Implementing Guardianship Policies in Special Needs Planning: Five Possible Pitfalls

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ABSTRACT

This article reviews recent literature, policies, and litigation concerning guardianship matters to analyze public and private guardianship programs across all 50 states. Special needs planners should consider that guardianship issues are rife with systemic inequities and inefficiencies. The authors conclude that planners must be aware of at least five possible pitfalls to best serve their clients: (1) There is a pressing need for improved government oversight of guardianship arrangements; (2) A full guardianship order can sometimes remove more rights than necessary; (3) Guardians can face conflicts of interest between their income and fiduciary duty; (4) Federal and state governments do not have comprehensive datasets to analyze guardianship matters in detail; and (5) Guardianship reform policies are stymied by insufficient government funding.

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Editor's note: This article is the first of a three-part series from the Journal on guardianship policy issues in special needs planning. In the November 2020 issue, see "Implementing Guardianship Policies in Special Needs Planning: Five Potential Positives" where Kelly et al. examine the benefits of leveraging guardianships when serving clients with special needs. See also "A 50-State Review of Guardianship Laws: Specific Concerns for Special Needs Planning" by Kelly et al. in the January 2021 issue, which contains best practice guidance for navigating state-specific issues.

Quis costodiet ipsos custodies?
But who is to guard the guards?
—Juvenal, Roman satirist and poet (60–130 BC)

Overview

Courts assume jurisdiction in guardianship matters to protect people who, because of a severe illness or disability, are unable to care for themselves.[1] At its core, a guardianship is a trust relationship in which a court gives one person—a guardian—the duty and power to make personal and/or property decisions for the benefit and protection of a beneficiary (also referred to as a "person subject to guardianship").[2] Beneficiaries can be minors or adults.

The title of guardian is not used consistently across all state codes. In certain jurisdictions, the title of "custodian" or "conservator" is used to describe either a full guardian or various types of guardianships with limited authority. Ideally, a total guardianship

is designed to care for all of the essential elements of a beneficiary's health and wellness. A guardianship must be appointed by a judge. Each guardian has a fiduciary duty to act in a beneficiary's best interests at all times.[3] In most states, a full guardian's scope of authority is extremely broad. It can include deciding where an individual will live, when to seek medical care, whether family members are allowed to visit, and how to spend retirement savings.[4]

A judge must first declare a beneficiary as lacking legal capacity before issuing a court order to appoint a full guardian. This means that the beneficiary is entirely incapable of managing personal and business affairs and therefore unable to fully safeguard against harm to personhood and/or property.[5] The most common populations served by guardians fall into four categories: those with age-related disabilities, intellectual and developmental disabilities (IDDs), traumatic brain injuries (TBIs), and severe mental health incapacities.[6] Financial practitioners should note the term "legal capacity" for purposes of guardianship must be distinguished from the beneficiary's mental ability.[7] The former embodies individual legal rights to have standing to bring and defend lawsuits and enter into/execute legally binding contracts. On the other hand, mental or cognitive capacity issues in guardianship matters focus on a person's ability to express personal will and intentions.[8] Depending on the jurisdiction in question, state law may require guardians to take a beneficiary's preferences into account when making life-changing decisions.[9]

There are two main guardian types: public and private. When a beneficiary cannot afford a private professional guardian and does not have family members or friends who are willing/able to serve as a guardian, a court will appoint a public guardian at a state's expense. By contrast, private guardians can be a beneficiary's family member, friend, or a private professional guardian (an individual, agency, or organization). In cases of private guardianship, the cost of guardianship services is paid out of a beneficiary's estate (often a special needs trust or other estate asset). The fees for private guardians differ depending on state laws and include professionals who are employed by for-profit companies or nonprofit organizations. Families often choose to hire a professional guardian when there are intrafamilial disputes about how finances or health care decisions should be managed.[10] Financial planners should note that many guardian fee procedures and compensation schedules are published on state district court websites or available through county probate offices.[11]

In theory, the relationship between courts and guardians is hierarchical—the judicial branch (in coordination with executive agencies) has the primary responsibility to monitor appointed guardians. Courts are deemed the "superior guardians" with ultimate jurisdiction over all guardianship decisions; guardians serve as appointed officers of the court.[12] In *Kicherer v. Kicherer,* the Maryland Court of Appeals emphasized this matter stating, "In reality the court is the [one true] guardian; an individual who is given that title is merely an agent or arm of that tribunal in carrying out its sacred responsibility."[13]

Although guardianship procedures are governed by statute, guardianship decisions also are made according to principles of legal equity. The Doctrine of Equity embodies the spirit of fairness, justness, and right dealing—indeed, U.S. common law states that equitable remedies are required whenever traditional legal remedies are insufficient or inadequate to rectify a plaintiff's damages.[14] As a general rule in a guardianship decision, a judge analyzes the totality of the circumstances surrounding a particular beneficiary's needs and capability to make reasonably informed decisions. The judge decides whether equity requires the appointment of a guardian to safeguard the beneficiary's best interests. In turn, guardians also are expected to make decisions based on equity—analyzing the totality of the circumstances concerning the beneficiary—to protect the beneficiary's person and estate.[15] The rub is that equity concerns are usually multifaceted in nature and can sometimes be subjectively construed.

