nr042406_MDFr.asp

RE: MINNESOTA WOMAN SENTENCED FOR THEFT BY BAILEE IN ROCK COUNTY CIRCUIT COURT / July 20, 2006:

http://www.doj.state.wi.us/news/2006/nr072006_.asp

RE: Woman Sentenced for Gutting Elderly Aunt's Estate Woman Used Money To Buy Breast Implants / July 20, 2006:
http://www.channel3000.com/liveatfive/9552732/detail.html

Related Newspaper Articles from the Janesville Gazette:
1) Woman charged with stealing from ill aunt's bank accounts / February 10, 2005
2) Woman to stand trial for theft from great aunt / April 27, 2005
3) Woman pleads guilty to stealing from aunt / April 24, 2006
4) Woman sentenced for swindling great-aunt / July 21, 2006

My commitment in the fight against all forms of elder abuse and elder financial exploitation is firm. All of our hope, faith and trust for our aging generations that fought for our county and built our country is in your hands.

Respectfully submitted,

Sylvia Rudek,
Personal Representative, Estate of Helen T. Fabis
Member, National Association to Stop Guardian Abuse - November 2006

Stephen Wasserman, Cerrillos, NM

To: Chairman, US Senate Special Committee on Aging
re: Call for papers on guardianship abuse.

Dear Senator;

Thank you for taking the time to read my story. I do not represent any organization, I am writing on behalf of my mother, Rhoda Wasserman, who because of abuses of the guardianship and eldercare system, can no longer speak for herself.

My mother is 78 and has been methodically stripped of her rights, her health, her property, and even her ability to speak, by unscrupulous persons who have turned a system which is supposed to protect and defend these most vulnerable citizens into a tool of exploitation, abuse, and even, in her case, almost murder.

Abuses of the guardianship process were common in the bad old days. It should not surprise us when, given the least chance, this crimes should rear it's ugly head again. There are always going to be old, vulnerable people with money, and there are always going to be predators looking for easy prey.

Criminals are adaptable, crime evolves. Likewise, efforts to combat these crimes must also evolve and adapt. In my mother's case, It's very much like an HIV infection, where the immune system (APS, Ombudsman, the Guardianship process) has been taken over, and it actually being used to exploit the very people it's supposed to protect.

I don't know what it's like elsewhere. I sincerely hope it's not this bad as it is down here. I can only report what I have learned here over the last 14 months: In Russell County, Virginia, one you are old, and at all infirm, you have no rights at all.

This should worry all future old people, as it worries me.

In the beginning I knew next to nothing about elder abuse and exploitation, had never spent any extended time in a nursing home and I had never been forced to deal with the guardianship process So, while for me this has been an intensely personal journey, it's also a perfect illustration of many of the problems associated with Elder Abuse and Exploitation and it's all too frequent offspring: Guardianship abuse.

One of the things I have learned about Elder Abuse and Exploitation is that it is a process, it happens gradually, over a period of many years. This makes it difficult to cram into a few short pages. So please, bear with me. It's not easy for me to describe and relive these events. Many are personally very upsetting. If at times I am not entirely lawyerly and detached, well, this is my Mother we're talking about, my own family.

And while I do endeavor to stick strictly to the facts, I am honestly outraged by these events, and about the way we are treating old people, generally. I'll try to keep it to a low roar.

One of the things I've learned over the last fourteen months that the crime of Elder Abuse and Exploitation follows known patterns – there is a definite M.O. with identifiable stages, symptoms and warning signs. I learned that there are established forensic protocols and profiles of typical perpetrators and their victims[1]. And I've learned, much to my dismay, that Guardianship, an institution designed to protect the helpless, is often the final "nail in the coffin" used by a predator to steal the last vestiges of a victims life, resources, and humanity.

Sadly, nearly everything I learned applies directly to my mother's situation, personally. It's virtually a textbook case of elder abuse and exploitation, culminating in the perpetrator, in this case a family member, being appointed guardian.

