

Guardianship: Remedy vs. Enabler of Elder Abuse

INTRODUCTION

Guardianship plays two opposing roles in the world of elder abuse. Often guardians are heroes – preventing, detecting and remedying abuse, neglect and exploitation, and improving the quality of life of at-risk older adults. Yet at other times, as we know from shocking media exposes, guardians are the villains, taking advantage of those they were named to protect. We have very little data on the extent of such guardian abuse. To address both of these roles, courts, adult protective services, protection and advocacy agencies for persons with disabilities, law enforcement, and other entities must forge pathways of communication and collaboration.



How Abuse Allegations Can Trigger Guardianship

Adult protective services (APS) in every state receives and investigates reports of adult/elder abuse, neglect (including self-neglect) and exploitation by a wide range of family and non-family perpetrators. Sometimes these investigations prompt APS to petition the court for appointment of a guardian, as a means of protection. The petition might be for appointment of a guardian of the person, a guardian of property (called a “conservator” in many states), or both.* A guardianship petition also may be filed by a family member, advocate, service provider, or any person who is concerned about an adult’s welfare.

The court will set a hearing date, ensure notice and procedural due process according to state law, in some cases send out an investigator or court visitor, and may order additional clinical evaluation. The court will hear evidence of the need for appointment and select an individual or entity qualified and willing to serve as guardian. The court then may approve an order transferring some or all decision-making authority from the adult to the appointed guardian. The guardian may be a family member, friend, professional, or public or private agency – and in some cases APS may serve, at least in an emergency or for a limited time.



Guardians Can Prevent and Address Elder Abuse

Guardians often step in at crisis points – self-neglect verging on disaster, aggravated mental health problems, medical emergencies, evictions, family feuds with allegations of exploitation. Guardians are expected to “fix” the situation, ensure the adult is safe, and at the same time maximize the adult’s self-determination to the extent possible. It is a job for a super-hero, drawing on knowledge or contacts in health care, bioethics, housing, long-term care, public benefits, insurance, finances and investments, family dynamics, and law. During the initial months of the court order, guardians must inventory the assets and come up with a plan for the adult’s care either in community-based or congregate settings. To do this heavy lifting, guardians employ a set of legal, financial and social tools that can be quite successful in stopping any abuse and improving the adult’s life – although family guardians may be less equipped with such tools than professionals.

*State terminology varies. In this Brief, the generic term “guardianship” refers to guardians of the person as well as guardians of property, frequently called “conservators” unless otherwise indicated.

Consider these two cases of a New York City nonprofit guardianship program:

The program was appointed guardian for an older adult with congestive heart failure who lived in a basement apartment that she owned. Her reverse mortgage was in default, and foreclosure was pending because her niece had taken the proceeds and fled. There were unpaid utility bills and the apartment was in dire need of repair, but the woman wanted to remain in her home of many years. The program settled the foreclosure action, set up a utility payment plan, had repairs made, sought to recover the lost funds, and reported the theft to the district attorney [Teaster et al, 2019, profiled in Wood, “Adult Guardianship Pipeline,” 2019-2020].

The program was appointed guardian for a 104-year old woman with dementia. She lived in the basement apartment of someone who claimed to be her granddaughter. The “granddaughter” drained the woman’s bank account and took out a mortgage on the woman’s home in another state, using the proceeds for herself. Family members believed the woman was being financially exploited and even physically abused. The program obtained a restraining order protecting her from “the granddaughter,” and secured low-income senior housing and 24-hour home care. The program investigated the financial history, and brought it to the attention of the district attorney, collaborating in the case against the granddaughter [Vera Institute of Justice Guardianship Project].

Perhaps the most famous story of guardianship as savior in battling elder abuse was the much-publicized 2006 Brooke Astor case in New York City. The grandson of elderly socialite and philanthropist Brooke Astor brought a guardianship petition making serious allegations of her neglect and mistreatment at the hands of her son who was her primary care giver and agent under a financial power of attorney. The petition charged that the son “had not provided for his elderly mother and, instead, had allowed her to live in less than adequate living conditions in her Manhattan apartment and had cut back on necessary medication and doctor’s visits, while enriching himself from her assets” [*Matter of Astor*, 2006]. Settlement of this complex case resulted in the naming of permanent guardians to improve care and living conditions, and the return of valuable assets.

