



# Adult Guardianship Initiative

*An Initiative of the NCSC's Center for Elders and the Courts and the CCJ/COSCA Joint Committee on Elders and the Courts*

## Background

The National Center for State Courts (NCSC) works closely with the Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA) to address key policy issues and promote court reform. Since the mid-2000s, all three organizations have called for resources and actions to improve responses to elder issues and the adult guardianship processes. In 2008, a joint CCJ/COSCA Task Force on Elders and the Courts was created, which would later become a standing committee. Later that year, the NCSC created a national resource center—the Center for Elders and the Courts (CEC).

In 2010, NCSC debuted its online resource center at [www.eldersandcourts.org](http://www.eldersandcourts.org). With support from the Retirement Research Foundation, the State Justice Institute (SJI), and the US DOJ Bureau of Justice Assistance, the Center for Elders and the Courts added several components to their portfolio—including prosecution and court elder abuse toolkits and a comprehensive online course—*Justice Responses to Elder Abuse*.

Most recently, the topic of adult guardianships/conservatorships has received considerable attention from judicial and court management associations. In 2013, the National College of Probate Judges updated their national probate court standards, which offer guidance on adult guardianship and conservatorship processes. In 2014, the National Association for Court Management released a guide on adult guardianships. In 2015, NCSC began a new research study on the problem of conservator fraud (funded by the Office for Victims of Crime) and with support from SJI, launched the Conservatorship Accountability Project (CAP).

NCSC and the CCJ/COSCA Joint Elders and the Courts Committee have worked collaboratively to develop strategies to further the field. This document recognizes our ongoing efforts and outlines actions that will meet the needs of state courts and the constituents we serve. NCSC’s Center for Elders and the Courts will serve as the “umbrella” organization to meet the stated goals.

## Mission

**The mission of the Adult Guardianship Initiative is to improve state court responses to guardianship and conservatorship matters. This Initiative encourages the use of less restrictive alternatives, the prioritization of the protected person’s individual rights, active court monitoring and oversight, the modernization of processes, and the restoration of rights.**

## Guardianship Initiative Goals

### 1. Develop and maintain a partnership of key stakeholders representing

- Judicial and court management associations (e.g., Conference of Chief Justices, Conference of State Court Administrators, National College of Probate Judges, American Judges Association, National Association for Court Management)
- Federal agencies (e.g., Consumer Financial Protection Bureau, Administration for Community Living, Social Security Administration, Office for Violence Against Women, Department of Justice, Office for Victims of Crime)
- Guardianship and Aging networks (e.g., National Guardianship Association, AARP, American Bar Association, National Adult Protective Services Association)
- State Working Interdisciplinary Networks of Guardianship Stakeholders (WINGS)

## **2. Prioritize the protection and enhancement of individual rights by**

- Encouraging the use of less restrictive alternatives, such as durable powers of attorney and supported decision making agreements
- Crafting individualized limited guardianship/conservatorship orders based on the capabilities and desires of the protected person
- Educating guardians and conservators on their responsibilities and obligations
- Incorporating the National Guardianship Association’s “Rights of an Individual Under Guardianship” into court practices
- Encouraging supported decision making within guardianship and conservatorship arrangements
- Focusing on strategies that will lead to the restoration of rights
- Emphasizing legal representation of the subject of the guardianship/conservatorship petition and protected person

## **3. Promote modernization and transparency in the guardianship process by**

- Adopting and implementing e-filing and conservatorship/guardianship software
- Collecting and reporting basic guardianship/conservatorship data
- Offering forms and advice in plain language
- Establishing a forum in which interested parties can have their concerns heard
- Documenting the specific reasons for a guardianship/conservatorship and whether less restrictive alternatives may satisfy the needs of protected persons
- Engaging in outreach opportunities in the community
- Developing performance measures and moving toward performance management systems
- Using differentiated case management techniques to better allocate resources and strategies
- Training judges/judicial officers on best practices in guardianship/conservatorship proceedings

## **4. Enhance guardianship/conservatorship court processes and oversight by**

- Supporting implementation of the National Probate Court Standards
- Training judges and court staff on reviewing and auditing annual reports
- Encouraging the allocation of resources, including court visitors, auditors, and volunteer monitors, that will improve the oversight capacity of the courts
- Developing innovative approaches and partnerships with community groups that can provide resources to protected persons and their families
- Establishing resources for guardians/conservators that will help them meet their responsibilities and provide assistance and encouragement
- Requiring bonds and background checks for proposed guardians/conservators
- Promoting technology to standardize submissions and facilitate the review process
- Developing model investigative, auditing and monitoring practices that can be replicated
- Proactively and timely responding to allegations of abuse, neglect or exploitation of a person placed under a guardianship or conservatorship

## **Project Concepts**

### **★ Funding and Implementing a Guardianship Court Improvement Program (GCIP)**

**Statement of the Problem:** The demand for adult guardianships is growing as a result of a larger older population and increasing life spans. At the same time, resources that would assist the state courts and executive agencies to efficiently and effectively process and monitor guardianship cases have not kept pace with the need. Resources to improve guardianship processes remain scarce in the vast majority of states.

