COLA CELEBRATES 40 YEARS OF RESEARCH, EDUCATION AND ADVOCACY

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BIFOCAL
Journal of the American Bar Association Commission on Law and Aging

Commissio...
We are pleased to present this special issue of BIFOCAL, celebrating the 40th anniversary of the American Bar Association Commission on Law and Aging. I have been honored to chair the Commission for the past two years and can say unequivocally, based on my many years in the profession and involvement with the ABA, that the Commission on Law and Aging is one of the brightest jewels in the ABA’s multi-faceted crown.

The Commission’s esteemed reputation is due, in large part, to the professional staff led by Director Charlie Sabatino. The five members of the legal staff average 23 years of experience at the Commission and 30 career years in the field of law, aging, and disability. Leading the charge has been Assistant Director Erica Wood, whose tenure extends back to the very first meeting of the Commission in 1979. Erica’s work has touched the professional life of virtually every advocate who has worked in this field over the last four decades.

The deeply felt tectonic change in staffing this anniversary year is Erica’s planned retirement at the end of this year. She leaves a huge legacy behind while she continues to pursue aging advocacy in new ways, along with expanding her role as grandmother.

The Commission also owes much of its success over the years to the many leaders both within and outside the legal profession who have served voluntarily and with great distinction as members.

The 15-member Commission, appointed annually by the incoming ABA president, has included not only lawyers with sweeping legal expertise, but national experts in aging from the fields of medicine, social work, nursing, academia, state and federal public administration, associations, advocacy, and more. We are unique in having this interdisciplinary team and we have been blessed with the tireless volunteer efforts of the best and the brightest from across the country.

This expertise and energy of members and staff will continue to push the envelope of law and aging advocacy as we embark on the next 40 years, but not without new challenges. The “silver tsunami” continues and the scope and complexity of issues we face will only grow. This includes health care access and affordability, long-term care, financial security, independent living, aging in place, technology and privacy, housing and the environment, to name a few of the challenges. But no matter what the issue, we at COLA strongly believe – and fight for – the right of every member of society to age with dignity.

The operations of associations like the ABA are also changing dramatically as robust membership is no longer taken for granted. The many public interest law programs within the ABA, such as this Commission, now shoulder the responsibility of developing business plans that rely far more on grants and generous donations and less on the ABA’s baseline funding.

As a result, readers may already have encountered some of our new initiatives such as the “Friends of the Commission” fundraising effort and the sale of the smartphone app Mind Your Loved Ones, or MYLO for storing and sharing family member’s advance directives and other medical information.

We are confident that these initiatives and your support, along with our core work in policy development, research, training and education, and technical assistance, we will continue to move aging policy and practice toward the highest and the best.

Here’s to the next 40 years!
In 1977, when then-ABA President William B. Spann determined to add the concerns of senior citizens to the association’s roster of public service priorities, the Washington office was a fertile garden for new initiatives of this kind.

The ABA’s Public Services Division had recently moved its location from Chicago to Washington and there was a real enthusiasm for exciting and diverse programs of this kind. Moreover, success with operating formats, such as specially focused bar committees and interdisciplinary “commissions,” coupled with opportunities for public and charitable funding to expand such endeavors, had opened a world of new possibilities.

Through these units, the ABA was increasingly able to study a variety of issues, marry formidable volunteer leadership to talented staff specialists, and then formulate responses ranging from policy positions to study reports, clearinghouse functions, demonstration projects, working conferences, and collaborative advocacy.

President Spann proceeded by designating a special task force to examine the status of the legal problems and needs confronting our elderly population, to determine whether, indeed, the ABA could play a constructive role, and to suggest what structure and broad priorities for an association program seemed most promising. With the nation’s elderly citizens steadily moving toward 15 percent of the total population and increasingly severe strains on their economic and social status being imposed by inflation, bureaucracy, resource scarcity, and benefit program squeezes, this appeared to be a pressing area for public service attention.

The task force reported out in mid-1978, affirming the value of an ABA initiative and suggesting that this might be best implemented through an interdisciplinary commission. It identified four priority areas that seemed worthy of attention—provision of legal services to the elderly, discrimination against the elderly, simplification and coordination of administrative procedure and regulation, and rights of persons subject to institutionalization or subsidized care.

The task force also reviewed prior work relating to older persons within other units of the ABA, urging that this be continued, that duplication be avoided, and cooperation fostered. Where feasible, the Commission was to mobilize and stimulate the talents and contributions of other ABA entities undertaking work in the field rather than replace them. The task force report was favorably received and at the ABA’s 1978 annual meeting, the establishment of a new interdisciplinary Commission on Legal Problems of the Elderly was authorized by the ABA governing bodies.

Appointments to the Commission were made in late 1978 and its first meeting was held in February 1979. This initiative brought together an outstanding group of practicing attorneys, legal educators, specialists in aging, and nonlawyer experts on problems of the elderly, including key federal officials, national organization leaders, and two former secretaries of the U.S. Department of Health, Education and Welfare.

The new Commission established a committee structure based on its four major priority areas. By midyear 1979, it was intensively engaged in problem analysis and program development efforts. A grant award from the American Bar Endowment made possible the retention of a small full-time staff to support the Commission’s effort in its first year of activity, which grew steadily over the next few years to reach a plateau of roughly 8 to 10 well-chosen members as its funded project portfolio grew.

From these beginnings emerged a truly significant and extraordinary effort that, contrary to expectations of its founders, went on to produce thirty years of steady leadership, service, hard work, and contributions to the cause and interests of our older citizens—and continues, from all indications, to be moving forward at full strength today.
How could this have happened and what was so unique about the Commission’s launching? That’s hard to say but, in retrospect, it seems, first, that the time was terribly right; and second, whether by design or good fortune, the Commission’s founding fathers did virtually all the right things. First, the use of a talented and well-chosen task force to carefully study the design and wisdom of a focused public service effort addressing legal problems of the elderly was not only “good form,” but yielded a sound product design.

Second, the choice of an interdisciplinary Commission, rather than an all-lawyer committee, and the filling of that Commission's roster with a stunning and diverse selection of appointees—both “top of the mountain” figures (such as Arthur Flemming, Wilbur Cohen, and Robert Butler) and up-and-coming ABA legal stars (such as George Alexander, Esther Lardent, Paul Nathanson, Fernando Torres-Gil, and Erica Wood)—assured creative depth.

Third, the hiring and launching of the right staff director resulted in the era of Nancy Coleman, whose performance and destiny, as it turned out, encompassed “heads up” leadership for a full 25 years.

Fourth, the selection of wise and meaningful program priorities for initial concentration and the initial selection of veteran chairs assured stability. The first two chairs, Lyman Tondel, followed by John Pickering, provided more than 15 years of stable and dynamic stewardship for the Commission, followed, happily, by a succession of equally dedicated “normal term” chairpersons. From this base, the Commission would go on to compile an impressive record of service in continuing education, policy development, rights advocacy, state and local bar partnerships, “hard issue” analysis and confrontation, legal services field support for programs funded by the federal Administration on Aging, national aging and law conferences, and expansion of the original 1979 program priorities to encompass such vital aging areas as guardianship, elder abuse, housing needs, planning for incapacity, federal benefit program participation, and health care decision-making—all adding up to a hard-to-measure but clearly enormous impact beyond its modest size and numbers.

The writer is well aware that these reflections on Commission beginnings by a former ABA staffer, who was there at the time and had the responsibility (as Public Service Activities Division Chief) of helping with the start-up of the Commission may have taken on the look of a eulogy. This is hardly an intended result. Yet, a close reflection on and study of its 30-year record cannot help but justify a respectful salute and warm pat on the back for the kind of excellence and accomplishment that honors the ABA and assures a well-earned place among the ABA’s corpus of public service achievements touching so many facets of law and society.

[This is a reprint of Daniel Skoler’s column on COLA’s 30th anniversary].

What was so unique about the Commission’s launching? That’s hard to say but, in retrospect, it seems, first, that the time was terribly right; and second, whether by design or good fortune, the Commission’s founding fathers did virtually all the right things.

Daniel L. Skoler is the former director of the ABA Public Services Division (1971-1980) and member of the Commission (1980-1986).
The Commission took root and grew in its early years largely because of the energy and passion of its first director, Nancy Coleman. A University of Michigan MSW social work graduate and political science MA, Nancy came to the Commission after cutting her teeth in positions such as project director for Michigan’s Citizens for Better Care and investigator for the U.S. Senate Special Committee on Aging.

Her intelligence, skills in project development, and networking ability among lawyers and other advocates serving older persons established the Commission as an important national resource. Her convening of lawyers scattered about the country whose practices focused on aging issues helped give birth to the National Academy of Elder Law Attorneys (NAELA) in 1987 and earn her a presumptive status of the elder law lawyer’s lawyer, sans JD. She remains the only non-lawyer granted membership, including a term on the board, in NAELA’s history.

By the time Nancy moved on from the Commission in 2005, she had built a record of ground-breaking events and resources that helped define the field of elder law and support regulatory and practice improvements in long-term care, Medicare and Medicaid, Social Security, capacity and guardianship issues, and legal services delivery.

She had the ability to tap the best resources within the ABA to establish a firm foundation. I had the pleasure of joining the Commission staff in 1984 after managing a legal aid office practice focused on seniors. It is due to her inspiration, knowledge and passion that I reluctantly stepped into the director role of the Commission and continue to be inspired by its mission.

By the way, Nancy’s inquisitive heart is still probing new issues in her latest role as foreperson of a Los Angeles County Civil Grand Jury. She continues to shed light where it makes a difference.

—Charlie Sabatino

The Commission is Here to Help You

- Our website americanbar.org/aging contains resources you can use in guardianship, elder abuse, health care decision-making, capacity assessment, ethics, & more.
- Our experienced staff can provide training on these and other topics.
- We provide consultation services directly and through the NCLER.
- We are available as collaborators on grant-funded research & education.
- Contact us at aging@americanbar.org.
The Commission is an interdisciplinary body of experts in aging and law, including lawyers, judges, health and social services professionals, academics, and advocates. With its professional staff, the Commission examines a wide range of law-related issues.
COLA at 40

For 40 years, we've worked tirelessly to improve the lives of thousands of vulnerable older adults. We appreciate the support that enables us to continue to fight to strengthen and preserve elders' rights now and in the future.

### Elder Law Then and Now

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<thead>
<tr>
<th>Then (1979)</th>
<th>Now (2019)</th>
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<tr>
<td><strong>Elder Law</strong> didn’t exist as a field or even as a descriptive term.</td>
<td><strong>Elder Law</strong> is a widely recognized area of practice.</td>
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<td><strong>Americans over 65</strong> numbered 24.4 million and made up 11 percent of the population.</td>
<td><strong>Americans over 65</strong> number over 54 million and make up over 16% percent of the population.</td>
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<td><strong>The Older Americans Act</strong> authorized funding for “legal services” for older persons only 6 years earlier and created the state role of “Legal Services Developer” only 3 years earlier.</td>
<td><strong>The Older Americans Act</strong> continues to fund “legal assistance” as well as elder justice initiatives, and supports innovative delivery programs to reach the most socially and economically needy.</td>
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<td><strong>The Administration on Aging</strong> funded very few fledgling national support projects such as the Legal Research and Services for the Elderly and the National Senior Citizens Law Center.</td>
<td><strong>The Administration on Aging</strong> funds 23 national resource centers, including the National Center on Law and Elder Rights in which the Commission partners with Justice in Aging.</td>
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<td><strong>Publicly funded legal services</strong> programs for older persons numbered about 120 nationwide.</td>
<td><strong>All 655 Area Agencies on Aging</strong> fund some legal assistance, most commonly a Legal Services program.</td>
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<td><strong>Bar projects</strong> serving the elder existed in about 20 states, most often in the form of no cost or low-cost lawyer referral programs.</td>
<td><strong>Bar projects</strong> exist in nearly every state. The Commission provided seed funding for scores of elder law partnership projects over 30 years.</td>
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<td><strong>No state bar</strong> had an elder law section. About half had a committee on the elderly.</td>
<td><strong>Thirty-two state bars</strong> have active Elder Law Sections; an additional eight have committees with membership totaling nearly 19,000.</td>
</tr>
<tr>
<td><strong>Ten law schools</strong> were known to have law and aging seminars of clinical programs. None had LLM programs in Elder Law.</td>
<td><strong>More than 100 law schools</strong> nationwide teach elder law courses or clinics. Three have LLM programs in Elder Law: Stetson University College of Law; Touro College - Jacob D. Fuchsberg Law Center; and Western New England University School of Law.</td>
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| **No Elder Law journal** existed but two professional and one mass market guide on law and aging guide were available:  
  - *The Law and aging Manual* by Legal Research and Services for the Elderly  
  - *The Rights of Older Persons: An ACLU Handbook* by Robert N. Brown, et al. | **Two law schools** (U. of Illinois and Marquette University) publish dedicated elder law journals in addition to the journal of the National Academy of Elder Law and the Commission’s own *BIFOCAL*. Several state bar elder law sections publish extensive state practice manuals. All major law publishers have texts and practice guides for elder law. |
Congress amended the Social Security Act in 1974 to require all states to establish adult protective services units (APS) for adults aged 18 and older.

The U.S. House of Representatives held hearings and sponsored investigations about elder abuse throughout the middle to late 1970s.

“Caregiver stress” was thought to be the primary cause of elder abuse. As a result, models that relied upon recognition and reporting of elder abuse by health care providers were developed to identify and help victims. Helping victims often involved removing them from their home and placing them in a nursing home.

Every state had an APS program by 1981. States may choose to devote some of their Social Service Block Grant funds to APS. Federal APS funding has been authorized but never appropriated.

The National Center on Elder Abuse (NCEA) was authorized by the Older Americans Act in the late 1980s, and funding has been appropriated since then for its activities which include information dissemination, research, technical assistance, and training.

The U.S. Senate, House, and Government Accountability Office have conducted myriad hearings and studies on elder abuse issues.

Congress has enacted two key pieces of elder abuse legislation—the Elder Justice Act (EJA) in 2010 and the Elder Abuse Prevention and Prosecution Act (EAPPA) in 2017—but funding for the activities and programs authorized has never been appropriated. (Some authorized activities, such as the federal Elder Justice Coordinating Council, have been funded by federal agencies in other ways. Amendments to the Violence Against Women Act have authorized dedicated funding for training about abuse of women in later life and persons with disabilities, and those funds have been appropriated.

