STATEMENT

of

THOMAS M. SUSMAN

on behalf of the

AMERICAN BAR ASSOCIATION

before the

SENATE COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS

for the hearing on

“Protecting Seniors and Persons with Disabilities –
An Examination of Court-Appointed Guardians”

Washington, DC

September 22, 2011
Chairman Klobuchar, Ranking Member Sessions and members of the Subcommittee:

On behalf of the American Bar Association and its nearly 400,000 members nationwide, I commend the subcommittee for convening this hearing to explore issues in the appointment and oversight of court-appointed guardians of adults and appreciate the opportunity to submit these comments.

The American Bar Association has long taken a leadership role in adult guardianship reform, tracking state legislation since 1988, participating in groundbreaking consensus conferences and partnering with others in studies of guardianship monitoring and public guardianship. In 2007, the ABA Commission on Law and Aging worked with the AARP Public Policy Institute on Guarding the Guardians: Promising Practices for Court Monitoring. Currently the ABA Commission is engaged in a project supported by the State Justice Institute and the Borchard Foundation Center on Law and Aging to develop a handbook for courts on volunteer guardianship monitoring and assistance programs. Through such programs, cadres of trained volunteers could visit incapacitated persons as the “eyes and ears of the court,” providing needed information to judges and help to guardians in identifying community resources. Programs are underway in Charleston County South Carolina, Maricopa County Arizona and a number of other jurisdictions.

In varying degrees, incapacitated adults lack the ability to care for themselves and to protect their property. They are dependent on others for their safety, rights, comfort, health care, living arrangements and social contacts. They deserve our vigilance.

State courts appoint guardians to “step into the shoes” of people the judge determines cannot care for themselves or manage their own property. Guardians face a daunting challenge of finding what the person wants or would have wanted, or what is in the person’s best interest; of navigating our complex systems of health care, housing and long-term care, social services, public benefits and finances; and of being accountable to the court. Guardians are family members, friends, attorneys, private professionals, non-profit or for-profit agencies, volunteers, and public programs. The number of individuals in need of guardianship services is spiraling with the aging of the population and the growing number of persons with disabilities.

Guardianship is a double-edged sword that provides protection yet removes fundamental rights and places someone with diminished capacity under the authority of someone else – “half Santa Claus and half ogre,” as described in the 1970s to a Congressional committee (Protective Services for the Elderly, prepared for the U.S. Senate Special Committee on Aging, 1977). A seminal 1987 Associated Press Report (Bayles & McCartney, Guardians of the Elderly: An Ailing System, Associated Press) found that “the nation’s guardianship system, a crucial last line of protection for the ailing elderly, is failing many of those it is designed to protect” and that “in thousands of courts around the nation every week, a few minutes of routine and the stroke of a judge’s pen are all that it takes to strip an old man or woman of basic rights.” The report charged that “after giving guardians such great power over elderly people, overworked and
understaffed court systems frequently break down, abandoning those incapable of caring them themselves.”

This landmark AP report launched the modern guardianship reform movement, triggering statutory changes in every state that sought to strengthen procedural due process in appointment of guardians, improve the determination of incapacity, ensure there are no less restrictive options -- as guardianship is truly a “last resort” -- and bolster court oversight. The rush to reform saw the development of a Uniform Guardianship and Protective Proceedings Act, National Guardianship Association Standards of Practice, National Probate Court Standards and a growing number of state education and training materials including handbooks and videos for guardians.

Yet practices by courts, guardians and others did not automatically follow these statutory reforms. Implementation of the new laws was uneven, and sometimes the actual process seemed to bear little resemblance to the legislative revisions. Scattered press articles and governmental reports in the past decade highlighted instances of misconduct, lack of judicial oversight, need for clear guidelines for guardian performance and decision-making -- and the dire need for assistance for family guardians unfamiliar with the legal, judicial and social services systems. In 2004, the Government Accountability Office (GAO) found a troubling lack of coordination between state courts handling guardianship and federal agencies that appoint representative payees (GAO-04-655). A 2010 GAO report profiled cases of guardianship malfeasance and spotlighted lack of adequate screening of proposed guardians (GAO-10-1046). And a 2011 GAO report again noted the lack of coordination with representative payment programs, and recommended federal support for court oversight of guardians (GAO-11-678).

