STATE ADULT GUARDIANSHIP LEGISLATION: DIRECTIONS OF REFORM – 2013

Commission on Law and Aging
American Bar Association

An earlier version of this 2013 legislative summary [January – September] was published as part of the National Guardianship Association's *2013 NGA Legal Review*, presented at the October 2013 NGA National Conference.

In 2013, at least 24 states passed a total of 31 adult guardianship bills – which is just about the same level of passage as last year, in which 24 states passed 32 bills. New York and Wyoming passed the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act. North Dakota and Indiana scored big wins in appropriations for guardianship. Nevada passed a Senate bill providing for guardian training and making numerous revisions in procedure and guardian authorities and duties. Based on a study and public hearings by the Tennessee Bar Association, Tennessee passed a bill with substantial procedural changes. Texas also passed legislation making many procedural changes, as well as re-codifying the probate code.

Among those who contributed to or were helpful in the legislative summary were Ginny Casazza (NV, National Certified Guardian), Steven Fields (TX, Court Administrator/Senior Attorney, Tarrant County Probate Court #2), Pam Wright (TN, West Tennessee Legal Services), Bob McLeod (MN, Lindquist & Vennum PLLP), and Hon. Jean Stewart (CO, Of Counsel, Holland & Hart LLP).

This work was prepared as an informational guide, and may not be a complete listing of all legislation that passed. If you know of additional state guardianship legislation enacted in 2013, please contact Erica Wood, erica.wood@americanbar.org.

I. Pre-Adjudication Issues

Over the past two decades, legislative changes have sought to bolster safeguards in proceedings for the appointment of a guardian or conservator. At the same time, states continue to make various procedural "tweaks" to clarify requirements or address inconsistencies.

1. Petition and Notice. Specificity of the petition, as well as clarity and breadth of the notice, are basic safeguards to protect rights of the respondent. Nevada, Tennessee and other states made the following changes:

Nevada SB 78 amends the list of person upon whom notice must be served, including the proposed guardian if not the petitioner, the VA if the person receives VA benefits and the Department of Health and Human Services if the person receives Medicaid – and care providers (but if the care provider is not related to the individual, the provider must not receive copies of the inventory or accounting). Anyone filing a request to receive notice must state the interest and give other information. The bill also makes changes in the service and publication of notice. Finally, the new measure expands those who can advise a respondent of the right to counsel if the respondent is not attending the hearing or appearing by videoconference; and broadens those who may sign a waiver of attendance.

Tennessee SB 555/HB692 added to the list of petition elements "a request for a guardian ad litem, conservator or co-conservator, or attorney ad litem with specific experience or expertise in matters like those faced by the respondent, if warranted under the circumstances." The Tennessee bills also clarified that the notice must be served by mail on the respondent's closest relatives and any person or institution having care and custody or with whom the respondent is living.

Texas HB 2080 amends a unique procedure for court-initiated guardianships. In such a procedure, the court may require that an interested person submit an information letter about the individual alleged to be incapacitated. The new measure provides that information letters submitted by relatives of an alleged incapacitated person must be signed and sworn to before a notary or must include a written and signed declaration signed under penalty of perjury that the information is true.

2. Role of Guardian ad Litem. In practice, and often in statute, the role of a guardian ad litem often is hazy, veering between an advocate for the individual and a neutral court investigator.

Tennessee SB 555/HB692 steers the guardian ad litem role clearly toward an objective court investigator, changing the definition from someone "appointed by the court to represent the respondent" to someone "appointed by the court to investigate the allegations . . . . and report to the court with recommendations as to the best interest of the respondent." The new language indicates that the guardian ad litem "serves as an agent of the court, and is not an advocate" for the respondent. Further, the bill clarifies

that if the respondent is represented by counsel, the court may nonetheless appoint or continue the services of a guardian ad litem, or may terminate or waive such services.

Additionally, the Tennessee bill lists the elements of a GAL investigation, including: an in-person interview; and a review of the clinical report to ensure it includes detailed descriptions of the condition and how it may impair the person's ability to function. Finally, a GAL must investigate the financial capabilities of the individual including a credit report, previous experience in managing assets, management plans, previous borrowing history, and the financial capabilities and integrity of the proposed fiduciary.

3. Emergency Appointment. In making an emergency appointment, the legislature and the court must make a difficult balance between procedural safeguards and prevention of irreparable harm. An emergency guardianship, sometimes established without full procedural protections, may open the door for a plenary and permanent appoint. In the landmark case *Grant v. Johnson*, 757 F. Supp. 1127 (D. Or. 1991), a federal district court declared the Oregon temporary guardianship statute unconstitutional in that it did not provide minimum due process protections. Following the *Grant* decision, a number of states revised their temporary guardianship provisions.

Tennessee SB 555/HB692 sets out an emergency appointment procedure in which the conservator's [guardian for adults] authority may not exceed 60 days, and may not go beyond powers specified in the order. The court must appoint an attorney ad litem to represent the individual and the petitioner must give "reasonable notice" of the hearing. An emergency conservator may be appointed without notice and attorney ad litem only if the court finds that the respondent will be substantially harmed before a hearing can be held. If so, the respondent must be given notice of the appointment within 48 hours, and the court must hold a hearing within five days. The bill specifies that "appointment of an emergency . . . conservator, with or without notice, is not a determination of the respondent's incapacity."

