

**The Time Has Finally Come: An Argument and a Roadmap
for Regulating the Court-Appointed Professional Fiduciary**

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Abstract

The National Center for State Courts estimated that guardians across the country supervise approximately 1.3 million adults and an aggregate of \$50 billion of their assets. The second national study of public guardians found a rising need for guardians and a changing guardianship landscape—one including the oldest old and a younger population needing representation due to functional limitations caused by mental illness, developmental disability, head injury, and substance abuse.

Against an escalating need for guardians, a rise in the complexity of guardianship cases, and recent scrutiny concerning exploitation by guardians, it is imperative that the quality of guardian services be as high as possible. A ways to insure and to improve the quality of services is through certification and licensure of guardians. Benefits include greater awareness of ethics and standards of guardianship practice and an improved ability of guardians to make decisions on behalf of the incapacitated persons they serve. Other measures of improvements in practice include an increase in timely and accurate filing of guardianship reports and a decrease in the number of grievances against guardians.

Seven states (i.e., Alaska, Illinois, North Dakota, Nevada, Oregon, and Utah) require certification by the Center for Guardianship Certification (CGC). Arizona, Florida, Texas and Washington enacted their own state certification of guardians. California requires a combination of CGC certification and state certification. States currently requiring state licensure for guardians and conservators are Alaska, California and Nevada. This paper presents an argument that it is time for all states to require either licensure, certification, or both to significantly improve the delivery of guardianship and conservatorship services.

I. Introduction

Elder abuse (e.g., physical, sexual, and psychological abuse; active and passive neglect; financial exploitation) affects approximately five million older Americans each year (Department of Justice, 2014). The personal, financial, and societal impact of abuse is devastating; it is estimated to cost billions annually, yet it is projected that only one in 24 cases is ever reported (Department of Justice, 2014).¹ Significant gaps in knowledge of adult abuse exist and persist, especially regarding the abuse, neglect, and exploitation (ANE) of vulnerable adults by guardians. With a burgeoning aging population as well as a growing population of younger adults with mental illness, traumatic brain injury, and developmental and intellectual disabilities, there is a growing need for these surrogate decision makers (SDMs). Oversight of and guidance for all guardians remains inadequate.

Individuals who require the assistance of guardians and conservators² are especially vulnerable because they rely on another person for care and/or are unable to advocate for themselves. The issue of abuse by guardians has been highly visible nationally, with reports by the Government Accountability Office (2010; 2016)³, testimony before the U.S. Senate

¹ Department of Justice. 2014. Elder abuse. Online: <https://www.justice.gov/elderjustice/about-elder-abuse>

² This paper uses the uniform law terms guardianship to define the appointment of a fiduciary for an individual who has been adjudicated as not having sufficient capacity to manage their personal affairs, which may include health care decision, residential decisions and other matters regarding their person and conservatorship to define to the appointment of a fiduciary to handle the finances of an individual who is unable to manager their financial and business affairs.

³ Government Accountability Office (2010). Guardianships: Cases of financial exploitation, neglect and abuse of seniors. GAO-10-1046. Retrieved online at <https://www.gao.gov/products/GAO-10-1046>. Government Accountability Office (2016). Elder abuse: The extent of abuse by guardians is unknown, but some measures exist to help protect older adult. Retrieved online at <https://www.gao.gov/products/GAO-17-33>

Committee on Aging and Social Security Administration (Teaster, 18 April 2018)⁴, and a flurry of media attention in *Forbes*, *The Huffington Post*, *NPR On Point*, and *Senior Living*.⁵

An influential article in *The New Yorker* by Rachel Aviv (2017) entitled *How the Elderly Lose Their Rights* described egregious treatment by private professional guardian April Parks, a Las Vegas, Nevada, guardian.⁶ Ms. Parks warehoused persons under her care in unacceptable facilities, charged unreasonably high fees, and made it impossible for concerned family members or friends to have contact with loved ones. Parks was indicted on over 250 felony counts (one for each person she served); her story became the subject of a recent movie, *I Care a Lot*.

In another media report, Rebecca Fierle, a Florida private professional guardian in the Orlando and Volusia area was investigated for placing numerous do-not-resuscitate orders on older adults under her care without family or court permission.⁷ According to the Orange County Comptroller she billed Advent Health approximately \$4 million for guardian-related services over a decade: in some cases she billed both AdventHealth and the person under her

⁴ Knutson, T. (2018, April 18). Vast majority of elder financial abuse by guardians can be prevented, experts tell Senate. <https://www.forbes.com/sites/tedknutson/2018/04/18/vast-majority-of-elder-financial-abuse-by-guardians-can-be-prevented-experts-tell-senate/?sh=7b07cfd5caa0>

⁵ Leland, J. (2018, December 7). I'm Petitioning...for the Return of My Life. *New York Times*. <https://www.nytimes.com/2018/12/07/nyregion/court-appointed-guardianship-like-prison.html>
(2017, November 15). The Briefing Powered by Dartmouth. SiriusXm Radio.
(2017, October 5). On Point, WBUR, Who's Guarding Against the Guardians?
(2017, October 10). The Huffington Post. *The System Of Court-Appointed Guardians Continues To Fail The Elderly*. https://www.huffingtonpost.com/entry/court-appointed-guardian-system-failing-elderly_us_59d3f70be4b06226e3f44d4e
(2017, October 8). Business Insider. *There's a legal way for someone to take your home, your stuff, and your money — but everyone ignores the two documents that can help keep you safe*. <http://www.businessinsider.com/power-of-attorney-form-guardianship-estate-planning-2017-10>

⁶ Rachel Aviv (2017) "How the Elderly Lose Their Rights", *New Yorker Magazine* (October 2, 2017) , <https://www.newyorker.com/magazine/2017/10/09/how-the-elderly-lose-their-rights>

⁷ Frank Fernandez (2019) "Guardian in Volusia Elder Cases Under Criminal Investigation Over DNRs" *Daytona Beach News Journal* (October 2, 2019)

care for the same services but at different rates. In a case that garnered national attention, Ms. Fierle reportedly refused to remove a do-not-resuscitate order from one of the people she represented at a Tampa hospital even though the man asked her to do so. The man subsequently died; medical staff did not try to save him because of the DNR order. Fierle resigned on July 25, 2019 as a registered guardian in Florida, according to a letter provided by the Florida Department of Elder Affairs.

