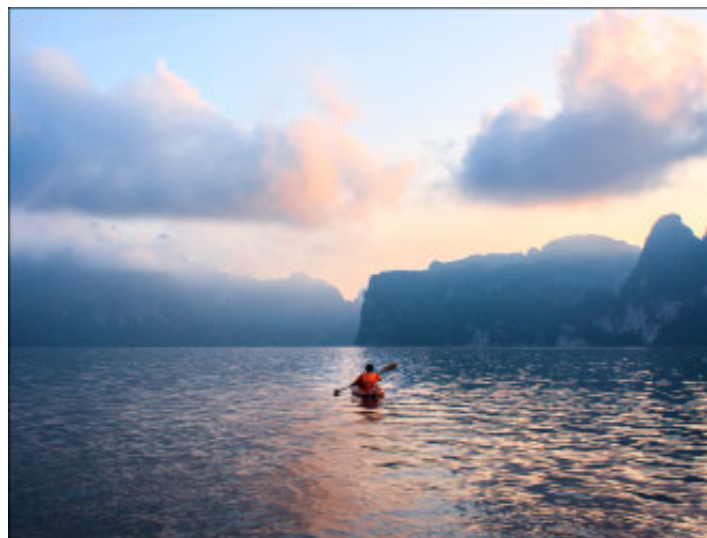


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Guardianship Laws: Improving, But Problems Persist



Next Avenue

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Next Avenue, Contributor

By Emily Gurnon, [Next Avenue Contributor](#)

(Editor's note: This is Part 2 of a three-part series on guardianship abuses appearing this week on [Next Avenue](#). Here's [Part 1](#).)

Cases of [abusive guardianships](#) have made headlines for decades. Horrific tales — of relatives fighting over Mom to access her savings, professional guardians draining an estate through exorbitant fees or nursing homes filing for guardianship to keep their beds filled — have been all too common.



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When a judge imposes legal guardianship or conservatorship, everything changes.

After a hearing that might last only minutes, the ward or “incapacitated person” may no longer be allowed to decide

where to live or whom he or she will see. If a guardian is appointed for you, that person will choose whether you get any spending money. You won't be able to enter into contracts, including marriage, or demand a different guardian or your freedom back — even if your guardian is abusing you or stealing your money.

Nationwide Reforms

Many such arrangements are undoubtedly necessary and benign. And the ranks of guardians and conservators include some highly dedicated, caring and selfless people.

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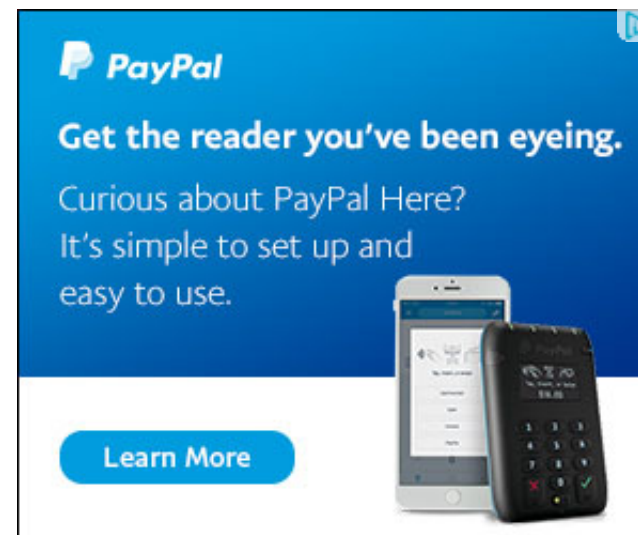
What Prompts Elder Abuse? This Doctor Found Out

What Banks Are Doing To Halt Elder Abuse



(**More:** [Guardianship in the U.S.: Protection or Exploitation?](#))

Yet this Next Avenue investigation has come to a key conclusion: changes are desperately needed.





Credit: Shutterstock

Yes, lawyers, judges, advocates and politicians have fought hard for reform in the guardianship and conservatorship systems. (Guardianship generally refers to control over a person; [conservatorship](#), to control over a person's finances.) And dozens of new laws have been put in place throughout the country.

