

# ENSURING TRUST: STRENGTHENING STATE EFFORTS TO OVERHAUL THE GUARDIANSHIP PROCESS AND PROTECT OLDER AMERICANS

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## A R E P O R T

OF THE

SPECIAL COMMITTEE ON AGING  
UNITED STATES SENATE



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## LETTER OF TRANSMITTAL

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U.S. SENATE,  
SPECIAL COMMITTEE ON AGING,  
*Washington, DC, November 28, 2018.*

Hon. MIKE PENCE,  
*President, U.S. Senate,*  
*Washington, DC.*

DEAR MR. PRESIDENT: Under authority of Senate Resolution 62 agreed to on February 28, 2017, I am submitting to you a report of the U.S. Senate Special Committee on Aging entitled: "Ensuring Trust: Strengthening State Efforts to Overhaul the Guardianship Process and Protect Older Americans."

Senate Resolution 4, the Committee Systems Reorganization Amendments of 1977, authorizes the Special Committee on Aging "to conduct a continuing study of any and all matters pertaining to problems and opportunities of older people, including but not limited to, problems and opportunities of maintaining health, of assuring adequate income, of finding employment, of engaging in productive and rewarding activity, of securing proper housing and, when necessary, of obtaining care and assistance." Senate Resolution 4 also requires that the result of these studies and recommendations be reported to the Senate annually.

I am pleased to transmit this report to you.

Sincerely,

SUSAN M. COLLINS,  
*Chairman.*



**Ensuring Trust: Strengthening State Efforts to Overhaul  
the Guardianship Process and Protect Older Americans**



**U.S. Senate Special Committee on Aging**

**Senator Susan M. Collins (R-ME), Chairman  
Senator Robert P. Casey, Jr. (D-PA), Ranking Member**

**November 2018**

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## **Abbreviations**

Achieving a Better Life Experience (ABLE)

Administration for Community Living (ACL)

American Bar Association (ABA)

Adult Protective Service (APS)

Associated Press (AP)

Center for Advocacy for the Right & Interests of the Elderly (CARIE)

Conservator Account Monitoring Preparation and Electronic Reporting (CAMPER)

Government Accountability Office (GAO)

Guardianship Inventory Reports & Accountings for Florida (GIRAFF)

U.S. Department of Health and Human Service (HHS)

National Adult Maltreatment Reporting System (NAMRS)

National Adult Protective Services Association (NAPSA)

National Guardianship Association (NGA)

National Council on Disability (NCD)

National Center for State Courts (NCSC)

Supported decision-making (SDM)

Social Security Administration (SSA)

Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA)

Uniform Law Commission (ULC)

U.S. Department of Veterans Affairs (VA)

Volunteer Advocates for Seniors or Incapacitated Adults (VASIA)



## **Executive Summary**

Guardians are entrusted with significant power over individuals who rely on their support. A guardian's authority can range from deciding where an individual will live and when to seek medical care to choosing if family members are allowed to visit and how to spend retirement savings. Most guardians are selfless, dedicated individuals who play an important role in safeguarding vulnerable individuals. However, recent reports of guardianship abuse highlight cases where guardians have abandoned their duty of doing what is in the best interest of the individual in their care. Unscrupulous guardians acting with little oversight have used guardianship proceedings to obtain control of vulnerable individuals and have then used that control to liquidate assets and savings for their own personal benefit. Earlier this year, a professional guardian and her colleagues in Nevada were indicted on more than 200 felony counts after they allegedly used the guardianship process to take advantage of and financially exploit over 150 individuals. In another case, two individuals from North Carolina lost hundreds of thousands of dollars through exploitation by a family member who served as their guardian. These examples are important reminders that guardianship must only be imposed when necessary and that all guardianships must be subject to regular and substantive oversight.

In order to protect individuals subject to guardianship from abuse, exploitation, and neglect, governments and courts must be vigilant in their enforcement of laws and procedures that provide oversight of these relationships. While all states have laws designed to protect due process rights and to ensure that guardians are performing their fiduciary duties, these laws are not always consistently enforced, and more must be done to protect individuals subject to guardianship.

The United States Senate Special Committee on Aging ("the Committee") recognizes the impact of the guardianship system on the health and well-being of seniors and people with disabilities. For example, at a hearing on the issue in 2016, the Committee heard from witnesses who testified about the lack of information available on guardianship, the financial abuses that individuals have suffered at the hands of guardians, and how states have engaged in efforts to address these and other related abuses. This report is a continuation of the Committee's effort to highlight opportunities to improve protections and supports for older Americans and people with disabilities. Through its work, including this report, the Committee seeks to encourage states to develop the proper tools to ensure that guardians and court officials have the resources necessary to serve the best interests of those under guardianship, and that guardians who instead use the system to exploit, abuse, or neglect are quickly identified and are held accountable.

As part of its examination of guardianship and survey of current practices, the Committee sent an official request for comments, recommendations, and best practices to states, courts, and organizations representing older Americans and people with disabilities throughout the country. We received more than 100 responses, which contributed to the findings and recommendations in this report. Many of these responses detailed stories of guardianship abuses from throughout the country, demonstrating the necessity of increased national attention.

This report presents a broad review of the guardianship system, provides insight into discrete issues from a variety of stakeholder perspectives, and identifies opportunities for improving the

lives of those individuals for whom decision-making authority has been entrusted to a guardian. It provides an overview of guardianship and related arrangements, data and information regarding the effect these relationships have on individuals nationally, common barriers to proper oversight, and alternatives to guardianship. Finally, the report contains recommendations for courts and policymakers that would improve outcomes for individuals subject to guardianship arrangements.

## KEY FINDINGS

Through hearing testimony, meetings with stakeholders, letters from constituents, research, and a public comment process, the Committee has identified persistent and widespread challenges that require a nationwide focus in order to ensure the guardianship system works on behalf of the individuals it is intended to protect. This report focuses on three key areas that should be addressed to protect the well-being of individuals placed under guardianship:

- ***Oversight of Guardians and Guardianship Arrangements*** – A lack of clear guidelines and education for court officials, community-based organizations, family members, and guardians has resulted in guardianships being imposed without a full knowledge of the responsibilities needed to ensure that an individual subject to guardianship is properly protected and cared for. Once a guardianship is imposed, there are few safeguards in place to protect against individuals who choose to abuse the system. Greater oversight of guardians and guardianship arrangements would protect against abuse, neglect, and exploitation.
- ***Alternatives to Guardianship and Restoration of Rights*** – In some cases, a full guardianship order may remove more rights than necessary and may not be the best means of providing support and protection to an individual. Should individuals subject to guardianship regain capacity, all or some rights should be quickly and efficiently restored. Unfortunately, this rarely occurs. An alternative arrangement may better promote the individual's values and terminate fewer rights while also providing necessary support and oversight.
- ***The Need for Better Data*** – Few states are able to report accurate or detailed guardianship data, and figures related to the number of individuals subject to guardianship are largely unavailable. Reliable data would help policymakers make informed decisions on ways to improve the guardianship system.

## RECOMMENDATIONS

Following its year-long investigation, the Committee recommends several actions to that will strengthen these arrangements and improve the well-being of those subject to guardianship.

To improve oversight of guardians and guardianship arrangements, the Committee recommends:

- ***Enhanced Monitoring*** – State courts should engage in more thorough and frequent reviews of guardianship arrangements, and should work with financial monitoring

companies to identify suspicious transactions and notify the court and guardian of potential risks.

- **Background Checks** – Courts should conduct criminal background checks on all prospective guardians.
- **Improved Collaboration** – Coordination and communication should occur between the court and federal agencies, including the SSA and VA, and between the court and community organizations.
- **Volunteer Visitor Programs** – Support for individuals who help to inform the court about the status of the respondent before a guardian is appointed and periodically throughout the guardianship should be increased.
- **Training** – All parties related to the guardianship, including the guardian, court staff, and family members, should be trained on guardian responsibilities and on the signs of abuse.

To encourage the use of less-restrictive alternatives and promote restoration of rights, when appropriate, the Committee recommends:

- **Promotion of Alternatives to Guardianship** – States should encourage courts to utilize alternatives to guardianship through state statutes and public awareness campaigns. Such efforts would officially promote less restrictive alternatives such as limited guardianships and supported decision-making.
- **Increased Training and Education** – Required comprehensive training for judicial officials, attorneys, and guardians would increase understanding and appreciation of less restrictive alternatives to guardianship and the availability of opportunities for restoration of rights, when and if it becomes appropriate.
- **Strengthened Protections for Individuals under Guardianship** – State laws need to be strengthened to ensure individuals seeking a restoration of rights are guaranteed unbiased legal representation and access to resources for a timely consideration by the courts.
- **Nationwide Adoption of the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act** – State guardianship laws need greater uniformity to ensure better protections and control for individuals being considered for guardianship and those pursuing a restoration of their rights.

To provide policy makers and other stakeholders with improved data regarding guardianship arrangements, the Committee recommends:

- **Statewide Data Registries** – Such registries would create a single location to collect and disseminate data, allowing for more cohesive collection of data.
- **Increased Federal Support and Guidance to States** – Support to state court systems or other state entities would help create cohesive collection efforts, improving the ability to share information and collect national data.
- **Increased Data Collection by Federal Agencies** – Additional resources aimed at data collection from federal agencies would help states design, test, and improve data collection systems, complement increased federal guidance, and further help create a more consistent national data collection effort.