Whether the judge ultimately appoints a guardian or not, the court guardianship proceeding itself may uncover resources and options to support the individual. Little known family members may come forward. A clinical evaluation may result in new medical facts and treatment strategies. A court investigator may identify community resources or aspects of the adult’s living situation that could be improved. Court-based mediation may allow the adult to voice concerns and bring about collaboration among family members. It may turn out that a less restrictive legal option can be put in place and the guardianship is not needed. Sometimes, bringing the situation to light in a structured setting can clarify the problem, address any abuse, and prompt solutions that can preserve rights. But not all courts have the staff, training, funding, or judicial will for such a comprehensive assessment.

Once appointed, a guardian is not a panacea for every ill. But guardians are charged by court, by state law, and by professional standards with advocating for the adult's rights and wishes, or if these are not known, for the adult's best interest. A guardian is a "fiduciary" who must exercise "the utmost care and diligence, always with the idea of protecting the self-reliance, autonomy, independence, and rights of the person" [National Guardianship Association, Fundamentals, 2017]. While data on guardian actions are scarce, we know that guardians often serve as a critical support for an at-risk adult on both the property and personal sides.

Addressing Financial Abuse

Guardians [or "conservators" of property] often use multiple approaches to improve financial security and tackle exploitation.

A guardian may:

- **Inventory the adult's property**, develop a budget for management of income and assets, and use the property according to the adult's goals, needs and preferences [National Guardianship Association, *Standards of Practice*, Std 17 & 18, 2013]. The NGA *Standards* require guardians to "keep estate assets safe by keeping accurate records of all transactions" and being "able to fully account for all the assets in the estate."
- **Watch for signs** of past or present financial exploitation or scams by third parties [Consumer Financial Protection Bureau, 2019]
- **Seek restitution** of lost funds; file insurance claims
- **Ask the court to void a deed** or set aside a contract based on fraud or exploitation
- **Ask the court to revoke a power of attorney** if the agent was taking advantage of the adult
- **If the adult is facing eviction**, identify an attorney and/or state and local eviction protection programs – many of which were prompted or expanded during the pandemic. If needed, arrange for a rental payment plan
- **Take steps to obtain all public benefits** for which the adult is eligible – including any payments or debt reduction opportunities made available in response to the pandemic
- **Establish direct deposit** and automatic payment systems when appropriate
- Determine if any existing **Social Security representative payee** is trustworthy, or seek to become the payee if necessary

Addressing Personal Abuse and Neglect

Guardian financial tools go hand in hand with initiatives to protect the adult against abuse and neglect, while maximizing choice and self-determination.

Guardians often play key roles to:

- **Restrict harmful interactions with an abuser.** Guardians may ask the court for a protective order to prevent – or at least limit to a supervised setting – perpetrator contact with the adult. [Of course, the guardian could also use this authority inappropriately to unnecessarily isolate an adult, as noted below.] Keeping the person's preferences in mind, the guardian also could support the person in a move to a safe venue such as assisted living or to live with trusted family members.
- **Promote contacts** that are meaningful to the adult. The pandemic taught us that connections to family, friends, and the community are essential to health and well-being [Karp & Wood, COVID-19 Lessons, 2021]. The *NGA Standards of Practice* require guardians to “encourage and support the person in maintaining contact with family and friends, as defined by the person, unless it will substantially harm the person.”
- **Facilitate technology** to reduce harmful isolation. Guardians can supplement in-person visits of friends and family members with remote access technologies. Guardians can ensure the adult has access to and is able to use or get help with phone calls, texts, video chats, email, and social media. This might entail buying computers or devices, making sure they are set up and accessible, securing internet access, getting help from nursing home or assisted living staff, and working with the adult to communicate digitally.
- **Identify and link with community resources.** To best meet the adult's needs, guardians must maintain contacts with agencies on aging, centers for independent living, or local departments of human services. Guardians can arrange for home delivered meals, transportation, home care, home modification and repair, friendly visitors from companion programs, and more.
- **Promote access to medical care and housing.** Guardians routinely navigate the complex health care system, making choices about insurance plans and providers, and securing medications. Guardians investigate affordable, accessible housing options, and may assist in a move to a residential setting that best meets the person's needs.
- **Support the adult's choices in clinical settings.** At the heart of the guardian's job is making decisions that align with the adult's values, and seeking the adult's participation – sometimes in wrenching choices about surgery, mental health interventions, and end of life care.
- **Monitor long-term care quality.** Good guardian practice goes far beyond arranging for institutional care if needed, to advocating for quality care that meets state and federal standards. The *NGA Standards of Practice* direct the guardian to “monitor the residential setting on an ongoing basis and take any necessary action when the setting does not meet the individual's current goals, needs and preferences.”