**Proposed Solution:** In 2010, CCJ and COSCA submitted a letter to the Assistant Secretary for Aging at the U.S. Department of Health and Human Services, in which they proposed the creation of a Guardianship Court Improvement Program (GCIP) in the reauthorization of the Older Americans Act. GCIP is based on the Court Improvement Program, which is a model for federal support of court-community collaboration in the child welfare arena. This proposal supports the creation and assessment of pilot projects for the sole purpose of making improvements in state court handling of adult guardianship proceedings. The highest state court would develop a partnership with the State Agency on Aging and established WINGS (Working Interdisciplinary Network of Guardianship Stakeholders) to identify needs and assist with implementation. GCIP funds could be used to conduct assessments and identify problems in the way adult guardianship works in the jurisdiction, develop strategies for addressing those identified problems, and implement system improvements. GCIP would also be used to establish Guardianship Offices in the administrative offices of the state courts, thus raising the stature of this issue.

### **Conservatorship/Guardianship Accountability Project: Building a National Resource that uses Technology and Analytics to Modernize the Process**

**Statement of the Problem:** State courts are charged with protecting the assets of incapacitated persons who are placed under a guardianship of the estate (conservatorship). However, few courts have the resources or specialized personnel to actively monitor the funds under conservatorships, which are often managed by family members with little training or expertise. Generally, conservators must file inventories and accountings with the court and provide supplemental information. Practices vary considerably, with some states requiring standardized forms and e-filing of the accountings and other states permitting individually crafted forms submitted in person or by mail. Moreover, details of financial transactions are recorded in paper form or in a text field, which is a major obstacle to the courts' ability to audit accountings over time. The combination of insufficient resources and antiquated processes does little to deter or document the exploitation of vulnerable adults placed under conservatorships. Similar problems exist in terms of the guardianship reporting process.

**Proposed Solution:** In 2015, the National Center for State Courts, with support from the State Justice Institute and in collaboration with the Minnesota Judicial Council, launched a pilot project known as the Conservatorship Accountability Project (CAP). The project team is working with five pilot states (Indiana, Iowa, Nevada, New Mexico, Texas) to adapt the MyMNConservator software—which requires conservators to enter transaction level information and submit documentation—for their jurisdiction. The project includes an analytical component that has resulted in the identification of ten risk factors that can be used to predict accountings in which there is a “concern of loss.” The risk factors are currently being tested in the Minnesota dataset for the purpose of refining the factors to improve their predictive powers. The project includes the development of an implementation manual and a technical guide. At least two of the pilot states are also planning to adapt the software so that guardians of the person can submit their annual well-being reports through the software.

The CAP can be adopted by local and state courts to modernize the submission process and improve the ability of courts to review and audit accountings. However, most states do not have the resources necessary to build/implement the software or audit accountings. NCSC envisions a national resource center that will help states adapt the software, periodically analyze anonymized transaction data to improve the algorithms that predict “concern of loss” cases, assist states in developing differentiated case management strategies to audit a subset of accountings, and develop judicial response protocols that emphasize the return of assets that have been misappropriated. The CAP Resource Center would be a long-term project that seeks innovative and streamlined strategies to prevent conservator fraud and provide timely responses that protect the protected person's assets. Ideally, the project would expand to address guardians of the person.

## ★ National Summit for Courts on Improving Adult Guardianship Practices

**Statement of the Problem:** State courts are responsible for overseeing adult guardianships and conservatorships, but encounter similar problems. Nationally, there are seven major issues that pose particular challenges for the court: (1) the determination of capacity; (2) the use of alternatives or limited guardianships; (3) qualifications and availability of guardians (4) costs associated with the administration of guardianships; (5) training and education standards for judges and court staff; (6) court monitoring of guardianships; and (7) the collection of data. While a number of states have worked in recent years to substantively reform their guardianship processes, reform remains a state-by-state effort.