- ***Creation of a National Resource Center*** – A national resource center on guardianship would collect and publish information for the benefit of courts, policy makers, individuals subject to guardianship, guardians, community organizations, and other stakeholders. Information collected and published by the resource center may include statistics related to guardianship, information on laws and regulations, published research, and training materials.

## **Introduction: Guardianship and Calls for Reform**

Members of the United States Senate Special Committee on Aging are dedicated to examining issues of importance to older Americans, and this report continues the Committee's work to support and protect individuals subject to guardianship from abuse, neglect, and exploitation. Over the last year, the Committee has engaged in a comprehensive review of the guardianship system with the goal of identifying opportunities for reform that will improve outcomes for individuals subject to these arrangements. Following a hearing in April 2018, the Committee solicited insight from guardianship stakeholders throughout the country, including state and local government entities, courts and judicial organizations, advocates for individuals subject to guardianship, organizations representing guardians, academics, lawyers, legal organizations, and others. Three recurring themes emerged during the course of the Committee's investigation: 1) the absence of consistent and reliable data related to guardianship arrangements; 2) the need for improved oversight of guardians; and 3) consideration for increased use of less-restrictive alternatives to guardianship. The Senate Aging Committee received more than 100 comments, which helped to inform its work; many of those comments are cited in this report. For a complete list of entities and individuals providing comments, along with the information provided, please contact the U.S. Senate Special Committee on Aging at (202) 224-5364.

As the Baby Boomer generation continues to age, guardianship increasingly touches the lives of individuals and their families. According to the National Center for State Courts (NCSC), an independent nonprofit organization dedicated to improving court administration and practices, there are approximately 1.3 million adult guardianship cases in the United States and an estimated \$50 billion of assets under guardianship.<sup>1</sup> Despite these staggering numbers, many Americans remain unaware of the central role guardianship can play in the lives of older adults and people with disabilities.<sup>2</sup>

Guardianship is often a necessary and valuable tool used to serve the needs of an individual that a court has determined lacks the capacity to manage his or her own affairs. It is a legal relationship created by a court between an individual whom it has determined is not capable of making decisions regarding his or her life or property and the person or organization appointed by that court to make such decisions. A guardian may be appointed to care for an individual due to a disability, injury, or illness, such as the onset of dementia, or, in some cases, a mistaken belief that, because of a certain disability, injury, or illness, an individual is unable to make decisions about his or her health or welfare.

A trusted and qualified guardian can provide years of support and protection for an individual by managing his or her finances, arranging for health care, coordinating residential support services, and performing other essential life tasks. However, individuals lose almost all of their rights when a full guardianship order is imposed on them, increasing the risk of abuse, neglect, and exploitation at the hands of unscrupulous guardians. A series of Associated Press stories in the late 1980s drew the nation's attention to a "dangerously burdened and troubled" guardianship system where "a few minutes of routine and the stroke of a judge's pen" were all that was necessary to remove an individual's most basic rights.<sup>3</sup>

Three decades later, recent stories of abuses in the guardianship system demonstrate a continued and pressing need for guardianship reform. For example, a professional guardian in Nevada was recently indicted on more than 200 felony charges, including racketeering, theft, exploitation, and perjury, after targeting a couple in their 60s, petitioning the court and becoming their guardian, moving them to a nursing home, and selling their property.<sup>4</sup> Another article documents the exploitation that two brothers with intellectual disabilities in North Carolina experienced after 30 years in prison due to a wrongful conviction. In this case, “trusted” individuals, including a sibling who served as their guardian, a lawyer in Florida, an advocate in Georgia, and a professor from New York, squandered hundreds of thousands of dollars that the brothers had received from the state as compensation for wrongful imprisonment.<sup>5</sup>

## **History of Guardianship and Reform Efforts**

“Guardianship” is an extension of a state’s power under the doctrine of *parens patriae*, a principle that holds that the government is the protector of citizens who are unable to protect themselves.<sup>6</sup> It is primarily governed by laws, regulations, and practices of each of the states and the courts therein,<sup>7</sup> and therefore practices can vary greatly from jurisdiction to jurisdiction. This chapter provides a brief review of the history of guardianship reform in the United States as well as a general overview of how guardianships are created and operate across the country.

Guardianship operated throughout much of early American history with little state or federal oversight. Older individuals and individuals with disabilities were provided only limited, if any, protections against being in an unnecessary guardianship arrangement. Court decisions in the 1960s began addressing concerns related to civil confinement and the due process rights of individuals subject to these proceedings, and studies funded by the American Bar Association (ABA) considered the adequacy of existing state safeguards and opportunities for legislative improvements.<sup>8</sup> The Uniform Law Commission (ULC), which drafts nonpartisan legislation that states may adopt in order to help clarify and promote uniformity in areas of state law, released the first model legislation on guardianship in 1969 as Article V of its Uniform Probate Code.<sup>9</sup> Introductory comments to Article V highlighted the drafters’ intent to minimize the need for guardianship and protect individuals from “unwise use” of the system by providing for alternative arrangements and giving judges greater discretion.<sup>10</sup>

Concerns related to due process protections for individuals subject to guardianship petitions continued into the 1970s and 1980s, but serious focus on legal reforms to the guardianship system did not begin until the Associated Press (AP) in *Guardians of the Elderly: An Ailing System* (1987)<sup>11</sup> documented ways in which the system stripped some seniors of their rights with little evidence, and then failed to protect them from abuse.<sup>12</sup> Following the AP’s shocking reports, the ABA convened the first National Guardianship Symposium in 1988, and many states took action by updating laws to improve due process protections and enacting statutes to regulate guardianship.<sup>13</sup>

The ULC adopted a significant revision to its model guardianship statute in 1997, continuing to focus on limited guardianships and enhanced due process protections.<sup>14</sup> Guardianship stakeholders met again in 2001 and 2011, including judges, attorneys, guardians, doctors,

ethicists, professors, and others. The conversations focused on issues facing the guardianship system and recommendations for reform.<sup>15</sup> Generally, the reforms advocated by the conferences followed five trends:

1. Strengthened procedural protections for individuals being considered for guardianship;
2. Provided greater scrutiny over the determination of incapacity;
3. Increased use of limited guardianship;
4. Provided stronger court oversight of guardians; and
5. Developed of public guardianship programs.<sup>16</sup>

Leveraging the work of the symposia and continued study and input by guardianship stakeholders, in 2017, the ULC released another significant revision to its model guardianship statute, the “Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act” (“UGCOPAA”).<sup>17</sup> This revision continues the promotion of less-restrictive alternatives to guardianship, incorporates the term “protective arrangement” instead of “guardianship” or “conservatorship,” and includes model forms to be used for assessing an individual’s capacity and needs that will better inform courts making decisions about the most appropriate arrangements. As of 2018, 18 states have passed a version of the uniform guardianship law and several others have enacted specific provisions.<sup>18</sup> However, only Maine has enacted the most recent version of UGCOPAA.<sup>19</sup>

### **Creation and Operation of Guardianships, Generally**

Guardianship arrangements are traditionally separated in two categories: those created to oversee personal and health decisions and those created to oversee financial and property decisions. The latter is sometimes referred to as a “conservatorship” or “guardian of the estate,” but the term “guardianship” is often used to refer to both arrangements. For the purposes of this report, we will discuss the two together and use the term “guardianship” to refer to both.

Although every state has laws and procedures in place to protect an individual’s right to due process and provide for oversight of guardians, statutes and practices differ from state to state, and courts often possess significant discretion in deciding how these relationships are created and operate.<sup>20</sup> The process for the appointment of a guardian typically begins with the filing of a petition in court by a person or organization (the “petitioner”) that is interested in becoming the guardian of person they believe lacks the capacity to make important life decisions (the “respondent”). After the petition and any other required information have been filed with the court, a hearing will be held where the judge will determine the individual’s capacity and then grant, dismiss, or modify the petition.<sup>21</sup>

Often a family member or friend will petition and serve as an individual’s guardian, but a professional guardian paid for by the respondent’s estate or a public guardian funded by the government can be appointed in appropriate situations.<sup>22</sup> The petition must include specific information required by the court, typically including the respondent’s name and address, the relationship of the parties, the circumstances that led to the need for a guardian, and the names and addresses of relatives. Courts generally require a report or other documentation from a medical professional who has recently evaluated the individual,<sup>23</sup> and some may also require a

guardianship plan that includes, among other items, a description of the proposed living arrangement for the respondent and an explanation of how financial, medical, and other needs will be met.<sup>24</sup> Legal counsel will be appointed in some states to represent the respondent if he or she has not hired one separately, while in others, courts may use a guardian *ad litem* or court visitor to conduct independent assessments of the respondent's capacity.