4. Mediation in Contested Guardianship Proceedings. The 2001 "Wingspan" Second National Guardianship Conference recommendations urged that "the use of mediation for conflict resolution [in guardianship proceedings] and as a pre-filing strategy alternative be increased." The Center for Social Gerontology and others have pioneered in the use of mediation to address family and other disputes at the time of a petition concerning less restrictive alternatives, who will serve as guardian, and the elements of a guardianship plan (see http://www.tcsg.org/med.htm). The Association for

Conflict Resolution's Section on Elder Decision-making and Conflict Resolution has proposed "Mediation Training Objectives for Adult Guardianship Cases (see http://www.acrelder.org.

Arizona HB 2308 permits the court to require disputes to go to arbitration in all phases of a probate proceeding, including those that occur prior to the appointment of a fiduciary.

Texas HB 2080 provides for mediated settlement agreements in contested guardianship proceedings. It states that on written agreement of the parties, or on the court's own motion, the court may refer a contested guardianship proceeding to mediation. The measure says the agreement is binding and entitled to judgment if it states that it is not subject to revocation by the parties, is signed by each party, and is signed by the part's attorney, if any, who is present at the time the agreement is signed. However, the court may decline to enter judgment on the agreement if it finds the agreement is not in the individual's best interests.

5. Other Procedural Changes

New Hampshire SB 106 makes a change in the confidentiality of court records relating to guardianship proceedings. Previously records, reports and evidence submitted to the court or recorded by the court were confidential "only insofar as they directly relate to alleged specific functional limitations of the proposed ward." The bill removed the limitation on what is considered confidential, expanding it to all court records, not just those concerning functional limitations.

Tennessee SB 555/HB692 addresses the appeal rights of the individual, specifying that on the appeal, the person has the right to "assistance of an attorney ad litem or adversary counsel." The individual also has the right to request a protective order placing under seal the person's health and financial information.

Texas HB 2080 expands provisions concerning the appointment of an "attorney ad litem" (counsel). In addition to the mandatory appointment of an attorney ad litem for a proposed ward after the filing of a guardianship application, the court also may appoint an attorney ad litem in other contexts such as to represent an incapacitated person, an unborn person or an unknown or potential missing heir.

Texas HB 2080 concerns confidential personal information. It provides that a person protected by a Family court protective order, a guardian, attorney ad litem or

family member may apply to the court to exclude from any court pleadings the address, phone number, place of employment and other personal information about the individual.

Virginia SB 759 makes a number of procedural changes including: (1) permitting another person beside a parent to initiate a guardianship proceeding before an incapacitated minor turns 18 if there is no living parent; (2) requiring a petition to state the basis for the court's jurisdiction; and (3) requiring the court to hold a hearing on the appointment of a guardian or conservator within 120 days from filing.

The Virginia bill also adds "best interests of the respondent" to a list of factors (such as development maximum self-reliance and independence, availability of less restrictive alternatives, and extent of necessary protection from abuse) the court should consider in determining the need for a guardian or conservator. This addition shows the constant tension in guardianship between its *parens patriae* origins emphasizing protection and the more modern trends recognizing autonomy and self-determination.

II. Multi-Jurisdictional Issues

In our increasingly mobile society, adult guardianships often involve more than one state, raising complex jurisdictional issues. For example, many older people own property in different states. Family members may be scattered across the country. Frail, at-risk individuals may need to be moved for medical or financial reasons. Thus, judges, guardians, and lawyers frequently are faced with problems about which state should have initial jurisdiction, how to transfer a guardianship to another state, and whether a guardianship in one state will be recognized in another.

Such jurisdictional quandaries can take up vast amounts of time for courts and lawyers, cause cumbersome delays and financial burdens for family members, and exacerbate family conflict – aggravating sibling rivalry as each side must hire lawyers to battle over which state will hear a case and where a final order will be lodged. Moreover, lack of clear jurisdictional guideposts can facilitate "granny snatching" and other abusive actions.

To address these challenging problems, the Uniform Law Commission in 2007 approved the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA). The UAGPPJA seeks to clarify jurisdiction and provide a procedural

roadmap for addressing dilemmas where more than one state is involved, and to enhance communication between courts in different states. Key features include:

- Determination of initial jurisdiction. The Act provides procedures to resolve controversies concerning initial guardianship jurisdiction by designating one state – and one state only – as the proper forum. It sets out a schema for determining a person's "home state" and if none then a "significant jurisdiction state" in which a proceeding should be heard.

- Transfer. The Act specifies a two-state procedure for transferring a guardianship or conservatorship to another state, helping to reduce expenses and save time while protecting persons and their property from potential abuse.

- Recognition and enforcement of a guardianship or protective proceeding order. UAGPPJA helps to facilitate enforcement of guardianship and protective orders in other states by authorizing a guardian or conservator to register orders in the second state.

- Communication and cooperation. The Act permits communication between courts and parties of other states, records of the communications, and jurisdiction to respond to requests for assistance from courts in other states.

- Emergency situations and other special cases. A court in the state where the individual is physically present can appoint a guardian in the case of an emergency. Also, if the individual has real or tangible property located in a certain state, the court in that jurisdiction can appoint a conservator for that property.