Everything that has been done to my mother is a crime, under state, federal and even international law. It's illegal to confine someone against their will. It's illegal to seize a patient's mail or to refuse to let them have a telephone. It's illegal to deny a patient a second opinion or their own doctor, or to deny a patient access to her own medical records. It's highly illegal to threaten an incapacitated person. It's illegal to drug someone nearly to death and then declare them incontinent and incompetent.

To do all of this to her without ever allowing her a day in court or to speak on her own defense obviously a violation of my mother's constitutional right of due process. But they did it anyway. They are still doing it, right now, even as I write this.

I am writing this, as it turns out, on Christmas day, 2006. I am alone in the country trying desperately to finish this letter before the deadline, having read about your hearings and your request for papers only last week. I can't be with my mom this christmas because over the last year I've spent almost every penny I had trying to help her get help. I've had to go home for a while to earn a living. So this letter is my Christmas present to her – to give her a little hope. I hope, that maybe, someone with some authority will finally do what she begged for in her letters, which were seized: Please Help Me!!

In between fighting for her rights and trying to keep my mother alive long enough for it to do her any good. I have had quite a bit of time to think about what we could possible do to fix the system. I've talked to hundreds of individuals and organizations and done extensive research.

Everyone agrees the system is completely broken. Everyone agrees something really must be done. And yet its as though we are in a state of national paralysis on this issue.

Something really *must* be done.

Now, I want to be clear: I don't favor solving every problem through government regulation, intervention or legislation. When this nightmare began, I immediately started to read everything I could find on the applicable laws. I was, initially, very encouraged. On paper, it all

[1]See I.D.E.A.L. Protocol and Testimony By Dr. Bennet Blum, Senate Committee on Commerce, Science and Transportation, "Fraud: Targeting America's Seniors, July 28th, 1999.

looks great. There are patient's bills of rights, state and federal, there are rules, laws, regulations and standards. There are scientific studies and senate hearings. There are experts and organizations, commissions and courts and procedures.

The trick is, none of that matters if nobody cares. Even with all my resources time and efforts devoted to my mom, I still have had no success in getting anyone to enforce anything.

Guardianship abuse is really a subset of elder abuse. So, I believe it is impossible to talk about guardianship abuse without also talking about the crime of elder abuse and exploitation generally. And I am sure that a fair percentage of guardianship abuse cases involve individuals who, like my mom are held in substandard nursing homes against their will.

## BACKGROUND: A TEXTBOOK CASE OF ABUSE AND EXPLOITATION

As I've said, I didn't know much about any of this before. I now know that my relative is virtually a textbook example of a perpetrator, and my mother a classic victim. I now know that her medical condition made her particularly vulnerable to undue influence, exploitation and other abuse. For my relative, she was a ripe fruit waiting to be plucked.

I know that all the warning signs were present, many years before. I should have known something was very wrong. But even when I began to suspect serious abuses, I did not know that the things my relative was and is doing were crimes. And I didn't know who to go to or what to do.

This all came to a head in 2005 when my mother fell and broke her hip after being left alone for the weekend. My relative concealed her injuries and confinement from the entire family for 6 months, and used this time to to secretly liquidate major assets. He then files to become her guardian, "to keep anyone from taking advantage of her". Only then did I learn she was starving to death in a substandard nursing home in Southwest Virginia.

By the time I found out what had happened and arrived in Virginia in October of 2005, I was told my mother was expected to die at any moment. The odd thing was, she had, to my knowledge, no known terminal condition2.

My first day at Maple Grove Nursing Home, my mother was in such bad shape I didn't even recognize her. I had to ask the nurse. When I found her, I was in tears. Her beautiful full head of hair had been shorn off practically to a crew cut. She had lost 40 lb.'s and was still losing weight. She was strapped into a wheelchair, slumped over in a drooling stupor, clearly overmedicated.