Judicial training and development of bench tools and other resources for judges has expanded.

There is substantially greater training of and involvement of criminal justice system professionals. However, the lack of dedicated federal funding means that involvement may vary widely from community to community and may not continue if key individuals leave their jobs.

Books, scholarly journal articles, news stories, and other articles and publications about elder abuse have increased exponentially.

There is growing use of civil remedies including civil protection orders, actions to recover homes and personal property, and removals of abusive guardians or agents under a power of attorney.

Multidisciplinary responses have developed and are widely regarded as best practices, with increasing support from federal, state, and local government agencies and philanthropies. These responses include multidisciplinary or interdisciplinary teams, task forces, coordinating councils, elder abuse fatality review teams, forensic centers, and more.

Multiple research agendas have been developed, including the National Academy of Sciences groundbreaking report, Elder Mistreatment: Abuse, Neglect, and Exploitation in an Aging America (2003).

Important research has been funded by various federal government agencies (primarily the Department of Justice) and a few foundations. Research focused first on the extent of the problem, then on development of tools for detecting elder abuse, and is beginning to shift toward outcomes for victims. Perspectives about the manifestations of elder abuse and theories about its causes have broadened significantly.

While tragic, several cases involving allegations of elder abuse against high-profile individuals such as Brooke Astor, Mickey Rooney, Harper Lee, Casey Kasem, and Stan Lee have raised awareness of the problem among the public, a wider array of professionals, and policy makers.
Commission’s Elder Abuse Action Highlights

- Developed *Recommended Guidelines for State Courts Handling Cases Involving Elder Abuse* (1995). The ABA adopted the recommendations as Association policy in 1996. This work has informed efforts in the 2000s to change court practices, such as establishment of elder protection courts and elder justice centers.

Developed *Elder Abuse in the State Courts – Three Curricula for Judges and Court Staff* (1997).

- As a partner in the National Center on Elder Abuse, helped implement the National Policy Summit on Elder Abuse held in December 2001. Led by the Commission, the ABA adopted the Summit’s law-related recommendations as Association policy in 2002. This policy has enabled the ABA to advocate for enactment of the EJA, EAPPA, and other relevant legislation.

The *Managing Someone Else’s Money* guides we produced for the Consumer Financial Protection Bureau have been distributed to more than 1.5 million people, adapted in whole or part by at least nine states, and translated into Spanish.

- Produced *Legal Issues Related to Elder Abuse: A Pocket Guide for Law Enforcement* and distributed almost 25,000 hard copies to police departments, sheriffs’ agencies, prosecutors, judges and court staff, and community corrections agencies.

- With help from the National Adult Protective Services Association, provided seed funding to demonstration sites to establish the earliest elder abuse fatality review teams and produced *Elder Abuse Fatality Review Teams: A Replication Manual* (2005). A recently concluded project, conducted with program evaluators at the University of Texas Health Science Center at Houston, allowed us to update and expand the replication manual, conduct a team inventory, develop a library of team documents and other resources, and collect and analyze team outcomes.

- For AARP’s Public Policy Institute, we analyzed the abuse-related provisions of the Uniform Power of Attorney Act (UPOAA) and prepared a report comparing existing state provisions with the UPOAA provisions. This report has helped inform state AARP advocates and others, including legislative and bar association study committees, about the benefits of state enactment of the UPOAA.
## Health Care Decision-Making

### Then & Now (1979 - 2019)

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<th>1979</th>
<th>2019</th>
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<td>The Medicare hospice benefit was not yet implemented. A miniscule fraction of deaths in America occurred in hospice.</td>
<td>Over 50 percent of all deaths of Medicare patients are in hospice (in-patient and home-based).</td>
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<td>In 1979, Medicaid long-term care expenditures for home and community-based care was almost non-existent. By 1995, it reached only 18 percent of total Medicaid long-term care spending. The rest went to institutional care.</td>
<td>In FY 2015 Medicaid long-term care expenditures for home and community-based care reached 55 percent of total long-term care spending.</td>
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<td>Ten states had “living will” statutes. None had comprehensive health decisions legislation. No state had a proxy directive.</td>
<td>Every state has comprehensive health decisions legislation recognizing advance directives (including living wills and proxy directives).</td>
</tr>
<tr>
<td>Some six cases nationally addressed the right to refuse life-sustaining treatment in case law, the most well-known being the 1976 <em>Karen Ann Quinlan</em> case of New Jersey. All affirmed the basic right.</td>
<td>Nearly 500 reported cases nationally have affirmed the right to consent to or refuse treatment under appropriate safeguards. The most well-known case remains the 1990 <em>Nancy Cruzan</em> decision of the U.S. Supreme Court.</td>
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<tr>
<td>The term “advance directive for health care” didn’t exist. A tiny fraction of adults had a living will or anything else that would qualify as an advance directive.</td>
<td>Advance directives for health care are widely known, both proxies and living wills. About one-third of adults have one. Of those over age 60, 72 percent have one.</td>
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<tr>
<td>No state had default surrogate decision-making laws authorizing family members to make end-of-life decisions.</td>
<td>All but six states have a comprehensive default surrogate decision-making law, and more than half of those also recognize a close friend as a possible surrogate.</td>
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No state had a do-not-resuscitate (DNR) order that could be honored by EMS personnel or others outside of a hospital or other institution. No hospice benefit existed in federal law and was rare under private insurance.

All states authorize either “out-of-hospital” DNR protocols or have adopted some variation of Physicians Orders for Life-Sustaining Treatment (POLST) addressing other high-probability critical care decisions for persons with advanced illness.

The birth of Advance Care Planning focused almost exclusively on the legislative creation of living wills and later health care powers of attorney.

Advance Care Planning is understood as an ongoing process of discussion of one’s care, clarification of related values and goals, and embodiment of preferences through written documents and medical orders.

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**Commission Contributions in Health Care Advance Planning**

The Commission has moved the issue of health care advance planning forward. These are among our contributions over the last four decades:

- Presented more than 500 professional education programs on health decisions law and practice.
- Worked with Uniform Law Commissioners in shaping the 1993 Uniform Health Care Decisions Act.
- Served in advisory or consultative capacity to nearly 200 federal, state, university-based, and non-profit national groups on health decisions.
- Responsible for a dozen key ABA policies on health care decision-making, end-of-life, and palliative care.
- Produced one of the first national advance directive forms with AARP and the AMA in 1990, receiving national attention by columnist Ann Landers.
- Produced more than 30 research reports, articles, professional practice aids, and public education materials on health decisions and advance planning, including the *Tool Kit for Advance Care Planning; Making Medical Decisions for Someone Else; a Multi-state Health Care Power of Attorney Form; and The Lawyer’s Advance Directive Counseling Guide*.
- Continued efforts to strengthen the Medicare and Medicaid home and community-based health and support services especially for those with advanced illness.
- Provided consultative support to the National POLST Paradigm since its inception.
- Advocated for federal supports for advance care planning and POLST. Provided legislative tracking and annual updates of state advance directive and surrogate decision-making laws, available to all on our website.
- Participated in multiple governmental and academic research and review processes focused on health, caregiving, and advance care planning.
- Produced practical articles for health care decision-making, caregiving, and advance care planning for both the public and the legal profession, all available free in our bi-monthly BIFOCAL e-journal.
In 1979, the average private pay rate for a nursing home semi-private room was $27 per day.

In 2019, the national median private pay rate for a nursing home semi-private room is $247.


In 1979:

- The cost of in-state tuition was under $1,000 at most U.S. colleges and universities for the 1978-79 school year.

Sources: https://libraryguides.missouri.edu/pricesandwages/1970-1979
Advancing Elder Rights: Our Accomplishments in 2019

The Commission is transforming guardianship and supporting decision-making rights

By Erica Wood

Adult guardianship issues are challenging, and transforming practices is an uphill battle. Sometimes older adults lose their rights to a guardianship system that too quickly determines “incapacity” in the name of protection. Some courts lack the resources, data and political will to improve guardianship monitoring and accountability. Family guardians often don’t have the guidance they need. In some cases, guardians take advantage of their position of trust to exploit those under their care.

Since the 1980s, the ABA Commission on Law and Aging has been pushing for guardianship change. We analyze bills, respond to hundreds of requests for technical assistance, speak before state and national groups to prompt action and educate professionals, and urge best practices to change systemic problems. We are a “go-to” source on guardianship and supported decision-making. Our web page is packed with up to date legislative, policy and practice information. In 2019, here’s how we made a difference:

• The National Center for State Courts partnered with the ABA Commission to release an interactive, user-friendly online training called Finding the Right Fit: Decision-Making Supports and Guardianship. The course offers realistic scenarios as well as information on supporting someone to make decisions; legal decision-making options; and serving as a guardian. It features realistic scenarios to help users develop their own strategies.

• The Commission once again produced its nationally recognized annual state guardianship legislative update, an essential tool for policymakers, researchers, and law-related groups. The final 2019 update will be posted at the end of the year. Throughout the year, the Commission partnered with AARP to help state AARP advocates track and analyze bills.

• Working with the National Center on Law and Elder Rights, the Commission led two national webinars on guardianship reaching professionals who can take action to change lives. In June, the Commission, with Jim Berchtold of Legal Aid Center of Southern Nevada, presented “When the Guardian is an Abuser”; and in September, with Catherine Seal of Kirtland & Seal, LLC of Colorado, we presented “Representing a Client in A Defense of Guardianship Case.”

• Under a grant from the DHHS Administration for Community Living, the ABA Commission is enabling state stakeholders to work together strategically on guardianship improvements specific to their state, through WINGS, or Working Interdisciplinary Networks of Guardianship Stakeholders. WINGS can drive changes that any single agency or organization could not. For example, this year Oregon WINGS completed a comprehensive assessment of the availability and use of less restrictive decision-making options throughout the state and has produced a train-the-trainer curriculum to inform professionals. Florida developed a four-part, web-based judicial and legal continuing education curriculum.

• The Commission partnered with the Virginia Tech Center for Gerontology and the New York Vera Guardianship Project to develop and release a comprehensive report with recommendations, Incapacitated, Indigent, and Alone: Meeting Guardianship and Decision Support Needs in New York, funded by the New York Community Trust.
The Commission on Law and Aging is at the forefront of a national dialogue between policy makers, advocates, and practitioners about supported decision-making. We draw on our expertise in guardianship reform, health care decision-making, capacity determination, the rights of older adults, elder abuse and undue influence to create useful tools and trainings for practitioners and the public. With our connections in the aging and disability fields, we bring stakeholders together to engage in meaningful conversations about supported decision-making.

Supported decision-making empowers individuals who historically have been denied the right to make their own choices, including people with disabilities and older adults, to make decisions with the support of trusted individuals. Supported decision-making can be an alternative to the most drastic of restrictions on a person’s autonomy: court-appointed guardianship.

**New Concept Gains Attention**

Supported decision-making, a cutting-edge concept, is one of many ways to provide decision supports to those who need assistance. As this model gains attention in the United States and abroad, its implementation is not uniform. Some decision-makers and their supporters complete a formal written agreement called a supported decision-making agreement. Other individuals use a wide range of decision supports that they do not refer to as supported decision-making, including discussing choices with friends and family or asking a supporter to accompany them to a medical appointment, a financial planning meeting or when consulting a money manager. The disability rights community, all too familiar with suppression of personal autonomy and the right to make choices, has embraced supported decision-making as a best practice and alternative to guardianship. Recent pilot programs, academic research, and legal advocacy have focused on supported decision-making for individuals with intellectual and/or developmental disabilities.

Advocates for supported decision-making recognize if this model is to become a widespread alternative to court-appointed guardianships, it must also work for older adults with dementia and age-related cognitive decline. As relevant interest groups for older adults join the conversation, they are raising important questions about the potential risks of supported decision-making, such as the potential for a so-called supporter to use his or her role to take advantage of the decision-maker.

Choosing a trusted supporter could be challenging for older adults who have lost their families and friends over the years. However, a supported decision-making model could also address issues of isolation, enhancing existing personal connections and forging new ones.

**States Consider Agreement Laws**

As supported decision-making gains recognition, state legislatures are considering how to incorporate the model into state law. In recent years, several states have defined supported decision-making in statute. Nine states passed laws recognizing supported decision-making agreement as legally enforceable. The Commission tracks these laws in our annual Guardianship Legislation Summary.

As supported decision-making increasingly becomes a viable option for individuals who may have otherwise been appointed a guardian or surrogate decision-maker, there is a critical need for education and training. In 2019 the Commission developed, in partnership with the National Center for State Courts, *Finding the Right Fit: Decision-Making Supports and Guardianship*, a user-friendly, interactive resource for friends and family who want to provide support for their loved ones; individuals considering what assistance they may need now or in the future; and guardians who want to learn more about their role. Users can learn about supported decision-making through realistic scenarios and plain language explanations.

**Sharing Expertise**

In addition to developing an online curriculum to reach people across the country, several organizations invited us to speak about a variety of topics relevant to supported decision-making.

(continued next page)
The organizations with which we shared our expertise include the American Society on Aging, American Psychiatric Association’s Council on Psychiatry and Law and Committee on Judicial Action, Council for Court Excellence, Maryland State Bar Association, National Association of Elder Law Attorneys, North Carolina Rethinking Guardianship, National Resource Center on Supported Decision Making, Puerto Rico Bar Association, and the Virginia Public Guardianship Program.

In 2020 and beyond, supported decision-making will continue to gain recognition as a decision-making model and alternative to guardianship in state law and legal practice for a wide range of individuals. The Commission will continue to play a pivotal role in exploring its application, considering challenging questions, and creating helpful materials for practitioners and the public.

For more information on supported decision-making, go to the Commission online at https://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice/

These include:
- Legislative trends
- Supported decision-making for people with dementia and older adults
- The integral role of supported decision-making and decision supports in the Uniform Guardianship Conservatorship and other Protective Arrangements Act
- How elder law attorneys can use supported decision-making

The Commission has been a part of federally-funded national support programs for professionals in law and aging for 36 of our 40 years. Over the decades we have been funded to provide expertise on a diverse array of substantive issues and on legal service delivery. At times we have been funded as a stand-alone grantee, at other times as a partner in a collaboration or as a subcontractor. The structure and focus of the national support centers have varied, but the commitment to creating resources, providing education and training, and providing advice to professionals in law and aging has remained constant. The Commissions’ role in national support offices has allowed us to share our expertise with a diverse group of advocates in law and aging and spread awareness of the work that we do.