The length of the hearing depends on the court and the complexity of the case; many are short and take only a few minutes. The court may also choose to hold the hearing at a location outside the courtroom that is more convenient for the respondent, such as at a hospital or nursing home.<sup>25</sup> Although practices vary by jurisdiction, if the court determines that the individual lacks capacity and a guardian is necessary, the judge will enter an order appointing a guardian and outlining his or her powers. Once the guardianship is established, the court creating the relationship has responsibility for overseeing it for as long as it lasts unless it is transferred to another jurisdiction. The guardian has a fiduciary relationship with the individual subject to guardianship, which means the guardian has a "special obligation of trust and confidence, and a duty to act primarily for [the client's] benefit."<sup>26</sup>

The primary way in which courts ensure guardians are fulfilling this obligation is through the enforcement and oversight of reporting requirements. Most jurisdictions require reports to be filed annually, but the timing and contents vary across jurisdictions, with annual reports being most common.<sup>27</sup> Guardians of individuals with assets are usually required to file an inventory of his or her belongings soon after the appointment is made, and then file reports regularly for the duration of the relationship that detail the transactions and financial status of the estate.<sup>28</sup> Procedures for reviewing and auditing reports filed by guardians also differ among jurisdictions.

A guardian who does not perform his or her duties appropriately may be removed or "discharged" by the court; however, as described later in the report, removal rarely occurs. Reasons for removal include the use of fraud in obtaining the position, failure to comply with court orders, failure to use the appropriate standards of care and diligence in performance of duties, and the existence of a conflict of interest, among others.<sup>29</sup> These proceedings can be initiated by the individual subject to guardianship or by the court on its own motion, or an interested person or agency may provide information to the court that it believes warrants a review.<sup>30</sup>

## **The Role of the Federal Government**

While states are responsible for appointing guardians and monitoring guardianships in order to protect individuals subject to guardianship from abuse, neglect, and exploitation, the federal government does play a role in the guardianship system. For example, federal agencies such as the Social Security Administration (SSA) and the Department of Veterans Affairs (VA) oversee benefits that are directly affected by guardianship. While some courts send notices of guardianship to the VA and SSA, coordination between federal agencies and states is sometimes lacking or delayed. For instance, federal agencies and state courts do not automatically notify each other when one or the other discovers that a guardian is abusing the incapacitated person.<sup>31</sup>



The federal government has taken steps to improve communication and cooperation between states and increase public understanding of guardianship by facilitating data collection on guardianship, supporting states with grants to improve oversight of guardians and the development of standards of practice, and creating guides for fiduciaries and financial institutions engaging in transactions involving guardianship arrangements.<sup>32</sup> The Department of Health and Human Services (HHS) launched the National Adult Maltreatment Reporting System (NAMRS) in 2013, which created a national reporting system for elder abuse with the goal of providing consistent and accurate national data on all types of elder abuse.<sup>33</sup>

Congress also took action when it passed the Elder Abuse Prevention and Prosecution Act, which was signed into law in October 2017. The law directs the U.S. Attorney General to publish best practices for improving guardianship proceedings and develop model legislation relating to guardianship proceedings for the purpose of preventing elder abuse. It also requires the Department of Justice to designate Elder Justice Coordinators in each federal judicial district to raise awareness about, advise on, and prosecute all types of elder abuse cases.<sup>34</sup>

## **Chapter 1: Oversight of Guardians and Guardianship Arrangements**

Guardianship arrangements can be a valuable means for ensuring the continued care and well-being of individuals whom a court has determined lacks capacity; however, such arrangements require appropriate oversight to prevent abuse. When a full guardianship order is imposed, the protected individual loses most of his or her basic rights, including the right to make medical decisions, to buy or sell property, to manage their own money, to marry, to choose where to live, or to choose with whom to associate.<sup>35</sup> Aside from incarceration or civil commitment, potentially no other court process infringes upon an individual's personal liberties more significantly than the appointment of a guardian.<sup>36</sup> Once a guardianship is imposed, and an individual's rights are removed, the court must monitor the guardian and the arrangement in order to protect the individual from abuse, neglect, and exploitation by the guardian or others.<sup>37</sup>

Calls for improved oversight of guardianship arrangements are not new, however. Before the AP's landmark reporting on guardianship abuses in the late 1980s,<sup>38</sup> a grand jury in Florida documented insufficient monitoring by courts in a report published in 1982.<sup>39</sup> Unfortunately, reports of fraud abuse and neglect continued well beyond these reports. In February 2015, the Committee examined the 2006 case of New York philanthropist and socialite Brooke Astor, which involved allegations that Ms. Astor's son, who was also serving as her guardian, illegally enriched himself with assets from her estate. The high-profile case again called national attention to the need for guardianship reform.<sup>40</sup> More recently, *The New Yorker* documented the horrific story of an older couple in Nevada who lost control of their lives and assets to a professional guardian who was able to obtain a court order appointing her as the couple's guardian without providing any advance notice to the couple or their adult daughter.<sup>41</sup> In "the most significant guardianship exploitation indictment in Nevada's history," in 2018, the guardian and her business colleagues were indicted on more than 200 felony counts stemming from allegations that they used their positions of authority to "prey on vulnerable people ranging in age from 40 to 90, and systematically bilk them out of their life savings."<sup>42</sup>

As these and other cases demonstrate, without sufficient court oversight, individuals subject to guardianship can be exposed to abuse and exploitation with little or no defense. Every state has procedures in place intended to safeguard the protected individual's well-being and provide for oversight of guardians, but statutes and practices are different from state to state and even court to court.<sup>43</sup> Although state laws may govern some elements of guardianship appointment and oversight, courts and judges generally possess broad discretion.<sup>44</sup> Therefore, courts must be vigilant in overseeing guardians and monitoring guardianship arrangements.

### **Need for Improved Oversight of Guardians and Guardianship Arrangements**

Protections against abusive guardianship arrangements begin before they are imposed. However, most states impose few limits on who can petition and become a guardian,<sup>45</sup> and although some states forbid a person convicted of a felony from serving as a guardian, background checks are not always required.<sup>46</sup> In response to an official request from the Committee, commenters recommended a number of reforms to improve the appointment and oversight of guardians and thereby overall outcomes in guardianship cases.

In their comments to the Committee, several organizations, including the ABA, called for jurisdictions to adopt a process for investigating the general background of prospective guardians.<sup>47</sup> The Baltimore Department of Human Services noted the importance of knowing about a prospective guardian's prior conviction for a crime related to exploitation as an example of why courts should engage in background checks before appointing a guardian.<sup>48</sup>

Guardians who are friends or family of the protected individual may not be familiar with the duties and obligations expected of the position.<sup>49</sup> In comments to the Committee, some recommended that guardians receive training on record maintenance in addition to fiduciary and reporting obligations,<sup>50</sup> while AARP pointed out the importance of guardian education on substantive issues relating to advance planning, including long-term care.<sup>51</sup> In an effort to address this concern, specific provisions were included in the recently approved UGCOPAA intended to "provide clearer guidance to guardians and conservators." The Act "clarifies how appointees are to make decisions, including decisions about particularly fraught issues such as medical treatment and residential placement."<sup>52</sup> The NCSC and the ABA are also working to create online, interactive training for guardians with the support of funding from the Department of Justice's Elder Justice Initiative.<sup>53</sup>

Several stakeholders also noted the need for court officials and staff to receive regular training on how to evaluate reports and oversee guardianship arrangements. The Conferences of Chief Justices and State Court Administrators, organizations which bring together state court leaders to study and advocate for improvements to state court systems, noted the need for training to identify signs of abuse, neglect, and exploitation.<sup>54</sup> Maine's Legal Services for the Elderly called attention to the need for training for court volunteers in order to promote uniformity in assessment and reporting on guardianship cases,<sup>55</sup> and Montana's Adult Protective Services Agency noted that strengthened visitor processes could also improve evaluation of the guardian's compliance with the plan of care for the individual subject to the arrangement.<sup>56</sup>

Commenters also noted the need for improved procedures for the filing of complaints about guardians and for their investigation.<sup>57</sup> According to the Administrative Conference of the United States, a 2014 survey of 855 court personnel and 147 guardians and others found that 64 percent of courts took action related to misconduct against at least one guardian in the prior three years.<sup>58</sup> NCSC's Center for Elders and the Courts, in its 2016 Strategic Action Plan, highlighted the need for "proactively and timely responding to allegations of abuse, neglect or exploitation" against individuals subject to guardianship and for enhancing court oversight.<sup>59</sup> In the same vein, Americans Against Abusive Probate Guardianship, an organization founded to eliminate guardianship abuse and assist victims of guardianship abuse, recommended the formation of a single, federal organization for the investigation of complaints against guardians.<sup>60</sup>

## **State and Local Reform Efforts**

A persistent concern for individuals subject to guardianship has been legal representation or advocacy in court proceedings. Some courts utilize a guardian *ad litem* or court visitor to conduct independent assessments and provide information to assist the court in making decisions on the appropriateness of guardianship or of proposed actions.<sup>61</sup> Acting as agents of the court, these individuals may meet with the person who may become subject to a guardianship, and often with

the proposed guardian, and report to the court on issues such as the circumstances that led to the guardianship petition, the appropriateness of guardianship or a more limited arrangement, and the proposed guardian's qualifications.<sup>62</sup> Some courts also use these agents to investigate cases after the guardianship has been imposed. In Utah, for example, volunteer monitors, trained through the state's Guardianship Reporting and Monitoring Program, investigate cases and provide information to courts to support decisions related to any actions that may be needed.<sup>63</sup> Volunteers in Indiana are trained through the Volunteer Advocates for Seniors or Incapacitated Adults ("VASIA") program to support individuals subject to guardianship, and often act as advocates in court proceedings.<sup>64</sup> The individual subject to guardianship may also hire an attorney to represent their interests in the proceeding, or one may be appointed by the court in some jurisdictions.<sup>65</sup> As part of reforms the state enacted in 2017, Nevada now requires the appointment of an attorney for the respondent unless he or she chooses to retain an attorney independently.<sup>66</sup>

