

Long-Term Care Ombudsman Program: Ombudsmen Talk about Guardianship

Prepared by the National Association of State Units on Aging

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February 2004

Supported by the U. S. Administration on Aging

Acknowledgements

We wish to acknowledge and thank those persons who participated in the two teleconferences on guardianship, held May 13 and May 14, 2003. The Ombudsmen and State Unit on Aging staff from 11 states (Alaska, Arizona, California, Illinois, Minnesota, Missouri, Nebraska, Oklahoma, Tennessee, Vermont, and Wisconsin) that participated in the discussions provided ideas and experiences from which this paper was developed. Teleconference participants are listed in Appendix A.

About the Author

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The National Association of State Units on Aging (NASUA) is a private, nonprofit organization whose membership is comprised of the 57 state and territorial offices on aging.

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<p>This paper was supported, in part, by a grant, No. 90AM2139, from the Administration on Aging, Department of Health and Human Services. Grantees undertaking projects under government sponsorship are encouraged to express freely their findings and conclusions. Points of view or opinions do not, therefore, necessarily represent official Administration on Aging policy.</p>

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Table of Contents

Background	1
Definitions	2
Teleconferences	2
Highlights of the Discussion	4
<u>Current State Activities</u>	4
<u>Issues Identification</u>	6
<u>Addressing Complaints about Guardianship</u>	9
<u>Guidelines for Handling Complaints Involving Guardians</u>	10
<u>Successful Systems Strategies for Addressing Guardianship Issues</u>	10
Summary	11
Resources	13
Appendices	
A: List of Teleconference Participants	
B: Long Term Care Ombudsman Program Guidance: Guardianship and Related Issues, Background and Policy Options for States	
C: When a Resident has a Guardian: Oklahoma Ombudsman Guideline	
D: Good Guardianship: Promising Practice Ideas on Court Links for Area Agencies on Aging, Adult Protective Services, and Long-term Care Ombudsman	
E: Good Guardianship: Promising Practice Ideas on Community Links	

Long-Term Care Ombudsman Program:

Ombudsmen Talk about Guardianship

The National Association of State Units on Aging (NASUA), as part of its support for the National Ombudsman Resource Center, conducted two teleconferences for state long-term care ombudsmen to discuss the challenges they encounter in the guardianship and surrogate decision-making arena and how their programs are attempting to address these issues. This paper presents highlights from the discussions.

Background

When the Older Americans Act was amended in 1992, the Ombudsman Program was given additional responsibility to address issues related to the appointment and activities of guardians of long-term care residents. Specifically, Sec. 712(a)((3)(A)(ii) states that the Ombudsman Program shall identify, investigate and resolve complaints that --

relate to action, inaction, or decisions, that may adversely affect the health, safety, welfare, or rights of the residents (including the welfare and rights of the residents with respect to the appointment and activities of guardians and representative payees).

Over the years, ombudsman programs have encountered a variety of situations related to residents' needs for guardians and surrogate decision-makers. These issues include the following circumstances:

- The resident is able to express his/her wishes but there is a question about his/her capacity to make a decision.
- The resident is unable to make a specific decision and does not have a guardian or surrogate decision-maker.
- The guardian or legal representative is not acting in the resident's best interest or fulfilling their duties.
- The resident's wishes conflict with the actions or judgment of the guardian or legal representative.

Although the ombudsman program has experienced a continual increase in the number of complaints received (from 1996 through 2001, the number of complaints increased by 47.5%), the percentage of complaints concerning guardianship, conservatorship, power of attorney, and wills remained constant. However, aggregated complaint data tells only part of the story of ombudsman challenges and involvement in this arena. To capture a fuller understanding of the issues related to guardianship and surrogate decision-making ombudsmen are encountering, NASUA convened two teleconference discussions in May 2003.

Definitions

Except for the definition of "Guardian ad litem" (GAL), the following definitions are taken from *The Long Term Care Ombudsman Program Guidance: Guardianship and Related Issues*, which is attached in Appendix B.

- ❑ **Fiduciary** is an individual or legal entity (such as a bank) appointed to manage the property, benefits and/or finances of an individual. A fiduciary may also be referred to as a "trustee."
- ❑ **Guardian (or Conservator)** means an individual or organization named by order of the court to exercise any or all powers and rights over the person and/or estate of an individual.
- ❑ **Guardian ad litem (GAL)** serves as the eyes and ears of the court. This person is charged with investigating the circumstances of the potential ward's situation and acting as an advocate to protect the person's due process rights¹
- ❑ **Guardianship** is a legal relationship that occurs when a guardian is appointed by a judge to make decisions for another person (the ward or incapacitated persons) who is found to lack capacity to make personal and/or property decisions. Guardianship is the most restrictive and intrusive form of surrogate decision making
- ❑ **Limited guardian** is a guardian who is given only those powers and rights over the person and/or estate of the individual which are specified in the court order appointing the guardian. The ward keeps the remainder of his/her legal rights.
- ❑ **Surrogate decision-maker** can be a person designated by an individual under an advance directive, a court-appointed guardian, or an informally identified person such as a close family member or friend.
- ❑ **Ward (or Conservatee)** is the person for whom a guardian (or conservator) has been appointed.

Teleconferences

NASUA extended invitations to all state long-term care ombudsmen to participate in one of two teleconferences on guardianship and surrogate decision making issues. Two teleconferences were offered to allow for greater participation and discussion. Teleconferences were held on May 13 and May 14, 2003. A total of 14 persons representing 11 states participated. A list of teleconference participants is provided in Appendix A.

The primary goal of the calls was to stimulate dialogue among state ombudsmen to facilitate the exchange of ideas and successful strategies and to:

1. Identify the primary concerns related to guardianship and surrogate decision-making which ombudsman programs are encountering.

¹ Summers, Scott K. *Guardianship & Conservatorship: A Handbook for Lawyers*. Senior Lawyers Division, American Bar Association, 1996.

2. Identify successful practices or initiatives for working with guardians, families and surrogate decision-makers to address these concerns.

