



# Innovations in Guardianship: Maximizing Autonomy and Ensuring Accountability

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DEPARTMENT OF JUSTICE  
**ElderJustice**  
INITIATIVE

SEPTEMBER 30, 2021



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# DISCLAIMER

The views expressed in this presentation are those of the presenter and do not necessarily reflect the views or positions of the US Department of Justice

# ELDER JUSTICE INITIATIVE

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The **mission** is to support and coordinate the Department of Justice's enforcement and programmatic efforts to combat elder abuse, neglect, and financial fraud and scams that target older adults.

The Initiative does so by—

- Promoting justice for older adults.
- Helping older victims and their families.
- Enhancing state and local efforts through training and resources.
- Supporting research to improve elder abuse policy and practice.



# ELDERJUSTICE.GOV

You are fighting elder abuse on the front lines. We have got your back.



## Outreach Materials

Get involved, get safe community presentations, pamphlets, and materials on all types of elder abuse.



## Prosecutor Video Series

Training videos geared toward successful prosecution of elder abuse cases.



## Elder Abuse Research

References to articles, books, and government reports on all types of elder abuse and financial exploitation topics.



## Elder Abuse Statutes

State statutes relevant to elder abuse cases.



## MDT Guide & Toolkit

Start or grow a local elder abuse case review multidisciplinary team with this research- and resource-rich toolkit.



## Financial Exploitation & Reporting

Learn about financial scams and find the right reporting agency.



## Webinars

Webinars targeted to elder abuse professionals and those interested in elder abuse topics



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# INTRODUCTIONS

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**Systemic Advocacy Attorney**

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# TODAY'S AGENDA

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**Preserving autonomy to the greatest extent possible:** Introduction to guardianship and less restrictive alternatives

**The dark side of guardianship:** Unnecessary deprivation of rights under guardianship and potential for mistreatment by guardians

**Finding a path for the future:** Recommendations of the Fourth National Summit on Guardianship

**Applying the National Summit's recommendations:** Case scenario

**Implementing the Summit recommendations in your state**



# INTRODUCTION TO GUARDIANSHIP

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“Guardianship, also, referred to as conservatorship, is a legal process, utilized when a person can no longer make or communicate safe or sound decisions about his/her person and/or property or has become susceptible to fraud or undue influence.”

- National Guardianship Association

## LESS RESTRICTIVE ALTERNATIVES

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Because guardianship strips individuals of their rights to make decisions for themselves, all less restrictive alternatives should be considered and, whenever possible, utilized.



Identify the specific problem you are trying to solve and consider person-centered alternatives that would narrowly address that issue.

# LESS RESTRICTIVE ALTERNATIVES

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- ▶ Financial Power of Attorney
- ▶ Medical Power of Attorney
- ▶ Supported Decision-making
- ▶ Representative Payees
- ▶ Joint ownership/bank accounts
- ▶ Conservatorships
- ▶ Trusts
- ▶ Family consent laws
- ▶ Provision of home and community based or other social and health care services
- ▶ Protection Orders
- ▶ Protective Orders
- ▶ And more...



# GUARDIANSHIP AND CIVIL RIGHTS

Guardianship can be a way to protect individuals from abuse, neglect, and exploitation as well as a mechanism by which individuals are abused, neglected or exploited.

Rep. Claude Pepper: “The typical ward has fewer rights than the typical convicted felon . . . . [Guardianship] is, in one short sentence, the most punitive civil penalty that can be levied against an American citizen, with the exception . . . of the death penalty.” (1987)

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# THE DARK SIDE OF GUARDIANSHIP

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Little data, limited oversight

Once a guardian is appointed, can be very difficult to end guardianship

“The appointment of a guardian or a conservator removes from a person a large part of what it means to be an adult: the ability to make decisions for oneself . . . We terminate this fundamental and basic right with all the procedural rigor of processing a traffic ticket.”—Utah Judicial Commission

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# WHAT GOES WRONG...

