

2021-2022 Adult Guardianship Legislation Summary: Highlights, Trends, and Still Missing Pieces to Ensure Meaningful Due Process

North Carolina Guardianship Association
2022 Virtual Annual Conference:

**Modern Guardianship: New Resources, Gaining a National Perspective,
and Increasing Sensitivity in Supports**

Wednesday, May 13, 2022
9:15-10:15am

Presented by:
Elizabeth Moran, Senior Attorney/Chief Counsel
ABA Commission on Law and Aging
Elizabeth.Moran@americanbar.org



Commission on
Law and Aging

2021-2022 Projects & Trends: Adult Guardianship Legislation Across the Country



- Federal: Legislation Introduced *only***
 - **Freedom and Right to Emancipate from Exploitation (FREE) Act** (July 2021)
 - **Conservatorships Immoral Relationship with Contraception in the United States (CIRCUS)Act** (July 2021)
 - **Guardianship Accountability Act** (Sept. 2021)
- Adult Guardianship Court Improvement Program (GCIP, August 2020 - ongoing)**
- Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPPA, 2017 - ongoing)**
- Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA, 2007 –ongoing)**
- 4th National Guardianship Summit Recommendations** (May 2021 – implementation ongoing)
 - Bill of Rights (1.1), Meaningful Due Process (1.2), and Collection of Data (4.1)
 - GCIP (6.1)

State Legislative Highlights



- Supported Decision-Making:** Alabama, California, Kansas, Maryland, New York
- Guardian Certification/Training:** Michigan
- Financial Exploitation:** Connecticut, Wyoming, Rhode Island
- Data collection:** Florida
- Immunity for state:** Arizona
- Power of Attorney/Befriended Elders:** Massachusetts
- Elder Care/Abuse:** Alabama
- E-Wills/Electronic Estate Planning:** Pennsylvania, Virgin Islands
- Court-appointed attorneys/Payment:** Maryland
- Limited Guardianship:** Alaska
- Court Visitor/Guardianship Plans, etc.:** Iowa

Step 1: Get Up-to-Speed on Alternatives to Guardianship in Your State



- ❑ Rethinking Guardianship | <https://rethinkingguardianshipnc.org/>
- ❑ Making Alternatives to Guardianship a Reality in North Carolina |
<https://nccdd.org/initiatives/current-initiatives-2017/43-initiatives/1052-making-alternatives-to-guardianship-a-reality-in-north-carolina.html>
 - ❑ Supporting Choice and Self-Determination in North Carolina: A Guide (March 2022)
 - ❑ Introduction to Options (brochure)
 - ❑ Exploring Alternatives to Guardianship in North Carolina (video)
- ❑ Disability Rights North Carolina | <https://disabilityrightsnc.org>
 - ❑ Self-Determination and Guardianship
 - ❑ Alternatives to Guardianship

National Resources

- Attend State and [ABA CLE](#) on alternatives to guardianship, supported decision-making, etc.
- Attend conferences such as:
 - [National Guardianship Association](#) (NGA)
 - ABA Commission on Law and Aging's [National Aging and Law Conference](#) (NALC)
 - [National Guardianship Network](#) (NGN) partners to learn from and contribute to conversations with national experts on alternatives to guardianship, adult capacity, and guardianship reform efforts.
- Visit online resources such as:
 - [ABA Commission on Law and Aging resources and publications](#) on Guardianship and Supported Decision-Making, Health Care Decision-Making, and Capacity Assessments
 - [National Resource Center for Supported Decision-Making](#)
 - [U.S. Department of Justice Guardianship: Less Restrictive Options](#)

Step 2: Develop a Business Plan for How to Make a Practice that Includes Alternatives to Guardianship

Consider adding and/or including the following advising and drafting services to your practice:

- **Identifying and advising on integrated supports** – both decision-making supports and day-to-day living supports – that would greatly reduce, if not eliminate, the need for guardianship.
- **Identifying and advising individuals, their family, and stakeholders on creating supported decision-making teams** that can meet an individual's support needs.

Step 3: Help Reduce the Number of Guardianship Cases in the Courts

Consistent with the 4th National Guardianship Summit [Recommendations](#) (3.1), states are encouraged to adopt and implement the [Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act](#) (Uniform Act). Key provisions of the Uniform Act include, among others:

- Prohibit guardianships where less restrictive alternatives would meet an adult's functional needs
- Require specific court findings before certain critical rights (e.g., to marry, vote, choose visitors) are abridged
- Require petitioners to state whether less restrictive alternatives have been tried and justify any failure to do so
- Create mechanisms that adults subject to guardianship and others can use to trigger modification or termination of an order
- Clarify that a lawyer for a respondent, or adults subject to guardianship, must represent the adult's wishes
- Enable protective orders (or single transaction orders)

Step 4: Host Educational Opportunities for Other Guardianship Stakeholders to Learn About Alternatives to Guardianship