A list of questions was sent to state ombudsmen prior to the calls. NASUA staff used these questions to guide the discussions:

1. Is there anything currently going on in your state concerning guardianship that you would like your colleagues to be aware of? (e.g., legislation, conferences, state or local initiatives or task forces, establishment of guardianship associations or committees, etc.)
2. What are the top two or three complaint issues/concerns your program handles concerning surrogate decision-making or guardianship related issues for residents?
3. What creative or successful strategies have you used to work with residents, families, guardians, and surrogate decision-makers to resolve these concerns on behalf of residents?
4. Do you have written policies or procedures for handling complaints, which involve residents who cannot speak for themselves and do not have a guardian or other surrogate decision-maker? Or for whom the guardian or surrogate decision-maker is allegedly not acting in the resident's best interests?
5. Has your program developed any policies or model practices for working or coordinating with the legal community, ethics committees, guardianship associations, or protection and advocacy programs to address these issues?

Two additional questions were posed during the teleconferences:

1. Has your program been involved with The Center for Social Gerontology's (TCSG) mediation program?
2. Have you read or used the NASUA's "Long Term Care Ombudsman Program Guidance: Guardianship and Related Issues, Background and Policy Options for States" (issued in 1995).

While most participants had not utilized these two resources, there was significant interest in having more information about them. Information about both resources is included in the Resources Section of this paper and the Program Guidance document is attached in Appendix B.

Highlights of the Discussion

Current State Activities

- The two primary issues of concern ombudsmen see relate to **training** and **oversight** of guardians.

Several teleconference participants indicated that their current laws regarding training and oversight are generally effective when followed. However, others indicated problems with implementation of the guardianship and conservator laws in their states and problems with getting recommended legislation enacted. Two states (Missouri and Wisconsin) have special training programs for guardians of children but not for adults. The state ombudsmen in these states are working to address this inconsistency. In Arizona and California, how guardianships are handled and who is responsible for oversight varies by locality. This inconsistency presents challenges for persons needing guardians and those who wish to modify or negate existing guardianships.

- ◆ **Alaska:** Three years ago a group of stakeholders, including the Office of Public Advocacy (the public guardianship program in Alaska), private guardians, the ombudsman program and the Disability Law Center, came together to discuss the need for guardianship legislation. Originally, the group thought the ombudsman program could oversee all guardians in the state, but that concept was quickly dismissed. There is a need for guardians in the Anchorage area but only two persons have expressed an interest in becoming guardians. So far, legislation has not been proposed, but the group continues to meet to discuss these issues.
- ◆ **Arizona:** The State Supreme Court requires all fiduciaries to complete a certification program. The training is done by the public court administrator and includes ethics training. There is also a Guardianship Review Program (GRP) operated by the Superior Court of Arizona, Maricopa County, which uses community volunteers to monitor guardianships by reviewing the annual reports that guardians are required to submit, contacting the guardians and visiting the wards. The volunteers report their observations and any recommended actions to the court. Court staff review the reports to determine if further action is necessary. The Superior Court has authority to send out investigators to handle complaints both before and after the guardianship is awarded.
- ◆ **Illinois:** About three years ago, a multi-disciplinary task force of the Illinois Guardianship Reform Project, initiated by the Protection & Advocacy agency Equip for Equality, identified and examined problems with the state's guardianship system. The task force produced a report that included recommendations for legislative reform. None of the proposed reforms has been enacted. The Office of the State

Guardian is the guardian of last resort. The state has no required training for guardians ad litem (GALs).

- ♦ **Minnesota:** Current law provides for a "court visitor" to make a face-to-face visit with all potential wards when a petition is filed, in order to assess their capacity and determine their wishes.
- ♦ **Missouri:** The state ombudsman program has been attending guardianship hearings to observe the process of how guardianships are determined. According to the Missouri Bar Association (MBA), formal training is not required or offered to guardians or guardians ad litem. Training is provided to GALs for children but not adults. The Missouri Long-Term Care Ombudsman Program has approached the Missouri Bar Association about putting together a work group to develop training for GALs of adults. The work group has identified three states that have developed some training, and is in the process of gathering information to develop a five - six hour training program. Carol Scott, State Ombudsman, stated that "We are hoping that the Missouri Bar will attach CEUs to entice lawyers to get the training." The ombudsman program is attempting to get on the agenda at the MBA's annual conference to raise awareness about this effort. In Missouri, elected officials known as public administrators (one in each of Missouri's 115 counties) serve as guardians when no one else is available or in situations where there are family disputes over guardianship. It is hoped that these public administrators would receive the new training and help identify likely attorneys in their counties to target them for training as well. The MBA and/or the ombudsman program will underwrite the printing costs of the training materials if and when the training program is set up.

"... there is no formal training for guardians or guardians ad litem ..."
Carol Scott
MO State Ombudsman
- ♦ **Nebraska:** An accounting must be filed by guardians annually with the court; however, the reports generally go into a file and nobody looks at them. Nebraska also has a "Single Transaction" statute that provides for guardians to deal with single tasks to assist the ward, such as helping the person spend down to become Medicaid eligible or make a placement decision. Once the task is accomplished, the guardianship ends and it is difficult to find someone to act as a guardian for on-going decision-making.
- ♦ **Wisconsin:** GALs for children, but not for adults, are required to be trained before taking cases. A current bill in the legislature would make training a requirement for GALs of adults, whether the person is elderly or has a disability. If passed, training for GALs of adults will be conducted by the Wisconsin State Bar using their existing educational framework. Continuing Legal Education (CLE) credits will most likely be attached to the requirement. A second bill proposes reorganization of the guardianship statute for consistency in the code. Currently, if someone is under a guardianship and admitted to a nursing home with more than 16 beds, they must also have a "Chapter 55", which is a protective placement order in addition to the

guardianship. Certain time limits are set for protective placement hearings and guardianship hearings. Under the proposed legislation, these proceedings and time frames would be made more consistent.

In Wisconsin, an individual cannot be guardian for more than five persons. Corporate guardians (commercial entities or private, non-profit organizations such as Lutheran Social Services or Catholic Charities) have a higher case load limit. The Department of Health and Family Services monitors these guardians and there have been few reported problems.

