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Guardianship In The U.S.: Protection Or Exploitation?



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Next Avenue, Contributor

By **Emily Gurnon, Next Avenue Contributor**

(Editor's note: This is Part 1 of a three-part series on guardianship abuses appearing this week on [Next Avenue](#).)

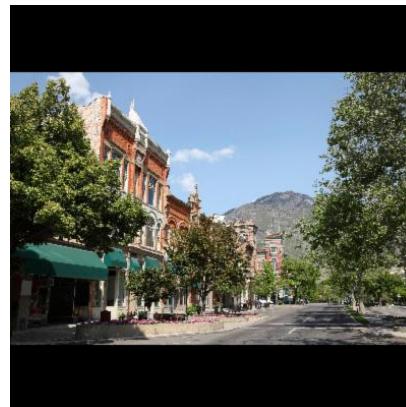
Ginger Franklin was just shy of her 50th birthday when she fell down the stairs of her Nashville-area townhouse in 2008. A marketing representative for Sam's Club, she

was taken to the hospital with a severe brain injury. Doctors weren't sure if she would survive.

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Since Franklin had not designated anyone to make decisions for her if she became incapacitated, and with no immediate family, her aunt was advised to petition the court for a guardian. The guardian, a lawyer appointed by the county, placed her in a group home for seriously mentally ill adults.

But Franklin was not mentally ill. And she did what no one expected her to do: she recovered.

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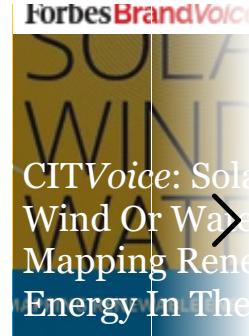
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When she returned home from a rehabilitation center seven weeks later, however, the guardian “told me that I didn’t have a home anymore and that my townhouse was empty,” Franklin said.

As is common in [guardianship cases](#), the court granted permission for the guardian to sell Franklin’s home and its contents. The owners of the group home where she was placed then put Franklin to work: She was forced to do the grocery shopping, cook, dispense medication, watch over the other residents of the house and clean the owners’ personal home — for no pay, Franklin said. Meanwhile, she was paying \$850 monthly rent to the owners, plus \$200-per-hour attorney fees to the guardian for such tasks as writing checks for Franklin’s expenses and leaving phone messages, according to a court document.

With the help of an advocate, and media attention, Franklin fought the guardianship in court, winning her

freedom in 2010 after two long years of having no legal rights. She now lives independently in the Nashville area and has [sued the guardian](#).



Credit: Shutterstock

“It’s quite an understatement to say I was devastated,” she told Next Avenue. “I don’t trust people anymore. I lost everything — because I fell down the stairs.”

More Will Enter ‘The Danger Age’

Franklin’s case, originally investigated by The Tennessean newspaper, is just one of many cases of guardianship and conservatorship abuse across the country.

In a [2010 report](#), the U.S. Government Accountability

An advertisement for the Florida Prepaid College Board. The top left features the logo with the text "FLORIDA PREPAID COLLEGE BOARD" and a tagline "► Starting is Believing". The top right shows a woman and a young child looking at a book together. The middle section contains text: "An easy way to save for college" and "► No minimum contribution". At the bottom left is the text "Florida 529 Savings Plan" and a yellow button on the right with the text "Learn More".

Office (GAO) found hundreds of allegations of physical abuse, neglect and financial exploitation by guardians in 45 states and the District of Columbia between 1990 and 2010. Guardians also stole \$5.4 million in assets from their wards in that period, the GAO said. (The GAO is currently working on an updated report.)