1. Passage of Uniform Act by States. As it is jurisdictional in nature, the UAGPPJA cannot work as intended – providing uniformity and reducing conflict – unless all or most states adopt it. See "Why States Should Adopt the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act," http://www.nccusl.org/Update/uniformact_why/uniformacts-why-agppja.asp. In 2008, five states (Alaska, Colorado, Delaware, Utah and the District of Columbia) quickly adopted the Act. In 2009, the eight states adopting the Act include Illinois, Minnesota, Montana, Nevada, North Dakota, Oregon, Washington, and West Virginia. In 2010, seven states adopted the Act, including Alabama, Arizona, Iowa, Maryland, Oklahoma, South Carolina and Tennessee. In 2011 another ten states enacted the UAGPPJA, including Arkansas, Idaho, Indiana, Kentucky, Missouri, Nebraska, New Mexico, South

Dakota, Vermont and Virginia. In 2012, six states passed the Uniform Act, including Connecticut, Hawaii, Maine, New Jersey, Ohio and Pennsylvania.

In 2013, *Wyoming passed S.F. 39,* and in *New York, A.857* is has passed the legislature and is awaiting the Governor's signature, which would bring the total to 37 states plus the District of Columbia and Puerto Rico.

2. Other Jurisdictional Bills. In addition to the passage by two states of the UAGPPJA, two other states passed provisions relating to guardianship jurisdiction.

Arizona 1237 amends the state's version of the UAGPPJA enacted in 2010 to conform more closely to the Uniform Act. The state's version had required an Arizona court as the transferring court to enter an order confirming the transfer upon receiving a certified copy of the letters of office or other authority indicating appointment in the receiving court. The new measure requires only that the Arizona court receive a "provisional order accepting the proceeding" similar to the Uniform Act, allowing the transfer to proceed more smoothly and expeditiously.

Georgia HB 446. Unlike Arizona, Georgia is one of the thirteen states that have not yet enacted the UAGPPJA. HB 446 inserts selected language from the Act into requirements for appointment of guardians. First, it requires that the petition list any state "in which the proposed ward was physically present, including any period of temporary absence, for at least six consecutive months immediately before the filing of the petition or ending within the six months prior to the filing of the petition" – essentially, what would be the "home state" under the Uniform Act. Second, it requires that if there is such a state, the petitioner must give notice to persons in that state who would be entitled to notice according to Georgia law. There is no requirement in the Uniform Act routinely to list a state where the person has lived prior to the petition, and no requirement to provide notice to parties in that state unless the jurisdiction is contested.

III. Choice of Guardian

1. Guardian Background Checks. An increasing number of states have begun to enact criminal and other accountability background checks for prospective guardians. (See http://www.americanbar.org/content/dam/aba/administrative/law_aging/2013_04_CHARTFelony&Backgroundcheck.authcheckdam.pdf). Pending federal legislation (S. 975

sponsored by Sen. Klobuchar and Sen. Cornyn) would support background checks of potential guardians and conservators.

Arizona HB 2308 provides that the court may require individuals seeking appointment as a guardian or conservator (except licensed fiduciaries or employees of a financial institution) to furnish a full set of fingerprints to enable the court to conduct a criminal background investigation. The person must bear the cost of the criminal history record investigation.

Idaho HB 125 requires proposed guardians to submit to and pay for a criminal history and background check. In additional, pursuant to a court order, any person who resides in the proposed residence of the alleged incapacitated person must have a criminal history and background check. The findings must be made available to the visitor and guardian ad litem. Also, a proposed guardian must provide a report of any civil judgments and bankruptcies to the visitor, guardian ad litem and others entitled to notice. Finally, guardians must report any change in criminal history, civil judgments and bankruptcy to the visitor, guardian ad litem and others entitled to notice.

Illinois SB 1287 concerns Illinois qualifications for guardians. Illinois law prohibits the court from appointing as guardian any person convicted of "a felony involving harm or threat to an elderly or disabled person." This new bill expands the scope of the felony to include those involving harm or threat to a minor as well.

Minnesota SF 1029/HF1160. Minnesota had an existing provision for guardian background checks, but the 2013 legislation significantly strengthened it. The new measure:

- Requires a background study before appointment unless such a study has been done within the previous two years rather than the previous five years;
- Requires a background study after appointment once every two years rather than once every five years;
- Provides that, if the proposed guardian has not lived in Minnesota for the previous ten years rather than five (or if there is information indicating that the person may be a multi-state offender), the study must include criminal history data from the National Criminal Records Repository;
- Requires state licensing agency data if the person has been denied a professional license related to guardianship responsibilities, or has ever had such a license suspended, revoked or canceled;

- Indicates that while the court may make an appointment pending the results of the background study, the study must be completed no later than 30 days after appointment; and
- Provides for fees from the proposed guardian to cover the costs of the background study.

Nevada SB 78. Existing Nevada law has required the petition to state whether the proposed guardian has been convicted of a felony and, if so, information concerning the crime, as well as whether the proposed guardian was placed on probation or parole. New provisions under SB 78 require the petition also to state whether the proposed guardian is a party to any pending criminal or civil litigation; and whether the proposed guardian has filed for or received bankruptcy protection within the immediately preceding seven years.

In addition, *SB 78* requires that after appointment, a guardian must immediately inform the court of: convictions of a gross misdemeanor or felony; a bankruptcy filing; suspension, revocation or cancelling of a driver's license for nonpayment of child support; a disbarment from the practice of law, accounting, or other profession requiring a license and involving financial management; or a judgment for misappropriation of funds. The court may remove the guardian and appoint a successor unless the court finds it is in the person's best interest to allow the guardian to continue serving.