Wisconsin has a **Guardianship Support Center** operated by the Elder Law Center, a sub-section of the Coalition of Wisconsin Aging Groups (CWAG). The CWAG is a grass-roots, non-profit organization concerned with issues affecting older persons and their families. The Center operates a telephone hotline (1-800-488-2596) to respond to questions from guardians, wards, nursing homes or any member of the public; publishes a newsletter; and conducts training around the state. The Center handles issues relative to guardianships and guardianship law specific to Wisconsin. Information about the Guardianship Support Center can be found at the CWAG website: www.cwag.org.

Issues Identification

- ❑ Complaints come from **many different sources** --- families, nursing home administrators, local ombudsmen and residents.
- ❑ Complaints center around both **systems issues** and **individual complaints**, which are often perceived as indicative of the larger systems issues.
- ❑ The primary issues identified by the ombudsmen on the teleconferences were: **corporate guardianships and ethical dilemmas; the lack of available guardians; and unresponsive and untrained guardians.**

Ombudsmen were asked to identify the two or three top guardianship issues on which they receive complaints. Not surprisingly, many reported handling similar types of concerns, which include both systemic and individual quality issues.

Systems Issue #1: Corporate Guardianships and Ethical Dilemmas

- ◆ **Arizona:** One company that owns home care agencies acts as guardians/conservators for their clients, responsible for making decisions about how much care they need.
- ◆ **Minnesota:** When there is no decision-maker for residents with dementia, it can be difficult to get the court to act when circumstances arise, such as a need for surgery.

Absent court action, the nursing home may act on the resident's behalf, creating an ethical dilemma.

- ♦ **Nebraska:** There are no oversight or legislative limit on the number of individual cases a private "guardianship business" can handle or how many wards a guardian can represent. Complicating this issue is the fact that there are not enough available guardians for the public guardianship program.

Systems Issue #2: The Lack of Guardians and Petitioners for Guardianship

- ♦ **Alaska:** Ron Cowan, State Ombudsman, reported that "... when I was a surveyor I found that residents who needed a guardian had no one advocating for them, no one with legal standing, and no one willing to petition. The biggest problem we have now is judges who are not willing to hear a guardianship case unless you can show evidence that the individual is being harmed because they don't have a legal advocate." If a person is in a nursing home, judges perceive that they are protected.
- ♦ **Arizona and California:** The public judiciary are resistant to taking new guardianship cases unless the individual has an estate (funds, etc.) that requires management. Often there is no one to serve if the individual has no money. In Arizona, the court does not have the power to appoint the Public Fiduciary when no one is willing or able to serve as such or file a petition. Without funds for an attorney or the involvement of the Attorney General's Office in cases of extreme need for protection, it is difficult to initiate.
- ♦ **Illinois:** There is no entity willing to file guardianship petitions on behalf residents in facilities who need guardians. The State Guardianship and Advocacy Commission, which operates the Office of the State Guardian, is understaffed and unable to handle all the requests that come in.
- ♦ **Minnesota:** The biggest issue is not being able to find people willing to act as guardians.
- ♦ **Tennessee:** The public guardianship program has a cap on the number of clients a conservator can accept. Once that number is reached, the program does not accept any new clients without a court order, which is difficult to obtain if there is no one to speak on behalf of the person. This situation may occur because a nursing home is unwilling to petition the court. Additionally, legal services (if the person is not competent) will not assist because they require a competent person to request their services, and Adult Protective Services will not petition the court if the person is residing in a nursing home because he or she is considered to already be in a protected environment and not in need of APS services. Individuals may go without needed guardianship services as a result.

Individual Issues: Unresponsive and Untrained Guardians

Ombudsmen report that complaints come from facilities and family members who are not happy with what other family members are doing.

- ♦ **California:** The state ombudsman has noted an increase in issues involving public guardians not following through on end-of-life care decisions made by the conservatee because of fear of liability. Some of these situations involve conservators whose beliefs are in conflict with the conservatee's expressed wish to discontinue treatment. There is currently a bill in the legislature that would require public guardians and conservators to follow the wishes of the conservatee specified in an advance health care directive or expressed in oral communication. There is a question about whether or not the person with the advance directive could later override it by orally communicating a contrary wish.
- ♦ **Minnesota:** The biggest issue is guardians not listening to what the resident wants and not making an effort to address issues such as moving people from the community to a nursing home or not helping them move from a nursing home back into the community, if that's what they want. Another issue is guardians limiting visitors that the resident wants to see.
- ♦ **Illinois and Missouri:** In some cases, a family member who is not the guardian or legal representative makes a complaint about the guardian. Such cases are usually handled through mediation. The ombudsman typically visits the resident to determine if there is a problem and if s/he can speak for him/herself. In these situations, the ombudsman encourages the family member to talk with the guardian and provides information on how to petition the court to obtain a guardianship or have a power of attorney amended.
- ♦ **Oklahoma:** The ombudsman program is getting a lot of complaints from residents who say "my guardian won't let me do this", or "I am not getting my money and I want my personal needs allowance." The ombudsman's intervention, after obtaining the resident's permission to speak with the guardian, usually resolves the problem when the guardian realizes that someone is monitoring the situation. Such instances may arise when the resident wants to leave the nursing home and the guardian refuses to assist.

The ombudsman finds that some guardians do not seem to care what the ward wants and do not talk to their wards. The ombudsman program visits residents who want to have guardianships overturned. Residents complain that they are not included in making decisions they can make for themselves and are being shut out of their own lives. The ombudsman tries to help residents in such situations consider their options and what may occur if they cannot get the guardianship removed or have the current guardian replaced.

"Residents complain that they are not included in making decisions ... and are being shut out of their own lives."

Eleanor Kurtz
OK Assistant SLTCO

Often, nursing homes do not understand what a guardian is, do not ask for verification when someone says they are the resident's guardian, and do not understand the difference between a guardian and a power of attorney. Some judges do not follow the state's guardianship law that should lead to guardianship orders "tailored" to the needs of the person, specifying how the ward will participate in decision-making. In some cases, the prospective ward never sees an attorney, as required by law. The ombudsman program often educates newly appointed guardians about available resources.

Case Example: A resident wanted to move to another nursing home, so the ombudsman advised the judge and court-appointed guardian regarding the available resources to help them make an appropriate placement decision. The judge ordered the attorney to accompany the resident on visits to several nursing homes to help her decide where she might want to move. Unfortunately, the resident fell and broke her hip and stayed in the original nursing home.