But many experts believe it's all happening far too slowly — and some of the most finely crafted laws remain mere words on paper.

“Even though we’ve made changes in the statutes, it’s as if we’re living in a virtual reality,” said A. Frank Johns, a Greensboro, N.C. attorney and a national leader in the field of



elder law. “When you go out and try to look for the application of those changes, it’s nowhere to be found.”

In 2014, there were 33 changes in laws on adult guardianship in 18 states, according to a report by the Commission on Law and Aging of the American Bar Association. The changes concerned such aspects as background checks on guardians, access of the ward to visitors and phone calls (an issue in the highly publicized [guardianship of radio personality Casey Kasem](#)), health care decision-making by guardians, guardian fees and rights of people under guardianship.

For the most part, however, “we don’t need to change the laws; we need to enthusiastically and effectively apply the laws that we have,” said Sally Hurme, an elder law attorney in Washington, D.C., and a leader in guardianship reform for two decades. “And we need to give courts the resources to do their legislative and moral mandate.”

Landmark Investigation

Experts say there was little widespread recognition or publicity about the problems in guardianships until 1987, when the Associated Press published a blistering [six-part series of articles](#) following a year-long investigation.

Then as now, there were no reliable statistics on exactly how many guardianships there are nationwide; the AP estimated 300,000 to 400,000. Today, experts give a range from 1 million to 2 million. States do not keep track of the numbers.



(**More:** My Family's Elder Financial Abuse)

The exposé prompted impassioned calls for reform and led to a host of new state laws.

Some of the changes since then include these requirements:

- That the would-be “incapacitated person” is notified of the guardianship hearing and be present if desired
- That he or she has the right to an attorney
- That there is “clear and convincing” evidence that the person is incapacitated, and, in some states, that guardianship is necessary to avoid harm
- That (in some states) a medical expert assesses the proposed ward.

Efforts in Michigan

Changes in the laws didn't always translate to changes in the courtroom, however.

For instance, after the AP series came out, Michigan passed a comprehensive new law. “After the Guardianship Reform Act of 1988, Michigan has probably had the best or among the best statutes in the United States,” said attorney Bradley Geller, who has spent his career in the field, most recently as an assistant long-term care ombudsman for Michigan. However, he added, “that has, over the past 27 years, meant absolutely nothing.”



Geller attended a conference of probate judges when the law took effect. “One probate judge rose and said, ‘Guardianship reform will come to Michigan when all the sitting judges are dead.’ And he was, unfortunately, optimistic, because even with a new generation of probate judges, the problems remain,” Geller said.

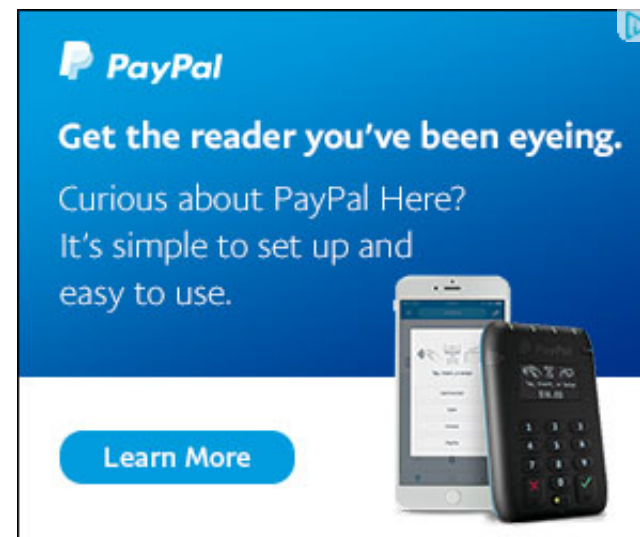
An example: Michigan law says, as in other states, that a prospective ward has the right to be present for the guardianship hearing and that “all practical steps shall be taken to ensure his or her presence, including, if necessary, moving the hearing site.” If she is too sick or frail to come to court, and wants to be there, the judge should hold the hearing in a more convenient place, such as a hospital or nursing home, Geller said.