Texas HB 2080 excludes violent offenders as guardians. "It is presumed to not be in the best interests of a ward to appoint as guardian a person who has been finally convicted of a terroristic threat or continuous violence against the family of the ward or incapacitated person. A person found to have committed family violence who is subject to a Family Court protective order may not be appointed as the guardian of a ward or proposed ward who is protected by the protective order." (Steven Fields)

2. Guardian Certification. The Center for Guardianship Certification (CGC) has a national certification process that requires applicants to pass a test, meet minimum eligibility requirements, pay a fee, and make attestations about their background. As of January 2011, the CGC had certified more than 1,936 guardians nationally. In addition, the Center has implemented state-specific testing in California, Florida, Texas, and Oregon. Finally, a few additional states either require CGC certification or have their own requirements. Arizona was the first state to implement a state program and has established specific requirements for all fiduciaries other than family members who serve as guardian or conservator. As of April 2013, CGC had approved over 1,600 National Certified Guardians and 65 National Master Guardians throughout the country. In

addition, CGC has state-specific testing in California, Florida and Oregon. Beyond the CGC efforts, a number of states have enacted their own guardian certification programs.

Oregon HB 3129 requires certification of "professional fiduciaries," defined as a "fiduciary who is acting at the same time as a fiduciary for three or more protected persons who are not related to the fiduciary." While the Oregon statute previously included requirements for professional fiduciaries, the new bill requires certification by the Center for Guardianship Certification. It also establishes a Fiduciary Education Work Group to "review best practices for training and providing ongoing education for professional fiduciaries." The group will include members appointed by the Chief Justice and by the Governor. The group is to report its recommendations to the Legislative Assembly by August 1, 2014.

3. Standby Guardian. Many states have statutory provisions for "standby" guardians to serve in case of the guardian's death or incapacity. The Uniform Guardianship and Protective Proceedings Act includes procedures for a standby guardian only appointed by the parent of an unmarried adult child or by a spouse of an individual whom he or she "believes is an incapacitated person." Such an appointment must be confirmed by the court.

In Washington, a guardian appointed by the court must designate a standby guardian to serve upon his or her death or legal incapacity (RCW 11.88.125). In *SB 5692*, Washington has expanded its standby guardianship provisions to include the "planned absence" of the guardian. A standby guardian may assume some or all of the duties, responsibilities and powers of the guardian during the guardian's planned absence. Prior to the planned absence, the guardian must file a petition and give notice of the planned absence and the standby guardian to the individual and interested parties. The court is to hold a hearing on the planned absence and the appointment of the standby guardian; and issue an order specifying the duties of the standby guardian, as well as the expected duration of the planned absence. The standby guardian must post a bond, and is subject to all of the code's provisions for guardians and limited guardians.

4. Public Guardianship. The 2008 national public guardianship study found that 44 states have statutory provisions on public guardianship or guardianship of last resort. Of these, 27 states have "explicit schemes" that refer specifically to public guardianship and frequently establish a public guardianship program or office; while 18 states have "implicit schemes" (some state have more than one system) that address the role of guardian of last resort – for instance designating a governmental agency to serve if no one else is available. Additional states have public guardianship functions in practice.

(See Teaster et al, *Public Guardianship: In the Best Interest of Incapacitated People?* Preager, 2010); also an earlier version of the study (2008) at http://www.americanbar.org/content/dam/aba/migrated/aging/PublicDocuments/wards_state_full_rep_11_15_07.authcheckdam.pdf.

Arkansas HB 1811 amends the Arkansas Public Guardianship Law to authorize the employment of a deputy public guardian. It also provides that the Public Guardian for Adults must petition for appointment as guardian of a person or estate, and must consent to the appointment. Often the genesis for such a provision concerning public guardianship programs petitioning for their own appointment is a perception that if the office does not petition, (a) there may be no one else to petition; and (b) the office should not be appointed without its knowledge or consent, as it may have limited resources to serve clients in need. However, the 2008 national public guardianship study recommended that "Public guardianship programs should not petition for their own appointment, because of the inherent conflicts involved.

North Dakota HB 1041. This year North Dakota scored a great win in securing funds for public guardianship. *HB 1041* will provide full state funding for up to 86 individuals to receive guardianship services over the next two years. Qualified individuals must have incomes at or below 100% of the federal poverty level or be Medicaid-eligible. Individuals with developmental disabilities who have case management services through the Department of Human Services are not included. Additionally, the bill joins with counties to cover half the cost of existing public guardianships. The legislative success built on a comprehensive 2012 *Study of Guardianship Services for vulnerable Adults in North Dakota,* by Prof. Winsor Schmidt, a co-author of the national public guardianship study. Also key to success was extensive advocacy by AARP, the North Dakota Association of Counties, the North Dakota Long-Term Care Association, the court system, the State Bar, and others. (As indicated above, funds also were appropriated for guardian training.)

New Mexico. In SB 152, under the Office of Guardianship Act, New Mexico has created an "office of guardianship fund" in the state treasury for deposit of all funds directed toward the Developmental Disabilities Planning Council's Office of Guardianship. Money in the fund is not to go to any other state fund or be used for any other purpose than for the Office of Guardianship.

Indiana. While not specifically addressing public guardianship, Indiana achieved a great victory in securing legislative appropriations for volunteer guardian programs, an adult guardianship registry, and establishment of an Office of Adult Guardianship. The

appropriation is the result of several years of intensive work by the Indiana Adult Guardianship State task Force.

