

STATE ADULT GUARDIANSHIP LEGISLATION: DIRECTIONS OF REFORM – 2016

Commission on Law and Aging American Bar Association

This 2016 legislative summary includes information on 39 state enactments on adult guardianship from 22 states, as compared with 31 enactments from 17 states in 2015. An earlier version of this 2016 legislative summary [January – August] was published as part of the National Guardianship Association's *2016 NGA Legal Review*, presented at the October 2016 NGA National Conference.

The issue of right to visitation/association recently has been exploding in hotly contested guardianship cases and legislation. This year nine states enacted bills concerning right to visits and communication – and the role of the guardian and of the courts in promoting, protecting, and in some cases limiting such visits and communications. These nine measures differ markedly in language, reach, and requirements.

Also in 2016 Delaware became the second state to enact recognition of supported decision-making agreements. Florida enacted an important bill expanding the public guardianship office responsibility to include oversight of registered professional guardians. Additionally, three more states passed the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, bringing the total to 45 states plus DC and Puerto Rico. The 2016 legislative activity is set against a backdrop of continuing work by a Uniform Law Commission Drafting Committee making revisions in the Uniform Guardianship and Protective Proceedings Act, which has the potential to affect future guardianship legislative enactments.

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If you know of additional state adult guardianship legislation enacted in 2016, please contact erica.wood@americanbar.org or dari.pogach@americanbar.org . The views expressed in the legislative summary have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the policy of the American Bar Association.

I. Pre-Adjudication Issues

Over the past 30 years, legislative changes have sought to bolster safeguards in proceedings for the appointment of a guardian or conservator. Additionally, states continue to make various procedural “tweaks” to clarify requirements, promote effective administration, or address inconsistencies.

1. Counsel for Respondent. Perhaps the most basic procedural right of respondents in guardianship proceedings is right to counsel. Both the Uniform Guardianship and Protective Proceedings Act and the National Probate Court Standards provide for appointment of counsel. State guardianship laws address the right to, and appointment of, counsel – although the role of counsel differs substantially with some states requiring counsel as vigorous advocate and others specifying that counsel should act as guardian ad litem. See state-by-state chart at: http://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice.html

- Utah HB 101 makes a serious inroad on right to counsel. Under Utah law, unless the individual has counsel of his or her own choice, the court must appoint an attorney. HB 101 provides that counsel is *not* required if: the individual is the biological or adopted child of the petitioner; the value of the person’s estate is not over \$20,000; the person appears in court with the petitioner and is given the opportunity to communicate acceptance of the appointment of the petitioner; and the court “is satisfied that counsel is not necessary in order to protect the interests of the person.” The bill was opposed by members of Utah’s disability community and the Utah State Bar.

2. Role of Guardian Ad Litem. Guardians ad litem are attorneys who play a critical part in the guardianship appointment process. Their duties differ by state, and there often is confusion about their roles as a court investigator, and as representing the “best interests” of the respondent – and how this should differ from representation by counsel. Guardians ad litem may be the only party who has a clear view of the case from all sides, and the court may rely heavily on their report.

- Nebraska LB 934 clarified the role of the guardian ad litem, stating that the GAL may act as counsel for the respondent unless the respondent secures his or her own counsel or there are “special reasons” why the person should have separate counsel. The GAL is to “advocate for the best interests” of the individual – a very different role from the traditional advocacy role of an attorney representing the individual’s wishes. The GAL must “defend the social, economic, and safety interests of [the] person.” The GAL must meet with the person within two weeks of appointment and must attend all hearings, must investigate, make recommendations to court, may conduct discovery, and may request relevant documents.

2. Procedural Changes. Over the past 25 years, most states have made changes in pre-appointment requirements for the petition, notice, guardian ad litem and hearing.

- Connecticut SB 219 addresses waiver of the right to certain required hearings. By law in Connecticut, a person subject to “conservatorship” [the Connecticut term for adult guardianship of person or property] may waive the right to certain hearings if his or her attorney consults with the person and files a record of the waiver. The act extends use of such a waiver to a person under “voluntary conservatorship.” This applies to hearings that are generally required before a conservator may change a person’s residence, including admission to a long-term care institution, termination of a lease, or sale of the person’s property.
- Oklahoma SB1495 adds to the list of parties entitled to notice of a guardianship hearing “all adult children of any deceased brothers or sisters of the subject of the proceeding.”
- Virginia HB 1267 addresses procedures for youth transition. Virginia law allows a parent or guardian (or others when there is no living parent or guardian) of a respondent who is under age 18 to petition for guardianship or conservatorship six months before the respondent’s 18th birthday. The amendment permits the court to enter an order of appointment of the petitioner prior to the 18th birthday, and must specify if it takes effect immediately or on the birthday.

3. Confidentiality of Documents. Some states and some courts have laws or rules addressing the confidentiality of guardianship documents relating to a case. In some instances, all or specified parts of the case file are sealed from the public view.

- Connecticut HB 5255 provides that all case records of guardianships of individuals with intellectual disabilities are confidential and not open to public inspection except for cause shown.

