

# **American Bar Association Commission on Law and Aging**

## **RECOMMENDATION**

RESOLVED, That the American Bar Association encourages the federal government to provide funding and support concerning adult guardianship for training, research, exchange of information on practices, consistent collection of data, and development of state, local and territorial standards.

## **REPORT**

This report traces the growing need for adult guardianship; the reform of guardianship law and practice during the last two decades; federal action in the guardianship arena to date; the need for federal funding and support; and existing Association policy. The resolution is timely in that there is an increasing interest in federal action, and the American Bar Association should have a voice in any upcoming developments.

**Adult Guardianship.** Guardianship is a relationship created by state law in which a court gives one person or agency (the guardian) the duty and power to make personal and/or property decisions for another (the ward or incapacitated person). The appointment of a guardian occurs when a judge decides an individual lacks capacity to make decisions on his or her own behalf. Adult guardianship protects at-risk individuals and provides for their needs while at the same time removing fundamental rights. It is viewed as a last resort, after less restrictive alternatives have been exhausted or abused.

The need for guardianship is accentuated by ongoing demographic trends that will sharply boost the number of appointments in the coming years. The older population (age 65+) numbered 36.8 million in 2005. As baby boomers age, the older population will spiral upwards, reaching 40 million by 2010 and 55 million by 2020. Within the older population, the number of “old old,” age 85+, is growing especially rapidly and is expected to reach 6.1 million by 2010 and 7.3 million by 2020.<sup>1</sup> At the same time, Alzheimer’s disease and related dementias are becoming more prevalent. In 2007, it is estimated that more than five million people have Alzheimer’s disease in the United States; that there will be an additional 454,000 new cases a year by 2010, and that the number of new cases per year will increase significantly thereafter.<sup>2</sup>

Moreover, guardianship also serves a younger population of adults with intellectual disabilities and mental illness. Today about 9.2 million Americans have intellectual and

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<sup>1</sup> U.S. Administration on Aging, *A Profile of Older Americans: 2006*, <http://www.aoa.gov/prof/Statistics/profile/2006/profiles2006.asp>

<sup>2</sup> Alzheimer’s Association, *Every 72 Seconds Someone in America Develops Alzheimer’s: Alzheimer’s Disease Facts and Figures 2007*.

developmental disabilities,<sup>3</sup> and this number will rise with new forms of medical treatment that extend the lives of people with these conditions.<sup>4</sup> In addition, about 1.4 million people sustain a traumatic brain injury each year in the United States, and many experience functional impairments and changes in memory and problem-solving ability.<sup>5</sup> Finally, adults of all ages may experience cognitive impairment due to chronic illnesses and substance abuse.

**Reform of Guardianship Law and Practice.** Following a seminal 1987 Associated Press Report, *Guardians of the Elderly: An Ailing System*,<sup>6</sup> the last two decades have seen significant guardianship reform, including widespread revision of state guardianship statutes, preparation of extensive training materials, and attention to court practices. In particular:

- The 1988 “Wingspread” and 2001 “Wingspan” interdisciplinary National Guardianship Conferences made visionary recommendations concerning procedural due process, determination of incapacity, powers and duties of guardians, monitoring and accountability, and public guardianship.
- The National Guardianship Association has created widely recognized *Standards of Practice* and a *Code of Ethics*, as well as a national guardian certification program. In addition, a small but growing number of states have implemented certification programs.
- The National College of Probate Judges has established a set of *National Probate Court Standards*, a section of which address guardianship standards.
- The Uniform Guardianship and Protective Proceedings Act, originally Title V of the Uniform Probate Code adopted in 1969, was revised in 1982 and again in 1997. More recently, the Uniform Law Commissioners have approved a Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act to address jurisdictional problems when more than one state is involved.<sup>7</sup>
- During the last 15 years, almost all states have revised their adult guardianship laws, and about half the states have made very substantial changes in their code, strengthening procedural protections, refining the determination of incapacity, emphasizing use of the least restrictive alternative and bolstering court oversight.<sup>8</sup>

**Federal Role.** A critical question is: what role, if any, should the federal government play in adult guardianship reform? Guardianship has traditionally been a creature of state law

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<sup>3</sup> President’s Committee for People with Intellectual Disabilities, Administration for Children & Families, U.S. Department of Health and Human Services, *Fact Sheet*, [http://www.acf.hhs.gov/programs/pcpid/pcpid\\_fact.html](http://www.acf.hhs.gov/programs/pcpid/pcpid_fact.html).