At times she would go into some kind of unexplained convulsive fits lasting days. At other times her hands shook almost like Parkinson's disease. She was obviously in great distress

[2]I later learned my relative had placed hundreds of thousands of dollars of her assets into funds with himself named a survivor. Also, he had sopped paying the bills at that time, (presumably presuming her immanent demise), another textbook example of the perpetrator's method's. He even complained to the billing department that they were spending to much on adult diapers, about a dollar each.

and pain. Yet, not only was no one trying to do anything to help her – no one would admit that anything at all unusual was going on. They referred to her obvious neurological symptoms as "mumbling". They stuck her in a hallway and left a woman with severe osteoarthritis in a position that must have been sheer torture given her spine and hip problems.

Her room was completely void of any decoration, convenience, comfort, or amenity, and she was sleeping on the floor in a broken plastic bed. This is a woman with assets of about a million dollars. No tv, no phone, no window she could see out of. No skin creams or cosmetics, no glasses, not a single picture on the wall, no flowers, absolutely nothing. My relative had even taken her false teeth away.

These are also, as I have learned, textbook examples, known and established patterns and practices of elder abuse, right down to the false teeth. The victim is stripped of every comfort and dehumanized. Once a person is no longer considered human, anything is justifiable – exploitation, neglect, even murder.

Even to a layman such as myself, it was obvious she was suffering from some kind of neurological condition. My mother was dying in front of my eyes for no good reason, and no one would do anything to help. She was not allowed to see a neurologist or get a second opinion. They would not even allow her to see her own medical records.

I took over feeding my mom, and did what I could for her. I found out that many of the nurses other staff were themselves upset at my mother's unexplained and precipitous decline. At some risk to themselves, many of them talked to me and helped me figure out what was going on[3]. To them I am eternally grateful.

So I did what you're supposed to do in the cases. I talked to the head nurses tried to talk to the doctor. I printed up informational sheets for the staff concerning the drug reactions we were all seeing. I consulted with MD's and other experts familiar with geriatric problems neurodegenerative disease and the side effects of psychotropic drugs. When I thought I knew enough, I went to the Maple Grove administration with my concerns.

They refused to do anything, or even admit that my mother had gone into severe decline. It began to feel a little like an episode from the twilight zone. My is being mother wracked with repeated torturous spasms (dystonia) frequently lasting more than 24 hours, literally dying before my eyes, while everyone pretends as though all this is somehow *normal* in a person her age!

I am from a medical family, my dad was an MD, many of my folks friends were fellow MDs. I have been involved in several serious medical situations in my life. I have never experienced anything remotely like the situation I encountered in Lebanon, Virginia. My

[3]Which was a) completely wrong diagnosis b) completely wrong medication c) Completely wrong treatment

relative, the doctor, the nursing home, all used their positions of trust and authority to keep me in the dark and to actual *prevent* my mother from getting proper, basic medical care. They wouldn't even allow her a second opinion.

I've also seen Alzheimer's before, and it was obvious to anyone who know my mother that she didn't have AD, including the nurses.[4] Yet my relative, the Doctor, and the administration kept insisting she was an end AD stage vegetable with little or no consciousness – this in a woman who a few months before was giving counseling sessions, teaching history, and speaking in fluent french with staff members.

I fed my mom at every meal possible, tiring to help her regain some weight. It was very difficult to feed her when she was severely Dystonic, and it could take an hour or more. This in part explains some of her sever weight loss- they just didn't have the time.

I talked to my mom, read to her, watched movies with her, for many hours each day. I found her to be far from a vegetable. With all the drugs she was on and her extreme reaction to them, it was hard to gauge her mental status. When she wasn't too drugged to speak or in a fit, she was obviously somewhat impaired, but usually rational and with a fairly good memory.

Mainly she had trouble moving and speaking, not with understanding. She told me, quote " I seem to be having trouble transmitting". As I explained to her, this is called *aphasia*, and is very common in strokes.

