

**AN ARGUMENT AND A ROADMAP FOR  
REGULATING THE COURT-APPOINTED  
PROFESSIONAL FIDUCIARY**

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ABSTRACT

The National Center for State Courts estimated that guardians across the country supervise approximately 1.3 million adults and \$50 billion of their assets.<sup>1</sup> The most recent national study of public guardians found a rising need and complex adult guardianship landscape composed of both the oldest old and a new, younger

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1. BRENDA K UEKERT ET AL., NAT’L CTR. FOR STATE CTS., FINANCIAL EXPLOITATION BY CONSERVATORS 1 (2016), [https://www.eldersandcourts.org/\\_data/assets/pd\\_file/0009/6102/ovc-introduction.pdf](https://www.eldersandcourts.org/_data/assets/pd_file/0009/6102/ovc-introduction.pdf).

population needing representation with functional limitations caused by mental illness, developmental disability, head injury, and substance abuse.<sup>2</sup>

This backdrop, coupled with recent scrutiny concerning exploitation by guardians, makes imperative strategies to ensure that the quality of guardian services is as high as possible. The route to insure and to improve the quality of services is through certification and licensure of guardians. Benefits include greater awareness of ethics and standards of guardianship practice and an improved ability of guardians to make decisions on behalf of the incapacitated persons they serve. Other improvements in practice include increases in timely and accurate filing of guardianship reports and a decrease in the number of grievances filed against guardians. To date, seven states (i.e., Alaska, Illinois, North Dakota, Nevada, Oregon, and Utah) require certification by the Center for Guardianship Certification (CGC).<sup>3</sup> California requires a combination of CGC certification and state certification, while Arizona, Florida, Texas and Washington developed their own state certification.<sup>4</sup> Alaska, California, and Nevada require state licensure.<sup>5</sup> This paper presents an argument that it is time for all states to require certification, licensure, or both to significantly improve guardianship and conservatorship services.

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2. PAMELA B. TEASTER ET AL., PUBLIC GUARDIANSHIP AFTER 25 YEARS: IN THE BEST INTEREST OF INCAPACITATED PEOPLE? 9, 17, 90 (2007) [hereinafter TEASTER, PUBLIC GUARDIANSHIP].

3. *See State Specific Information*, CTR. FOR GUARDIANSHIP CERTIFICATION, <https://guardianshipcert.org/become-certified/state-specific-information/> (2020) [hereinafter *State Specific Information*] (providing Map of the United States Coded by Guardian Certification Requirement (illustration)).

4. *See id.*

5. *See id.*

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## INTRODUCTION

The National Center for State Courts estimated that guardians across the country supervise approximately 1.3 million adults and \$50 billion of their assets.<sup>6</sup> The most recent national study of public guardians found a rising need and complex adult guardianship landscape composed of the oldest old and a younger population needing representation with functional limitations caused by mental illness, developmental disability, head injury, and substance abuse.<sup>7</sup> To date, no state in the United States can reliably provide the number of people under guardianship.<sup>8</sup> Reports of abusive guardians appear in the popular press periodically each year, a situation capturing public attention most recently due to the movie, *I Care A Lot* and the Free Britney Spears efforts.<sup>9</sup>

Individuals requiring a guardian, conservator, or both<sup>10</sup> are especially vulnerable to mistreatment because they rely heavily on another person for care and are unable to advocate for themselves. The issue of abuse by guardians has become visible nationally, with reports by the Government Accountability Office<sup>11</sup>, testimony before the United States Senate Committee on Aging and Social Security

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6. UEKERT ET AL., *supra* note 1, at 2. (State court leaders strive to improve guardianship and conservatorship oversight).

7. TEASTER, PUBLIC GUARDIANSHIP, *supra* note 2, at 9, 17.

8. *See Abuse of Power: Exploitation of Older Americans by Guardians & Others they Trust: Hearing Before the U.S. S. Spec. Comm. on Aging*, 115th Cong. 3 (2018) (statement of Pamela B. Teaster, Ph.D. Professor and Director, Center for Gerontology, Virginia Tech) [hereinafter Statement of Pamela B. Teaster].

9. *See* David Smith, ‘99% of the World Has No Idea’: Inside the Shocking Legal Guardianship Industry, THE GUARDIAN (Feb. 18, 2021, 1:42 AM), <https://www.theguardian.com/film/2021/feb/17/99-of-the-world-has-no-idea-inside-the-shocking-legal-guardianship-industry>; *Britney Spears: Singer’s Conservatorship Case Explained*, BBC (Nov. 12, 2021), <https://www.bbc.com/news/world-us-canada-53494405>.

10. This paper uses the uniform law term “guardianship” to define the appointment of a fiduciary for an individual who has been adjudicated as not having sufficient capacity to manage their personal affairs, which may include health care decision, residential decisions and other matters regarding their person and conservatorship to define to the appointment of a fiduciary to handle the finances of an individual who is unable to manager their financial and business affairs.

11. *See generally* U. S. GOV’T ACCOUNTABILITY OFF., GAO-17-33, ELDER ABUSE: THE EXTENT OF ABUSE BY GUARDIANS IS UNKNOWN, BUT SOME MEASURES EXIST TO HELP PROTECT OLDER ADULTS (2016); U. S. GOV’T ACCOUNTABILITY OFF., GAO-10-1046, GUARDIANSHIPS: CASES OF FINANCIAL EXPLOITATION, NEGLECT AND ABUSE OF SENIORS (2010).

Administration,<sup>12</sup> and a flurry of media attention in *The Huffington Post*, *NPR On Point*, and *Senior Living*.<sup>13</sup>

An influential article in *The New Yorker* by Rachel Aviv (2017) entitled *How the Elderly Lose Their Rights* described egregious treatment by private professional guardian April Parks, a Las Vegas, Nevada, guardian.<sup>14</sup> Parks warehoused persons under her care in unacceptable facilities, charged unreasonably high fees, and made it impossible for concerned family members or friends to have contact with loved ones.<sup>15</sup> Parks was indicted on over 250 felony counts (one for each person she served); her story actually inspired the movie, *I Care a Lot*.<sup>16</sup>

In another recent instance of abuse, Rebecca Fierle, a Florida private professional guardian in the Orlando and Volusia area, was investigated for placing numerous do-not-resuscitate orders without

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12. See Ted Knutson, *Vast Majority of Elder Financial Abuse by Guardians Can Be Prevented, Experts Tell Senate*, FORBES (Apr. 18, 2018, 12:47 PM), <https://www.forbes.com/sites/tedknutson/2018/04/18/vast-majority-of-elder-financial-abuse-by-guardians-can-be-prevented-experts-tell-senate/?sh=7b07cfd5caa0>.

13. See John Leland, *'I'm Petitioning . . . for the Return of My Life,'* N.Y. TIMES (Dec. 7, 2018), <https://www.nytimes.com/2018/12/07/nyregion/court-appointed-guardianship-like-prison.html>; Ann Brenoff, *The System of Court-Appointed Guardians Continues to Fail the Elderly*, HUFFINGTON POST (Oct. 10, 2017 6:01 AM), [https://www.huffpost.com/entry/court-appointed-guardian-system-failing-elderly\\_n\\_59d3f70be4b06226e3f44d4e](https://www.huffpost.com/entry/court-appointed-guardian-system-failing-elderly_n_59d3f70be4b06226e3f44d4e); On Point Radio, *Who's Guarding Against the Guardians*, WBUR (Oct. 5, 2017), <https://www.wbur.org/onpoint/2017/10/05/state-sanctioned-guardians>; Aine Cain, *There's a Legal Way for Someone to Take Your Home, Your Stuff, and Your Money — But Everyone Ignores the Two Documents that Can Help Keep You Safe*, BUSINESS INSIDER (Oct. 8, 2017, 11:00 AM), <http://www.businessinsider.com/power-of-attorney-form-guardianship-estate-planning-2017-10>; *A Heartbreaking Story of Elder Abuse*, SENIOR LIVING (Nov. 11, 2020), <https://seniorlivingnepa.com/a-heartbreaking-story-of-elder-abuse/>.

