

# GUARDIANSHIP OF THE ELDERLY

## PAST PERFORMANCE AND FUTURE PROMISES

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*“We are all aging, but unfortunately, I cannot say with confidence that if any one of us becomes incapacitated that a robust system is in place to protect our person and our financial assets.”*

SENATOR GORDON H. SMITH<sup>1</sup>

### INTRODUCTION

Guardianship is a relationship created by state law in which a court gives one person or entity (the guardian) the duty and power to make personal and/or property decisions for another (the ward). Guardianships were designed to protect the interest of incapacitated adults and elders in particular. Yet Congress, national advocacy organizations, and the media have increasingly highlighted the use of guardianships and conservatorships as a means to further exploit older persons. The ease at which guardianships are granted, the lack of court oversight, the questionable qualifications of guardians, the general lack of accountability, soaring caseloads, and poor data management make the guardianship system primed for further abuse, neglect, and exploitation of elders. However, recent developments suggest a new era in court leadership, technology, and innovative practices that have the potential to vastly improve court assignment and monitoring of guardianships.

Guardianship is defined by state laws that vary from one state to the next. In general, a **Guardian of the Person** is a guardian who possesses some or all power with regard to the personal affairs (health and welfare) of the individual, while a **Guardian of the Estate** is a guardian who possesses some or all powers with regard to the real and personal property of the individual (often referred to as conservators or fiduciaries). In many cases, this is the same person. In most states, the probate division handles guardianship cases. In other states, general jurisdiction courts or divisions other than probate have oversight of guardianships.

Due to the seriousness of being incapacitated and the loss of individual rights, guardianships are considered to be an option of “last resort.” The court can order either a full or limited guardianship for incapacitated persons. Under full guardianship, wards relinquish all rights to self-determination and guardians have full authority over their wards’ personal and financial affairs. Wards lose all fundamental

rights, including the right to manage their own finances, buy or sell property, make medical decisions for themselves, get married, vote in elections, and enter into contracts. For this reason, limited guardianships — in which the guardian’s powers and duties are limited so that wards retain some rights depending on their level of capacity — tend to be preferred.

Courts rely on a variety of types of guardians, including private and professional individuals and entities. Courts prefer to appoint a family member to act as guardian over an incapacitated relative, but it is not always possible to find family members or friends to take on this responsibility. In recent years, an entire service industry of private professional guardians has grown out of the increasing demand for guardians. In addition, every state has a public guardianship program, funded by state or local governments, to serve incapacitated adults who do not have the means to pay for the costs associated with guardianship and do not have family or friends who can serve in a guardianship capacity.<sup>2</sup>

Generally, the process begins with the determination of incapacity and the appointment of a guardian. Interested parties, such as family members or public agencies, petition the court for appointment of guardians. The courts generally require that professional guardians be fully bonded for all liquid assets of the ward at the time they are appointed guardian.<sup>3</sup> The court is then responsible for ensuring that the alleged incapacitated person’s rights to due process are upheld, while making provisions for investigating and gauging the extent of incapacity, if any. Should the individual be deemed incapacitated, the judge appoints a guardian and writes an order describing the duration and scope of the guardian’s powers and duties. Once a guardianship has been appointed, the court is responsible for holding the guardian accountable through monitoring and reporting procedures for the duration of the guardianship. The court has the authority to expand or reduce guardianship orders, remove guardians for failing to fulfill their responsibilities, and terminate guardianships and restore the rights of wards who have regained their capacity.

## MAJOR ISSUES ASSOCIATED WITH GUARDIANSHIPS

Nationally, there are five major issues that pose particular challenges for the court: (1) the determination of capacity, (2) costs associated with the administration of guardianships, (3) training and education standards for judges and court staff, (4) court monitoring of guardianships, and (5) the collection of data.

### Capacity

The determination of “capacity” is not an exact science. Capacity is both situational and transient — different degrees of capacity are required for different tasks, and an individual can experience both periods of relative lucidity and confusion. Moreover, capacity can be affected by external factors, such as medication. Thus, the judicial finding of incapacity must take into account objective criteria as well as an analysis of how specific capacities impact an individual’s ability to function in a variety of settings. Yet reports suggest that courts are reluctant to order lengthy and costly investigations that document capacity.<sup>4</sup> Rather, judges may use their own discretion by installing an emergency guardian, effectively denying prospective wards their

right to due process. Similarly, full guardianships may be “easier” for a judge to grant as they circumvent a full assessment of the dimensions of capacity and functionality.