<sup>4</sup> The term “intellectual disability” is the currently preferred term for the disability historically referred to as mental retardation. See American Association on Intellectual and Developmental Disabilities, [http://www.aaidd.org/Policies/faq\\_intellectual\\_disability.shtml](http://www.aaidd.org/Policies/faq_intellectual_disability.shtml).

<sup>5</sup> Brain Injury Association of America, *About Brain Injury*, <http://www.biause.org/aboutbi.html>.

<sup>6</sup> Bayles, F. & McCartney, S., Associated Press Special Report (Sept. 1987).

<sup>7</sup> Uniform Law Commission, <http://www.nccusl.org/Update/>.

<sup>8</sup> Hurme, Sally & American Bar Association Commission on Law and Aging, *Guardianship Statutory Charts*, updated through December 31, 2007, <http://www.abanet.org/aging/legislativeupdates/home.shtml>.

and practice. What is the rationale for federal intervention; and how would such intervention best be implemented? A brief history of federal action on the guardianship front is outlined below.

1. Federal Legislation. Congressional zeal to respond to the distressing problems profiled by the Associated Press led to the introduction of Federal legislation in 1988, 1989 and 1991, in both the House (Rep. Claude Pepper) and Senate (Sen. Olympia Snowe). These bills sought to set out guardianship standards for states, to be enforced by the withholding of withholding federal benefits. The bills did not pass, but their introduction unleashed considerable discussion within the legal and judicial community on the pros and cons of federal intervention.

2. Senate Special Committee on Aging. In 1992, the Senate Special Committee on Aging held a *Roundtable Discussion on Guardianship*<sup>9</sup> to examine the need for Federal legislation and the possible Federal “hooks” for regulation. The clear consensus of the invited experts at the Roundtable was that coercing state reform under threat of Federal sanctions would not be helpful or appropriate. Instead, they said, the Federal government might aid states in data collection and offer financial support to test innovative approaches. One participant concluded that “a carrot in terms of Federal initiatives is going to work better than a stick. Federal legislation, no matter how well intended, that imposes rigid substantive and procedural standards or face loss of significant Federal benefits is likely to be resisted by the States. . . . I submit that Federal incentives rather than mandates should encourage these efforts. Through its grant-making capacities, the Federal Government should provide states with funds for self-assessment, for self-improvement. . . .”

3. Elder Justice Act. The notion of federal intervention into the adult guardianship arena was next raised almost decade later with the introduction of the first Elder Justice Act in 2003. Other versions of the Act were introduced in 2005 and 2007. Generally, the Act seeks to ensure “adequate public-private infrastructure and to resolve to prevent, detect, treat, intervene in, and prosecute elder abuse, neglect, and exploitation.” Some portions of the Elder Justice Act were included in the Older Americans Act (OAA) 2006 reauthorization legislation, but the bulk of the Act has not yet been passed. Some versions of the Act included specific language on guardianship. For example, S. 2010, introduced in November 2005, stated that one purpose of the Act was to:

“promote the development of an effective adult fiduciary system, including an adult guardianship system, that protects individuals with diminished capacity, maximizes their autonomy, and develops effective resources and an elder rights system” (Sec. 3(7)).

However, in S.1070, introduced in April 2007, the only reference to “guardianship” and “fiduciary abuse” was in the definitions, and in the requirement that an Advisory Board prepare and submit to an Elder Justice Coordination Council a report including recommendations on “activities relating to adult fiduciary systems, including guardianship and other fiduciary arrangements” (Sec. 2022(f)(3)(B)(iii)). The clear trend of the successive versions of the Act has been to remove a focus on guardianship systems development, training, research and other aspects.