Tennessee SB555/HB 692. Tennessee also addressed public or corporate guardianship in *SB 555/HB692*, changing the definition of a "conservator" [guardian of adult] to include either a person "or an entity" appointed by the court. In the list of priorities for appointment, after a hierarchical list of relatives, the new law lists "a district public guardian" as described in the state's public guardianship law.

IV. Guardian Actions

1. Guardian/Conservator's Financial Authority. Every year a host of bills aim to expand, contract, clarify and fine-tune the financial and property authority of guardians and conservators. There were several such bills in 2013:

Colorado SB 13-077 addresses the situation in which the conservator (appointed for the protection of property) finds that payment of claims in the priority order set out in the law would substantially deplete the estate and result in insufficient funds for the person's basic living and care expenses. The conservator may file a motion seeking permission to withhold payment of allowed claims, and pay only expenses requested by the conservator regardless of the priority – and must notify all interested parties of the request. The conservator must consider:

- Current and projected care costs;
- Current and projected assets;
- Life expectancy;
- Current and projected income;
- Eligibility for benefits; and
- Dependents of the protected person.

Nevada SB 78 aims to address difficulties guardians sometimes have with banks and other financial institutions. It clarifies that banks and other financial institutions must accept a copy of the court order appointing the guardian and letters of guardianship as proof of the guardianship, and must allow the guardian access to the account or other assets of the individual, unless there are any limitations set out in the court order. It also states that unless the financial institution is a party to the guardianship proceeding, it is not entitled to a copy of the capacity evaluation or other medical information concerning the individual.

The Nevada bill also addresses the process for receiving bids for the sale of real estate by a guardian.

Virginia SB 759 grants a conservator the power to make elections for a family allowance, exempt property allowance, and homestead allowance. The bill also grants the court the ability to authorize a conservator, for good cause shown, to create and fund a trust for an incapacitated person.

2. Long-Term Care Placement. Guardian decisions about where an individual will live have received increasing attention. See Karp, N. & Wood, E., "Choosing Home for Someone Else: Guardian Residential Decision-Making," *Utah Law Review*, Vol. 2012, No. 3. See also the National Guardianship Association *Standards of Practice*, 2013. State statutes vary on the need for court approval for changes in residential settings.

Nevada SB 78 specifies that it is the guardian of person rather than the guardian of the estate that must file a petition with the court before placing an individual in a secured residential long-term care facility, unless the court previously has granted such authority, or the move is pursuant to a written recommendation by a physician, social worker or protective services employee.

3. Employment of Individual. Some state provisions address the authority of a guardian concerning employment of the individual. *Texas HB 2080* states that a guardian of the person has can authorize the employment of the person if the guardian was appointed with full authority over the person, or if the authority is specified in the court order.

4. Authority to Determine Domicile. States vary on the authority of a guardian to determine an individual's domicile. *Texas HB 2080* provides that an order appointing a guardian of the person – or a guardian of the person and estate – must specify that the guardian has "the right to the physical possession" of the person and to determine the person's domicile; and must include a bold-faced statement that "notifies peace officers that the guardian has the right to physical possession of the ward and that the peace officer can rely on the court's order and use reasonable efforts to assist the guardian to enforce the terms of the order. . ." (Steven Fields).

5. Do Not Resuscitate Order. Michigan law has provisions for an individual to execute a "do not resuscitate order" signed by a physician. *Michigan HB 4384* provides that a guardian may execute such a DNR order if the guardian: (1) visits the person not

more than 14 days before executing the order, and consults with the person about the order if possible; and (2) consults with the attending physician as to "indications that warrant" the DNR order. Annually the guardian must visit and consult with the person, and consult with the attending physician concerning the order; and must include in the annual report to court whether the guardian has executed, reaffirmed or revoked a DNR order. Additionally, prior to appointment of a guardian, the guardian ad litem must inform the person that if appointed, a guardian may have the power to execute a DNR order; and the guardian ad litem must "discern if the individual objects."

6. Guardian Post-Death Duties. A growing number of state provisions address the role of the guardian following the death of the individual, before the assets are turned over to the executor, administrator, trustee or other representative. *Nevada SB 78* requires the guardian to notify the court, interested parties, and the representative of the estate of person's death within 30 days. Upon the death, the guardian has no authority to act except to "wind up the affairs" of the guardianship and to distribute the property to the estate representatives. The guardian has 180 days to wind things up. The court may authorize the guardian to retain sufficient assets to pay anticipated taxes and expenses.

V. Fees for Guardians and Attorneys

1. Guardian Fees. The National Guardianship Association *Standards* concerning guardian fees focus on reasonableness, the aim of conserving the estate, and the requirement that fees be directly related to the fiduciary duties at hand (Standard #22). Despite this practice standard, guardian fee disputes are frequent and press reports have highlighted the charging of excessive fees that can drain the estate. A California measure addressed conservator fees:

- Existing California law requires that upon a petition by a professional fiduciary for a temporary conservatorship, the petition must include specified information concerning the petitioner's license, how the petitioner was engaged to file for appointment of a conservator, and the relationship of the petitioner with the proposed conservatee or the person's family or friends. *AB 1339* requires that the petition also include the petitioner's or the proposed conservator's proposed hourly fee schedule or another statement of the proposed compensation. The schedule or statement is not to preclude a court from reducing the hourly fees or other compensation.

  AB 1339 also requires a conservator to file with the inventory and appraisal a proposed hourly fee schedule or statement of compensation. Such a filing would

not preclude a court from reducing the compensation. Finally, the bill also addresses a court's authorization of periodic payments to the conservator from the estate. The bill specifies that the court may authorize such periodic payments only if the conservator filed a proposed hourly fee schedule or statement of compensation.