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- Petitions filed to address the needs, wishes, or convenience of other parties, not the alleged incapacitated person
- Insufficient resources in state probate courts to investigate and track cases
- Due process protections in statutes and court rules not provided
- Cursory proceedings—“cattle call” hearings, alleged incapacitated person is neither present nor represented by a lawyer, scant medical evidence, reliance on diagnosis rather than capacity determination
- Plenary guardianships when limited guardianships or other alternatives would be more appropriate; overprotection
- Lack of oversight after guardian is appointed
- Barriers to modifying or terminating guardians when circumstances change
- *All this despite decades of reform efforts*



# OPPORTUNITIES FOR REFORM: GUARDIANSHIP IN THE NEWS...

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# GUARDIANSHIP IN THE MEDIA...

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Rachel Aviv, *How the Elderly Lose Their Rights*, The New Yorker, 10/2/2017

John Leland, *I'm Petitioning... for the Return of My Life*, the New York Times, 12/7/18

Bridget Balch, *Unguarded: A Three Part Series on Richmond's Guardianship Process*, The Richmond Times-Dispatch, Fall, 2019

Ronan Farrow and Jia Tolentino, *Britney Spears's Conservatorship Nightmare*, The New Yorker, 7/3/21

Adam Walser, *Guardianship Task Force Focuses on Reforming a Broken System*, ABCActionNews, 8/18/21...

And more...

# GUARDIANSHIP AT THE MOVIES





## 2021 FOURTH NATIONAL GUARDIANSHIP SUMMIT RECOMMENDATIONS:

### ROADMAP FOR THE FUTURE

- I. Rights-Based Guardianships - Enhancing Rights of Persons Subject to Guardianship
- II. Supporting Decision-Making
- III. Limited Guardianship, Protective Arrangements and Diverting Pipelines
- IV. Rethinking Guardianship Monitoring and Addressing Abuse
- V. Addressing Fiduciary Responsibilities and Tensions
- VI. Guardianship Court Improvement Programs

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# WHAT ARE THE BROAD GOALS OF THE SUMMIT?

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Well-educated stakeholders who understand and promote all less restrictive alternatives to guardianship, appreciate both the risks and benefits of guardianship, and rigorously adhere to due process protections throughout the process.

Guardianship that is established only when necessary and when there are no less restrictive alternative, only for the functions with which the person needs assistance and protection, and only for as long as the need continues or until a less restrictive alternative emerges.

Person-centered, diligent, educated guardians who promote the well-being of the protected person, maximize autonomy for the individual and, when possible, support modification or termination of the guardianship.

A system capable of overseeing guardianship, analyzing data, promptly identifying and addressing abuse or inadequacies, embracing innovation, and promoting the welfare of individuals in the guardianship system.

# SCENARIO

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- 75-year-old **Moira Rose** has spent her entire adult life in the home she owns. The once grand home has fallen into disrepair. Once wealthy, Ms. Rose now relies on her modest Social Security check.
- Ms. Rose is hospitalized following a stroke but is ready for discharge. Her doctors have stated she is expected to improve, but she has limited mobility on one side, her speech is impaired making communication very difficult, and she is extremely fatigued.
- Ms. Rose is insistent that she return home as soon as possible and that she can manage on her own. Ms. Rose has a son, David, who lives in town, a daughter, Alexis, who lives out of state, and a large and supportive group of friends in her community choral group.
- The hospital social worker has said that it is not safe for Ms. Rose to go home alone, and because Ms. Rose doesn't understand that it's not safe (and is somewhat eccentric in any case), the hospital will be filing a petition for appointment of a guardian.



# WHAT WILL HAPPEN TO MOIRA ROSE?

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In many jurisdictions, the hospital's petition would likely be granted as an emergency petition to facilitate Ms. Rose's move to a long term care facility.

If her children are not considered suitable or realistic, in some jurisdictions, a professional guardian could be appointed who would likely move her to a rehab or long term care facility.