II. Multi-Jurisdictional Issues

In our increasingly mobile society, adult guardianships often involve more than one state, raising complex jurisdictional issues. For example, many older people own property in different states. Family members may be scattered across the country. Frail, at-risk individuals may need to be moved for medical or financial reasons. Thus, judges, guardians, and lawyers frequently are faced with problems about which state should have initial jurisdiction, how to transfer a guardianship to another state, and whether a guardianship in one state will be recognized in another.

1. Background on Uniform Act. To address these challenging problems, the Uniform Law Commission in 2007 approved the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA). The UAGPPJA seeks to clarify jurisdiction and provide a procedural roadmap for addressing dilemmas where more than one state is involved, and to enhance communication between courts in different states. Key features include:

- Determination of initial jurisdiction. The Act provides procedures to resolve controversies concerning initial guardianship jurisdiction by designating one state – and one state only – as the proper forum.
- Transfer. The Act specifies a two-state procedure for transferring a guardianship or conservatorship to another state, helping to reduce expenses and save time while protecting persons and their property from potential abuse.
- Recognition and enforcement of a guardianship or protective proceeding order. UAGPPJA facilitates enforcement of guardianship and protective orders in other states by authorizing a guardian or conservator to register orders in the second state.
- Communication and cooperation. The Act permits communication between courts and parties of other states, records of the communications, and jurisdiction to respond to requests for assistance from courts in other states.

- Emergency situations and other special cases. A court in the state where the individual is physically present can appoint a guardian in the case of an emergency. Also, if the individual has real or tangible property located in a certain state, the court in that jurisdiction can appoint a conservator for that property.

2. Passage of Uniform Act by States. As it is jurisdictional in nature, the UAGPPJA cannot work as intended – providing uniformity and reducing conflict – unless all or most states adopt it. See “Why States Should Adopt the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act,” <http://uniformlaws.org/Narrative.aspx?title=Why%20States%20Should%20Adopt%20UAGPPJA>.

- In 2008, five states (Alaska, Colorado, Delaware, Utah, and the District of Columbia) quickly adopted the Act.
- In 2009, the eight states adopting the Act include Illinois, Minnesota, Montana, Nevada, North Dakota, Oregon, Washington, and West Virginia.
- In 2010, seven states adopted the Act, including Alabama, Arizona, Iowa, Maryland, Oklahoma, South Carolina, and Tennessee.
- In 2011 another ten states enacted the UAGPPJA, including Arkansas, Idaho, Indiana, Kentucky, Missouri, Nebraska, New Mexico, South Dakota, Vermont, and Virginia.
- In 2012, six states passed the Uniform Act, including Connecticut, Hawaii, Maine, New Jersey, Ohio, and Pennsylvania.
- In 2013, two additional states, Wyoming and New York, joined the list
- In 2014, three states passed the Uniform Act, including Mississippi, Massachusetts and California.
- In 2015, two states passed the Act, including New Hampshire and Rhode Island.

In 2016, Georgia passed the Uniform Act in HB 954; Louisiana passed the Act in SB 94, and North Carolina passed the Act in HB 817, bringing the total to 45 states plus the District of Columbia and Puerto Rico – and leaving six states/jurisdictions remaining – Florida, Kansas, Michigan, Texas, Virgin Islands and Wisconsin.

III. Choice of Guardian

Bills on choice of guardian target guardian certification and licensure; standards and training; requirements for court selection of guardians; and guardian background checks.

1. Who May Serve? Several states clarified what persons or entities may serve as guardian or conservator:

- Arizona SB 1296 (also described below under Right to Visitation/Association) addresses choice of guardian for a youth in transition – that is, for appointment before or within two years after the individual’s 18th birthday. It provides that, unless contrary to the individual’s best interests, the court must appoint the person “who had court-ordered decision-making” when the individual turned 18. If two persons had joint authority, the court is to appoint both persons as co-guardians. The co-guardians are to share the decision-making authority. The aim appears to be to avoid having parents “re-litigate earlier custody battles involving the same child” (Robert Fleming).
- Connecticut SB 219. Many states specify what kinds of agencies may serve as a corporate guardian or conservator. This Connecticut bill expands the types of entities that may serve as “conservator” [Connecticut’s term for adult guardian of person or property]. Previously for-profit or nonprofit corporations could serve, and the new provisions allow for-profit or nonprofit limited liability companies, partnerships or other entities recognized under state law to serve as well (as also provided in Connecticut HB 5255 for individuals with intellectual disabilities).
- Oklahoma SB 902 requires that only a person who is “a citizen or legal resident of or legally present in the United States” is eligible for appointment as a guardian of person or property, unless the court determines “that there are no such qualified individuals available . . . and it is in the best interest” of the incapacitated individual.

2. Guardian Standards and Training. South Dakota’s Elder Abuse Task Force resulted in a legislative mandate for training guardians and conservators.

- South Dakota SB 54 requires the State Bar of South Dakota to prepare and approve a training curriculum including the rights of “protected persons,” the duties and responsibilities of guardians and conservators, least restrictive options, and resources. Guardians and conservators must complete the training within four months after appointment.

3. Guardian Background Checks. An increasing number of states have begun to enact criminal and other accountability background checks for prospective guardians.