Although courts rely heavily on the information filed in reports by guardians in order to oversee the arrangements, commenters noted that compliance with reporting requirements is difficult to evaluate. In his testimony before the Senate Aging Committee earlier this year, Texas court official David Slayton reported that 43 percent of guardianship cases reviewed by the state's Guardianship Compliance Project were found to be out of compliance with reporting requirements.<sup>67</sup> A number of commenters, including the ABA, noted the need for better communication of reporting requirements to guardians to improve compliance. The ABA recommended a number of actions, such as developing court systems for electronic filing of reports and making reports more easily accessible and available in "plain language."<sup>68</sup>

Online filing and electronic monitoring systems have improved compliance and oversight in some jurisdictions. A 2014 survey of state courts found "that two-thirds of court respondents (67 percent) indicated they use an electronic case management system or database for guardianship cases and another ten percent expect to use an electronic system in the next three years."<sup>69</sup> In its comments to the Committee, the Conferences of Chief Justices and State Court Administrators recommended practices that would "improve the archaic paper-driven process" and highlighted Minnesota's leadership on this issue. Through its "MyMNConservator" system, Minnesota provides for online filing and professional auditing of annual reports.<sup>70</sup> Although other states have attempted to implement Minnesota's system, the Conferences of Chief Justices and State Court Administrators noted that none have been successful, "with the primary barrier being financial resources."<sup>71</sup> Texas, however, is currently developing a similar system,<sup>72</sup> and Mr. Slayton noted in his comments to the Committee that Texas's online reporting and monitoring system improves monitoring of cases and allows for "timely and accurate submission of information about the ward and his or her estate to the court."<sup>73</sup>

The NCSC has developed a "Rapid Response" pilot project that would use a financial monitoring company to monitor accounts of individuals subject to guardianship and notify courts of suspicious transactions.<sup>74</sup> As previously discussed, Minnesota's online reporting system has improved audits of guardian filings, and Texas is developing a similar system as well.<sup>75</sup> Congress also took action by passing the SeniorSafe Act. Signed into law in May 2018, SeniorSafe is modeled after a successful program in Maine. This law allows financial institutions, such as

banks, credit unions, and investment advisers, to alert authorities without violating privacy laws when trained employees, acting in good faith, suspect fraud.<sup>76</sup>

Many of the reforms that have been implemented in states have been the result of “compliance projects.” Texas has implemented a pilot project at the state’s Office of Court Administration, which assists courts in adequately monitoring guardianship cases by providing resources for staff to review cases and determine whether there were irregularities in financial dealings of the estate. The project was a \$250,000 endeavor, staffed by three employees who, as of April 2018, had reviewed over 27,000 guardianship cases in 27 counties.<sup>77</sup> This project found that 43 percent of cases were out of compliance with reporting requirements, and in most of those cases, the guardian was a family member or friend. The office also noted that the project “regularly found unauthorized withdrawals from accounts; unauthorized gifts to family members and friends; unsubstantiated and unauthorized expenses; and the lack of backup data to substantiate the accountings.”<sup>78</sup> These findings have led to improved procedures in Texas courts as well as calls for additional resources in order to provide enhanced oversight.

The National Guardianship Association (NGA), a group dedicated to advancing national guardianship standards, highlighted several projects that are showing success in improving guardianship arrangements. One example is a specialized Audit and Investigations program by the Palm Beach County, Florida County’s Clerk Office, which includes a guardianship “fraud hotline” program to report fraud. The NGA stated that the program is “rapidly scalable to collect data for all of Florida’s 40,000 to 50,000 guardianship cases.”<sup>79</sup> In addition, Idaho has worked toward a “differentiated case management tool” for allocating resources for better monitoring of high-risk cases.<sup>80</sup>

## **Recommendations**

Commenters who responded to the Committee’s request provided a number of recommendations for improving oversight of guardians. The Committee endorses the following recommendations

- ***Enhanced Monitoring*** – State courts should engage in more thorough and frequent reviews of guardianship arrangements, and should work with financial monitoring companies to identify suspicious transactions and notify the court and guardian of potential risks.
- ***Background Checks*** – Courts should conduct criminal background checks on all prospective guardians.
- ***Improved Collaboration*** – Coordination and communication should occur between the court and federal agencies, including the SSA and VA, and between the court and community organizations.
- ***Volunteer Visitor Programs*** – Support for individuals who help to inform the court about the status of the respondent before a guardian is appointed and periodically throughout the guardianship should be increased.
- ***Training*** – All parties related to the guardianship, including the guardian, court staff, and family members, should be trained on guardian responsibilities and on the signs of abuse.

## **Chapter 2: Less Restrictive Alternatives and Restoration of Rights**

When an individual is placed under guardianship, the guardian is given the legal authority to make decisions on the individual's behalf. However, an order for a less-restrictive arrangement may provide sufficient support for individuals who retain or develop the ability to make certain decisions for themselves. If a court later determines guardianship is no longer necessary, or should be modified, the individual's rights to decide where to live, manage their finances, and remain independent may be partially or fully restored.<sup>81</sup> Although many individuals subject to guardianship do not regain capacity, for those who do, and for those who should not have been ordered into such a restrictive relationship initially, rights are rarely restored. Commenters representing the courts, state agencies, and advocates generally agreed that "the time is ripe for restoration of rights to become a viable option for people subject to guardianship."<sup>82</sup>

### *Less Restrictive Alternatives*

In 2011, national organizations including AARP, the ABA, NGA, the National Disability Rights Network, and The Arc, among others, convened the Third National Guardianship Summit.<sup>83</sup> This conference passed a number of recommendations and proposed standards, including the least restrictive alternative standard, which requires the imposition of guardianship only if there is no less restrictive alternative available.<sup>84</sup> According to the National Council on Disability (NCD), an independent federal agency charged with advising the federal government on issues that affect people with disabilities, "most state statutes require consideration of less-restrictive alternatives, but courts and others in the guardianship system often do little to enforce this requirement."<sup>85</sup>

Several commenters to this report recommended greater use of less restrictive alternatives to guardianship, such as durable power of attorney and supported decision-making agreements."<sup>86</sup> The Georgia Department of Human Services supports expanding "established alternatives to guardianship to include supportive decision making and exploring alternatives that would allow the individual to maintain a sense of independence."<sup>87</sup>

In addition to preserving important rights and decision-making authority for those individuals who retain sufficient capacity, employing alternatives to full guardianship would also provide added health and financial benefits. Encouraging individuals to retain as much authority over their lives as possible is an important component of mental health.<sup>88</sup> Less restrictive alternatives and easily obtained restoration of rights, where appropriate, could also avoid high legal expenses and court fees.<sup>89</sup> Further, a focus on restoration of rights could help reduce the number of unnecessary guardianship cases brought to court, allowing the courts to focus on guardianship where fraud and abuse may be taking place.<sup>90</sup>

Limited guardianships enable individuals subject to guardianship to retain certain decision-making rights while also providing the guardian with limited authority to make other decisions on the individual's behalf.<sup>91</sup> The revised UGCOPAA makes changes to create options for courts to consider less restrictive alternatives and offers model forms to make it easier for petitions to seek limited guardianship.<sup>92</sup> Tom Berry, a former probate judge from Maine who now works as an attorney in private practice, noted in comments to the Committee that, "[f]or at least five of

my final years as a probate judge, I would not and did not grant one full guardianship. Almost all of them limited the guardianship to residential placement, medical oversight and financial oversight: the big three.” He discussed his concern over how families might react to his orders for limited guardianship, and suggested surprise at often finding “the parents, wives, and others were glad that they did not have to strip their loved ones of all of their rights.”<sup>93</sup>

Instead of a caretaker making unilateral decisions, as is the case under a full guardianship, supported decision-making (SDM) is a process in which the individual under care is given the support and information needed to make an informed decision on their own. The goal of SDM is to identify where assistance is needed and, in cooperation with the individual under SDM, find the system of supports that will help that person when needed.<sup>94</sup> SDM protocols consider that different people need help with different types of decisions. For example, the Administration for Community Living (ACL), a federal agency charged with improving the health and well-being of older adults and individuals with disabilities, explains that, “For some, it might be financial or health care decisions...Some people need one-on-one support and discussion about the issue at hand. For others, a team approach works best.”<sup>95</sup> The goal of SDM is to ensure the individual is able to have control over his or her own lives, but also able to access whatever level of assistance is needed.

There are also other limited options that some contributors to this report noted could be considered before pursuing guardianship, as listed below. Often, however, these options fall outside the scope of guardianship cases.