14. Rachel Aviv, *How the Elderly Lose Their Rights*, THE NEW YORKER (Oct. 2, 2017), <https://www.newyorker.com/magazine/2017/10/09/how-the-elderly-lose-their-rights>.

15. *Id.*

16. See KTNV Staff, *The Guardian is Guilty: April Parks, Others Plead Guilty in Guardianship Abuse Case*, KTNV LAS VEGAS, <https://www.ktnv.com/news/contact-13/april-parks-others-plead-guilty-in-guardianship-exploitation-case> (last updated Nov. 21, 2018, 5:46 PM); Hunter Levitan, *Um, Just Wondering, Is that Netflix Movie "I Care a Lot" Based on a True Story?*, COSMOPOLITAN (Mar. 2, 2021), <https://www.cosmopolitan.com/entertainment/movies/a35686444/i-care-a-lot-true-story/>.

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family or court permission on the older adults under her care.<sup>17</sup> Fierle reportedly refused to remove a do-not-resuscitate order (DNR order) from one of the people whom she represented at a Tampa hospital even though the man asked her to do so.<sup>18</sup> The man subsequently died; medical staff did not try to save him because of the DNR order.<sup>19</sup> Also, the Orange County Comptroller found that she billed Advent Health approximately \$4 million for guardian-related services over a decade, in some cases billing both Advent Health and the person under her care for the same services but at different rates.<sup>20</sup> Fierle resigned on July 25, 2019, according to the Florida Department of Elder Affairs.<sup>21</sup>

Against this backdrop are efforts at local, state, and national levels to ensure that the quality of guardian services is as high as possible.<sup>22</sup> One important route to insure and improve the quality of guardian services is through certification and licensure. Certification and licensure afford greater awareness of ethics and standards of guardianship practice and an improved ability of guardians to make decisions on behalf of the incapacitated persons they serve.<sup>23</sup> Additionally, certification and licensure can increase timely and accurate filing of guardianship reports and decrease grievances filed against guardians. To date, seven states (i.e., Alaska, Illinois, North Dakota, Nevada, Oregon, and Utah) require certification by the Center

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17. Frank Fernandez, *Guardian in Volusia Elder Cases Under Criminal Investigation Over DNRs*, DAYTONA BEACH NEWS J. (Oct. 2, 2019, 11:16 AM), <https://www.ktnv.com/news/contact-13/april-parks-others-plead-guilty-in-guardianship-exploitation-case>.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*; Beth Kassab & Monivette Cordeiro, *Florida Professional Guardian Rebecca Fierle: Devoted or Dangerous?*, ORLANDO SENTINEL (Aug. 2, 2019, 10:17 AM), <https://www.orlandosentinel.com/news/florida/guardians/os-ne-rebecca-fierle-guardian-profile-20190802-i2zbn45qu5dsjheq5m3fg6kysm-story.html>; Monivette Cordeiro & Jeff Weiner, *Florida Elder Affairs Chief Announces 'Immediate' Changes as Embattled Orlando Guardian Rebecca Fierle Resigns From All Cases*, ORLANDO SENTINEL (July 26, 2019, 7:44 PM), <https://www.orlandosentinel.com/news/breaking-news/os-ne-criminal-investigation-into-orlando-guardian-rebecca-fierle20190726fn4uyfjy5newfj4lreiimxqze-story.html>.

22. *See, e.g.*, Kimberly George & Susan DeMaio, *Opinion: New York State's Escalating Need for High Quality Guardianship*, CITY LIMITS (Aug. 26, 2019), <https://citylimits.org/2019/08/26/opinion-new-york-states-escalating-need-for-high-quality-guardianship/>.

23. *See About Us*, CTR. FOR GUARDIANSHIP CERTIFICATION, <https://guardianshipcert.org/about-us/> (last visited Oct. 22, 2021).

for Guardianship Certification (CGC).<sup>24</sup> California requires a combination of CGC certification and state certification, while Arizona, Florida, Texas and Washington developed their own state certification. Alaska, California and Nevada require state licensure.<sup>25</sup> This paper presents an argument that it is time for all states to require certification, licensure, or both to significantly improve guardianship and conservatorship services.

## I. HISTORY OF THE PROBLEM

### A. *The National Picture*<sup>26</sup>

Currently, the United States (U.S.) has about 50 million individuals aged 65 and older and is approaching a monumental demographic change.<sup>27</sup> By the year 2030, all Baby Boomers will be 65 or older, meaning that one in every five residents will be retirement age.<sup>28</sup> The U.S. has seen significant increases in the aging population in the past 10 years with those 65 and older increasing by 35%.<sup>29</sup> Racial and ethnic minority populations composed 23% of adults 65, and older and about one in 10 older adults were living below the United States poverty level in 2018.<sup>30</sup> More than five million Americans are living with Alzheimer's disease,<sup>31</sup> now the sixth

24. See PAMELA B. TEASTER ET AL., *OUTCOMES OF GUARDIANSHIP CERTIFICATION: A REPORT FOR THE CENTER FOR GUARDIANSHIP CERTIFICATION 2* (2021) [hereinafter TEASTER, *OUTCOMES*] (finding New Mexico also requires certification by the Center for Guardianship Certification); *State Specific Information*, *supra* note 3.

25. See TEASTER, *OUTCOMES*, *supra* note 24, at 2; *State Specific Information*, *supra* note 3.

26. See *Older People Projected to Outnumber Children for First Time in U.S. History* (Oct. 8, 2019), U.S. CENSUS BUREAU, [www.census.gov/newsroom/press-releases/2018/cb18-41-population-projections.html](http://www.census.gov/newsroom/press-releases/2018/cb18-41-population-projections.html).

27. ANDREW W. ROBERTS ET AL., *THE POPULATION 65 YEARS AND OLDER IN THE UNITED STATES: 2016 2* (2018).

28. America Counts Staff, *By 2030, All Baby Boomers Will Be Age 65 or Older*, U.S. CENSUS BUREAU (Dec.10, 2019), [www.census.gov/library/stories/2019/12/by-2030-all-baby-boomers-will-be-age-65-or-older.html](http://www.census.gov/library/stories/2019/12/by-2030-all-baby-boomers-will-be-age-65-or-older.html).

29. ADMIN. FOR CMTY. LIVING, *2019 PROFILE OF OLDER AMERICANS 3* (2019) [hereinafter 2019 PROFILE].

30. *Id.* at 3–4.

31. ALZHEIMER'S ASS'N, *2021 ALZHEIMER'S DISEASE FACTS AND FIGURES: RACE, ETHNICITY, AND ALZHEIMER'S IN AMERICA 19* (2021), <https://www.alz.org/alzheimers-dementia/facts-figures>.