However, the extent of problems remains unclear. The GAO in 2010 “could not determine whether allegations of abuse by guardians are widespread.” Data and empirical research on adult guardianship are scant. Many courts and states do not know the number of adults currently under guardianship within their jurisdiction. Anecdotal evidence and press inquiries indicate that guardianship practice ranges widely from quietly heroic to satisfactory to unknowingly deficient to malfeasant, but the proportions remain unclear. It appears that guardianship practice is markedly uneven, varying dramatically from state to state, court to court, judge to judge, and guardian to guardian, and there remains a troubling gap between law and practice. Many aspects of guardianship suffer because of the Balkanization of law, data, and procedures across state lines -- and because of strained court budgets, substantially exacerbated during the recession.

In February 2009, the American Bar Association adopted policy “encourag[ing] the federal government to provide funding and support for training, research, exchange of information on practices, consistent collection of data, and development of state, local and territorial standards regarding adult guardianship.” Thus, the Association welcomes support and actions by the Committee to enhance guardianship systems at the state level.

State courts, working in collaboration with the aging and disability network, as well as state bar associations and others, can play an important role in identifying and
driving needed changes in law and practice within their jurisdictions. The American Bar Association has extensive policy on state-level guardianship reform, dating back to 1987. These policy recommendations address both the “front end” of guardianship (including procedures leading up to the appointment of a guardian and the crafting of a court order) and the “back end” (including standards for guardians and means of court oversight). The following principles are embodied in those policies:

- **Less Restrictive Alternatives.** The ABA encourages the appropriate use of less restrictive alternatives to guardianship such as health care advance directives and financial powers of attorney naming a trusted agent. (February 1989 and August 2002 policies). Guardianship is a drastic last step and should not be used if other surrogate approaches will suffice. Education about and use of less restrictive alternatives, as well as screening to ensure that such alternatives have been exhausted before appointment of a guardian, will narrow the pool of guardians needed, reduce the burden on courts and heighten the independence of individuals as they plan ahead and direct what they want.

- **Procedural Due Process Protections.** The Association supports procedural safeguards at “the front end” of the process before appointment of a guardian. This includes a simplified but specific petition form, meaningful notice that clearly conveys a genuine opportunity for the alleged incapacitated person to be heard, hearing rights, use of a clear and convincing evidence standard of proof, right of the alleged incapacitated person to be present at the hearing and right to counsel as advocate for the individual in every case (August 1987 and February 1989 Policies). Because, as the Associated Press report suggested, guardianship “unpersons” an individual by restricting basic rights and self-determination, rigorous procedures are required to ensure the person can be fairly heard and evidence properly considered.

- **Determination of Incapacity.** Incapacity is a difficult concept to pin down. It can be used prejudicially as a trigger to needlessly deprive people of independence. ABA policy recognizes that incapacity may be partial; should be supported by evidence of functional impairment over time; does not equate to advanced age, eccentricity or medical diagnosis; and a determination of capacity should consider the risks the person faces (February 1989 Policy).

The ABA Commission on Law and Aging has collaborated with the American Psychological Association, along with the National College of Probate Judges, to come up with a framework for judges on capacity assessment. This framework goes by the acronym of “MCFVRE” – medical condition, cognitive impairment, functional abilities, values of the individual that must be considered, risks involved, and consideration of ways to enhance autonomy (*Judicial Determination of Capacity of Older Adults in Guardianship Proceedings: A Handbook for Judges*). A few states, such as Maine, have begun judicial training around these elements.
- **Limited Guardianship Orders.** Capacity is not “all or nothing” and neither should court orders be. The Uniform Guardianship and Protective Proceedings Act, the majority of state statutes, and Association policy provide for and encourage each court to craft a limited, tailored order according to the individual’s specific abilities and needs (February 1989 Policy). Putting the concept of “limited guardianship” into practice remains a continuing challenge.

- **Guardian Qualifications and Standards.** Most guardians want to do the right thing and welcome guidance. The Association supports guardian orientation and training, as well as adoption of minimum guardian standards. Association policy also supports certification for guardians who receive fees for serving two or more unrelated individuals. Additionally, ABA policy provides that guardianship agencies should not directly provide services such as housing, medical care and social services to the individuals under their care (February 1989 and August 2002 Policies). The ABA Commission on Law and Aging is one of ten national organizations sponsoring an upcoming *National Guardianship Summit: Standards of Excellence*, a consensus conference that will result in recommendations on universal minimum standards of practice.