The National Center on Law and Elder Rights (NCLER) was created in the fall of 2016 by the Administration for Community Living funded from the Older Americans Act with an expected term of five years. We are beginning our fourth year as part of the NCLER.

The role of the Commission in the NCLER is to provide expertise on advance planning, decision supports, guardianship reform, and elder abuse. We create and present six national webinars each year. The webinars are offered free of charge to professionals in law and aging and archived online for viewing on demand. For each webinar we create an issue brief of three to six pages. The goal of the issue briefs is to provide concise action oriented written materials for advocates and consumers. See https://ncler.acl.gov/ for details on NCLER.

The Commission presented webinars in 2019 for NCLER on:
- Drafting advance planning documents to reduce the risks of abuse or exploitation
- Representing a client in defending against a guardianship case
- Signs of abuse neglect or exploitation
- When the guardian is the abuser
- Ethical issues in mandatory reporting
- Self-neglect and hoarding

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We created six or more issue alerts that NCLER distributes to its email list. The most popular have been practice tips, and practice checklists. Tips to become a better family guardian, and tips for writing better funding proposals were among the most popular.

NCLER funds also enable the Commission staff to spend time providing expert advice to advocates in law and aging. NCLER refers to these as “case consultations.” We receive requests through the NCLER website, through other NCLER partners, and directly from professionals in law and aging seeking information, guidance or advice on many of the issues. This year, we responded mostly by email or phone to 277 requests.

The NCLER has an email database of over 30,000 professionals in law and aging from across the country. About one-third report being lawyers; the rest are a blend of social workers, health care professionals, academics, government staff, and various advocates.

National Aging and Law Conference

The 2019 National Aging and Law Conference (NALC) was held October 31-November 1 at the Crystal Gateway Marriott in Arlington, Virginia. Attendance was up slightly from the year before; about 250 attended NALC and about 90 attended the pre-conference program. It was the Commission on Law and Aging’s sixth year of organizing and hosting this annual event. What sets NALC apart from other conferences on aging, elder law or estate planning is a focus on training advocates who provide services to primarily low-to-moderate income older adults.

The Commission on Law and Aging has played a role in interdisciplinary conferences on aging and law since the 1980s.

First called the Joint Conference on Law and Aging, it was co-hosted by several advocacy organizations including COLA. AARP underwrote, planned, and co-hosted the conference starting in the early 2000s through 2010 when it became known as the National Aging and Law Conference. From 2011 through 2013 the conference was hosted by the National Academy of Elder Law Attorneys under the program title, National Aging and Law Institute. NALI was an effort to produce a conference for both attorneys in private practice and legal aid – public interest advocates. This proved very difficult. When NAELA shifted directions, the Commission on Law and Aging assumed responsibility for organizing and hosting the National Aging and Law Conference in 2014. In 2019 the program started with a Pre-Conference program on advanced issues Supplemental Security income organized by NCLER. The main conference agenda included 30 workshops and four plenary sessions. The planning committee carefully balances the agenda covering health care, abuse, guardianship reform, legal service development and delivery, benefits, and legal ethics.

Planning is underway for the 2020 National Aging and Law Conference. It will be held at the Hilton Crystal City in Arlington, Virginia, with pre-conference programs on October 21 and NALC on October 22-23. The request for workshop proposals will be released in early 2020. The best source of up-to-date information on NALC is the Elderbar distribution list.

Stay Connected

The Commission on Law and Aging has hosted email discussion lists on issues in law and aging for years. The largest of these is Elderbar, with nearly 1,400 members. Elderbar is open to any professional in law and aging. We also have specialized lists such as Collaborate on elder mediation, Law and Aging Networking for ABA members and staff interested in programs, services or policy on aging, and Aging SOLO, a discussion list for professionals helping persons without readily identifiable family or friends. These lists provide a forum for discussion and a place to disseminate information.

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Platform Changes
For decades the lists were hosted using a software platform that allowed list members to send an email to all members of the list, using a single email address, and for replies to the list to go to all members of the list. That platform was largely unchanged since the early 1990s. The platform had an online function, but its operation was not user friendly or intuitive.

This year the ABA has begun transitioning our email lists to connect.Americanbar.org, hosted by Higher Logic. The new platform goes far beyond the basic email discussion platform (though it does that well.) The new platform provides a robust and easily searchable online archive of past discussions, an online library of documents posted to the list, or uploaded to the website, an events calendar, and an online directory of list participants.

Student Interns and Externs
The Commission hosted four students in 2019: Laura B. Ruppalt; Travis Goeden, an undergraduate at Knox College in Galesburg, Illinois; Zack Allen, a second-year law student at Temple University in Philadelphia; and Ann Moody, a second-year law student Georgetown Law School in Washington, D.C. Students conduct in-depth research, attend policy briefings, and learn about law, aging, and public policy under the tutelage of our team.

Many of our students have gone on to be leaders in the field of law and aging. Sarah Richardson Ferendorf is now at the Center for Medicare and Medicaid Services. Dara Valanejad is now a staff attorney at the Center for Medicare Advocacy. He interned with us when he was a law student at American University. Jenica Cassidy interned with the Commission and returned as a Borchard Fellow working on complex guardianship issues. She is now an associate with the law firm Lerch, Early & Brewer in Bethesda, Maryland.

Emeritus Pro-Bono Practice Rules
In the minutes of the first Commission on Law and Aging meeting 40 years ago, a discussion ensued involving the emeritus pro-bono practice rule that the Washington, D.C., Bar Association had just adopted. These rules lessen some of the licensing burden for attorneys who agree to practice pro-bono cases only. The rules are intended to make it easier for retired or inactive attorneys, or attorneys who are not otherwise engaged in the practice of law to offer pro-bono help. In the last decade, the number of jurisdictions that approved these rules increased from 32 to 44.

Several states have recently amended their rules to make them more helpful, such as expanding the definition of a qualified legal service or pro-bono provider, allowing attorneys licensed in other states to participate, or by including inactive attorneys to the mix.

In the past year we updated our listing of Emeritus Pro Bono Practice rules, provided resources and consultation to several states looking to create new rules or amend new rules, and provided resources to researchers writing on these issues. The Commission is seen at the go-to place in the ABA for understanding these rules, and also for what is happening across the country.

For more information about pro bono work, visit the ABA Center for Pro Bono at https://www.americanbar.org/groups/center-pro-bono/. We provide technical assistance and planning advice to a wide range of constituents in the field, including bar associations, pro bono programs, legal services offices, bar leaders, law schools, corporate counsel, judges and government attorneys.
Other speakers and experts in law and aging include (from left) Héctor L. Ortiz, PhD, Consumer Financial Protection Bureau Office for Older Americans; Lisa Weintraub Schifferle, Federal Trade Commission Division of Consumer & Business Education; Odette Williamson, National Consumer Law Center. About 250 people attended the annual event, which was held October 31-November 1 at the Crystal Gateway Marriott in Arlington, Virginia. Planning is under way for the 2020 conference. Stay tuned for details!
The Commission continued its endeavors to improve the justice system’s role in preventing, detecting, andremedying elder abuse, neglect, and exploitation (“elder abuse”). Increasingly, victims and their family members seek redress to this devastating and costly problem from the civil, criminal, family, and probate courts. Staff also continued work on other projects addressing the intersection of elder abuse and guardianship; those projects are discussed in our supported decision-making and guardianship articles.

The Commission completed its project to enhance and evaluate the capacity of elder abuse fatality review teams (EAFRTs) to improve the delivery of services to elder abuse victims. The project was funded by the U.S. Department of Justice, Office of Victims of Crime (DOJ/OVC), building on the foundational investment made by DOJ/OVC in 2001 when it funded the Commission to provide seed funding to some of the earliest EAFRTs and to develop Elder Abuse Fatality Review Teams: A Replication Manual (ABA, 2005).

DOJ/OVC made these investments in the EAFRT concept because these teams examine the deaths of individuals that may be caused by or related to elder or adult abuse with the goal of identifying system gaps and improving victim services. We collaborated with Dr. Jason Burnett, an elder abuse researcher and program evaluator at the University of Texas Health Science Center at Houston, to identify 35 teams in 13 states. Of the 35 teams, 30 are EAFRTs and five are domestic violence FRTs that review some elder deaths. (Other teams may exist or be in development.)

Using three questionnaires, we obtained information from the leaders, coordinators, or members of 24 of the 35 teams about team documents such as confidentiality forms, case review forms, data collection tools, and reports/recommendations; team members and processes; and team outcomes.

We asked team members about the impact of EAFRT participation on themselves, their organizations, and their community (county, region, or state in which the team operates). Seventy-eight percent (n=62) of the responses were from members who had served on their team for more than one year; 44 percent (n=35) had served for four or more years.

Team members indicated the following benefits of EAFRT participation:

1. EAFRT participation enhances members’ knowledge and ability to do their jobs
2. EAFRT members share what they learn at EAFRT meetings with their colleagues
3. EAFRTs often advance systemic changes in their communities and states

We also created an EAFRT web page on the Commission’s website. That page provides information including a list of teams and the jurisdictions they serve; team documents organized by category and by team; 11 charts updating or expanding the charts contained in the 2005 replication manual; fact sheets about team operations and team outcomes; and links to other useful resources. This information will benefit individuals involved with existing teams and those who may be considering establishment of an EAFRT.

We continued supporting federal, state, and community efforts to improve laws and practices related to elder abuse, by providing information and technical assistance to congressional committees, federal agencies, state AARP offices as consultants to AARP’s State Advocacy and Strategy Integration Team, and to numerous state and local providers of legal and other services to older persons.

Efforts to educate lawyers, judges, and allied professionals continued in various ways. We provided or sponsored in-person presentations or webinars about elder abuse to thousands of lawyers, judges, and other professionals primarily through the National Aging and Law Conference and National Center on Law and Elder Rights webinars.
Test Your Knowledge of Elder Law and Policy

1. What was the original name of the ABA Commission on Law and Aging?
   a) Commission on Concerns of the Aging
   b) Commission on Aging Law and Policy
   c) Commission on Legal Problems of the Elderly

2. How many adults age 65 and older will there be in the US in 2020?
   a) 46 million
   b) 56 million
   c) 66 million

3. What percentage of households age 55 and older have neither retirement savings nor a defined benefit retirement plan?
   a) 12%
   b) 17%
   c) 29%

4. How many people in the U.S. are unpaid caregivers of adults ages 65 and older?
   a) 17 million
   b) 40 million
   c) 52 million

5. Who was the first person to enroll in Medicare?
   a) President Harry Truman
   b) Eleanor Roosevelt
   c) Keith Richards

6. In 2019, how many state bar associations have a section or committee devoted to the legal needs of the elderly?
   a) 22
   b) 32
   c) 42

7. How many national resource centers, including the National Center on Law & Elder Rights, does the Administration for Community Living fund?
   a) 12
   b) 17
   c) 23

8. What percent of adults over age 65 are employed full-time or part-time?
   a) 12%
   b) 20%
   c) 24%

9. How many centenarians are there in the United States in 2017?
   a) 46,000
   b) 66,000
   c) 86,000

10. What percentage of Medicare beneficiaries lack dental coverage?
    a) 65%
    b) 75%
    c) 85%

11. How many grandparents were raising grandchildren in 2017?
    a) 1.5 million
    b) 2.5 million
    c) 9.5 million

12. Which movie star did an early ABA Commission video on advance directives feature?
    a) Raul Julia
    b) Helen Hayes
    c) Lloyd Bridges

Answers on the next page.
Medicare Premiums Update for 2020

- Medicare Part B premiums and deductibles for 2020 will increase a full 7 percent.
- The basic monthly premium for Part B will be $144.60, an increase of $9.10 from $135.50 in 2019.
- The annual deductible for Part B beneficiaries will be $198, an increase of $13 from the annual deductible of $185 in 2019.
- The hospital deductibles and coinsurance amounts are increasing by 3 percent.

Source: Centers for Medicare and Medicaid Services

Quiz Answers

1. C
5. A
6. C (Commission on Law and Aging, unpublished survey)
9. C (Administration for Community Living, 2018 Profile of Older Americans)
10. A (Meredith Freed, et al., Policy Options for Improving Dental Coverage for People on Medicare, Kaiser Family Foundation Issue Brief, September 2019)
An Interview with Erica Wood:
A 40-Year Lookback on Guardianship

Erica leaves the Commission at the end of 2019

Erica Wood, assistant director at the ABA Commission on Law and Aging, will be leaving the ABA at the end of December. She has spent much of her time over the last almost four decades on adult guardianship issues. BIFOCAL interviewed her about her recollections and changes she has observed in the field.

BIFOCAL: What did adult guardianship look like 40 years ago when you came to the ABA?

Wood: In 1980, most state guardianship laws were still pretty archaic, using discriminatory terms and lacking in procedural protections. For instance, many statutes still included the term “advanced age” in defining who needs a guardian — meaning a number of birthdays alone would be enough for a person to lose fundamental rights. Guardianship, once considered a backwater area of probate law, was little understood and was certainly not a hot topic! My interest was piqued in hearing one of our early Commission members, Dean John Regan, talk about the dire need for due process safeguards, which began to be addressed to some extent in the 1982 version of the Uniform Guardianship and Protective Proceedings Act.

BIFOCAL: What early events do you recall that stirred reform?

Wood: A major event that garnered attention and launched the beginnings of reform was the shocking Associated Press report entitled Guardianship of the Elderly: An Ailing System. I remember opening the paper in September 1987 and reading that there were older people across the country who were “declared legally dead by a troubled system.” Following the AP Report, the U.S. House Committee on Aging (which no longer exists) convened a hearing, chaired by Rep. Claude Pepper of Florida, who opened the session by saying: “This hearing illustrates how diligent we must be to protect . . . rights.” He also said, “So these victims of guardianship were just lost people. That is, they were lost in the shuffle? I wonder if they would get me. I am 87.”

