

## NOTE

### #FREEBRITNEY: A SOCIAL MEDIA MOVEMENT SHINING A LIGHT ON GUARDIANSHIP ABUSE AND OVERSIGHT

#### I. INTRODUCTION

Over a decade ago, the world got a front-row ticket to Britney Spears' public breakdowns consisting of driving with her infant son on her lap, shaving her head, and attacking a photographer's car with an umbrella.<sup>1</sup> In January of 2008, Spears was placed on a psychiatric hold for mental evaluation after refusing to surrender custody of her children to their father.<sup>2</sup> After Spears' second hospital stay, her father, Jamie, successfully petitioned the court for an emergency temporary conservatorship.<sup>3</sup> Throughout 2008, Spears' temporary conservatorship<sup>4</sup> was continuously extended, resulting in an indefinite conservatorship.<sup>5</sup> Spears expressed serious concern for her conservatorship early on.<sup>6</sup> In a 2016 report by a court investigator, she stated that the conservatorship had become an oppressive, controlling tool against her and that she was the one working while everyone was on her payroll.<sup>7</sup> Similarly, in 2019, Spears told the court that she felt her conservatorship forced her to

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1. Women's Health Editors, *Britney Spears' Conservatorship Is Over: The Full Legal Timeline and the #FreeBritney Movement, Explained*, WOMEN'S HEALTH (Nov. 12, 2021), <https://www.womenshealthmag.com/life/a33336398/britney-spears-conservatorship-timeline>.

2. Heran Mamo, *A Timeline of Britney Spears' Conservatorship*, BILLBOARD (Sep. 30, 2021), <https://www.billboard.com/articles/news/9445409/britney-spears-conservatorship-timeline>.

3. *Id.* Jamie Spears was named conservator of her person and co-conservator of her estate, along with attorney Andrew Wallet. *Id.*

4. *Guardianship: Key Concepts and Resources*, U.S. DEP'T JUST., <https://www.justice.gov/elderjustice/guardianship-key-concepts-and-resources> (last visited July 25, 2022). Conservatorships and guardianships are oftentimes used interchangeably by states. *Id.* As such, this Note will use conservatorship and guardianship interchangeably and will oftentimes just refer to the two using "guardianships." *See id.*

5. Mamo, *supra* note 2.

6. Liz Day et al., *Britney Spears Quietly Pushed for Years to End Her Conservatorship*, N.Y. TIMES, <https://www.nytimes.com/2021/06/22/arts/music/britney-spears-conservatorship.html> (last updated Nov. 2, 2021).

7. *Id.*

perform against her will<sup>8</sup> and stay at a mental health facility.<sup>9</sup> Spears also cited concern over her father being her conservator largely because of his drinking issue.<sup>10</sup> Regardless of these concerns, Spears' conservatorship was deemed appropriate as a result of her complex finances, occasional drug use, and proneness to undue influence.<sup>11</sup>

Throughout her thirteen-year conservatorship,<sup>12</sup> Spears released four albums, won various awards, joined *The X Factor* as a judge, partook in two Las Vegas residencies,<sup>13</sup> and performed at various award shows.<sup>14</sup> All the while, Spears was subjected to therapy sessions, forced to take lithium medication, and remained unable to get married or remove her IUD to get pregnant.<sup>15</sup> Even though she was a successful adult fully capable of working for herself and earning her own money, it was still deemed appropriate for her to be under a conservatorship.<sup>16</sup> Many of Spears' loyal fans began to suspect that she was improperly held in this conservatorship leading to the creation of the #FreeBritney movement in early 2009.<sup>17</sup> The #FreeBritney movement utilized social media to uncover the discrepancies surrounding Spears' conservatorship.<sup>18</sup> Fans launched the movement completely convinced

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8. See Marc Hogan, *A Timeline of the Connections Between Britney Spears' Music and Her Conservatorship Fight*, PITCHFORK (July 29, 2021), <https://pitchfork.com/thepitch/britney-spears-conservatorship-music-timeline> (detailing that Britney was forced "to perform against her will with a 104-degree fever").