“That almost never happens. In fact, one judge said at a continuing education seminar that in his seven-and-a-half years as a judge he had never moved the site of a hearing, and he said it with pride,” Geller said. “It was like, ‘I don’t give a shit what the law says, I’m going to do what I feel like doing — it’s too much trouble to obey the law.’”

Abuses Elsewhere

Michigan is not the only state to resist change.

One major push in new legislation across the country has been to mandate that judges grant limited guardianship orders whenever possible, rather than a wholesale



termination of the person's rights. An example might be allowing a person to retain some say over where he or she lives. It's an uphill battle.

A preference for limited orders is "the statutory mandate in just about every state, but we know there are more excessive removals of rights in too many cases," said Hurme. "We're trying to come up with language beating the judges over the head [that] you'd better have a good reason on the record why you are not imposing a limited guardianship rather than a full guardianship."

Minnesota law says that a full, or plenary, guardianship, shall be granted only when there is no other way to protect the person sufficiently, 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.

However, "there are almost no limited orders," she said. "It's very rare. The default is plenary." Experts in several other states echoed that sentiment.

Wright said one judge told her that if he granted the limited order she was requesting, he'd have to modify it a year later if the ward's health declined. (In his defense, he agreed to the limited order.) "So there's a strong push, for judicial efficiency, against them," Wright said.

And judges are afraid, she added. "Judges are really worried about people getting hurt, and they think that guardianship

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protects them. They do get hurt. They get hurt when they get stuck in nursing homes for the rest of their lives. They get hurt when their power to make decisions is taken away and that drives them into depression.”

She and others have worked to find creative alternatives to guardianship.

One woman told Wright she wanted a guardianship because her mother kept leaving papers on the stovetop, and one day it caused a fire. “I said, ‘We’ll take the stove out. Get her on Meals on Wheels. Leave the microwave in,’” Wright said. “There are ways to solve that problem other than guardianship.”

Evaluating the ‘Alleged Incapacitated Person’

Many advocates believe that it is still far too easy to get a judge to sign off on a guardianship or conservatorship. The evidence stating that the older adult can’t handle his or her own affairs is supposed to be “clear and convincing,” but in reality may consist of:

- a brief letter from a general practitioner, who may be taking the word of an adult child
- a statement from a doctor who does not know the difference between delirium, which is temporary, and dementia, which is not
- a court petition from a proposed guardian or conservator who



has a conflict of interest in getting the older person under their control

- a petition from a nursing home that wants to ensure they retain a regular, paying client
- a statement from an adult child who simply wants to take over the decision-making from Mom or Dad instead of arguing about what they see as necessary care

“In my experience, a lot of times, people will utilize guardianships as a means to another end,” said Bernard Krooks, an elder law attorney and founding partner of the New York law firm Littman Krooks. “Sometimes family members will get a guardianship so that one of the siblings can resolve an issue that he or she has with another sibling and they’re using the parent as a pawn.”

