

ARTICLE: FOURTH NATIONAL GUARDIANSHIP SUMMIT: MAXIMIZING AUTONOMY AND ENSURING ACCOUNTABILITY MAY 2021

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Reporter

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Highlight

PREFACE

During the week of May 10, 2021, the National Guardianship Network, with the support of the State Justice Institute, the Borchard Foundation Center on Law and Aging, and the Syracuse University College of Law, brought together 125 advocates, family guardians, judges, lawyers, scholars, and other stakeholders for the Fourth National Guardianship Summit. These participants gathered virtually for four days to discuss the current state of the nation's adult guardianship system and develop recommendations for reform and improvement around the theme of maximizing autonomy and ensuring accountability.

Six working groups convened during the week to address the rights of persons subject to guardianship; supporting decision-making; limited guardianship, protective arrangements, and diverting guardianship pipelines; rethinking monitoring and addressing abuse by guardians; fiduciary responsibilities and tensions; and developing guardianship court improvement programs.

Seventy-five summit participants served as delegates for National Guardianship Network member and other sponsoring organizations, and had the opportunity to vote on the draft recommendations developed by each working group. On the final day of the summit, for five hours participants discussed, debated, and amended the recommendations offered by the working groups. At the conclusion of the summit, delegates approved the following 22 final recommendations to improve and reform the adult guardianship system in the United States.

* *Guardianship* includes adult guardianship, conservatorship and any other corresponding terms used by a state or tribe. The term includes both guardianship of the person and guardianship of the property unless otherwise specified.

* *State or states* includes the District of Columbia and all U.S. territories.

* *Supported decision-making* means "a series of relationships, practices, arrangements, and agreements, of more or less formality and intensity, designed to assist an individual with a disability to make and communicate to others decisions about the individual's life." (Prof. Robert Dinerstein)

The National Guardianship Network intends to reach out to Indian tribes to discuss the recommendations and how the recommendations may be applicable to various tribes.

Text

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I. Rights-Based Guardianships - Enhancing Rights of Persons Subject to Guardianship

Recommendation 1.1

The National Guardianship Network (NGN) should convene a task force with representatives that include NGN members; national disability and aging organizations; persons currently at risk of or formerly subject to guardianship; and family and professional guardians to develop an enforceable bill of rights.

* The bill of rights will identify the rights of adults subject to guardianship for passage by state legislatures, inclusion in court rules and policies, and adopted in state guardianship regulatory, licensing, training, monitoring and reporting requirements, as applicable. Such bill of rights should be in plain language understandable by adults subject to guardianship.

* The task force will identify those inherent rights which cannot be restricted, those rights which can be restricted but cannot be delegated, and those rights which can be restricted but only with further due process protections which ensure the decision is consistent with the adult's preferences and values, regardless of a determination of legal decision-making status or appointment of a guardian.

* The task force will consider, but not be limited to, the following specific rights to ensure dignity, privacy, autonomy, and the opportunity to fully participate in all **[*31]** decisions which affect them: marriage, divorce, relationships and association, communication, due process and notice, voting, education, employment, health care (including reproductive health and end of life), place of residence, community integration, free practice of religion, and personal choices.

Recommendation 1.2

States and courts must ensure that all judicial proceedings which may impact any of an adult's rights to legal capacity provide meaningful due process, which includes:

* Right to a qualified and compensated lawyer, paid a reasonable fee through the use of public funds if the adult is unable to pay, and appointed by the court should the adult not have a lawyer of their own choosing.

* Reasonable notice provided in the adult's preferred language in an understandable and accessible format, served in a manner that ensures timely receipt.

* An impartial, valid, and reliable assessment by a compensated and qualified person conducting a capacity assessment who has knowledge and training about decision-making in the area(s) related to the proceedings, inclusive of the adult's preferred reasonable accommodations and method of communication.

* Protection of the adult's right to participate in the proceeding consistent with their preferences, including preferred communication accommodations, after the right to appear and the purpose of the proceeding have been explained to the adult through the means the adult understands.