Even if she improves, it may be difficult for her to terminate or modify the guardianship.



# WHAT SHOULD WE BE CONSIDERING?

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- The only evidence of Ms. Rose’s incapacity is that she is not accepting the hospital’s view that it is unsafe for her to go home. If Ms. Rose has capacity, what about “the dignity of risk”?
- Ms. Rose is expected to get better
- Ms. Rose has excellent informal supports – her son and her friends
- We don’t know if Ms. Rose has a power of attorney for healthcare or finances. If not, does she have capacity to execute one?
- We don’t know if formal or informal services and supports are available to maximize Ms. Rose’s safety at home.
- If she needs a guardian, who should be appointed? If a professional guardian is appointed, what impact will that have on Ms. Rose and her family?
- Who is the hospital protecting?

# SUMMIT RECOMMENDATIONS: PROTECTING MS. ROSE BEFORE THE PETITION IS FILED

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Every state should have a guardianship diversion project to facilitate alternatives to guardianship. (Rec. 3.3). *Utilize the diversion project before considering court intervention!*

Hospitals and other pipelines to plenary guardianship should be trained about their legal and ethical obligations to exhaust less restrictive alternatives to guardianship (Rec. 3.4) *Help the hospital social worker learn about and offer alternatives.*

Alternatives such as supported decision-making, advance directives, formal and informal services and supports, legal and non-legal alternatives should be made available to meet Ms. Rose's needs (Rec. 3.4)

# SUMMIT RECOMMENDATIONS: IF THE HOSPITAL FILES A PETITION

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State statutes, court rules, policies, and processes should require the hospital (and all petitioners) to plead affirmatively that supported decision-making has been tried or why it is not feasible. (Rec. 2.3).

Ms. Rose would have the right to meaningful notice; a qualified lawyer paid out of public funds if she is unable to pay; and an impartial, valid, and reliable assessment written on a standard form with enough detailed information for the judge to make an appropriate decision (Recs. 1.2 and 3.1).

Ms. Rose would understand the purpose of the hearing and have a right to participate. (Rec. 1.2)

## SUMMIT RECOMMENDATIONS: HOW WILL THE JUDGE DECIDE?

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The court must find by clear and convincing evidence that supported decision-making is not feasible before imposing guardianship. (Rec. 2.3)

Pursuant to the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (which every state is encouraged to adopt), the judge would be prohibited from imposing guardianship if less restrictive alternatives would meet Ms. Rose's needs (Rec. 3.1)

Plenary guardianship should be eliminated. Even if guardianship is required, Ms. Rose should retain the maximum of rights including the right to make choices such as association, free practice of religion, personal choice, marriage, and voting unless the court makes a specific finding that a restriction is essential. The court should tailor the guardianship order to meet her specific needs. (Rec. 3.2)

If a professional guardian must be appointed, he or she should be licensed or certified and vetted and trained. (Rec. 5.1)



# WHAT ISSUES SHOULD WE CONSIDER AFTER THE COURT APPOINTS A GUARDIAN?

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- ▶ How have Ms. Rose's needs or circumstances changed?
- ▶ Have services been identified to meet her needs?
- ▶ Has her condition improved as the doctors predicted?
- ▶ Does neuropsych testing show improvements in her cognition?
- ▶ Have other less restrictive alternatives emerged that could meet her needs?
- ▶ Is her guardian meeting her needs and preferences, and helping her work toward a restoration of rights?
- ▶ Is Ms. Rose safe from abuse, neglect and exploitation by her guardian and others?
- ▶ Is there a preponderance of evidence that would permit a modification or termination of the guardianship?