(See state law chart on criminal and credit background checks of guardians by S. Hurme, updated to 2015 at:

http://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice.html

- South Dakota SB 54, derived from the state’s Elder Abuse Task Force, bars felons from appointment as guardian or conservator unless the court finds that appointment is in the individual’s best interest, considering the nature and date of offense and the evidence of rehabilitation. A proposed guardian or conservator (except for a financial institution) must have a criminal history record check and a check for abuse, neglect or exploitation. The court may waive the requirement for good cause shown. The judge may not sign a guardianship or conservatorship order until the record check results have been filed and reviewed. The requirement does not apply to temporary orders.

4. Public Guardianship. The 2008 national public guardianship study found that 44 states have statutory provisions on public guardianship or guardianship of last resort. Of these, 27 states have “explicit schemes” that refer specifically to public guardianship and frequently establish a public guardianship program or office; while 18 states have “implicit schemes” (some state have more than one system) that address the role of guardian of last resort – for instance designating a governmental agency to serve if no one else is available. Additional states have public guardianship functions in practice. (See Teaster et al, *Public Guardianship: In the Best Interest of Incapacitated People?* Preager, 2010); also an earlier version of the study (2008) at http://www.americanbar.org/content/dam/aba/migrated/aging/PublicDocuments/wards_state_full_rep_11_15_07.authcheckdam.pdf. In 2016, three states made changes in their public guardianship provisions.

- Florida SB 232. In March 2016, the Florida Governor signed SB 232, creating the Office of Public and Professional Guardians (OPPG) to replace the Statewide Public Guardianship Office (SPGO) within the Department of Elder Affairs. The bill has expanded the guardianship office to have regulatory oversight of all registered professional guardians. Previously, the office had been responsible for the registration of professional guardians, and contracting, monitoring, and overseeing the 17 public guardian offices statewide.

With a deadline of October 1, 2016, the OPPG will be responsible for developing standards of practice and investigating complaints against professional guardians, alleging that the standards of practice, relevant statutes, or regulations have been violated. Additionally, the office will be responsible for developing disciplinary

guidelines that will provide a range of sanctions for each violation. The ultimate sanction for a professional guardian under the new bill is the revocation of the professional guardian's registration, resulting in the individual no longer serving as a professional guardian in all the counties in which he or she is registered. The OPPG has worked with the Florida State Guardianship Association (FSGA) and the National Guardianship Association's *Standards of Practice* as a model for the program's administrative rules (Summary by Amelia Milton).

- Illinois HB 4552 provides that a representative of the public guardian investigating the appropriateness of guardianship or while pursuing a petition for guardianship has access to APS records concerning abuse, neglect and exploitation.
- Nebraska LB 934 makes important changes in the state's new public guardianship law passed in 2015. First, the amendments address the client to staff ratio. The 2008 national public guardianship study provides that "public guardianship programs should be staffed at specific staff-to-client ratios. The recommended ratio is 1:20." At the time of the study, seven states had established ratios by statute, either mandating a specific ratio in law or requiring an administratively specified ratio. LB 934 changes the ratio of 1:40 enacted in 2014 to 1:20, bringing it into alignment with the national study.

Second, LB 934 amends the Office's staff qualifications. It requires the Public Guardian to be an attorney, and the deputy public guardian to be an attorney unless the state court administrator directs otherwise. It directs the Public Guardian to hire a "multidisciplinary team of professionals" trained in law, health care, social work, education, business, accounting, administration, geriatrics, psychology, or other relevant specialties.

- Virginia HB 816 makes a change in the state's Public Guardian and conservator Advisory Board. The bill removes a representative of the Virginia Guardianship Association from membership, since the Association ceased to exist.

IV. Guardian Actions

1. Visitation by Family/Friends. See below summary of bills restricting and/or authorizing guardians to take various actions concerning an individual's right to

visitation/association and communication with family and friends, under Section VI on Rights of Individuals.

2. Notification of Changes. Two of the eight 2016 bills addressing the right to visitation/association also included requirements for guardians to notify the court and specified parties of important changes concerning the individual. In jurisdictions where such notification is required, professional guardians might respond by preparing a form and triggering the notice to be sent in a timely manner to those required to receive it.

- Arizona SB 1296 requires a guardian to notify family members (as defined in the bill) if the individual subject to guardianship dies or is admitted to a hospital for more than three days. The notification also must include information about funeral arrangements and place of burial.
- New York A 3461-C requires the court's order of appointment of a guardian to identify persons entitled to notice of the individual's death, the disposition of remains, funeral arrangements and final resting place, if known. Additionally the order may identify person(s) entitled to notice of the individual's transfer to a medical facility.
- Illinois H.B. 5924 – Approved in August, this Illinois bill expanded the duties of the guardian of person to require the guardian to notify adult children, who have requested notification and provided contact information, of admission to a hospital or hospice program, death, and and arrangements post death. This requirement does not apply to duly appointed public guardians or the Office of the State Guardian.

3. Health Care Decision-Making. Perhaps one of the most controversial or “hottest” topics in the guardianship arena is the authority of guardians to make health care decisions for incapacitated persons. Which decisions can guardians make independently and which require approval by the court? What standards are guardians to use?

An especially difficult subset of health care decisions concerns mental health treatment, including authority to admit an individual to a mental health facility.