The AP report and the House hearing prompted a rush of state guardianship legislation, as well as a steady flow of education and training materials for attorneys, judges, guardians and the public over the next years. The National Guardianship Association was created in 1987.

BIFOCAL: What has helped to drive reform over the past three decades?

Wood: Among other things, there were three broad-based national consensus conferences jumpstarted the guardianship reform movement. The first, in 1988, was held at the prestigious Wingspread conference facility in Racine Wisconsin, whose walls bore a quote by Oliver Wendell Homes: “A mind once stretched by a new experience can never regain its original shape.” Over 30 interdisciplinary stakeholders participated in crafting the landmark “Wingspread” recommendations, some of which eventually found their way into state statutes. I remember a flurry of flip chart activity — and the very civilized bell that called us to break in the lovely garden.

Thirteen years later in 2001, the “Wingspan” conference convened at the Stetson University College of Law in Florida. Its recommendations built on and strengthened the earlier set and in particular urged the development of a uniform act on guardianship cross-state jurisdictional issues, eventually leading to the approval of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act in 2007. I most remember the vociferous arguments about the role of counsel for the respondent in a guardianship proceeding. After another decade, the University of Utah S. J. Quinney College of Law hosted the 2011 Third National Guardianship Summit.

(continued next page)
Set against a dramatic red rock background, the Summit crafted standards for guardians that paved the way for the Uniform Guardianship, Conservatorship and Other Protective Arrangements Act and a revised set of NGA Standards of Practice as well as coining the term WINGS for Working Interdisciplinary Networks of Guardianship Stakeholders.

**BIFOCAL:** What stands out from your 30-plus years of tracking state guardianship legislation?

**Wood:** The ABA Commission began tracking state adult guardianship legislation in 1988, before we had access to Westlaw. The updates over the years were printed by Legal Counsel for the Elderly at AARP, and later incorporated into the National Guardianship Association’s annual Legal and Legislative Review. We saw activity in five major areas: procedural protections including the right to and role of counsel; determination of incapacity that emphasized more of a functional approach; limited court orders and requirements for exploring less restrictive options; monitoring and accountability of guardians; and development of public guardianship programs. By and large, the trends in these legislative measures were positive, highlighting rights and accountability, but sometimes there were retreats to overcome.

**BIFOCAL:** What changes need to be made on the ground in guardianship practices?

**Wood:** While passing good guardianship legislation is not easy, making sustainable changes in practice is much harder. Practices vary throughout any state, resources are generally insufficient, the cases are complex, staff turnover in courts and agencies is constant, data is almost nonexistent, family guardians get little help, and the political will for change is uneven.

More than 30 years after the 1987 Associated Press report, subsequent media reports of egregious guardianship practices have surfaced in a growing number of states – reports that highlight some of the same insufficiencies as found by the AP. The Government Accountability Office and the U.S. Senate Special Committee on Aging have spotlighted cases of abuse and exploitation by both professional and family guardians. So there is still much to do through a combination of legislation, law enforcement, rules changes, best practice models, education and training, data improvements, media accounts and more. Some states have convened court-stakeholder WINGS to spark and reinforce these actions.

**BIFOCAL:** As you know, the movement toward supported decision-making is gaining momentum. What has been the impact on guardianship?

**Wood:** The supported decision-making movement has shaken up the guardianship world in a positive way. It is a big conceptual leap from surrogates such as guardians or agents under powers of attorney making a decision for someone else, to supporters enabling people to make their own decisions with help, or as the Beatles said, “with a little help from my friends.”

The idea is not new. But the supported decision-making movement has placed decision-supports and supporters as a central element to examine before a guardianship is ordered, or when a restoration of rights or limited order is considered. A creative variety of supports and informed supporters can reduce use of overbroad or unnecessary guardianship and build self-determination. That’s why in 2016 the ABA Commission and other ABA entities created the PRACTICAL Tool for lawyers, and in 2017 the ABA passed a resolution urging use of supported decision-making as a less restrictive option to guardianship. Much more discussion is needed about supported decision-making, especially its use by people with dementia – and that’s a good thing.

To learn more about guardianship and supported-decision making, go to the Commission website at https://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice/
Movers & Shakers

Naomi Karp Leaves the CFPB

Naomi Karp, who had worked with the ABA Commission on Law and Aging, recently made a career change. She left the Consumer Financial Protection Bureau (CFPB) after eight years. Prior to the CFPB, Naomi was at the AARP Public Policy Institute. Her departure from the CFPB in October prompted memories by Commission staff.

Erica Wood: Naomi and I had an informal job share for over 17 years, as we both worked 60 percent time, with young children. We usually worked jointly and shared many challenges, successes and adventures. Perhaps most memorable was our 2003 project on health care decision-making for “unbefriended” elders. We researched current state laws on how health care decisions are made for adults with no decisional ability, no family, no friends, no connections, and no funds – adults who often slip through societal cracks. We made site visits and held a forum to gain additional information for our report and recommendations.

We also co-authored a report on mediation in nursing homes called Keep Talking, Keep Listening. We went to many meetings of the Dispute Resolution Coalition on Aging and Disability over many years, and later secured a grant to develop state or local coalitions on aging, disability and dispute resolution. We researched internal managed care plan grievance procedures and made recommendations. But that’s not all! We were co-investigators on a potpourri of additional projects – health care decision-making of patients with dementia in Medicare managed care plans; an early roundtable on coordination of Social Security representative payees and state courts with guardianship jurisdiction -- and we were part of a challenging project to assess the nursing home “informal dispute resolution” process.

After Naomi moved from the Commission to AARP, we continued to work together on a national study of guardian residential decision-making, a national study of guardianship monitoring, and a 2007 report on best judicial practices in “Guarding the Guardians.” For the report, we made several site visits -- and took the opportunity whenever we could to indulge our hobby of visiting state capitol buildings!

Finally, when Naomi moved from AARP to the CFPB in 2011, we worked together again as the CFPB contracted with the ABA COLA for an innovative project that Naomi conceived and managed. Our COLA staff (Charlie Sabatino, Erica Wood, Lori Stiegel, Andrea Amato) worked closely with Naomi to develop national plain language guides for four types of lay fiduciaries, collectively called Managing Someone Else’s Money, state-specific adaptations for six states, and a set of templates and tips to facilitate adaptation by other states. The CFPB disseminated more than 1.5 million hard and virtual copies of the national and state documents. They are among the agency’s most popular publications and are helping to improve family fiduciary practices.

Lori Stiegel: Except for ongoing discussions about clothes, shoes, and restaurants, Naomi and I collaborated more after she left the ABA. Her AARP and CFPB jobs focused on financial matters, including planning for incapacity and detecting, preventing, and redressing financial exploitation, that overlapped with my work on elder abuse, neglect, and exploitation.

In 2007, thanks to Naomi, AARP’s Public Policy Institute funded the ABA COLA to conduct a national study on power of attorney abuse. Our key tasks were to identify the consumer protection provisions of the new Uniform Power of Attorney Act (UPOAA), compare them to existing provisions in state statutes, and produce a national report. That report, Power of Attorney Abuse: What States Can Do About It—A Comparison of Current State Laws with the New Uniform Power of Attorney Act (AARP, 2008), benefited advocates and legislative staff working to support enactment of the UPOAA in their states.

Subsequently, again thanks to Naomi, to help inform aging and elder abuse experts, state policy makers, state program administrators and staff, attorneys general, prosecutors, law enforcement, and legal experts, AARP’s Public Policy Institute funded the ABA COLA to examine professionals’ opinions on the effectiveness of state laws and to elicit new ideas for improving states’ responses to elder financial exploitation.

Although Naomi’s departure from AARP meant there was no AARP staff to shepherd the resulting report and recommendations through AARP’s review and publication process, the work has informed other activities by ABA COLA staff and undoubtedly informed much of Naomi’s work at the CFPB.
Naomi made a significant contribution. She had a major part in our first attempt to look at Ethical Issues in Representing Older Clients. Naomi drafted the overview for the Fordham Law Review’s special issue that contained the papers contracted for the symposium as well as editing the recommendations that were adopted by those in attendance. She was instrumental in the success of the Symposium. The Special Issue was dated March 1994, Volume LXII, Number 5.

Nancy Coleman (former COLA director): Naomi approached me at an Age Discrimination in Employment workshop that the Commission was co-sponsoring with the National Senior Citizens Law Center, now Justice in Aging. This was in late 1987. She said she was moving to Washington and was looking for part-time work. The Commission had just been awarded a grant to look at Grandparent Visitation Rights with the ABA’s Center on Children and Law.

Naomi joined the ABA part-time in early 1988. There were numerous projects over the years where Naomi made a significant contribution. She had a major part in our first attempt to look at Ethical Issues in Representing Older Clients. Naomi drafted the overview for the Fordham Law Review’s special issue that contained the papers contracted for the symposium as well as editing the recommendations that were adopted by those in attendance. She was instrumental in the success of the Symposium. The Special Issue was dated March 1994, Volume LXII, Number 5.

During her time at COLA, Anne has contributed to the ABA’s online resources. She has researched state laws regarding mandatory reporting of elder abuse and updated ABA charts with recently-adopted statutory provisions.

She created a resource that describes states’ voluntary guardianship statutes and state guardianship statutes that contain language that could be interpreted to allow for a voluntary guardianship. She has researched and synthesized state laws regarding the criteria that make an individual eligible for adult protective services and has condensed states’ 2019 amendments to their health decisions laws into concise, digestible summaries. In her most recent project, Anne researched a recent decision from the New York Supreme Court regarding termination of a consent guardianship and due process concerns.

After graduating law school, Anne plans to go into the private sector and pursue litigation. She intends to continue to be involved in pro bono matters and hopes to circle back to public services work in the future.

Connect with Us!

The Commission provides a forum for legal professionals to communicate and share ideas.
Check these out:

- Elderbar, an open discussion list for professionals in law and aging
- Collaborate, a discussion list on aging, disability, and dispute resolution.

Visit the Commission’s homepage for more information on how to sign up. And follow us on:
Twitter: @ABALawandAging
Facebook: ABA Commission on Law and Aging

COLA Intern Anne Moody Gains Knowledge Under the Tutelage of Commission Staff

Intern Anne Moody is a student intern for the Commission on Law and Aging. Anne is from Los Angeles, California and is currently a second-year student at Georgetown University Law Center. Before law school, Anne earned a Master’s degree in psychology and provided counseling to older adults in a large community mental health center.

While working at the community mental health center, Anne witnessed many of her clients struggle with legal issues such as healthcare, housing, employment, and government benefits. Her desire to advocate for underrepresented communities on the legal front drove her to attend law school.

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As part of the ABA Fund for Justice and Education, CoLA fights for justice for all older Americans. Through national advocacy, policy development, education, and research, we work tirelessly to:

* Promote independence
* Protect vulnerable seniors from abuse and financial exploitation
* Enhance their quality of life.

As the Commission celebrates 40 years of empowering advocates to effectively represent seniors in life-altering situations, we ask for your support. Help us to continue our mission-critical efforts that make a dramatic difference in the lives of older Americans.

Donate online to become a Friend: ambar.org/donatecola

FRIEND LEVELS
Friend: $300/year
Old Friend: $500/year
Lifelong Friend: $1,000/year
Commission Matriarch/Patriarch: $5,000/year
Other
The Commission on Law and Aging produces a wide array of publications to assist elder law attorneys, advocates, and consumers. Many of these publications are available as free downloads on our Resources pages. Click on the images or visit us online to learn more.

BIFOCAL, A Journal of the ABA Commission on Law and Aging

The ABA Commission's bi-monthly journal, provides timely, valuable legal resources pertaining to older persons, generated through the joint efforts of public and private bar groups and the aging network. Visit Bifocal web pages to view current and extended archive issues of BIFOCAL.

Health and Financial Decisions: Legal Tools for Preserving Your Personal Autonomy

Why Am I Left in the Waiting Room? Understanding the Four C’s of Elder Law Ethics

Advance Directives: Counseling Guide for Lawyers

Giving Someone a Power of Attorney for Healthcare (multi-state guide and form)
Consumer’s Tool Kit for Health Care Advance Planning

Legal Issues Related to Elder Abuse: Guides for Law Enforcement

Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers

Managing Someone Else’s Money Guides, available from Consumer Financial Protection Bureau

The PRACTICAL Tool for Lawyers: Steps in Supporting Decision-Making

Judicial Determination of Capacity of Older Adults in Guardianship Proceedings

Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists
We all wish for good things in aging but what do we have a right to? An important working group within the United Nations has struggled with that question for the last 10 years. The UN General Assembly established an Open-Ended Working Group on Ageing (OEWGA) by resolution in 2010, with a mandate to consider the existing international framework of the human rights of older persons and identify possible gaps and how best to address them, including, as appropriate, the feasibility of further “instruments and measures.” That phrase covers everything from an aspirational memo to a binding U.N. convention. The ultimate goal is to strengthen the protection of human rights of older persons. But is that done by paying better attention to applying existing human rights conventions and principles to older persons, or is a more targeted, specialized convention needed?

From the first annual meeting of the OEWGA in 2011 to the present, the major issue repeatedly debated has been whether there is a need for a specialized binding convention on the rights of older persons.

Virtually every participating non-governmental organization (NGO) and many nations have argued that existing human rights instruments lack both normative standards and operational frameworks effectively applicable to older persons and therefor fail to recognize older persons as clear rights holders in all aspects of human rights laws.

Ageism still lurks in well-intended efforts by nations to take care of the elderly, as opposed to empowering them as rights holders.

The United States, along with many other nations, argue that existing human rights instruments already cover older persons adequately and all we need is better implementation strategies. Which way the pendulum will swing in the debate depends to a large extent on civil society— that is, the NGOs that advocate for and provide services to older persons.

(continued on next page)
NGOs have played a major role in the Working Group’s discussion and the OEWGA invites NGOs to participate via a fairly simple credentialing process. The current process parallels that which drove the creation of the Convention on the Rights of Persons with Disabilities where the successful outcome depended heavily on the strength of the voice of NGOs. In the current deliberations, NGOs have been overwhelmingly in favor of a convention, but they still lack the critical mass necessary to make the member states of the U.N. to heed their voice.