As its name suggests, a legal "totality of the circumstances" evaluation for the best interests of a potential beneficiary requires that a judge consider all of the factors surrounding an issue or event. So, when a declaration of incapacity decision needs to be made, the court will take into account several factors to determine the best course of action that yields the most positive and productive result for proposed beneficiary.[16] The legal burden of proof for determining incapacity varies between states. Each state uses one of three standards: beyond a reasonable doubt (a higher standard of proof that is commonly used in criminal cases, but a minority view among state laws), by clear and convincing evidence (a majority rule in most states), and a mere preponderance of the evidence (a lower standard of proof that is commonly used in civil actions, and a competing minority view).[17]

Few areas of the law are more disjointed and challenging to implement effectively than guardianship for special needs planning (SNP).[18] Interestingly, these challenges for governments are anything but new. In fact, back in the 16th century BC, these issues were included in the Babylonian Code of Hammurabi, the earliest known written laws from ancient Mesopotamia.[19] Looking back through the annals of history, a mix of competing government priorities and varied prejudices kept guardianship law and SNP from evolving equitably. From its inception, through its slow evolution through Roman antiquity and English common law, to the present day's American legal system, guardianship law has lacked—and to a great extent, continues to lack—fairness and equity. It has always been—and continues to be—a great challenge for policymakers to create systematic processes for follow-up and follow-through to ensure the best interests of the beneficiary.

A nationwide review of guardianship laws, policy, and scholarly literature confirms serious and ongoing failures, shortcomings, and impediments to efficiency within the guardianship system as a whole. These concerns should serve as reminders for all stakeholders that guardianship is designed to be imposed when absolutely necessary and with extreme concern for the beneficiary's health and wellness. Moreover, all guardianships must be subject to meaningful governmental oversight that is both consistent and substantive. Though each state has laws designed to protect due process rights—and to ensure that guardians satisfy their fiduciary duties—these laws are inconsistently applied and enforced across the country. See Table 1, which summarizes the key reforms that are needed to help protect individuals in the guardianship system against negligence, abuse, and exploitation.[20]

There is a need for greater attention to processes for the selection and monitoring of guardians. All in all, financial planners must be keenly aware that the current guardianship system does not uniformly protect individuals subject to guardianship to advise

TABLE 1
Key Reforms Needed to Further Safeguard Individuals Subject to Guardianship

Increased Screening	Increased Education	Increased Monitoring	Increased Enforcement
All courts must thoroughly screen prospective guardians and seek to ensure only those in absolute need of a guardian are assigned a guardianship.	Prospective guardians must be required to complete training and education prior to assuming guardianship duties.	Courts and other government entities must monitor the caretaking and spending activities of all guardians to identify any instances of abuse, neglect, and exploitation.	Guardians who have committed abuse must be removed from their duties, pay fines, and/or face jail time.

their clients accordingly. The following section explores each possible pitfall in-depth to assist financial planners in that process.

Possible Pitfalls

Possible Pitfall 1: There Is a Pressing Need for Policies to Improve the Government's Oversight of Guardians and Guardianship Arrangements

Laham describes the current American guardianship system as hampered by "failures of trust" and con artists.[21] She asks, "Who is guarding the guardians?"[22] Today's guardianship procedures constitute an "open invitation to potential abuse" because they are "relatively unrestricted."[23] It is widely documented that courts generally lack the time and resources to thoroughly monitor guardianship cases. Some states have created new administrative agencies dedicated to providing oversight on guardianship matters; however, these efforts have been grossly underfunded to date. A lack of meaningful judicial and administrative oversight has created challenges in investigating and enforcing protections against allegations of guardian mismanagement. A pressing need exists for policies to improve government oversight of guardians and guardianship arrangements to identify and remove predator guardians who are taking advantage of vulnerable beneficiaries.

Federal and state governments have long recognized that a minority number of guardians seek to use the guardianship system to exploit those with special needs. In these situations, beneficiaries are vulnerable to physical, emotional, and financial harm from the very system that was established to help protect them. In the U.S. Senate Special Committee on Aging's most recent report on guardianship issues in America, this concern is highlighted:

> Most guardians are selfless, dedicated individuals who play an important role in safeguarding vulnerable individuals. However, recent reports of guardianship abuse highlight cases where guardians have abandoned their duty of doing what is in the best interest of the individual in their care. Unscrupulous guardians acting with little oversight have used guardianship proceedings to obtain control of vulnerable individuals and have then used that control to liquidate assets and savings for their own personal benefit.[24]

Many of the government's current monitoring systems are generally inadequate to ensure that beneficiaries are protected against abusive guardians. For instance, in 2018, a professional guardian and her colleagues in Nevada were indicted on more than 200 felony counts after they allegedly used the guardianship process to financially exploit over 150 people.[25] In a different case, two beneficiaries from North Carolina lost hundreds of thousands of dollars through exploitation by a family member who served as their guardian.[26] In this and other similar instances, abuses continued unchecked for years.

Just as there are many undocumented cases of personal success made possible with guardian assistance, there are also many unreported cases of guardianship abuses. Consider, for instance, a 2017 story from the *New York Times* called "How the Elderly Lose Their Rights."[27] In this case, Rudy and Rennie North of Nevada were subject to an inappropriate full guardianship when a limited guardianship, trustee, home care professional, or other caregiver would have sufficed to meet their needs. The Norths were traumatized by an abusive and controlling guardian who inappropriately sold the Norths' assets:

> April Parks, the owner of the company called A Private Professional Guardian, met Rudy and Rennie for the first time when she appeared at their home with a court order from the Clark County Family Court to relocate them to an assisted living facility. As Aviv explains, 'Parks had filed an emergency ex-parte petition, which provides an exception to the rule that both parties must be notified of any argument before a judge…[w]ithout their realization, the Norths had become temporary wards of the court.'[28] The