- **Power of Attorney** – Under a power of attorney, an individual is granted the authority to act on behalf of the person appointing them. The power of attorney is limited by clearer laws in most states than those that govern guardianship, and an individual is able to more easily revoke or modify the power of attorney.<sup>96</sup>
- **Health Care Surrogate** – A health care surrogate is granted decision-making only over health care decisions. Most states have clearer laws than under guardianship on when a person has capacity to appoint a health care surrogate, and make it easier for individuals to revoke a health care surrogate’s authority if they choose.<sup>97</sup>
- **Social Security Representative Payee (Rep Payee)** – A rep payee receives the benefits for a beneficiary who has been determined unable to manage their Social Security benefits. A rep payee offers a narrow scope of authority only over benefits from the SSA.<sup>98</sup>

### *Restoration of Rights*

According to the NCD, there are several circumstances that warrant a review as to whether an individual’s rights should be restored:

- When it is found that an individual did not meet the legal standard of incapacity and was unnecessarily placed under guardianship;
- When an individual did not meet the legal standard of incapacity, but a less restrictive alternative would have allowed appropriate assistance; or

- When an individual regains the capacity to make and implement decisions on their own behalf.<sup>99</sup>

Every state has a process for the restoration of the rights under guardianship, although these processes are rarely used.<sup>100</sup> Most commonly, processes allow for the individual under guardianship to request that the court restore some or all of the rights that were removed when the guardianship was established. In most states, the court will then convene a hearing regarding the restoration of rights and make a ruling on whether to restore some, all, or none of the individual's rights. A study published this year by the ABA found that "an unknown number of adults languish under guardianship" when they no longer need it, or never did. The authors wrote that guardianship is generally "permanent, leaving no way out— 'until death do us part.'"<sup>101</sup> Individuals under guardianship are not always guaranteed independent counsel from their guardian, and if their guardian is truly abusing their position, the lack of representation can make it much more difficult to end the guardianship. The Area Agency on Aging of Westmoreland County, Pennsylvania, recommends, "visitation by an outside individual trained to determine the appropriateness of the guardianship...to avoid the phenomenon of once under a guardianship, always under a guardianship."<sup>102</sup>

### **Barriers to Less Restrictive Alternatives and Restoration of Rights**

Most often, guardians are given their authority for an indefinite amount of time, regardless of whether the situation that prompted the need for a guardian has passed, as in cases where an individual who has recovered from a temporary incapacitating injury, or an individual with a disability who develops the skills necessary to make certain decisions.<sup>103</sup> One reason courts may favor full guardianships is because of the burden additional hearings to limit the scope of a guardianship arrangement can have on a court.<sup>104</sup> This is particularly common for family guardians, where courts often assume they will act in the best interest of the individual.<sup>105</sup> A review of guardianship filings in some Indiana courts from 2008 found that limited guardianships were granted in less than one percent of the cases.<sup>106</sup> According to testimony by Professor Nina Kohn before the Senate Aging Committee in April 2018, "While all states' laws now recognize limited guardianship, petitioning for a limited guardianship is typically harder than petitioning for a full one."<sup>107</sup>

Although every state provides a process to partially or fully terminate a guardianship, there are limited data surrounding the frequency of restoration of rights for individuals under guardianship. The lack of adequate data makes it extremely difficult to even understand how many guardianship cases are terminated before an individual passes away, not to mention the number of individuals who are unnecessarily under guardianship or who are attempting to have the scope of their guardianship reduced or entirely removed.

Apart from a lack of data, there is a lack of awareness by those under guardianship that they may be able to seek a restoration of their rights.<sup>108</sup> Even if an individual is aware of this right, he or she may lack access to the court or the state official that could officially review their guardianship and begin the restoration of rights process. Periodic court reviews of individual guardianship arrangements are sporadic or nonexistent in most states and, therefore, provide limited options for individuals to contest their guardianship or highlight concerns about the



relationship without the consent of the guardian.<sup>109</sup> The role of the lawyer is not always clearly defined. Some guidelines and laws leave open the possibility for a lawyer representing an individual seeking a restoration of their rights to independently decide that the individual still requires a guardian and argue as such in court.<sup>110</sup>

There is also a lack of clear standards around the burden of proof when requesting the restoration of rights. Many states do not clearly define when restoration should be pursued, leaving little guidance for individuals under guardianship. Further, the responsibility to cover the costs of restoration usually lies with the person seeking restoration, which can be a significant financial barrier. Guardians are allowed significant power over individuals under their care, and when a guardian opposes the restoration of rights, regardless of the reason behind their opposition, the individual under guardianship faces a tremendous burden in mounting a successful case.<sup>111</sup>

## **Reform Efforts**

### *National Efforts*

The recently adopted UGCOPAA devotes an entire article to “Other Protective Arrangements” in an effort to promote their use.<sup>112</sup> The ULC noted in the preface to the Act that, in addition to reducing the need for protection of the individual’s liberties, these arrangements are also more efficient from a time and cost perspective.<sup>113</sup> The UGCOPAA is intended to offer protection for individuals subject to guardianship, and provides a number of key provisions to support their rights under guardianship, including:

- Clarifying decision-making standards for guardians;
- Making it easier to petition for a limited guardianship;
- Encouraging person-centered planning by requiring guardians to develop an individualized plan for the individual subject to guardianship;
- Stipulating that courts may not impose a guardianship if a less restrictive alternative, such as supported decision-making, would provide adequate protection; and
- Making restoration of rights a real possibility when an individual no longer requires a guardian, or no longer requires as extensive a guardianship.<sup>114</sup>

Among other provisions, the UGCOPAA also provides guidance for adult guardianship petition forms, which are filed by prospective guardians in local court. The National Academy of Elder Law Attorneys pointed out that revisions to these forms are necessary because “several jurisdictions lack forms for limited guardianships.”<sup>115</sup>

### *State Efforts*

While efforts to promote enactment of the least restrictive alternative standard and push for greater restorations of rights across the nation continue, some states have taken significant steps on their own. Notably, Texas expanded and protected an individual’s right to pursue restoration, and became the first state to enact a least-restrictive alternative statute with the Supported Decision-Making Agreement Act.<sup>116</sup> Texas has also made it easier for individuals to seek a restoration of their rights,<sup>117</sup> and made it easier to end a guardianship of the estate by placing all

assets in an ABLE (Achieving a Better Life Experience) account.<sup>118</sup> ABLE accounts make it possible for people with disabilities and their families to create tax-exempt savings accounts that can fund a variety of essential disability-related expenses for the disabled person while not risking the loss of their state and federal benefits. In Maine, Legal Services for the Elderly provides legal assistance to those looking to modify or terminate guardianship cases – services they believe should be made available to all individuals, regardless of their financial status.

Nevada has also emerged as a leader in this area, enacting a series of guardianship reforms which established a bill of rights for individuals subject to guardianship to guarantee the right to ask the court to review the need for a guardianship. In 2017, South Carolina also enacted legislation that lays out specific duties of the guardian, including investigating less restrictive alternatives and planning for steps that can be taken to restore the individual's decision-making ability."<sup>119</sup> Courts in Maine are required by statute to "make appointive and other orders only to the extent necessitated [by the incapacitated person's condition],"<sup>120</sup> and court orders will specify whether the guardian has "full" or "limited" powers and, if limited, describe the limitations on the guardian's authority.<sup>121</sup>

## **Recommendations**

Commenters who responded to the Committee's request provided a number of recommendations for encouraging the use of less restrictive alternatives and restoring rights when appropriate. The Committee endorses the following recommendations:

- ***Promotion of Alternatives to Guardianship*** – States should encourage courts to utilize alternatives to guardianship through state statutes and public awareness campaigns. Such efforts would officially promote less restrictive alternatives such as limited guardianships and supported decision-making.
- ***Increased Training and Education*** – Required comprehensive training for judicial officials, attorneys, and guardians would increase understanding and appreciation of less restrictive alternatives to guardianship and the availability of opportunities for restoration of rights, when and if it becomes appropriate.
- ***Strengthened Protections for Individuals under Guardianship*** – State laws need to be strengthened to ensure individuals seeking a restoration of rights are guaranteed unbiased legal representation and access to resources for a timely consideration by the courts.
- ***Nationwide Adoption of the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act*** – State guardianship laws need greater uniformity to ensure better protections and control for individuals being considered for guardianship and those pursuing a restoration of their rights.