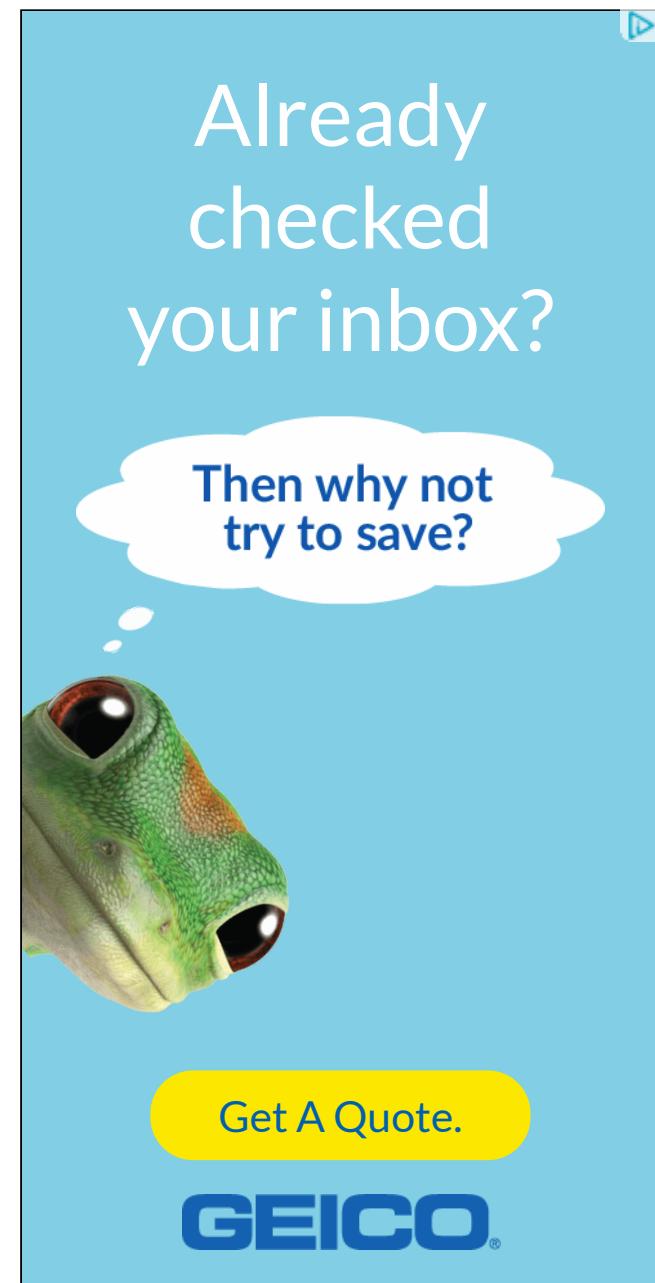
As the boomer population moves into old age, the numbers of people affected by guardianship and conservatorship will rise “tremendously,” said Jennifer Wright, a professor at the University of St. Thomas School of Law in Minneapolis who directs the school’s Elder Law Practice Group.

“There are more of us who are going to enter the danger age,” she said.

With as little as a single document — and in some cases, not even a court hearing — older adults can see their most basic rights stripped away. They cannot vote, get married or get divorced. A family member or a stranger appointed by the court will decide where they will live, how their money will be spent, what health care they will get or not get, when they will go out, when and where they may travel and whom they are allowed to see.

Guardianships: Difficult to Challenge

Rarely is an “incapacitated person” or ward able to get a guardianship or conservatorship terminated — until



death, that is. Franklin was, in that sense, very lucky.

“Go ahead and see what you can do, because you have been deemed incapacitated, so everything you say or do is meaningless,” said Brenda Uekert, principal court research consultant with the National Center for State Courts. “You can’t even get an attorney, because a judge has already determined that you don’t have the ability to make decisions for yourself.”

Those who do try to fight often end up paying exorbitant amounts of money.

“Many families go bankrupt because they believe if they hang in there long enough the system will work for them, and it doesn’t,” said Elaine Renoire, a director of the [National Association to Stop Guardian Abuse](#) in Loocootee, Ind., a victims’ rights group. The No. 1 complaint she hears: guardians who try to isolate older adults from their loved ones.

(More: Tom Brokaw: What He Wants at Life’s End)

In her 2014 book, *The Con Game: A Failure of Trust*, business professor T.S. Laham of Diablo Valley College in the San Francisco Bay Area wrote that America’s guardianship system is “an open invitation to potential abuse.” (*Next Avenue* [wrote about the book](#) last year.)