II. History of the Problem

A. The National Picture⁸

The United States currently has about 50 million individuals aged 65 and older and is approaching a monumental demographic change (U.S. Census, 2018). By the year 2030, all baby boomers will be 65 or older, expanding the older adult population so that “1 in every 5 residents will be retirement age” U.S. Census, 2018). The United States has seen significant increases in the aging population in the past 10 years with those 65 and older increasing by 35%⁹. Racial and ethnic minority populations composed 23% of adults 65 and older and about 1 in 10 older adults were living below the United States poverty level in 2018¹⁰. Currently, more than 5 million Americans are living with Alzheimer’s disease and it is the 6th leading cause of death in the

⁸ U.S. Census. (2018). Older People Projected to Outnumber Children. (2021). Retrieved 7 March 2021, from <https://www.census.gov/newsroom/press-releases/2018/cb18-41-population-projections.html>

⁹ Administration for Community Living. (2019). *2019 Profile of Older Americans*.

¹⁰ Id.

United States ¹¹¹² 1 in 3 American seniors die with Alzheimer’s or dementia, currently costing the nation \$305 billion and this number is expected to rise as high as \$1.1 trillion by 2050.¹³ The United States cost of health care is nearly twice that of the average member country of the Organization for Economic Co-Operation and Development, yet has the shortest life expectancy comparatively.¹⁴ The need for assistance with care more than doubles from the ages of 75-84 to 85 and older (going from 8% to 21%). This population of adults 85 and older is expected to more than double (6.5 million to 14.4 million) by 2040 (123% increase)¹⁵In 2018, 34% of older adults 65 and older reported some sort of disability.¹⁶ Converging with the aging of the population is an increase in the number of “oldest old” people over 85, a rising lifespan of individuals with disabilities, and increased mobility of family members—adding up to a greater need for decisional support, including a need for guardianship for some. For too many people, there is too little money, no available housing or long-term supports and services, and no family or close friend to serve them.

In addition to the aging population, somewhere between 3.2 million and 5.3 million people in the United States are living with a disability as a result of a traumatic brain injury.¹⁷ The percentage

¹¹ Alzheimer’s Association (2021). Facts and Figures. (2021). Retrieved 7 March 2021, from <https://www.alz.org/alzheimers-dementia/facts-figures>

¹² Id.

¹³ Id.

¹⁴ The Commonwealth Fund. (2021). U.S. Health Care from a Global Perspective: Higher Spending, Worse Outcomes?. Retrieved 7 March 2021, from <https://www.commonwealthfund.org/publications/issue-briefs/2020/jan/us-health-care-global-perspective-2019>

¹⁵ Supra, Note 9

¹⁶ Supra, Note 9

¹⁷ Report to Congress, Traumatic Brain Injury in the United States: Epidemiology and Rehabilitation, Centers for Disease Control and Prevention, (2008) https://www.cdc.gov/traumaticbraininjury/pdf/tbi_report_to_congress_epi_and_rehab-a.pdf

of children diagnosed with an intellectual disability has increased to 1.2% of the population, which increase may be attributed to improved awareness, screening and diagnosis.¹⁸

These statistics make clear that the demand for guardians and conservators is not expected to decline over time, despite an increased awareness of alternatives to guardianship and conservatorship, including but not limited to supported decision making. With these population groups described above increasing in numbers, while only a fraction of the individuals require a surrogate decision maker (SMD), there is a corresponding need for court appointed guardians and conservators.

B. The Need for Surrogate Decision Makers

In addition to the demographic trends, the recognition of the need for SDMs has evolved over the last century for both medical and financial decisions, also contributing to the increase in need for the services of a guardian or conservator.

i. Medical and Personal Decision Making

It could be argued that the United States recognized the right to personal autonomy in the Declaration of Independence.¹⁹ The concept of the right to prior consent for medical treatment

¹⁸ Increase in Developmental Disabilities Among Children in the United States, Centers of Disease Control and Prevention (2019) <https://www.cdc.gov/ncbddd/developmentaldisabilities/features/increase-in-developmental-disabilities.html>

¹⁹ Declaration of Independence (US 1776)

developed over the time through tort law²⁰, legislation ²¹ and codes of medical ethics.²² As this body of law developed, the question of whether or not the patient had the necessary decision-making ability to give informed consent to medical treatment became an important question for medical providers. With the increases in life expectancy in the last century, physicians were confronted with the question of whether the patient could in fact consent and if not, whether someone else had the authority to consent on behalf of the patient. If a patient had not signed a durable power of attorney for healthcare or medical proxy, the medical profession was increasingly aware of the risk in treating a patient who both could not consent and did not have an authorized decision maker to consent on his or her behalf. Many states have passed surrogate health care decision making statutes, giving authority to family or close friends to make health care decisions²³, but those laws do not cover every situation.