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<sup>9</sup> U.S. Special Committee Print 1992.

4. GAO Report. Meanwhile, in 2003, prompted by a high profile guardianship case in the District of Columbia, *In re Mollie Orshansky*,<sup>10</sup> the Senate Special Committee on Aging again held a hearing on guardianship.<sup>11</sup> In his opening statement, the Committee Chair noted that “substantial sums of Federal money, including Social Security and SSI payments, disability and survivor benefits, Federal Pensions, and welfare benefits, are administered and potentially misused by guardians.” He asked the Government Accountability Office to conduct a study. The resulting report, *Guardianships: Collaboration Needed to Protect Incapacitated Elderly People*,<sup>12</sup> stated that “although guardianship is a state responsibility, there are many incapacitated elderly people who receive federal benefits . . . and may need federal agencies to identify a representative payee . . . .” The report focused largely on the lack of coordination between state courts handling guardianship and federal agencies that appoint representative payees.

5. The Kohl/Smith Report. In December 2007, Senators Gordon Smith (Ranking Member) and Herb Kohl (Chair) of the U.S. Senate Special Committee on Aging released a report entitled *Guardianship for the Elderly: Protecting the Rights and Welfare of Seniors with Reduced Capacity*. The report concludes with a set of recommendations calling for “federal leadership” including:

- Passage of federal elder abuse prevention legislation;
- Mandated collection of data on guardianship, as well as a survey to generate nationwide estimates of the number and characteristics of adult guardianship cases;
- Implementation of the GAO recommendations regarding coordination among the Social Security Administration, the Department of Veterans Affairs and state courts on guardianship cases; and
- A GAO inventory of the recipients and objectives of all federal funding directed at elder abuse.

At the press conference for the release of the Report, Sen. Smith presented a statement calling for action at the federal level “to ensure we are properly looking after the welfare of those who can’t protect themselves.”

**Need for Federal Funding and Support.** Federal involvement in the adult guardianship arena could fall into two broad categories. The first is legislation that aims substantively to direct and control state guardianship law and policy, perhaps by using the “stick” of withholding federal benefits. There is no impetus for such legislation. Moreover, holding back federal benefits hurts the very vulnerable people whom adult guardianship seeks to help.

The second kind of federal involvement is broad-based funding for implementing state laws through training, education, data collection and exchange of information on promising practices. Indeed, the real challenge in guardianship today lies in the implementation of the

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<sup>10</sup> 804 A. 2d 1077(D.C. App., 2002).

<sup>11</sup> U.S. Senate Special Committee on Aging, *Guardianships Over the Elderly: Security Provided or Freedoms Denied?*, Serial No. 108-3, Washington DC (2003).

<sup>12</sup> U.S. Governmental Accountability Office, GAO-04-655 (July 2004).

progressive state legislation and national recommendations put forth over the past two decades. While research is scant, continuing press inquiries and other anecdotal evidence indicates that adult guardianship practice is markedly uneven, varying dramatically from state to state, court to court and judge to judge; and that there is a troubling gap between law and practice. Many aspects of guardianship suffer because of the Balkanization of law, data, and procedures across state lines, and because of increasingly strained court budgets. Thus, there is a growing need for a federal role in offering resources and incentives for quality improvement and reform.

A federal role in offering support, visibility and the opportunity for replication could jump-start local efforts and foster systems change. Federal support is required to:

- Encourage *education and training* of stakeholders. All of the national guardianship recommendations, as well as the 2005 AARP monitoring study, have emphasized the compelling need for training of guardians, lawyers, judges, adult protective services staff, and the aging and social services systems.
- Provide for *research* on all aspects of how the guardianship system is working, and what changes are required to confront the burgeoning needs as the demographics change.
- Promote the development of strong *state standards* for good guardianship practice. This approach would encourage states to craft standards that best fit their needs, rather than adhering to any single federal standard.
- Address the dire need for the *collection of guardianship data*. There has been no reliable estimate of the number of adults under guardianship nationally since 1987; and most states lack such data as well. The lack of data on population size and growth hampers effective shaping of guardianship policy, practices, training and education.<sup>13</sup>

