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National Center on Elder Abuse

Ten Ways to Reduce Guardianship Abuse

Through Enactment of the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA)

INTRODUCTION

What guardianship laws could states adopt to best address guardianship abuse? Can a model state guardianship law make a difference?

Guardianship is the appointment by a court of one person or entity to make personal and/or property decisions on behalf of another whom the court determines is unable to make such decisions. Guardians make important life choices for at-risk adults with diminished decision-making capacity. Courts appoint guardians for the adult's protection, yet at the same time, the appointment strips the person of fundamental rights.

Guardianship is governed by state statutes, which may be modified by state legislation from year to year (American Bar Association Commission on Law and Aging). The Uniform Law Commission (ULC), established in 1892, "provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law" (Uniform Law Commission). The ULC published its first uniform law on guardianship in 1969 and approved the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA, or "the Act") in 2017. The Act improves upon most current state guardianship laws with strong protections for adults subject to guardianship. It is available now for adoption by state legislatures. In fact, the Act has already been enacted in two states – Maine and Washington (Uniform Law Commission), and five other states have adopted parts of the Act.

One key theme throughout the Act is the targeting of guardianship abuse. While many guardians are dedicated fiduciaries, an unknown number take advantage of those they were named to protect (Karp & Wood, 2021). We have very little data on the extent of such abuse, but abusive guardians have been profiled in numerous media stories over the past three decades. The Act offers a set of tools to reduce opportunities for abuse, and better protect the rights and needs of individuals subject to guardianship.*

*State terminology varies. In this Brief, the generic term "guardianship" refers to guardians of the person as well as guardians of property, frequently called "conservators" unless otherwise indicated. In UGCOPAA, the term "guardian" refers to a person appointed to make decisions about personal affairs whereas "conservator" refers to a person appointed to make decisions about property or financial affairs (UGCOPAA Section 102). Some of the UGCOPAA provisions cited in this Brief relating to guardianship have counterpoints for conservatorship.

1 Grievance Procedure

How can an adult subject to guardianship communicate to court their concerns about the guardian's conduct?

A number of states have enacted guardianship complaint procedures. The National Probate Court Standards urge courts to establish "a clear and easy-to-use process for communicating concerns…" (Van Duizend & Uekert, 2013).

The Uniform Act's Section 127 creates a process for anyone interested in the welfare of an adult subject to guardianship to bring grievances about a guardian to the attention of the court without a formal petition or motion. The grievance could be based on a guardian's breach of fiduciary duty, or could be seeking termination of the guardianship and restoration of the adult's rights. For instance, in one case, the person subject to guardianship sent a handwritten note to the court saying "I feel very competent to take care of myself. I request that all my civil rights be restored" (Wood, Teaster, Cassidy, 2017).

Under Section 127 of the Act, the court, after receiving a written grievance about a guardian, must review the grievance and any related court records, and schedule a hearing if "the grievance supports a reasonable belief" that removal of the guardian or termination of the guardianship may be appropriate. The court may take action supported by the evidence including ordering the guardian to provide a report or other information, appointing a guardian ad litem, appointing an attorney for the individual, or holding a hearing. Notably, to avoid unnecessary burdens on the court, if the same or similar grievance was filed within the preceding six months and the court followed the Act's procedures, the court may decline to act.

2 Notice of Key Changes in the Case

How can courts remain informed about the needs of an adult subject to guardianship, and whether there is any risk of abuse?

Most states require guardians to file annual reports. While annual reports can bring certain concerns to light, they may not always be timely filed, may not include key information –and much can happen in the year between report filings. Often family members and friends will have more timely information about the person's changing condition and needs – and may be able to report to the court about any abuse by guardians. They can provide the court with valuable information if they are regularly notified of key case events. The Act includes an innovative provision that, as explained in the Prefatory Note, allows certain named persons such as family members to "serve as an extra set of eyes and ears for the court."

Section 310(e) requires the court appointing a guardian to name anyone who cares about the adult's welfare to receive copies of essential documents such as the notice of rights of the adult and notice of a change in the adult's primary dwelling. Those identified are also entitled to a copy of the guardian's plan, access to court records about the case, notice of the adult's death or significant change in health, notice that the court has modified the guardian's powers, and notice of the guardian's removal. For little or no cost to the court, this new approach will enable the court to better monitor the guardian and determine at an early stage whether the guardian is abusing, neglecting or exploiting the adult.

