

Written Testimony of Nina A. Kohn
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for

Hearing on “Abuse of Power: Exploitation of Older Adults by Guardians
and Others They Trust”

United States Senate Special Committee on Aging

April 18, 2018

Statement to the U.S. Senate Special Committee on Aging

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Thank you Chairman Collins, Ranking Member Casey, and Committee Members for this opportunity speak with you today. My testimony will summarize the primary problems facing the guardianship system, key reforms needed to curb abuse, and model legislation that has been developed by the Uniform Law Commission to do just that.

As a general matter, I see four fundamental problems with the guardianship system in the U.S.:

- First, some people who are subject to guardianship should not be.
- Second, many—indeed, probably most—people subject to guardianship are subject to more restrictive arrangements than they need.
- Third, a subset of guardians act in ways that violate the rights and insult the humanity of those they serve. Sometimes this is intentional. Sometimes it is negligent. Sometimes it is simply because the guardian does not understand his or her role.
- Finally, existing systems and rules unintentionally create incentives that exacerbate these problems.

To address these problems, state-level law reform is essential as guardianship is governed by state law. Indeed, even the terminology varies by state. Today I will use the term “guardian” to refer to a person appointed by a court to make either financial or personal decisions for another person, but only some states take that approach. Many states, by contrast, use the term “conservator” to refer to a person appointed by a court to make financial decisions for another, and the term “guardian” to refer to a person appointed to make decisions about personal affairs.

Fortunately, there are straight-forward reforms that could have a substantial, systemic impact.

First, states must provide very clear guidance to guardians. Most guardians are lay people. To do their best, they need to understand exactly what they are supposed to consider when making decisions for an individual subject to guardianship. They also deserve clear rules that they can point to when their actions are questioned. Clear guidance also makes it easier to hold guardians responsible for bad behavior. They cannot hide behind vague or confusing language.

Second, states must create systems that incentivize the use of limited guardianship and alternatives to guardianship where these mechanisms provide adequate protection. Currently states often do the opposite. It is easier for petitioners to seek, and courts to order, a full guardianship than a limited one. While all states’ laws now recognize limited guardianship, petitioning for a limited guardianship is typically harder than petitioning for a full one. Unless the law requires otherwise, for a full guardianship, the petitioner simply requests all powers available under state law. To petition for a limited guardianship, by contrast, petitioners must spell out exactly what powers they want the court to grant—which can be confusing and difficult, especially for those without lawyers. Similarly, it is typically easier for a court to order a full guardianship than a limited one. Unless the law requires otherwise, to order a full guardianship, the judge simply grants the guardian all powers permitted under state law. For a limited guardianship, by contrast, the judge needs to spell out the specific powers to be granted.

The result is that the incentives align to strip individuals of more rights than is necessary to actually protect their interests.

Third, states must increase monitoring of guardians. Currently, monitoring is typically anemic, and the ability to monitor is generally limited to under-resourced courts.

Fourth, states must ensure that systems for guardians' fees do not reward bad behavior. Guardians should not be allowed to charge fees that are inconsistent with their fiduciary duties.

Consistent with the need for state-level reform, the 2017 Elder Abuse Prevention and Prosecution Act requires the Attorney General to publish "model legislation relating to guardianship proceedings for the purpose of preventing elder abuse."

I am pleased to report that such model legislation now exists, and addresses each of the challenges I have identified. Specifically, the Commission has now adopted and finalized the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA), for which I served as Reporter. The Uniform Law Commission, a non-profit organization founded in 1892, consists of commissioners who are volunteer attorneys appointed by each state, as well as by the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands. The Commission creates model legislation for the states on topics where state uniformity is desirable. This particular Act represents a fourth revision of provisions originally included in the Uniform Probate Code in 1969.

The UGCOPAA was drafted over a three-year period by a Committee that included commissioners from 10 states and participants from organizations representing divergent interests, including guardians and judges, persons with disabilities, and family members devastated by abuse. National organizations providing significant input included AARP, The ARC, the American Bar Association, the American College of Trust and Estate Counsel, the National Academy of Elder Law Attorneys, the National Association to Stop Guardianship Abuse, the National College of Probate Judges, the National Center for State Courts, the National Disability Rights Network, and the National Guardianship Association.

Together, this inclusive, non-partisan, expert-informed group drafted an Act that addresses each of the challenges I have discussed, and which garnered strong support from participants despite their diverse interests.

- The Act provides clear decision-making standards for guardians.
- The Act incentivizes limited guardianships over full ones by making it easier to petition for a limited guardianship than a full one (including by providing easy-to-use forms for those who wish to use them) and requiring courts to do more to justify full orders.
- The Act limits the ability of unscrupulous guardians to drain assets by charging unreasonable fees. For example, it requires courts to consider the market value of services provided by guardians before approving fees. After all, attorneys serving as guardians should not generally be paid their hourly rate to do non-legal tasks like grocery

shopping.

- The Act creates new mechanisms to monitor guardian behavior at minimal cost to the public by leveraging persons interested in the welfare of the individual subject to guardianship. Specifically, courts must—absent a good cause—require guardians to give notice of certain suspect actions to the individual’s family members or friends. These relatives and friends can, in turn, act as the court’s eyes and ears to prevent or remedy abuse. Similarly, it creates mechanisms that work for laypeople, including those subject to guardianship, to alert the court to abuses.

In addition, the Act represents a modern, person-centered approach to guardianship that is sensitive to the rights of persons with disabilities and their family members. For example:

- It encourages person-centered planning by requiring guardians to develop an individualized plan for the individual subject to guardianship. The court can then monitor for compliance with the plan. Unless the court specifically orders otherwise, key family members will also receive copies of the plan, and can thus provide additional monitoring.
- It promotes independence and dignity for persons with disabilities. Courts may not impose a guardianship if a less restrictive alternative, such as supported decision-making, would provide adequate protection. It also creates a mechanism for a court to order a protective arrangement instead of guardianship or conservatorship when a person’s needs could be met with this less restrictive option.
- It protects fundamental rights. For example, individuals subject to a guardianship must be given notice of certain key rights, including the right to independent legal counsel and the right to have the order modified or terminated when appropriate. In addition, courts may not remove certain fundamental rights without explicit findings as to those particular rights.
- It makes restoration of rights a real possibility when an individual no longer requires a guardian, or no longer requires as extensive a guardianship. It limits guardians’ abilities to charge fees to oppose the alteration or termination of orders, and adds new triggers for reconsideration of an appointment. It also clarifies that an individual subject to guardianship has a right to obtain counsel to seek restoration of rights.
- It helps prevent isolation and family estrangement. A guardian may not restrict family members and friends from visiting or communicating with the individual subject to guardianship for more than one week without a court order. Unless the court orders otherwise, the guardian must notify key family members of a significant change in the health of an individual subject to guardianship or a change in the individual’s place of residence.

In short, the Act provides a smart, fiscally responsible model for states, and its widespread enactment will bring about the reform necessary to curb guardianship abuse.

Thank you for this opportunity to speak with you. I look forward to your questions.

Respectfully submitted,

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