In addition, federal funding also could:

- Aid in funding for stronger *court oversight* and replication of promising practices in guardianship monitoring. A 2005 AARP report showed that monitoring practices vary widely, that verification of guardian reports and accounts is frequently lacking, that use of technology in monitoring is minimal, and that funding for monitoring remains insufficient.<sup>14</sup>
- Support *public guardianship programs* for incapacitated, impoverished and “unbefriended” individuals who have no one else to serve and no funds to pay for professional guardianship services. The 2005 and 2008 National Public Guardianship

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<sup>13</sup> National Guardianship Network, *What Paper Project on Guardianship Data*, unpublished proposal (2007). See also GAO, 2004; and Wood, E., *State-Level Adult Guardianship Data: An Exploratory Survey*, National Center on Elder Abuse (2006), [http://www.ncea.aoa.gov/NCEARoot/Main\\_Site/pdf/publication/GuardianshipData.pdf](http://www.ncea.aoa.gov/NCEARoot/Main_Site/pdf/publication/GuardianshipData.pdf).

<sup>14</sup> Karp, N. & Wood, E., *Guardianship Monitoring: A National Survey of Court Practices*, AARP Public Policy Institute, #2006-14 (March 2006).

Study reports concluded that most state public guardianship systems are vastly understaffed and underfunded.<sup>15</sup>

Thus, the need for federal funding and support is evident and substantiated. However, there still must be clear rationales or “hooks” for such federal involvement in state affairs. There are at least three such hooks:

- (1) While guardianship traditionally has been under the aegis of the states, significant federal pensions and other federal funds may be managed by guardians/conservators.
- (2) Guardianship involves fundamental human and civil rights protected by the U.S. Constitution.
- (3) Guardianship increasingly crosses state lines, thus becoming an issue that extends beyond the reach of individual state jurisdictions.

**ABA Policy.** The American Bar Association has extensive policy on adult guardianship reform, dated August 1987, February 1989, August 1991 and August 2002.<sup>16</sup> 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.

In addition, the ABA has policy that “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 and urges implementation of the recommendations adopted by the National Policy Summit on Elder Abuse in 2001.” This language has allowed the support of many of the Elder Justice Act provisions.

Prompted by the introduction of the federal legislation in the late 1980s and early 1990s, the Association adopted specific policy on federal involvement in guardianship in August 1991. The resolution was sponsored by the Section of Real Property, Probate and Trust Law, and provides as follows:

“BE IT RESOLVED, That the American Bar Association supports the initiatives of the Section of Real Property, Probate and Trust Law and the ABA Commission on the Elderly and other organizations, such as the Conference of Chief Justices, the conference of Special Court Judges, the Conference of State Trial Judges, the American College of Probate Judges and the American College of Estate and Trust Counsel to encourage

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<sup>15</sup> Teaster, P., Wood, E., Lawrence, S., Schmidt, W. & Mendiondo, M., *Wards of the State: A National Study of Public Guardianship* (April 2005); Teaster, P., Wood, E., Schmidt, W. & Lawrence, S., *Public Guardianship After 25 Years: In the Best Interest of Incapacitated People?*, University of Kentucky and American Bar Association (January 2008).

<sup>16</sup> The text of all of the ABA policies on adult guardianship is available on the Web site of the ABA Commission on Law and Aging at <http://www.abanet.org/aging/commissionprojects/home.shtml>.

continuing improvement of the guardianship and conservatorship laws and procedures within the several states.

BE IT FURTHER RESOLVED, That in view of these initiatives the Association believes that the enactment of federal legislation is unnecessary at this time.”

This resolution was in response to the punitive and controlling federal bills in both the House and Senate, and was aimed at stemming substantive federal standards in an area traditionally reserved for the states. The proposed resolution is aimed not at such legislation, but at the need for federal resources and recognition to boost -- but not control -- the field and enhance practices essential to provide for the needs yet preserve the rights of the growing number of incapacitated persons.