> guardianship appointment was based on Parks' allegations that the Norths posed a 'substantial risk for mismanagement of medications, financial loss and physical harm.'[29] Ms. Parks filed a brief letter from a physician's assistant—whom Rennie had seen once—stating that 'the patient's husband can no longer effectively take care of the patient at home as his dementia is progressing.'[30] In addition, Ms. Parks filed with the court a letter from one of Rudy's physicians, who described him as 'confused and agitated.'[31] The article stresses that 'Rudy and Rennie had not undergone any cognitive assessments—[t]hey had never received a diagnosis of dementia.'[32]

In the Norths' home state of Nevada and several other jurisdictions, anyone can become a guardian simply by taking a qualifications course, provided they have not been convicted of a felony or recently declared bankruptcy.[33]

In 1987, the U.S. House Select Committee on Aging published a report titled, "Abuses in Guardianship of the Elderly and Infirm: A National Disgrace."[34] It poses the question: "What checks are in place to protect…[a] person from abuse by his or her guardian?" The report offers a brief, but ominous answer: "There are few."[35] It adds, "Even in states that do require financial reporting, there is often little or no auditing of these reports."[36] Alarmingly, to this day, these same concerns regarding limited restrictions to protect beneficiaries from abusive guardians and inadequate judicial court monitoring persist in all states to greater or lesser degrees of severity. Most states still do not require detailed accounts of guardianship activities and do not have the tools to audit all reports. While all guardians must file initial and yearly plans with the courts, the scrutiny that plans receive varies between court circuits.[37] Oftentimes, guardianship reports receive only minimal scrutiny.

Typically, governmental agencies lack the funding and personnel to provide detailed oversight of guardians. Because guardianship is an enormous responsibility, many policymakers and nonprofit organizations fear the potential for abuse is enormous.[38] As Santich notes, "[Guardians who receive a full scope of authority from a court's Guardianship Order] can decide whether your leg should be amputated, your dog should be euthanized, the home that has been in your family for generations should be sold—and even where you should live."[39] Santich adds that there is a serious concern that state governments are "making it too easy to become a guardian and too hard to get rid of the bad ones."[40]

Guardianship concerns are moving to the forefront of policy agendas in most states, particularly those who have high rates of retirees. In Florida, for example, the tide of guardianship cases has risen extremely fast. In 2018, the Florida Office of Public & Professional Guardians (OPPG), a branch of the State Department of Elder Affairs, issued an annual report on guardianship investigations—one of the first truly comprehensive reports on state guardianship services in the country.[41] It notes that with the 550 professional guardians statewide, the OPPG received "more than 140 legally sufficient complaints" against professional guardians.[42] This figure indicates that approximately one in five professional guardians in Florida received a formal complaint that required further investigation.[43] Interestingly, of these complaints only one resulted in the office requesting that the guardian's registration be revoked; 26 complaints "supported the issuance of a letter of concern."[44]

Based on the extremely limited amount of data available on the topic, it appears that the courts rarely receive complaints of abuse, neglect, or exploitation regarding public guardians.[45] It is possible that the lower number of complaints against public guardians is because their beneficiaries lack resources and/or family members available to advocate on their behalf. In light of the aforementioned concerns, federal and state laws require the courts to oversee guardianship and be vigilant in ensuring that guardians promote the best interests of the beneficiary without abuse, neglect, or exploitation. The court itself may be un-

able or unwilling to provide sufficient oversight of the guardian. Additionally, if a beneficiary has severe incapacities, then they may entirely lack the ability to identify instances of fraud, abuse, and exploitation, let alone report those concerns to a third party. As such, financial planners working with families where guardianship may be necessary must help the client make careful choices to ensure that worst-case scenarios are avoided and a means for providing oversight is established.

Possible Pitfall 2: In Certain Situations, a Court Order for a Full Guardianship Over an Individual Can Remove More Rights Than Is Necessary and Therefore, Is Not the Best Means to Provide Support and Protection to an Individual. It Is Procedurally Difficult to Restore an Individual's Rights Once a Full Guardianship Order Is in Place

Once established, a guardianship can be extremely difficult to remove. When a full guardianship order is imposed, protected individuals lose many of their basic rights, including the right to choose with whom they visit, communicate, and interact.[46] In cases where an individual truly lacks capacity and has a dedicated guardian, guardianship arrangements can be a valuable means for ensuring the continued care and well-being of the beneficiary. Apart from prison and the forced institutionalization of those who are a danger to themselves or others, guardianship is one of the most restrictive means for taking away an individual's control of their lives. In 1987, the Associated Press (AP) published a series of articles on guardianship concerns.[47] One article contains this alarming message:

> The nation's guardianship system, a crucial last line of protection for [those who are] ailing elderly, is failing many of those it is designed to protect. A year-long investigation by the Associated Press of courts in all 50 states and the District of Columbia found a *dangerously burdened and troubled system* that regularly puts elderly lives in the hands of others with little or no evidence of necessity, then fails to guard against abuse, theft, and neglect. In thousands of courts around the nation every week, a *few minutes of routine and the stroke of a judge's pen* are all that it takes to strip…basic rights.[48] [emphasis added]

Over three decades have passed since the above AP report was issued; however, recent stories of abuses in the guardianship system demonstrate these problems continue. In 2009, the Utah State Courts Ad Hoc Committee on Probate Law and Procedure issued a warning to the State Judicial Council that is similar to the 1987 warnings from advocates in the AP.[49] The Utah State Courts reported, "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."[50] They added, "We terminate this fundamental and basic right with all the procedural rigor of processing a traffic ticket."[51]

The sweeping nature of guardianship underscores the second serious possible pitfall in the guardianship process: the de facto permanency of guardianship arrangements. Most often, with some exceptions, guardians are given their authority in perpetuity under the assumption that the beneficiary's circumstances will not change and that they will not develop the ability to make reasonably informed decisions. Stated another way, there is usually an assumption that the situation that prompted the need for a guardian will not pass. Of concern is the fact that, once made, guardianship determinations are difficult to overturn. In many states, once a court has deemed a person to be in need of a guardian, that person no longer has the legal capacity to enter into or execute binding contracts. As such, many states will not allow beneficiaries to hire an attorney and/or set aside the necessary funds to challenge a guardianship determination. In this situation, the beneficiary may have restricted access to the resources necessary to challenge their guardianship arrangement in court.