- **Court Oversight of Guardians; Data.** The ABA has far-reaching policy supporting court monitoring of guardians. This includes requiring timely filing of annual reports and financial accounts and review and audit of those reports and accounts by such means as volunteers, investigators and review boards (February 1989 Policy). The Association also supports the development and funding of a uniform system of data collection for adult guardianship (August 2002 Policy). Indeed, without solid data, we cannot determine how best to target support where it is needed.

One recent approach to promote timely and accurate accountings is the Minnesota system of “e-filing” in which accountings and supplemental documents are filed online. Such a system is a “win-win,” making filing easier for guardians and making monitoring easier for courts. Another approach is the use of trained court volunteers to visit people under guardianship.

- **Collaboration of Court and Aging/Disability Networks.** Courts and cases do not exist in a vacuum. Guardianship systems will benefit by greater collaboration of courts and the aging/disability networks. Courts may receive and refer cases to and from adult protective services. Courts may provide guardians with education and information on social services and long-term care. Together courts and aging/disability agencies, with bar associations and other key stakeholders, can assess critical gaps in practice and begin to formulate plans of improvement. The ABA supports “multi-disciplinary guardianship and alternatives committees to serve as a planning, coordinating and problem-solving forum . . . .” (February 1989 Policy).
The American Bar Association applauds the Committee for holding a hearing on critical guardianship issues, progress on which will improve the lives of vast and growing numbers of at-risk incapacitated people. We would be pleased to provide additional information and assist the subcommittee as it develops and implements an agenda on these important issues.

This statement is submitted by:

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AMERICAN BAR ASSOCIATION
ADOPTED BY THE HOUSE OF DELEGATES
ANNUAL MEETING 1987
RECOMMENDATION

BE IT RESOLVED. That the American Bar Association supports efforts to improve judicial practices concerning guardianship, and adopts the following Recommended Judicial Practices and urges their implementation for the Elderly at the state level:

I. Procedure: Ensuring Due Process Protections

A. Notice to the Alleged Incompetent

1. Personal service upon respondent should be by a court officer in plain clothes trained in dealing with the aging. In addition to the respondent, notice should be given by mail to the spouse, all the next of kin, the custodian of the respondent, the proposed guardian, and the providers of service.
2. There should be at least fourteen (14) days' notice before the hearing unless the court otherwise orders.
3. Notice should be in plain language and in large type. It should indicate the time and place of hearing, the possible adverse results to the respondent (such as loss of rights to drive, vote, marry, etc.), and a list of rights (such as the right for court-appointed counsel or guardian ad litem.) A copy of the petition should be attached.

B. Presence of the Alleged Incompetent at the Hearing

1. Respondent has a right to be present and should be present if at all possible.
2. The court should do everything possible to encourage access to the courts by the elderly, including making the court facilities accessible and training court staff as to available services and resources. However, this shall not diminish the court's ability to convene at any other location if in the best interest of the respondent.
3. To make participation of the respondent and others as meaningful as possible, courts should make all possible resources available for impaired persons, including interpreters for the deaf and non-English speaking persons, and visual aids.
C. Representation of the Alleged Incompetent

1. Counsel as advocate for the respondent should be appointed in every case, to be supplanted by respondent's private counsel if the respondent prefers. If private funds are not available to pay counsel, then public funds should be used, not to exceed the rates ordinarily paid to court-appointed counsel.
2. Counsel for the respondent should make a thorough and informed investigation of the situation. After accomplishing the investigation, counsel should proceed to represent the respondent in accordance with the rules of professional conduct governing attorneys of that state.

II. Evidence: Applying Legal Standards to Medical / Social Information

A. Assessment of Medical Diagnosis of the Alleged Incompetent

1. The court has ultimate responsibility to assess medical evidence and to determine incompetence. A doctor's input should be required but a doctor's medical diagnosis should not be the sole criterion for a court's adjudication of incompetency.
2. Respondent has a right to cross-examine the physician, but a physician's letter or affidavit may be admitted if stipulated to by the respondent. The respondent, or the court on its own motion, has the right to ask for an independent evaluation by a physician or other mental health or social service professional.