9. Day et al., *supra* note 6.

10. *Id.* Jamie Spears was a recovering alcoholic who was also accused of verbal and physical abuse. *Id.*

11. *Id.*

12. Chloe Melas, *Britney Spears' Father Petitions to End Her Conservatorship*, CNN (last updated Sept. 7, 2021, 10:41 PM), <https://www.cnn.com/2021/09/07/entertainment/britney-spears-conservatorship-petition-to-end/index.html>.

13. See Taylor Mims, *Britney Spears Likens Conservatorship to Sex Trafficking at LA Court Hearing: 'I Am Not Here to Be Anyone's Slave'*, BILLBOARD (June 23, 2021, 03:59 PM), <https://www.billboard.com/articles/news/9591474/britney-spears-court-hearing-conservatorship-recap> (describing how Spears was mandated to go on tour in 2018 and immediately forced to start rehearsing for her new Las Vegas residency that she did not want to perform).

14. See Hogan, *supra* note 8 (detailing the release of each of Britney's songs and her success while under her conservatorship).

15. Jem Aswad, *Read Britney Spears' Full Statement Against Conservatorship: 'I Am Traumatized'*, VARIETY (June 23, 2021, 3:59 PM), <https://variety.com/2021/music/news/britney-spears-full-statement-conservatorship-1235003940>.

16. See Hogan, *supra* note 8.

17. *Id.*

18. See Bianca Betancourt, *Why Longtime Britney Spears Fans Are Demanding to #FreeBritney*, HARPER'S BAZAAR (Nov. 12, 2021, 5:39 PM), <https://www.harpersbazaar.com/celebrity/latest/a34113034/why-longtime-britney-spears-fans-are-demanding-to-freebritney> (listing the reasons as to why Britney Spears' conservatorship was put in place, the various events that occurred along the way, and the present outcome of the conservatorship).

that Spears herself wanted to be free from her legally constrictive conservatorship.<sup>19</sup> On June 23, 2021,<sup>20</sup> fans received the confirmation they had for so long suspected when Spears exclaimed, “I shouldn’t be in a conservatorship if I can work and provide money and work for myself and pay other people—it makes no sense.”<sup>21</sup> Finally, in November 2021, after a long thirteen-years of being unable to make decisions for herself, yet sustaining a prosperous career, Spears’ conservatorship was officially terminated.<sup>22</sup>

Britney Spears’ fight to end her thirteen-year conservatorship caused many to question the guardianship and conservatorship system.<sup>23</sup> Many have raised concerns that if someone as rich and famous as Spears can be exploited through this system, what are other individuals within this institution enduring?<sup>24</sup> Appointing a guardian<sup>25</sup> has become a quick solution for aging adults and individuals with diminished capacity while less restrictive alternatives are scarcely ever explored.<sup>26</sup> Currently, no federal law or guidance exists on how states should handle or oversee guardianships.<sup>27</sup> In fact, in the United States, each state has control over their own guardianship system, each with different laws.<sup>28</sup> The Freedom

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19. *Id.*

20. Hogan, *supra* note 8. In an over twenty-minute testimony, Spears contended that she had been exploited and abused throughout her conservatorship while exclaiming that she did not know she could have petitioned to end her conservatorship. *Id.*

21. Aswad, *supra* note 15.

22. Ashley Fetters Maloy & Sonia Rao, *Britney Spears’s Conservatorship Is Terminated After 13 Years*, WASH. POST (last updated Nov. 12, 2021, 7:23 PM), <https://www.washingtonpost.com/arts-entertainment/2021/11/12/britney-spears-conservatorship-hearing/>.

23. See Chris Farrell, *How to Fix Conservatorship in America*, FORBES (Aug. 6, 2021, 02:04 PM), <https://www.forbes.com/sites/nextavenue/2021/08/06/how-to-fix-conservatorship-in-america/?sh=6f5df252380e> (detailing the attention the guardianship system has gathered as a result of Spears’ story).