### Financial Costs

The costs of guardianships nationwide have not been documented, and there tends to be little guidance and few regulations on the types of “acceptable” costs in the administration of a guardianship. In individual cases, guardianships can result in the total loss of a ward’s resources (unless the guardian was fully bonded).<sup>5</sup> The public also pays a heavy price, as public guardianship programs are funded through state and local tax dollars. For courts, the costs to improve guardianship practices might entail hiring specialized staff, requiring thorough medical and psychological assessments, requiring specialized judicial and court staff training, building outreach to local community resources, creating and implementing a database to facilitate guardianship monitoring, and developing court monitoring programs. Yet the combination of scarce state and federal dollars and an increasing number of impoverished elderly requiring the assignment of public guardians creates an undue burden on individual courts to fund improvements. Moreover, there are no studies that demonstrate the association between programmatic costs and court performance.

### Training and Education

In 1993, the National Probate Court Standards were released, along with recommendations to improve judicial education on guardianship matters.<sup>6</sup> However, judicial training has not kept pace with demands. In its 2007 report on “Guardianship for the Elderly,” the U.S. Senate Special Committee on Aging noted that there is a strong sentiment that judges receive very little education that would enable them to address complicated guardianship issues.<sup>7</sup> The lack of judicial training is associated with the greater use of full guardianships, questionable monitoring practices, and difficulties in identifying and replacing poor performing guardians. The status of judicial training is compounded by insufficient training for court managers, staff, and volunteers assigned to review reports, make home visits, and/or investigate cases. In addition to limited judicial and court staff training opportunities, guardians — both professional and family members, are unlikely to be fully trained. The lack of guardianship training is especially apparent in cases where family or friends are assigned as guardians with little guidance on the boundaries of their authority or knowledge of appropriate actions.

### Court Monitoring

It is the responsibility of the court to actively oversee and monitor guardianship cases — indeed, court monitoring is the only way to ensure the welfare of wards, discourage and identify neglect, abuse, or exploitation of wards by guardians, and sanction guardians who demonstrate malfeasance. Yet court monitoring is an expensive and timely proposition, and despite 20 years of legislation designed to reform guardianship procedures, the failures of the court to provide appropriate oversight and monitoring continue to make national headlines. A 2006 report from the AARP and the American Bar Association (ABA) Commission on Law and Aging found that court oversight of guardianships is generally lacking, citing infrequent reviews of guard-

ian reports and visits to wards, under-utilized volunteers, and wasted community resources.<sup>8</sup>

## Data

Adult guardianship data do not exist at the national level. In 2004, the U.S. Government Accountability Office (GAO) reported a grave lack of hard data on guardianships involving incapacitated seniors.<sup>9</sup> In 2006, the ABA issued a report with similar findings.<sup>10</sup> Currently, there is not a scientifically based estimate of the number of open guardianships in the country. Nor is there solid data on the incidence of guardianship abuse. While some of this information is available at the individual court level, few states can provide accurate and reliable numbers on adult guardianships and conservatorships.

## RECENT DEVELOPMENTS AND THE CASE FOR OPTIMISM

With the exception of a handful of exemplary courts, current practices related to the assignment and monitoring of adult guardianships are insufficient in protecting the rights of individuals. However, recent developments indicate an environment ripe for reform and improvement. Three developments show particular promise in highlighting the challenges and solutions associated with court handling of adult guardianship cases. First, court leaders have taken up the call to address elder issues and have concentrated much of their effort on guardianship cases. Second, technological innovations hold tremendous promise in their ability to help courts record, track, and monitor guardianships, especially conservatorships. Third, a number of national-level organizations are highlighting and developing innovative practices aimed at improving court resources and the monitoring process.