### **Chapter 3: The Need for Better Data**

There is general consensus among stakeholders and advocates that data on the guardianship system at both the state and national level are severely lacking. While states have oversight over the guardianship system, most do not keep extensive records regarding guardianship. Few states appear able to track the total number of individuals subject to guardianship, let alone record demographic information, the types of guardianship being utilized, or the extent of a guardian's authority.<sup>122</sup> The lack of broad state and national data makes it very difficult to identify trends in guardianship, leaving advocates and policymakers in the dark when trying to enact reform.<sup>123</sup>

Even understanding if guardianship arrangements are on the rise is challenging. A 2009 survey from the NCSC provides some data on this question.<sup>124</sup> The survey collected data from state courts and found that, over a three-year period, 58 percent of respondents—consisting of judges/judicial officials, court managers, and court clerks/registrars—said that the number of guardianship filing petitions had stayed the same, and 37 percent saw an increase in filings. Only five percent of respondents saw a decrease in petitions. This survey suggests the number of guardianship cases are either staying the same or increasing.<sup>125</sup>

Collecting data to assess the guardianship landscape is a significant challenge. For example, the results of the previously mentioned 2009 NCSC survey were not from a nationally representative sample because the NCSC was only able to collect information from 187 respondents in 36 states/territories.<sup>126</sup> Even the often-cited national estimates of 1.3 million adults and \$50 billion of assets under guardianship are based on information from selected states with the most reliable data.<sup>127</sup> Testimony before the Committee and comments received from advocates, state agencies, and nonprofits, among others, pointed out the need for accurate and detailed data to inform comprehensive reform of the guardianship system. As the NGA highlights in its comments to the Committee, reliable national data would help in “guiding reform efforts...and [be] used for developing national performance measures for guardianship cases.”<sup>128</sup> Further, the Center for Advocacy for the Rights and Interests for the Elderly (CARIE), a state-based advocacy organization that represents older Pennsylvanians, points out that as the system is currently set up, “we often use conjecture rather than research to determine what the issues are.”<sup>129</sup>

#### **Barriers to Data Collection**

Differences in systems for overseeing guardians across states and territories make compiling accurate and comprehensive national data difficult. At the request of the Senate Aging Committee, the U.S. Government Accountability Office (GAO) conducted an investigation and reported in 2016 that “the extent of elder abuse by guardians nationally is unknown due to limited data...such as the numbers of guardians serving older adults, older adults in guardianships, and cases of elder abuse by a guardian.”<sup>130</sup> GAO spoke to court officials from six states and found that various limitations in each state, such as inadequate funding and unclear guidance on what information to collect, prevented the collection of reliable data.<sup>131</sup> Similarly, a 2015 press article reported that guardianship systems can vary by counties within a state as well as by state, with inconsistent record-keeping systems, making precise national data unavailable.<sup>132</sup>

Many organizations that provided comments to the Committee recommended centralizing statewide data collection. However, recommendations varied on which entities are best suited to collect that data. The National Academy of Elder Law Attorneys, an organization created to assist and educate attorneys working in elder law, asserts “the entities in the best position to track this data would be the state courts.”<sup>133</sup> State organizations such as the Tennessee Council on Developmental Disabilities echoed confidence in the ability of the state court system to collect data and recommended that states should “require county courts to publish for the public information about the number of annual guardianship petitions and guardianship orders.”<sup>134</sup> The Montana Adult Protective Services Bureau commented that “each court could be responsible for collecting relevant information... [since] the Clerk of District Court[s] already has on file all Guardianship/Conservatorship data/records.”<sup>135</sup> The Georgia Department of Human Services recommended that “each statewide registry, [be] maintained through a state entity or agency specialized in data reporting, management, and security.”<sup>136</sup>

A key part of data collection is ensuring that the information collected is maintained and housed in an easily accessible database. The value of data collection is diminished if it cannot be easily accessed and shared with those who need it to inform regulatory, legislative, and other policy decisions. The value of collected data also depends on standardizing the means and type of information to be collected. The Pennsylvania Supreme Court Office of Elder Justice made clear that “national standards should be developed for the types of data to be collected... [because] only with national standards and support to the state court systems to meet these standards will we be able to develop the robust information needed to understand guardianship.”<sup>137</sup>

Moving to such a system, with states collecting data in accordance with national standards, would overcome many of the barriers to collection of detailed and reliable data for informed planning and policy decisions. The NGA stated that a database “would provide empirical data by which caseloads could be more carefully forecasted and processed. If the number of wards is known, then necessary funding would provide for sufficient staff, and the cost of training and enforcement.”<sup>138</sup>

Similar to the calls for statewide databases are calls for some form of a national registry or database for guardianship information. Some commenters called for a limited database, such as “a National registry...that allows law enforcement, attorneys, and other courts to validate someone’s claim that they have a guardianship/conservatorship in another state.”<sup>139</sup> In order to maximize data collection on abusive guardians, others called for “collaboration and data sharing with National Adult Protective Services Association (NAPSA) who collects statistics on abuse, neglect and exploitation of vulnerable adults from state-based Adult Protective Services (APS) programs.”<sup>140</sup>

## **National Reform Efforts**

Despite recognition of the need, coordinating a national response among states to collect more detailed data on guardianship arrangements has proved difficult. In 2007, the NGA and the NCSC initiated a guardianship data project to facilitate research and data collection. However, the project was set aside due to a lack of resources.<sup>141</sup> There have since been increased calls for more federal support and guidance on data collection. The Pennsylvania Supreme Court’s Office

of Elder Justice in the Courts commented that “assistance is needed to support state courts in efforts to improve...data collection regarding guardianships” and that “states should be offered incentives and technical assistance in developing electronic filing and reporting systems that collect basic guardianship information.”<sup>142</sup>

In recent years, the federal government has taken steps to improve communication and cooperation between states and increase public understanding of guardianship by facilitating data collection on guardianship. As previously discussed in this report, HHS launched NAMRS in 2013 with the goal of providing consistent and accurate national data on the exploitation and abuse of older Americans, including abuse that may occur under guardianship.<sup>143</sup> NAMRS collects state APS data on elder adults and adults with disabilities. In the first year of being active, 54 state and territorial APS programs volunteered to submit data, allowing NAMRS to begin collecting national data in 2017.<sup>144</sup> HHS also administers the National Center on Elder Abuse, which collects information on the research, training, and resources available regarding elder abuse.<sup>145</sup>

### **State and Local Reform Efforts**

Some states have taken steps to collect detailed guardianship data. Among the states that have taken a lead in guardianship data collection, Minnesota is often viewed at the forefront. Minnesota developed an online accounting system called Conservator Account Monitoring Preparation and Electronic Reporting (CAMPER), which tracks all transactions made by guardians of the estate.<sup>146</sup> In 2016, the then Manager of the Conservator Account Auditing Program for the Minnesota Judicial Branch, Cate Boyko, testified before the Committee on the implementation of this system.<sup>147</sup> While its central purpose is to monitor and audit financial activities, the system also allows the state to collect uniform data from each county and provide detailed statewide trends in guardianship.

In testimony to the Senate Aging Committee in April 2018, David Slayton, the Administrative Director of the Texas Office of Court Administration, discussed Texas’ new law requiring all guardians to be registered in a central database.<sup>148</sup> This will not only help with oversight, but will provide much needed data in one of the largest states in the country. In Nevada, the newly created Guardianship Compliance Office will also implement a guardianship case management system to allow statewide tracking of guardianship data.<sup>149</sup> Pennsylvania is also in the process of implementing a statewide Guardianship Tracking System, “which will allow a centralized place for accessing information about guardianship arrangements.”<sup>150</sup>

There are also efforts being led and implemented on the county level. In June 2018, the Clerk & Comptroller’s Office of Palm Beach County Florida began implementing the Guardianship Inventory Reports & Accountings for Florida (GIRAFF) program, a web-based system to help evaluate and track guardianships in Palm Beach County.<sup>151</sup> GIRAFF has been designed to eventually grow and collect data for every county in Florida.<sup>152</sup> In Indiana, a 2014 four-county pilot program has expanded to a 60-county guardianship registry which collects basic information on new guardianships with plans to eventually expand to every county in the state.<sup>153</sup>

## Recommendations

Commenters who responded to the Committee's request provided a number of recommendations to improve the data that is collected and available regarding guardianship. The Committee endorses the following recommendations:

- ***Statewide Data Registries*** – Such registries would create a single location to collect and disseminate data, allowing for more cohesive collection of data.
- ***Increased Federal Support and Guidance to States***– Support to state court systems or other state entities would help create cohesive collection efforts, improving the ability to share information and collect national data.
- ***Increased Data Collection by Federal Agencies*** – Additional resources aimed at data collection from federal agencies would help states design, test, and improve data collection systems, complement increased federal guidance, and further help create a more consistent national data collection effort.
- ***Creation of a National Resource Center*** – A national resource center on guardianship would collect and publish information for the benefit of courts, policy makers, individuals subject to guardianship, guardians, community organizations, and other stakeholders. Information collected and published by the resource center may include statistics related to guardianship, information on laws and regulations, published research, and training materials.

## Conclusion

Guardianship is an important and necessary tool used to support and protect individuals who are unable to make important decisions about their finances and well-being. However, it also creates an opportunity for abuse and exploitation by unscrupulous individuals. This report continues the United States Senate Special Committee on Aging's long-standing effort to protect older Americans and people with disabilities from abuse, neglect, and exploitation by calling attention to issues that prevent guardianships from fulfilling their valuable and intended purpose.

In April 2018, following reports of guardians using legal process to strip individuals of their rights, homes, savings, and, ultimately, their dignity, the Committee held a hearing to examine the current state of the guardianship system and reform efforts underway. One witness who testified divided guardians into two groups: "[t]he protectors, the good guardians, the good agents under powers of attorney, the good representative payees, and all the good friends, families, and agencies acting in this capacity... [who] protect the individuals for whom they are responsible and confront those who try to take advantage of them," and "[g]uardians who act as intentional predators, ...[and] exploit vulnerable persons without mercy."<sup>154</sup>

In the course of our investigation, the Committee identified a number of issues that leave individuals subject to guardianship exposed to risk of exploitation, neglect, and abuse. To gain greater insight, the Committee officially requested recommendations on guardianship reform from stakeholders throughout the country. Among the issues identified by those who responded, the need for better data collection, improved oversight of guardians, and greater use of alternatives to guardianship were common themes.