Recommendation 1.3

States and courts must ensure full access to a full or partial restoration of rights as soon as possible after a right is legally restricted. The process to restore rights includes:

- * A clearly defined statute, regulation, court rule or policy which sets forth the procedures and the evidentiary burden and timelines.
- * Representation of the adult whose rights were legally restricted by a qualified and compensated lawyer, paid a reasonable fee through the use of public funds if the adult [*32] is unable to pay, and appointed by the court should the adult not have a lawyer of their own choosing.
- * A process triggered by informal or formal means.
- * Notice to the adult whose rights have been legally restricted of the opportunity to restore their rights, annually and upon a change in the applicable law, regulation, rule or policy.
- * A meaningful periodic review by a court or other appropriate entity, inclusive of the perspective of the adult whose rights were restricted, of whether it is necessary to continue to restrict the adult's rights.
- * A guardian trained on the rights restoration process and the guardian's obligations in regards to the restoration of rights, the training to occur initially upon appointment and upon a change in the applicable law, regulation, rule or policy.
- * Courts and lawyers trained on the rights restoration process.
- * A prohibition on guardian interference with the restoration of rights, and as appropriate guardian facilitation of the restoration of rights.

Any party seeking to restore any right or rights of an adult whose rights have been legally restricted need only demonstrate the right to restoration by a preponderance of the evidence.

II. Supporting Decision-Making

Recommendation 2.1

States, the federal government, and the National Guardianship Network organizations should provide education, training, and outreach programs about supported decision-making (*see preface definition*).

* Direct education, training and outreach to stakeholders including state courts, guardians, the education system, families, anyone at risk of or subject to guardianship, health care providers, and other third parties, including government officials, financial institutions, advocates and protective entities, lawyers, Working Interdisciplinary Networks of Guardianship Stakeholders, and the general public.

[*33] * Develop campaigns and training curricula around availability, feasibility, and utilization of supported decision-making.

* Include in education, training, and outreach experiences from and presented by decision-makers and supporters.

* Target education, training, and outreach to marginalized populations and individuals across the lifespan/spectrum of support for diversity of **disabilities**.

Recommendation 2.2

Governments and organizations should expand **supported decision-making** practice and principles through promotion and expansion of sustainable (funded) pilot projects targeting diverse populations.

* Focus pilot programs on diverse populations as defined by differing disability issues and conditions (including, but not limited to, intellectual and developmental, physical, psycho-social, mental health, substance use, traumatic brain injury, communication, dementia, and other cognitive impairments), linguistic and cultural and intersectional identities, and across the life span.

* Establish, replicate, and scale up promising or best practices for sustainable supported decision-making practices and models.

* Identify gaps where supported decision-making best practices are not evident or used (e.g., older adults at risk of guardianship, geographical, and other marginalized populations) as a basis for determining funding priorities.

* Fund pilot projects targeting older adults at risk of guardianship.

Recommendation 2.3

Statutes, court rules, policies, and processes in every state should require courts to consider supported decision-making as one of the alternatives to guardianship at appointment and periodically thereafter by requiring that:

* Petitioners for guardianship plead affirmatively that supported decision-making as one of the alternatives has been tried or why it is not feasible.

[*34] * Before guardianship can be imposed, the court find by clear and convincing evidence that supported decision-making is not feasible.

* Courts institute procedures for periodic review of the need to continue guardianship, which includes an affirmative determination that supported decision-making and other less restrictive alternatives are not feasible.

Recommendation 2.4

The Department of Justice and other federal and state agencies should recognize that **supported decision-making** can be a reasonable accommodation under the Americans with **Disabilities** Act of 1990, as amended, in supporting an individual in making their own decisions and retaining their right to do so.

III. Limited Guardianship, Protective Arrangements and Diverting Pipelines

Recommendation 3.1

States should adopt and implement the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (Uniform Act), including the provisions mandating representation by a lawyer of all adult respondents. State guardianship laws need to ensure better avenues, stronger protections, and greater independence for individuals being considered for guardianship, and persons seeking to terminate or modify guardianship orders.

* Key provisions of the Uniform Act include, among others: (1) prohibit guardianships where less restrictive alternatives would meet an adult's functional needs; (2) require specific court findings before certain critical rights (e.g., to marry, vote, choose visitors) are abridged; (3) require petitioners to state whether less restrictive alternatives have been tried and justify any failure to do so; (4) create mechanisms that adults subject to guardianship and others can use to trigger modification or termination of an order; (5) clarify that a lawyer for a respondent, or adults subject to guardianship, must represent the adult's wishes; and (6) enable protective orders (or single transaction orders) instead of guardianship, thus expanding alternatives to guardianship.