3 Selection of Residential Setting

How should a guardian decide where the adult subject to guardianship will live? What safeguards should target a move to a nursing home or other restrictive setting, or a move across state lines?

One important power that a guardian has is the authority to make choices about where the person will live. Decisions about moving to a nursing home are particularly fraught, since a nursing home may isolate the person from family and friends, increase exposure to infectious diseases such as COVID, and may provide poor quality care. Moreover, living in an institution may be counter to the person's wishes (Hirschel & Smetanka, 2021).

Section 314(e) of the Act instructs guardians to choose the residential setting that the adult would select if able. If the guardian cannot determine what the person would want, or if the individual's choice would cause the adult unreasonable harm, the guardian may choose a setting based on the adult's best interest. The guardian must give priority to living situations that will allow the individual to continue important social relationships and that won't impose any unnecessary restrictions. Also, the guardian must give notice of any change in residence to the court, the individual adult, and anyone else required by the court, within 30 days after the change. These provisions work to protect the adult from isolation and overly restrictive settings, and ensure that the court and other important people know where the person is living.

For permanent moves to particularly restrictive settings such as nursing homes and mental health facilities, the Act allows the guardian to make the change only if the move was in the guardian's plan, was specifically authorized by the court, or the individual and certain others received advance notice and did not object. Similar criteria are required before the guardian may sell the person's home or give up the person's residential lease. These provisions can help guard against unduly restrictive and potentially harmful changes in residence.

Finally, a guardian may not move the individual out of state unless the court authorizes the move and it was disclosed in the guardian's plan. This provides further protection against isolation from family, friends and community – and efforts to hide the guardian's actions from watchful eyes.

4 Precedence of Powers of Attorney

How can an adult's prior choice of a health or financial decision-maker be honored once the court appoints a guardian?

Advance planning for needed health care and/or financial decision-making enables an adult to have a trusted surrogate who is familiar with their values and preferences. Individuals may execute advance planning documents such as health care powers of attorney and financial powers of attorney. Ideally, such documents could make guardianship unnecessary, but sometimes a court nonetheless appoints a guardian.

Section 315(a) of the Act provides that if the individual subject to guardianship has previously executed a power of attorney for health care or finances, the guardian cannot revoke it without a court order. Moreover, the decisions of an agent under a valid power of attorney take precedence over the decisions of a guardian unless a court orders otherwise. The Act requires guardians to cooperate with agents under powers of attorney to the extent feasible.

This provision helps protect adults in several ways. First, it helps ensure that the individual's choice of a trusted surrogate decision-maker is respected – which in turn could enhance quality of life and protect against detrimental health or financial decisions. In addition, this section discourages people from filing a guardianship petition for the sole purpose of displacing a fiduciary who is carrying out the individual's wishes. Such conflicts, often among siblings or other family members, can be damaging to a person who has made prior choices and, who sought to preserve autonomy. Finally, since powers of attorney can be misused, the provision includes a safety valve against abuse by agents under a power of attorney. If the court believes the agent's conduct is abusive, the court can empower the guardian to override the agent's authority.

Limitations on Communication and Visitation

How can an adult subject to guardianship safely retain the right to interact with family and friends if they want to do so?

COVID brought to the fore the devastating effects of isolation. Social isolation and loneliness can cause psychological and emotional harm, impact physical health, and may even increase mortality (Holt-Lunstad et al., 2015). There have been growing concerns about guardians improperly isolating adults subject to guardianship and keeping them from interacting with family, friends and others who are important to them. States have wrestled with this controversial issue, highlighted in several key celebrity cases (Pogach, 2018).

Section 315(c) of the Act strongly limits a guardian's ability to restrict the adult's interaction with others. It recognizes that adults subject to guardianship have a right to these interactions. This right can only be curtailed in extremely limited circumstances. The person retains the right to communicate, visit and interact with others unless the guardian is authorized to restrict these interactions in a specific court order concerning a particular person or a very specific category of persons. Short of a court order, a guardian who has good cause to believe that interaction with a specific person poses a risk of significant physical, psychological or financial harm may restrict contact only: (a) for no more than seven days if there is a family or pre-existing social relationship; or (b) for no more than 60 days if there is no family or pre-existing relationship.

In addition to reducing the impacts of isolation, this provision enables family and friends to serve as "eyes and ears" on the person subject to guardianship, protecting them from possible mistreatment by the guardian or others in their environment. At the same time, it allows the guardian to protect the individual from harmful contacts by imposing short-term limits on specific interactions when absolutely necessary, and seeking a court order where a more permanent ban is warranted. In essence, the Act offers a workable balance that respects an adult's right to social interaction while it protects from the risk of possible harm.