- ♦ **Vermont:** The biggest issues are guardians ignoring the ward and wards who do not want a guardian or who believe the guardianship should be more limited.
- ♦ **Wisconsin:** The ombudsman program has found that in many cases guardians are not familiar with their responsibilities or how to make decisions that take the ward's wishes into consideration. The ombudsman program attempts to educate the players in these situations, but it is often difficult because of the animosity among the parties.

Addressing Complaints about Guardianship

- ❑ Most ombudsman programs handle guardianship related issues on a **case-by-case** basis, employing resources and strategies crafted to help meet the individual resident's needs and wishes.
- ❑ Only one state (Oklahoma) reported that they have developed written **guidelines** specific to guardianship issues.
- ❑ Most state programs provide **technical assistance** to local programs on how to handle guardianship related complaints.

Case-by-Case Responses

- ♦ **Arizona:** The ombudsman makes a referral to the Guardianship Review Program (see page 4 for a description) in cases involving guardians who are unresponsive or who do not consider the wishes of the ward.

- ◆ **Minnesota:** When complaints are reported about guardians, the ombudsman program typically pushes for a formal mediation, getting one of the mediation projects around the state to step in and try to resolve the issue by getting the guardian to make a decision more in line with the resident's wishes. If mediation does not work, the ombudsman consults with the Office of the Attorney General. A referral to legal services to have the guardian removed is considered a last resort. The resolution rate on such cases is high since many are resolved without going to court.
- ◆ **Vermont:** If there is a problem with a guardian or a resident wants a more limited guardianship, the ombudsman program assists such residents to obtain representation through the Senior Law Project. Ombudsmen then work closely with the attorneys in those cases to ensure the resident's wishes are considered.
- ◆ **Wisconsin:** The ombudsman program has petitioned the court for guardianship on behalf of residents in a couple of cases when there were extraordinary circumstances. The program is able to do this since the ombudsman is considered a public official and state law permits any relative, public official or other person to petition for the appointment of a guardian.

Guidelines for Handling Complaints Involving Guardians

- ◆ **Oklahoma:** The ombudsman program has developed guidelines for when a resident has a guardian and when a resident wants to go home (see Appendix C). These guidelines identify steps the ombudsman should take, including: determining if there is a guardianship; reviewing the guardianship order; advising the resident of his/her choices (one of which is to have the guardianship reviewed by the court); identifying other agencies that can offer assistance; determining if the situation is appropriate for mediation; and specifying appropriate actions when the local ombudsman receives a subpoena.

Successful Systems Strategies for Addressing Guardianship Issues

- Ombudsman programs coordinate with a variety of organizations at the state and local levels to address guardianship concerns and/or **develop educational initiatives and materials** to sensitize judges and guardians to the ward's perspective.

Working with Guardianship Associations

- ◆ The ombudsmen in **Arizona, California, and Minnesota** discussed the role of their state guardianship associations as a vehicle for addressing concerns about guardianship. In Arizona, the association is comprised of public and private guardians who are certified. In California, the association consists of public guardians in the

state's 58 counties; membership is not open to private conservators. In Minnesota, the state ombudsman has spoken at the guardianship association's state conference.

Education Efforts

- ♦ **Illinois:** The ombudsman program helped develop a booklet for guardians published by the Illinois Bar in 2000.
- ♦ **Oklahoma:** The ombudsman program is attempting to get on the agenda for the probate judges' yearly retreat to educate them about the guardianship law from a ward's perspective.

Local Coordination

- ♦ **Arizona:** In Maricopa County, a local ombudsman program coordinates a project called Alternatives to Guardianship. Comprised of representatives from Adult Protective Services, Medicaid, the Veterans' Administration and private attorneys, the project has been meeting regularly for the past five years to resolve cases. One alternative involves the use of a legal action known as a "single transaction" (A. R. S. 14-5409). This option can be used to access a person's funds to pay for care related expenses, spend down their funds to qualify for Medicaid or other benefits. This action is limited, and when the transaction is complete, the lawyer or other appointed fiduciary is released. This option has been used when an individual has limited funds and no one is in petitioning to become the person's conservator. Another alternative that can be used to help the person obtain non-emergency care is the Surrogate Decision Maker statute (A. R. S. 36-3231). The ombudsman program often provides education to physicians to encourage them to act as a surrogate decision maker in situations where the individual does not have any family or friends available or willing to serve in such a capacity, so that medical decisions can be made in a timely manner. Finding alternatives to guardianship is especially important when there is no one to serve as a guardian or conservator. The multidisciplinary team assesses each situation to determine which alternatives to guardianship are appropriate and feasible.
- ♦ **Oklahoma:** One local ombudsman started a committee of retired attorneys, judges and Adult Protective Services workers who developed a pilot project to get retired judges and attorneys to each take one guardianship case a year.

Summary

NASUA convened two teleconferences in May 2003 for state ombudsmen to discuss problems and strategies related to guardianship. Fourteen people from eleven states participated, sharing the types of complaints they receive regarding guardianships and what their programs have done to address guardianship issues at the individual and systemic levels. Primary concerns identified focused on training, oversight and availability of guardians and guardians ad litem, including corporate guardians. Most ombudsman programs handle guardianship related issues on a case-by-case basis,

providing technical assistance to local ombudsman programs about handling specific complaints. However, ombudsman programs that participated in the teleconferences provided examples educational efforts and coordination with other agencies and organizations to address systemic guardianship issues. A number of resources are attached to this paper that offer additional reference and guidance to ombudsman programs on this topic.

Resources

Long Term Care Ombudsman Program Guidance: Guardianship and Related Issues, Background and Policy Options for States (NASUA, 1995). This paper provides guidance based on the 1992 OAA amendments for developing policies and procedures for handling guardianship complaints, including: intervention criteria; working with guardians and other legal representatives; accessing residents' records; and legal and court actions. The appendices include definitions, proposed national standards for rights of wards and beneficiaries, and additional references. (This document is attached in Appendix B.)

The Center for Social Gerontology (TCSG), Ann Arbor, Michigan; is a non-profit organization that promotes the autonomy of older adults through research, training and social policy on law and aging issues. Recent efforts have focused on guardianship standards and the use of mediation in resolving guardianship issues. TCSG has numerous publications and training materials available on adult guardianship mediation and alternative to guardianship, developed under their Guardianship Mediation Program. TCSG also operates an Administration on Aging-funded National Support Center on Law & Aging. TCSG contact information: website: www.tcsg.org; email: tcsg@tcsg.org; telephone: (734) 665-1126.