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leading cause of death in the United States.<sup>32</sup> One in three older adults die with Alzheimer's or dementia, currently costing the nation \$355 billion, with this number expected to rise as high as \$1.1 trillion by 2050.<sup>33</sup> The cost of health care in the U. S. is nearly twice that of the average member country of the Organization for Economic Co-Operation and Development, yet comparatively, its citizens have the shortest life expectancy.<sup>34</sup> The need for assistance with care more than doubles from the ages of 75–84 to 85 and older (going from 8% to 21%).<sup>35</sup>

The present population of adults 85 and older is expected to more than double (6.5 million to 14.4 million) by 2040 (123% increase).<sup>36</sup> In 2018, 34% of older adults 65 and older reported some sort of disability.<sup>37</sup>

In addition to the aging population, somewhere between 3.2 million and 5.3 million people in the U.S. are living with a disability as a result of a traumatic brain injury.<sup>38</sup> The percentage of children diagnosed with an intellectual disability has increased to 1.2% of the population, which increase may be attributed to improved awareness, screening and diagnosis.<sup>39</sup> For too many people, there is too little money, no available housing or long-term supports and services, and no family or close friend to serve these expanding needs.<sup>40</sup>

The sociodemographic information above supports the fact that the need for guardians and conservators is expected to increase over

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32. *Id.* at 29.

33. *Id.* at 69.

34. Roosa Tikkanen & Melinda K. Abrams, *U.S. Health Care from a Global Perspective, 2019: Higher Spending, Worse Outcomes?*, COMMONWEALTH FUND (Jan. 30, 2020), <https://www.commonwealthfund.org/publications/issuebriefs/2020/jan/us-health-care-global-perspective-2019>.

35. 2019 PROFILE, *supra* note 29, at 19.

36. *Id.* at 6.

37. *Id.* at 19.

38. CTRS. FOR DISEASE CONTROL & PREVENTION ET AL., REPORT TO CONGRESS ON TRAUMATIC BRAIN INJURY IN THE UNITED STATES: EPIDEMIOLOGY AND REHABILITATION 2 (2015).

39. Benjamin Zablotsky et al., *Prevalence and Trends of Developmental Disabilities Among Children in the United States: 2009–2017*, 144 PEDIATRICS 1, 1–2 (2019).

40. See Angela Colantonio et al., *Living Environments for People with Moderate to Severe Acquired Brain Injury*, 5 HEALTHCARE POL'Y 120, 133 (2010); see also Tolu O. Oyesanya et al., *Caring for Patients with Traumatic Brain Injury: A Survey of Nurses' Perceptions*, 26 J. CLINICAL NURSING 1562 *passim* (2017).

time, despite an increased awareness of alternatives to guardianship and conservatorship, including supported decision making.

### *B. Need for Surrogate Decision Makers*

Over the past decade, surrogate decision makers (SDMs) have been needed to make increasingly complex medical and financial decisions, thus contributing to the demand for services of a guardian or conservator.<sup>41</sup> Evolving laws, principles, and constructs are central to how decisions are made and SDMs are chosen/appointed (and monitored).<sup>42</sup>

#### *1. Medical and Personal Decision Making*

Although it could be argued that the U.S. recognized the right to personal autonomy in the Declaration of Independence,<sup>43</sup> the concept of the right to prior consent for medical treatment developed over the time through tort law,<sup>44</sup> legislation,<sup>45</sup> and codes of medical ethics.<sup>46</sup> As a body of law developed, the question of whether or not a patient had the necessary decision making ability to give informed consent to medical treatment became an important one for medical providers.<sup>47</sup> Starting in the 1950s, increases in life expectancy and medical advances caused physicians to confront the question of whether patients could consent and if not, whether someone else had the authority to do so on their behalf.<sup>48</sup> If a patient had not signed a durable

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41. See Alexander A. Kon et al., *Shared Decision Making in Intensive Care Units: An American College of Critical Care Medicine and American Thoracic Society Policy Statement*, 44 CRITICAL CARE MED. 1, 2 (2016).

42. See *id.* at 2, 12.

43. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

44. See Joan L. O'Sullivan & Breck G. Borcharding, *Informed Consent for Medication in Persons with Mental Retardation and Mental Illness*, 12 HEALTH MATRIX 63, 67–68 (2002).

45. See, e.g., ALASKA STAT. § 09.55.556 (1976); Timothy J. Paterick et al., *Medical Informed Consent: General Considerations for Physicians*, 83 MAYO CLINIC PROC. 313, 314 tbl.1 (2008) (listing state statutes developed to protect medical informed consent).

46. See *Informed Consent, Code of Medical Ethics Opinion 2.1.1*, AMA, <http://www.ama-assn.org/delivering-care/ethics/informed-consent/> (last visited Oct. 9, 2021).

47. See Daniel E. Hall et al., *Informed Consent for Clinical Treatment*, 184 CANADIAN MED. ASS'N J. 533, 533 (2012); Paterick et al., *supra* note 45, at 316.

48. See Hall, *supra* note 47, at 533; see also A. Kimberley Dayton, *Standards for Health Care Decision-Making: Legal and Practical Considerations*, 3 UTAH L. REV. 1329 *passim* (2012).



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power of attorney for healthcare or medical proxy, the medical profession was increasingly aware of the risk in treating a patient who both could not consent and was without an authorized decision maker. Many states passed surrogate health care decision making statutes, giving authority to family or close friends to make health care decisions;<sup>49</sup> however, those laws do not cover every situation.

Also in the last century, growing awareness of elder abuse, neglect, and exploitation of vulnerable adults led to funding for state adult protective service organizations.<sup>50</sup> Intervention by Adult Protective Services on behalf of at-risk adult requires either the adult's consent to receive services or a determination that the adult lacks capacity and may require the appointment of a decision maker to consent on behalf of the adult.<sup>51</sup>

## 2. *Financial Decision Making*

Common law principles of agency made it possible to delegate financial decision making through appointment of an agent, using a power of attorney.<sup>52</sup> However, the agency concept did not allow the agent to make decisions for a principal who became incapacitated.<sup>53</sup> “Agency is the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.”<sup>54</sup>

Under the common law, an agent could not act under delegation of authority unless the principal had capacity to act, as a principal

49. See AM. BAR ASS’N COMM’N ON L. & AGING, DEFAULT SURROGATE CONSENT STATUTES 1–17 (2019).

50. See *History: About Adult Protective Services from 1960 to 2000*, NAT’L ADULT PROTECTIVE SERVS. ASS’N, <http://www.napsa-now.org/about-napsa/history/history-of-adult-protective-services/> (last visited Mar. 15, 2022).

51. See HOLLY RAMSEY-KLAWSNIK, NAT’L ADULT PROTECTIVE SERVS. RES. CTR., THE COMPLEXITIES OF COGNITIVE CAPACITY 2 (2014), <http://www.napsa-now.org/wp-content/uploads/2015/06/TA-Brief-Mental-Capacity-FINAL.pdf>.

52. See, e.g., *Power of Attorney*, A.B.A., [https://www.americanbar.org/groups/real\\_property\\_trust\\_estate/resources/estate\\_planning/power\\_of\\_attorney/](https://www.americanbar.org/groups/real_property_trust_estate/resources/estate_planning/power_of_attorney/) (last visited Mar. 15, 2022).

53. See VA. CODE ANN. § 64.2-1608 (2021); W. Alfred Mukatis, *Does the Agency Die When the Principal Becomes Mentally Incapacitated?*, 7 UNIV. PUGET SOUND L. REV. 105, 106 (1983) (“The frequently cited general common law rule is that an agent’s authority automatically terminates upon the permanent loss of mental capacity of the principal, irrespective of knowledge or notice.”).

54. RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. L. INST. 2006).

could not authorize an agent to act if the principal did not have the capacity to do so.<sup>55</sup> “Just as there must be legal capacity to be an agent so there must be capacity to create a power. One who cannot make a contract cannot authorize another to make it for him.”<sup>56</sup> Because the agency created by a power of attorney designation ceased when the principal became incapacitated, the power of attorney was an effective tool for delegation by competent principals, although, earlier, it was not the useful tool it is today. Added over time was the concept of durability, even if the principal lost capacity to act, which made the durable power of attorney the estate-planning device it is today.<sup>57</sup>

Even for individuals with the foresight to sign a general durable power of attorney delegating an agent to handle financial affairs in the event of incapacity, situations still arise where the agent cannot or should not act. In some instances, the agency authority has been abused, and the principal has suffered financial loss.<sup>58</sup> In other instances, the agent(s) nominated by the principal fails to survive the principal or is unwilling or unable to act.<sup>59</sup>

Importantly, if a power of attorney is not signed before the onset of incapacity, conservatorship is the most common solution for management of financial affairs.<sup>60</sup> A conservator is granted authority over the financial matters of an individual unable to manage their own finances.<sup>61</sup> Typically, the conservator is required to comply with annual reporting, and the court is expected to review their actions.<sup>62</sup>

At one time, the trust department of an individual’s local bank would serve as conservator, but the banking industry realized that, as

55. See RESTATEMENT (FIRST) OF AGENCY § 20 (AM. L. INST. 1933).

56. Warren A. Seavey, *The Rationale of Agency*, 29 YALE L. J. 859, 870 (1920).

57. See, e.g., VA. CODE ANN. § 64.2-1602 (2021).

58. See, e.g., *id.* § 64.2-1612.

59. See, e.g., *id.* § 64.2-1608(a)(2).

60. See Kimberly Fowler, *The Top Misconceptions About a Power of Attorney, A Place for Mom* (Oct. 28, 2019), <https://www.aplaceformom.com/caregiver-resources/articles/misconceptions-about-a-power-of-attorney>.

61. See DIANE ROBINSON, KATHRYN HOLT & CATE BOYKO, NAT’L CTR. FOR STATE CTS. ET AL., *GUARDIANSHIP/CONSERVATORSHIP MONITORING* 5 (2020).

62. See, e.g., *id.* at 14; *Reporting Requirements for Conservators and Guardians*, TR Spencer & Assocs. (Mar. 13, 2019), <https://trspencer.com/blog/reporting-requirements-for-conservators-and-guardians#:~:text=The%20majority%20of%20conservators%20and,the%20beginning%20of%20the%20appointment>.

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a rule, this service was not profitable.<sup>63</sup> Many local banks downsized or closed trust departments over the years with the continued trend toward bank mergers, leaving as the only option large banks and trust companies that imposed minimum asset size and other requirements as the only and untenable option for small conservatorship estates and assets and escalated need for guardians and conservators.<sup>64</sup>

*C. The Unmet Need for Surrogate Decision Makers*

The growing need for guardians and conservators would be helped immensely by understanding trends in the population of people who are served by them.<sup>65</sup> However and as mentioned earlier, no statewide databases exist showing the number and characteristics of open guardianship cases or the people who act as their surrogate decision makers.<sup>66</sup> Consequently, it is difficult to quantify the extent of unmet need. Teaster, Wood, Holt, and George used surveys and interviews to explore unmet need in the state of New York.<sup>67</sup> One component of the study involved a survey of New York judges, with 55% of responding judges indicating that this population makes up 21–40% of their guardianship caseload.<sup>68</sup> When asked about cases with limited financial resources, one third said “low-fee or no-fee” cases involving this population make 21–40%.<sup>69</sup> One New York City judge estimated that these cases make up over 60% of his caseload.<sup>70</sup>

Over half of responding judges indicated that there are not enough resources to handle their current, active caseload involving no-fee or low-fee cases, citing that more guardians would help the problem.<sup>71</sup> Over 80% indicated that it was difficult to find an

63. See Chris Nichols, *Does Your Bank Trust Too Much in Trust?*, LINKEDIN (January 28, 2016), <https://www.linkedin.com/in/cknichols/>.

64. See, e.g., CHARLES SCHWAB TR. CO., CHARLES SCHWAB TRUST COMPANY PERSONAL TRUST SERVICES 3 (2020), <https://www.schwab.com/secure/file/P-10486790> (demonstrating that Charles Schwab Trust Company will not accept the following assets: tangible personal property, such as art and collectibles, non-residential real property and LLC interests or operating businesses).

65. See Statement of Pamela B. Teaster, *supra* note 8, at 3.

66. See *id.*

67. See PAM TEASTER ET AL., INCAPACITATED, INDIGENT, AND ALONE: MEETING GUARDIANSHIP AND DECISION SUPPORT NEEDS IN NEW YORK 19 (The Guardianship Project ed., 2018) [hereinafter INCAPACITATED, INDIGENT, AND ALONE]

68. *Id.* at 24.

69. *Id.*

70. *Id.*

71. *Id.*

appropriate guardian to serve for no-fee or low-fee cases, with more than 55% stating this occurs “most of the time.”<sup>72</sup> When asked whether there are a sufficient number of guardians with skills to take no-fee/low-fee cases, 60% said no.<sup>73</sup> Alternately, individuals with sufficient resources to pay for a guardian or conservator are served by private professional fiduciaries, some of whom have little experience or training to provide this complex service.<sup>74</sup>

## II. CONCERNS – OVERSIGHT OF GUARDIANS AND CONSERVATORS

Concerns associated with the performance of some guardians are ongoing.<sup>75</sup> Even if an appointment is made by the court to address the unmet need, appointment of an inadequately trained, monitored, or overburdened guardian or conservator rarely ameliorates the presenting problems and may exacerbate them.<sup>76</sup> Some commentators have written that it would be better to have no guardian at all rather than to have a guardian providing poor services.<sup>77</sup>

Although courts are expected to supervise the actions of guardians and conservators, in too many instances, their supervision has failed to protect persons under guardianship against abuses by fiduciaries. From the first national conference on guardianship policy in 1988 until today, there have been repeated calls for better supervision of court appointed guardians and conservators.<sup>78</sup> For

72. INCAPACITATED, INDIGENT, AND ALONE, *supra* note 67, at 24.

73. *Id.*

74. *See, e.g., id.* at 15, 55; Barbara Peters Smith, *Elder Guardianship: A Well-Oiled Machine*, Herald-Tribune (Sarasota) (Feb. 9, 2015), <https://www.heraldtribune.com/article/LK/20141206/news/605207346/SH?template=ampart> (noting the dramatic rise of professional guardians in Florida, and abuse resulting from “one-size-fits-all” process for treating persons under guardianship).

75. *See* Laurel Wamsley, *Britney Spears Is Under Conservatorship. Here's How That's Supposed to Work*, NPR (June 24, 2021, 5:36 PM), <https://www.npr.org/2021/06/24/1009726455/britney-spears-conservatorship-how-thats-supposed-to-work>.

76. *See* David Godfrey, *Challenges in Guardianship and Guardianship Abuse*, 42 BIFOCAL A.B.A COMM. ON L. & AGING 84, 85 (2021).

77. *See* PAMELA B. TEASTER, WINDSOR C. SCHMIDT JR., ERICA F. WOOD, SUSAN A. LAWRENCE & MARTA S. MENDIONDO, PUBLIC GUARDIANSHIP: IN THE BEST INTEREST OF INCAPACITATED PEOPLE? 144 (2010).