### Court leaders have begun to address challenges associated with adult guardianships.

Since the late 1980s, a host of national, state, and local efforts have sought to strengthen guardianship practice.<sup>11</sup>

- The National Guardianship Association was created in 1987 and produced *Standards of Practice* and a *Code of Ethics*.
- The National Guardianship Symposium (the “Wingspread” conference), sponsored by the American Bar Association, was held in 1988.
- A 1991 study by the ABA Commission profiled best practices in guardianship monitoring.<sup>12</sup>
- Legal Counsel for the Elderly Inc., (at AARP), coordinated the National Guardianship Monitoring Program, which used trained volunteers to be the “eyes and ears” of the court.

- The *National Probate Court Standards* was released in 1993 and included standards related to procedural protections, limited guardianships, use of less restrictive guardianship alternatives, and court procedures to monitor guardian activities.<sup>13</sup>
- A second national guardianship conference (“Wingspan”), sponsored by seven national groups, was held in 2001.
- The Uniform Guardianship and Protective Proceedings Act was revised in 1997, with a new version taking effect August 1, 2003.

Despite these efforts, high-profile cases involving the abuse of guardianships have been highlighted by the media. In June 2003, the *Washington Post* published several articles detailing massive neglect

and exploitation by court-appointed attorney guardians in the District of Columbia.<sup>14</sup> In 2004 and 2005, a series of articles in the *Dallas Morning News* spotlighted problems with guardianships in Texas, also detailing neglect.<sup>15</sup> In November 2005, the *Los Angeles Times*, in a report following the examination of more than 2,400 conservatorship cases, found that “judges frequently overlooked incompetence, neglect and outright theft.”<sup>16</sup> According to the authors, “Probate judges say that they do their best, but that the courts are swamped with cases and short of staff.” The media continue to report significant problems with guardianships and conservatorships.

The United States Congress has held a number of hearings and published reports on the problems of guardianship in recent years. For instance, in 2003, the U.S. Senate Special Committee on Aging held hearings on guardianship entitled “Guardianships Over the Elderly: Security Provided or Freedoms

Denied?” Three years later, hearings in front of the Special Committee “brought to light the continuing failure of guardianship to protect the elderly from physical neglect and abuse, financial exploitation, and indignity.”<sup>17</sup> In December 2007, the Special Committee on Aging released its report on guardianship for the elderly and called for the development of promising new models for guardianship for the elderly.<sup>18</sup>

Recently court leaders have taken action to address challenges associated with adult guardianships. In May 2008, the Pew Center on the States sponsored a conference for chief justices and state court administrators, “The Role of Court Leaders in Supporting Public Policy,” in Philadelphia. The topic of guardianships was used to demonstrate an area in which court leadership could make a strong impact in improving the system nationwide. Two months later, the Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA), meeting at their annual conference, took the following actions:



- Passed a resolution in support of the concept paper, *State Courts and Elder Abuse: Ensuring Justice for Older Americans*.<sup>19</sup> The paper calls for the creation of a national resource for the courts on aging issues, elder abuse, and guardianships and for the development of national and statewide model practices.
- Passed a resolution in support of the *Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act*, which outlines interstate jurisdiction of guardianship cases.
- Established a task force to address elder issues and guardianships.

These actions signal an oncoming wave of court awareness of the problem and suggest the potential for real solutions that can filter down to courts nationwide.

### **TECHNOLOGICAL INNOVATIONS CAN STREAMLINE THE PROCESS AS WELL AS IMPROVE ACCOUNTABILITY**

Most courts in the United States are not able to readily document the number of open guardianship cases without reviewing actual case files. Where statistics are available, the perpetual nature of guardianship and the poor level of court monitoring have resulted in questionable case status data.<sup>20</sup> Many case management systems do not have sufficient fields for courts to document case-related activities such as compliance with annual accountings and review hearings. Yet advances in technology and their application to guardianships are very promising.

Generally, software applications can be used to enhance the court's responsibilities in overseeing the guardianship process and to identify guardian activities that appear to be out of the norm. At its basic level, software can be used to create a "tickler" system that primarily reminds the court and notifies guardians of due dates of particular reports, such as annual accountings. At a higher level, financial-based software can be used to detect anomalies in guardianships of the estate or conservatorships. Several examples showcase how technology can improve the guardianship process and court oversight.