**Proposed Solution:** NCSC proposes convening a National Summit that highlights promising practices and results in state action plans detailing processes, technology and resource solutions that can be implemented in both the short- and long-term. A Summit Planning Team would be created, comprised of NCSC subject matter experts, leaders from innovative programs, representatives from funding agencies, and selected partners. The Planning Team will develop a two-day Summit, with each state/territory requested to send four to five-member teams appointed by the Chief Justice and State Court Administrator, in consultation with WINGS (Working Interdisciplinary Networks of Guardianship Stakeholders) where relevant. NCSC proposes periodic follow-up after the Summit to document activities and to highlight and share notable projects and practices nationwide. To accommodate variations in state court organizational structures and available resources, the Planning Team will feature projects that can be implemented both locally and statewide and will emphasize low-cost innovations that can improve guardianship processes. NCSC and select member organizations of the National Guardianship Network will provide technical assistance and follow-up with attendees following the Summit.

## ★ Establishing Judicial Response Protocols to Address Guardianship Abuse, Neglect and Exploitation

**Statement of the Problem:** The national media and federal and state agencies have highlighted cases in which protected persons have been subjected to abuse, neglect and/or exploitation. Preliminary finds from a study on conservator fraud show that judges and judicial officers do not have any guidance and may face structural barriers in developing timely and appropriate responses to allegations and evidence of wrong-doing in guardianship cases. Additionally, prosecution in these matters is rare.

**Proposed Solution:** NCSC proposes to carry out a national study that explores judicial strategies in responding to abuse, neglect and exploitation in guardianship/conservatorship cases. The project will identify barriers that may inhibit efforts to provide relief to the protected person or estate and highlight specific cases in which relief was provided. Also, the study would explore referrals for prosecution and strategies prosecutors might take to provide relief for the protected person and sanctions where appropriate. Findings will be used to inform a national advisory group, composed of NCSC, a select group of expert judges and prosecutors, and representatives from key stakeholder groups (e.g., National College of Probate Judges, the American Judges Association, the National District Attorneys Association). The group will develop recommendations and national-scope response protocols that will inform prosecutors and guide judicial officials to take actions that prevent and address abuses that occur in guardianship cases. The protocols will be widely disseminated through judicial, court and prosecutions associations and placed on NCSC's Center for Elders and Courts website.

## ★ Developing a Mentor Guardianship Court Program

**Statement of the Problem:** Guardianship practices vary from judge to judge and court to court. The National Probate Court Standards offer a guide to courts, but the lack of judicial training and documented best practices results in a wide array of problems, including the overuse of guardianships/conservatorships and insufficient monitoring. Judicial officers and court managers do not have any nationally-recognized courts on which to model their processes and performance.

**Proposed Solution:** Mentor courts, which have existed in a number of other areas, including child dependency and domestic violence, would provide valuable lessons to judges/judicial officials on the entire guardianship process, from the submission of the petition, the competency hearing, the use of less restrictive alternatives, the appointment of guardians/conservators and their responsibilities, court monitoring and oversight, and the restoration of rights. This concept calls for nominations and selection of one or two mentor court programs that will serve as resources for courts across the country by hosting site visits, facilitating peer-to-peer learning, and providing examples of effective practices for visiting teams of judges, court personnel, and other stakeholders. The National Center for State Courts and key members of the National Guardianship Network would guide the criteria and selection of sites, provide technical assistance, develop marketing materials and resources, schedule tours and learning resources, and develop and deliver webinars. Experts from the mentor courts would help NCSC and the project team develop an interactive online training program for judicial officers and court staff.

## ★ Building a Research Portfolio and Developing Court Performance Management Systems

**Statement of the Problem:** There is very little research on particular guardianship practices and their effectiveness in promoting the well-being of vulnerable adults placed under a guardianship or conservatorship. Evaluations of specialized programs, including volunteer monitoring programs, are non-existent. Moreover, the field lacks performance measures that can be used to gauge and improve court performance over time.

**Proposed Solution:** A research portfolio that includes program evaluations and comparative studies on guardianship practices is proposed to develop best practices. These studies will inform the development of measures that courts can implement to gauge performance over time and to initiate reforms. Initially, court performance measures can be extracted from state requirements and the National Probate Court Standards (e.g., percentage of conservators filing inventories and appraisals within 60 days after appointment, percentage of prospective guardians and conservators subjected to background checks). Following the construction of court measures, several courts would be recruited to participate in a pilot study to inform the usefulness of each measure. The cycle of research—performance measures—implementation—refinement is considered an ongoing effort as additional evidence-based practices become known. Ultimately, the courts should move toward performance management processes that are constantly informed by data.

## ★ Developing Innovative Distance-Learning Programs

**Statement of the Problem:** Individuals considering accepting the responsibility of being a guardian or conservator and those already appointed have very few resources or training available to them. While laws and requirements vary across states and localities, there are national standards that guide good practices. A distance learning course would provide training and resources to individuals who are considering petitioning for a court order, as well as those who have already been appointed by a court.