- Washington HB 1258 (actually passed in 2015 but not included in the 2015 update) allows immediate family members or guardians or conservators of an individual may petition the court for involuntary commitment if the court finds it

is warranted. The new law is called “Joel’s Law,” named after a young man in crisis with bipolar disorder. While he lived independently for five years, he experienced a crisis and was killed in a standoff with police in which he thought he was shooting at zombies. His family had tried to petition the court for help to no avail. Under the new law, upon petition by a family member, guardian or conservator, the court must review a mental health professional’s decision not to commit, and may enter an order for initial detention for treatment.

- Arizona SB 1169 makes changes in language to existing state law that generally prohibits guardians from admitting an individual subject to guardianship to a locked mental health treatment facility. The bill uses the term “inpatient psychiatric facility” – defined as “a hospital that contains an organized psychiatric services unit or a special hospital that is licensed to provide psychiatric services.” (The law also makes changes in the state’s mental health powers of attorney.)

4. Authority of Agents vs Guardians. Financial and health care powers of attorney are important planning tools that can reduce or avoid the need for guardianship. If a guardian is nonetheless appointed, the question arises as to the extent to which the agent’s power continues. Of course sometimes possible abuse or exploitation is involved and the agent must be stopped. A key guardianship topic is the extent to which, and under what circumstances, agent authority “trumps” that of a guardian. A recent ABA Commission on Law and Aging article and chart explores the authority of guardians and health care agents, at:

http://www.americanbar.org/publications/bifocal/vol_36/issue_6_august2015/health-care-decision-making-authority-guardians-agents.html.

- Washington SB 5635 enacts provisions of the Uniform Power of Attorney Act with modifications. Under previous Washington law, once a guardian was appointed, the agent’s power of attorney continued but the agent was to account to the guardian, and the guardian had the authority to modify or terminate the power of attorney. Under the new provisions, the agent’s authority terminates upon appointment of a plenary guardian unless the court specifies otherwise; and in a limited guardianship, the agent’s authority continues except to the extent the court orders otherwise. This departs from the Uniform Law language providing that “the agent is accountable to the fiduciary as well as to the principal” – that the agent’s power continues unless the court specifies otherwise.

5. Financial Investments. Tennessee HB 1700 allows a conservator to petition the court to waive the requirement for court approval to make changes in investments.

The court must consider the history of the conservator's performance and other factors, and must hold a hearing on the waiver request. If it is approved, the conservator must maintain a balance of funds sufficient to provide for care for three years; and must give specified assurances in the accounting report.

6. Guardian Access to Digital Assets. The Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA) allows individuals to plan for the disposition of their digital assets in the same way they can make an estate plan for traditional assets. Digital assets include email, digital photographs, documents stored in electronic form, websites, and social media accounts. For conservators, access to certain private communications is restricted unless approved by the court or the protected person. RUFADAA was approved by the Uniform Law Commission in 2015 and introduced in 31 states this year. So far, 20 states have enacted a RUFADAA law, and most of the remaining states are expected to introduce a bill in the 2017 legislative sessions. (Summary by Ben Orzeske.)

7. Post-Death Authority Concerning Disposition of Property. A growing number of state provisions address the role of the guardian following the death of the individual.

- New Hampshire SB 387 provides that if within 30 days after the death of the individual subject to guardianship no petition for probate has been filed and the value of the property is no more than \$5,000, the guardian may file in probate court for authority to dispose of the estate, as ordered by the court. If there is a will, the guardian may file the will and a death certificate with the probate court. If there are debts, the probate court may order the guardian to pay such debts. Finally, a guardian under the public guardianship program may petition the probate court to dispose of any non-guardianship accounts, including Social Security representative payee accounts.

V. Fees for Guardians and Attorneys

Payment of attorney fees, as well as court fees and costs, is a significant factor in bringing a guardianship proceeding. Moreover, guardian fees can be substantial, and fee disputes have been frequent.

Guardian Fees. One issue in payment of guardian fees is whether a guardian can take a fee from the "personal needs allowance" of a nursing home resident who is on

Medicaid. The personal needs allowance, according to federal law, is for “clothing and other personal needs of the resident.” The 2013 NGA *Standards of Practice* provide that “A guardian may seek payment of fiduciary fees from the income of a person receiving Medicaid services only after the deduction of the personal needs allowance, spousal allowance and health care insurance premiums” (Std #22).

- Maryland SB 449 provides that a guardian of person and property may take a fee of \$50 per month “as part of the personal needs allowance,” and if the guardian of person and guardian of property are two different people, each may take \$50 per month. The personal needs allowance in Maryland is indexed for inflation, and currently is \$77 per month. However, in Maryland the guardian fees of \$50 per month will come from an increased amount, and will not reduce or detract from the resident’s discretionary spending in any way. The new statute also only permits guardian fees in excess of the \$50 per month in “unusual” circumstances.

Court Fees. Connecticut SB 219 sets a flat fee of \$225 for probate courts motions, petitions or applications including several with respect to conservatorship.

VI. Rights of Individuals

Writings and enactments over the past 25 years have heightened awareness that guardianship removes or infringes on fundamental rights, that some basic rights should be retained statutorily, and that limited guardianship can allow the person to retain rights in areas in which he or she can make decisions.