Florida's 17th Judicial Circuit (Broward County) uses guardianship reporting software that includes inventory, plan, and accounting forms. The goal of the software is to reduce paper logistics, offload costly data entry, and reduce errors and redundancy. The court is developing a probate and guardianship database management system to work in conjunction with the e-filing system. The software promises judges and court staff flexibility in searching particular items and running reports. The reporting capacity is particularly intriguing. For example, reports could be run on cases where the visitation of the ward was not completed once per quarter or on cases where income increased or decreased by a specific percentage when compared to the prior accounting.

In St. Paul, Minnesota's Second Judicial District (Ramsey County), a pilot program focuses on the online submission of financial reports. The court cites the following benefits:

- The software is able to produce comparative reports on demand.
- Analysis across all or a selected group of conservators/conservatorships can be completed quickly.
- Additional supplemental information is handled electronically.
- Audit abilities are greatly enhanced.
- The increased capabilities, documentation, and accountability have a deterrent effect.
- Less staff time is required for reviewing and filing reports and associated activities.
- The system reduces paper and paperwork.

Minnesota's pilot project is expected to be expanded statewide. As the database becomes populated, experts will be able to develop programs that "flag" cases for follow-up and/or investigation. For instance, there may be a sudden increase or decrease in funds being withdrawn from financial institutions.

The increasing availability and utilization of technology can make the courts more efficient and improve accountability. Current software applications make court monitoring of conservatorships and the detection of financial abuse and exploitation more manageable. However, technology will never replace the personal oversight that is required in guardianship cases. Guardianship of the person is likely to continue to require intensive monitoring to ensure the physical and mental wellbeing of wards.

### **NEW RESOURCES AIMED AT IMPROVING COURT RESPONSES TO GUARDIANSHIP ARE BECOMING AVAILABLE**

A number of organizations have been making significant strides in providing tools that courts can use to improve the administration and oversight of guardianships. In 2007, the AARP Public Policy Institute published *Guarding the Guardians: Promising Practices for Court Monitoring*.<sup>21</sup> The publication outlines promising practices to improve court monitoring of guardianships. The ABA also completed a report on volunteer guardianship-monitoring programs.<sup>22</sup> The ABA and AARP are currently working to brief state courts on promising monitoring techniques.

In 2008, the National Center for State Courts received funding to create the Center for Elders and the Courts, whose mission is to "provide leadership and resources to the courts on a spectrum of issues impacting the elderly."<sup>23</sup> The Center for Elders and the Courts will feature a Web-based clearinghouse ([www.eldersandcourts.org](http://www.eldersandcourts.org)) that focuses on aging issues, guardianship, and elder abuse. It will highlight promising practices, offer a speaker's bureau, and develop a listserv that aims to build a community of judicial and court staff with interests in serving the needs of older persons.

In addition, a number of court membership associations have been working to address guardianship issues. The National College of Probate Judges consistently offers educational sessions at its conferences. Representatives from the National Association for Court Management

and the American Judges Association have noted the need for guardianship reform and training. The Conference of Chief Justices and the Conference of State Court Administrators have prioritized guardianship issues. Innovation, education, and communication are the keys to improving the current state of affairs. The synergy of activities from a number of national organizations is highly encouraging.

## RECOMMENDATIONS

Guardianship laws vary from state to state, with practices varying by court and judge. Yet the types of challenges are similar enough that recommendations can be implemented to help most courts nationwide.

### RECOMMENDATION 1 DOCUMENT THE NUMBER AND TYPE OF ADULT GUARDIANSHIPS

Accurate and reliable data is essential to the development of any strategic planning in this area. Data that document the number of open and closed cases by type of guardianship (e.g., conservatorship, limited guardianship) on a quarterly or annual basis would allow a closer examination of trends and forecasts on how the volume of cases may change as the population ages. Ultimately, courts should strive toward monitoring the number and outcomes of hearings and annual reports and to identify data elements that can help judges identify cases that need further attention from the courts. In the long term, state courts should consider the development of performance standards for guardianship cases that can be used to assess and improve court performance.

### RECOMMENDATION 2 USE TECHNOLOGY TO INCREASE COURT EFFICIENCY AND ENHANCE ACCOUNTABILITY

Technology exists that can move a court from simply documenting cases to streamlining the process. At minimum, courts should have systems that allow for automatic notifications to be sent to guardians and conservators announcing important hearing dates and report deadlines. Courts should explore software applications, such as those showcased earlier in this article, that can be used to statistically analyze trends and flag cases for additional follow-up. Technology should serve the dual purposes of improving court efficiency and easing the task of judicial oversight.