2. Attorney's Fees. Payment of attorney fees is a significant factor in bringing a guardianship proceeding. Three bills this year made clarifications about attorney fees:

Nevada SB 78 concerns the provision of "reasonable compensation" for attorneys. First, the bill adds payment of expenses as well as compensation; and second, states that unless the estate cannot pay or the court shifts payment to a third party, compensation must be paid from the estate.

Oregon HB 2570 clarifies that the court may award attorney fees incurred while representing the respondent in a protective proceeding, before appointment of a guardian (but prior court approval is not required for payment of such fees). Additionally, prior court approval is now required for attorney fees for representation of the individual following appointment, in services such as eviction of a tenant. The bill also specifies factors for the court to follow in determining whether to award attorney fees and the amount to be awarded. (See Oregon State Bar, 16 *Elder Law Newsletter* 4 (October 2013).

Tennessee SB555/HB 692 provides that the court has discretion to charge costs not only against the property of the respondent, but to the petitioner or any other party.

Texas HB 2080 provides that if the court finds that a party acted in bad faith or without just cause in prosecuting or objecting to an application for guardianship, the court may require the party to pay all or part of the costs of the proceeding including the cost of the attorney ad litem, guardian ad litem, court visitor, mental health professionals and interpreters appointed by the court. The court also may require the party to reimburse the individual's estate for the cost of the applicant's attorney fees. "In the past, all these costs and fees were to be paid from the ward's estate, or if insufficient, from the county treasury. The ability of the court to assess these costs may prevent many unnecessary guardianship contests because an attorney or guardian ad litem can request that an applicant or contestant deposit money as security for costs in the event that the court assesses these fees or costs . . ." (Steven Fields).

Texas HB 2080 also addresses the payment of a filing fee. A person or entity filing an application for guardianship, a complaint, petition or any other request in a guardianship proceeding must pay a filing fee to the court clerk, including a deposit for payment to an attorney ad litem – unless there is an affidavit of inability to pay, or unless the party is the guardian, an attorney ad litem, a guardian ad litem, a guardianship program, a governmental entity or agency, or a nonprofit agency providing guardianship services. If a guardianship is created, the person or entity that paid the filing fee is entitled to be reimbursed from the guardianship estate, or from the county treasury if the guardianship estate is sufficient to pay.

Virginia SB 759 states that if the court finds that the petitioner initiated a proceeding in bad faith or not for the benefit of the respondent, the court may require the petitioner to pay all or some of the costs.

VI. Rights of Individuals

Writings and enactments over the past 25 years have heightened awareness that guardianship removes or infringes on fundamental rights, that some basic rights should be retained statutorily, and that limited guardianship can allow the person to retain rights in areas in which he or she can make decisions.

1. Limited Orders and Focus on Decision-Making Rights. In recent years, states have strengthened provisions for limited orders, which remove rights only in those areas in which an individual is unable to make decisions – thereby preserving rights and self-determination.

California AB 937 provides that the control of the conservator [guardian of adult] over the individual "shall not extend to personal rights retained by the conservatee [adult under guardianship], including, but not limited to, the right to receive visitors, telephone calls, and personal mail, unless specifically limited by a court order."

Tennessee SB 555/HB692 changes the definition of "conservator" [called guardian of person or property of an adult in many other states] from a focus on "supervision, protection and assistance" to the exercise of "the decision-making rights and duties . . . in one or more areas in which the person lacks capacity. . . ."

Additionally, the new Tennessee law provides that the letters of conservatorship must either recite the specific powers removed and transferred to the conservator, or have attached the court order specifying the powers removed, all other powers being retained

by the individual. It lists rights that the order may remove, which "may include, but are not limited to" for example, the right to make informed decisions about medical treatment, the right to make end of life decisions, to consent to admission to hospitalization, to be discharged or transferred to a residential setting, the right to consent to participate in activities and therapies, apply for public benefits, sell property, make purchases, contract, and more. Such a list may aid the court in fashioning a limited order.

2. Right to Vote. In recent elections, attention has focused on issues of voting access – absentee voting, requirements for voter IDs, and voting by individuals in institutional settings or with some level of cognitive impairment. See "Symposium Facilitation Voting As People Age: Implications of Cognitive Impairment, 38(4) *McGeorge Law Review*, University of the Pacific (2007). Policy resulting from the 2007 Symposium and endorsed by the American Bar Association urges that state enactments explicitly provide that the right to vote is retained, except by court order in a proceeding with due process protections, in which the court finds by clear and convincing evidence that the person cannot communicate, with or without accommodations, "a specific desire to participate in the voting process."

Nevada A.B. 108 changes the state's existing law concerning the right to vote, adopting the language from the 2007 Symposium. Under existing law, a person who "has been adjudicated mentally incompetent" is not eligible to vote. The bill explicitly provides that a person for whom a court has appointed a guardian retains the right to vote, unless the court "specifically finds by clear and convincing evidence that the person lacks the mental capacity to vote because he or she cannot communicate, with or without accommodations, a specific desire to participate in the voting process and includes the finding in a court order.

3. Changes in Terminology. Many states are making changes in language to reflect preferred terminology ("people first" language) more in line with individual self-determination and rights.

- *Idaho HB 125* replaces the term "developmentally disabled person" with the term "person with a developmental disability."