Also in the last century, growing awareness of elder abuse and the need for protective services for at risk adults led to funding for state adult protective service organizations. ²⁴ Intervention by Adult Protective Services on behalf of at-risk adult requires consent to receive services or a determination that the client lacks capacity and may require the appointment of a decision maker to consent on behalf of the client.²⁵

²⁰ Joan L. O’Sullivan and Breck G. Borcharding (2002) , *Informed Consent for Medication in Persons with Mental Retardation and Mental Illness*, 12 Health Matrix 63, Winter 2002

²¹ P.L. 101-508 Patient Self-Determination Act of 1990

²² American Medical Association Code of Medical Ethics

²³ Default Surrogate Consent Laws, https://www.americanbar.org/content/dam/aba/administrative/law_aging/2019-sept-default-surrogate-consent-statutes.pdf

²⁴ National Adult Protective Services Association, History: About Adult Protective Services from 1960 to 2000 <http://www.napsa-now.org/about-napsa/history/history-of-adult-protective-services/>

²⁵ Holly Ramsey-Klawnsnik , The Complexities of Cognitive Capacity, Technical Assistance Brief, National Adult Protective Services Association (June 2014) <http://www.napsa-now.org/wp-content/uploads/2015/06/TA-Brief-Mental-Capacity-FINAL.pdf>

ii. Financial Decision Making

Common law principles of agency established the concept of delegating financial decision making through appointment of an agent, using a power of attorney. However, the agency concept did not allow an agent to make decisions for a principal who became incapacitated. “Agency is the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.”²⁶

Under the common law, an agent could not act under delegation of authority unless the principal had capacity to act, as a principal could not authorize an agent to act if the principal did not have the capacity to do so.²⁷ “Just as there must be legal capacity to be an agent so there must be capacity to create a power. One who cannot make a contract cannot authorize another to make it for him.”²⁸ Therefore, a minor could not delegate authority to an agent to contract on behalf of the minor nor could an incapacitated person. Because the agency created by a power of attorney designation ceased when the principal became incapacitated, the power of attorney was an effective tool for delegation by competent principals; however, it was not the useful tool it is today. The concept of durability or the survival of the agency delegation even if the principal lost capacity to act, made the durable power of attorney the estate-planning device it is today. Although

²⁶ Restatement (Third) of Agency § 101 (2006).

²⁷ Restatement (First) of Agency § 20 (1933).

²⁸ Warren A. Seavey, *The Rationale of Agency*, 29 Yale L. J. 859, 870 (1920).

durability made delegation of financial authority an essential component of estate planning, a principal must still have capacity at the time of execution of a power of attorney instrument.

Even for those individuals with the foresight to sign a general durable power of attorney to provide for an agent to handle his or her financial affairs in the event of incapacity, situations still arise where the agent cannot or should not act. In some instances, the agency authority has been abused and the principal has suffered financial loss as a result of an agent's breach. In other instances, the agent or agents nominated by the principal fail to survive the principal or is unwilling or unable to act.

If an individual does not have a valid power of attorney signed before the onset of incapacity, conservatorship is the most common solution for management of his or her financial affairs. A conservator is granted authority over the financial matters of an individual who is unable to manage their own finances, and the court is expected to review the actions of the agent, usually through annual reporting by the conservator.

In years past, the trust department of an individual's local bank was often willing to serve as conservator or trustee, but there has a realization in the banking industry that, as a rule, trust departments are not profitable.²⁹ Local banks are downsizing or closing their trust departments, leaving large banks and trust companies as the only option, which often have minimum asset size and other requirements, rendering this option unavailable for smaller conservatorship estates and assets that are more difficult to manage.³⁰

²⁹ Chris Nichols, Does Your Bank Trust too Much in Trusts?, January 28, 2016, <https://csbcorrespondent.com/blog/does-your-bank-trust-too-much-trust>

³⁰ e.g. Charles Schwab Trust Company will not accept the following assets: tangible personal property, such are art and collectibles, non-residential real property and LLC interests or operating businesses.

C. The Unmet Need for Surrogate Decision Makers

No statewide databases exist showing the number and characteristics of open guardianship cases. Thus, it is difficult to quantify caseloads and even more difficult to estimate the extent of unmet need for guardians. A study by Teaster, Wood, Holt, and George (2019) concerned surveys and interviews to understand that need in the state of New York.³¹ The research team surveyed New York judges to estimate unmet need for guardianship services for individuals deemed incapacitated but with no available family members or others to serve. Some 55 percent of responding judges said this population makes up 21-40 percent of their guardianship caseload. When asked about cases where there are limited financial resources, one third said “low-fee or no-fee” cases involving this population make 21–40 percent. *One New York City judge estimated that these cases make up over 60 percent of his caseload.*³²

Over half of the responding judges indicated that there are not enough resources to handle their current, active caseload involving no-fee or low-fee cases and named an increased number of guardians and increased number of clerks as resources that would help.³³ Over 80 percent indicated that it was difficult to find an appropriate guardian to serve for no-fee or low-fee cases. Over 55 percent said this occurs “most of the time.” When asked whether there are a sufficient number of guardians with skills to take no-fee/low-fee cases, 60 percent said no, citing the difficulty of finding qualified guardians due to the fact that the work required exceeds available payment. However, with individuals who have sufficient resources to pay for the services of a

³¹ Teaster, P.B., Wood, E.F., Holt, J., & George, K. (2019). *Incapacitated, indigent, and alone: Meeting guardianship and decision support needs in New York*. Report to The New York Community Trust.

³² Id.

³³ Id.

guardian or conservator, the private professional fiduciary field is growing in numbers to meet the need.

III. Concerns – Oversight of Guardians and Conservators

The problems with the oversight of guardians are hardly new. Even when a person is determined to lack capacity to make decisions for their person, property or both, guardianship may not ameliorate the presenting problems. In fact, some commentators have written that it would be better to have no guardian at all rather than to have a bad guardian.³⁴ Even under the best of circumstances, it is difficult to locate willing and able guardians, who often serve for the life of the person under guardianship.

Courts are expected to supervise the conduct of guardians and conservators, but this supervision has failed to protect against abuses by fiduciaries in many instances. From the first national conference on guardianship policy in 1988 until today, there have been repeated calls for better supervision of court appointed guardians and conservators.³⁵ For example, the United States Government Accountability Office has published numerous reports over the last twenty years on the need for better accountability.³⁶ Consonant with the GAO, Barnes commented on the need for and challenges with monitoring.

³⁴ Teaster, P.B., Wood, E., Schmidt, W., Lawrence, S.A., Mendiondo, M. (2010). *Public guardianship: In the best interest of incapacitated people?* Praeger Publishing Company.