Human rights consideration

Now is the time for the countless NGOs that advocate for or serve older persons in the U.S. to consider human rights, even if a human rights perspective has never been part of their thinking. Most probably never considered playing a role in United Nations affairs, let alone even try to understand the working of such a complex organization. However, it is easier than you think.

First, several organizations have been doing this work since the start of the Working Group. They have developed materials that explain the issues and can assist in learning the procedural niceties of the U.N. For example: The Global Alliance for the Rights of Older Persons, http://www.rightsfoilderpeople.org. Established in 2011, GAROP was born out of the need to strengthen the rights and voice of older people globally. The Alliance is the result of the collaborative efforts of nine organizations:

- International Longevity Centre (ILC) Global Alliance – www.ilc-alliance.org
- International Federation on Ageing (IFA) – www.ifa-fiv.org
- International Federation on Ageing (IFA) – www.ifa-fiv.org
- International Association of Homes and Services for the Ageing (IAHSA) – www.iahsa.net
- International Association of Gerontology and Geriatrics (IAGG) – www.iagg.info
- HelpAge International – www.helpage.org
- AGE Platform Europe – www.age-platform.eu
- Age UK – www.ageuk.org.uk
- AARP – www.aarpinternational.org

The next step will be to get your organization accredited to attend the next meeting of the Working Group, scheduled for April 6-9, 2020, at the UN headquarters in New York. The Working Group has posted instructions in the past, but if not posted, use the contact email on the Working Group’s web page to request them. Accreditation is granted only to organizations and not to individuals. You only have to be accredited once to attend all the future meetings.

The application asks for information about the competence of your organization and the relevance of its activities to the work of the OEWGA. If your group works to serve or advocate for elders in need, you probably qualify. The UN Secretariat reviews applications and makes a recommendation. The OEWGA, by motion and vote, makes the final accreditation decision. If you are approved, your organization can register up to five representatives to meetings of the Working Group.

Benefits to participation

Past meetings have focused on particular human rights topics as they apply to older persons, such as equality and non-discrimination; violence, neglect and abuse; autonomy and independence; long-term and palliative care; and social protection and social security. Future topics will likely address matters such as access to justice, health care, and housing, but all these subjects are overlapping and interdependent, so the deliberations are not siloed. Participation does not require you to do anything more than observe or, if you wish to make a comment for your organization, put your name in the cue to deliver comments (called “interventions”) to the topic at hand. Written submissions are also invited on the specific topics that the Working Group plans to address on its agenda. You will find tremendous professional benefit from participating in the process both in terms of learning more about the U.N. processes as well as experiencing the diversity of international aging advocacy.

Keep in mind that UN processes move slowly. Movement toward a majority consensus on recommending a convention, if successful, and the process of drafting one is likely to be a long-term, multi-year process, so you are not too late to get on the train.

(continued on next page)
UN Aging continued

You can read the relevant documents and summaries of past meetings on the website of the OEWGA at: https://social.un.org/ageing-working-group. (And yes, at the U.N., they do spell “Ageing” with an “e”).

Other Resources:


• Also be aware of the wealth of material submitted in all of the annual meetings of the Working Group available on its web page at: https://social.un.org/ageing-working-group.

*The author is director of the American Bar Association Commission on Law and Aging, which has participated as an accredited NGO in the meetings of U.N Open-Ended Working Group on Ageing since 2012.

Advance Directives: Counseling Guide for Lawyers is designed to assist lawyers and health care professionals in formulating end-of-life health decision plans that are clearly written and effective.

The guide provides detailed information on how to bridge the chasm between lawyers and health care providers. It helps lawyers to provide guidance that is more in harmony with the clinical and family realities that clients face. The foundation for it is a set of eight principles to guide patients and clients through the advance care planning process.

Order a hard copy through the ABA Web Store or download the complete guide. Go to https://www.americanbar.org/products/inv/brochure/346598312/
Mind Your Loved Ones is a mobile app sponsored by the ABA Commission on Law and Aging that families will find very useful. The app allows users to store their own and their loved ones’ critical medical information, healthcare directives, and other related data on their smartphones. Users can send this information directly to healthcare providers or to their family members and trusted friends via email, fax, text, or print. Visit mindyour-lovedones.com for more information.
STATE ADULT GUARDIANSHIP LEGISLATION SUMMARY:
DIRECTIONS OF REFORM – 2018

Commission on Law and Aging
American Bar Association

This 2018 legislative summary includes information on 39 state enactments from 22 states on adult guardianship, as compared with 49 enactments from 25 states in 2017. An earlier version of this 2018 legislative summary [January – August] was published as part of the National Guardianship Association’s 2018 NGA Legal and Legislative Review, presented at the October 2018 NGA National Conference.

States were active on a variety of fronts. Maine was the first state to adopt the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA)(approved in 2017 as “a modern guardianship statute that better protects the individual rights of both minors and adults subject to a guardianship or conservatorship order.”). New Mexico adopted parts of UGCOPAA, making multiple changes to its guardianship law. Missouri passed a landmark measure, which was originally drafted by Missouri WINGS, and underwent additional significant revisions from other stakeholders. Kentucky amended its unique jury trial requirement for guardianship cases, allowing for a bench trial under certain circumstances. Florida, Iowa, Kentucky, and Utah made changes to their public guardian laws. Alaska, the District of Columbia and Wisconsin formally recognized supported decision-making agreements.

Finally, Congress passed Strengthening Protections for Beneficiaries of Social Security Act (H.R. 4547), a bipartisan measure aimed to improve the Social Security Administration (SSA)’s representative payee program. See https://www.ssa.gov/legislation/legis_bulletin_042418.html. The new federal law pertains to guardians in at least two ways. First, the law exempts certain representative payees who have a familial relationship with the beneficiary from the annual accounting of use of benefits requirement: parents/legal guardians of a minor child, parents of an adult child with a disability living in the same household, and spouses. 42 U.S.C. § 405(j)(3)(D). Some of these family members are also guardians. Second, the law directs the SSA to contract with the Administrative Conference of the United States to conduct a study on the feasibility and barriers of information sharing between SSA, state courts, and relevant state agencies. The results of this study have the potential to improve the flow of information between guardians and the representative payee program. With a framework for sharing information, guardians and representative payees could alert state courts and SSA of financial exploitation; avoiding the unfortunate situation when a fiduciary, who has been removed as a guardian or representative payee, continues to serve in the other role.

Since 2011, states have enacted approximately 270 adult guardianship bills – ranging from a complete revamp of code provisions to minor changes in procedure. Most
have been steps forward for individuals in safeguarding rights, addressing abuse, and promoting less restrictive options – but a few have taken steps back. The real challenge lies in turning good law into good practice.

Among those who contributed to or were helpful in the legislative summary were Erica Wood, Karolina Abuzyarova, Kelly Crowe, David English, Scarlet Hughes, Sally Hurme, Lucille Lyons, Gregory MacKenzie, Diana Noel, Catherine Sewell, DeAnza M. Valencia, and Homa S. Woodrum.

If you know of additional state adult guardianship legislation enacted in 2018, please contact 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

For the last 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 the right to counsel. Both the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA) and the National Probate Court Standards provide for appointment of counsel, while not every state guarantees an attorney. 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 the ABA Commission on Law and Aging state-by-state chart updated to 2018 at: https://www.americanbar.org/content/dam/aba/administrative/law_aging/chartrepresentationandinvestigation.authcheckdam.pdf.

- **Missouri SB 806** establishes the right to representation at a guardianship hearing.

- **Missouri SB 806** adds several provisions addressing the role of the lawyer who represents an allegedly incapacitated person in a guardianship proceeding. According to the new law, the attorney:

  o Has the right to obtain the person’s medical and financial information.
  o Must visit the person at least twenty-four hours before the hearing. The court may waive this requirement for good cause.
  o Shall get as much help as possible from the person in advancing the person’s interests.
If the attorney finds the person cannot communicate or participate in the proceedings, the attorney shall safeguard and advance the interests of the person.

Must have the court’s permission before withdrawing in favor of private counsel.

Cannot also serve as guardian ad litem or conservator.

May not be nominated by the petitioner to serve as attorney for the person.

Must inform the respondent of the respondent’s rights, including the right to appeal the court’s decision.

- **Missouri SB 806** guarantees the right to a court-appointed attorney for a person who consents to the appointment of a conservator of their estate. The attorney must advise the “proposed protectee” of their rights and the consequences of being appointed a conservator.

- **Utah HB 167** enlarges the list of exceptions when counsel for the respondent is not required. A new exception exempts court appointed counsel if, within 60 days of the date the court initiated the appointment of counsel, there is no attorney available from the court’s list of attorneys who have volunteered to represent respondents in guardianship cases, and the court appoints a court visitor.

2. Procedural Changes. Over the past 30 years, most states have made changes in pre-appointment requirements for the petition, notice, presence, and hearing procedures.

- **California SB 931**. Under existing law, when a professional in charge of an agency that provides comprehensive evaluation or a facility that provides intensive treatment determines that a person is gravely disabled because of a mental disorder or impairment by chronic alcoholism, the professional may recommend conservatorship to the county investigatory authority. Mental health professionals in county jails have the same option. SB 931 codifies this authority for professionals serving county jails, at the discretion of the county. Moreover, under the new law a conservatorship investigator cannot choose not to decline an investigation because the person is in a county jail.

- **Kentucky HB 5** amends its jury trial requirement for guardianship cases. Kentucky is the only state that requires a jury trial for guardianship cases. Now, a bench trial is permissible if: “(a) the respondent is present, counsel for the respondent, and the attorney for the Commonwealth agree to a bench trial; (b) no objection to a bench trial is made by an interested person or entity; and (c) the interdisciplinary evaluation report prepared for the proceeding reflects a unanimous consensus of the persons preparing it that the respondent is disabled or partially disabled, the court has reviewed the report, and the court finds no cause to require a jury trial.”
• **Missouri SB 806** makes several changes to pre-appointment requirements, including:
  o Requiring the petitioner to state in the petition a factual basis for the conclusion of incapacity, including incidents and specific behaviors that support why the appointment of the guardian or limited guardian is sought.
  o Granting the right to notice of the petition to the: proposed guardian/conservator, co-tenants and co-depositors of the respondent. The Public Administrator who serves as public guardian (if nominated) shall receive notice of the petition and any accompanying documents, including exhibits and medical opinions, and can attend and participate in the hearing.
  o Adding the following requirements to a petition for appointment of a co-guardian: (1) reasons for co-appointment; (2) whether co-guardians are to act independently or jointly; (3) statement that written consent has been obtained from proposed co-guardian.
  o Clarifying if parents petition the court to become the guardians of an adult child, and they also have a child custody or visitation case pending, the court with the authority to enter the child support order may only do so after the probate court appoints the guardian.
  o Requiring not only clear and convincing evidence of incapacity to appoint a guardian, but also clear and convincing evidence that the person’s identified needs cannot be met by a less restrictive alternative.
  o Requiring the court to include the following in the guardianship order:
    ▪ Extent of the person’s physical, mental, and cognitive incapacity to manage essential requirements for food, clothing, shelter, safety, other care, and financial resources.
    ▪ Whether the person requires placement in a supervised living situation and, if so, the degree of supervision required.
    ▪ Whether the person’s financial resources require supervision and, if so, the nature and extent of supervision needed.
    ▪ Whether the person retains the right to vote.
    ▪ Whether the person is permitted to drive if the person can pass the required driving test.
    ▪ Whether the person retains the right to marry.

• **Missouri SB 806** establishes the right to present evidence, cross-examine witnesses, the right to remain silent, the right to have a hearing open or closed to the public, and the right to a hearing in accordance with rules of evidence in civil proceedings.

• **New Mexico SB 19** requires the petitioner to state the following in the petition for guardianship or conservatorship:
  o Name and address of several individuals.
  o What less restrictive means have been attempted.
  o Whether limited guardianship would be appropriate.
  o Any individual with whom contact should be limited.
• **New Mexico SB 19** expands notice of proceedings to include the rights of the person alleged to need a guardian or conservator, including the right to attend the hearing. Notice must be provided to all individuals named in the petition.

• **New Mexico SB 19** addresses when records from a guardianship or conservatorship hearing are public or sealed. The hearing itself shall be open to the public unless the court determines otherwise.
  o Generally, the guardianship hearing is a matter of public record, unless the person alleged to be incapacitated requests the court to seal the record and the petition was dismissed or the proceeding was terminated.
  o The person alleged to be incapacitated, the attorney for that person, and anyone entitled to notice may access court records.
  o Other persons may petition for access based on good cause.
  o Visitor and healthcare professional reports are sealed but available to the individual alleged to be incapacitated and certain other individuals.

• **Utah HB 167** directs notice of a guardianship hearing to be provided to Adult Protective Services (APS) if APS has received a referral concerning the welfare of a person with a guardian; a person alleged to lack capacity; a guardian or conservator; or a potential guardian or conservator.

3. **Temporary/Emergency Guardianship Orders.** In emergency situations, statutory provisions and the court must strike a difficult balance between procedural safeguards and prevention of irreparable harm. An emergency guardianship, sometimes established without full procedural protections, may open the door for a plenary and permanent appointment. In the landmark 1991 case *Grant v. Johnson*, a federal district court declared the Oregon temporary guardianship statute unconstitutional because it did not provide minimum due process protections. Following the *Grant* decision, some states revised their temporary guardianship provisions. The ABA Commission on Law and Aging published a chart of state provisions on temporary guardianship in 2014. [https://www.americanbar.org/content/dam/aba/administrative/law_aging/Emergency_Guardianship_Chart.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/law_aging/Emergency_Guardianship_Chart.authcheckdam.pdf).

• **Missouri SB 806** extends the maximum possible term of an emergency guardian/conservator from 30 to 90 days. A hearing must be held within five days of a petition. If the petition for a permanent guardianship or conservatorship is not filed within the 90 days, the court may terminate the appointment upon a finding that termination would not be contrary to the respondent’s interests.

• **Virginia HB 850/SB 543** provides for the appointment of a temporary conservator when the court orders an emergency appointment of adult protective services (APS). Previously, Virginia’s law only allowed for a temporary guardian in this context. The court may appoint the local APS department or another interested person as temporary conservator of the adult for the sole purpose of managing the adult’s
estate and financial affairs related to the approved adult protective services until the expiration of the order (maximum 15 days with an option for a 5-day extension). The court shall set the bond of the temporary conservator. The temporary conservator may petition the court to set aside or modify the emergency order upon a substantial change in circumstances and is required to submit a report to the court describing any services provided to the adult.