78. *See* COMM’N ON THE MENTALLY DISABLED & COMM’N ON LEGAL PROBS. OF THE ELDERLY, AM. BAR ASS’N, GUARDIANSHIP: AN AGENDA FOR REFORM 23–24 (1989); Sally Balch Hurme & Erica Wood, *Guardianship Accountability Then and Now: Tracing Tenants for an Active Court Role*, 31 STETSON L. REV. 867, 868 (2002); Mary Joy Quinn & Howard S. Krooks, *The Relationship Between the*

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example, over the past twenty years, the U.S. Government Accountability Office (GAO) has published a plethora of reports calling for better accountability.<sup>79</sup> Consonant with the GAO, Barnes commented on the need for and challenges with monitoring:<sup>80</sup>

The difficulties with guardian monitoring can be attributed primarily to the fact that few or no persons who are knowledgeable and concerned with quality of services have access to information likely to prevent or curtail guardian abuse and neglect. The situation is the very paradigm of justification for professionalization of services providers. The individual who knows a great deal about the quality of services is the one to be held personally responsible for that quality. “The ward, the courts, and society rely on the professional who is deemed to know the most about what should be done for the individual client, the ward.”<sup>81</sup>

Although guardians and conservators are restricted by statutory authority and court-imposed restrictions and required to exercise judgment and make decisions within their authority with little to no input from the court, they are usually subject only to annual reporting.<sup>82</sup> Breaches of their duties may not become apparent without thorough review of annual reports;<sup>83</sup> moreover, remedies for poor conduct may be limited by the passage of time.<sup>84</sup>

Court oversight of guardians and conservators has improved through statutory reform and additional resources to assist courts with

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*Guardian and the Court*, 3 UTAH L. REV. 1611, 1666 (2012). These published articles from the three prior national policy conferences illustrate that the barriers to accountability to the courts still exist, despite statutory changes and other efforts.

79. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-04-655, GUARDIANSHIPS: COLLABORATION NEEDED TO PROTECT INCAPACITATED ELDERLY PEOPLE 31 (2004); GAO-10-1046, *supra* note 11, at 7; U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-678, INCAPACITATED ADULTS: OVERSIGHT OF FEDERAL FIDUCIARIES AND COURT-APPOINTED GUARDIANS NEEDS IMPROVEMENT 16 (2011); see also GAO-17-33, *supra* note 11, at 18.

80. Alison Barnes, *The Virtues of Corporate and Professional Guardians*, 31 STETSON L. REV. 941, 980 (2002).

81. *Id.* at 984.

82. See TEASTER, PUBLIC GUARDIANSHIP, *supra* note 2, at 35.

83. See Godfrey, *supra* note 76, at 85.

84. See U.S. SENATE SPEC. COMM. ON AGING, ENSURING TRUST: STRENGTHENING STATE EFFORTS TO OVERHAUL THE GUARDIAN PROCESS AND PROTECT OLDER AMERICANS 12 (2018).

requiring and reviewing annual reporting, but problems remain.<sup>85</sup> Mentioned above, a primary impediment to reform is the lack of data across states on guardianship cases, even cataloguing abusive guardians. Without empirical information on this topic alone, it is difficult to formulate comprehensive policy.<sup>86</sup>

An example of a notorious breach of fiduciary duty, going unchecked for years, occurred in Nevada by professional conservator and former public guardian Jared Shafer, who owned and operated Professional Fiduciary Services.<sup>87</sup> One employee, Patience Bristol, stole over \$200,000 from her clients.<sup>88</sup> After a lengthy trial, Ms. Bristol was found guilty of “a single charge of the exploitation of a vulnerable adult, sentenced to three to eight years in prison, and ordered to pay back \$160,000 in restitution to individuals whom she exploited.”<sup>89</sup> Members of the press following the case and family members assert that Mr. Shafer masterminded the exploitation, “which caused enormous harm to victims and family members alike.”<sup>90</sup> No criminal charges have ever been brought against Mr. Shafer.<sup>91</sup>

### III. SOLUTIONS

Against a rising need for guardians, an increase in the complexity of guardianship cases, and recent scrutiny concerning exploitation by guardians such as the example above,<sup>92</sup> these authors assert that it is critical that the quality of guardianship services be as high as possible. Further, because the private professional fiduciary profession is relatively new and expanding to meet the need, we authors argue that certification and licensure can increase professionalism and provide resources to guide fiduciaries as they provide services.

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85. See *Summit Information*, NAT'L GUARDIANSHIP ASS'N, <https://www.guardianship.org/summit-information/> (last visited Mar. 15, 2022).

86. See U.S. SENATE SPEC. COMM. ON AGING, *supra* note 84, at 6; see also Sally B. Hurme & Diane Robinson, *What's Working in Guardianship Monitoring: Challenges and Best Practices*, 72 SYRACUSE UNIV. L. REV. 289, 351–52 (2022).

87. See NAT'L CTR. FOR STATE CTS. ET AL., *EXAMPLES OF CONSERVATOR EXPLOITATION: AN OVERVIEW* 4 (2018).

88. *Id.*

89. *Id.*

90. *Id.*

91. See *id.*

92. See Statement of Pamela B. Teaster, *supra* note 8, at 1–2.

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**Certification** involves a recognition process by a nongovernmental agency or association to an individual who has met an agency's or organization's qualifications, which may include education, examination and relevant work experience.<sup>93</sup> In contrast, **licensure** is a "process by which an agency of government grants permission to persons to engage in a particular profession or occupation by certifying that those who are licensed" have met predetermined standards of competency to ensure the protection of the public.<sup>94</sup> Certification can be removed by the certifying organization, which may or may not have an effect on the individual's ability to engage in the occupation.<sup>95</sup> Removal of certification may be posted on a website of the organization.<sup>96</sup> Licensure can be revoked by a state and can prohibit individuals from engaging in the occupation without a license.<sup>97</sup> Some states have a process in place to report disciplinary actions against a licensed professional to other states where the individual may be licensed, thus preventing a wrongdoer from moving from state to state.<sup>98</sup>

*B. Certification*

Although more than one organization exists to certify guardians, perhaps the one most widely recognized is The Center for Guardianship Certification (CGC), which was created in 1997 to enhance the quality of guardianship services through national certification.<sup>99</sup> CGC is a steward of the national certification process and is "responsible for exam content, scheduling and oversight of the exams, maintaining a de-certification process and providing leadership in every area of certification."<sup>100</sup> A goal of CGC is to

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93. See U.S. DEP'T OF HEALTH, EDUC., AND WELFARE, PUB. NO. 72-11, LICENSURE AND RELATED HEALTH PERSONNEL CREDENTIALING 7 (1971) [hereinafter LICENSURE AND RELATED HEALTH PERSONNEL CREDENTIALING].

94. *Id.*

95. See *Make a Complaint*, CTR. FOR GUARDIANSHIP CERTIFICATION, <https://guardianshipcert.org/make-a-complaint/> (last visited Mar. 15, 2022).

96. See *Disciplined Guardians*, CTR. FOR GUARDIANSHIP CERTIFICATION, <https://guardianshipcert.org/disciplined-guardians/> (last visited Mar. 15, 2022).

97. See LICENSURE AND RELATED HEALTH PERSONNEL CREDENTIALING, *supra* note 93, at 24–25.

98. See *id.* at 43.

99. See *About Us: History*, CTR. FOR GUARDIANSHIP CERTIFICATION, <https://guardianshipcert.org/about-us/> (last visited Mar. 15, 2022).

100. *Id.*

“demonstrate to the public, clients, and the courts that the CGC certified guardian has sufficient skill, knowledge, and understanding of the universal guardianship principles to be worthy of the responsibilities entrusted to him or her.”<sup>101</sup>

Further,

Certification entitles the guardian to represent to the courts and the public that he or she is eligible to be appointed, is not disqualified by prior conduct, agrees to abide by universal ethical standards governing a person with fiduciary responsibilities, submits to a disciplinary process, and can demonstrate through a written test an understanding of basic guardianship principles and laws.<sup>102</sup>

Although guardians in any state can be certified, nine states (i.e., Alaska, Idaho, Illinois, North Dakota, New Hampshire, Nevada, New Mexico, Oregon, and Utah) require certification by the CGC.<sup>103</sup> Alaska, California and Nevada require a combination of CGC certification and state licensing.<sup>104</sup> Arizona, Florida, Texas and Washington enacted their own state certification of guardians.<sup>105</sup>

The Washington State Certified Professional Guardianship Board is an example of state certification.<sup>106</sup> The board “develops, adopts, and implements regulations governing certification, minimum standards of practice, training, and discipline of professional guardians, with the goal of protecting the public and facilitating the delivery of competent and ethical guardianship services.”<sup>107</sup> Education is provided by The University of Washington Continuum College (UWCC).<sup>108</sup> A review of its website revealed that the certification body was on hiatus for the 2020-2021 school year due to COVID-19, though it advised the Administrative Office of the Courts that the

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101. *Id.*

102. *Id.*

103. *See* AM BAR ASS’N COMM’N ON L. & AGING, STATE GUARDIAN CERTIFICATION 1–5 (2021) [hereinafter STATE GUARDIAN CERTIFICATION].