**Proposed Solution/Funding Promised:** The Department of Justice’s Elder Justice Initiative is working on a contract with National Center for State Courts, in collaboration with the American Bar Association and the Washington State Courts, to develop an online program, *Enhancing Choice and Fulfilling Duties: National Training Resource on Decision Support and Guardianship*. The project will fill a glaring national gap by developing and promoting an overarching national training course that will help people avoid unnecessary or overbroad guardianship, consider less restrictive options, and assist family and other lay guardians to serve in what is one of society’s most difficult roles. The online interactive training program will engage the learner through real-world scenarios, activities based on learning objectives, and interactive animations in 3D environments. The project will be guided by a multidisciplinary advisory team.

## RIGHTS OF AN INDIVIDUAL UNDER GUARDIANSHIP

**Guardianship** is the legal process by which a court determines that a person is incapable of making decision about some or all areas of life. Because of certain medical conditions, a developmental disability, mental retardation, dementia, mental illness, or the inability to communicate, a person may not be able to take care of his or her own finances, make medical decisions, or understand the need for assistance with the activities of daily living.

After the court has heard medical testimony and other reliable evidence, it may declare a person to be “**incapacitated**” and appoint a **guardian** to make decisions on the person’s behalf. This determination of incapacity and the appointment of a guardian may take specific rights from the person. Once under guardianship, the court might refer to this person as the “**ward,**” the “**incapacitated person**” or the “**protected person.**”

The court should specifically state which rights it is taking from the ward. The ward keeps all rights that the court has not specifically given to the guardian. State laws may also restrict the ward’s rights. The state Constitution, for example, may deny the ward the right to vote. The ward, however, has the right to the **least restrictive** guardianship suitable to his or her needs and conditions. The guardian also has the affirmative duty to advise the ward of his or her rights and to attempt to maximize the ward’s self reliance and independence.

### Rights of the Ward

In general, the ward keeps all legal and civil rights guaranteed to all residents under the states’ and the United States’ Constitution, **except those rights which the court grants to the guardian.**

These rights include, but are not limited to:

1. The right to be treated with dignity and respect.
2. The right to privacy, which includes the right to privacy of the body, and the right to private, and uncensored communication with others by mail, telephone, or personal visits.
3. The right to exercise control over all aspects of life that the court has not delegated to the guardian.
4. The right to appropriate services suited to the ward’s needs and conditions, including mental health services.
5. The right to have the guardian consider the ward’s personal desires, preferences, and opinions.
6. The right to safe, sanitary, and humane living conditions within the least restrictive environment that meets the ward’s needs.
7. The right to procreate.
8. The right to marry.
9. The right to equal treatment under the law, regardless of race, religion, creed, sex, age, marital status, sexual orientation, or political affiliations.
10. The right to have explanations of any medical procedures or treatment. This includes information about the benefits, risks, and side effects of the treatment, and any alternative procedures or medications available.
11. The right to have personal information kept confidential. This may include withholding certain information the ward may not want his or her family to know. The guardian may have to provide personal information to apply for benefits, or in emergency situations where the ward or others may be in danger, or if the information is required by law to be shared with agencies or health departments. Personal information may also be contained in the reports the guardian makes to the court, and which may be available for others to see.
12. The right to review personal records, including medical, financial, and treatment records.
13. The right to speak privately with an attorney, ombudsman, or other advocate.
14. The right to petition the court to modify or terminate the guardianship. This includes the right to meet privately with an attorney or other advocate to assist with this legal procedure.



15. The right to bring a grievance against the guardian, request the court to review the guardian's actions, request removal and replacement of the guardian, or request that the court restore rights if it can be shown that the ward has regained capacity to make some or all decisions. The guardian also has a responsibility to request that the ward's rights be restored when there is evidence that the ward has regained capacity.

### **Removal and Replacement of a Guardian**

A **petition** asking the court to review the guardianship can be filed in the clerk of court's office by the ward, the ward's attorney, the ward's family, or any concerned party. This petition should simply state the reasons a review is being requested. It is strongly recommended that the petitioner seek **legal assistance** when considering whether to file such a petition. There may be quicker, more effective, and/or less costly remedies available, such as **writing a letter** to the guardian or asking an **ombudsman or other advocate** to intervene with the guardian.

The court may order a **hearing** at which the party bringing the petition presents evidence. At the conclusion of the evidence, the court may order the guardian to consider or pursue a different course of action, be more responsive to the needs of the ward, file timely reports or accountings, or the court may **remove and replace** the guardian. Where it can be shown that the ward has regained the capacity to make decisions in some or all areas, the court may **dismiss or modify** the guardianship.