4. Youth Transition. In many cases parents of minors with disabilities file for guardianship when (or in some states before) the child turns 18. Parents or legal guardians of a child with a disability may have been told by education or social service professionals that they must seek guardianship to remain involved with their child’s life when the child turns 18. In some cases, parents/legal guardians may fear their child will not be able to receive medical treatment or public benefits without an adult guardian. It is seldom, if ever true that a young person must have a legal guardian upon turning eighteen or suffer calamitous consequences. There are many legal options for ensuring parents/legal guardians can continue to provide support and care without rushing into what may be an unnecessary guardianship.

- **Louisiana HB 395** allows the court to appoint a tutorship (guardianship) for a person over the age of 15 who has less than “2/3 the intellectual functioning of a person the same age.” The tutorship, which restricts the legal capacity of a person with an intellectual disability to that of a minor, does not end at any age, but rather continues until revoked by the court.

- **Utah SB 182** enacts statutory provisions allowing parents or other interested parties to initiate guardianship proceedings for a minor who is at least 17 and a half years old and alleged to be incapacitated. The petitioner can request that the guardianship order take effect on the day the minor turns eighteen. Furthermore, unless contrary to the person’s best interests, if a petition is filed within two years of the eighteenth birthday of the allegedly incapacitated person, the court shall appoint the person or persons who had sole legal decision-making authority when the “incapacitated person” was 17 and a half years old as guardian.

5. Basis for Appointment. **California AB 3144** expands the basis for which a mental health conservatorship (of the person and property) may be appointed. According to state law, a conservator may be appointed for a person who meets the definition of “gravely disabled” as a result of a mental health disorder or alcoholism. This law expands the basis of appointment of a conservator for a person who: cannot care for their own health and well-being due to a serious mental illness and substance abuse disorder as evidenced by eight or more detentions for evaluation and treatment in the preceding 12 months. Note that this bill only applies to Los Angeles, San Diego, and San Francisco County. The board of supervisors of each respective county may not authorize the new law without first establishing a working group to conduct an evaluation of the new statutory provisions, and ensuring there is available funding and resources to provide an extensive list of
services, including: supportive community housing that provides wraparound services, appropriately trained public conservators, outpatient mental health counselling, coordination and access to medications, psychiatric and psychological services, vocational rehabilitation, veterans’ services, family support and consultation services, and a service planning and delivery process.

6. Vetting of Potential Guardian. Oregon HB 4094 requires the petitioner and the nominated fiduciary in a protective proceeding to disclose whether the nominated fiduciary has failed to perform a fiduciary duty which resulted in a loss, and was surcharged a surety for that loss by the court, or if the fiduciary was removed according to Oregon Rev. Stat. §125.225. In addition, the petition must provide a statement of circumstance surrounding such actions and repercussions. Finally, once a person is appointed fiduciary, they have a duty to inform the court immediately if they have failed to perform a fiduciary duty which resulted in a loss, and were surcharged a surety for that loss by the court, or if they were removed from a fiduciary position according to Oregon Rev. Stat. §125.225.

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 be moved for medical or financial reasons. Thus, judges, guardians, and lawyers are frequently 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.


In 2018, Wisconsin joined 46 other states in adopting the UAGPPJA. Four states remain that have not adopted the Act: Florida, Kansas, Michigan, and Texas.

III. Choice of Guardian

In the past, bills on choice of guardian have targeted guardian certification and licensure; standards and training; requirements for court selection of guardians; and guardian background checks. This year most of the bills in this category addressed public guardianship.

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

- **California AB 3144** extends the operation of the Professional Fiduciaries Bureau (“bureau”) within the Department of Consumer Affairs until 2023. The Bureau licenses and regulates professional fiduciaries, including private/professional conservators and guardians. The law requires the licensee to disclose whether the licensee has been removed for cause as an agent under a power of attorney for health care or finances. The law already requires the licensee to disclose any prior removals as guardian or conservator. The new law requires the bureau to keep the licensee’s current principals under a power of attorney in the licensee’s file, as well as documentation of whether the licensee has ever been removed for cause as an agent under a power of attorney. The law prohibits the licensee from billing a client or estate for time spent responding to a complaint filed with the bureau against the licensee.
• **Illinois HB 4867** requires the potential guardian of an adult with disabilities to disclose how many other adults with disabilities are under their guardianship. The State and Public Guardian are exempted. If the number is more than five, the court shall notify the Guardianship and Advocacy Commission. The Guardianship and Advocacy Commission shall maintain a list of all notifications it receives under this section for reference by other agencies and the public.

• **Illinois HB 4686** clarifies that not only are agencies serving residential services to an individual, but also their employees, prohibited from serving as guardian.

• **Missouri SB 806** clarifies the priority of appointment of the following individuals as guardian, specifying an unrelated third party shall be the last resort: (1) any eligible person nominated by the person at the time of the hearing; (2) any eligible person nominated in a durable power of attorney or an instrument in writing, signed by the person, before the “inception of the person’s incapacity or disability;” (3) “the spouse, parents, adult children, adult brothers and sisters and other close adult relatives of the incapacitated or disabled person;” (4) any eligible person, or for the estate only, any organization or corporation nominated in a will of such spouse or relative.

• **New Mexico SB 19** authorizes the court to require the guardian to petition for the appointment of a conservator.

2. **Guardian Background Checks**

• **Missouri SB 806** requires a proposed guardian or conservator submit to a background check at their own expense, and a proposed conservator must submit to a credit history investigation. The results of the background checks and credit history investigations must be filed with the court at least ten days prior to guardianship/conservatorship appointment hearing. Guardians certified by a national accrediting organization may file proof of certification in lieu of a background check. Public administrators and family members are exempt from this requirement.

3. **Public Guardianship.** A 2008 national public guardianship study found that 44 states have statutory provisions on public guardianship or guardianship of last resort. According to the study, 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 states 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?* Praeger, 2010); see also an earlier version of the study (2007) at
• **Florida SB 268** creates an exemption to the public records requirement for certain identifying information of public guardians, their families, and “employees with fiduciary responsibility.” The legislature deemed this exemption a “public necessity” to protect the safety of public guardians who may be at risk of attack or harassment from individuals for whom they served as guardians.

• **Florida SB 498** removes the scheduled repeal date of the law authorizing the Foundation for Indigent Guardian, Inc, which serves as a not-for-profit organization with the sole purpose of supporting Florida’s Office of Public and Professional Guardians.

• **Iowa HF 2449** renames the “Iowa Substitute Decision Maker Act” as the “Iowa Public Guardian Act,” transferring the statutory authority formerly bestowed upon a “substitute decision-maker” to a public guardian. The term substitute decision-maker referred to a guardian, conservator, representative payee, attorney in fact under a power of attorney, or personal representative. The new law eliminates the references to power of attorney or personal representative, and defines “public guardianship services” as “guardianship, conservatorship, or representative payee services.” While many of the Office’s duties remain the same as its predecessor, the law eliminates the duty of managing a person’s affairs after death and removes all references to “decedents.”

• **Kentucky HB 5** provides several clarifications and changes to the role of the state’s public guardian, known as the Cabinet for Health and Family Services, defining the role of the cabinet as a “fiduciary.” The cabinet, when appointed as a guardian, shall not assume physical custody of the person; be assigned as the person’s caregiver or custodian; or become personally liable for the person’s expenses or placement, or to third parties for the person’s actions. However, the cabinet shall procure resources and services when they are necessary and available for which the person is eligible. The law also states, “before appointing the cabinet, consideration shall be given to the average caseload of each field social worker.”

• **Kentucky HB 5** provides only a “resident of the state” may be appointed a public guardian. The new law defines “‘resident of the state’ as an individual who has a permanent, full-time residence in Kentucky prior to the filing of a petition for or appointment of a …guardian…for at least the previous six months that is not a hospital, treatment facility, correctional facility, or long-term care facility, and who is a citizen or permanent resident of the United States.” In addition to the residency requirement, a person who has been convicted of a sex crime or violent offense is also not eligible for appointment of a public guardian on their behalf.
• **Missouri SB 806** provides that the court may not appoint a public administrator as a guardian or conservator unless the public administrator can participate in the hearing. The public administrator may waive notice and the opportunity to participate.

• **Utah HB 167** adds the Office of Public Guardian to the list of prioritized individuals for the court to consider when appointing a guardian.

IV. Guardian Actions

1. Guardian’s Powers/Authority

• **Kentucky HB 5** changes the definition of the powers of a guardian from having “full care, custody, and control,” and “managing the financial affairs,” to simply having the responsibility to “manage the personal affairs” of the “disabled person.” The law defines “personal affairs” as decisions about, but not limited to, health care, food, clothing, shelter or personal hygiene.

• **Missouri SB 806** clarifies that a limited guardianship is only appropriate if a less restrictive alternative is not sufficient to meet the person’s needs. The limited guardianship shall preserve as much of the person’s autonomy as possible: “The order of appointment shall specify the powers and duties of the limited guardian so as to permit the individual to provide for self-care commensurate with the individual’s ability to do so and shall also specify the legal disabilities to which the individual is subject. In establishing a limited guardianship the court shall impose only such legal disabilities and restraints on personal liberty as are necessary to promote and protect the well-being of the individual and shall design the guardianship so as to encourage the development of maximum self-reliance and independence in the individual.”

• **Missouri SB 806** directs the guardian to only exercise authority to the extent necessary given the person’s limitations, and as much as possible, the guardian must encourage the person to participate in decisions, to act independently, and to develop or regain capacity.

2. 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, a key question is the extent to which, and under what circumstances, an agent’s authority trumps that of a guardian. A 2015 ABA Commission article and chart explored 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](http://www.americanbar.org/publications/bifocal/vol_36/issue_6_august2015/health-care-decision-making-authority-guardians-agents.html). For agents under financial powers of attorney, there may be considerations of abuse and exploitation. The new
UGCOPAA provides that, unless authorized by specific order, a guardian does not have the power to amend or revoke a power of attorney. In fact, a power of attorney for healthcare or finances trumps the authority of the guardian. Thus, the decision-maker appointed in a power of attorney maintains authority over health care or financial decisions, and the guardian/conservator should cooperate as much as possible. UGCOPAA § 315(a). Recent legislation diverges on following the Uniform Law and deferring to an agent in a power of attorney (New Mexico), and following the older Uniform Power of Attorney Act (2006), which terminates a power of attorney upon appointment of a guardian or conservator (Kentucky, Missouri).

- **Kentucky HB 11** adopts parts of the Uniform Power of Attorney Act, providing that if a court appoints a guardian, conservator or other fiduciary after a power of attorney is executed, the power of attorney terminates unless the court specifically provides that it remains in effect. In a power of attorney, the principal can nominate a limited or plenary guardian or conservator, and the court will consider the nomination if protective proceedings are initiated after the principal executes the power of attorney. “The nomination shall be treated as indication of the principal’s preference…and the court shall give the preference due consideration.”

- **Missouri SB 806** clarifies that the appointment of a guardian revokes the powers of an agent under a health care power of attorney, unless the court orders otherwise.

- **New Mexico SB 19** prohibits a guardian from amending or revoking a healthcare power of attorney. The agent’s decisions take precedence over the guardian’s.

- **New Mexico SB 19** clarifies what kinds of actions the court may authorize an individual to carry out to protect a person’s finances or property instead of appointing a full conservator. The court may issue a protective order restricting the access of a specific individual to the person’s property. Before it issues an order, the court should consider the preferences of the person.

3. Sale of Real Property. Many states have specific requirements concerning the authority of the guardian/conservator authority in the sale of real property.

- **Missouri SB 806** gives the person ten days of notice prior to a hearing on the sale of the person’s real or tangible personal property. Prior notice is not required for sale of intangible personal property.

4. Comingling of accounts.

- **Missouri SB 806** prohibits conservators from combining personal property and estate property.
• **New Mexico SB 19** prohibits guardians or conservators from comingling their own accounts with the person or the person’s accounts with those of another conservatee.

5. **Guardian/conservator liability for the actions of the individual.**

• **New Mexico SB 19** makes clear that the guardian is not liable for the actions of the person subject to their guardianship, merely because they are the guardian.

• **New Mexico SB 19** prohibits the request of a waiver of a liability from a conservator.

6. **Dissolution of Marriage.** Marriage and divorce generally are considered so personal in nature that authority concerning these actions may not transfer to a guardian.

• **Missouri SB 806** recognizes the right of the person with a guardian to ask the court for permission to marry.

7. **Guardian Access to Digital Assets.** The Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA)(approved by the Uniform Law Commission in 2015) 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. Georgia, Maine, Missouri, U.S. Virgin Islands, and West Virginia enacted a RUFADAA law this year, bringing the total number of states with such a law to 42. (Summary by Ben Orzeske).

8. **Post-Death Authority Concerning Disposition of Property.**

• **Maine LD 123** adopts UGCOPAA, stating one of the purposes of recodification is to “discover and make effective the intent of a decedent in the distribution of the decedent’s property.”

9. **Commitment to an institution for mental health treatment.**

• **Maryland HB 33** states the appointment of a guardian of a person may not be the basis for commitment of that person to a “mental institution.” Furthermore, “appointment of a guardian of the person; (1) Is not evidence of incompetency of the disabled person; and (2) Does not modify any civil right of the disabled person unless the court orders, including any civil service ranking, appointment, THE RIGHT TO APPLY FOR VOLUNTARY ADMISSION TO A FACILITY…and rights relating to licensure, permit, privilege, or benefit under any law.” In addition to the existing requirement
that the facility notify the guardian if someone requests discharge after a voluntary admission to a facility, HB 33 directs the facility to notify the guardian if a person subject to their guardianship has been admitted to the facility.

• **New Mexico SB 19** requires the guardian to follow involuntary civil commitment procedures if the guardian seeks to commit a person to a mental health facility.

V. Fees for Guardians and Attorneys

Payment of guardian fees and attorney fees, as well as court fees and costs, is a significant factor in bringing a guardianship proceeding. Guardian fees can be substantial, and are often the subject of legal disputes.