104. *See id.*

105. *See id.*

106. *See Certified Professional Guardianship & Conservatorship Board Mission*, WASH. CTS., <https://www.courts.wa.gov/guardianportal/index.cfm?fa=gardianportal.board> (last visited Mar. 15, 2022).

107. *Id.*

108. *See Certificate in Guardianship*, PRO. & CONTINUING EDUC. UNIV. OF WASH., <https://www.pce.uw.edu/certificates/guardianship> (last visited Mar. 15, 2022).



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hiatus year would be used to redevelop its educational program to reflect Washington's newly passed Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UCGOPAA).<sup>109</sup>

In 2020, Teaster and Hurme examined the effectiveness of the certification of guardians, using an online or conventionally mailed survey to targeted judges (e.g., those in whose jurisdiction with certified guardians—certified by the Center for Guardianship Certification or by a state certification process) across the country.<sup>110</sup> Three versions of the survey were sent out: a.) a “general” survey to judges in states where CGC certification is voluntary; b.) a survey to California judges, with California terminology and with questions modified to accommodate California's hybrid process that requires CGC certification and state licensing, and c.) a survey sent to judges in states (i.e., Arizona, Texas and Washington) with mandated certification that reflected state certification rather than CGC certification.<sup>111</sup>

Results indicated that certification of guardians made a significant impact on guardians' knowledge concerning their responsibilities (35%), timely filing of personal status reports (28%), providing complete information on personal status reports (28%), knowledge of guardianship procedures (26%), and application of ethical codes of conduct/standards of practice (26%).<sup>112</sup> Judges reported that state-certified guardians are more likely to file timely personal status reports (61.5%), file accurate personal status reports (60.0%), and file timely (58%) and accurate (58%) financial accountings.<sup>113</sup> The survey also found “[m]ore than half of judge respondents indicated that certified guardians contributed to the administration of justice by understanding guardian responsibilities (80%), complying with guardianship procedures (75%), demonstrating an understanding of ethical codes/standards of practice

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109. See MEETING MINUTES FROM THE CERTIFIED PROFESSIONAL GUARDIANSHIP BOARD, WASH. CTS. 2 (May 11, 2020), <https://www.courts.wa.gov/content/publicUpload/CPGB%20Meeting%20Materials/20200511M.pdf> (declaring “a hiatus for the 2020-2021 school year” but stating that during that time the University of Washington Continuum College “will redevelop the Program to reflect the newly passed Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act”).

110. TEASTER, OUTCOMES, *supra* note 24, at 5.

111. *Id.*

112. *Id.* at 8.

113. *Id.* at 9.

(64%), assisting people under guardianship with complex needs (58%), and managing large and/or complex estates (53%).<sup>114</sup>

Teaster and Hurme concluded that certification provides the same functions as licensure, but at no cost to the state if done by the CGC, which also provides service from fingerprinting to discipline to continuing education.<sup>115</sup> Their findings indicated that “certification of guardians can make a difference in the administration of justice in courts by promoting professionalism in guardians.”<sup>116</sup>

### C. State Licensure

Professionals are regulated through the mechanism of licensure to correct for market failure, to protect the public interest, or to protect private interest.<sup>117</sup> Market failure for the services of private professional guardians and conservators exists because it is difficult, particularly for lay individuals, to value the services of a fiduciary.<sup>118</sup> Protection of the public interest is particularly important when a private professional guardian or conservator is appointed by a court, giving a judge’s imprimatur of the appointed professional.<sup>119</sup> Considerations for requiring licensure for guardians must take into account that creating barriers to entry has the potential to decrease the supply of guardians and increase the fees of those who are licensed.<sup>120</sup>

As stressed above, media reports reveal anecdotal evidence of misconduct by private professional guardians and conservators.<sup>121</sup> Also, evidence exists to establish that while improving their review process, too many courts still do not effectively review and regulate the conduct of private professional guardians and conservators.<sup>122</sup>

114. *Id.*

115. See TEASTER, OUTCOMES, *supra* note 24, at 11; CTR. FOR GUARDIANSHIP CERTIFICATION, RULES AND REGULATIONS REGARDING CERTIFICATION AND RECERTIFICATION OF NATIONAL CERTIFIED GUARDIANS (NCG) 1–3 (Aug. 6, 2020), <https://guardianshipcert.org/wp-content/uploads/2020/08/NCG-Rules-Regulations.pdf> (providing disciplinary and continuing education requirements for CGC participation, fingerprinting, and fees to be paid by applicants, not states).

116. TEASTER, OUTCOMES, *supra* note 24, at 11.

117. See Nuno Garoupa, *Regulation of Professions in the US and Europe: A Comparative Analysis*, 42 AM. L. & ECON. ASS’N ANN. MEETINGS 4–5 (2004), <https://core.ac.uk/download/pdf/7158697.pdf>.

118. *See id.* at 4.

119. *See id.* at 6–7.

120. *See id.* at 7.

121. *See, e.g.,* Aviv, *supra* note 14.

122. *See* GAO-04-655, *supra* note 79, at 2; GAO-10-1046, *supra* note 11, at 2; GAO-11-678, *supra* note 79, at 2; GAO-17-33, *supra* note 11, at 2.

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Market failure can serve to restrain fiduciary misconduct, as guardians and conservators are most often appointed in a crisis situation.<sup>123</sup> Because the individual receiving the services of a guardian or conservator is as a rule unable to effectively review the actions of the fiduciary, regulation of private professional guardians and conservators also protects the public interest.<sup>124</sup> Although mandatory licensure for guardians and conservators may impede entry into the profession and increase in the cost of services, increased costs do not justify lack of regulation.

First, costs of reviewing the conduct of private professional guardians and conservators are borne solely by the judicial system in a state without other regulation.<sup>125</sup> Licensure actually assists the monitoring of conduct by the judicial system and has the potential to recognize improper conduct. This would be enhanced by providing information on the complaint process for the state agency to interested parties in guardianship and conservatorship cases.<sup>126</sup> Second, if a guardian or conservator improperly exhausts the resources of a vulnerable client, costs usually borne by public benefit sources or state funds, the state has a compelling public interest, through state licensure, to protect the assets of vulnerable citizens.<sup>127</sup>

State licensure vis a vis a state regulatory agency can establish minimum educational requirements, examination and continuing education requirements, and clear ethical standards, all of which can be enforced by a state agency.<sup>128</sup> A state regulatory board can review complaints regarding the conduct of a private professional guardian or conservator. Further, unlike a non-governmental certifying agency or organization, a state regulatory process can provide an opportunity for complaining parties to personally appear before an agency reviewing a complaint.<sup>129</sup>

For interested parties, the complaint process can be a simple report obtained on-line or by telephone, in which the complaining

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123. See Garoupa, *supra* note 117, at 4; *Guardianships*, ELDER L. FIRM, <https://theelderlawfirm.com/guardianships> (last visited Mar. 15, 2022) (noting “[t]he most common reason for asking the court to appoint a temporary guardian is to get medical care or to arrange for placement in a care facility in a crisis situation”).