³⁵ See, ABA Commn. on the Mentally Disabled & Commn. on Leg. Problems of the Elderly, *Guardianship: An Agenda for Reform — Recommendations of the National Guardianship Symposium and Policy of the American Bar Association* (ABA 1989). See also, Sally Bach Hurme and Erica Wood, *Guardianship Accountability Then and Now; Tracing Tenants for an Active Court Role*, 31 *Stetson Law Review* 867 – 940 (2002) and Mary Joy Quinn and Howard S. Krooks, *The Relationship Between the Guardian and the Court*, 2012 *Utah Law Review* 1611 – 1688. These published articles from the three prior national policy conferences illustrate that the barriers to accountability to the courts still exist, despite statutory changes and other efforts.

³⁶ See, U.S. Gov't Accountability Off., GAO-04-655, *GUARDIANSHIPS: Collaboration Needed to Protect Incapacitated Elderly People* (2004); U.S. Gov't Accountability Off., GAO-10-1046, *GUARDIANSHIPS: Cases of Financial Exploitation Neglect, and Abuse of Seniors* (2010); U.S. Gov't Accountability Off., GAO-11-678, *INCAPACITATED ADULTS: Oversight of Federal Fiduciaries and Court-Appointed Guardians Needs*

The difficulties with guardian monitoring can be attributed primarily to the fact that few or no persons who are knowledgeable and concerned with quality of services have access to information likely to prevent or curtail guardian abuse and neglect. The situation is the very paradigm of justification for professionalization of services providers. The individual who knows a great deal about the quality of services is the one to be held personally responsible for that quality. The ward, the courts, and society rely on the professional who is deemed to know the most about what should be done for the individual client, the ward.³⁷

Guardians and conservators are restricted by statutory authority and court imposed restrictions in an order of appointment; however, as fiduciaries, they are still required to exercise judgment and make all decisions within their authority without input from the court, subject only to annual reporting. A breach by a guardian or conservator may not become apparent without a thorough review of annual reports and even then, the ability to remedy some conduct may be limited by the passage of time.

As the private professional fiduciary profession is relatively new and growing to meet the need, the authors are raising awareness of the need to increase professionalism in the industry and provide resources and guidance to fiduciaries as they provide services to the public.

While court oversight of guardians and conservators is showing improvement as a result of both statutory reform and provision of additional resources by state legislatures to assist courts

Improvement (2011); U.S. Gov't Accountability Off., GAO-17-33, *Elder Abuse: The Extent of Abuse by Guardians is Unknown, but Some Measures Exist to Help Protect Older Adults* (2016).

³⁷ Alison Barnes, *The Virtues of Corporate and Professional Guardians*, 31 STETSON L. REV. 941, 984 (2002).

with requiring and reviewing annual reporting, problems remain. One of the primary impediments to reform is the lack of data across states on guardianship cases, making formulation of comprehensive policy more difficult.³⁸³⁹

In addition to the cases mentioned above, one of the most notorious breaches of fiduciary duty, which went on unchecked for years was in Nevada and concerned a professional conservator named Jared Shafer. Shafer was the owner of Professional Fiduciary Services, an organization with employees who helped him manage guardianships and conservatorships.⁴⁰ One of his employees, Patience Bristol, exploited persons whom she served, stealing over \$200,000 from clients. Ms. Bristol was found guilty of a single charge of the exploitation of a vulnerable adult, sentenced three to eight years in prison, and ordered to pay back \$160,000 in restitution to individuals whom she exploited. The reporter and family members assert that Mr. Shafer was the mastermind behind the exploitation, which caused enormous harm to victims and their family members alike, although no criminal charges were ever brought against Mr. Shafer.

IV. Solutions

A. Certification

Against a rising need for guardians, an increase in the complexity of guardianship cases, and recent and current scrutiny concerning exploitation by guardians),⁴¹ now more than ever, it is

³⁸ U.S Senate Special Committee on Aging, *Ensuring Trust: Strengthening State Efforts to Overhaul the Guardian Process and Protect Older Americans*, November 2018, p. 5.

³⁹ See companion summit paper by Hurme and Robinson.

⁴⁰ Nevada; Las Vegas Review Journal (May 28, 2014) *Professional conservator, multiple system reform efforts*

⁴¹ *Supra*, Notes 3 & 6

critical that the quality of guardianship services be as high as possible. Some commentators regard that one way to improve the quality of services is through the certification of guardians⁴² These commentators posit that benefits of guardianship certification include greater awareness of ethics and standards of guardianship practice and an improved ability of guardians to make appropriate decisions on behalf of the persons they serve.⁴⁴ Improvements in practice should include an increase in timely and accurate filing of guardianship reports and a decrease in the number of grievances against guardians⁴⁵

The Center for Guardianship Certification (CGC), initially the National Guardianship Foundation was created in 1997 to enhance the quality of guardianship services through national certification.⁴⁶ In 2007, the name was changed to CGC to distinguish CGC from the National Guardianship Association (NGA), reflecting that, while allied, the two organizations provide different services. CGC is recognized for its stewardship of the national certification process, being responsible for exam content, scheduling and oversight of the exams, maintaining the de-certification process and providing leadership in every area of certification.⁴⁷

⁴² Third National Guardianship Association Standards and Recommendations, Utah Law Review, 2012 (3), pp 1191-1205

⁴³ Teaster, P.B., Wood, E., Schmidt, W., Lawrence, S.A., Mendiondo, M. (2010). *Public guardianship: In the best interest of incapacitated people?* Praeger Publishing Company.

⁴⁴ Id.

⁴⁵ Teaster, P.B., & Hurme, S.B., Du, Z., & Du, C. (2021). Outcomes of guardianship certification: A report for the Center for Guardianship Certification.

⁴⁶ Center for Guardianship Certification. History. Online: <https://guardianshipcert.org/about-us/>

⁴⁷ Center for Guardianship Certification. History. Online: <https://guardianshipcert.org/about-us/>

Certification through the CGC demonstrates to the public, clients, and the courts that a CGC certified guardian has sufficient skill, knowledge and understanding of universal guardianship principles to be worthy of the responsibility entrusted to him or her.