1. Right to Visitation/Association. Visits by, and communication with, family members and friends are basic to quality of life of an individual subject to guardianship. Guardians stand in a position to either restrict or enhance such communication. Restrictions may result in harmful isolation, yet at the same time may be an effort to protect *against* harm and abuse. The complex cases in which visitation issues arise often are marked by family dysfunction, and may involve undue influence, neglect and financial exploitation. A fundamental question is: to what extent should decisions involving basic rights to visitation/association be in the hands of guardians or be required to be authorized by courts.

The NGA *Standards of Practice* state that “the guardian shall promote social interactions and meaningful relationships consistent with the preferences of the person” . . . and “the guardian shall encourage and support the person in maintaining contact with

family and friends, as defined by the person, unless it will substantially harm the person” (Std #4). Also see the NGA “Position Statement Regarding ‘Right to Association’ Legislation” at www.guardianship.org .

Federal nursing home regulations specify that the resident has the right to visitation, and the facility must provide immediate access to any resident by family members or other relatives, subject to the resident’s right to deny or withdraw consent at any time (42 CFR 483.10).

The issue of right to visitation/association recently has been exploding in hotly contested guardianship cases and legislation. Adult children of celebrities Casey Kasem and Peter Falk have aimed to raise public awareness of the visitation/association issue, and have developed model bills introduced in a number of states. Last year varying bills concerning visitation/association were passed in Texas, Iowa and California. This year, *nine* additional states passed visitation/association bills. These measures differ markedly in language, reach, and requirements. Each bill faced substantial controversy in passage, and went through significant amendments. (Note that some of the bills also include requirements for guardians to notify certain parties of specified changes, as described above in Section IV on Guardian Actions.) Additional bills concerning visitation/association are pending, as for example in Connecticut.

- Arizona SB 1296, signed by the Governor in May, defines a “contact order” allowing contact between an individual subject to guardianship and a person with a significant relationship to the individual. The bill requires guardian to “encourage and allow” such contact, but also allows guardians to limit, restrict or prohibit contact “if the guardian reasonably believes that it will be detrimental” to the individual; and specifies that the guardian must consider the individual’s wishes when determining contact.

The bill permits the individual or a person with a significant relationship to petition for a contact order, and sets out factors the court must consider, including:

- The past and present relationship between the individual and the person seeking contact;
- The wishes of the individual subject to guardianship, if the individual can “make an intelligent choice;”
- The mental and physical health of the individual and the person seeking contact.
- The existence of any domestic violence;

- Whether the person seeking contact has engaged in drug or alcohol abuse;
- Whether the person seeking contact is listed in the state’s elder abuse central registry; and
- Whether the person has been convicted of a violation under statutes concerning false reporting of child abuse or vulnerable adult abuse.

Additionally, the bill addresses a petition to modify the contact order; and provides procedures for temporary modification or suspension of a contact order.

- Hawaii HB 1585, approved in June, prohibits a guardian from restricting the “personal communication rights” of the individual, including the right to receive visitors, telephone calls, and personal mail, “unless deemed by the guardian to pose a risk to the safety or well-being of the ward.”
- Indiana SB 192. While a substantive visitation bill was introduced in Indiana and generated considerable discussion, what passed was a mandate for action by a study committee. The committee must examine “the topic of visitation, communication, and interaction with a protected person” and issue a final report by November 1, 2016.
- Louisiana HB 350, signed by the Governor in May, states that a curator (Louisiana’s term for guardian) “shall allow communication, visitation, and interaction between an interdict [Louisiana’s term for individual subject to guardianship] who is over the age of eighteen years and a relative of the interdict . . . or another individual who has a relationship with the interdict based on or productive of strong affection if it would serve the best interest of the interdict.” Such a person may file a “rule to show cause” seeking the communication, and may request an expedited hearing on a showing of good cause. Additionally, an undercurator must move to appoint a successor curator for a curator who violates these provisions – and the court may remove a curator or undercurator for violation.
- New York A 3461-C, signed by the Governor in July, provides that in the order of appointment of a guardian, the court *may* identify persons entitled to visit the individual, but specifies that this “shall in no way limit the persons entitled to visit.”
- South Dakota SB 152, signed by the Governor in March, states that a guardian or conservator “may not restrict a protected person’s right of communication,

visitation, or interaction with other persons, including the right to receive visitors, telephone calls, or personal mail, unless the restriction is authorized by a court order.” The bill defines “other persons” as including parents, children, and siblings. The bill:

- Specifies that if the individual cannot express consent to communication, the guardian may presume the consent based on proof concerning the nature of the individual’s relationship with the other person.
 - Provides that the guardian or conservator may petition the court for a communication restriction, and sets out factors the court must consider, including any desires expressed by the individual.
 - States that the restriction may be a time, manner or place restriction, a requirement for supervision; or a denial.
 - Sets out sanctions for guardians and conservators who violate the court order.
- Tennessee SB 2190. The Tennessee bill, approved by the Governor in May, sets out a “right to communication, visitation, or interaction with other person, including the right to receive visitors, telephone calls, or personal mail.” It then provides that persons designated in writing by the individual, a spouse, child or “closest relative or relatives” may petition the court to require the conservator (guardian for adults) to comply with these rights; and that the prevailing party is entitled to court costs and reasonable attorney fees. Finally it clarifies that if an individual subject to guardianship is not able to express consent to such communication, visitation or interaction, it may be presumed “based on the . . . prior relationship history with the person.”
 - Utah SB 111. Utah passed a “Right of Association” bill signed by the Governor in March. The bill defines “association” to include visitation as well as communication between an adult subject to guardianship and a “relative or qualified acquaintance” (as defined by the bill) – through telephone, mail or electronic communication. The bill clearly states that, except as otherwise required by court order, “a guardian may not restrict or prohibit the right of an adult ward to associate with a relative or qualified acquaintance” If an individual is unable to express consent for the visit or communication, it is “presumed based on a prior relationship” between the individual and the relative or acquaintance. The bill also:
 - Sets out circumstances in which a guardian may not permit visitation/association (if there is a court order, or if the individual expresses a desire not to associate);

- Allows guardians to petition for an order prohibiting or limiting association or for authority for the guardian to do so;
 - Allows an individual subject to guardianship, a relative or qualified acquaintance to petition for an order rescinding or modifying an order prohibiting association;
 - Addresses a hearing on such petitions;
 - Describes relevant evidence and clarifies who has the burden of proof; and
 - States required court findings for an order prohibiting or limiting association.
 - Specifies sanctions for guardians violating the act.
- Virginia HB 342/SB 466. Virginia inserted a sentence into the statutory provisions about duties and powers of a guardian to specify that “a guardian shall not unreasonably restrict an incapacitated person's ability to communicate with, visit, or interact with other persons with whom the incapacitated person has an established relationship.”
 - Illinois H.B. 5924. Approved in August, this Illinois measure provides that an adult child may petition a court for a visitation order if the guardian “unreasonably prevents” the child from visiting. The court must find that the visitation is in the individual’s best interest – but in making its determination, the court must use the decision-making standard set out in the Code for guardians – which should conform as closely as possible to what the person would have wanted and take into account the person’s values, but if this is not known, the determination would be made on a more objective “best interest” standard. This new provision does not apply to duly appointed public guardians or the Office of the State Guardian.

2. Changes in Terminology. Many states are making changes in language to reflect preferred terminology more in line with individual self-determination and rights.

- Connecticut HB 5255 replaces the term “ward” with “protected person” for individuals with intellectual disabilities.
- New York S.7132-A replaces the term “mentally retarded” with “persons who are intellectually disabled.”
- Ohio HB 158 replaces the term “mental retardation” with “intellectual disability.”

VII. Capacity Issues

1. Supported Decision-Making. A recent shift in the decision-making landscape is the advent of “supported decision-making.” The United Nations Convention on the Rights of Persons with Disabilities recognizes in Article 12 that persons with disabilities have the “legal capacity” and the right to make their own decisions, and that governments have the obligation to support them in doing so. For people with cognitive, intellectual or psychosocial disabilities, Article 12 is critical to self-determination and equality.

In 2015, Texas became the first state to recognize supported decision-making agreements. The groundbreaking bill stated that its purpose was to “recognize a less restrictive alternative to guardianship” for adults who need assistance but are not “incapacitated persons.” The bill allowed an adult with a disability to “voluntarily, without undue influence or coercion, enter into a supported decision-making agreement with a supporter” and it set out the scope of the agreement. The bill provided an agreement form yet specified that the agreement is valid if it “substantially” follows the form. The 2015 measure also included a warning on the form concerning abuse, neglect and exploitation, indicating that if a third party believes the supporter is abusing the adult, the person must report to adult protective services.

Delaware SB 230. This year Delaware became the second state to recognize supported decision-making agreements. The bill aims to “provide assistance in gathering and assessing information, making informed decision, and communicating decisions to adults who do not need a guardian or other substitute decision-maker for such activities, but who would benefit from decision-making assistance.” The bill:

- Defines “support services” as “a coordinated system of social and other services supplied by private, state, institutional or community providers designed to help maintain the independence of an adult.”
- Allows an adult to enter into a supported decision-making agreement with a supporter “voluntarily and without coercion or undue influence.”
- Requires that the agreement be on a form to be developed by the Department of Health and Social Services.

- Includes safeguards such as a requirement for two witnesses; a written acknowledgement by the supporter of his/her duties; provision that either the individual or the supporter may revoke the agreement; and a disqualification of certain supporters with conflicts of interest.
- Specifies the powers and duties of supporters, including “assist[ing] the principal in understanding information, options, responsibilities, and consequences of the principal’s life decisions, including those decisions relating to the principal’s affairs or support services.”
- Prohibits a supporter from exerting undue influence, obtaining without the consent of the individual information not reasonably related to matters on which the supporter is assisting.
- Provides that a decision made under such an agreement must be recognized and may be enforced by the principal or supporter.
- Limits liability for those who in good faith rely on the agreement or in good faith decline to honor it, including declining to comply with an authorization concerning health care because the action “is contrary to the conscience or good faith medical judgment” of the third party.

2. Restoration to Capacity. While it is most common for a guardianship to end upon the death of the individual, all state statutes provide for termination of a guardianship upon finding that the person has sufficient capacity to manage his or her personal and/or financial affairs – or the person has sufficient supports, or new evidence is identified to show the individual does not meet the definition of “an incapacitated person” or a similar definition.