Yet, in spite of stroke being listed on the doctor's report as one of her possible conditions, she was receiving no speech therapy, or rehabilitory therapy of any kind. She was simply restrained in a broken wheelchair, drugged up and left to die in a corridor.[5] And I was never even told she was there.

When it became obvious that neither my relative or Maple Grove would lift a finger to help my mom, I did what one is supposed to do: I contacted the appropriate authorities. Called Russell County Adult Protective Services and the Office of the Long Term Care Ombudsman. I also hired a local attorney to dispute the guardianship and try to get my mother to a neurological hospital.

## GUARDIANSHIP HITS ICEBERG !

One of the most shocking things was to observe just how openly and flagrantly all this was done. This was no conspiracy conducted under cover of darkness. This was clearly business as usual in Russell County.

Through the federal government sets standards and funds programs to protect the elderly,

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[4]Over the subsequent 14 months everything I have said concerning my mother's condition, medication and care has proven correct. In fact, it turns out to have been even worse than I thought: Not only did she have a severe drug reaction, but the drugs they were giving her made her condition (PSP) much worse, greatly accelerating the progress of her disease.

[5]This is not hyperbole, she actually starving to death..

the actual programs are run and controlled locally. When the local system is either negligent or actually corrupt, as I believe is the case here, there is really no place to go.

This is a former coal town, a company town, the sort of place where people learn their place, not their rights. Anyone who persists in pursuing his or her rights is quickly labeled a "troublemaker". Or as my relative called me, "uppity". The message we got everywhere was "Get lost Go away, nobody cares what happens to old, sick people anyway".

Documented fiduciary breaches by my relative, now her guardian, include undocumented $100,000 gifts to himself, large, improper loans to his girlfriend, the attempted embezzlement of $450,000, fraud and threatening an incapacitated person – And that's just the tip of the iceberg. You'd think the powers that be would at least look into it. They all promised they would, and in the case of Adult Protective Services, support our request to the court for an independent medical evaluation by a neurologist. Then, nothing.

On new years of 2006 my mom was hospitalized due to continuing abuse and neglect. While she was there, I made a complaint to the hospital department of social services. They submitted a report to APS as required by Virginia law[6] and became the first legally mandated reporter to actually follow the law. A few days later, I met with APS for the third time. Once again, they promised they would investigate. Virginia law says they have 45 days to issue a written report. This last meeting was in January of '06. In a subsequent phone call with the director of APS warned me that I was, quote: "obviously too smart for my own good". That was the last I heard from them.

## PROBLEMS WITH THE LTC OMBUDSMAN'S OFFICE

I also had serious problems with the office of the Long Term Care Ombudsman, a federally funded program. These complaints include refusing to investigate a complaint and illegal sharing of (my) confidential information. Unfortunately, space does not allow me to go into this here. These complaints are now under review (and I hope, investigation) by the Office of Civil rights at the Department of Health and human Services.[7]

## THE GUARDIANSHIP HEARING

Gross Abuses by the court and others involved are too numerous to list here, so I will stick to what are, in my mind, the most egregious offenses.

First and foremost, My mother was not allowed to appear and speak in her own defense. Nor was she properly served. This would seem to be an obvious violation of due process.

The Virginia statute is explicit:[8] a defendant **has an absolute right** to appear at his or her own hearing and to a trial by jury. If the defendants physical limitations preclude her appearing,

[6]Va Code SS63.2-1606
[7]If any of your committee knows anyone at HHS, A good word would be highly appreciated.
[8]va code 37.2-1007

the court is directed to hold the hearing at a place convenient to her, ie: **the court should go to the nursing home**, which happens to be practically across the street. Two witnesses told the judge my mother had expressed her wish to appear. Our protests were ignored and then expunged.

Secondly, and this goes beyond even a constitution right, it's a violation of my mother's basic human rights: You're not allowed to hold someone against their will, drug them into a stupor and then declare them "incompetent". Yet this is exactly what they did, deliberately, to keep my mother from asserting and protecting her rights.