Definitions Inconsistent, Numbers Elusive



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What is meant by the terms “guardian” and “conservator” varies depending on the state. National groups working on reform efforts use “guardian” to refer to a person appointed by the court to make decisions over an individual and “conservator” to refer to a person appointed to handle the estate. Some use the terms interchangeably or use one to cover both situations.

It is difficult to impossible to know how many people are under guardianship or conservatorship in the United States, experts said. Many states do not do comprehensive record-keeping. A [2013 AARP report](#) gave a “best guess” estimate of the number of adults under guardianship nationally at 1.5 million, but added the data “are scant and vary in quality.”

Despite the lack of statistics, those familiar with the system say the vast majority of guardians and conservators, perhaps 80% or more, are relatives of the incapacitated person.

Idaho and Minnesota are the only states that track the amount of money being controlled by guardians or conservators; the combined total for just those two states is over \$1 billion, according to Uekert.

A Parade of Atrocities

Abuses that have been reported in recent years include the following:

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- A Phoenix woman, Marie Long, had managed through careful saving and investing to amass \$1.3 million by the time she had a stroke in 2005. Four years later, she was nearly broke, her estate having been bilked by an unscrupulous guardian agency that, among other things, charged \$50 per hour for someone to open her mail, according to the Arizona Republic. The agency later closed shop; Long died in 2014.
- Daniel Gross of Long Island was hospitalized with cellulitis while visiting a daughter in Connecticut in 2005. When his children began arguing over his care and who should control his money, he was placed under conservatorship in that state without being told of a hearing; his court-appointed lawyer didn't object. Gross then landed in a locked nursing home ward with a violent roommate, the Hartford Courant wrote. He was later freed by a judge who called what happened under a different jurist "a terrible miscarriage of justice."
- Sixty-seven-year-old William Kehl suffered a major stroke that landed him in a Punta Gorda, Fla., hospital in 2009. When the facility wanted to discharge him to a distant rehab center, his ex-wife and medical power-of-attorney resisted. The hospital petitioned the court to appoint a guardian, who sold off Kehl's assets and paid herself \$1,827 a month until Kehl's ex-wife managed to take over as guardian and bring him to her home, according to a 2014 article in the Sarasota Herald-Tribune.
- Palm Beach County, Fla., Circuit Judge Martin Colin was transferred from the court's guardianship division earlier

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this year after an investigation by the Palm Beach Post raised questions of a conflict of interest based on the fact that his wife was a paid professional guardian in the same court.

- A Las Vegas woman, Patience Bristol, is now in prison after pleading guilty in 2013 to exploitation of a vulnerable person. She “tapped the accounts of her [four] wards to cover her sizable gambling debts and personal expenses” totaling \$495,000 in just one case, according to a lawsuit reported in the Las Vegas Review-Journal.

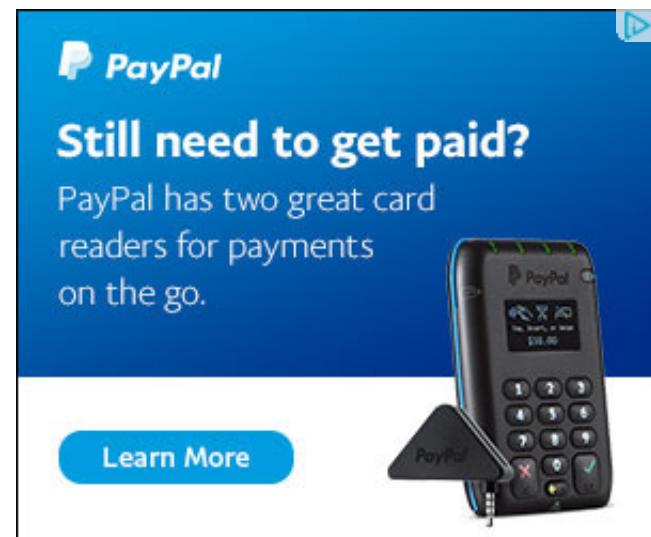
Reasons for the Abuse

The principle behind guardianship and conservatorship is noble: Make sure that someone who cannot take care of himself or herself has another person or institution watching out for their interests.