124. See Garoupa, *supra* note 117, at 4.

125. See *id.* at 10.

126. See *id.* at 6; U.S. SENATE SPEC. COMM. ON AGING, *supra* note 84, at 15.

127. See Garoupa, *supra* note 117, at 6.

128. See *id.* at 9.

129. See LICENSURE AND RELATED HEALTH PERSONNEL CREDENTIALING, *supra* note 93, at 25.

party identifies the professional, the particular matter and the concern.<sup>130</sup> The regulatory board review process may screen the report and determine that additional information is required, either through follow up with the complaining party or investigation or may determine that the complaint is not actionable and dismiss at the initial review.<sup>131</sup> The regulatory board can cross-reference an individual report with any other pending concerns received about a particular professional.<sup>132</sup> Without such a process, a private professional guardian or conservator could be serving in more than one court within a state and the different courts may not have knowledge of concerns in other courts unless removal and civil or criminal prosecution has occurred.<sup>133</sup>

There are concerns about creating barriers to entry into the profession with licensure.<sup>134</sup> However, professional guardians and conservators make important decisions about their clients, including end of life decisions and management of significant property.<sup>135</sup> With such responsibility, it is reasonable to have some barriers to entry through licensure and ethical standards to make certain that professional guardians and conservators have basic competency.<sup>136</sup> For licensed professionals, there are advantages to having complaints reviewed by a regulatory board comprised partially of other professionals with the same license.<sup>137</sup>

### *1. States that Currently License Guardians and Conservators*

There are currently three states that require private professional guardians and conservators to be licensed by the state: Alaska, California, and Nevada. Alaska requires a licenses for all individuals who serve as guardian or as conservator for compensation for more

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130. *See, e.g., id.; Discipline Complaint Form*, NYSED.GOV (Aug. 19, 2020), <http://www.op.nysed.gov/opd/complain.htm> (link to download and print complaint form against professional, provided by New York State Office of the Professions).

131. *See* LICENSURE AND RELATED HEALTH PERSONNEL CREDENTIALING, *supra* note 93, at 25.

132. *See id.*; Garoupa, *supra* note 117, at 4.

133. *See* LICENSURE AND RELATED HEALTH PERSONNEL CREDENTIALING, *supra* note 93, at 25; Garoupa, *supra* note 117, at 5.

134. *See* LICENSURE AND RELATED HEALTH PERSONNEL CREDENTIALING, *supra* note 93, at 5.

135. *See* Aviv, *supra* note 14.

136. *See* LICENSURE AND RELATED HEALTH PERSONNEL CREDENTIALING, *supra* note 93, at 57.

137. *See id.*; Garoupa, *supra* note 117, at 9–11; U.S. SENATE SPEC. COMM. ON AGING, *supra* note 84, at 15.

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than one person or for more than two related persons.<sup>138</sup> California requires a license for any individual serving as guardian or conservator for two or more individuals at the same time who are not related to the professional fiduciary or to each other.<sup>139</sup> Nevada requires the individual guardian to be certified by the Center for Guardianship Certification and for the guardian to be employed by an entity licensed by the state.<sup>140</sup>

Alaska enacted mandatory licensure in 2004 and requires applicants for licensure to have two years of verified professional client casework experience or a minimum of “an associate degree in human services, social work, psychology, sociology, gerontology, special education or a closely related field,” or hold a national certification as a guardian.<sup>141</sup> The applicant must submit a state and FBI background check and provide his or her fingerprints with the application.<sup>142</sup> Each year, the licensee must submit an annual report, which includes a list of cases and a business financial statement as well as an attestation that the licensee has filed all required court reports in the previous year and report if he or she has been found to have engaged in professional misconduct or incompetence by a court.<sup>143</sup> Although the licensure statute calls for the Alaska Department of Business and Industry to adopt standards of practice for guardians and conservators, the statute also refers to the National Guardianship Association standards of practice, but there is no record that those standards or any other standards were adopted by the department.<sup>144</sup>

California enacted legislation effective in 2009, requiring professional fiduciaries to be licensed by the state.<sup>145</sup> Applicants for licensure must pass a state licensing examination<sup>146</sup> as well as have either a bachelor’s degree, an associate degree with at least three years of fiduciary experience either as a fiduciary or in the employment of a fiduciary or have at least five years of experience either as a fiduciary

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138. ALASKA STAT. § 08.26.010 (2021).

139. *sSee* CAL. BUS. & PROF. CODE § 6501(f)(1) (West 2021).

140. NEV. REV. STAT. § 159.0595 (LexisNexis 2021).

141. *See* ALASKA STAT. §§ 08.26.020, 030.

142. *See id.* § 08.26.060.

143. *See id.* § 08.26.080.

144. *See id.* §§ 08.26.020, .030, .080.

145. *See* CAL. BUS. & PROF. CODE § 6530(a) (West 2021).

146. *See* CAL. BUS. & PROF. CODE § 6533(d) (West 2021). Applicants must pass both a national exam and a state-specific exam developed by the Center for Guardianship Certification. *See* § 6533.

or working for a fiduciary.<sup>147</sup> Like Alaska, applicants must submit a state and federal criminal background check<sup>148</sup> and fingerprints.<sup>149</sup> The California Professional Fiduciaries Bureau maintains a list of each licensee's current conservatees or wards and the "aggregate dollar value of all assets currently under a licensee's supervision" as well as a list of all case names, court locations and case numbers for all closed cases in which the licensee served as conservator or guardian as well as other relevant data.<sup>150</sup>

California delegates responsibility for certain function of the Professional Fiduciaries Bureau to an advisory committee made up of three professional fiduciaries and four members of the public.<sup>151</sup> The Professional Fiduciaries Bureau investigates complaints against professional fiduciaries and has the authority to impose sanctions for violations of statute, regulation or the California Professional Fiduciaries Code of Ethics,<sup>152</sup> including fines and license suspension, probation or revocation.<sup>153</sup> Sanctions imposed against a licensee are available on the internet.<sup>154</sup> Licensees are prohibited from billing clients for responding to complaints, including billing for legal fees incurred.<sup>155</sup>

Nevada implemented mandatory certification for private professional guardians by the Center for Guardianship Certification and mandatory state licensure for private professional guardianship businesses in 2015.<sup>156</sup> There are no mandatory education requirements for individuals, but each person who acts in any capacity in a private professional guardianship company must submit fingerprints.<sup>157</sup> The Commission of Financial Institutions investigates each application including a review of any criminal history or absence of such and whether a review of the disclosed financial status of the applicant parties and employees indicates fiscal responsibility before rendering

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147. *See id.* § 6533(f).

148. *See* CAL. BUS. & PROF. CODE § 6533.5 (West 2021).

149. CAL. BUS. & PROF. CODE § 6533(c).

150. CAL. BUS. & PROF. CODE § 6534 (West 2021).

151. CAL. BUS. & PROF. CODE § 6511 (West 2021).

152. *See* CAL. CODE REGS. tit. 16, §§ 4470–4484 (2021).

153. *See* CAL. BUS. & PROF. CODE § 6580 (West 2021).

154. *See id.* § 6580(c).

155. *See* CAL. BUS. & PROF. CODE § 6581 (West 2021).

156. *See* NEV. REV. STAT. ANN. § 159.0595 (LexisNexis 2021); NAT'L CTR. ON ELDER ABUSE, 2015 STATE GUARDIANSHIP LEGISLATION RELATING TO ELDER ABUSE (2015).

157. *See* NEV. REV. STAT. ANN. § 628B.315.1 (LexisNexis 2021).