Restoration proceedings are under increasing focus – especially for younger individuals with intellectual disabilities, mental illness or head injuries who may be able to make decisions on their own with adequate family and community support. For a recent article examining restoration of rights, see Cassidy, Jenica, “Restoration of Rights in the Termination of Adult Guardianship,” *23 The Elder Law Journal* 1, 83-122 (2015). The ABA Commission on Law and Aging currently is completing a pioneering research project on restoration including a review of court files in four states (final report expected January 2017). In 2016, the ABA Commission on Law and Aging, with the Virginia Tech Center for Gerontology, collected initial cross-state court file data on restoration cases, and sponsored a discussion roundtable on restoration issues; and will complete a report in January 2017.

- Colorado SB 16-131. Colorado added a new statutory section concerning post-adjudication right to counsel. The new measure provide that an individual subject to guardianship or conservatorship “has the right post-adjudication to be represented by a lawyer of the [individual’s] choosing” at the expense of the estate, unless the individual “lacks sufficient capacity to provide informed consent for representation” – in which case the court must appoint a guardian ad litem (and the person retains the right to a lawyer for the appeal of the decision concerning right to a lawyer). The court must appoint a lawyer if the individual subject to guardianship is not represented by a lawyer and the court determines the person needs such representation.

VIII. Medicaid/Public Benefits

1. Appointment of Special Medicaid Representative. New Hampshire SB 127 addresses a situation in which payment has not been made for a resident in a care facility, and the resident and where applicable the person’s spouse fails to cooperate in the Medicaid application process, the facility may petition the court for appointment of a “special Medicaid representative” for the limited purpose of applying for Medicaid. If there is already a guardianship proceeding underway, the care facility may petition the court to compel the guardian to submit and complete the Medicaid application.

2. Guardian Fee and Nursing Home Personal Needs Allowance. As indicated above, Maryland SB 449 provides that a guardian of person and property may take a fee of \$50 per month “as part of the personal needs allowance,” of a resident on Medicaid. However, in Maryland the fee will come from an increased amount, and will not reduce or detract from the resident’s discretionary spending.

IX. Guardian and Fiduciary Misconduct

The 2010 Government Accountability Office report entitled *Guardianships: Cases of Financial Exploitation, Neglect, and Abuse of Seniors* (<http://www.gao.gov/Products/GAO-10-1046>) “could not determine whether allegations of abuse by guardians are widespread,” but the report identified hundreds of such allegations by guardians in 45 states and DC between 1990 and 2010. The GAO examined 20 cases in which criminal or civil penalties resulted, and found that guardians engaged in significant exploitation of assets. In November 2016, the GAO, without making any recommendations, reaffirmed

its earlier finding that it could not identify the extent of guardianship abuse due to a lack of data nationwide in its report, *Elder Abuse: The Extent of Abuse by Guardians is Unknown, but Measures Exist to Help Protect Older Adults* (<http://www.gao.gov/assets/690/681088.pdf>). In this recent report, the GAO examines eight new cases of guardianship abuse and describes new federal initiatives for supporting coordination and sharing information among state programs.

Within the past couple of years, several high profile media stories have spotlighted serious flaws and sometimes abuse in guardianship practice, especially in Ohio (*The Columbus Dispatch*), Nevada (*KTNV ABC News*) and Florida (*Sarasota Herald Tribune*). Bonds, restricted accounts, required reporting of abuse, criminal penalties, third party notice, specific record-keeping requirements, tracking of guardians with multiple cases, and complaint procedures are examples of approaches to address fiduciary misconduct.

- Colorado SB 16-131 clarifies provisions concerning removal of a fiduciary for cause; and provides that after a fiduciary receives notice of removal proceedings, the fiduciary may not pay compensation or attorney fees and costs from the estate of the individual without a court order.

X. Post-Adjudication/Monitoring Issues

During the past 15 years, many states have sought to strengthen the court's tools for oversight of guardians. (See *Guarding the Guardians: Promising Practices for Court Monitoring*, http://assets.aarp.org/rgcenter/il/2007_21_guardians.pdf.) Several 2015 bills addressed court oversight tools.

1. Bond Requirements. South Dakota law provides the court may not require a bond by a guardian except for good cause shown; and must determine whether a bond by a conservator is necessary. Any required bond must be with such surety as the court orders.

- South Dakota SB 54 adds that the surety(ies) must immediately notify the court and the individual if the bond is not renewed by the guardian or conservator.

2. Notice of Appointment. Virginia HB 1266 requires that notices of guardianship appointment, modifications, and terminations be sent to the Department of Medical Assistance Services, in addition to the local department of social services.

3. Guardianship Studies. Two states approved guardianship study committees:

- Indiana SEA 31 creates an interim Probate Study Subcommittee to recommend any needed changes in the probate code and other statutes affecting guardianship, probate jurisdiction, trusts or fiduciaries.
- New Hampshire SB 341 creates a committee to study guardianship, including whether guardians should be registered and licensed, who should have jurisdiction over guardians, the number of guardians in the state and how the role of a private and public guardian differ, the requirements for becoming a guardian, and whether New Hampshire should adopt the NGA *Standards of Practice*.