She was was not allowed an independent diagnosis or evaluation or even a second opinion. She was not even allowed access to her own medical records. There was no proper doctor's report. The other side even fraudulently submitted a "second doctor's report".

When over a thousand pages of unorganized documents were dropped on us the day before the hearing, we asked for a continuance. The judge assured us we did not need one, as nothing would be decided at monday's hearing. He said just wanted to "get the ball rolling". Then he rushed it through and appointed my relative guardian the same day. When we protested, we were ignored and then our please deleted from the record.

No one would ever consider buying or selling a piece of real estate this hastily, or without proper documentation or disclosure. I've seen *car sales* that took longer. Shouldn't it take more than a few hours to, effectively, condemn a woman to death?[9]

We were not allowed any real discovery, not any time to analyze what discovery we did obtain. Crucial documents that were listed as provided were missing. There was hearsay testimony, and plenty of just plain lies. The GAL was a personal buddy of my relative and another supposedly independent official is closely associated politically with the other side.

We spent that night in shock, crying till dawn, unable to sleep. We hadn't necessarily expected to win, but we expected at least a fair and diligent process. All we had asked was so reasonable: to be given enough time to examine the evidence[10], and that my mother be allowed to see a neurologist, that she be given a chance to live.

## SOME PERSONAL THOUGHTS AND OBSERVATIONS

What we are really talking about is here civil and human rights. Guardianship is the stripping away of some or all of those rights. My mom can no longer vote. My mom can no longer go where she wants to go, or spend her money for herself. Her "Guardian" won't even let her go for a 10 minute ride in a car – doctor approved. She has been institutionally dehumanized – she is no longer considered a full human being.

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[9]This is not an exaggeration- we now know the drugs they insisted on keeping her on for no good medical reason were actually killing her, and were not even licensed by the FDA.

[10]Later analysis shows clear evidence of fraud and breach of trust, forgery and just plain old theft. We still have not been allowed to examine medical records at all, despite three promises by my relative to share this vital information.

Over the last 14 months I've been working to rescue my mom I've had a lot of time to think about how is it that abuse and neglect can become institutionalized and accepted.

I am a former volunteer firefighter. In firefighting, you learn about "the fire triangle", the three conditions necessary before a fire can happen. These are: Fuel, Oxygen, and source of ignition.

For certain types of civil and human rights violations, one could imagine a similar formula: 1) A helpless, powerless, isolated,, captive population which is effectively and easily dehumanized. 2) No effective oversight or regulation. 3) Persons without conscience who are willing to take advantage of the situation.[11] 4) Big money, Power involved.

The elderly, particularly the population confined to so called "nursing homes" fit all of these criteria. Senators, I don't know about you, but from what I've seen of "nursing homes" over the last fourteen months, when I get old I'd much prefer be tied to tree out back. At least you get some fresh air that way, and you're not exposed to MRSA infections.

Everything that has been done to my mother is a crime. It's all spelled out in state and federal law. Yet it continues to this day.

Everyone knows these things happen. Everyone agrees it's a crime and a scandal, everyone agrees: something *really* should be done. So How is it that my mother, literally, has come to have less human rights than a terrorist at Gitmo?

My mom is a psychologist, and my dad was a psychiatrist, so at the risk of sounding too theoretical about it all, I have to say I believe much of the problem is societal and psychological.

First, Simply put: we are in a complete state of national denial about these problems because no one really wants to deal with these realities- who would? I certainly didn't. Nobody wants to hear about it, nobody wants to think about it, and nobody wants to imagine that they, themselves might end up in such a situation.

This creates a climate of denial which makes such crimes easy to get away with. It's akin to the wall of silence formerly surrounding child sexual abuse and other forms of horrific abuse. No one wanted to talk about it, or believe it was common, which made our children easy prey.