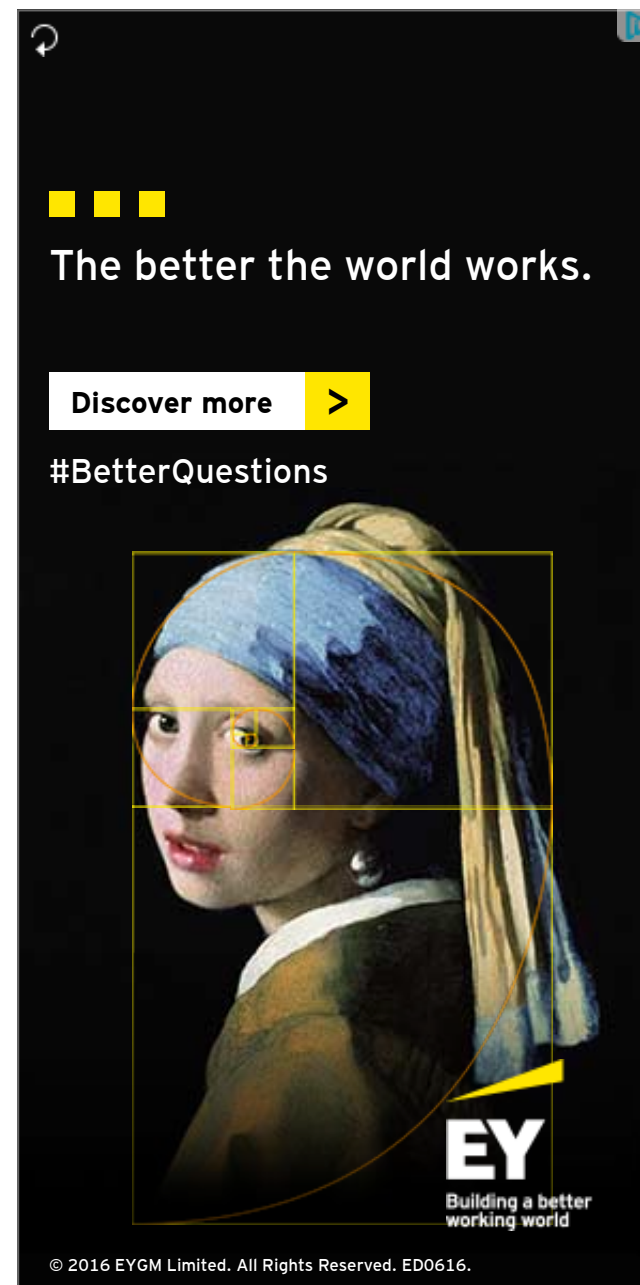
In those cases, the judge should throw out the petition, Krooks said, but that often doesn’t happen.

The Challenge of Monitoring

Another sticking point in the efforts to reform guardianship and conservatorship is the difficulty of monitoring it.

Most, if not all, states require guardians and conservators to keep records of their activities and file periodic reports with the court.

But the extent to which they comply is anyone’s guess,



because most courts don't have enough money to hire staff to do the painstaking work of tracking all those reports and ferreting out potential problems.

Minnesota has stood out, however, for its efforts to track the work of conservators.

The state received the 2015 Justice Achievement Award from the National Association for Court Management (NACM) for its Conservator Account Auditing Program. The NACM called the program "a nation-leading initiative to protect the assets of vulnerable individuals... for whom the court has appointed a conservator to manage the individual's financial affairs."

Cate Boyko directs the program, in which each of Minnesota's 8,000 conservators must submit reports online to the state. Minnesota received a grant in 2012 from the State Justice Initiative, a nonprofit established by federal law to improve state courts, to develop the program.

"There are features that help court staff and there are features that help conservators," Boyko said. Filing online eliminates the need for paper accountings with boxes of receipts. And it ensures that the information is in a format the court can readily deal with.

The tracking system is vital to ensuring that the financial resources of vulnerable people are used for their benefit, Boyko said.

“The court has deemed that these people cannot look after their own assets, so the court is putting someone else in charge of that,” she said. “And if nobody’s watching, then it’s an opportunity ripe for people to abuse those assets.”

Minnesota is sharing the system at no cost with any other state that wants to use it.

Just having the reports may still not be enough to correct abuses in many states, however. And monitoring the activity of guardians, who control significant though less quantifiable aspects of a ward’s life than conservators, is even more difficult.

“How many courts today have somebody who’s helping the judge look at these reports that are supposed to be getting filed?” asked Hurme. The answer: No one knows.

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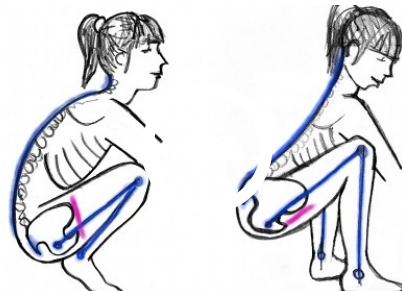
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