There is a growing concern in guardianship lit-

erature that courts may be too quick to grant full guardianship when limited guardianship is more appropriate. Even in situations where a judge has the best of intentions for the prospective beneficiary, it is easy to see how these oversights might occur. Nevertheless, in certain cases, a full guardianship order can remove *more* rights than absolutely necessary and, as such, it is not always the proper vehicle to provide support and protection to an individual with serious disabilities. Stated another way, full guardianship is not a "one size fits all" way to protect our society's most vulnerable children and adults. Government agencies have recognized that courts may inappropriately favor full guardianships arrangements to address special needs concerns because they are procedurally less complicated to establish and maintain. Full guardianships do not require additional court hearings to establish the detailed needs of the proposed beneficiary and then limit the scope of a court-sponsored guardian accordingly. As the Senate Committee on Aging's research points out, additional guardianship hearings can place a "burden" on already stressed court dockets.[52] Particularly when a family member is available to serve as guardian, there often is a presumption of mutual love between the family member and prospective beneficiary. It can sometimes seem tempting for courts—and altogether more expeditious in managing their busy workload—to grant a full guardianship.[53]

There are exceptions to this general rule. In 2018, the Senate Committee on Aging recognized the growing body of research that confirms it is possible for some individuals who are subject to guardianship to regain their legal capacity.[54] Though these circumstances are rare, there are documented "cases where an individual who has recovered from a temporary incapacitating injury, or an individual with a disability who develops the skills necessary to make certain decisions."

Notwithstanding such exceptions, financial planners should be sure the client understands the likelihood that guardianship is a permanent decision, one likely not to be revoked. Before including a recommendation for guardianship, the financial advisor should be sure all parties affected understand the implications of such a decision. But in some cases, guardianship is the correct call to protect the individual with special needs and, where it is called for, the financial planner needs to place guardianship in the context of a comprehensive long-term financial plan to ensure the guardianship functions as intended.

Possible Pitfall 3: Under Current Laws, Guardians Can Face Conflicts of Interest between Personal Cost Management and Their Fiduciary Duty to the Individual Subject to Guardianship

Financial planners must take care to weigh such potential conflicts of interest when helping clients choose an appropriate type of guardian for the special needs of the beneficiary. In a 1984 study of public guardianship programs, SNP attorney Winsor Schmidt astutely pointed out how several possible conflicts can arise.[55] He writes, "Public guardianship programs risk the self-aggrandizing position of both petitioning for adjudication [of legal incapacity]… and serving as guardian, the conflict-of-interest position of being part of a social service agency, inadequate staffing and funding, and…lax procedures."[56]

Today, this assessment still rings true in several respects. Many public guardians, as well as private ones, receive a profit to perform their services that is paid for with the beneficiary's assets. This in and of itself is not a conflict of interest. It is a serious concern, however, that guardians, both public and private, are paid for with a beneficiary's assets while also subject to minimal oversight. In cases of private and public guardians, there is a true risk that any personal need for increased compensation may come at the expense of a beneficiary.

If they are required, most annual guardianship report filings with state court simply are not meaningfully designed to root out and catch instances of abuse, fraud, and conflicts of interest. For example, the state of Michigan Courts' form for the "Annu-

al Report of Guardian on Condition of Legal Incapacitated Individual" is just three pages in length.[57] The form requires guardians to explain whether the adult's current mental condition and current social condition have "remained about the same," "improved," or "worsened" with a text field limited to just 97 typed characters and spaces.[58] This same form provides a text field of just 282 typed characters and spaces to explain all of the activities that were performed by the guardian on behalf of the individual subject to guardianship in the past year.[59]

Financial planners must recognize that guardians have several possible conflicts of interest which may put them at odds with their fiduciary duty to the beneficiary. Guardians are paid under a rate set by the court. Public guardians who have a steady case load of dozens of clients stand to reap lucrative salaries.[60] Many states have limits on the number of beneficiaries that private guardians can have on their docket at one time. There is often no limit for professionals, however, who have been known to have more than 100 open cases.[61] As Cordeiro asks, can a single guardian provide adequate care for "*hundreds* of sick or disabled people, many of them elderly, declared incapacitated by a judge, and in need of someone to handle their medical decisions, financial affairs, or both?"[62] Even if a guardian procures the assistance of third-party agents to assist the guardian with their responsibilities, the size of a guardian's caseload may compromise the quality of the attention to the needs of the beneficiary.

Possible Pitfall 4: Few States Have the Procedures and IT Systems in Place to Collect Accurate and Detailed Guardianship Data; Therefore, Large, Reliable Datasets Are Not Yet Available to Inform Guardianship Policy Decisions

At present, most state governments and federal agencies cannot collect, maintain, and publish extensive, accurate guardianship data logs for the same key reasons that they cannot provide detailed guardianship services examinations: limited numbers of trained staff and inadequate budget allocations.[63] Data collection efforts for guardianship studies are further complicated because guardianship statutes can vary widely and, in the majority of states, the court records are kept as confidential records under judicial seals.[64] It is procedurally difficult to remove the extensive amount of individually identifiable information from sealed records so that they can be declassified. Considering the vast legal powers given to a guardian—it is one of society's most drastic interventions—some experts consider the lack of meaningful government data to be unconscionable.[65] Without direct evidence from reliable datasets, it is likely that guardianship reform strategies will continue to evolve slowly.