6 Submission of Reports and Accounts, and Court Monitoring

What information must the guardian share with the court, the person subject to guardianship, and other interested parties? What responsibilities does the court have to monitor the guardian's conduct?

Court monitoring of guardianship cases is crucial to ensure that the guardian does not mistreat the person, mishandle the money and property, or otherwise fail to carry out their fiduciary duties–and to take action if abuse takes place (Hurme & Robinson, 2021). Monitoring includes a spectrum of post-appointment events such as:

- Ensuring that plans, reports, inventories, and accountings are filed on time
- Reviewing promptly the contents of all plans, reports, inventories, and accountings
- Independently investigating the well-being of the individual and the status of the finances as needed
- Improving the performance of the guardian and enforcing the terms of the order, and
- Considering whether a less restrictive option would be appropriate (Van Duizend & Uekert, 2013).

Section 317 of the Act lays out a series of responsibilities of the guardian and the court. Within 60 days of appointment and annually thereafter, the guardian must file reports with the court on the condition of the person, as well as their funds and other property within the guardian's control. The Section includes a detailed description of 14 elements the report must include. The adult subject to guardianship and others designated by the court have the right to receive a copy of the report no later than 14 days after it is filed.

The court must establish procedures for monitoring reports and must review each report at least annually. If the court determines that the guardian may have failed to comply with their duties, the court must notify the adult and others, may appoint a "visitor" (investigator) to interview the parties and investigate other matters. The court may hold a hearing on whether the guardian should be removed, the guardianship terminated, or other changes made. The court can also determine whether to adjust the fees requested by the guardian.

Section 317's reporting requirements enable the court to oversee the guardian's activities in a meaningful way. They also allow the adult and key third parties to get a detailed picture of how the guardian is carrying out their responsibilities and determine whether there is any abuse, neglect or exploitation. The goal is to make the guardian's conduct as transparent as possible. This section also places specific responsibilities on the court to oversee the guardian's conduct and states that the court must act if the guardian hasn't complied with statutory mandates. It gives the court tools for investigating any suspected wrongdoing and for taking action if there is evidence of malfeasance, including removing the guardian or ending the guardianship.

7 Court Removal of Guardian

How does the court determine whether to remove a guardian for failure to perform the guardian's duties?

To protect individuals subject to guardianship, courts must have the power to remove a guardian and appoint a new one if the guardian abuses the adult under their care or otherwise fails to perform required duties. It is important for the adult –and others with knowledge of the guardian's performance – to have a clear route to bring evidence of malfeasance to the attention of the court and to trigger a hearing.

Section 318 empowers the court to remove a guardian for dereliction of duty or other good cause. It states that the court must hold a hearing to determine whether to remove a guardian and appoint a successor guardian under three specified circumstances:

1. If the individual, the guardian or another person interested in the welfare of the person petitions for removal and makes allegations that, if true, would support removal;
2. If any person communicates to the court information that would support a reasonable belief that removal is in order: or
3. If the court determines that a hearing would be in the best interests of the individual.

These provisions allow multiple parties to bring relevant information to the court's attention and ensure that a hearing will be held once someone communicates information that would form a basis for removal if true. Section 318 also gives the adult subject to guardianship the right to choose an attorney to represent them in the matter of removal, which may increase the likelihood that evidence of mistreatment is presented to the court. The court must award reasonable fees to the attorney.

8 Conservator Bond

How can the court protect an individual subject to conservatorship* against financial exploitation by the conservator?

One way to protect an individual against conservator exploitation is by requiring the conservator to furnish a bond. A bond functions somewhat like an insurance policy: if the conservator financially exploits the individual, the court can call in the bond and the individual can be repaid for funds lost.

Section 416 of the Act mandates that the court either: (a) require a conservator to furnish a bond; or (b) make an alternative asset-protection arrangement such as restricting conservator access to an account above a specified amount. The court can only waive this requirement if it finds that a bond or other arrangement is not necessary to protect the individual's interests. The court can never waive the bond if the person is in the business of serving as a conservator and is being paid. The provision specifies a formula for determining the amount of the bond.