When a Resident has a Guardian: Oklahoma Ombudsman Guideline (rev. 2003). Step-by-step procedures for ombudsmen to follow when handling guardianship related complaints, including what to do if subpoenaed. (This document is attached in Appendix C.)

Wisconsin Guardianship Support Center. Information on the described on page 6, can be found at the Coalition of Wisconsin Aging Groups (CWAG) website: www.cwag.org, or by calling the Center hotline at 1-800-488-2596.

Good Guardianship: Promising Practice Ideas on Court Links for Area Agencies on Aging, Adult protective Services, and Long-term Care Ombudsman and Good Guardianship: Promising Practice Ideas on Community Links. These two brochures, developed by the American Bar Association in 2003, encourage collaboration in guardianship practices between the court system and the aging network. These brochures can be found at: http://www.abanet.org/aging/good_guardianship.html. (These brochures are attached in Appendix D and Appendix E, respectively.)

APPENDIX A

Guardianship Teleconference Participants

Guardianship Teleconference Participants

Alaska

Ron Cowan
State Ombudsman

Arizona

Robert Nixon
State Ombudsman

Dawn Savattonne
local ombudsman

California

Joseph Rodrigues
State Ombudsman

Illinois

Neyna Johnson
Office of the State LTC
Ombudsman

Natasha Thayer
DuPage County Department of
Human Services

N. Lee Beneze
Illinois Department on Aging

Minnesota

Diane Levitt
Office of the State LTC
Ombudsman

Missouri

Carol Scott
State Ombudsman

Nebraska

Cindy Kadavy
State Ombudsman

Oklahoma

Eleanor Kurtz
Assistant State Ombudsman

Tennessee

Adrian Wheeler
State Ombudsman

Vermont

Jackie Majoros
State Ombudsman

Wisconsin

Bill Donaldson
Legal Counsel, Office of the
State LTC Ombudsman

APPENDIX B

Long Term Care Ombudsman Program Guidance: Guardianship and Related Issues, Background and Policy Issues for States

APPENDIX C

WHEN A RESIDENT HAS A GUARDIAN Oklahoma Ombudsman Guideline

WHEN A RESIDENT HAS A GUARDIAN
Oklahoma Ombudsman Guideline

- 1. First make sure that there is a legal guardianship. Many residents think that they have an appointed guardian when they do not. Many people think that by virtue of being a spouse that they are automatically legal guardian. Make sure. Ask questions. Did they go to court? Did they or their relative visit with a judge? Ask the resident for permission to look in their chart or to ask the administrator for a copy of the guardianship papers to review for the extent of the authority granted over them. If the administrator says a guardianship DOES exist, but has no copy, they must have a copy of it for the file. Ask them to contact the guardian and obtain a copy for the file immediately. Review it as soon as it is available, with the resident's permission.**
- 2. Discuss the content of the guardianship with the resident. Explain that the guardian exercises the resident's decision making for the areas covered in the document. According to Oklahoma guardianship law, if the guardianship was executed before 1990, the resident is entitled to an automatic review. If it was granted after 1990, there may be a "limited" guardianship. The law allows for a guardianship that is tailored to meet only the needs that the resident cannot meet for him or herself. It can be a guardianship over the finances, over the "person" (where they live, health care decisions or whatever it delineates) or over both the person and the finances and/or property. If the resident has a guardianship and wants something done on his behalf, inform him that the guardian will need to be consulted. Obtain the resident's permission (document contemporaneously for your record OR get resident to sign a permission slip) directing you to contact the guardian for discussion of his/her wishes.**
- 3. If the resident's complaint is about the guardian (i.e., no longer needing a guardianship, wanting someone else to be appointed guardian, needing the guardianship revised from a full guardianship to a limited one, asking for the judge to order the guardian to allow whatever activity is desired), advise the resident of his/her choices. One of those choices is the right to have the guardianship reviewed. The resident will need to know that he/she must contact the judge who granted the guardianship to request the review. They may also ask the court for a 'court appointed attorney,' if they need representation. Legal Aid may also help the resident with getting the request made, depending upon the services available in your area. Obtain permission to make a referral if the resident would like assistance from any other program (like Legal Aid). Talk to the resident about a "back-up" or contingency plan. If the judge decides to leave the guardianship in place, would they want someone else designated as guardian, or the judge to order the current guardian to allow some particular activity. Who would they**

rather have exercising their rights for them? Do they have a friend, family member or someone else in mind to “step in” and take over the guardianship? Evidence will need to be presented to support the resident’s wish to have the guardianship removed or the appointment altered. If there is question of the extent of the resident’s capacity, it is wise to discuss with the resident the possibility of making a referral to Adult Protective Services or another program that can interview and assess the capacity of the resident. This will assist the resident if determination is made that they understand the consequences of their decisions and choose to make the decision regardless. This process will also provide others for testimony as to the resident’s ability to plan, and make contacts and decisions.

4. Contact the State Ombudsman in any case in which you are intervening on behalf of a resident to resolve guardianship issues. Keep your supervisor informed so that she may respond readily to calls from guardian or family member about the Ombudsman’s role in the process. This type case is usually contested by an angry guardian who thinks the Ombudsman should “mind his/her own business”. The resident’s quality of life and participation in their decision making IS our business. Be diplomatic and empathic when you talk to the guardian and tell them you understand their concerns. You can discuss and explain the guardian’s role as similar to that of an advocate, soliciting and encouraging participation in decision making when that is possible for the resident. It is a large responsibility.
5. If there are strained relationships between the resident and their family member/guardian, or if the resident has hope the guardian will allow more activity/decision making by the resident, you may offer to the resident your willingness to meet with all concerned. Such a meeting can get the issues out in the open, and make it possible to address and alleviate them. The resident needs to understand that in this meeting you would be advocating for them to get what they want. If they are capable of handling that communication for themselves, your role could be that of a “classic mediator” – facilitating discussion, asking questions, reinforcing the parties’ willingness to work together to find common ground and helping them build a negotiated and mutually acceptable agreement. Successful negotiation or mediation may alleviate the need for further legal intervention.