Certification entitles guardians to represent to the courts and the public that they are eligible for appointment, have not been disqualified by prior conduct, will abide by ethical standards governing a person with fiduciary responsibilities, agrees to a disciplinary process, and can demonstrate through a written test an understanding of basic guardianship principles and laws.

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While guardians in any state can elect to be certified, nine states (i.e., Alaska, Illinois, North Dakota, New Hampshire, Nevada, New Mexico, Oregon, and Utah) require certification by the CGC. Arizona, Florida, Texas and Washington enacted their own state certification of guardians⁵⁰⁵¹. Alaska, California and Nevada require a combination of CGC certification and state licensing. ⁵²Collectively and respectively, these 13 states represent unique state certification practices. ⁵³

⁴⁸ Rules and Regulations Concerning Certification and Recertification of National Certified Guardians
www.guardianshipcert.org

⁴⁹ Id.

⁵⁰ Supra, Note 45

⁵¹ https://www.americanbar.org/content/dam/aba/administrative/law_aging/2020-chrt-st-guard-cert.pdf

⁵² Supra, Note 45

⁵³ Supra, Note 45

One example of state certification is the Washington State Certified Professional Guardianship Board. The board develops, adopts and implements regulations governing certification, minimum standards of practice, training, and discipline of professional guardians, with the goal of protecting the public and facilitating the delivery of competent and ethical guardianship services. Education for certified guardians is provided by The University of Washington Continuum College (UWCC). On hiatus for the 2020-2021 school year due to COVID, UWCC advised the Administrative Office of the Courts that the hiatus year would be used to redevelop its educational program to reflect Washington’s newly passed Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UCGOPAA).⁵⁴

B. Measuring the Effectiveness of Certification

To study the issue of the certification of guardians, in 2020, Teaster and Hurme sent an online or conventionally mailed (depending on the ability to locate judges' email addresses) survey to targeted judges (those in whose jurisdiction there are certified guardians--certified by the Center for Guardianship Certification or by a state certification process) across the country.
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A “General” survey was sent to judges in those states where certification through CGC is voluntary. For California judges, survey question terminology reflected that under California law the term conservator is used for those appointed to serve adults, while guardian is used for those appointed to serve minors. The California questions were also modified to accommodate

⁵⁴ Washington Courts. 2020. Johnson, Stacey, Office of the Public Guardian. 4 May Office of Guardianship and Elder Services . Hiatus Letter. Online: <https://www.courts.wa.gov/guardianportal/cpg/content/docs/UW%20Hiatus%20Letter%202020%2005%2004.pdf>

⁵⁵ Supra, Note 45

California's hybrid process to require CGC certification as well as state licensing. Terminology in the survey sent to judges in states with mandated certification (i.e., Arizona, Texas and Washington) was adjusted to reflect state certification rather than CGC certification. The questions in all three versions were otherwise identical.

Results indicated that certification of guardians made a significant impact on guardians' knowledge concerning their responsibilities (35%), timely filing of personal status reports (28%), providing complete information on personal status reports (28%), knowledge of guardianship procedures (26%), and application of ethical codes of conduct/standards of practice (26%). Judges reported that state-certified guardians are more likely to file timely personal status reports (61.5%), file accurate personal status reports (60.0%), and file timely (58%) and accurate (58%) financial accountings. More than half of judge respondents indicated that certified guardians contributed to the administration of justice by understanding guardian responsibilities (80%), complying with guardianship procedures (75%), demonstrating an understanding of ethical codes/standards of practice (64%), assisting people under guardianship with complex needs (58%), and managing large and/or complex estates (53%).⁵⁶

Teaster and Hurme (2021) concluded that certification is so much more than an exam. Certification provides the same functions as licensure, but at no cost to the state if done by the CGC, which provides service from fingerprinting to discipline to continuing education. Their findings indicated that certification of guardians can make a difference in the administration of justice in courts by promoting professionalism in guardians and elevating guardianship to that of a profession.⁵⁷

⁵⁶ Supra, Note 45

⁵⁷ Supra, Note 45

C. The Distinction between Certification and Licensure

Certification is a recognition process by a nongovernmental agency or association to an individual who has met the agency or organization's qualifications, which may include education, examination and relevant work experience.⁵⁸ Licensure is a process by which an agency of government grants permission of persons to engage in a particular profession or occupation by certifying that those who are licensed have met predetermined standards of competency to ensure the protection of the public.⁵⁹ A certification can be removed by the certifying organization, which may or may not have an effect on the individual's ability to engage in the occupation. If state licensure is required, the state can regulate the profession, including the ability to prohibit individuals from engaging in the occupation without a license. Further, states have a process in place to report disciplinary actions against a licensed professional to any other states where the individual may be licensed, which can prevent a wrongdoer from moving easily from state to state.

D. Can State Licensure Be A Solution to Averting Fiduciary Misconduct?

Professionals are regulated for one or more of three general purposes: to correct for market failure, to protect the public interest, or to protect private interest.⁶⁰ Market failure exists in the market for the services of private professional guardians and conservators because it is

⁵⁸ Licensure and Related Health Personnel Credentialing, U.S. Dep't of Health, Education and Welfare, 1971 <https://files.eric.ed.gov/fulltext/ED061420.pdf>

⁵⁹ *Id.*

⁶⁰ Nuno Garoupa, *Regulation of Professions in the US and Europe* American Law & Economics Association Annual Meetings, Paper 42 (2004) <https://core.ac.uk/download/pdf/7158697.pdf>

difficult, particularly for lay individuals, to value the services of a fiduciary. Protection of public interest can be particularly important when a private professional guardian or conservator is appointed by a court, which can give the impression of the appointing judge's imprimatur of the appointed professional. Protection of private interests should not be the goal for a state considering licensure of private professional guardian and conservators. However, the effect of requiring licensure must be considered in a decision to license a profession, as licensure creates barriers to entry into a profession which can result in a decrease in supply and increased fees for those who are licensed.