## SUMMIT RECOMMENDATIONS: PROTECTING MS. ROSE IF A GUARDIAN IS APPOINTED

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- The court should provide a post-appointment, person-centered monitoring system including uniform forms, written care and financial management plans, regular review of the guardian's reports and accountings, and periodic in-person visits. (Rec. 4.2)
- Access to a complaint process that is accessible, user-friendly, transparent and effective. (Rec. 4.3)
- An independent statewide entity to investigate the guardian's conduct in appropriate cases. (Recs. 4.2)
- Annual judicial in-person review. (Rec. 4.3)
- Continuing representation by a qualified lawyer. (Rec. 4.3)
- An advocacy program for adults subject to guardianship using trained volunteers to visit and advocate for the adult's rights and preferences. (Rec. 4.3)

# SUMMIT RECOMMENDATIONS: RESTORING MS. ROSE'S RIGHTS AFTER APPOINTMENT OF A GUARDIAN

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- Ms. Rose must have full access to a full or partial restoration of rights as soon as possible in a process that can be triggered by formal or informal means and in which Ms. Rose can be represented by a qualified lawyer paid by the court if she is unable to pay. (Rec. 1.3)
- The court must engage in meaningful review of the guardianship and Ms. Rose must receive notice annually of her right to full or partial restoration of her rights. (Rec. 1.3)
- Ms. Rose's guardian, the court, and lawyers must be trained on the restoration process. (Rec. 1.3)
- Ms. Rose's guardian will be prohibited from interfering with the restoration of rights and will facilitate restoration when appropriate. (Rec. 1.3)
- Ms. Rose can prevail by demonstrating her right to restoration by a preponderance of evidence. (Rec. 1.3)

# SYSTEMIC REFORMS EVERY JURISDICTION SHOULD CONSIDER

Adopt the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (Rec. 3.1)

Establish sustainable pilot projects targeting diverse populations (Rec. 2.2)

Collect critical data and develop and implement technology that includes mechanisms to validate reports, flag potential problems, and track monitoring. (Rec. 4.1)

Promote multi-disciplinary, multi-system state and local collaborations to address guardianship abuse (Rec. 4.4)

Training, training, training! (Rec. 5.3)

Establish a National Court Improvement Program (Recs. 6.1-6.3)

# IMPLEMENTING THE RECOMMENDATIONS IN YOUR STATE: CHALLENGES

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- Little data to shed light on practices
- Court funding scarce
- Practices differ from court to court
- Reluctance to change; investment in status quo
- Judges with general jurisdiction caseloads; judicial turnover
- Institutionalized biases
- Complexity of cases
- Guardianship not included in elder justice reform agendas



# IMPLEMENTING THE SUMMIT IN YOUR STATE: ACTION IDEAS & STEPS

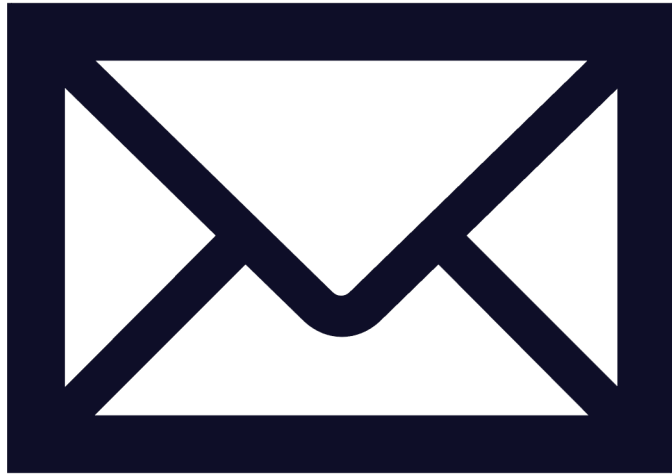
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- Identify stakeholder leaders; brainstorm
  - Summit participants from your state
  - NGN partner representatives from your state
  - WINGS or similar collaborative reform group
- Delineate legislative vs practice/culture changes
- Consider state summit to adapt and prioritize recommendations
- Meet with state court administrative office; key judges
- Involve state or local elder justice coalitions



# QUESTIONS?

If we cannot get to your question today,  
please e-mail us at [elder.justice@usdoj.gov](mailto:elder.justice@usdoj.gov)



THANK YOU!