24. See Melody Gutierrez, *#FreeBritney Movement Prompts Lawmakers to Consider Changing Conservatorship Laws*, L.A. TIMES (Mar. 26, 2021, 10:33 AM), <https://www.latimes.com/california/story/2021-03-26/freebritney-movement-prompts-conservatorships-law-debate> (describing the impact of Spears’ case and how it has led the California Legislature to reform their conservatorship requirements and system as a whole).

25. *Guardian*, BLACK’S LAW DICTIONARY (11th ed. 2019). A guardian is “[s]omeone who has the legal authority and duty to care for another’s person or property, [especially] because of the other’s infancy, incapacity, or disability.” *Id.*

26. David Godfrey, *Challenges in Guardianship and Guardianship Abuse*, BIFOCAL, Mar.–Apr. 2021, at 84, 85 (“All too often guardianship becomes the universal answer when an adult faces struggles with protecting themselves from harm or self-neglect, without exploring alternatives. Funding is needed to promote alternatives; decision supports and make guardianship truly a last resort.”).

27. Alexandra Wallin, *Living in the Gray: Why Today’s Supported Decision-Making-Type Models Eliminate Binary Solutions to Court-Ordered Guardianships*, 57 SAN DIEGO L. REV. 433, 450 (2020).

28. *Id.*

and Right to Emancipate from Exploitation (“FREE”) Act is presently being proposed in Congress to allow individuals with private guardians to petition the court for a public guardian.<sup>29</sup> However, this proposed act fails to tackle the prevalent issues plaguing the guardianship system throughout the country, such as a shortage of funding, lack of oversight, and the minimal use of alternatives to guardianships.<sup>30</sup>

As a solution, this Note will propose a new federal law that expands Medicare and Medicaid to grant courts in every state funds to meet certain federal guidelines that include screening prospective guardians, recommending less restrictive alternatives, and monitoring current guardianships to ensure that abuse is avoided.<sup>31</sup> States would receive such funds on the condition that they put in place the three federal guidelines stated above.<sup>32</sup> This additional funding will aid state courts in addressing the issues that they face in supervising and approving guardianships.<sup>33</sup> State courts that are well-equipped with the funds and personnel to oversee current or prospective guardians will help in ensuring that abuse and exploitation are not overlooked within the system and will have the resources necessary to recommend less restrictive alternatives if possible.<sup>34</sup>

In Part II, this Note will discuss the history of guardianships, why the system was originally created, how a conservator is appointed, and examine current state procedures.<sup>35</sup> Part III of this Note will discuss the proposed bills currently in Congress and the lack of federal oversight over the state-run guardianship system.<sup>36</sup> Subsequently, Part IV of this Note will argue that the proposed legislation does not do enough to aid the guardianship system. It will propose a federal law that expands Medicare and Medicaid funding to mandate increased screening and

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29. Freedom and Right to Emancipate from Exploitation (“FREE”) Act, H.R. 4545, 117th Cong. § 2(b)(2) (2021).

30. See David Godfrey, *Prevent Guardian Abuse: Demand Accountability*, AM. BAR ASS’N (Apr. 28, 2021), [https://www.americanbar.org/groups/senior\\_lawyers/publications/voice\\_of\\_experience/2021/voice-of-experience—april-2021/challenges-in-guardianship-and-guardianship-abuse](https://www.americanbar.org/groups/senior_lawyers/publications/voice_of_experience/2021/voice-of-experience—april-2021/challenges-in-guardianship-and-guardianship-abuse); *Problems with Guardianship Abuse Leading to Calls for Reform*, ELDERLAWANSWERS (May 13, 2016), <https://www.elderlawanswers.com/problems-with-guardianship-abuse-leading-to-calls-for-reform-15538> (supporting the proposition that a lack of oversight, lack of funding, and overused system has led to the abuse of wards).

31. See *infra* Part IV.

32. See *infra* Part IV.

33. *Problems with Guardianship Abuse Leading to Calls for Reform*, *supra* note 30.

34. See *id.* (explaining that a lack of funding and training has led to many of the issues that plague the conservatorship system).