Things have improved in that area somewhat, but it's been hard for everyone. To admit that parents, relatives caregivers and clergy all can be predators is upsetting, it disturbs our world view. It's the same the crime of Elder Abuse and Exploitation and it's child: Guardianship abuse. Our silence makes for a world where such abuse is becoming more and more common, and perpetrators usually go scott free.

Also I'm afraid that a look at the harsh realities of this national crisis would challenge the myth of the American family as a uniformly caring, loving institution. Some are, some are not.

[11]In my experience these types are never hard to find.

But to publicly bring this up apparently violates some sort of cultural taboo.

You're treated –(and this is something everyone I know who has had to deal with the system will tell you) as thought it's a "way out" notion, when everything we know, personally, statistically and through forensic research that not only are these crimes common, but they are uncommonly easy to get away with, as well as vastly underreported.

To those of you who have good, caring families, bless you, and yours. But I would guess all families have to deal with these problems.

My own anecdotal observations suggest some of it might be Demographics. I've observed that in some older style, large families with lots of siblings and other relatives involved, it's much harder for one child to take control and exert undue influence over a parent. One may try, but it's easier for the others to get together, compare stories and figure out who has telling mom tales, before it's too late.

In my case I didn't find out till years later that my relative had been telling my mom outrageous stories about me for decades, to alienate her from me and visa versa. This is one of the most common techniques of a predator, by the way, Isolation and Alienation.

To conclude my remarks: What can be done?

1. Stop **Guardianship abuse before it starts. Guardianship** and Guardianship abuse is usually the end stage of a long process. It can only be discouraged prevented by preventing abuse and exploitation of the elderly in earlier stages.

2. **Powers of attorney**. Much abuse of the guardianship process could be intercepted and avoided by stricter standards, penalties and requirements for Attorneys in Fact and Powers of Attorney generally.[12] , since a power of attorney frequently proceeds and is a precursor to guardianship. If my relative hadn't found it so easy to get away with abusing his Power of Attorney, he never would have become what he is now.

While they are a useful and convenient tool for many, Powers of attorney are also fertile ground for abuse. In guardianship cases, an abusive P of A may even be cited as evidence of a victim's intent: "see, she wanted him in charge" without any review of how well the attorney in fact performed his or her duties.

Again, this is an area where state law, in Virginia, reads just great. He's supposed to act in her best interest. He's supposed to keep her involved in her own affairs. He's supposed to be held to the very highest of standards. But there is absolutely no enforcement. Only the fox guards the henhouse.

The law needs to be written so there is no doubt about legal and ethical responsibilities,

[12]The ABA has been advocating such reforms for many years.

and Attorneys in Fact should probably be bonded and their actions subject to review similar to a guardianship.

3. **We have to make it a lot riskier for predators if we want these crimes reduced.** One of the things that makes these crimes so attractive to a predator is the low risk involved. Perpetrators are rarely prosecuted and recovery of funds exploited is almost nonexistent. Most people don't even know these actions are crimes. By the time anyone figures out what is going on, the money is usually gone and the victim, who is, of course, also the chief witness, is either disabled, demented or dead.

If the use of exploited funds could be made a tax offense it might help deter predators- even if they disappeared the money, they could still face consequences years later. A complimentary approach would be to extend the private prosecutor laws to include such crimes.

3. Many **of the victims of Guardianship abuse are or become residents of nursing homes**. Promoting respect of these patients as human beings with inalienable rights instead of as human garbage to be disposed of would prevent other forms of abuse including Guardianship abuse.

The main problem facing a perpetrator is the victims lifespan. The only thing that can really go wrong is if the elder lives long enough to use up his or her resources. Thus, as in my Mother's case, the Guardian/perpetrator frequently uses his position of trust to prevent the victim from receiving proper care and treatment.[13]

4. **Making abuse of Guardianship and Powers of attorney a federal offense** might scare a few predators off. The words "federal offense" still carry some weight, and could serve to at least curb some of the most flagrant abuses. I support this, as well as efforts to pass federal legislation against elder Abuse and Exploitation. In Virginia, Elder Abuse and Exploitation is a crime, but there is no enforcement provision. The only option is to sue the perpetrator- in the same local court before the same judge who granted him guardianship.