B. Use of Investigative Resources to Assist the Court

1. The court should have guardians ad litem, visitors or court investigative agencies available to it to investigate the respondent's situation and condition.
2. The investigator's report should cover the issues of incompetence, who should be guardian, placement of respondent, services available, and an assessment of less restrictive alternatives to the creation of a guardianship. The report should be made available to the court and all counsel.
3. Investigators should be professionally trained and familiar with the problems of the elderly.

C. Advanced Age of the Alleged Incompetent

1. "Advanced age," in itself, should not be a factor in determining incompetence.
2. Judges handling guardianship cases should be educated at local, state and national programs about the aging process, and the societal myths and stereotypes of aging.
III. Court Order: Maximizing Autonomy of the Ward

A. The court should find that no less restrictive alternative exists before the appointment of a guardian.

B. A scheme for limited guardianship and limited conservatorship should be provided, preferably by statute. Courts should always consider and utilize limited guardianships, as an adjunct of the application of the least restrictive alternative principle, either under existing statutory authority or under the court's inherent powers.

IV. Supervision: Ensuring the Effectiveness of Guardianship Services

A. Submission and Review of Guardian Reports Guardians should be required to make a periodic report as to the ward's present condition and the continuing need for a guardian, either limited or plenary. Courts should review such reports and take appropriate action with regard thereto. A system of calendaring such reports should be established to ensure prompt filing, with sanctions provided for failure to comply.

B. Training of Guardians The court should encourage orientation, training and ongoing technical assistance for guardians, including an outline of a guardian's duties and information concerning the availability of community resources, including the aging network, and information about the aging process.

C. Use of Guardianship Agencies When there is no suitable person to act as guardian, the court may utilize any public, private or volunteer office or agency to so act. Such guardians should be expected to observe the same standards of performance required of private guardians, and should not be an employee of the court.
AMERICAN BAR ASSOCIATION

COMMISSION ON THE MENTALLY DISABLED,

COMMISSION ON LEGAL PROBLEMS OF THE ELDERLY

AND

SECTION ON REAL PROPERTY, PROBATE AND TRUST

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

BE IT RESOLVED, that the American Bar Association supports the following recommendations of the National Guardianship Symposium, which aim to safeguard the rights and maximize the autonomy of adult disabled wards and proposed wards, while providing for their needs.

BE IT FURTHER RESOLVED, that the American Bar Association urges the implementation of the recommendations at the state and local level through appropriate legislation, legal and judicial rules and practices, workable programs, and educational sessions.

Approved by the ABA House of Delegates on February 7, 1989.
AMERICAN BAR ASSOCIATION
COMMISSION ON LEGAL PROBLEMS OF THE ELDERLY
COMMISSION ON MENTAL AND PHYSICAL DISABILITY LAW
SENIOR LAWYERS DIVISION

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

RESOLVED, That the American Bar Association recommends that state, territorial and local policy-making bodies implement the following principles derived from the 2001 Wingspan Conference addressing adult guardianship issues:

1. Support the concept that guardianship should be a last resort and that less restrictive alternatives should be explored and exhausted prior to judicial intervention by:
   a. Developing multi-disciplinary diversion programs with collaboration among financial institutions, law enforcement, and adult protective services as an early intervention process to avoid the need for guardianship.
   b. Adopting statutes requiring agents under durable powers of attorney to maintain fiduciary standards.
   c. Providing that lawyers drafting powers of attorney represent and meet with the principal rather than solely with the prospective agent.
   d. Undertaking study on the extent and nature of the abuse of powers of attorney and trusts, and exploring statutory options for court review of agents' performance.
   e. Providing special procedures for single transactions orders by a court in lieu of a guardianship appointment.
   f. Developing standards and training for mediators in conjunction with the dispute resolution community to address mediation in guardianship related matters.
   g. Using mediation for conflict resolution in guardianship cases and as a pre-filing strategy alternative to guardianship; and undertaking research to identify alternative payment sources to expand the availability and affordability of guardianship mediation services.

