

2015 State Guardianship Legislation Relating to Elder Abuse



Adult guardianship¹ can be both a solution to – and a source for – elder abuse. A court-appointed guardian can be a savior, protecting from abuse; or can enable elder abuse, particularly if a court fails to demand accountability.²

Each year state legislatures enact laws changing procedures and requirements in guardianship. In 2015, 18 states enacted changes in their guardianship code in 33 different bills. Here are the changes that most address issues of elder abuse, neglect and exploitation.³*

Counsel in Guardianship Proceedings

The right to counsel is a lynchpin in ensuring that guardianship proceedings focus on the real needs and protect the rights of individuals for whom a petition has been filed.⁴ In 2015, four states enacted measures concerning the provision of counsel. In *Texas*, a Senate Committee explained that “for more than two decades there has been controversy regarding favoritism, cronyism, and nepotism in court appointments. The occurrence, possibility, or even the appearance of some attorneys and judges colluding to profit from these appointments simply is unacceptable and undermines the public’s confidence in the entire judicial system...” Thus, a new Texas law requires the court to use rotation lists for the appointment of most attorneys and other professionals in the guardianship process – while still maintaining the judge’s discretion to appoint a particular person where specialized experience is needed.

Both the *District of Columbia* and *North Dakota* clarified the role of counsel for the respondent to a petition – stating that a guardian ad litem is to advocate for the “best interests” of the individual, as distinct from legal counsel, who advocates for an individual’s wishes if possible. *Washington* provides for “post appointment” counsel for modification or termination of the guardianship order.

Guardian Certification, Standards & Training

Some states have enacted their own guardian certification or licensure programs, beyond the national Center for Guardianship Certification [CGC]⁵ process. In 2015, *Nevada* established a licensure requirement covering business practices for private professional guardians. Such guardians also must continue to be certified by CGC.

In *Ohio*, the Supreme Court approved a long-awaited set of guardian standards drawing on many of the National Guardianship Association’s *2013 Standards of Practice*⁶ – especially as to avoidance of conflict of interest, exercise of due diligence, person-centered planning, use of the least restrictive choice, monitoring and coordinating of services and benefits, and prohibition of providing direct services. The Rules require that all guardians, including family guardians, complete an approved six-hour training course and continuing education annually.

*CA, DC, FL, IL, IN, IA, MT, NV, NH, NJ, NY, ND, OH, OR, RI, TX, VA, WA

¹ Guardianship terminology varies by state. In this brief, the generic terms “guardian” and “guardianship” refer to guardians of the person as well as guardians of the property, unless otherwise noted.

² Wood, E., “The Paradox of Adult Guardianship: A Solution to – and a Source for – Elder Abuse. *Generations*, American Society on Aging, Vol. 36, No. 3, Fall, 2012, pp. 79-82.

³ American Bar Association Commission on Law and Aging, *State Adult Guardianship Legislation: Directions of Reform – 2015*, http://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice.html

⁴ For a state by state chart of state statutory provisions on right to counsel, see “Representation and Investigation of Guardianship Proceedings” [2014], at http://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice.html

⁵ Center for Guardianship Certification, <http://www.guardianshipcert.org>

⁶ http://www.guardianship.org/guardianship_standards.aspx

Background Checks for Guardians

An increasing number of states have enacted criminal and other background checks for prospective guardians.⁷ In 2015, legislation in the *District of Columbia* and *Texas*, as well as the new *Ohio* Supreme Court Rules, required guardians to submit to criminal history checks. However, it is important to remember that this approach has limitations as many elder abuse crimes are not prosecuted.

Visitation Bills: Addressing Isolation

Visits by, or communication with, family and friends are basic to quality of life for a person under guardianship – yet in some instances could pose a risk of harm. Several 2015 bills sought to address this classic guardianship tension of rights vs. risk. *Iowa* and *California* recognized an express right of the individual to communication and visits with those of his or her choice; and lodged with the court – not the guardian – the authority to restrict such communication and visits. *Texas* authorized an adult child to file an application in court requesting access, and provided that the guardian must report key changes to family members. *Florida* legislation and the *Ohio* Rules require the guardian to encourage contact and foster communication except when such contact would be harmful.

Guardian Fees

Guardian fees can be substantial, and fee disputes have been frequent. The new *Ohio* Rules provide that the guardian may not receive incentives or compensation from any direct service provider serving the individual; and must itemize services and expenses. Guardians serving ten or more individuals must submit to court an annual fee schedule that differentiates guardianship fees from legal or other direct service fees.

⁷ See Hurme, S., 2016 Chart on Criminal and Credit Background Checks for Guardians, http://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice.html

⁸ Karp, N & Wood, E., *Guarding the Guardians: Promising Practices for Court Monitoring*, AARP Public Policy Institute, 2007, LINK. Also see National Association for Court Management, Adult Guardianship Guide, <http://eldersandcourts.org>

Fiduciary Misconduct

Guardians are fiduciaries with a high standard of care and accountability. Guardians who financially exploit individuals entrusted to their care breach their fiduciary duty. In 2015, *Florida* required that any person believing that a guardian is abusing, neglecting or exploiting an individual under guardianship must report to adult protective services. The bill makes guardians subject to specified criminal penalties for breaching certain fiduciary duties – including committing fraud in securing their appointment, abusing their powers; or wasting, embezzling, or intentionally mismanaging the assets.

The *Ohio* Supreme Court Rules require probate courts to maintain a roster of guardians serving ten or more individuals, who must certify that they are not aware of circumstances that could disqualify them; and the court must review the roster annually. Courts also must establish a process for submitting complaints about the performance of guardians.

Court Oversight of Guardians

During the past 15 years, many states have strengthened the court's tools for oversight of guardians.⁸ In 2015, *North Dakota* required guardians to provide an inventory within 90 days of appointment; and to report any change in residence, any medical treatment, income or expenditures affecting the person, sale of property, and exercise of legal authority by the guardian. The guardian must send the report to the court, the individual, and also to any interested persons designated by the court order. The *Ohio* Rules mandate the filing of a guardianship plan along with the guardian's annual report. The plan must state the guardian's goals for meeting the person's needs. The *District of Columbia* specified that every three years a court "case reviewer" must investigate the continued need for a guardian.