• **Utah HB 167** clarifies that the allegedly incapacitated person or respondent in a guardianship proceeding is only exempt from paying court-appointed counsel if the respondent or the respondent’s parents are indigent.

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 the 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 direct guardians to support visitation whenever possible: stating “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). See [https://www.guardianship.org/standards/](https://www.guardianship.org/standards/).

The Uniform Guardianship, Conservatorship and Other Protective Arrangements Act (UGCOPAA) provide a model for statutory provisions that support and foster communication and visitation (§§ 311, 315, 502, 503). The Act:
• Requires that the individual receive notice of the right to communicate, visit or interact with others;
• Limits a guardian’s authority to restrict communication/visitation, prohibiting such a restriction, with three exceptions – (1) the restriction is authorized by court; (2) there is a protective order or protective arrangement that limits contact; OR (3) the guardian “has good cause to believe the restriction is necessary because interactions with a specified person poses a risk of significant physical, psychological, or financial harm” AND the restriction is for not more than 60 days, OR the person with whom contact is restricted does not have a family or social relationship with the individual.
• Allows the court to order a “protective arrangement” instead of a guardianship. Under this Article, the court may direct a visitation or supervised visitation; or restrict access “by a person whose access places [the individual] at serious risk of physical or psychological harm” – or by a person who uses fraud, coercion, duress or deception and control.

For a more in-depth analysis of the right to visitation, see the ABA Commission on Law and Aging’s recent publication, Legislative Fact Sheet: Guardianship and the Right to Visitation, Communication, and Interaction, available at https://www.americanbar.org/content/dam/aba/administrative/law_aging/2018-05-24-visitation-legislative-factsheet.authcheckdam.pdf. The Fact Sheet provides a comprehensive review of legislative amendments since 2015.

The following bills restrict and/or authorize guardians to take various actions concerning an individual’s right to visitation/association and communication with family and friends:

• **Illinois HB 4309** enacts the Frail Elderly Individual Family Visitation Protection Act, also known as the Kasem/Baksy Visitation Law. The Act gives standing to family members to petition the court for visitation with a “frail, elderly individual,” or someone over the age of 60 who is determined by the court to functionally impaired, when a caregiver unreasonably prevents the family members from doing so. The Act does not apply to individuals with guardians.

• **Maryland HB 1483** authorizes a court to include in an order appointing a guardian the duty to foster and preserve family relationships, including assisting to arrange visitation and communication by telephone calls, personal mail, and electronic communications.

• **Maine LD 123** adopted UGCOPAA, including its strong provisions on visitation.

• **Nebraska LB 845** addresses the process in which a family member may petition the court for the right to visit a family member who is in a healthcare facility or another dwelling where the person receives care and services, and the family member has
been denied the opportunity to visit by a guardian or other caregiver (designee under power of attorney or another person denying visitation). The law expands the list of factors the court may consider, including the nature of the relationship between the family members, the location of the proposed visit, the likely effect of visitation on the person, and the likelihood of onerously disrupting the established lifestyle of the person.

- **New Mexico SB 19**, in line with UGCOPAA, prohibits the guardian from restricting visitation unless (1) authorized by court order; (2) “a less restrictive alternative is in effect that limits contact between the protected person and a person; or” (3) the guardian has good cause to believe the interaction in question would cause harm to the person, and the restricted contact is for no more than seven days for a family member or someone with a preexisting relationship or 60 days for all other parties.

- **Utah SB 182** requires a guardian to immediately inform anyone who requests notification of the following, provided they are not restricted in associating with the person: the person’s admission to a hospital or hospice for three more days, and (in addition to notification of death) the arrangements for disposition of the person’s remains.

2. **Bill of Rights.** At least six states have statutory provisions listing rights of individuals with guardians. **Florida** sets out basic rights at Fla. Stat. § 744.3215, **Minnesota** has a statutory “bill of rights for individuals and protected persons” at Minn. Stat. § 524.5-120, which provides that “the individual/protected person retains all rights not restricted by court order and these rights must be enforced by the court,” and enumerates 14 specific rights. In 2012 **Michigan** created a new provision summarizing and reiterating within a single section the basic rights of individuals at Mich. Comp. Laws Ann. § 700.5306a. In 2015, **Texas** enacted a new subchapter (1151.351 of the Estates Code), “Rights of Individual,” setting out a total of 24 distinct rights. The person retains all rights under law “except where specifically limited by a court-ordered guardianship.” In 2017 **Nevada** enacted a “Protected Persons’ Bill of Rights” at Nev. Rev. Stat. § 159.327-8. Also in 2017, **South Carolina** required the court’s guardianship order to specify from a detailed list the rights specifically removed and the rights vested in the guardian at S.C. Code §62-5-101 et seq. This year **Missouri** enacted a comprehensive list of rights for people under guardianship.

- **Missouri SB 806** provides an individual with a guardian has the right to:
  - A guardian who acts in the best interests of the individual.
  - A guardian who is reasonably accessible to the individual.
  - Communicate freely and privately with family, friends, and other persons other than the guardian; except that, such right may be limited by the guardian for good cause but only as necessary to ensure the individual’s condition, safety, habilitation, or sound therapeutic treatment.
Individually or through the individual’s representative or legal counsel, bring an action relating to the guardianship, including the right to file a petition alleging that the individual is being unjustly denied a right or privilege, including the right to bring an action to modify or terminate the guardianship.

- The least restrictive form of guardianship assistance, taking into consideration the individual’s functional limitations, personal needs, and preferences.
- Be restored to capacity at the earliest possible time.
- Receive information from the court that describes the individual’s rights, including rights the individual may seek by petitioning the court.
- Participate in any health care decision-making process.

3. Right to Less Restrictive Alternatives

- *Missouri SB 806* requires that before appointing a guardian or conservator, the court must find, by clear and convincing evidence, that the respondent’s needs cannot be met by a less restrictive alternative. Less restrictive alternatives include, but are not limited to:
  - Durable power of attorney.
  - Trust.
  - Representative payee.
  - Supported decision-making agreements or the provision of protective or supportive services or arrangements provided by individuals or public or private services or agencies.
  - The use of appropriate services or assistive technology.
  - Temporary emergency guardian ad litem or conservator ad litem.
  - Limited guardian or conservator.


- *Missouri SB 806* expressly grants the court the authority to enter an order preserving certain rights even if it finds the person is wholly incapacitated: the right to vote, drive if the person can pass a driving test, and the right to marry.

- *Missouri SB 806* allows a person who has been appointed a guardian to petition the court for the right to:
  - Marry or divorce.
  - Make, modify, or terminate other contracts or ratify contracts made by the individual.
  - Consent to medical treatments.
  - Establish a residence.
  - Change the person’s domicile.
Bring or defend any legal action, except an action relating to the guardianship.

Missouri HB 1719 assigns discretion to the board of the Division of Professional Registration to refuse to reinstate any certificate of registration of authority if someone needs or is assigned a guardian or conservator.

New Mexico SB 19 holds an adult subject to guardianship retains the right to vote unless the court order appointing the guardian includes findings that support removing that right.

4. Changes in Terminology. Many states are making changes in language to reflect preferred terminology more in line with individual self-determination and rights. Some changes are simply reflective of efforts to clarify meaning.

Missouri SB 806 modifies several definitions:
- “disabled,” “partially disabled,” and “partially incapacitated” - adds a reference to cognitive condition.
- “habilitation” - updates the definition to match current practice, as the “process of treatment, training, care, or specialized attention that seeks to enhance and maximize the ability of a person with an intellectual disability or a developmental disability to cope with the environment and to live as determined by the person as much as possible, as is appropriate for the person considering his or her physical and mental condition and financial means."
- “incapacitated person” - adds reference to cognitive condition and clarifies that an individual is NOT incapacitated if they can manage “essential requirements for food, clothing, shelter, safety or other care ...” with appropriate services and technology.
- “least restrictive alternative” - replaces “alternative” with “environment” and updates language to match current practices. The law defines least restrictive alternative as it relates to the guardianship order and the guardian’s powers, allowing the person found “incapacitated” to live, learn, and work with minimum restrictions. It also means choosing the approach that places the least possible restriction on the person’s personal liberty and promotes the person’s inclusion in the community. At the same time, the least restrictive alternative will meet the person’s needs for health, safety, habilitation, treatment, and recovery, and protect the person from abuse, neglect, and financial exploitation.

New Mexico SB 19 replaces the term “incapacitated person,” which referred to a person who was found to lack capacity and appointed a guardian, to “protected person.”
VII. Capacity Issues

Fundamental to guardianship law is the “trigger point” that states use to determine when an individual’s rights can be removed and in some cases transferred to a court-appointed surrogate – a guardian or conservator. State statutes have a definition of “incapacity,” or some similar term, to direct judges in their determination. These definitions generally combine or select from four elements: medical condition, cognitive ability, functional ability, and potential harm without a surrogate appointment.

The Uniform Guardianship and Protective Proceedings Act of 1997 used a functional and cognitive test. The recently approved Uniform Guardianship, Conservatorship, and other Protective Arrangements Act (UGCOPAA) uses similar language but: (1) adds supports and supported decision-making; and (2) does not use the term “capacity” or “incapacity” – instead the language sets out the “basis for appointment” of a guardian, which is a finding by clear and convincing evidence that the respondent:

“lacks the ability to meet essential requirements for physical health, safety, or self-care because: (A) the respondent is unable to receive and evaluate information or make or communicate decisions, even with appropriate supportive services, technological assistance, or supported decision making; and (B) the respondent’s identified needs cannot be met by a protective arrangement instead of guardianship or other less restrictive alternatives.” (Sec. 301).

1. Determination of Capacity. States use a variety of definitional elements and a variety of experts to assist the judge in making the difficult determination of whether an individual needs a guardian or conservator.

- **Kentucky HB 5** raises the age of legal disability from 14 to 17 years.

- **Missouri SB 806** adds the following regarding a court ordered evaluation for capacity. A physician or “other professional” may conduct the evaluation, provided the “other professional” has experience or training in the alleged impairment of the person. **SB 806** removes the requirement for the professional to explain the legal definitions of incapacity or disability to the person. If a party objects to an evaluation report, a court may hold a hearing to determine whether the report is admissible. Finally, that report may not be used in any other civil action or criminal proceeding without the consent of the person holding evidentiary privilege.

- **Missouri SB 806** clarifies that the appointment of a guardian does not mean the court has found that the person lacks testamentary capacity.
2. 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, Article 12, recognizes that persons with disabilities have “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. For more on supported decision-making, see the National Resource Center on Supported Decision-Making, http://www.supporteddecisionmaking.org.

As supported decision-making gains recognition, state legislatures have begun to debate whether and how to define, recognize and authorize supported decision-making in law. Some states have authorized supported decision-making agreements. In 2015, Texas became the first state to do so, with a groundbreaking bill intended to “recognize a less restrictive alternative to guardianship” for adults who need assistance but are not “incapacitated persons.” The law 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. Texas expanded the law in 2017, when it enacted safeguards against abuse by the supporter, and sought to inform transition age youth about alternatives including supported decision-making. In 2016, Delaware became the second state to statutorily recognize supported decision-making agreements. This year, the District of Columbia, Wisconsin and Alaska formally recognized supported decision-making agreements.

Other states passed relevant legislation without addressing supported decision-making agreements. Missouri and Tennessee recognized supported decision-making as a less restrictive alternative to guardianship and affirmed the rights of people with guardians to continue to make their own decisions when possible. Utah charged guardians with encouraging people under their guardianship to participate in decisions, engage in self-determination, and develop/regain capacity to manage their own affairs.

- **Alaska HB 336** authorizes supported decision-making agreements, lists who may not serve as a supporter, and details what information is required to put in the document.

- **District of Columbia B22-0154** recognizes supported decision-making agreements, specifying who may not be a supporter, and provides a mandatory format for a supported decision-making agreement.

- **Wisconsin AB 655** recognizes supported decision-making agreements between an adult with a “functional impairment” and a supporter. The law provides an outline of a form that will become a Supported Decision-Making Agreement and specifies the Department of Health Services will make the forms available. The law requires courts to consider whether supported decision-making has been attempted before appointing a guardian for an individual.
• **Tennessee SB 264** adds a definition of “least restrictive alternatives,” relative to supported decision-making agreements, as “techniques and processes that preserve as many decision-making rights as practical under the particular circumstances for the person with a disability.”

• **Utah SB 182** charges guardians with encouraging people under their guardianship to participate in decisions, engage in self-determination, and develop/regain capacity to manage their own affairs.

3. **Restoration to Capacity.** While it is most common for a guardianship to end with the death of the individual, all state statutes provide for termination of a guardianship upon a finding that: (1) the person has sufficient capacity to manage personal and/or financial affairs; (2) the person has gained sufficient supports; or (3) 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 brain injuries who may be able to make decisions on their own with adequate family and community support. In 2017, the ABA Commission on Law and Aging, with the Virginia Tech Center for Gerontology, completed a pioneering research project on restoration including a review of court files in four states and a roundtable discussion resulting in recommendations. See *Restoration of Rights in Adult Guardianship: Research & Recommendations*, [https://www.americanbar.org/content/dam/aba/administrative/law_aging/restoration%20report.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/law_aging/restoration%20report.authcheckdam.pdf). For an overview of restoration, including a discussion of recent success stories, see the Commission on Law and Aging’s 2018 webinar training, *Guardianship Termination and Restoration of Rights*, hosted by the National Center on Law & Elder Rights (NCLER), available at [https://vimeo.com/286254712](https://vimeo.com/286254712).

• **Missouri SB 806** adds the following statutory provisions regarding termination of guardianship and restoration of rights:

  o The court will terminate the guardianship if it finds the guardian cannot serve because the person is out of state or other circumstances.
  o The petition for termination of the guardianship, whether from the person or anyone on behalf of the person, may be in the form of an informal letter. Anyone who interferes with delivery of the letter may be subject to contempt.
  o If the court believes the guardian or conservator’s powers should be increased or decreased, or additional rights should be returned to the person, the court shall set the matter for a hearing.
  o The court may require a professional report with recommendations on whether to terminate or modify a guardianship.
IX. Guardian and Fiduciary Misconduct


In October 2017, the New Yorker magazine featured a chilling article, “How the Elderly Lose their Rights” describing fraudulent actions by guardians in Clark County, Nevada.