Evidence of misconduct by private professional guardians and conservators is readily available through media reports, despite the lack of collection of comprehensive data on a state or national basis. Evidence also exists to establish that courts, while improving the review process, still do not as a rule effectively review and regulate the conduct of private professional guardians and conservators. Despite more than twenty years of incremental changes in statutes and regulations, professional fiduciary misconduct still exists.

Market failure will always be a factor in restraining fiduciary misconduct, as guardians and conservators are most often appointed in a crisis where either no pre-planning or ineffective planning leaves a vulnerable adult without the ability to manage personal or financial affairs. Because the individual receiving the services of a guardian or conservator is as a rule unable to effectively review the actions of the fiduciary, regulation of private professional guardians and conservators also protects the public interest.

Critics of mandatory licensure for guardians and conservators may argue that licensure will be a barrier to entry into the profession which will result in an increase in the cost of services. While the potential for increased cost exists, it should not be the justification for lack

of regulation, for two reasons. First, the expense of reviewing the conduct of private professional guardians and conservators is borne solely by the judicial system in a state without other regulation. Licensure would assist the judicial system in the important role of monitoring conduct of private professional guardians and conservators and may aid in recognizing improper conduct. This would be enhanced by providing information on the complaint process for the state agency to interested parties in guardianship and conservatorship cases. Second, if a guardian or conservator improperly exhausts the resources of a vulnerable client, the cost of care for such client is usually funded from public benefit sources often from state funds, such as Medicaid. Because the cost of care is borne by the state in such cases, the state has a compelling public interest in protecting the assets of vulnerable citizens.

State licensure with a state regulatory agency can allow for minimum educational requirements, possible examination and continuing education requirements as well as clear ethical standards which can be enforced by the state agency. A state regulatory board can review complaints from the public regarding the conduct of a private professional guardian or conservator. There are many advantages to addressing complaints through the regulatory process rather than review and hearing by the guardianship court for the interested parties, the courts and the professional. Unlike a non-governmental certifying agency or organization, a state regulatory process can provide an opportunity for complaining parties to personally appear before an agency reviewing a complaint.

For interested parties, the process of filing a complaint with a state regulatory board does not require a knowledge of legal procedure, as does filing a complaint with the court. Generally, the complaint process is a simple report obtained on-line or by telephone, in which the complaining party identifies the professional, the particular matter and the concern. The

regulatory board review process may screen the report and determine that additional information is required, either through follow up with the complaining party or investigation or may determine that the complaint is not actionable and dismiss at the initial review. The regulatory board can cross-reference an individual report with any other pending concerns received about a particular professional. Without such a process, a private professional guardian or conservator could be serving in more than one court within a state and the different courts may not have knowledge of concerns in other courts unless removal and civil or criminal prosecution has occurred.

When a complaint about a guardian or conservator is reviewed by the guardianship court, the process can cause the guardianship or conservatorship estate to incur legal fees on behalf of private professional guardians and conservators. If a court requires further investigation regarding a complaint, often the cost of such review is also funded by the guardianship or conservatorship estate. Further reform efforts could include states taking legislative or regulatory action to expressly prohibit the fiduciary from reimbursement of legal fees from a client's estate for defense in regulatory actions and to prohibit fiduciaries from entitlement to compensation from a client's estate for their own time and expense in participation in a regulatory action, following California's prohibition on compensation from the estate.⁶¹

For the courts, although the requirement to review annual reports would not be abated by state licensure, courts would not have to expend judicial resources on detailed review of complaints against guardians and conservators. When a private professional guardian or conservator appears to be in compliance with a supervising court, there can be instances of

⁶¹ California Business and Professions Code ' 6581.

misconduct or neglect that would not be apparent in a court's review process. Family members and friends or any interested party may have legitimate concerns about the conduct of a private professional guardian or conservator based on his or her knowledge of the protected person and/or their assets. While the grosser complaints may be a violation of a professional fiduciary's statutory obligations, many of the concerns raised are nuanced and involve a professional's subjective assessment as to the best course of conduct.⁶² In order to determine whether an allegation made against a private professional guardian or conservator is in fact misconduct, the matter may require investigation, which is a task better suited to a state licensing agency or board, as opposed to a court trying to manage a busy docket.

The guardianship court has been the subject of frequent criticism based on a perception that the relationships between the appointing judge and private professional guardians and conservators may affect the selection of a professional in a lucrative case. Even in courts where the nomination of one fiduciary over another is not alleged to be based on favoritism, there can be problems with familiarity between the appointing court and the professional which familiarity may cloud the court's judgement when reviewing a complaint. One media report in a high profile case of wrongdoing by a professional guardian, noted that before the guardian's actions came to light, a guardianship commissioner described the guardian as wonderful and good-hearted.⁶³ This particular commissioner appointed the guardian on average to at least one case per week at the time. That level of familiarity can create problems, as a judge who sees a

⁶² Often, in a review of such decisions, the important review question is what information the professional considered in making a decision. Did the professional obtain all the necessary and available information before making a decision? Was the decision made without consideration of the professional's own self interests? If so, and if the decision was reasonable, given the known facts, leeway should be given if an unexpected negative result occurred.

⁶³ *Supra*, Note 6

guardian as wonderful and good-hearted may not see early warning signs of fiduciary misconduct, making the case for review by a state agency.

There are concerns about creating barriers to entry into the profession with licensure. However, professional guardians and conservators make important decisions about their clients, including end of life decisions and management of significant property. With such responsibility, it is reasonable to have some barriers to entry through licensure and ethical standards to make certain that professional guardians and conservators have basic competency. For licensed professionals, there are advantages to having complaints reviewed by a regulatory board comprised partially of other professionals with the same license.⁶⁴

D. States that License Guardians and Conservators

There are currently three states that require private professional guardians and conservators to be licensed by the state: Alaska, California, and Nevada. Alaska requires a license for all individuals who serve as guardian or as conservator for compensation for more than one person or for more than two related persons.⁶⁵ California requires a license for any individual serving as guardian or conservator for two or more individuals at the same time who are not related to the professional fiduciary or to each other.⁶⁶ Nevada requires the individual guardian to be certified by the Center for Guardianship Certification and for the guardian to be employed by an entity licensed by the state.