Guardians May Be Perpetrators of Elder Abuse

While guardians have a high duty of trust, care, honesty, and confidentiality, some are in fact the perpetrators of abuse:

In June, 2021, the Acting US Attorney for the Eastern District of Pennsylvania announced that Gloria Byars, 60, and two Virginia co-conspirators were indicted for stealing over \$1 million dollars from older individuals subject to guardianship. Working as office manager for a private guardianship firm and then as a private guardian with her own company, Byars allegedly stole large sums from dozens of older adults under guardianship between 2012 and 2018 by writing unauthorized checks to accounts she controlled and by taking valuable gold coins. She was charged with conspiracy, bank fraud, wire fraud and money laundering [US Department of Justice, 2021].

Henrietta, 88, had physical disabilities as well as mental impairments that impacted her decision-making abilities. Her niece, Roberta, was appointed as Henrietta's guardian. Roberta visited Henrietta in her home a few times but then never came back and made no further arrangements for her care. A neighbor noticed the lack of activity at Henrietta's house. The neighbor knocked but couldn't get Henrietta to answer the door so she called law enforcement for a welfare check and notified Adult Protective Services [Department of Justice, 2021.]

Anyone appointed to serve as a guardian might mistreat the adult they are appointed to serve—family members, trusted others, non-profit or for-profit employees, professional guardians, and attorneys. Most reported cases of abuse by guardians involve financial exploitation, but the mistreatment also may be physical, emotional, or psychological abuse, or neglect. Consequences for victims include loss of savings, loss of a home, forced move to an institutional setting, and deterioration of physical and mental health.

Abusive acts by guardians may meet the definitions for various state and federal crimes, depending on the facts of the case. Guardians might be charged with such financial crimes as embezzlement, larceny, mail fraud, money laundering, and theft. Non-financial charges could include a broad array of crimes including elder abuse, neglect, assault, and forced labor.

Extent of Guardian Abuse

Abusive guardianships make news. A 2017 in-depth piece in the *New Yorker* featured dramatic and widespread financial exploitation and other mistreatment of individuals under guardianship in Clark County, Nevada [Aviv, 2017]. In 2021, most major news outlets covered events in the Britney Spears conservatorship, including her allegations that her father, who has served as her co-conservator for 13 years, profited hugely from her estate while she was forced to take inappropriate medications and treatments, and restricted in many aspects of her personal life. [New York Times, 2021; Wall Street Journal, 2021; Washington Post, 2021]. For every celebrity story, there are dozens of lesser known stories in which guardians are engaged in unethical or possibly criminal conduct.

While anecdotal information continues to grow, data are lacking on the extent of guardian abuse. But despite the scarcity of comprehensive data on guardian abuse—and guardianship cases generally—noted by the Government Accountability Office, the US Senate Special Committee on Aging, and the National Center for State Courts, these entities have flagged the dire problem of guardian malfeasance and the need to address it. [GAO, 2016; US Senate Special Committee on Aging, 2018; National Center for State Courts, 2018]

Red Flags for Mistreatment by Guardians

Signs that a guardian has mistreated the person for whom they serve as fiduciary often are the same as indicators for various types of elder abuse. In addition, there are red flags specific to the guardianship itself. These signs, compiled by court personnel, public guardians and researchers [Pogach & Wood, 2019; Karp & Wood, 2007], include the following actions and lapses by guardians:

- Failure to file timely accountings, receipts, and reports with court
- Multiple unexplained ATM transactions
- Lack of automated record-keeping system
- Attorney representing guardian withdraws from case
- Failure to pay bills, especially rent or residential care bills, putting the person at risk of eviction
- Large expenditures not appropriate to the person's environment or condition
- Request for fees that are high and not well substantiated
- Draining estate and then seeking to terminate appointment
- Selling individual's home or moving the individual out of state without justification
- Hiring friends, family, or business associates to provide services
- Isolating the person or otherwise interfering with relationships with family, friends, and service providers



Remedies for Abuse by Guardians: Stakeholder Collaboration Needed

Courts with jurisdiction over the guardianship have an array of responses they can implement when there are signs of guardian malfeasance. In addition, concerned individuals and professionals can seek intervention from non-court organizations and agencies.

Court Monitoring

Courts that hear initial petitions for guardianship and appoint guardians should play an on-going role after the appointment of the guardian. State statutes and court rules lay out the court's monitoring requirements. Guardianship monitoring aims to protect the individual and ensure the guardian is accountable to the court [Hurme & Robinson, 2021]. The *National Probate Court Standards* [3.3.17] list necessary elements of monitoring:

- Ensure that plans, reports, inventories, and accountings are filed on time
- Review promptly the contents of all plans, reports, inventories, and accountings
- Independently investigate the well-being of the individual and the status of the estate as needed
- Improve the performance of the guardian and enforce the terms of the order
- Consider whether a less restrictive option would be appropriate [Commission on National Probate Court Standards, 2013].

To some extent, these elements are aspirational, as courts may lack the resources to carry out all of these steps, and procedures differ from state to state and from court to court. A recent survey by the National Center for State Courts found that despite improvements in monitoring practices, especially in use of technology, over the past 15 years, there are “continuing challenges” in judicial oversight [Robinson et al, 2021].

Court Responses to Guardian Malfeasance

Through monitoring, a court may uncover evidence of mistreatment by a guardian. If not, a concerned individual, an attorney, another professional, or a representative of a government agency may file a complaint with the court or petition the court to take action. Some states and courts have complaint procedures [Pogach & Wood, 2019]. The National Center for State Courts has developed a [judicial response protocol](#) for guardianship abuses [National Center for State Courts, 2021].

Courts with jurisdiction over guardianships can take an array of actions to respond to guardian malfeasance and protect the adult [Pogach & Wood, 2019]:

- **Freeze assets and/or restrict accounts** – Courts may take these actions to limit a guardian’s access to money and property while investigating a case or preparing to take another protective step.
- **Investigate allegations of malfeasance** – Once allegations of abuse have been made, courts can appoint a guardian ad litem, investigator or visitor to investigate. A court can also audit an individual’s assets or order an accounting by an external entity such as a certified public accountant.
- **Order repayment for lost assets or property** – Such orders might restore lost assets, but in many cases, the only way to recover funds is through a bond that the guardian obtained upon appointment. Sometimes courts do not require bonding when the guardian is appointed, making it more difficult to recover losses.
- **Enforce statutory rights to communication and visitation** – When abusive guardians use isolation tactics, family members and others can seek orders enforcing state laws that define the rights of people subject to guardianship to interact with others of their choosing.
- **Appoint a co-guardian or limit the powers of the guardian** – This strategy may help deter or stop mistreatment by a guardian.
- **Remove the guardian** – Removal may be the best way to stop guardian malfeasance, and petitioners might suggest a willing and suitable replacement.

- **Terminate the guardianship** – Less restrictive options or changed circumstances might lead a court to terminate the guardianship entirely and restore the adult’s rights.

To enhance the likelihood that court will detect and respond to abuse by guardians, the National Guardianship Network’s 2021 Fourth National Guardianship Summit produced recommendations about monitoring. The Summit urged states and courts to implement a post-appointment, person-centered monitoring system that includes periodic in-person visits, verification of guardians’ financial reports, status review of the appropriateness of the guardian, and an independent statewide entity to investigate the guardian’s conduct in appropriate cases [Recommendation 4.2, National Guardianship Network, 2021]. The Summit also recommended continuing representation by a qualified lawyer who was appointed to represent the person subject to guardianship at the outset of the case; a complaint process for response to guardian conduct; and an advocacy program for adults subject to guardianship using trained volunteers [Recommendation 4.3, National Guardianship Network, 2021].