- ***Oversight of Guardians and Guardianship Arrangements*** – Judges may lack sufficient information when considering guardianship petitions, and courts often struggle to conduct oversight of guardians and guardianship cases.
- ***Alternatives to Guardianship and Restoration of Rights*** – Courts often fail to consider less-restrictive alternatives to guardianship, and it is difficult for individuals who regain capacity or were placed in inappropriate arrangements to have their rights restored.
- ***Data Collection*** – The lack of reliable, consistent data – at the local, state, and national level – hinders the ability of policy makers to identify structural deficiencies and trends that would support targeted reforms.

In addition to these themes, commenters also called for enhanced protections for the individual subject to guardianship's due process rights, as well as improved training for guardians, judges, court staff, community organizations, and all parties with interests in the guardianship system. This report contains many of the comments received by the Committee, but readers can access all of the comments by contacting the U.S. Senate Special Committee on Aging at (202) 224-5364.

## Looking Ahead

As America's population continues to age, guardianship will continue to be an important and necessary tool used to protect and support individuals whom courts have determined lack sufficient capacity to make certain decisions on their own. However, as this report has demonstrated, there are many opportunities for improving and reforming the guardianship system. Following its year-long investigation, the Committee recommends several actions to that will strengthen these arrangements and improve the well-being of those subject to guardianship:

- To improve oversight of guardians and guardianship arrangements, the Committee recommends:
  - **Enhanced Monitoring** – State courts should engage in more thorough and frequent reviews of guardianship arrangements, and should work with financial monitoring companies to identify suspicious transactions and notify the court and guardian of potential risks.
  - **Background Checks** – Courts should conduct criminal background checks on all prospective guardians.
  - **Improved Collaboration** – Coordination and communication should occur between the court and federal agencies, including the SSA and VA, and between the court and community organizations.
  - **Volunteer Visitor Programs** – Support for individuals who help to inform the court about the status of the respondent before a guardian is appointed and periodically throughout the guardianship should be increased.
  - **Training** – All parties related to the guardianship, including the guardian, court staff, and family members, should be trained on guardian responsibilities and on the signs of abuse.
- To encourage the use of less-restrictive alternatives and promote restoration of rights, when appropriate, the Committee recommends:
  - **Promotion of Alternatives to Guardianship** – States should encourage courts to utilize alternatives to guardianship through state statutes and public awareness campaigns. Such efforts would officially promote less restrictive alternatives such as limited guardianships and supported decision-making.
  - **Increased Training and Education** – Required comprehensive training for judicial officials, attorneys, and guardians would increase understanding and appreciation of less restrictive alternatives to guardianship and the availability of opportunities for restoration of rights, when and if it becomes appropriate.
  - **Strengthened Protections for Individuals under Guardianship** – State laws need to be strengthened to ensure individuals seeking a restoration of rights are guaranteed unbiased legal representation and access to resources for a timely consideration by the courts.
  - **Nationwide Adoption of the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act** – State guardianship laws need greater uniformity to ensure better protections and control for individuals being considered for guardianship and those pursuing a restoration of their rights.



- To provide policy makers and other stakeholders with improved data regarding guardianship arrangements, the Committee recommends:
  - ***Statewide Data Registries*** – Such registries would create a single location to collect and disseminate data, allowing for more cohesive collection of data.
  - ***Increased Federal Support and Guidance to States***– Support to state court systems or other state entities would help create cohesive collection efforts, improving the ability to share information and collect national data.
  - ***Increased Data Collection by Federal Agencies*** – Additional resources aimed at data collection from federal agencies would help states design, test, and improve data collection systems, complement increased federal guidance, and further help create a more consistent national data collection effort.
  - ***Creation of a National Resource Center*** – A national resource center on guardianship would collect and publish information for the benefit of courts, policy makers, individuals subject to guardianship, guardians, community organizations, and other stakeholders. Information collected and published by the resource center may include statistics related to guardianship, information on laws and regulations, published research, and training materials.

This report continues the U.S. Senate Special Committee on Aging’s commitment to examining issues of importance to older Americans, and serves as a foundation for developing these and other policies that will improve the lives of seniors today and for generations to come.

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<sup>1</sup> National Center for State Courts, *State court leaders strive to improve guardianship and conservatorship oversight*, Backgrounder, Nov. 30, 2016, at <https://www.ncsc.org/Newsroom/Backgrounder/2016/Guardianship.aspx>.

<sup>2</sup> Although guardians may also be appointed to care for minors, those relationships are outside the scope of this report.

<sup>3</sup> Fred Bayles, "Guardians of the Elderly: An Ailing System Part I: Declared 'Legally Dead' by a Troubled System," *ASSOCIATED PRESS* (September 19, 1987).

<sup>4</sup> Rachel Aviv, "How the Elderly Lose Their Rights," *NEW YORKER*, Oct. 9, 2017, at <https://www.newyorker.com/magazine/2017/10/09/how-the-elderly-lose-their-rights>.

<sup>5</sup> Joseph Neff, They Did 30 Years for Someone Else's Crime. Then Paid for It, *NEW YORK TIMES*, Apr. 7, 2018, at <https://www.nytimes.com/2018/04/07/us/mccollum-brown-exoneration.html>.

<sup>6</sup> Frank Johns, "A Modern History of Guardianship Law," in *COMPARATIVE PERSPECTIVES ON ADULT GUARDIANSHIP*, ed. Kimberly Dayton (2014), pp. 17-18. See also Winsor C. Schmidt, Pamela B. Teaster, Marta Mendiondo, Jennifer Marcum, Tenzin Wangmo, "Program and Ward Characteristics and Cost Savings of Public Guardianship: An Evaluation of the Florida Public Guardianship Program," *University of Florida Journal of Law and Public Policy*, no. 28 (2017), pp. 329, 342-43 (citing Peter Hostman, "Protective Services for the Elderly: The Limits of Parens Patriae," *Missouri Law Review*, no. 40 (1975), pp. 215, 221).

<sup>7</sup> Frank Johns, "A Modern History of Guardianship Law," in *COMPARATIVE PERSPECTIVES ON ADULT GUARDIANSHIP*, ed. Kimberly Dayton (2014), pp. 17-18.

<sup>8</sup> *Ibid.*

<sup>9</sup> National Conference of Commissioners on Uniform State Laws, "Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act," 2017, at [http://www.uniformlaws.org/shared/docs/Guardianship%20and%20Protective%20Proceedings/UGCOPAA\\_Final\\_2018aug28.pdf](http://www.uniformlaws.org/shared/docs/Guardianship%20and%20Protective%20Proceedings/UGCOPAA_Final_2018aug28.pdf).

<sup>10</sup> Uniform Law Commission, *Uniform Probate Code* Article 5, 1969.

<sup>11</sup> Fred Bayles, "Guardians of the Elderly: An Ailing System Part I: Declared 'Legally Dead' by a Troubled System," *ASSOCIATED PRESS* (September 19, 1987).

<sup>12</sup> Frank Johns, "A Modern History of Guardianship Law," in *COMPARATIVE PERSPECTIVES ON ADULT GUARDIANSHIP*, ed. Kimberly Dayton (2014), pp. 17-18.; National Council on Disability, *Beyond Guardianship: Toward Alternatives That Promote Greater Self-Determination*, March 22, 2018, at [https://ncd.gov/sites/default/files/NCD\\_Guardianship\\_Report\\_Accessible.pdf](https://ncd.gov/sites/default/files/NCD_Guardianship_Report_Accessible.pdf). See also Fred Bayles, "Guardians of the Elderly: An Ailing System Part I: Declared 'Legally Dead' by a Troubled System," *ASSOCIATED PRESS* (Sept. 19, 1987), in Human Resources Committee, *Abuses in Guardianship of the Elderly and Infirm: A National Disgrace*, Print 100-639 (Dec. 1987).

<sup>13</sup> U.S. Congress, Sen. Gordon H. Smith and Sen. Herb Kohl, *GUARDIANSHIP FOR THE ELDERLY: PROTECTING THE RIGHTS AND WELFARE OF SENIORS WITH REDUCED CAPACITY*, POSITION PAPER, 110th Cong. (Washington, DC: GPO, 2007) p. 4.

<sup>14</sup> See National Conference of Commissioners on Uniform State Laws, "Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act," 2017, at [http://www.uniformlaws.org/shared/docs/Guardianship%20and%20Protective%20Proceedings/UGCOPAA\\_Final\\_2018aug28.pdf](http://www.uniformlaws.org/shared/docs/Guardianship%20and%20Protective%20Proceedings/UGCOPAA_Final_2018aug28.pdf).

<sup>15</sup> These conferences were convened by members of the National Guardianship Network and partner organizations to set national standards for guardianship, develop standards of practice, and promote rules that would protect the interests of individuals under guardianship. For more information, see National Center for State Courts Center for Elders and the Courts; "Guardianship Reform Efforts," at <http://www.eldersandcourts.org/Guardianship/Guardianship-Material-For-Right-Rail-Menu-for-Guardianship/Guardianship-Basics/Guardianship-Reform-Efforts.aspx>.

<sup>16</sup> *Ibid.*

<sup>17</sup> Uniform Law Commission, A SUMMARY, THE UNIFORM GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT (2017), at <http://www.uniformlaws.org/her.aspx?title=Guardianship,%20Conservatorship,%20and%20Other%20Protective%20Arrangements%20Act>.