* States should align practice with the requirements of the Uniform Act.

[*35] * Standardized evaluations and forms should contain details in plain language that provide courts with sufficient information to fully understand the adult's abilities.

* In all guardianship proceedings, including termination or modification, state law should require the appointment of a qualified and compensated lawyer to represent the adult's expressed wishes, paid a reasonable fee through the use of public funds if the adult is unable to pay, and appointed by the court should the adult not have a lawyer of their own choosing.

Recommendation 3.2

States should eliminate plenary guardianship, allowing people to retain the maximum of rights, and if guardianship is imposed, require tailored guardianship orders in all cases.

* The person should retain the right to make certain choices such as association, free practice of religion, personal choice, marriage, and voting unless the court makes a specific finding that a restriction is essential.

* All jurisdictions should review existing plenary guardianship orders to determine if continuation is justified, with the presumption being that continuation is not warranted.

Recommendation 3.3

Every state should have a guardianship diversion program tasked with facilitating alternatives to guardianship, reducing the likelihood that guardianships will be granted where not necessary, and monitoring for the continued need for the guardianship. Such programs could be operated as a multi-disciplinary approach in collaboration with schools, adult protective services, healthcare, aging and disability service providers, the legal community, and other entities.

* Diversion should include education and facilitation about specific tools such as use of powers of attorney, health care consent statutes, and supported decisionmaking.

* The diversion program should design and implement ongoing training and public information about alternatives to guardianship.

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Recommendation 3.4

States should provide accessible, practical and tailored training to individuals and entities known to be pipelines to plenary guardianship (e.g., lawyers, judges, schools, nursing homes, health care providers, evaluators, investigators, adult protective services) on (1) the impact of guardianship; (2) legal and ethical obligations to exhaust alternatives to guardianship before pursuing it; (3) alternatives to guardianship including supported decision-making, formal and informal services and supports, advance directives, voluntary fiduciaries, other legal and non-legal interventions; and (4) orders that are limited in scope and limited in time.

*IV. Rethinking Guardianship Monitoring and Addressing Abuse**Recommendation 4.1*

The state's highest court should require ongoing collection of timely guardianship data through the following steps:

* Establish a multidisciplinary user group to review and adopt data standards reflective and inclusive of the community's diversity, based upon the National Open Court Data Standards and the Conservatorship Accountability Project standards.

* Develop and implement technology that includes mechanisms to validate reports, flag potential problems, and track monitoring.

* Establish a multidisciplinary user group reflective and inclusive of the community's diversity to develop monitoring reports of the status and well-being of adults, and to manage cases effectively, develop and evaluate policy, conduct research, and budget.

Recommendation 4.2

States and courts should enhance the wellbeing and safety of all adults who have court-appointed guardians by implementing a post-appointment, person-centered monitoring system that includes the following elements:

* Uniform statewide forms available online and in hard copy, in multiple languages, with clear instructions and sample completed forms in plain language.

[*37] * Written care and financial management plans serving as baselines for subsequent reports, which can be filed electronically or in hard copy.

* In addition to regular review of guardian reports and accountings, periodic in person visits, verification of financial reports, and status review of the appropriateness of the choice of guardian and implementation of less restrictive options to enhance autonomy.

* An independent statewide entity to investigate the guardian's conduct in appropriate cases.

Recommendation 4.3

The state's highest court and state legislature should establish, and identify or appropriate funding for, advocacy measures to safeguard the rights of adults subject to guardianship and to augment the court's review process, including:

* Annual judicial in-person review.

* Continuing representation by a qualified lawyer for the adult appointed at the outset of the case, preferably a legal services, public defender, or other public service lawyer to minimize expenses to the estate.

* A complaint process for response to guardianship conduct that is accessible, user-friendly, transparent and effective for all, including those with access and functional needs which is in compliance with Title V of the Rehabilitation Act of 1973, as amended, and the Americans with Disabilities Act of 1990, as amended.