Non-Judicial Responses

Swift and effective court action is necessary to support and assist good guardians and penalize or remove abusive guardians. But court action alone is not sufficient. Numerous federal, state, and local government entities and non-profit agencies can intervene if a guardianship “goes bad” [Anetzburger & Thurston, 2021]. These include:

- **Adult protective services** – Anyone suspecting mistreatment by a guardian should report to adult protective services. Find your state or local adult protective services agency through the [Eldercare Locator](#). Most states have laws making certain categories of people mandatory reporters of elder or vulnerable adult abuse. A challenge, however, is ensuring that APS consistently responds in these situations, despite the fact that an adult appears “protected” through the court’s appointment of a guardian.
- **Protection and advocacy systems** – Protection and Advocacy Systems are federally-mandated and funded, state-based organizations that work to protect the rights of people with disabilities, including guarding against abuse. Find your protection and advocacy agency [here](#).
- **Long-term care ombudsmen** – If the individual resides in a nursing home or assisted living (or, in some states, receives home- and community-based services), the long-term care ombudsman can investigate and resolve complaints about abuse, neglect, and exploitation, including complaints about guardians. Anyone can file a complaint, but the resident (or an appropriate representative) must consent in order for the ombudsman to investigate and share information. Learn about the ombudsman program [here](#) and [find](#) your local ombudsman.
- **Law enforcement** – A guardian’s breach of duty may violate criminal laws and warrant investigation and prosecution. In addition to reporting to Adult Protective Services, individuals suspecting guardian abuse should report it to law enforcement. Contact your local law enforcement agency, your state attorney general, or call 911. Some recent examples of guardianship fraud cases pursued by the United States Department of Justice include cases in [Pennsylvania](#) and [Florida](#).

- **Attorneys** – Separate from the guardianship system, there are various civil actions that may apply to abuse by guardians. Depending on state law, civil attorneys might bring cases alleging breach of fiduciary duty, breach of contract, fraud, undue influence or a private right of action for elder abuse. Remedies might include restitution (repaying money lost), voiding documents including deeds, or other monetary awards of damages. Some state statutes provide for enhanced damages when the defendant is a fiduciary such as a guardian or conservator.
- **Federal agencies** – If the guardian also serves as a Social Security representative payee or VA fiduciary and is misusing public benefits, individuals may report to the [Social Security Administration Office of the Inspector General](#) or the [VA Office of the Inspector General](#).
- **Professional licensing boards** – In some states, professional guardians may be certified, licensed or registered. State boards can investigate and may revoke a license or certification. If the guardian is a lawyer, the state has a committee that takes disciplinary action when a lawyer violates professional responsibilities.

The field of elder abuse has long recognized the need for a multidisciplinary or multi-systems approach. Multidisciplinary collaborations can be for either: [1] case review; or [2] systemic improvements. Using such elder justice collaborations for systemic improvements appears to have potential for addressing guardianship abuse. However, these multidisciplinary elder abuse or elder justice coalitions – where they exist – have not focused attention on guardianship abuse, and would require significant education and training to do so [Anetzberger & Thurston, 2021]. Finally, a perception of conflict of interest may limit court involvement in multidisciplinary teams and coalitions, especially if there is not a clear line between individual case review and systems change.

The 2021 Fourth National Guardianship Summit recognized the need for stakeholder collaboration to address abuse by guardians and improvements in the guardianship system. A Summit recommendation seeks to “promote state and local collaborations at the policy level concerned about elder abuse or guardianship” in “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” [Recommendation 4.4, National Guardianship Network, 2021]. Through such increased communication and coordination, courts and other guardianship stakeholders can support effective person-centered guardianship practices and quash abusive practices.

CONCLUSION

Celebrity cases and exposés of systemwide abuses bring guardianship to the attention of policy-makers and the public. Depending on the case, guardianship can put an end to the mistreatment of an older adult or can trigger abuse by giving overbroad or unnecessary authority – or giving authority to the wrong person – to make decisions on behalf of an adult. Better understanding of this multi-faceted issue can lead to improvements in policy and practice. Increased collaboration among key stakeholders can enhance the wellbeing and safety of adults who need support in making personal and financial decisions.

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