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a decision on licensure.<sup>158</sup> The Commission may require an applicant entity to maintain equity, fidelity, and surety bonds based on the Commissioner's assessment of risk associated with the applicant's business plan or any other information contained in the application.<sup>159</sup>

Nevada expressly prohibits several forms of self-dealing between the guardian and the protected person's estate.<sup>160</sup> The Commission has authority to conduct financial audits of private professional guardianship companies.<sup>161</sup> All fees charged by the Commission for licensure and for any examinations of financial records of private professional guardianship company may not be assessed directly to the estate of any protected person.<sup>162</sup> Each licensee is required to display a copy of its license and the following notice in a conspicuous place in each business location and each website<sup>163</sup> The Commissioner is authorized to take administrative action against a licensee, including revoking or suspending a license as well as seeking injunctive relief and appointment of a receiver to immediately secure assets under management by the licensee.<sup>164</sup>

#### IV. RECOMMENDATIONS

Collectively and respectively, 14 states discussed above represent unique state certification or licensure practices that are central and critical to appropriately serve individuals under guardianship.<sup>165</sup> The authors argue that, though certification and licensure<sup>166</sup> of professional

158. *See id.* § 628B.330.1.

159. *See id.* § 628B.540.1.

160. *See id.* § 628B.550.

161. *See id.* § 628B.700.

162. *See* NEV. ADMIN. CODE § 628B.500 (2021).

163. *See id.* § 628B.340.

164. *See* NEV. REV. STAT. ANN. §§ 628B.940; 628B.710 (LexisNexis 2021).

165. *See* STATE GUARDIAN CERTIFICATION, *supra* note 103, at 1–5.

166. *See id.* at 1–3. After review of three very different approaches by Alaska, California and Nevada, the following is suggested as an approach:

1. There should be licensure of individuals, rather than entities, although states may also consider also creating separate licenses for private professional agencies over a certain size to ensure accountability for management. Such individual licensure could and should exempt public non-profit guardians, but there may be a need for registration of such individuals and a requirement for compliance with a state ethics code for private professional guardians. The National Guardianship Association Guardianship Standards of Practice and Ethical Principles can be adopted or serve as a model, subject to any legislative edits to comply with state statutes and regulations.
2. Licensure by examination is a viable option, as is outsourcing the examination to the Center for Guardianship Certification. Any state

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considering doing so should review its own state statutes and regulations, to determine if a national examination is sufficient for practice within the state. The state may consider creating a second, less comprehensive examination on relevant state requirements to ensure that applicants become familiar with all requirements for practice in that state.

3. A state should impose educational requirements or suitable experience as a qualification for licensure and continuing education requirement to maintain or renew the license. There should also be a requirement for mandatory continuing education.
4. Providing notice of the license and the mechanism for complaints as Nevada requires should be considered, to make certain that anyone who has concerns about the conduct of a guardian has the necessary information to bring a complaint to the state licensing authority. As is the case with attorneys, judges should be advised to consider filing a report with a state agency when the judge has concerns about the conduct of a fiduciary in a case under the supervision of the reporting judge's court.
5. The state should consider delegating authority for review of policy, statute, regulation and individual complaints to a regulatory board, comprised both of members of the public and professional members. As stated above many of the decisions a fiduciary is required to make require the exercise of judgment. A regulatory authority should not require a licensee to be a guarantor of results for a result which was unanticipated, provided the licensee had the requisite training, knowledge of the individual and the estate, and knowledge of all regulatory requirements, including statutes, regulations and any ethical codes. Making a sound decision after gathering all the appropriate information should be the standard, rather than making a licensee responsible for an unanticipated result that could not have been predicted. Having members of the profession on the regulatory board can assist the public members with understanding the difference between an unfortunate result and a reckless or careless fiduciary.
6. Guardians and conservators should be prohibited from billing the estate for responding to regulatory complaints or for recovering fees for legal representation in the regulatory process as well as prohibition of charging the guardianship or conservatorship estate for any fines assessed by a regulatory board.
7. States should consider whether to exempt individual who hold professional licenses other than a guardianship or conservatorship license from mandatory licensure as guardians or conservators, including but not limited to medical doctors, nurses, attorneys and CPAs. If such individuals are granted exemption for licensure, states should consider a registration requirement and acknowledgement by the registrant that the registrant is bound by the state's statutory, regulatory and ethical requirements for guardians and conservators when serving in that capacity. This avoids a defense that the individual was not aware of any such requirements. While this may present a dilemma for a licensed professional if the requirements of their professional license are in conflict with guardianship and conservatorship requirements, the state should place the burden on the individual to be aware of the possibility of such conflicts prior to accepting appointment as a guardian or conservator.



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guardians and conservators, awareness of the reporting functions required of them is enhanced by the necessary education and training, which, in turn can improve performance and monitoring of guardians and preservation of the remaining rights of people under guardianship. Monitoring of guardians is key.

Each state in the country requires that, no less than yearly, the fiduciary submit a financial accounting and an annual report to the court.<sup>167</sup> Certified and licensed guardians are “keenly aware of this requirement and the importance of its being thoroughly and thoughtfully completed.”<sup>168</sup> The annual report and financial accounting are significant lifelines for the court to determine the safety and well-being of a person under guardianship as well as to assess the appropriateness of continuing the guardianship, when other solutions, such as supported decision making might better serve a person’s needs. Although the reports should be thorough, timely, and complete, such is not the case in many jurisdictions.<sup>169</sup> Reports in some states have languished unread for years.<sup>170</sup> A number of guardians submit a copy of the same report year after year.<sup>171</sup> And, a number of judges are unable to read and review them, either personally or through an officer of the court.<sup>172</sup> Consequently, it is possible that an abusive guardian or conservator, similar to those mentioned above, goes unnoticed and unchecked for years. We authors argue that the certification or

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8. States enacting licensure for guardians and conservators should have a process for notifying the state judicial system of the results of any disciplinary action against a fiduciary. Further, Nevada’s statute authorizing appointment of a receiver should be considered when enacting a state regulatory framework. An individual under guardianship or conservatorship is vulnerable and it may be appropriate to give a regulatory authority the power to enact an immediate emergency remedy if the risk is significant. Otherwise, if a guardian or conservator poses severe risk and has a large caseload, any delay in reviewing other cases in which the fiduciary is serving may harm the protected persons.

167. See CATHERINE ANNE SEAL & PAMELA B. TEASTER, *THE TIME HAS FINALLY COME: AN ARGUMENT AND A ROADMAP FOR REGULATING THE COURT APPOINTED PROFESSIONAL FIDUCIARY* 29 (2021) [hereinafter SEAL & TEASTER, *THE TIME HAS FINALLY COME*].

168. *Id.*

169. *See id.* at 30; U.S. SENATE SPEC. COMM. ON AGING, *supra* note 84, at 13–17 (noting failure of reporting requirements in Florida and Texas, among other states).

170. *See* SEAL & TEASTER, *THE TIME HAS FINALLY COME*, *supra* note 167, at 30.

171. *See id.*

172. *See id.* at 30.

licensure of professional guardians and conservators increases the likelihood that these important documents are submitted to the courts appropriately.

The authors readily acknowledge that licensure and certification of guardians will not prevent all forms of abuse perpetrated by guardians and conservators who are appointed to protect them. We are painfully aware that certain certified or licensed individuals in all professions (e.g., medicine, law, social work) conduct poor practices and intentionally abuse the people they serve. However, we maintain that licensure and certification have the potential to improve guardianship and conservatorship practices through increasing guardians' knowledge, thought apprising guardians of applicable standards of practice, and through reprimand or removal when their actions are inappropriate. The population of persons under guardianship deserves no less than professional guardians and conservators who care a lot and serve their incapacitated person wisely and well.