2. Strengthen procedural due process safeguards in the guardianship process by:
   a. Using the term “investigator” or “visitor” instead of “guardian ad litem.”
   b. Ensuring that respondents have the right to request a closed hearing for determining diminished capacity, to have medical functional evaluations by someone who is not the respondent’s treating physician, to have the
treating physician's privilege recognized and confidentiality maintained, and to have medical records automatically sealed at the end of the hearing.

c. Requiring safeguards in emergency proceedings including actual notice to the respondent before hearing, mandatory appointment of counsel, establishment of the respondent's emergency, conduct of a hearing on the permanent guardianship as promptly as possible, and placement of limitations on emergency powers.

d. Limiting guardianship to the circumstances giving rise to the petition for emergency or temporary guardianship, and terminating them upon appropriate showing that the emergency no longer exists.

e. Prohibiting guardians from consenting to civil commitment, electric shock treatment, or dissolution of marriage without obtaining specific judicial authority.

f. Ensuring that the hearing on a guardianship petition be held promptly after service upon the respondent.

g. Giving preference in appointing a guardian to the person nominated in an advance directive, power of attorney, or other writing.

3. Support high quality public and professional guardianship services by:

a. Providing public guardianship services when other qualified fiduciaries are not available.

b. Adopting minimum standards of practice for all guardians, using the National Guardianship Association Standards of Practice and A Model Code of Ethics for Guardians as a model.

c. Requiring professional guardians—those who receive fees for serving two or more unrelated wards—to be licensed, certified, or registered.

4. Support effective monitoring, personal and financial reporting, and accountability for all guardianships by:

a. Mandating annual reports of the status of the person with diminished capacity and annual financial accountings, and ensuring the auditing of such reports.

b. Maintaining adequate data systems to assure that required plans and reports are timely filed.

c. Including in the guardian’s report any other mandated reports which are the guardian’s responsibility, such as reports to the Social Security Administration or the Department of Veterans Affairs.

d. Ensuring that the courts maintain the primary responsibility for monitoring.

5. Better define the responsibility of lawyers as fiduciaries and as counsel to fiduciaries by:

a. Conforming state codes of ethics to the ABA Ethics 2000 revisions to the Model Rules of Professional Conduct 1.6 (Confidentiality) and 1.14 (Clients with Diminished Capacity).

b. Requiring lawyers who serve in any guardianship capacity to be bonded to the same extent as non-lawyers, and to maintain professional liability insurance that covers fiduciary activities.

c. Prohibiting a lawyer petioning for guardianship of his or her client from serving as the respondent's counsel, the respondent's guardian ad litem for the
guardianship proceeding, and as guardian except in exigent or extraordinary
circumstances, or in cases where the client made an informed nomination
while having decisional capacity.

d. Prohibiting the lawyer of a client with diminished capacity from representing
a third party petitioning for guardianship over the lawyer’s client.

e. With respect to lawyers who serve in the dual roles of both lawyer and court-
appointed fiduciary, ensure that the services and fees be differentiated, be
reasonable, and be subject to court approval.

f. Requiring that when the lawyer represents a fiduciary, the lawyer take
reasonable steps to ensure that the fiduciary understands his or her
responsibilities and good practice standards.

g. Ensuring education in and study concerning responsibilities of the lawyer
and/or guardian to engage in appropriate estate planning.

6. Support overarching efforts to improve the guardianship system by:

a. Adopting standard procedures to resolve interstate jurisdiction
controversies and to facilitate transfers of guardianship cases between
jurisdictions.

b. Using functional and multi-disciplinary assessments in determining
diminished capacity; and using the term “diminished capacity” in place of
the terms “incapacity,” “incapacitated,” and “incompetent.”

c. Amending Medicare and Medicaid laws to cover the cost of respondents’
functional assessment.

d. Developing and funding a uniform system of data collection within all
areas of the guardianship process.

e. Developing innovative and creative ways by which funding sources
(federal, state, local, private) are categorically directed to guardianship,
including funding for court investigation and oversight and public
guardianship services.

f. Utilizing multi-disciplinary assessments to help identify the least
restrictive intervention throughout the judicial process.

g. Undertaking research to measure successful practices and programs to
examine how guardianship is enhancing the well-being of persons with
diminished capacity.
AMERICAN BAR ASSOCIATION
ADOPTED BY THE HOUSE OF DELEGATES
FEBRUARY 16, 2009

RECOMMENDATION

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