- *New Jersey AB 3357* replaces the term "incompetent" with "person who is incapacitated," replaces ""mental deficiency" with "intellectual disability," and makes other similar changes in terminology.

- *Tennessee SB 555/HB692* replaces the term "disabled person" with the term "person with a disability."

4. Restoration to Capacity. While it is most common for a guardianship to end upon the death of the individual, all state statutes provide for termination of a guardianship upon finding that the person has sufficient capacity to manage his or her personal and/or financial affairs. Restoration proceedings are under increasing focus, especially for younger individuals with intellectual disabilities, mental illness or head injuries who may be able to make decisions on their own with adequate family and community support. For a recent article examining state statutory authority for restoration of rights, see Cassidy, J., "State Statutory Authority for Restoration of Rights in Termination of Adult Guardianship," ABA Commission on Law and Aging, *Bifocal*, Vol. 34, Issue 6 (August 2013) at http://www.americanbar.org/publications/bifocal/vol_34/issue_6_august2013/guardianship_restoration_of_rights.html.

Texas HB 2407 concerns right to purchase a firearm upon restoration to capacity. It states that a person whose guardianship was terminated due to complete restoration of capacity may file an application requesting removal of the person's disability to purchase a firearm. "The court must hear evidence about the circumstances that led to the imposition of the firearms disability and about the person[‘s mental history, criminal history, and reputation. The court may not grant relief unless it makes affirmative findings on the record that the person is no longer likely to act in a manner dangerous to public safety and that removing the person's disability to purchase a firearm is in the public interest" (Steven Fields).

VII. Capacity Issues

A sound and thorough evaluation of medical, cognitive and functional elements can make a real difference in the judge's decision to appoint a guardian, as well as the scope of the guardianship order. Several bills this year addressed capacity assessment for an individual alleged to have diminished decision-making ability.

Colorado SB 13-077 addresses the professional evaluation of capacity, conforming the provisions in current law for a guardianship proceeding to the evaluation required in a conservatorship (protection of property) proceeding. In both proceedings, the court may order and shall order if respondent so demands, a professional evaluation by a physician, psychologist or other individual qualified to evaluate the alleged

impairment, and the examiner must promptly file a written report with the court including:

- A description of the specific cognitive and functional limitations;
- An evaluation of the person's mental and physical condition, and if appropriate, educational potential, adaptive behavior, and social skills;
- A prognosis for improvement and recommendation about a treatment or habilitation plan; and
- The date of the examination.

Nevada SB 78 broadens evidence concerning why a guardian is needed from a certificate signed by a physician licensed by the state or employed by the VA to a letter signed by any governmental agency that conducts investigations or a certificate signed by "any other person whom the court finds qualified to execute a certificate." Query whether this dilutes requirements for needed clinical expertise. The bill also broadens evidence for appointment of a temporary guardian to include a police report.

Tennessee SB 555/HB692 removes the word "medical" in describing the required examination report concerning the condition of the respondent. The Tennessee bill also states that "the examiner's sworn report shall be *prima facie* evidence of the respondent's disability and need for the appointment" of a conservator, unless the report is "contested and found to be in error." (See the ABA/APA *Handbook for Judges on Capacity Assessment*, which states that after reviewing such a report, the judge should determine if further information or evaluation is needed, especially if there are "red flags" that warrant more investigation, or if the examination lacks attention to the person's areas of strength, prognosis for improvement, or situational or mitigating factors. http://www.apa.org/pi/aging/resources/guides/judges-diminished.pdf) The new Tennessee bill also provides that in a proceeding for restoration of capacity and rights, the court may require the individual "to submit to an examination . . . to support the contention that a conservator is no longer needed."

VIII. Post-Adjudication/Monitoring Issues

During the past 15 years, many states have sought to strengthen the court's tools for oversight of guardians (See *Guarding the Guardians: Promising Practices for Court Monitoring*, http://assets.aarp.org/rgcenter/il/2007_21_guardians.pdf. Several 2012 bills addressed court oversight tools.

1. Information to Interested Parties. One way of bolstering oversight is to provide for interested parties to receive the inventory, copies of the guardian report and accounting, and any other notification about the case. Current Nebraska law requires that the guardian or conservator send a copy of the inventory to the individual and to all other interested persons as defined in the law.

Nebraska LB 172 provides that along with the inventory, the conservator (or any guardian with control of funds) must file with the court a certificate of mailing showing that copies of the inventory were sent to all interested persons along with a form for the interested parties to fill out and return to the court indicating whether they wish to continue to receive further notifications about the case. If an interested party does not return the form, the guardian or conservator does not need to send any notifications thereafter.

2. Guardian Training. Serving as guardian is truly one of society's most demanding roles. Guardians must make critical decisions about the care and property of another, must meet fiduciary standards, and must be knowledgeable about a vast array of topics and resources. In 2013, two states addressed guardian training.

Nevada SB 78 allows the court to require a guardian to complete any available training concerning guardianship as a condition of appointment. This clarifies and gives judges broad authority to implement training requirements, and will help to protect individuals under guardianship.

North Dakota HB 1041 appropriates general fund monies to the state Supreme Court for developing and delivering training for guardians and public administrators.

3. Filing of Accountings and Reports. The primary way courts are informed about an individual's status after a guardianship has been established is through periodic guardian reports – personal status reports and financial accountings, as required by state law and court rules. At least four states made changes in reporting or accounting requirements:

Arizona HB 2308 modifies the date by which guardians and conservators must submit their written reports to an annual deadline pursuant to rules adopted by the Supreme Court.