⁶⁴ Supra, Note 2

⁶⁵ AS ' 08:26.010

⁶⁶ California Business and Professions Code, ' 6501(f)(1)

Alaska enacted mandatory licensure in 2004 and requires applicants for licensure to have two years of verified professional client casework experience or a minimum of an associate's degree human services, social work, psychology, sociology, gerontology, special education or a closely related field or hold a national certification as a guardian.⁶⁷ The applicant must submit a state and FBI background check and provide his or her fingerprints with the application.⁶⁸ Each year the licensee must submit an annual report, which includes a list of cases and a business financial statement as well as an attestation that the licensee has filed all required court reports in the previous year and report if he or she has been found to have engaged in professional misconduct or incompetence by a court.⁶⁹ The licensee must also answer several questions on the renewal application, including reporting any gifts over \$100 received by a ward or protected person in the two years preceding appointment and must disclose any interest in an enterprise that provides services to a ward or protected person.⁷⁰ Although the licensure statute calls for the Alaska Department of Business and Industry to adopt standard of practice for guardians and conservators, the statute also refers to the National Guardianship Association standards of practice, but there is no record that those standards or any other standards were adopted by the department.⁷¹

⁶⁷ AS ' ' 08:26020 – 030

⁶⁸ AS ' 08:26:060

⁶⁹ AS ' 08:26:080

⁷⁰ Id.

⁷¹ AS ' 13:26:001; National Guardianship Association Standard of Practice <https://www.guardianship.org/wp-content/uploads/2017/07/NGA-Standards-with-Summit-Revisions-2017.pdf>

California enacted legislation effective in 2009, requiring professional fiduciaries to be licensed by the state.⁷² Applicants for licensure must pass a state licensing examination⁷³ as well as have either a bachelor's degree, an associate degree with at least three years of fiduciary experience either as a fiduciary or in the employment of a fiduciary or have at least five years of experience either as a fiduciary or working for a fiduciary.⁷⁴ Applicants must submit a state and federal criminal background check⁷⁵ and fingerprints.⁷⁶ The California Professional Fiduciaries Bureau maintains a list of each licensee's current conservatees or wards and the aggregate dollar amount of all assets currently under a licensee's supervision as well as a list of all case names, court locations and case numbers for all closed cases in which the licensee served as conservator or guardian as well as other relevant data.⁷⁷

California delegates responsibility for certain function of the Professional Fiduciaries Bureau to an advisory committee made up of three professional fiduciaries and four members of the public.⁷⁸ This advisory committee makes recommendations on policies, practices and regulations and on any matter involved professional fiduciaries.⁷⁹ The Professional Fiduciaries

⁷² California Business and Professions Code, ' 6530.

⁷³ California Business and Professions Code ' 6533(d). Applicants must pass both a national exam and a state-specific exam developed by the Center for Guardianship Certification.

⁷⁴ California Business and Professions Code, ' 6533(f)

⁷⁵ California Business and Professions Code ' 6533.5

⁷⁶ California Business and Professions Code ' 6533 (c)

⁷⁷ California Business and Professions Code ' 6534

⁷⁸ California Business and Professions Code ' 6511 – 6511.

⁷⁹ California Business and Professions Code ' 6511(f)

Bureau investigates complaints against professional fiduciaries and has the authority to impose sanctions for violations of statute, regulation or the California Professional Fiduciaries Code of Ethics⁸⁰, including fines and license suspension, probation or revocation.⁸¹ Sanctions imposed against a licensee are available on the internet.⁸² Licensees are prohibited from billing clients for responding to complaints, including billing for legal fees incurred.⁸³

Nevada implemented mandatory certification for private professional guardians by the Center for Guardianship Certification and mandatory state licensure for private professional guardianship businesses in 2015.⁸⁴ There are no mandatory education requirements for individuals, but each person who acts in any capacity in a private professional guardianship company must submit fingerprints.⁸⁵ The applicant must disclose the intended business name, the residence and business address of the applicant and the name and residence address of all members and managers as well as financial statement for each applicant and employee.⁸⁶ The Commission of Financial Institutions investigates each application including a review of any criminal history or absence of such and whether a review of the disclosed financial status of the applicant parties and employees indicates fiscal responsibility before rendering a decision on licensure.⁸⁷ The Commission may require an applicant entity to maintain equity, fidelity and

⁸⁰ Cal. Code Regs., tit. 16, ' ' 4470 – 4484

⁸¹ California Business and Professions Code ' 6580.

⁸² California Business and Professions Code ' 6580(c)

⁸³ California Business and Professions Code ' 6581.

⁸⁴ Nev. Rev. Stat. ' 159.0595

⁸⁵ Nev. Rev. Stat. ' 628B.315

⁸⁶ Ne. Rev. Stat. ' 628B.310 (3)

⁸⁷ Nev. Rev. Stat. ' 628B.330

surety bonds based on the Commissioner's assessment of risk associated with the applicant's business plan or any other information contained in the application.⁸⁸

Nevada expressly prohibits several forms of self-dealing between the guardian and the protected person's estate.⁸⁹ The Commission has authority to conduct financial audits of private professional guardianship companies.⁹⁰ All fees charged by the Commission for licensure and for any examinations of financial records of private professional guardianship company may not be assessed directly to the estate of any protected person.⁹¹ Each licensee is required to display a copy of its license and the following notice in a conspicuous place in each business location and each website which notice must be substantially in the following form:⁹²

**NOTICE OF RIGHT TO CONTACT THE OFFICE OF THE
COMMISSIONER OF FINANCIAL INSTITUTIONS
REGARDING CONCERNS OR COMPLAINTS**

**You may contact the Office of the Commissioner of Financial
Institutions regarding concerns or complaints about the licensee**

⁸⁸ Nev. Rev. Stat. ' 628B.540

⁸⁹ Ne. Rev. Stat. ' 628B.550

⁹⁰ Nev. Rev. Stat. ' 628B.700

⁹¹ Nev. Admin. Code ' 628B.500

⁹² Nev. Admin. Code ' 628B.340

with whom you are dealing by calling the following toll-free telephone number in Nevada: (866) 858-8951.