If you are asked to meet with the resident and his/her guardian, make sure you are clear in your role before any meeting takes place and make sure you are honoring the resident’s request as a strategy for problem resolution. If the resident prefers that you advocate for him/her, negotiating on behalf of the resident, you MAY want to consider involving a third party mediator with the resident’s permission. Low-cost (\$5.00) Guardianship mediation service is available through the Court Administrator’s office. If you are mediating, make sure the resident understands that you will not be taking sides but will be facilitating a discussion and agreement, acting as a resource

and making sure that the laws and regulations are followed (including the resident's rights).

However, if the resident does not wish you to contact the guardian, you can not. In this case, you would go ahead with providing the resident information about their available choices and assist them as requested and appropriate. Contact your Supervisor for assistance and direction along the way.

6. If you are asked (or subpoenaed) to testify concerning a resident at a guardianship hearing, contact the State Ombudsman Office at once. Contact the attorney and let him/her know that he/she will need to communicate with the State Ombudsman Office about proper procedure (which is that a court order comes to the State Ombudsman Office.) The Ombudsman Supervisor makes copies of applicable notes to send to the state Ombudsman office, removing (redacting) names of residents who are not involved and situations identifying residents. We will request that our program's designated legal counsel provide you with assistance in preparation for your testimony.

A subpoena does not release you from the Federal law requiring confidentiality. A court order is required for any production of documents or release of information about a case or complaint. The ONLY exceptions will be at the direction of our legal counsel who will tell us what is permissible under what extenuating circumstances.

7. Always review with the resident what has been said, and/or agreed upon. Encourage the resident's attorney to review and discuss all procedures, actions and decisions made about their case with the resident him/herself. After all, the resident is the client.
8. Offer to provide information and assistance with rules, procedures, and resources to the court appointed attorney, the resident's personal attorney and/or the judge in any given court case. You want to educate them as well as "role-model" resident 'empowerment' in the process. (Maybe they would repeat the behavior in the next case where an Ombudsman is not involved.) You may want to suggest other means of supporting the resident, through geriatric assessment or other psychiatric or functional assessment, and alternatives to nursing home care, including in-home Medicaid waived services. You may even develop resource lists for the judge, including names of nursing homes for the area in which the resident chooses to live.

Note: Please ask assistance from the State Office in the development of the resource lists for the court, especially if the resident chooses to live outside of your planning and service area.

9. **Document in detail, including discussions with the resident about permission to proceed, bottom line negotiated agreements, discussions with the legal aid attorney, court appointed attorney, referral sources, and with the State Office and legal counsel for the Ombudsman program. Follow complaint investigation guidelines for documenting the case and filling out the Complaint Intake form. Call for assistance as often as needed during the course of your work and in order to keep your Supervisor informed of guardianship cases.**

APPENDIX D

Good Guardianship: Promising Practice Ideas on Court Links for Area Agencies on Aging, Adult Protective Services, and Long-term Care Ombudsman

Good Guardianship.

Promising Practice Ideas on Court Links for Agencies on Aging, Adult Protective Services, and Long-term Care Ombudsman

State Court Partnerships with the Aging Network

This brochure encourages collaboration in guardianship practices between the court system and the aging network. The idea is that by working together, courts and aging organizations—such as agencies on aging, adult protective services (APS), and long-term care ombudsmen—can tackle some of the difficult barriers to good guardianship practice in a cost-effective way.

The objective is to get courts and service providers or advocates in the aging field talking to each other about specific constructive improvements in guardianship in their area.

The Problems:

- Guardians and courts frequently do not have enough information on aging services, elder abuse, and long-term care.
- Guardians can protect against elder abuse. Guardians also can help “unbefriended” at-risk individuals to get the services they need. But in many areas there are not enough guardians or other surrogate decision-makers.
- Sadly, some guardians mistreat their vulnerable charges. Courts sometimes do not have enough resources for thorough monitoring—and abuse, neglect, or exploitation may go unchecked.

The Solution:

Develop a partnership with the court. Set out specific practical approaches to improve guardianship and to increase the use of advance planning approaches that could delay or avoid guardianship. Involve the bar association in this partnership. Become court-community partners for good guardianship now.

- ✦ State and area agencies on aging, APS, and long-term care ombudsman programs have skills, contacts, experience, and resources that could help guardians and courts.
- ✦ Contacting key judges and court staff in your area can be a turning point in overcoming barriers in guardianship practice and improving the lives of vulnerable individuals.
- ✦ Bridging the gap between the aging network and the court that handles guardianship can help to inform judges and court staff about critical needs and key services.

Court Partnerships: 10 Promising Practice Tips

1. Invite judges or court staff to speak on guardianship and alternatives at Elder Law Day presentations or other community events for seniors. Encourage them to attend a meeting of the advisory council for the agency on aging or the long-term care ombudsman program.
2. Provide the court with basic brochures on aging services, the aging process, long-term care, residents’ rights, and elder abuse to give to newly appointed guardians with their order of appointment.
3. When you are conducting training for staff or volunteers on aging, long-term care, or elder abuse, offer to include court staff who handle guardianship cases.
4. Offer to conduct sessions on aging, long-term care, or elder abuse at judicial education conferences or at training sessions for guardians.
5. Request a meeting with the judge to develop or clarify a protocol for reporting directly to the court any instances you might encounter of abuse or neglect by guardians.
6. Explore the joint development of a volunteer court visitor or guardianship monitoring program to contact isolated elders under guardianship and report on any problems. Use retired individuals or law, accounting, social work, or gerontology students as “eyes and ears of the court.”
7. Consider the joint development of a volunteer guardianship program. Involve members of the local bar association and local service groups.
8. Offer to evaluate accessibility of the courthouse and the judicial process. Do a “walk through” or “wheel through” with local disability advocates.
9. Offer to participate in “future of the courts” planning or visioning sessions, in light of the aging of the population. Will the court be “elder ready”?
10. Suggest an interdisciplinary *community coordinating group* on guardianship and alternatives to identify barriers, help close gaps between law and practice, pool resources, and increase knowledge.