### RECOMMENDATION 3 ESTABLISH STANDARDS AND CRITERIA FOR GUARDIANS

A handful of states require professional guardians and/or conservators to be certified or licensed, but in most states, there are few if any criteria to take on the assignment of guardian. Both family and professional guardians will require some level of training to learn the court's expectations and the ethical responsibilities associated

with guardianship. Professional guardians or conservators should be subjected to high standards that minimize the exploitation of the elderly. States should consider developing certification or licensing programs for professional guardians. A general resource is the National Guardianship Association, which offers standards of practice, a code of ethics, and educational conferences for members.

### RECOMMENDATION 4 PROVIDE JUDICIAL AND COURT STAFF TRAINING AND IMPROVE THE STATUS OF PROBATE COURT

In many jurisdictions, courts that handle probate cases or adult guardianships are neglected when considering financial and staff resources. Yet the complexity of these types of cases and the burden of ongoing court monitoring requires that judges and court staff be specially trained on guardianship and probate issues and that the courts receive the resources necessary to legitimately carry out its oversight function. For example, the issue of mental capacity is complicated and requires expert analysis that can guide judges in the determination of specific capacity issues and assign limited guardianships whenever possible. State courts should insist on mandatory training for judges and court managers assigned to handle adult guardianship cases. The National College of Probate Judges offers resources and educational conferences that often focus on guardianship issues.

### RECOMMENDATION 5 CREATE A STRATEGIC PLAN THAT REVIEWS CURRENT COURT PERFORMANCE, IDENTIFIES CHALLENGES, AND RECOMMENDS SPECIFIC IMPROVEMENTS

Individual courts should not wait for local media to expose sensational guardianship cases mismanaged by the court. Instead, court managers have the opportunity to develop a team of stakeholders that examines and evaluates current practices, assesses them in comparison to national promising practices, and develops a bold plan that will improve current court handling of guardianship cases. State court leaders should take a leadership position on this issue and use their leverage to oversee real reform.

## RESOURCES

A number of resources are available that may be helpful in guiding court improvement on guardianship.<sup>24</sup> The U.S. Government Accountability Office (GAO) published a 2004 and 2006 report on guardianship. The 2004 report, *Guardianships: Collaboration Needed to Protect Incapacitated Elderly People*, outlines the characteristics of four exemplary courts (Broward County, Florida; Rockingham County, New Hampshire; San Francisco County, California; and Tarrant County, Texas). The 2006 report, *Guardianships: Little Progress in Ensuring Protection for Incapacitated Elderly People*, offers some promising developments after lamenting the lack of follow-up to the 2004 report. In December 2007, Senators Gordon Smith and Herb Kohl, on behalf of the United States Special Committee on Aging, published *Guardianship for the Elderly: Protecting the Rights and Welfare of Seniors with Reduced Capacity*, which provides an overview of the problems and offers recommendations.<sup>25</sup>

The AARP Public Policy Institute's *Guarding the Guardians: Promising Practices for Court Monitoring*, identifies a number of approaches for effective monitoring of guardianships.<sup>26</sup> The American Bar Association Commission on Law and Aging offers a guide to creating volunteer guardianship monitoring programs.<sup>27</sup> The National Center for State Courts concept paper, *State Courts and Elder Abuse: Ensuring Justice for Older Americans*, has a number of recommendations relevant to the courts.<sup>28</sup> Additionally, the NCSC is currently developing a Web-based resource: the *Center for Elders and the Courts*.<sup>29</sup> The National College of Probate Judges and the National Guardianship Association also provide organizational information online.<sup>30</sup>