And in most instances, it works the way it should, say professionals who have pursued reform efforts.

But dig into the details and a more complicated picture emerges.

“The system is underfunded. There’s not enough judges who understand what to do and how to do it. There’s not enough volunteers to do the work. And there’s not enough money to pay people to do it on a compensatory basis,” said Bernard A. Krooks, founding partner of the New York law firm Littman Krooks.



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Courts need — but often lack — the money for staff to oversee guardians and conservators and to review the periodic reports they are required to submit. There may be a shortage of judges to handle cases of all kinds, including guardianships. Counties often lack the funds to appoint public or professional guardians when the ward is indigent.

“And you’re dealing with the most vulnerable segment of the population,” including the elderly and disabled who cannot stand up for themselves, Krooks said. “So you’ve just got a recipe for disaster, and that’s what’s happening in a lot of states.”

Angling for the Money

But much of it starts, he said, with greed.

“We’re seeing [relatives] initiate ‘will contests’ while the person is still alive — I think that’s what a lot of these contested guardianships come down to,” Krooks said. In those cases, what may be argued is not *whether* there should be a guardian but *who* it should be.

Uekert agreed. “Some of these cases are the ugliest family cases you can imagine. Some of them make child custody cases seem like a cake walk... somebody who did not get access to Mom and Dad’s money (against) someone who did,” she said.

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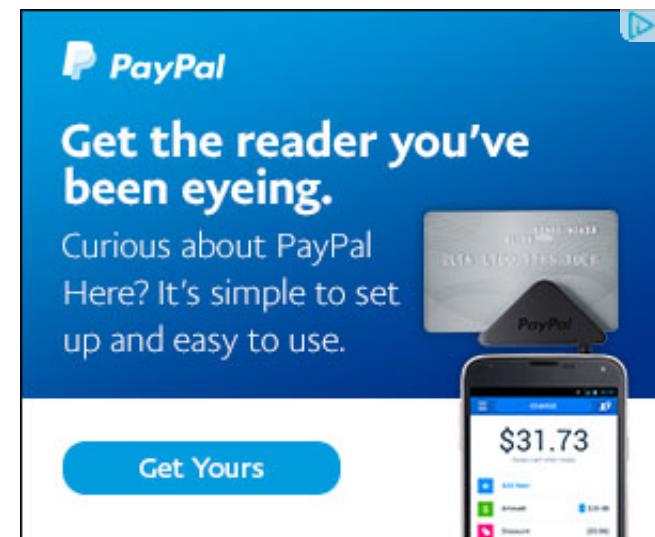
The petitioner — the person or institution asking a court for the guardianship — can be a relative or a nursing home or a hospital. The judge may appoint any of those — or name a professional guardian (if the ward has assets) or a public guardian (if a ward has no money).

Catherine Seal, a Colorado attorney who has worked in elder law for 20 years and been involved in guardianship reform, said state laws on the issue vary greatly. However, Seal noted, “Even in the states with the most sophisticated statutes, you still have court hearings that happen *ex parte*, which means that nobody gets to be there other than the petitioner.” She said she had a recent case in which a judge signed an initial order appointing an emergency guardian without any hearing and without the required affidavits swearing to the allegations in the petition.

“I represented the respondent, and I went into court as soon as I could, and we got the thing dismissed — because the court didn’t have the necessary information,” Seal said. Her client had the means to pay for an attorney, she said. Most don’t.

Limited Background Checks of Non-Professional Guardians

In December 2014, a survey on state guardianship laws and court practices found that almost 40% of the 1,000



respondents said that criminal background checks were not required of non-professional guardians of an estate. Respondents to the survey, commissioned by the Administrative Conference of the United States, included judges, court staff and guardians from around the country.

Sixty percent of the court respondents said they did not require a credit or financial background check on a prospective guardian.

But a background check could alert a judge to the potential for abuse once the guardian or conservator has control of someone's assets. Seal said judges should require guardians to get a bond so the protected person can be "made whole" in the event of misuse or fraud.