Twelve Promising Practice Examples

1. The *Nevada Second Judicial District Family Court* and the *Nevada Division of Aging* participate in the SAFE program (Special Advocates for Elders), a court-based volunteer project serving seniors under or facing guardianship. Deborah Van Veldhuizen, dvanveld@mail.co.washoe.nv.us.
2. In *Maricopa County, Arizona*, the *area agency on aging*, the *long-term care ombudsman program*, *APS*, the *public fiduciary*, the *local probate court*, and others have formed an Alternatives to Guardianship Program to identify alternatives to guardianship and to protect vulnerable adults. Dawn Savatone, savatone@aaaphx.org.
3. The *Area Agency on Aging in Palm Beach, Florida* is working with the *Fifteenth Judicial Circuit Court's Elder Justice Center* to recruit volunteers for a guardianship monitoring program. Fay Hewitt, fhwitt@co.palm-beach.fl.us.
4. The *Connecticut Office of Probate Court Administrator* and several *Connecticut Area Agencies on Aging* have operated a volunteer Court Visitor and Conservator Program through Sage Services of Connecticut, Inc. Lou Zaccaro, sageservices@snet.net.
5. The *Georgia APS*, with the participation of the *State Long-Term Care Ombudsman*, has conducted workshops on elder abuse for the annual probate judge conference. Local *Georgia Long-Term Care Ombudsmen* have testified on behalf of residents who are the subject of petitions in guardianship proceedings and assisted them to secure legal counsel. Both APS and ombudsmen have alerted probate judges to specific instances of guardian misuse of power or neglect of duties, and have worked with probate judges on multidisciplinary teams to address elder abuse. Becky Kurtz, bakurtz@dhr.state.ga.us.
6. The *San Francisco APS staff* and *court staff* conducted judicial training on elder abuse and reporting requirements. Mary Joy Quinn, mquinn@sftc.org.
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8. The *Rhode Island Long-Term Care Ombudsman* has conducted an in-service training for probate judges to inform them about the ombudsman program and residents' rights. The ombudsman contacts the judge with instances of guardian abuse or exploitation, and helps to monitor difficult situations. The ombudsman worked with a key judge in advocating for a public guardianship program and has provided training for the volunteer guardians. The ombudsman also educated social workers in long-term care facilities about guardianship. Roberta Hawkins, stateomb@alliancebltc.org.
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10. The *Indiana Long-Term Care Ombudsman* provides brochures about long-term care to probate courts for distribution to newly appointed guardians. Arlene Franklin, AFranklin@fssa.state.in.us.
11. The *Long-Term Care Ombudsman of Youngstown, Ohio* has invited the coordinator of the court's volunteer guardianship program to attend its regular training session for volunteer ombudsmen.
12. The *Long-Term Care Ombudsman of the Bluegrass, Lexington, Kentucky* has worked with guardians ad litem to ensure a thorough interview with facility residents who are respondents in guardianship proceedings, and with the court on accessibility of the hearing room. Kathleen Gannoe, ombuddy1@aol.com.

Know the Basics

Guardianship: A relationship established by law in which a court appoints one person or entity (the guardian) to make decisions for another (a person with diminished capacity). The guardian owes the person a special duty of care and accountability. Some states use different terms for "guardianship" or may differentiate between guardians making personal decisions and guardians making property decisions.

Who May Need a Guardian: State criteria vary, but a guardian may be appointed when a judge determines that a person lacks capacity to make personal and/or property decisions on his or her own behalf and may be at risk of harm without the protection of a guardian.

How is a Guardian Appointed? An interested person petitions the court for appointment. The individual and family members are notified about the petition and the date of a hearing. A doctor, psychologist, social worker, or other expert may examine the person and submit a report to the court. In some states a guardian ad litem (court investigator) or a court visitor also may meet with the person and report to the court. Sometimes the individual is represented by an attorney. A hearing is held and the judge decides whether the person lacks capacity generally or in specific areas, and may appoint a full or limited guardian.

Drawbacks to Guardianship: Guardianship often removes basic rights such as the right to vote, make health care decisions, make gifts, marry, decide where to live, and whether to sell property. Guardianship is frequently costly,

time-consuming, and cumbersome. It should be viewed as a last resort. On the other hand, guardianship can be the only way to protect assets, remove an abuser, and provide safety for an adult with diminished capacity. Getting good guardianship depends on the dedication and caliber of the guardian, as well as the oversight of the court.

Alternatives to Guardianship: Less restrictive measures and social programs may delay or even avoid guardianship. An individual who has capacity may use advance planning tools such as a health care power of attorney, a living will, a durable financial power of attorney, a trust, or joint ownership. In some states a family member or other person can make health care decisions for an adult who cannot make or communicate decisions due to cognitive impairment. A representative payee may be appointed by a government agency to manage a person's government benefits if the beneficiary is not able to do so. Money management programs may in some cases postpone the need for guardianship.

Drawbacks to Guardianship Alternatives: Whereas guardians are subject to court supervision, agents under powers of attorney are not. Agents may misuse and abuse their powers. Careful selection of an agent is important.

What Courts Handle Guardianships? In many states, probate courts handle guardianship cases, in addition to the administration of estates after death. In other states it may be a court with more general jurisdiction. Find out which judges and court staff are responsible for guardianship in your area.

For More Information

Contact your state court administrator's office, state guardianship association, state or local bar association, and the legal assistance developer in or through your state agency on aging.

Web sites with additional information on elder abuse, guardianship, and courts include:

- ✦ Nat'l Center on Elder Abuse, <http://www.elderabusecenter.org/>, including a compendium of promising practices;
- ✦ ABA Commission on Law and Aging, <http://www.abanet.org/aging>;
- ✦ Nat'l Guardianship Association, <http://www.guardianship.org/>; and
- ✦ Nat'l College of Probate Judges, <http://www.ncpj.org>.

For an AARP handbook on establishing a volunteer guardianship monitoring program (no charge), contact AARP order fulfillment, 1-800-424-3410, Stock #D16383.

APPENDIX E

Good Guardianship: Promising Practice Ideas on Community Links

Good Guardianship.

Promising Practice Ideas on Community Links

State Court Partnerships with the Aging Network

This brochure encourages collaboration in guardianship practices between the court system and the aging network. The idea is that by working together, courts and aging organizations—such as agencies on aging, adult protective services (APS), and long-term care ombudsmen—can tackle some of the difficult barriers to good guardianship practice in a cost-effective way.