The American Bar Association (ABA) Commission on Law and Aging explores data concerns at length in a 2017 report concerning restoration of rights issues in adult guardianship cases.[66] It notes that the statutes each state, on paper, provide for termination of a guardianship order and restoration of rights, however, "there are no data on the frequency with which restoration occurs and under what circumstances."[67] The ABA explains that guardianship generally is plenary and permanent, leaving no easy or efficient way out for those who do not actually require guardians or those who only required a temporary guardian.[68] According to the ABA's analysis, guardianship is frequently an experience of "'until death do us part' but often far harder to undo than a marriage."[69]

As with so many other concerns with guardianship work, this pitfall is due largely to the cost—it is expensive to collect, review, and store records, let alone maintain the necessary staff and IT systems required to follow up on copious records. The Senate Committee on Aging has researched this concern in detail and concluded as follows:

> Few states appear able to track the total number of individuals subject to guardianship, let alone record demographic information, the types of guardianship being utilized, or the extent of a guardian's authority. The lack of broad state and national data makes it very difficult to identify

> trends in guardianship, leaving advocates and policymakers in the dark when trying to enact reform…Differences in systems for overseeing guardians across states and territories make compiling accurate and comprehensive national data difficult.[70]

In a 2016 investigation of guardian elder abuse, the U.S. Government Accountability Office (GAO) also confirms that guardianship research has numerous barriers to data collection. The GAO states, "The extent of elder abuse by guardians nationally is unknown due to limited data on the numbers of guardians serving older adults, older adults [with] guardianships, and cases of elder abuse by a guardian."[71] Six states were selected for the GAO's survey: California, Florida, Minnesota, Ohio, Texas, and Washington.[72] Per the GAO, none of the court officials in those states were "able to provide exact numbers of guardians for older adults or of older adults with guardians."[73] After interviewing court officials further, the GAO also discovered that "none of the six selected states appear to consistently track the number of cases related to elder abuse by guardians."[74]

Most experts contend that often-cited estimates for the number of adults and assets under guardianship in the United States are grossly underestimated because they are only based on information from selected states with the most reliable data. Uekert and Duizend, both personnel from the National Center for State Courts (NCSC), published a "best guess national estimate" on the matter using data averaged from four states to posit that there are 664 active pending guardianship cases for every 100,000 adults.[75] Applying this extrapolation to the U.S. adult population, there are 1.5 million active pending adult-guardianship cases. Uekert and Duizend further note that the "variance between states is high, and the number of active pending adult-guardianship cases could range from fewer than 1 million to more than 3 million."[76]

By comparison, in 2016, the NCSC estimated that there were approximately 1.3 million adult guardianship cases in the United States and an estimated $50 billion of assets under guardianship. See Table 2.[77] It should be noted these were merely educated estimates based on a survey sample that was not nationally representative. The NCSC was only able to collect information from 187 respondents in 36 states/territories because the remaining states did not have the necessary data to share with the NCSC.[78] In 2019, Congressional findings concerning guardianship continue to cite the 2016 figures from the NCSC as part of calls for reforms to guardianship law.[79]

Possible Pitfall 5: Guardianship Reform Efforts Continue to Be Stymied by Insufficient Funding from Stretched Federal, State, and Local Government Budgets

Federal and state budgets concerns are present in the each of the above possible pitfalls. The guardianship reform efforts that are discussed herein have been long stymied by stretched federal, state, and local government budgets. According to the ABA's Commission on Law and Aging, state legislatures

TABLE 2
By the Numbers: National Probate Estimates on Guardianship Reform

1.3 million open guardianship cases	There are over 1.3 million active adult guardianship or conservatorship cases in U.S. courts.
$50 billion in assets subject to guardianship	$50 billion in assets under adult guardianships or conservatorships are overseen by the courts.

enacted approximately 270 adult guardianship bills from 2011 to 2018.[80] These changes ranged in scope from a complete revamp of code provisions to minor changes in procedure. The ABA Commission notes that most policy guardianship changes "have been steps forward for individuals in safeguarding rights, addressing abuse, and promoting less restrictive options—but a few have taken steps back…[t]he real challenge lies in turning good law into good practice."[81] All stakeholders who are involved in guardianship planning matters are impacted by this lack of large, comprehensive government data.

Conclusion: Summary Observations and Suggestions on How Financial Planners Can Avoid the Five Possible Pitfalls in Guardianship Matters

While most guardians assume their duties for good reasons, the guardianship system as a whole is a morass of potential risks and challenges.[82] Financial planners who assist clients subject to guardianship must be keenly aware of the possible pitfalls discussed above. A process approach to address each pitfall concern should be built into the design of the overall financial plan with clearly documented expectations for the guardian:

1. Given the lack of adequate government controls over guardianship, the financial planner should consider a system of checks and balances that builds in a private, third-party review whenever possible. This might include:
    a. documenting detailed expectations for the guardian and ensuring that the guardian is legally bound to follow those expectations pursuant to a court order;
    b. designating an additional party (a family member, friend, or private organization) as an independent trustee charged with performing an annual examination of the beneficiary's personal health and financial wellness in relation to a guardian's services; and/or
    c. holding assets for the beneficiary in external trusts that the guardian does not legally control.
2. In the event a guardian's actions present a serious cause for concern, the independent trustee can help to bring the concern to light; the trustee will likely have to file a complaint with law enforcement and/or petition the local probate court to seek a legal resolution of the matter at hand. Under this planning model, certain assets are controlled separately by the independent trustee in vehicles like an ABLE savings account (also referred to as an Achieving a Better Life Experience or 529A account), third party trust, and/or special needs trust. The examiner's assigned assets must be separate from those that the guardian is assigned to manage. To ensure that any financial plan is legally binding over the beneficiary's appointed guardian, all details must be expressly delineated within a judge's court order. The court must approve which specific assets are subject to the guardian's control and which are not.
3. Because the de facto state of American policy is that guardianships are often permanent, the financial planner should painstakingly confirm that a guardianship is truly necessary to service the client. When a less restrictive alternative to guardianship is possible, a guardianship is an inequitable violation of constitutional rights. That said, a necessary guardianship can be seen as an asset of additional protection to a vulnerable beneficiary if all pitfalls are avoided. If a planner has any concern regarding a proposed or existing guardianship appointment, best practices require independent evaluation from health care providers to determine the correct approach based on the individual circumstances of the beneficiary.
4. Financial planners cannot affect how governments allocate resources for probate court. Here, private financial planning services must innovate to ensure the best possible outcomes for beneficiaries. The role of the financial advisor increases the likelihood that clients will avoid all five possible pitfalls. ■

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(1) Financial planners should recognize that there are different schools of thought regarding the terms "special needs" and "disability." Many view the term special needs as empowering and inclusive, especially in cases where individuals with government-recognized disabilities consider their condition as unique, but not personally disabling or incapacitating. A minority of others, however, views the term special needs as an imprecise moniker for a serious disability that impacts an individual's ability to conduct activities of daily living.

In addition, in the past, the terms "ward," "incompetent person," and "incapacitated person" were often used to describe individuals who have a court-appointed guardian. The authors submit that the label of ward indicates a pejorative state of total dependence. Instead, the authors recommend that professionals who work with special needs planning matters strictly use person-first language in all communications with the client, their family, and third parties. The authors suggest using the terms "individual subject to guardianship," "beneficiary," "adult who is the subject of a proceeding," and/or "principal" to describe a person who receives guardianship services. All in all, these descriptions respectfully emphasize the importance of each individual's right to self-determination and general autonomy. In addition, the authors encourage financial planners to generally avoid using the term "incompetency" because it is overly broad and stigmatizing. For a broad overview of guardianship fundamentals, see "What Is Guardianship?" National Guardianship Association (2019); accessed at: https://www.guardianship.org/what-is-guardianship, and Sally Balch Hurme, ed., *The Fundamentals of Guardianship: What Every Guardian Should Know* (Chicago, IL: American Bar Association Book Publishing, 2016).

(2) See generally, well-established guardianship law precedents set forth in *Kicherer v. Kicherer,* 400 A.2d 1097 (Md. Ct. App. 1979); *Snyder v. US,* 134 F. Supp. 319 (NC 1955); *Grayson v. Linton,* 63 Idaho 695, 125 P.2d 318 (1942); and *Owen v. Hines,* 41 S.E.2d 739 (NC 1947).

(3) *In re Guardianship of BVG,* 52 N.E.3d 988 (Mass. 2016); and *In re Guardianship and Conservatorship of Karin P.,* 716 N.W.2d 681 (Neb. 2006).

(4) "Ensuring Trust: Strengthening State Efforts to Overhaul the Guardianship Process and Protect Older Americans," U.S. Senate Special Committee on Aging (November 2018); accessed at: https://www.aging.senate.gov/imo/media/doc/Guardianship_Report_2018_gloss_compress.pdf.

(5) *Gomes v. Hameed,* 184 P.3d 479 (Okla. 2008); and *McPhail v. McPhail,* 218 So.3d 290 (Miss. Ct. App. 2017).

(6) "Office of Public & Professional Guardians 2018 Annual Report," State of Florida Department of Elder Affairs (2018): 8; accessed at: http://elderaffairs.state.fl.us/doea/SPGO/pubs/OPPG_AR_2018.pdf. (This governmental audit was focused on the use of public guardian offices and noted that the state of Florida's public guardian offices used a sample size of over 3,800 people, the total number of clients served in state fiscal year 2017-2018). See also Matthew Maenner et al., "Prevalence of Cerebral Palsy and Intellectual Disability among Children Identified in Two U.S. National Surveys, 2011-2013," *Annals of Epidemiology* 26, no. 3 (2016): 222–226; accessed at: doi:10.1016/j.annepidem.2016.01.001. Also, American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5) (Washington, DC: American Psychiatric Publishing, 2013): 33-34. (Noting that age-related disabilities include, but are not limited to, Alzheimer's disease, Parkinson's disease, and dementia. IDDs can include, but are not limited to, Down syndrome, cerebral palsy, and autism spectrum disorders. TBI cases can involve concussions, contusions, and second impact syndrome. Second impact syndrome or SIS is a diagnostic

term for when the brain swells rapidly as a result of a second concussion before the symptoms of an earlier concussion have subsided. Severe mental health incapacities can include schizophrenia, anxiety or panic disorders, bipolar disorder, and eating disorders.)

(7) "Turning Rights into Reality: How Guardianship and Alternatives Impact the Autonomy of People with Intellectual and Developmental Disabilities," U.S. National Council on Disability (2019): 13; accessed at: https://ncd.gov/sites/default/files/NCD_Turning-Rights-into-Reality_508_0.pdf.