5. **We desperately need to develop new and better models for eldercare**. For the price my mother is being charged for substandard care in a place she hates, she and I could be on a round the world cruise together. Every one here knows this. Does anyone on this committee know anyone who wants to end up in a nursing home? How many for the cruise, could I please see a show of hands?

So why hasn't anything changed significantly, despite decades of dedicated effort by honest sincere people, some of whom are no doubt members of this committee? Probably, in part, because there are vested interests who are making one hell of a good living off the system as it is. And because it's always easier, in the short term, to keep doing what we've been doing.

Federal Criminal Penalties might help put some fear into predators and I'm all for it. But

[13]Also, senator PLEASE look into the continuing use of antipsychotic drugs administered, quasi-legally to many non psychotic nursing home residents. They nearly killed my mom, and the FDA and AMA say they almost double the risk of death.

these kinds of problems cannot be solved by enforcement alone. The scale of it is just too huge, and in my observation, passing laws that have no chance of being enforced actually makes things worse. It breeds disrespect for the law and corruption. A better approach might be to try to engineer systems that has built in, intrinsic motives to give each individual the highest quality of life and the most appropriate level of protection.

In our system of free enterprise, the factor that is mostly responsible for the maintenance of a high quality or at least good value of a product is consumers. We vote with out feed and our pocketbooks, and a bad product is shunned. There are government standards, such as truth in advertising, or health and safety, but by in large the process is self regulating. But what happens, in a corporate model, when the consumers of the product have no input on the system? They can't "vote with their feet" and move to a better run facility- many can't even walk. They aren't spending money, except on the facility, mostly through medicare. So no one is marketing to them, no one is polling them, no one asks any longer: What do you want?

The result is the elderly, especially in institutions, essentially become Non Human. Once a person becomes non-human, anything can be done to them, because they are no longer considered people. They become nothing but fixed and variable costs, disposable assets to be used and abused in an end of life scam that ends up taking everything they have – their home, their savings, their assets, and charging the rest to the taxpayers.

I'm not convinced that health care solely for profit is necessarily a great idea. But since we have apparently decided, for the most part, to turn over our elderly to a corporate for-profit system, we should expect and be prepared for that system to do what a corporation is supposed to do: make a profit, and serve it's shareholders.

Corporations are machines. Rather than be "shocked, shocked" that they are behaving in exactly the way they were designed and programmed to behave, we might try by tinkering a bit with the program. For instance, if we could find some scientific measure of well being and tie payments under medicare to that factor, then happy elders would equal higher profits- a self correcting system. This obviously would require some research and development. I'm not sure it could even be done, but it would be worth a try. It's essential that we find approaches that are not wholly dependent on either goodwill or enforcement – we have to design a system that self regulates.

Honestly, I doubt we will deal with these issues as a nation until it is forced upon us. The reality of nursing homes is too horrifying, as is dealing with neurodegenerative diseases like PSP, Parkinson's, and Alzheimer's. Only if there is a national outcry on a grassroots level will anything truly improve. We have a clear enough motive: We are next in line.

I suspect that there are vast numbers of us baby boomers who are now caring for our parents, seeing the system as it is, and frankly, freaking out a bit. None of us is getting any younger, and most of us have no savings. I think would rather die than be confined to a place like Maple Grove. I have no doubt many others of my generation feel similarly scared, angered and, I hope stirred to action.

Politically, I am a fairly lazy person. I vote, I read, I gripe, and that's about it. Anything that gets me off my butt to the extent that this issue has, HAS to be a national crisis.

The only real questions is, will we organize before it's too late? And, who among you, our political establishment, will realize this and take proper advantage of what I believe is a growing storm.

Thank you and Merry Christmas
(signed)
Stephen Wasserman