The objective is to get courts and service providers or advocates in the aging field talking to each other about specific constructive improvements in guardianship in their area.

The Problems:

- Guardians and courts frequently do not have enough information on aging services, elder abuse, and long-term care.
- Guardians can protect against elder abuse. Guardians also can help “unbefriended” at-risk individuals to get the services they need. But in many areas there are not enough guardians or other surrogate decision-makers.
- Sadly, some guardians mistreat their vulnerable charges. Courts sometimes do not have enough resources for thorough monitoring—and abuse, neglect, or exploitation may go unchecked.

The Solution:

- Judges and the aging network can work together in strengthening guardianship systems.
 - ✦ State and area agencies on aging created under the *Older Americans Act* are the focal points for community services for elders. They can work with courts to inform guardians and recruit volunteers.
 - ✦ State, regional, and local long-term care ombudsman programs under the *Older Americans Act* advocate and help resolve problems for residents of nursing homes and assisted living. They can educate guardians and courts about long-term care. They can help the court with monitoring by flagging problems of adults under guardianship in long-term care facilities.
- ✦ APS staff, often located in local social service agencies, help adults in danger of being mistreated or neglected. APS can identify at-risk individuals in need of guardianship, and provide training for courts and guardians on elder abuse.
- Develop partnerships with these front-line resources. Set out specific practical aims to improve guardianship and increase the use of advance planning approaches that could delay or avoid guardianship. Involve the bar association in this partnership. Become court-community partners for good guardianship now.

Aging Network Partnerships: 10 Promising Practice Tips

- ① Offer to speak on guardianship and alternatives at Elder Law Day presentations or other community events for seniors, and to attend a meeting of the advisory council for the agency on aging or the long-term care ombudsman program.
- ② Distribute basic brochures on aging services, the aging process, long-term care, residents’ rights, and elder abuse to newly appointed guardians with their order of appointment.
- ③ Suggest that court staff who handle guardianship be included in training sessions for staff or community volunteers by agencies on aging, APS, or ombudsmen.
- ④ Recruit knowledgeable staff from the aging network to speak on aging, long-term care, or elder abuse at judicial education conferences and training sessions for guardians.
- ⑤ Develop or clarify a protocol for agencies on aging, APS, and ombudsmen to report directly to the court any instances they encounter of abuse or neglect by guardians.
- ⑥ Explore the joint development of a volunteer court visitor guardianship monitoring program to contact isolated elders under guardianship and report on any problems. Use retired individuals or law, accounting, social work, or gerontology students as “eyes and ears of the court.”
- ⑦ Consider the joint development of a volunteer guardianship program. Involve members of the local bar association and local service groups.
- ⑧ Ask whether your courthouse and judicial process are easy for elders and adults with disabilities to use. Suggest an evaluation of court accessibility. Have disability advocates conduct a “walk through” or “wheel through.”
- ⑨ Invite aging network staff to participate in “future of the courts” planning or visioning sessions, in light of the rapid growth of the older population. Will the court be “elder ready”?
- ⑩ Initiate an interdisciplinary *community coordinating group* on guardianship and alternatives to identify barriers, help close gaps between guardianship law and practice, pool resources, and increase knowledge.

12 Promising Practice Examples

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Know the Basics

State and Area Agencies on Aging: A network of state and area agencies throughout the country created under the *Older Americans Act*, 42 U.S.C. §3001 *et. seq.* Under the Act, funding is allocated to the 57 *State Agencies on Aging* located in every state and territory to plan, develop, and coordinate systems of supportive in-home and community-based services. Most states are divided into Planning and Service Areas and nationwide there are over 650 *Area Agencies on Aging*. The area agencies contract with over 29,000 service provider agencies nationwide.

Older Americans Act Funds: Title III of the *Older Americans Act* provides for funding for home- and community-based services such as in-home care, transportation, meals—and legal services. Title VII of the Act provides for Elder Rights. *Older Americans Act* funds are scarce, but could be a resource for development of guardianship programs.

Adult Protective Services (APS):

Services provided under state law to elders and/or adults with disabilities who have suffered from abuse, neglect, exploitation, or self-neglect. APS receives and investigates reports of suspected abuse. If the report is

substantiated, APS arranges or provides services. Each year between 500,000 and five million elders are abused, neglected, and exploited in this country. APS staff may identify at-risk elders in need of guardianship. Court links with APS agencies can help in crafting solutions that protect the welfare and respect the rights of elder abuse victims.

Long-Term Care Ombudsman: An advocate for residents of long-term care facilities. Ombudsmen provide information about residents' rights, choosing a facility, and getting quality care. They can help to resolve problems and promote improvements in the long-term care system. Under the *Older Americans Act*, every state is required to have an ombudsman program. These programs vary, but many include local or regional programs using trained volunteers. Ombudsmen may be the first line of contact when a problem arises.

Legal Assistance Developer: An individual designated by a state agency on aging to provide leadership in securing and maintaining the legal rights of elders. Under the *Older Americans Act* the state legal assistance developer promotes state capacity to help older individuals understand their rights, exercise choices, and benefit from services and opportunities authorized by law. The developer can help to link the court with the aging network.

To Contact These Community Resources:

To find agencies on aging, APS, and long-term care ombudsmen in your jurisdiction use the *Eldercare Locator* at 1-800-677-1116, <http://www.eldercare.gov/>. For ideas on probate court practices, see the Web site of the National College of Probate Judges, <http://www.ncpj.org>.

Web sites with more information about aging resources include:

- ✧ U.S. Administration on Aging, <http://www.aoa.gov>;
- ✧ Nat'l Center on Elder Abuse, <http://www.elderabusecenter.org/>, including a compendium on promising practices;
- ✧ Nat'l Association of State Units on Aging, <http://www.nasua.org/>;
- ✧ Nat'l Association of Area Agencies on Aging, <http://www.n4a.org/>;
- ✧ Nat'l Long-term Care Ombudsman Resource Center, <http://www.ltombudsman.org/>; and
- ✧ ABA Commission on Law and Aging, <http://www.abanet.org/aging>.

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