(8) *Ibid.*

(9) *Ibid.*

(10) See generally, "Family Guardianship: Frequently Asked Questions," State of Alaska Department of Administration Office of Public Advocacy (2015); accessed at: http://doa.alaska.gov/opa/pg/faq.html.

(11) See, e.g., "Guardian/Trustee Fee Procedure," State of Wisconsin Tenth Judicial District Court Barron County Probate Office (2005); accessed at: https://www.barroncountywi.gov/vertical/Sites/%7B55B35465-9825-4C7F-A839-E0EDFC6408E8%7D/uploads/%7B02923B45-B72E-4C2A-9BA4-6DFFE10F9D59%7D.PDF.

(12) *In re Hards,* 885 N.E.2d 980 (Ohio App. Ct. 2008); *In re Guardianship of Hilton's Estate,* 265 P.2d 747 (Wyo. 1954) (rejected on other grounds by *In re Guardianship of Christiansen,* 56 Cal. Rptr. 505 (Cal. App. Ct. 1967)).

(13) *Kicherer v. Kicherer* (1979), endnote 2.

(14) Bryan Garner, ed., "Equity," in *Black's Law Dictionary,* 11th ed. (Eagen, Minnesota: Thomson West, 2019): 242.

(15) See, e.g., *James B. Nutter & Co. v. Black,* 123 A.3d 535 (Md. App. Ct. 2015); *In Matter of Guardianship of Richardson,* 423 P.3d 660 (Olk. 2016); and *In re Guardianship of Decker,* 353 P.3d 669 (Wash App. Ct. 2015). (Noting that a court assumes jurisdiction in guardianship matters to protect those who, because of illness or other disability, are unable to care for themselves; in reality, the court is the guardian, and an individual who is given that title is merely an agent or arm of that tribunal in carrying out its sacred responsibility.)

(16) See, e.g., Florida Stat. Sec. 744.3215 (2019).

(17) *Ibid.*

(18) Richard H. Helmoholz, "Roman Law of Guardianship in England, 1300-1600," *Tulane Law Review* 52, no. 2 (1978): 223; accessed at: https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2497&context=journal_articles, citing Archibald Simptom, *A Treatise on the Law and Practice Relating to Infants,* 183 (*Making of Modern Law: Legal Treatises 1800-1920,* 4th ed. (Farmington Hills, MI: Gale, 1926). (Note that when studying the history of guardianship, the great English legal historian Frederic William Maitland used the phrase "disjointed and incomplete" to describe guardianship laws. In particular, he noted that English law concerning the guardianship of minors in the 15th century recognized at least 10 different classifications of legal guardian, depending on the beneficiary's social and economic rank.)

(19) "The Code of Hammurabi," Yale Law School Lillian Goldman Law Library, trans. L.W. King (2008); accessed at: https://avalon.law.yale.edu/ancient/hamframe.asp.

(20) GAO-17-33 Report to Congressional Requesters, "Elder Abuse: The Extent of Abuse by Guardians Is Unknown, but Some Measures Exist to Help Protect Older Adults," United States Government Accountability Office (November 2016); accessed at: https://www.gao.gov/products/GAO-17-33 (GAO analysis of selected state courts' guardianship oversight roles.)

(21) T. S. Laham, *The Con Game: A Failure of Trust* (Morrisville, SC: Lulu Publishing Services, 2014).

(22) *Ibid.* (This quotation is a derivative of the quotation attributed to Juvenal at the start of this article.)

(23) *Ibid.*

(24) U.S. Senate Special Committee on Aging (2018), endnote 4.

(25) *State of Nevada v. April Parks, Mark Simmons, Gary Neal Taylor, and Noel Palmer Simpson,* D. Nev. Case No. C-17-321808-1 (2018); *State of Nevada v. April Parks,* D. Nev. Case No. C-18-329886-2 (2018).

(26) U.S. Senate Special Committee on Aging (2018), endnote 4.

(27) Rachel Aviv, "How the Elderly Lose Their Rights: Guardians Can Sell the Assets and Control the Lives of Senior Citizens without Their Consent—and Reap a Profit from It," *The New Yorker Magazine* (October 2, 2017); accessed at: https://www.newyorker.com/magazine/2017/10/09/how-the-elderly-lose-their-rights.

(28) *Ibid.*

(29) *Ibid.*

(30) *Ibid.*

(31) Aviv (2017), endnote 27.

(32) *Ibid.*

(33) *Ibid.*

(34) U.S. House Select Committee on Aging, "Abuses in Guardianship of the Elderly and Infirm: A National Disgrace," Comm. Pub. No. 100-639 (100 Cong., December 1987); accessed at: https://babel.hathitrust.org/cgi/pt?id=mdp.39015013435816&view=1up&seq=1.

(35) *Ibid.*

(36) *Ibid.*

(37) "Annual Report of Guardian on Condition of Legal Incapacitated Individual," State of Michigan Probate Court (February 2018); accessed at: https://courts.michigan.gov/Administration/SCAO/Forms/courtforms/pc634.pdf. Interview with Lewis Hershey, appointed legal guardian, in Ypsilanti, MI (October 1, 2019). (Discussing his personal experiences in 2019 as a guardian when filing a guardianship report with the Washtenaw County Probate Court in Ann Arbor, MI. After submitting a complete transactional record of all expenditures made on behalf of the ward, the Clerk of Court told Dr. Hershey not to include such detail in future reports to the Court.)