Consider the following:

- **CLE programs** through your state or local bar for judges and attorney colleagues.
- **Presentations and/or webinars at guardianship stakeholder events** to include, but not limited to, doctors, nurses, bankers, teachers, social workers, and other stakeholders who may not believe that the person with a disability has “capacity” to make his own choice.
- **Community presentations at your local library, town hall, or other places the public gathers** to educate and advocate for alternatives to guardianship with individuals who may be subject guardianship, their family, and related stakeholders.
- **Informal, one-on-one discussions with professional colleagues** to help evolve traditional practices and educate others about best practices involving alternatives to guardianship.
- **Updates to your webpage** to include tools and resources on alternatives to guardianship.
- **Engage Lawmakers in Capacity Legislation.**

Engaging Lawmakers in Capacity Legislation



Consider asking your legislator to...

- Visit events, people, and places in the community that relate to your issue
- Participate in an online discussion, webinar, or conference
- Give a speech on the House or Senate floor about your issue
- Attend an advocacy or strategic planning meeting about your issue
- Hold a town hall or community meeting on your issue
- Meet with you and other supporters in their home office or online meeting

Step 5: Ensure Justice for All by Protecting Individual Rights and Freedom of Choice

Do your part to help ensure liberty and justice for *all*. Consider the following:

- Educate yourself on **“effective communication” requirements under Title II of the ADA**, so to ensure your representation provides clear, concise, informative, accessible, and effective communication for every individual involved in the judicial process, particularly for individuals who are non-verbal and/or living with diminished capacity.
- **Model Rules of Prof'l Conduct Rule 1.14(a)**. When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
- Make it a priority to develop, provide, and assist individuals with disabilities, older adults, and their caregivers, by offering the kinds of advising, tools, and **services that provide the less restriction options** and information needed to facilitate, maintain, and promote their wellness, to continue to support their independence, their freedom of choice, their autonomy, and dignity.

“Effective Communication”



- **The Americans with Disabilities Act (ADA)** prohibits discrimination on the basis of disability.
- **Title II** of the ADA applies to all State and local governments and all departments, agencies, special purpose districts, and other instrumentalities of State or local government.
- **Title II** of the ADA requires that state and local government provide people with disabilities an equal opportunity to access and benefit from all of their programs, services, and activities.
- **Recommendation 2.4:**

“The Department of Justice and other federal and state agencies should recognize that supported decision-making can be a reasonable accommodation under the Americans with Disabilities Act of 1990, as amended, in supporting an individual in making their own decisions and retaining their right to do so.”

Food for Thought...

- The need for an **Adult Guardianship Court Improvement Program (GCIP)**
- “**Effective Communication**” and Meaningful Engagement in Due Process under Title II of the ADA
- **Decision-making supports:** Consider adding “but not limited to” or in the alternative, add “or other equivalent agreements for supports” or similar.
- Supported Decision Making “**Agreements:**” Does it have to be written? If so, does it have to be filed with the court? Are there non-traditional communication accommodations being provided for individuals who don’t necessarily read or write but can clearly indicate preferences for services and supports?
- What can **you** do right now, in the next week, month, and year to engage law makers in capacity legislation and legislative practices that support culture change that truly honors dignity of person, equality, and non-discrimination?

Additional Resources:



Commission on
Law and Aging

Something to Talk About: Supported Decision Making and Access to Justice for All

Something to Talk About: Supported Decision Making and Access to Justice for All

4th National Guardianship Summit | Recommendations

<http://law.syr.edu//academics/conferences-symposia/the-fourth-national-guardianship-summit-autonomy-and-accountability> See also (video): <https://youtu.be/SBqwFqS51BM>

Using Alternatives to Guardianship to Defend Against or Terminate Guardianship

https://ncler.acl.gov/getattachment/Legal-Training/upcoming_event/Alternatives-to-Guardianship-Ch-Summary.pdf.aspx?lang=en-US

ABA Journal Article: ABA pushes for a federal guardianship court improvement program

<https://www.abajournal.com/magazine/article/aba-pushes-for-a-federal-guardianship-court-improvement-program>

Did you know...

You can make your voice heard at the home of legal thought leadership by [joining the ABA](#) for as little as \$75/year. That's less than most individual CLE programs by themselves. ABA members have unlimited, complimentary access to more than 600 widely-accredited online CLE webinars and on-demand programs in the [ABA's Member Benefit Library](#) - at no additional cost, with more programs added each month. Under today's rules, members in most states can fully their entire MCLE requirement with the [free](#) library. ABA membership also provides networking career resources and an opportunity to be a part of positive social change by adding your voice to advocacy programs and initiatives., and qualify for exclusive savings on hotels and rental cars office supplies, insurance and retirement plans, and more.



Question?

Thank You!

Elizabeth Moran, JD
ABA Commission on Law and Aging
elizabeth.moran@americanbar.org