If displayed in print form, the notice must be in boldface type with the telephone number is at least 18-point type and the remainder in at least 16 point type, as shown above.

The Commissioner is authorized to take administrative action against a licensee, including revoking or suspending a license as well as seeking injunctive relief and appointment of a receiver to immediately secure assets under management by the licensee.⁹³

IV. Recommendations

A. Consistent Timely and Complete Financial Accounting and Annual Reports

We argue that awareness of the reporting functions required of all guardians is enhanced by the education necessary for certification and licensure, which, in turn has the potential to improve performance and monitoring of guardians and preservation of the remaining rights of people under guardianship . Each state in the country requires that, no less than yearly, the fiduciary submit a financial accounting and an annual report to the court. Certified and licensed guardians are keenly aware of this requirement and the importance of its being thoroughly and thoughtfully completed.

⁹³ Nev. Rev. Stat. ' 628B.940

The annual report and financial accounting are critical lifelines for the court to determine the safety and well-being of a person under guardianship as well as to assess the appropriateness of continuing the guardianship. Although the reports should be thoughtful, timely, and complete, such is not the case in many jurisdictions.⁹⁴ Some reports in some states have languished unread for years. Some guardians simply submit a copy of the same report. And, a number of judges are unable to read and review them, either personally or through an officer of the court.⁹⁵ Thus, it is possible that an abusive guardian, similar to those mentioned earlier in this brief, goes unnoticed and unchecked for years. We argue that guardians who are either certified or licensed are far more likely to submit these documents in a thorough and timely manner than those who are not.

B. State Licensure is a Viable Option

After review of three very different approaches by Alaska, California and Nevada, the following is suggested as an approach:

1. There should be licensure of individuals, rather than entities, although states may also consider also creating separate licenses for private professional agencies over a certain size to ensure accountability for management. Such individual licensure could and should exempt public non-profit guardians, but there may be a need for registration of such individuals and a requirement for compliance with a state ethics code for private professional guardians. The National Guardianship Association Guardianship Standards of Practice and Ethical Principles can be adopted or serve as a model, subject to any legislative edits to comply with state statutes and regulations.

⁹⁴ Supra, Note 43

⁹⁵ Supra, Note 43

2. Licensure by examination is a viable option, as is outsourcing the examination to the Center for Guardianship Certification. Any state considering doing so should review its own state statutes and regulations, to determine if a national examination is sufficient for practice within the state. The state may consider creating a second, less comprehensive examination on relevant state requirements to ensure that applicants become familiar with all requirements for practice in that state.
3. A state should impose educational requirements or suitable experience as a qualification for licensure and continuing education requirement to maintain or renew the license. There should also be a requirement for mandatory continuing education.
4. Providing notice of the license and the mechanism for complaints as Nevada requires should be considered, to make certain that anyone who has concerns about the conduct of a guardian has the necessary information to bring a complaint to the state licensing authority. As is the case with attorneys, judges should be advised to consider filing a report with a state agency when the judge has concerns about the conduct of a fiduciary in a case under the supervision of the reporting judge's court.
5. The state should consider delegating authority for review of policy, statute, regulation and individual complaints to a regulatory board, comprised both of members of the public and professional members. As stated above many of the decisions a fiduciary

is required to make require the exercise of judgment.⁹⁶ A regulatory authority should not require a licensee to be a guarantor of results for a result which was unanticipated, provided the licensee had the requisite training, knowledge of the individual and the estate, and knowledge of all regulatory requirements, including statutes, regulations and any ethical codes. Making a sound decision after gathering all the appropriate information should be the standard, rather than making a licensee responsible for an unanticipated result that could not have been predicted. Having members of the profession on the regulatory board can assist the public members with understanding the difference between an unfortunate result and a reckless or careless fiduciary.

6. Guardians and conservators should be prohibited from billing the estate for responding to regulatory complaints or for recovering fees for legal representation in the regulatory process as well as prohibition of charging the guardianship or conservatorship estate for any fines assessed by a regulatory board.

7. States should consider whether to exempt individual who hold professional licenses other than a guardianship or conservatorship license from mandatory licensure as guardians or conservators, including but not limited to medical doctors, nurses, attorneys and CPAs. If such individuals are granted exemption for licensure, states should consider a registration requirement and acknowledgement by the registrant that the registrant is bound by the state's statutory, regulatory and ethical requirements for guardians and conservators when serving in that capacity. This

⁹⁶ Supra, Note 62

avoids a defense that the individual was not aware of any such requirements. While this may present a dilemma for a licensed professional if the requirements of their professional license are in conflict with guardianship and conservatorship requirements, the state should place the burden on the individual to be aware of the possibility of such conflicts prior to accepting appointment as a guardian or conservator.

8. States enacting licensure for guardians and conservators should have a process for notifying the state judicial system of the results of any disciplinary action against a fiduciary. Further, Nevada's statute authorizing appointment of a receiver should be considered when enacting a state regulatory framework. An individual under guardianship or conservatorship is vulnerable and it may be appropriate to give a regulatory authority the power to enact an immediate emergency remedy if the risk is significant. Otherwise, if a guardian or conservator poses severe risk and has a large caseload, any delay in reviewing other cases in which the fiduciary is serving may harm the protected persons.

The authors readily acknowledge that licensure and certification of guardians will not prevent all forms of abuse perpetrated by guardians appointed to protect them. We are aware that some certified or licensed individuals in all professions (e.g., medicine, law, social work) provide poor practices or intentionally abuse the people they serve.

However, we maintain that licensure and certification both have the potential to improve guardianship practices through increasing guardians' knowledge, apprising guardians of

applicable standards of practice, and through reprimand or removal when their actions are inappropriate. The population of persons under guardianship deserves no less than guardians who care a lot and who serve their incapacitated person wisely and well.