

2016 State Guardianship Legislation Relating to Elder Abuse

Adult guardianship¹ can be both a solution to – and a source for – elder abuse. A court-appointed guardian can be a savior, protecting from abuse; or can enable elder abuse, particularly if a court fails to demand accountability.²

Each year state legislatures enact laws changing procedures and requirements in guardianship. In 2016, 22 states* enacted changes in their guardianship code in 39 different bills. For a full analysis with bill numbers, see the [2016 State Guardianship Legislative Update](#) by the American Bar Association Commission on Law and Aging.³ Based on the 2016 *Update*, here are highlights of changes that most addressed issues of elder abuse, neglect and exploitation.

Multi-State Cases: Addressing Cross-Border Abuse

Guardianship often involves more than one state. Jurisdictional issues can take up time for courts, cause delays in care and financial burdens for families, and aggravate family conflicts. Lack of clear jurisdictional guidelines can allow for cross-border “granny snatchings” and other abusive actions.

The Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA) clarifies jurisdiction and offers a procedural roadmap for dilemmas where more than one state is involved. The Act also targets abuse by guardians in several ways.⁴ It gives courts in cross-border cases more information about alleged abuse in other states and requires courts to consider that information in making decisions and monitoring guardians. It reduces the possibilities of “granny snatching” by changing the rules for a court to have initial jurisdiction.

As it is jurisdictional in nature, the Act cannot work as intended – providing uniformity and reducing conflict – unless all or most states adopt it. In 2016, **Georgia, Louisiana, and North Carolina** passed the Act, bringing the total to 45 states plus the District of Columbia and Puerto Rico – and leaving six states/jurisdictions remaining – Florida, Kansas, Michigan, Texas, the Virgin Islands (adopted the Act in 2017) and Wisconsin.

Guardian Training Requirements

In some states, legislative provisions have required specific training for professional guardians (often in connection with certification programs), non-professional or “lay” guardians, or both.

In 2016, a **South Dakota** Elder Abuse Task Force resulted in a legislative mandate for training guardians. Legislation required the State Bar to prepare and approve a training curriculum including the rights of individuals subject to guardianship, guardian duties and responsibilities, least restrictive options, and resources. Guardians were required to complete the training within four months after appointment.

*AZ, CO, CT, DE, FL, GA, HI, IL, IN, LA, MD, NE, NH, NY, NC, OH, OK, SD, TN, UT, VA, WA

¹Guardianship terminology varies by state. In this brief, the generic terms “guardian” and “guardianship” refer to guardians of the person as well as guardians of the property, unless otherwise noted.

²Wood, E., “The Paradox of Adult Guardianship: A Solution to – and a Source for – Elder Abuse. *Generations*, American Society on Aging, Vol. 36, No. 3, Fall, 2012, pp. 79-82.

³American Bar Association Commission on Law and Aging, [State Adult Guardianship Legislation: Directions of Reform – 2016](#)

⁴Stiegel, L. & Wood, E., “[Nine Ways to Reduce Elder Abuse Through Enactment of the Uniform Adult Guardianship and protective Proceedings Jurisdiction Act,](#)” American Bar Association Commission on Law and Aging.

Background Checks for Guardians

An increasing number of states have enacted criminal and other background checks for prospective guardians.⁵ In 2016, the **South Dakota** Elder Abuse Task Force recommendations resulted in new provisions that bar felons from appointment as guardian unless the court finds that appointment is in the individual's best interest. A proposed guardian [except for a financial institution] must have a criminal history record check, and a check for abuse, neglect or exploitation – but the court may waive the requirements for good cause shown.

Regulation of Public Guardians

The 2008 national public guardianship study found that 44 states had statutory provisions on public guardianship or guardianship of last resort – and additional states had public guardianship functions in practice.⁶ State public guardianship programs vary widely in governmental location, structure, services and requirements.

In 2016, a **Florida** bill expanded its public guardianship office to have regulatory oversight of all registered private professional guardians. The bill required the Office of Public and Professional Guardians to develop standards of practice, create disciplinary guidelines providing for a range of sanctions, and investigate complaints against professional guardians.

Nebraska made important changes in the state's new public guardianship law passed in 2015. The bill addressed the public guardianship program staff-to-client ratio, boosting it from 1:40 to 1:20 – thus bringing the ratio into alignment with the 2008 national public guardianship study recommendations.

Visitation Bills: Addressing Isolation

Visits by, or communication with, family and friends are basic to quality of life for an individual subject to guardianship. Isolation from family and friends can be a form of abuse – yet in some instances such visits could pose a risk of abuse. The complex cases in which visitation issues arise often are marked by family dysfunction, and may involve undue influence, neglect and financial exploitation. In 2015 and 2016, state legislators grappled with the visitation issue, often in hotly contested bills.

In 2016, **ten states** passed visitation/communication measures, which differed markedly in language, reach and requirements:

- **Arizona** – permits the individual or a person with a significant relationship to petition the court for a “contact order” and sets out factors the court must consider.
- **Hawaii** – prohibits a guardian from restricting the “personal communication rights” of the individual.
- **Indiana** – directed a study committee on visitation issues.
- **Louisiana** – directs a “curator” (state's term for guardian) to allow communication between the individual and a relative or another person who has a relationship based on “strong affection” if it would serve the individual's best interest. Such a person may file a petition seeking communication.
- **New York** – provides that in the order of appointment of a guardian the court may identify persons entitled to visit the individual, but specifies that this “shall in no way limit the persons entitled to visit.”
- **South Dakota** – states that a guardian or conservator may not restrict the individual's right of communication, visitation or interaction, unless the restriction is authorized by a court order. The bill sets out specifics about the restriction process.

⁵See Hurme, S., [2016 Chart on Criminal and Credit Background Checks for Guardians](#).

⁶Teaster et al, *Public Guardianship: In the Best Interest of Incapacitated People?*, Preager, 2010.

- **Tennessee** – sets out the individual's right of communication, visitation or interaction; and specifies those who may petition the court to require the conservator [the state's term for guardian of adults] to comply with the right.
- **Utah** – states that except as otherwise required by court order, a guardian may not restrict the individual's right of association. The bill sets out further clarifications -- including allowing the guardian to petition for an order prohibiting or limiting association; and allowing an individual or relative to petition for an order rescinding or modifying such an order.
- **Virginia** – includes in the statutory language about duties and powers of a guardian a provision that a guardian may not unreasonably restrict the individual's ability to communicate with, visit or interact with other persons with whom he or she has an established relationship.
- **Illinois** – provides that an adult child may petition a court for a visitation order if the guardian “unreasonably prevents” the person from visiting. The court must find that the visitation is in the individual's best interest.

Fiduciary Misconduct

Guardians are fiduciaries with a high standard of care and accountability. Guardians who financially exploit individuals entrusted to their care breach their fiduciary duty. Bonds, restricted accounts, required reporting of abuse, criminal penalties, third party notice, specific record-keeping requirements, tracking of guardians with multiple cases, and complaint procedures are examples of approaches to address fiduciary misconduct.

In 2016, **Colorado** clarified provisions concerning removal of a fiduciary for cause, stating that after a fiduciary receives notice of removal proceedings, the fiduciary may not pay compensation or attorney fees and costs from the individual's estate without a court order.

South Dakota strengthened its bonding provisions by directing sureties on a bond to immediately notify the court and the individual if a bond ordered by the court is not renewed by the guardian.

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