This year at least four states – Delaware, Kansas, Kentucky, and Minnesota explicitly included misuse of the role of guardian in a definition of financial exploitation of older and/or “vulnerable” or “dependent” adults. In addition, Florida created an injunction for protection against exploitation of a “vulnerable adult.”

- **Delaware HB 332** defines financial exploitation as the breach of a fiduciary duty, including misuse of a guardianship appointment, that results in the unauthorized use of the “eligible adult’s” property, income etc., for the benefit of a person other than the eligible adult.

- **Florida HB 1059** creates a cause of action for an injunction for protection against exploitation of a “vulnerable adult.” Those who have standing to file for an injunction include: the guardian of a vulnerable adult in imminent danger of being exploited, an organization or person granted permission by the guardian to file on behalf of the vulnerable adult, or someone who “simultaneously files a petition for determination of incapacity and appointment of an emergency temporary guardian with respect to the vulnerable adult.” If the vulnerable adult has a guardian, only the court overseeing the guardianship process may grant relief in the form of freezing assets or lines of credit held by the guardian on behalf of the person.

- **Kansas HB 2458** adds “a violation of the act for obtaining a guardian or conservator,” to the law’s existing definition of “mistreatment of a dependent adult.”

- **Kentucky HB 93** amends the statute’s definition of financial exploitation to include the “use of a guardianship” to misuse a person’s assets, money or property.
• **Minnesota HF 3833** amends the statute’s definition of exploitation to include “use of a guardianship” to misuse an older or vulnerable person’s assets, money or property.

**X. Post-Adjudication/Monitoring Issues**


1. **Bond Requirements.** Approximately 20 state statutes require a guardian of property/conservator to post a bond, and the remainder allow courts some or complete discretion. See ABA Commission chart on bond requirements (2014) at: [https://www.americanbar.org/content/dam/aba/administrative/law_aging/2014_guardian_bond_chart.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/law_aging/2014_guardian_bond_chart.authcheckdam.pdf). The UGCOPAA makes bond a default option for courts in the appointment of conservators, providing that “The court shall require a conservator to furnish a bond with a surety the court specifies, or require an alternative asset-protection arrangement. . .” (Sec. 416).

• **New Mexico SB 19** requires posting of a bond unless the court finds a bond is not necessary to protect the interests of the person subject to the bond. The requirement is not waivable for a professional conservator.

2. **Guardian Report.** One function of required guardian reports is to regularly assess the continuing need for the guardianship. The *Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act* (UGCOPAA) requires the guardian’s annual report to include “a recommendation as to the need for continued guardianship and any recommended changes in the scope of the guardianship.” (Sec. 317(a)). Many states require such a statement. See state by state chart, ABA Commission on Law and Aging & Hurme, S, “Monitoring Following Guardianship Proceedings,” [https://www.americanbar.org/content/dam/aba/administrative/law_aging/chartmonitoring.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/law_aging/chartmonitoring.authcheckdam.pdf) (2018).

• **Missouri SB 806** adds the following new requirements to the mandatory annual guardian report:
  o Plans for future care.
  o Summary of the guardian’s visits with the individual and activities on the individual’s behalf.
  o The extent to which the individual has participated in decision making.
  o Any changes in the individual’s condition since the last report.
  o A summarized plan for the coming year, including short-term and long-term goals, and how much the individual participated in the formation of the plan.
• Missouri SB 806 adds more required information to the conservator’s annual report, including: the conservator’s opinion as to the continued need for a conservator.

• Missouri SB 806 authorizes the court to waive the requirement for the conservator’s annual report and instead submit a form, if the conservatorship estate meets indigency standards and is under the control of another fiduciary such as a Social Security representative payee or Veteran’s Affairs fiduciary.

3. Court Auditing of Accounts. Once the guardian/conservator files the reports and accounts, the court must examine and audit them. UGCOPAA requires the court to “establish a system for monitoring reports submitted. . . and review the reports at least annually . . . (§§ 317, 423). The National Probate Court Standards state that courts should “[review] promptly the contents of all plans, reports, inventories, and accountings.” (Standard #3.3.17). In practice, many courts lack the staff and expertise for effectively auditing accounts.

• Florida HB 1187 allows the court clerk, who could already request and review documents that might pertain to the assets of a person with a guardian, to audit or to order an audit of guardian reports. The clerk shall inform the court of the results of the audit. Under this audit, the clerk may disclose confidential information to law enforcement as provided by court order. Furthermore, the guardian may disclose confidential information related to an investigation to the clerk or to the Office of Public and Professional Guardians. In Florida, the clerk’s office is an independent entity and it is not under the authority of the Probate Court.

• New Mexico SB 19 requires the guardian and conservator to fully comply with the requirements of any audit of the person’s property, account, inventory or report of the person.

4. Other Post-Adjudication/Monitoring Issues

• Alabama HB 251 explicitly authorizes guardians and conservators to contribute to an ABLE (Achieving Better Life Experience) account on behalf of a beneficiary. ABLE accounts are tax-advantaged savings accounts for individuals and their families.

5. WINGS. An important guardianship reform approach is to have stakeholders work together consistently and collaboratively in an ongoing court-community problem-solving group. This growing initiative is known as “Working Interdisciplinary Networks of Guardianship Stakeholders” (WINGS). WINGS brings together judicial, legal, aging, disability and mental health networks to identify strengths and weaknesses in a state’s
guardianship law and practice, and pursue common objectives for change through an ongoing consensus-building partnership. Currently 26 states have either a court-initiated WINGS or a similar stakeholder guardianship reform group. See http://ambar.org/wings. This year the Kentucky and Alabama legislatures passed resolutions in support of WINGS.

- **Kentucky HJR 33** recognized WINGS as an “innovative movement to improve adult guardianship” and recommended the creation of a Kentucky WINGS, headed by the Cabinet for Health and Family Services and the Administrative Office of the Courts.

- **Alabama HJR 254** expressed the legislature’s full support of Alabama WINGS, and recommended that the WINGS Steering Committee submit a yearly report to the legislature on any needed adult conservatorship and guardianship changes in the law.

- **Oklahoma HB 3328** created the Commission on the Prevention of Abuse of Elderly and Vulnerable Adults. Like a WINGS group, the Commission should be an interdisciplinary group of stakeholders, including a guardian.

**Table: State Adult Guardianship Legislation at a Glance: 2018**

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<td>HB 336</td>
<td>Ak. Stat. § 13.56</td>
<td>Authorizes supported decision-making agreements.</td>
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<td>AL</td>
<td>HB 251</td>
<td>Ala. Code § 16-33C-25(e)</td>
<td>Authorizes guardians and conservators to contribute to ABLE account on behalf of beneficiary</td>
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<tr>
<td>AL</td>
<td>HJR 254</td>
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<td>Recommends WINGS Steering Committee submit yearly report to the legislature on any needed change to adult conservatorship/guardianship law</td>
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<tr>
<td>CA</td>
<td>SB 931</td>
<td>Cal. Welf. &amp; Inst. Code § 5352</td>
<td>Allows psychiatric professionals in county jails to recommend prisoners for conservatorship.</td>
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<td>CA</td>
<td>AB 3144</td>
<td>Cal. Bus. &amp; Prof. Code §6501, 6510, 6533, 6534, 6561</td>
<td>Expands requirements for professional fiduciaries, which include professional guardians and conservators.</td>
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<tr>
<td>CA</td>
<td>SB 1045</td>
<td>Cal. Wel. &amp; Inst. Code § 5450 (add and repeal Ch. 5)</td>
<td>Creates a pilot program for Los Angeles, San Diego, and San Francisco counties to find 8 or more detentions for psychiatric evaluation</td>
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<tr>
<td>State</td>
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<td>DC</td>
<td>B22-0154</td>
<td>D.C. Code §§ 7-2131, 7-2132(a)-(b), (d)</td>
<td>Defines supported-decision making, specifies who may not be a supporter, provides format for supported decision-making agreement.</td>
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<tr>
<td>FL</td>
<td>SB 268</td>
<td>Fla. Stat. § 744.21031</td>
<td>Creates an exemption to the public records requirement for certain identifying information of public guardians.</td>
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<tr>
<td>FL</td>
<td>SB 498</td>
<td>Fla. Stat. § 744.2105</td>
<td>Removes the scheduled repeal date of the law authorizing the Foundation for Indigent Guardian, Inc., which serves as a not-for-profit organization with the sole purpose of supporting Florida’s Office of Public and Professional Guardians.</td>
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<tr>
<td>FL</td>
<td>HB 1059</td>
<td>Fla. Stat. § 825.101, 1035-36</td>
<td>Creates cause of action for injunction against exploitation of a “vulnerable adult”</td>
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<tr>
<td>IA</td>
<td>HF 2449</td>
<td>Iowa Code §§ 231E.1-E.11</td>
<td>Rewrites the “Iowa Substitute Decision Maker Act” as the “Iowa Public Guardian Act.”</td>
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<tr>
<td>IL</td>
<td>HB 4309</td>
<td>Ill. Stat. Ch. 750 § 95/1</td>
<td>Provides standing to family members to petition for visitation orders with frail and elderly individuals. This Act does not apply to individuals with guardians.</td>
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<td>IL</td>
<td>HB 4867</td>
<td>755 Ill. Comp. Stat. 5-11/a-5</td>
<td>Creates a new requirement for potential guardians of an adult with disabilities to disclose the number of people already under their guardianship.</td>
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<tr>
<td>State</td>
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<td>KY</td>
<td>HB 5</td>
<td>Ky. Rev. Stat. Ann. §§ 210.290; 387.570(7); 387.510(3), (17); 387.510(8)</td>
<td>Clarifies and changes the role of the public guardian; Amends the jury trial requirement for a bench trial; Changes the definition of the powers of a guardian; raises age of legal disability from 14 to 17.</td>
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<tr>
<td>KY</td>
<td>HB 93</td>
<td>Ky. Rev. Stat. Ann. § 365.245(1)(b)(2)</td>
<td>Amends the statute’s definition of financial exploitation to include the “use of a guardianship” to misuse a person’s assets, money or property.</td>
</tr>
<tr>
<td>KY</td>
<td>HJR 33</td>
<td>n/a</td>
<td>Recommends the creation of Kentucky WINGS.</td>
</tr>
<tr>
<td>LA</td>
<td>HB 395</td>
<td>Civil Codes Articles 355, 359, and 361</td>
<td>Allows for a guardianship of a child 15 years or older to continue indefinitely beyond the age of majority if the minor has an intellectual disability and meets certain requirements.</td>
</tr>
<tr>
<td>MD</td>
<td>HB 1483</td>
<td>Md. Code Ann. § 13-708(b)(4)</td>
<td>Authorizes court to include in an order appointing a guardian the duty to foster and preserve family relationships.</td>
</tr>
<tr>
<td>MD</td>
<td>HB 33</td>
<td>Md. Code Ann. § 13-706</td>
<td>Addresses admission to a “mental institution” for someone with a guardian.</td>
</tr>
<tr>
<td>MN</td>
<td>HF 3833</td>
<td>Minn. Stat. Ann. § 45A.01</td>
<td>Amends the statute’s definition of exploitation to include “use of a guardianship” to misuse an older or vulnerable person’s assets, money or property.</td>
</tr>
<tr>
<td>MO</td>
<td>HB 1719</td>
<td>Mo. Rev. Stat. § 335.066(2)(24)</td>
<td>Assigns discretion to the board of the Division of Professional Registration</td>
</tr>
<tr>
<td>State</td>
<td>Bill</td>
<td>Code Reference</td>
<td>Details</td>
</tr>
<tr>
<td>-------</td>
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</tr>
<tr>
<td>NE</td>
<td>LB 845</td>
<td>Neb. Rev. Stat. § 42-1301, et seq.</td>
<td>to refuse to reinstate any certificate of registration of authority if someone needs or is assigned a guardian or conservator.</td>
</tr>
<tr>
<td>OK</td>
<td>HB 3328</td>
<td>n/a</td>
<td>Creates the Commission on the Prevention of Abuse of Elderly and Vulnerable Adults</td>
</tr>
<tr>
<td>OR</td>
<td>HB 4094</td>
<td>Or. Rev. Stat. §§ 125.055; 125.210</td>
<td>Requires disclosure prior to appointment of guardian or immediately upon discovery that the nominated guardian violated prior fiduciary duties.</td>
</tr>
<tr>
<td>TN</td>
<td>SB 264</td>
<td>Tenn. Code Ann. § 34-1-101(11)</td>
<td>Adds a definition of “least restrictive alternatives” relative to supported decision-making agreements</td>
</tr>
<tr>
<td>UT</td>
<td>HB 167</td>
<td>Utah Code Ann. §§ 75-5-303(2)(b); 75-5-303(5)(d)(v); 75-5-311(3)(h)(l); 75-5-309(1)(e)</td>
<td>Addresses fees for court appointed counsel; Expands list of exceptions when counsel for respondent is not required; Adds Office of Public Guardian to list of prioritized individuals who may become guardian; provides for notice to APS in certain circumstances.</td>
</tr>
<tr>
<td>UT</td>
<td>SB 182</td>
<td>Utah Code Ann. §§ 75-5-312(3)(f)(iii); 75-5-312(7); 75-5-317</td>
<td>Requires a guardian to inform anyone who requests notification of certain circumstances regarding the person, provided they are not restricted in associating with the person; Enacts a process to petition for the guardianship of a minor who is at least 17 and a half years old and alleged to be incapacitated. The guardianship may take effect on the day the minor turns 18; Instructs</td>
</tr>
<tr>
<td>State</td>
<td>Bill/Act</td>
<td>Code/Section</td>
<td>Description</td>
</tr>
<tr>
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<tr>
<td>WI</td>
<td>AB 629</td>
<td>Wis. Stat. § 53.01, et seq.</td>
<td>Adopts the Uniform Adult Guardianship Protective Proceedings Jurisdiction Act.</td>
</tr>
<tr>
<td>WI</td>
<td>AB 655</td>
<td>Wis. Stat. §52.01, et. seq.</td>
<td>Defines supported decision-making, provides an outline of a form, includes provisions that protect a person from inappropriate actions</td>
</tr>
</tbody>
</table>

guardians to encourage people under their guardianship to participate in decisions and exercise self-determination.