* An advocacy program for adults subject to guardianship using trained volunteers to visit and advocate for the adult's rights and preferences throughout the case, similar to the Court-Appointed Special Advocate Program (CASA) for children, but which does not supplant the right to a lawyer.

Recommendation 4.4

The U.S. Department of Health and Human Services Administration for Community Living should take the lead, in partnership with relevant federal agencies, national aging and disability organizations, and Protection and Advocacy agencies, to promote state and local collaborations at the policy level concerned about adult abuse or guardianship (i.e., adult/elder abuse multi- **[*38]** disciplinary and multi-system networks and teams, Working Interdisciplinary Networks of Guardianship Stakeholders) to address abuse by guardians:

* Developing protocols for case reporting and management that include the collection and recording of reports made, identification of the lead system responsible, and facilitation of cross-referrals as necessary.

* Ensuring membership representation from adult protective services, law enforcement, the courts, and self-advocates or self-advocacy organizations.

* Educating professionals and the public about how to report abuse by guardians and how the problem is addressed by its multiple responsible systems.

V. Addressing Fiduciary Responsibilities and Tensions

Recommendation 5.1

States should regulate court-appointed professional guardians through licensure or certification, or both, with sufficient funding for an agency to implement and oversee licensure and certification and to vet, train, test and discipline these guardians, with flexibility in implementation, and with standards for education and training.

Recommendation 5.2

National Guardianship Network member organizations should address fiduciary conflicts by expanding, developing, and encouraging education for all stakeholders about:

- * Person-centered planning and supported decision-making.
- * Options for alternative dispute resolution.
- * Less restrictive alternatives.
- * Services delivered in the most integrated setting, in compliance with the Americans with Disabilities Act of 1990, as amended.
- * Tools for resolving fiduciary conflict, including mediation, eldercaring coordination, Protection and Advocacy agencies, appointment of a guardian ad litem, use of Achieving a Better Life Experience (ABLE) accounts and special needs trusts.

[*39] States and organizations should address fiduciary conflicts through revisions of the relevant uniform acts, and statutes and rules addressing the gap in subject matter jurisdiction when conflict issues arise.

Recommendation 5.3

State courts and other stakeholders should encourage training, education and support to enhance autonomy, and reduce reliance on approaches that restrict individual rights to:

- * Provide information on less restrictive alternatives to guardianship to adults who use or may use these arrangements, including supported decision-making, as well as family members, lawyers, judges and other professionals.
- * Establish options for assistance with completing and submitting guardianship reporting forms, such as volunteer lawyers, law school clinics, lawyer for the day, and booklets for lay people.
- * Support, educate, and train family and friends about guardianship issues.
- * Encourage more states to establish Working Interdisciplinary Networks of Guardianship Stakeholders groups.

Recommendation 5.4

The National Center for State Courts and National College of Probate Judges should support states to develop rules, forms and procedures to implement the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act.

VI. Guardianship Court Improvement Programs

Recommendation 6.1

Congress should establish a Guardianship Court Improvement Program modelled on the successful Child Welfare Court Improvement Program, and provide funding directly to the highest court in each participating state in order to enhance the rights and well-being of adults subject to, or potentially subject to, guardianship by:

- * Effectuating consistent and meaningful data collection.
- * Improving oversight and accountability.

[*40] * Avoiding unnecessary or overbroad guardianship.

- * Enhancing collaboration and education among courts, agencies, and organizations that have an impact on adults subject to, or potentially subject to, guardianship.

Recommendation 6.2

The Guardianship Court Improvement Program should include:

- * Inter-agency and multi-disciplinary collaboration among guardianship stakeholders, building upon groups such as Working Interdisciplinary Networks of Guardianship Stakeholders.
- * Funding authorized at a level similar to the \$ 30 million per year currently authorized for the Child Welfare Court Improvement Program and allocated on a formula basis.
- * Wide latitude given to participating courts to set priorities and create implementation plans after an initial assessment and planning period.

Recommendation 6.3

The Guardianship Court Improvement Program legislation should include creation of a national, non-profit capacity-building and/or resource center with appropriate expertise to provide training, technical assistance, and collaborative learning opportunities to participating courts and to coordinate national efforts.

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