Mandating a bond or alternative arrangement protects the person under conservatorship by providing a remedy in case the conservator subsequently misappropriates funds or engages in exploitation. Allowing an alternative asset-protection arrangement enables the court to appoint as conservator a family member or friend who is unable economically to obtain bond (such as someone with a poor credit rating) but who the court believes is nonetheless best suited to serve.

9 Determination of Reasonable Guardian Fees

What is a fair guardian's fee? How can we reduce the chances of guardians overcharging the estate?

According to state statutes, guardians are entitled to reasonable fees, subject to the court's approval. Often these fees are paid from the estate of the person subject to guardianship. But what is a "reasonable fee" and what services fall within the scope of payment? Sometimes guardians "[run] up their fees in ways large and small, eating into seniors' assets"

[Heisz, 2021]. Press headlines such as "Rights and Funds Can Evaporate Quickly" tell sad tales of exploitation through inappropriate charges for guardianship services.

Section 120 of the Act sets out seven factors for the court to consider in determining whether a fee is reasonable – beginning with "the necessity and quality of the services provided" and "the experience, training, professional standing, and skills of the guardian or conservator." One important factor is "the effect of the services on the individual subject to guardianship or conservatorship."

There are two especially notable features of Section 120. First, it addresses the scenario in which the guardian is an attorney and charges their standard rate for legal services, generally higher than rates normally charged by guardians. One of the factors the court must consider is "the fees customarily paid to a person that performs a like service in the community." The Act's Commentary points out that pursuant to this provision, when an attorney guardian performs a function that does not require legal expertise, the hourly fee generally should be lower. "For example, attorneys should not receive their standard hourly rate to accompany an individual subject to guardianship on a routine personal care appointment or to grocery shop for the individual."

Second, the section addresses situations in which the guardian opposes a modification or termination of the guardianship and restoration of rights to the individual, and the guardian charges a fee for the time spent in opposition. Under Section 120, the court may not order compensation for this time unless "the court determines the opposition was reasonably necessary to protect the interest of the individual…"

10 Protective Arrangements

What if an older adult needs a court order for a specific protective action, but doesn't need an ongoing guardianship that strips them of rights, often for the rest of their lives?

Article 5 of the Uniform Act creates an alternative to guardianship and conservatorship called a "protective arrangement." This allows the court to craft a specific order tailored to the particular needs of the individual – generally narrower in scope and shorter in time than an ongoing guardianship or conservatorship order. To use a protective arrangement instead of a guardianship or conservatorship, the court must first find that the adult is unable to make or communicate decisions even with appropriate supportive services, technological assistance or supported decision making, just as with guardianship –but the adults needs can be met by authorizing a specific action rather than a continuing guardianship.

Such specific court authorizations may target possible abuse or exploitation. For example, the court may order visitation or supervised visitation to be allowed with a family member, friend or other individual the person wants to see – or may restrict visitation by a specified individual who could put the person at risk of harm. The court may also, instead of conservatorship, direct a range of financial transactions, some of which could target exploitation. For instance, the court could ratify or invalidate a contract, trust or will, or restrict access to estate property by a specified person whose access may cause financial harm.

Additionally, Section 503(d) of the Act includes a special provision aimed at "undue influence" (although the term is not used in the Act's provision). Undue influence is "a process that occurs when one person (influencer) uses his or her role and power to exploit the trust, dependency, and fears of another person (victim) in order to gain control of that person's decision making" (American Bar Association Commission on Law and Aging & American Psychological Association, 2021). Diminished capacity is not an element of undue influence. Any adult can be unduly influenced, although diminished capacity may make a person more susceptible.

Under Section 503(d), the court may issue an order to restrict access to the person's property by a specified individual, *without* a finding of need for a conservator, if the court determines that "through fraud, coercion, duress, or the use of deception and control" the individual caused or tried to cause financial harm or poses a risk of substantial financial harm to the person. This allows the court to design tailored remedies for a situation in which a person may be unduly influenced. For example, the court could authorize application for public benefits, change title to an account, or order automatic online payment of bills – without the restriction of rights entailed with a conservatorship.

CONCLUSION

There are many reasons why a state might adopt provisions of the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act. The Act is built on person-centered principles. It protects rights. It sets out clear guidance to guardians and courts. It puts a strong emphasis on use of less restrictive options. It also targets guardianship abuse, through the ten provisions described in this brief. Enacting and fully implementing one or more of these provisions should help trigger a reduction in abuse or exploitation by guardians – and passage of the Act as a whole, with enforcement, could bring about real change.

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