If a financial institution refuses to issue the bond, that's a red flag. "If you're not a good financial risk, you shouldn't be in charge of the money," she said.

Where the Courts Fall Short

Seal and other experts said that once guardianships or conservatorships are established, monitoring of those ongoing relationships often falls short.

"Courts are not set up well to monitor guardians," but rather to initiate a process, get it finished and deliver a decision, Seal said.



Uekert agreed with others that an enormous part of the problem is funding.

“Everything is contingent on the courts trying to do this out of budgets that the state legislatures don’t want to support,” she said. “If the court is responsible for monitoring and doesn’t have anybody who can effectively act as a court visitor, audit cases or review accounting, to what extent can a court monitor?”

Judges and attorneys — especially those in rural counties who deal only rarely with guardianships — may be uninformed or impervious to changes in the law.

Wright said that in her early years of practicing elder law in Oregon, when she was representing someone in a contested guardianship and objected to part of the proceeding, “The judge said on the record, ‘Well, I don’t pay much attention to the rules of evidence or civil procedure in cases like this.’ So the judge has just told me outright that he doesn’t obey the law — what am I going to do now?”

How The Situation Is Improving

Experts who have been involved in the guardianship arena for decades said that, even with all the problems, the situation has improved.

In those early days of her practice, Wright said it was a

different world.

“There was almost no due process at all. And not only that, there was almost no perception that due process was important,” she said. A large proportion of guardianships were done by default — meaning that as long as the petitioner showed the proposed ward had been notified, that was all that needed to happen.

“No hearing, no inquiries as to why they didn’t respond or whether they were trying to figure out *how* to,” Wright said. “And that was considered perfectly fine.”

The attitude was, we’re doing something nice for these people, she said.

Everyone has good intentions. But even when they do, Wright said, the ward can be harmed.

That continues to happen far too often, said Alison Hirschel, director of the Michigan Elder Justice Initiative and the elder law specialist at the Michigan Poverty Law Program. Laws may be enacted and refined, but changes fail to materialize in the courtrooms where guardianships are decided.

In Michigan, Hirschel said, the law as written is very good. “The problem is what happens in probate law practice. If a petition is filed against someone, it’s extraordinarily likely that that petition will be granted.

Individuals are very frequently not represented in these hearings — they're very frequently not even present at these hearings, so the judge doesn't even see them," said Hirschel, who also teaches elder law at the University of Michigan Law School.

And even when there are caring relatives, or services in the community to help older adults remain in their homes, "guardianship is like a pipeline to the nursing home," she said. "And they never get out."

A Way Out?

One way you can protect yourself against becoming a victim of guardianship abuse: Get a durable power of attorney and a health care advance directive. These documents can help keep the determination of your future out of a courtroom.

Attorneys and advocates for older adults urge them to fill out such paperwork before they suddenly need it. Because after the fact, it's probably too late.

Those documents don't guarantee that you won't be exploited; the key is to give the responsibility for your welfare to the right person. But if done wisely, a great deal of heartache and expense may be avoided.

Why don't more people take proper steps to be prepared?

“Everybody is in complete denial,” said Seal. “Just like nobody’s going to go in a nursing home. We’re all going to live forever, very healthy — like on the commercials — or we’re going to die in our sleep after a game of tennis.

“If any one of us were to consider the fact that we might be the subject of a guardianship case, we would all be very unhappy with the system as it actually exists now,” Seal continued. “No one would want to be a party to this.”

This article was written with support from the Journalists in Aging Fellowships, a program of New America Media and the Gerontological Society of America, sponsored by the Retirement Research Foundation.

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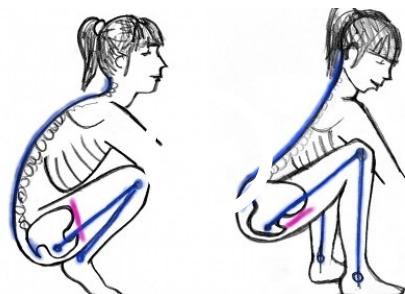


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