(38) Kate Santich, "Florida's Guardians Have a Huge Responsibility—

and Potential for Abuse," *Orlando Sentinel* (July 19, 2019); accessed at: https://www.orlandosentinel.com/news/os-ne-florida-guardians-great-responsibility-potential-for-abuse-20190719-m7l3pbepbzglzpksmx6gi5zyhu-story.html.
(39) *Ibid.*
(40) *Ibid.* (Noting that the number of guardianship cases in Florida is soaring as the state's population of individuals who are elderly continues to rise.)
(41) State of Florida Department of Elder Affairs (2018), endnote 6.
(42) *Ibid.,* p. 1-2.
(43) *Ibid.,* p. 2.
(44) *Ibid.*
(45) *Ibid.*
(46) See generally, Dari Pogach, "Guardianship and the Right to Visitation: An Overview of Recent State Legislation," American Bar Association Commission on Law and Aging (December 6, 2018); accessed at: https://www.americanbar.org/groups/law_aging/publications/bifocal/vol-40/issue-2-november-december-2018/guardianship-visitation. (Noting that "[a]s the public becomes more aware of the potential risks of guardianship—including isolation from friends, family, and community—more states are debating hotly contested visitation bills.")
(47) Fred Bayles, "Guardians of the Elderly: An Ailing System Part I: Declared 'Legally Dead' by a Troubled System," Associated Press (September 19, 1987); accessed at: https://www.apnews.com/1198f64bb05d9c1ec690035983c02f9f; Also, Fred Bayles, "Guardians of the Elderly: An Ailing System Part II: Many Elderly Never Get Their Day In Court," Associated Press (September 20, 1987); accessed at: https://apnews.com/8ea94c1c992fd97e7eea7fe72a924f73.
(48) *Ibid.*
(49) "Final Report to the Judicial Council," Utah State Courts Ad Hoc Committee on Probate Law and Procedure Administrative Office of Courts (2009); accessed at: https://digitallibrary.utah.gov/awweb/main.jsp?flag=collection&smd=1&cl=all_lib&lb_document_id=15013&tm=1595991395669&itype=advs&menu=on.
(50) *Ibid.*
(51) *Ibid.*
(52) U.S. Senate Special Committee on Aging (November 2018), endnote 4, p. 9.
(53) *Ibid.*
(54) *Ibid.,* p. 6 and p. 19-24, citing "Beyond Guardianship: Toward Alternatives That Promote Greater Self-Determination," U.S. National Council on Disability (March 22, 2018); accessed at: https://ncd.gov/sites/default/files/NCD_Guardianship_Report_Accessible.pdf.
(55) Winsor C. Schmidt, "The Evolution of a Public Guardianship Program," *Journal of Psychiatry & Law* 12, no. 3 (1984): 349-372; accessed at: https://doi.org/10.1177/009318538401200304.
(56) *Ibid.*
(57) State of Michigan Probate Court (2018), endnote 37.
(58) *Ibid.,* p. 2.
(59) *Ibid.,* p. 3.
(60) See generally, Santich (2019), endnote 40.
(61) Monivette Cordeiro, "Florida's Troubled Guardianship System Riddled with Conflicts of Interest, Critics Claim," *Orlando Sentinel* (August 17, 2019); accessed at: https://www.orlandosentinel.com/news/florida/guardians/os-ne-guardianship-examining-committee-conflicts-20190814-osbekpwlnfezneolyxttvzmrhy-story.html.
(62) *Ibid.*
(63) *Ibid.*
(64) *Ibid.*
(65) Cordeiro (2019), endnote 61.
(66) Erica Wood, Pamela Teaster, and Jenica Cassidy, "Restoration of Rights in Adult Guardianship: Research & Recommendations," American Bar Association, ABA Commission on Law and Aging with the Virginia Tech Center for Gerontology (2017); accessed at: http://asaga.info/wp-content/uploads/2018/11/ABA-restoration-report.pdf.
(67) *Ibid.,* p. 18.
(68) *Ibid.*
(69) *Ibid.*
(70) Senate Committee on Aging (2018), endnote 4, p. 25.
(71) GAO-17-33 Report to Congressional Requesters (2016), endnote 20.
(72) *Ibid.*
(73) *Ibid.*
(74) *Ibid.*
(75) Brenda Uekert and Richard Van Duizend, "Adult Guardianships: A 'Best Guess' National Estimate and the Momentum for Reform," *Future Trends in State Courts,* National Center for State Courts (2011); accessed at: https://ncsc.contentdm.oclc.org/digital/collection/ctadmin/id/1846.
(76) *Ibid.*
(77) "State Court Leaders Strive to Improve Guardianship and Conservatorship Oversight," National Center for State Courts (November 30, 2016). (The NCSC is an independent nonprofit organization dedicated to improving court administration and practices). See also U.S. Senate Special Committee on Aging (November 2018), endnote 4.
(78) *Ibid.*
(79) "Guardianship Accountability Act of 2019," S.591, 116th Cong. (February 27, 2019) (sponsored by Senator Susan Collins, Republican from the state of Maine); "Guardianship Accountability Act of 2019," H.R.4174, 116th Cong. (August 6, 2019) (sponsored by Representative Darren Soto, Democrat from the state of Florida).
(80) "State Adult Guardianship Legislation Summary: Directions of Reform," American Bar Association Commission on Law and Aging (2018); accessed at: https://www.americanbar.org/content/dam/aba/administrative/law_aging/2018-adult-guardianship-legislative-summary.pdf.
(81) *Ibid.,* p. 2.
(82) Aviv (2017), endnote 27 (quoting Pamela Teaster, director of the Virginia Tech University Center for Gerontology).