

**ADVOCACY PRIORITY:
GUARDIANSHIP**

Support oversight of the systems established for managing 1.3 million people living under guardianship and educate stakeholders on current challenges facing the systems.

Description

Guardianship generally involves a state court determination that an individual lacks the capacity to make important decisions with respect to their health, safety, welfare, and/or property. While precise definitions vary across jurisdictions, in general, a guardian is a person, institution, or agency appointed by a court to manage the affairs of another individual. The guardian may have the authority to manage personal and/or financial matters. Each state has specific laws that govern guardianship proceedings and the guardian's activities. States may also use different terms to refer to guardians, such as conservators.

This priority has two components. First, it focuses NAELA's advocacy on policies that ensure adequate transparency and oversight of guardianship court orders as a primary concern, as well as trusts, durable powers of attorney, representative payment arrangements, and other legal and social mechanisms which are designed to provide oversight of a person's financial and/or medical decisions. As alternatives to or in conjunction with guardianship, so as to provide for the least restrictive alternative, NAELA advocates for policies such as supportive decision-making, increased federal resources, technical assistance, and tools which allow for states to support the dignity and independence of individuals with diminished capacity. Second, this priority focuses on providing information to policymakers, health care providers (including physicians, long-term care facilities, and social workers), and the general public on the current challenges of the systems, including lack of data, limited resources, and the aging population.

Rationale

In March 2018, the National Center for State Courts [estimated](#) that 1.3 million adults are currently living under guardianship or conservatorship, and their guardians control roughly \$50 billion in assets. It is likely that this number is an underestimate of the number of adults under guardianship today, yet there is no federal mechanism to collect information about guardianship orders. Although guardianship is governed by state law, it entails the removal of rights protected by the U.S. Constitution. Additionally, individuals who are subject to guardianship are also protected by

the [Americans with Disabilities Act](#), the U.S. Supreme Court's landmark [1999 Olmstead decision](#), and [Section 504 of the Rehabilitation Act](#), which are federal mandates intended to increase the ability of individuals with disabilities to live and work in the community, encourage participation in civic life, and promote self-determination for these individuals. In addition to NAELA's public policy guidelines that discuss a set of principles and standards for guardianship proceedings,¹ this priority intersects with five areas of elder and special needs law:

- **Guardianship:** This priority directly addresses the need for oversight and education within the guardianship system to protect the rights and interests of individuals under guardianship.
- **Health Care Decision-Making:** Oversight of guardianship supports health care decision-making for individuals with disabilities.
- **Elder Justice:** Oversight of guardianship helps prevent elder abuse and exploitation, ensuring that appointed guardians act in the best interests of the individuals they represent.
- **Legal Services:** Providing education and support for guardianship oversight enhances legal services for vulnerable individuals who may be subject to guardianship proceedings.
- **Special Needs Planning:** Appropriate safeguards to monitor guardianship and protect individuals living under guardianship or supportive decision-making can help ensure that they receive adequate care and the public benefits to which they are entitled, and that income held under a special needs planning instrument (e.g., trust) is spent for the benefit of the beneficiary and is not subject to misuse.

Value to NAELA Members and Their Clients

Advocating for policies that offer the use of less restrictive alternatives to guardianship for individuals with diminished capacity. Doing so is not only consistent with member commitment to the NAELA [aspirational standards](#), but it may also decrease the burden on court and attorney workload tied to guardianship proceedings. At the heart of these standards are the need to support clients' dignity and independence.

Legislation and Regulations

State laws govern guardianship. While there is no federal statutory authority to regulate guardianship directly outside of civil rights and constitutional laws and their jurisprudence, bills

¹ NAELA approved guardianship recommendations on June 29, 2007, according to the NAELA Policies and Procedures Manual dated November 2018. These recommendations appear to be consistent with the [NAELA Public Policy Guidelines: Guardianship](#) (last revised July 14, 2012).

have been introduced in the U.S. Congress to increase federal transparency and oversight. To date, none have been endorsed by NAELA, due to their substance and minimal impact.

Recent NAELA Advocacy

- Submitted [statement](#) for the Congressional Record for March 22, 2023, Senate Special Committee on Aging [hearing](#), “Guardianship and Alternatives: Protection and Empowerment,” which considered [S. 1148](#), Guardianship Bill of Rights Act.
- Proactively met with HHS-Administration for Community Living (HHS-ACL) in January 2023 about their policy priorities. Based on this discussion, proactively monitored the Biden administration’s regulatory agenda to identify a proposed rule under development on Adult Protective Services by the HHS-ACL. Sent written recommendations to HHS-ACL in advance of the issuance of the proposed rule in September 2023. Regulations [finalized](#) in May 2024.

Future Opportunities

- With allied organizations such as the Elder Justice Coalition, lobby for reauthorization of the Older Americans Act programs which will expire at the end of FY 2024, and for reauthorization of the Elder Justice Act, which was enacted in 2010 as part of the Affordable Care Act and has continued to be funded by Congress (in spite of the absence of program authorization).
- Lobby for authorization and funding for an adult Guardianship Court Improvement Program (GCIP) that would bring together necessary stakeholders, evaluate state laws, and create plans for systemic improvement. It would give states the opportunity to provide training for guardians/conservators, judges, and lawyers, as well as greater oversight and monitoring through data collection and improvements to technology. A GCIP would help protect the due process rights of people subject to guardianship, promote the use of alternatives to guardianship, and increase collaboration between case workers, court staff, and investigative agencies (Adult Protective Services, Long-term Care Ombudsmen).
- With allied organizations such as the Elder Justice Coalition, lobby for continued funding for Adult Protective Services (APS) formula grants in any final legislation (e.g., FY2025 appropriations package, Elder Justice Reauthorization and Modernization Act of 2023 ([H.R. 2718](#) / [S. 1198](#))). This would build off the first-ever authorization of mandatory funding for APS in the Consolidated Appropriations Act, 2021, and provide state APS programs with resources to meet the new standards in the HHS-ACL final regulations which become applicable in 2028.