Mississippi HB 725 provides that for a guardianship of the person only, if there is any money in the estate (but no guardian of the estate), the guardian must file financial reports to court "only as often as the court requires, and the guardianship may be closed without the need for any accounting unless otherwise determined by the court." The guardian immediately must report to court any assets received.

Tennessee SB 555/HB 692 requires the filing of a sworn accounting six months after appointment, and annually thereafter. The new measure also specifies that a report on the physical and mental condition of the individual may not be waived or excused; and removes the court's discretion to extend the time for filing of accountings for good cause.

Texas HB 2080 concerns guardian annual reports filed electronically. It provides that a guardian who files electronically my use an unsworn declaration that the report is true and correct instead of a written sworn declaration or affidavit. This will facilitate the "e-filing" of such reports. E-filing is gaining increasing momentum with courts, and is promoted in a federal bill before the U.S. Senate, S. 975, the Guardian Accountability and Senior Protection Act sponsored by Sen. Amy Klobuchar.

Texas HB 2080 specifies that guardians required to be certified by the Texas Guardianship Certification Board must include a statement in their annual accounts and annual reports stating whether they are or have been the subject of an investigation conducted by the Board during the accounting/reporting period.

Virginia HB 219 concerns the filing of annual status reports. In Virginia, the guardian's annual report is filed with the local Department of Social Services. The bill provides that the report is to be filed with the local Department where the individual resides rather than where the guardian was appointed.

Table: State Adult Guardianship Legislation at a Glance: 2013

State	Legislation	Code Section Amended	Provisions
AZ	SB 1237	*Ariz. Rev. Stat*. § 14-12301(F)	Concerns transfer of guardianship or conservatorship to another state
AZ	HB 2308	*Ariz. Rev. Stat.* § 14-	Adds authority for court to require

		5304; 5315, additional	guardian/conservator fingerprints.
AR	HB 1811	*Ark. Code Ann.* § 28-65-703	Amends public guardianship law.
CA	AB 1339	*Cal. Probate Code* §§ 1821, 2250, 2614, 2643	Concerns conservator fees.
CA	AB 937	*Cal. Probate Code* § 2351	Limits conservator's control as to personal rights.
CO	SB 13-077	*Colo. Rev. Stat.* § 15-14-406.5; § 15-14-429	Addresses evaluation of respondent; conservator allowance of claims
GA	HB 446	*Ga. Code Ann*. §§ 29-4-10(b); 29-5-10; 29-9-7	Gives notice requirements if respondent lived in another state prior to petition.
ID	HB 125	*Idaho Code* § 15-5-311(5); more	Requires guardian criminal history and background check & report of civil judgments and bankruptcies; makes terminology change.
IL	SB 1287	755 *ILCS* 5/11a-5	Concerns qualifications for appointment as guardian.
IN	Legislative appropriation		Provided support for volunteer guardian programs, an adult guardianship registry, and establishment of Office of Adult Guardianship.
MI	HB 4384	*Mich. Comp. Laws Ann.* §§ 700. 5305, 5314, more	Concerns authority of guardian to execute a DNR order on behalf of individual.
MN	SF 1029/HF 1160	*Minn. Stat. Ann.* § 524.5-118	Enhances guardian background checks.
MS	HB 725	*Miss. Code Ann.* § 93-13-38	Concerns financial reporting by guardian of the person.
NE	LB 172	*Neb. Rev. Stat.* §§ 30-2628 & 30-2647	Concerns notifications to interested parties in guardianship case.
NV	SB 78	*Nev. Rev. Stat.* § 159.013 *et seq.*	Concerns guardian training; makes numerous procedural changes throughout guardianship code.
NV	AB 108	*Nev. Rev. Stat.* §§ 293.540, 293.542 & 293.543	Concerns right to vote.
NH	SB 106	*N.H. Rev. Stat. Ann* § 464-A:8	Addresses confidentiality of court records.
NJ	AB 3357	*N.J. Stat. Ann.* various sections	Makes changes in terminology

NM	SB 152		Creates Office of Guardianship Fund.
NY	A 857		Adopts Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act
ND	HB 1041		Appropriates funds for public guardianship and for guardian training.
OR	HB 3129	*Or. Rev. Stat.* § 125.240	Requires professional guardians to be certified by the Center for Guardianship Certification; and establishes a Fiduciary Education Work Group.
OR	HB 2570	*Or. Rev. Stat.* § 125.095	Clarifies payment of attorney fees.
TN	SB 555/HB 692	*Tenn. Code Ann.* § 34-101 *et. seq.*	Makes numerous procedural changes in Tennessee conservatorship [guardianship of adults] law.
TX	SB 1093		Recodifies the Texas probate code into a new Texas Estates code, effective January 1, 2014.
TX	HB 2080		Makes numerous procedural changes in various sections of Texas guardianship law.
TX	HB 2407	*Texas Estates Code* § 1202.201	Concerns right to purchase firearm upon restoration to capacity.
VA	SB 759	*Va. Code* §§ 64.2-2001, 2002, 2007, 2022 & 2023	Makes various procedural revisions in guardianship code; makes clarifications in financial authority of conservator.
VA	HB 219	*Va. Code* § 64.2-2020	Concerns filing of annual reports by guardians.
WA	SB 5692	*RCW* § 11.88.125	Concerns standby guardians.
WY	SF 39		Adoption of Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act