<sup>18</sup> National Conference of Commissioners on Uniform State Laws, "Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act," 2017, at [http://www.uniformlaws.org/shared/docs/Guardianship%20and%20Protective%20Proceedings/UGCOPAA\\_Final\\_2018aug28.pdf](http://www.uniformlaws.org/shared/docs/Guardianship%20and%20Protective%20Proceedings/UGCOPAA_Final_2018aug28.pdf). National Conference of Commissioners on Uniform State Laws, "Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act," 2017, at [http://www.uniformlaws.org/shared/docs/Guardianship%20and%20Protective%20Proceedings/UGCOPAA\\_Final\\_2018aug28.pdf](http://www.uniformlaws.org/shared/docs/Guardianship%20and%20Protective%20Proceedings/UGCOPAA_Final_2018aug28.pdf).

<sup>20</sup> See generally U.S. Congress, Sen. Gordon H. Smith and Sen. Herb Kohl, *GUARDIANSHIP FOR THE ELDERLY: PROTECTING THE RIGHTS AND WELFARE OF SENIORS WITH REDUCED CAPACITY*, POSITION PAPER, 110th Cong. (Washington, DC: GPO, 2007) pp. 8-10; Naomi Karp, AARP Public Policy Institute and Erica Wood, American Bar Association Commission on Law and Aging, *GUARDING THE GUARDIANS: PROMISING PRACTICES FOR COURT MONITORING* (2007), AARP Public Policy Institute, p. 6, and sources cited therein.

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<sup>22</sup> Uniform Law Commission, *The Guardianship, Conservatorship, and Other Protective Arrangements Act* (2017), Summary, at <http://www.eldersandcourts.org/Guardianship/Guardianship-Basics.aspx>.

<sup>22</sup> National Conference of Commissioners on Uniform State Laws, "Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act," 2017, at [http://www.uniformlaws.org/shared/docs/Guardianship%20and%20Protective%20Proceedings/UGCOPAA\\_Final\\_2018aug28.pdf](http://www.uniformlaws.org/shared/docs/Guardianship%20and%20Protective%20Proceedings/UGCOPAA_Final_2018aug28.pdf).

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<sup>24</sup> See 18-A MRSA 5-303(a). The plan must be filed at least 10 days before the hearing. See 18-A MRSA 5-303(d).

<sup>25</sup> National Guardianship Association and American Bar Association, *THE FUNDAMENTALS OF GUARDIANSHIP: WHAT EVERY GUARDIAN SHOULD KNOW* (American Bar Association, 2017), p. 9.

<sup>26</sup> *Ibid.*

<sup>27</sup> Naomi Karp, AARP Public Policy Institute and Erica Wood, American Bar Association Commission on Law and Aging, *GUARDING THE GUARDIANS: PROMISING PRACTICES FOR COURT MONITORING* (2007), AARP Public Policy Institute, p. 10.

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- <sup>35</sup> U.S. Congress, Sen. Gordon H. Smith and Sen. Herb Kohl, *GUARDIANSHIP FOR THE ELDERLY: PROTECTING THE RIGHTS AND WELFARE OF SENIORS WITH REDUCED CAPACITY*, POSITION PAPER, 110th Cong. (Washington, DC: GPO, 2007) p. 7.
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- <sup>38</sup> Fred Bayles, “Guardians of the Elderly: An Ailing System Part I: Declared ‘Legally Dead’ by a Troubled System,” *ASSOCIATED PRESS* (September 19, 1987).
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- <sup>48</sup> Letter from Maryland Department of Human Resources, to U.S. Senate Special Committee on Aging, Jul. 10, 2018.
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- <sup>115</sup> Letter from Michael Amoruso, President of the National Academy of Elder Law Attorneys, to the United States Senate Special Committee on Aging, July 20, 2018.
- <sup>116</sup> Rebekah Diller, “Legal Capacity for All: Including Older Persons in the Shift from Adult Guardianship to Supported Decision-Making,” *Fordham Urban Law Journal*, 2016, at <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2657&context=ulj>.
- <sup>117</sup> American Bar Association Commission on Law and Aging, *State Adult Guardianship Summary: Directions of Reform – 2017*, 2017, at [https://www.americanbar.org/content/dam/aba/administrative/law\\_aging/2017\\_legislative\\_summary\\_fnl.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/law_aging/2017_legislative_summary_fnl.authcheckdam.pdf).
- <sup>118</sup> *Ibid.*
- <sup>119</sup> LegiScan; “South Carolina Senate Bill 415;” May 31, 2017, at <https://legiscan.com/SC/bill/S0415/2017>.
- <sup>120</sup> 18-A MRSA 5-304.
- <sup>121</sup> Many commenters called for increased attention for limited guardianships and other protective arrangements that provide greater autonomy and due process protections for the individual; these are discussed in more detail in the next chapter. See Cumberland County, Maine; CumberlandCounty.org; “Adjudication of Incapacity and Appointment of Guardian For Incapacitated Person;” at <https://www.cumberlandcounty.org/DocumentCenter/View/931/PP-204-Adjudication-of-Incapacity-and-Appointment-of-Guardian-for-Incapacitated-Person?>.
- <sup>122</sup> U.S. Government Accountability Office, *Elder Abuse: The Extent of Abuse by Guardians Is Unknown, but Some Measures Exist to Help Protect Older Adults*, GAO-17-33, November 2016, at <https://www.gao.gov/assets/690/681088.pdf>.
- <sup>123</sup> Letter from Holly O’Grady Cook, Principal Deputy Director of the American Bar Association’s Government Affairs Office, to the United States Senate Special Committee on Aging, July 20, 2018.
- <sup>124</sup> National Center for State Courts, Center for Elders and the Courts, *Adult Guardianship Court Data and Issues Results from an Online Survey*, March 2, 2010, at [http://aja.ncsc.dni.us/pdfs/GuardianshipSurveyReport\\_FINAL.pdf](http://aja.ncsc.dni.us/pdfs/GuardianshipSurveyReport_FINAL.pdf).
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- <sup>126</sup> *Ibid.*
- <sup>127</sup> Letter from Holly O’Grady Cook, Principal Deputy Director of the American Bar Association’s Government Affairs Office, to the United States Senate Special Committee on Aging, July 20, 2018.
- <sup>128</sup> Letter from Carleton Coleman, President of the National Guardianship Association, to the United States Senate Special Committee on Aging, July 20, 2018, at <https://www.guardianship.org/wp-content/uploads/2018/08/Special-Committee-on-Aging.pdf>.
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- <sup>132</sup> Arian Campo-Flores and Ashby Jones, “Abuse Plagues System of Legal Guardians for Adults,” *The Wall Street Journal*, Oct. 30, 2015, at <https://www.wsj.com/articles/abuse-plagues-system-of-legal-guardians-for-adults-1446225524>.
- <sup>133</sup> Letter from Michael Amoruso, President of the National Academy of Elder Law Attorneys, to the United States Senate Special Committee on Aging, July 20, 2018.
- <sup>134</sup> Letter from Wanda Willis, Executive Director of the Tennessee Council on Developmental Disabilities, to the United States Senate Special Committee on Aging, July 20, 2018.
- <sup>135</sup> Letter from Michael Hagenlock, Chief of the Montana Adult Protective Services Bureau, to the United States Senate Special Committee on Aging, July 12, 2018.

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- <sup>136</sup> Letter from Abby Cox, Director of the Georgia Department of Human Services Division of Aging Services, to the United States Senate Special Committee on Aging, July 16, 2018.
- <sup>137</sup> Letter from Judge Paula Francisco Ott, Chair of the Pennsylvania Supreme Court Advisory Council on Elder Justice in the Courts, to the United States Senate Special Committee on Aging, July 20, 2018.
- <sup>138</sup> Letter from Carleton Coleman, President of the National Guardianship Association, to the United States Senate Special Committee on Aging, July 20, 2018, at <https://www.guardianship.org/wp-content/uploads/2018/08/Special-Committee-on-Aging.pdf>.
- <sup>139</sup> Letter from Heather Strickland, Assistant Special Agent in Charge of the Georgia Bureau of Investigations' Crimes Against the Disabled and Elderly, to the United States Senate Special Committee on Aging, July 2, 2018.
- <sup>140</sup> Letter from Judy B. Taylor, Administrator of the Idaho Commission on Aging, to the United States Senate Special Committee on Aging, July 16, 2018.
- <sup>141</sup> *Ibid.*
- <sup>142</sup> Letter from Judge Paula Francisco Ott, Chair of the Pennsylvania Supreme Court Advisory Council on Elder Justice in the Courts, to the United States Senate Special Committee on Aging, July 20, 2018.
- <sup>143</sup> Administration for Community Living, National Adult Maltreatment Reporting System, "What is NAMRS?" available at <https://namrs.acl.gov/>.
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- <sup>148</sup> Testimony of Texas Judicial Council Executive Director David Slayton, in U.S. Congress, Senate Special Committee on Aging, *Abuse of Power: Exploitation of Older Americans by Guardians and Others They Trust*, hearing, 115<sup>th</sup> Cong., 2<sup>nd</sup> sess., April 18, 2018, [https://www.aging.senate.gov/imo/media/doc/SCA\\_Slayton\\_04\\_18\\_18.pdf](https://www.aging.senate.gov/imo/media/doc/SCA_Slayton_04_18_18.pdf).
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