## ABOUT THE AUTHORS

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## NOTE

1. Gordon H. Smith, "Smith Report Exposes Deficiencies in Elder Abuse Prevention: Report examines the Federal Role in Overseeing America's Guardianship System," December 13, 2007, press release at [www.aging.senate.gov](http://www.aging.senate.gov).
2. The attorney and court fees associated with filing for guardianship, as well as the expenses incurred by a guardian in managing an incapacitated adult's affairs, typically are covered by the incapacitated adult.
3. The bonding of family members acting in the capacity of guardian is desirable, but the practice varies by court and is often considered on a case-by-case basis.
4. See Gordon Smith and Herb Kohl (United States Special Committee on Aging), *Guardianship for the Elderly: Protecting the Rights and Welfare of Seniors with Reduced Capacity*, 2007.
5. A bond acts as an insurance policy in that an annual premium is paid and the ward is fully protected should the guardian mishandle the liquid assets. Courts vary considerably in their use of bonds.
6. See the Commission on National Probate Court Standards.
7. Ibid.
8. Naomi Karp and Erica Wood, *Guardianship Monitoring: A National Survey of Court Practices*. Washington, DC: AARP Public Policy Institute, 2006.
9. United States Government Accountability Office (GAO), *Guardianships: Collaboration Needed to Protect Incapacitated Elderly People*, Washington, DC: USGAO — Publication # 04-0655, 2004.
10. Erica Wood, *State-Level Adult Guardianship Data: An Exploratory Survey*, Washington, DC: National Center on Elder Abuse, 2006.
11. Sally Balch Hurme and Erica Wood, "Guardian Accountability Then and Now: Tracing Tenets for an Active Court Role," *Stetson Law Review*, 16: 867-930, 2002.

12. Sally Balch Hurme, *Steps to Enhance Guardianship Monitoring*, American Bar Association Commission on the Mentally Disabled and Commission on Legal Problems of the Elderly, (Washington, DC, 1991).
13. Paula Hannaford and T. Hafemeister, "The National Probate Court Standards: The Role of the Courts in Guardianship and Conservatorship Proceedings," *The Elder Law Journal*, 2(2), 1994.
14. Carol D. Leonnig, Lena H. Sun, and Sarah Cohen, "Misplaced Trust: Guardians in the District: Under Court, Vulnerable Became Victims," *Washington Post*, June 15, 2003.
15. See for example, Kim Horner and Lee Hancock, "Holes in the Safety Net," *Dallas Morning News*. January 12, 2005.
16. Jack Leonard, Robin Fields, and Evelyn Larrubia, "Justice Sleeps While Seniors Suffer," *Los Angeles Times*, November 14, 2005.
17. "Smith and Kohl Request Proposals to Improve Guardianship for the Elderly," Press Release. December 6, 2006, found at <http://aging.senate.gov/minority>.
18. Smith and Kohl, *supra* note 4.
19. Brenda Uekert and Denise Dancy, *State Courts and Elder Abuse: Ensuring Justice for Older Americans* (Williamsburg, Virginia; National Center for State Courts, 2007).
20. For instance, studies have shown a number of guardianship cases that have remained "open" in the system even though the ward was found to be deceased.
21. Naomi Karp and Erica Wood, *Guarding the Guardians: Promising Practices for Court Monitoring* (Washington, DC: AARP Public Policy Institute, 2007).
22. Ellen Klem, *Volunteer Guardianship Monitoring Programs: A Win-Win Solution* (Washington, DC: American Bar Association, 2007).
23. The project is funded by the Retirement Research Foundation of Chicago, Illinois.
24. The 2004 report can be found at [www.gao.gov/new.items/d04655.pdf](http://www.gao.gov/new.items/d04655.pdf) and the 2006 report is at [www.gao.gov/new.items/d061086t.pdf](http://www.gao.gov/new.items/d061086t.pdf).
25. The report can be found online at [http://aging.senate.gov/minority/\\_files/guardianship\\_report.pdf](http://aging.senate.gov/minority/_files/guardianship_report.pdf).
26. See [www.aarp.org/research/legal/guardianships/inb126\\_guardianship.html](http://www.aarp.org/research/legal/guardianships/inb126_guardianship.html) for links to the full report.
27. The report is online at [http://www.aarp.org/research/legal/guardianships/inb126\\_guardianship.html](http://www.aarp.org/research/legal/guardianships/inb126_guardianship.html).
28. See the report at <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/famct&CISOPTR=198>.
29. The Web site, currently under development, can be found at [www.eldersandcourts.com](http://www.eldersandcourts.com).
30. The National College of Probate Judges can be found at [www.ncpj.org](http://www.ncpj.org). The Web site of the National Guardianship Association is [www.guardianship.org](http://www.guardianship.org).