Table: State Adult Guardianship Legislation at a Glance: 2016

State	Legislation	Code Section Amended	Provisions
AZ	SB 1296	Ariz. Rev Stat. §14-5101 et. Seq.	Addresses right of communication, visitation, association; guardian’s authority to restrict; and guardian duty to report changes.
AZ	SB 1169	Ariz. Rev. Stat. §14-5101; 14-5312.01 et seq.	Changes language concerning admission to mental health institution
CO	SB 16-131	Colo. Rev. Stat. Ann. §15-10-503 & 15-14-319	Concerns post-appointment right to counsel, including in restoration proceedings; amendments to fiduciary removal provisions
CT	SB 219	Conn. Gen. Stat. Ann 45a-45a-644, 45a-656b, 45a-106a, 45a-177	Expands types of entities that may serve as conservator; sets court fees; allows waiver of hearing rights in voluntary conservatorships
CT	HB 5255	Conn. Gen. Stat. Ann. §45a-699 et seq.	Broadens entities that may serve as guardian for individuals with intellectual disabilities; addresses

			confidentiality; and changes terminology.
DE	HB 303	Del. Code Ann. §3981	Makes minor change in term of service for Public Guardian.
DE	SB 230	Del. Code Ann. T. 16, §9401 et seq.	Recognizes supported decision-making agreements
FL	SB 232	Fla. Stat. Ann. §744.1012 et. Seq.	Creates Office of Public and Professional Guardianship with oversight of registered private guardians.
GA	HB 954		Enacted Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act
HI	HB 1585	Haw. Rev. Stat. §560:5-316	Addresses personal communications rights of individual and role of guardian
IL	HB 4552	320 Ill. Comp. Stat. Ann. §20/8	Addresses public guardian access to APS records
IL	HB 5924		Creates guardian duties to inform adult children of admission to hospital, hospice program or death; and grants an adult child the right to petition for visitation.
IN	SEA 31		Creates an interim probate study subcommittee
IN	SB 192		Directs committee to study person's right to communication, visitation, association; and guardian's authority to restrict
LA	SB 94		Enacted Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act
LA	HB 350	La. Code Civ. Proc. Ann. Art. 2995, more	Addresses right of communication, visitation, association; and authority of guardian.
MD	SB 449/ HB 981	Md Estate & Trust, 13-218; Md Health Gen 15-122.3	Concerns guardian fees in cases involving nursing home residents on Medicaid
NE	LB 934	Neb. Rev. Stat. 30-4103, 4104, 4115, 4116 & 39-2201	Amends the state's public guardianship provisions; clarifies role of guardians ad litem

NH	SB 341		Creates a guardianship study committee
NH	SB 387	NH Stat. §464-A:40(V)	Concerns post-death authority of guardian to dispose of assets
NH	SB 127	NH Stat. §151-I:1 – I:V	Concerns appointment of special Medicaid representative
NY	A 3461-C	NY Mental Hyg. Law, §81.16	Addresses right of communication, visitation, association, and guardian’s authority to restrict; and guardian duty to report changes.
NY	S 7132-A	NY Surrogate’s Court Procedure Act, Art. 17-A, §1750 et seq.	Makes changes in terminology
NC	HB 817		Enacts Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act
OH	HB 158	Ohio Rev. Code Ann., many sections	Makes changes in terminology
OK	SB 1495	Okla. Stat. Ann. §30 3-110	Concerns parties entitled to receive notice of hearing
OK	SB 902	Okla. Stat. Ann. §30 4-104 & 105	Specifies qualifications for guardians
SD	SB 54	S.D. Codified Laws, §§29A-5-110, 111 & 118	Provides for guardian/conservator background checks, training, notification if bond not renewed
SD	SB 152	S.D. Codified Laws, §29A-5	Addresses right to communication, visitation, association; and guardian’s authority to restrict
TN	HB 1700	Tenn. Code Ann. §34-1-115(f)	Allows for waiver of requirement for conservator to seek court approval for changes in investments
TN	SB 2190	Tenn. Code Ann. §§34-3-107, 108	Addresses right to communication, visitation, association; guardian’s authority to restrict
UT	HB 101	Utah Code Ann. §75-5-303(5)(d)	Makes exception to right to counsel

UT	SB 111	Utah Code Ann	Addresses right to communication, visitation, association; guardian's authority to restrict
VA	HB 1266	Va. Code Ann. §§64.2-2011(B) & 2014(A)	Requires that notice of appointment, modification or termination of the order be sent to Department of Medical Assistance Services
VA	HB 1267	Va. Code Ann. §64.2-2001(C)	Allows court to appoint guardian or conservator upon petition within six months prior to respondent's 18 th birthday
VA	HB 816	Va. Code Ann. §51.5-149.1	Removes one member from the Public Guardian and Conservator Advisory Board
VA	HB 342/ SB 466	Va. Code Ann. §64.2-2019	
WA	HB 1258 (passed 2015)	Wash. Rev. Code Ann. §71.05	Allows guardian/conservator to petition court for involuntary detention
WA	SB 5635		Enacts Uniform Power of Attorney Act – with some provisions that bear on guardianship