35. See *infra* Part II.

36. See *infra* Part III.

monitoring of guardians and the use of less restrictive alternatives.<sup>37</sup> Last, Part V of this Note will conclude and echo the importance of reform to ensure that no more individuals are the victims of abuse and exploitation as a result of an overlooked and underfunded system.<sup>38</sup>

## II. THE HISTORY OF GUARDIANSHIPS

Part II of this Note will define what a guardianship is and discuss the background of the system in the United States.<sup>39</sup> Subpart A explains what guardianships are and briefly explains the differences and similarities between conservatorships and guardianships.<sup>40</sup> Subpart B discusses why guardianships were created in the first place and the idea behind *parens patriae*.<sup>41</sup> Subpart C breaks down the current guardianship system by analyzing how a guardian is appointed and comparing various state practices.<sup>42</sup> Understanding the current guardianship system and the rights and liberties that guardians gain over their wards is critical to know how to best reform the system.<sup>43</sup> This analysis is critical to identifying the areas that are in need of reform to ensure that the likelihood of further exploitation within this system is reduced.<sup>44</sup>

### A. What Are Guardianships?

Guardianships are put in place when an adult becomes incapable of making their own decisions.<sup>45</sup> The terms guardianships and conservatorships represent different legal powers but are often used interchangeably by various states.<sup>46</sup> Typically, the term conservatorship is used for an individual that has control over another person's property

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37. See *infra* Part IV.

38. See *infra* Part V.

39. See *infra* Part II.

40. See *infra* Part II.A.

41. See *infra* Part II.B.

42. See *infra* Part II.C.

43. See Hailey M. Hanners, *Who Wants the Ward? The State's Role in Adult Guardianship Proceedings*, 11 EST. PLAN. & CMTY. PROP. L.J. 359, 363 (2019).

44. See *Problems with Guardianship Abuse Leading to Calls for Reform*, *supra* note 30 (contending that the way the current conservatorship system is set up has led to oversight and underfunding resulting in a lack of documenting abuse).

45. See Leslie Salzman, *Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act*, 81 U. COLO. L. REV. 157, 167 (2010) ("Guardianship is viewed as one such necessary and legitimate mechanism for protecting vulnerable citizens from harm.").

46. *Guardianship: Key Concepts and Resources*, *supra* note 4. In fact, California uses the word conservator to define an individual that has authority over both another's personal affairs and property. *Id.*

and finances.<sup>47</sup> In a guardianship, a person is appointed by the court and is given control over another individual's property and personal affairs.<sup>48</sup> State law governs guardianships, and states are tasked with overseeing all guardianships within their jurisdiction.<sup>49</sup>

Guardians have an immense amount of power over their wards.<sup>50</sup> A ward is the person on whose behalf the guardian makes decisions.<sup>51</sup> In fact, they have power to decide who their ward sees, where their ward lives, and what type of medical treatment they will receive.<sup>52</sup> Wards lose their individual rights, and have many of their interests ignored and preferences overlooked once they enter a guardianship.<sup>53</sup> Thus, guardianships should be a last resort because of their radical control over another individual's life.<sup>54</sup>

### B. *Why Were Guardianships Originally Created?*

Guardianships can be traced back to ancient times when individuals attributed mental illness to supernatural causes.<sup>55</sup> Originally, guardianships were used to control the finances of incapacitated adults, while their medical or personal needs were overlooked.<sup>56</sup> The concept of guardianships made its way to the United States through English common law.<sup>57</sup> The use of guardianships in English society grew significantly through the idea of *parens patriae*.<sup>58</sup>

The idea that the state should be responsible and care for its "mentally deficient" individuals corresponds with the historical idea of

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47. *Id.*

48. Salzman, *supra* note 45, at 167.

49. Hanners, *supra* note 43, at 364.

50. *See* Salzman, *supra* note 45, at 160 (detailing the various decision-making abilities guardians have over their wards).

51. *Guardianship Basics*, N.Y.S. UNIFIED CT. SYS., <https://www.nycourts.gov/Courthelp/Guardianship/basics.shtml> (last visited July 25, 2022).

52. Salzman, *supra* note 45, at 160.

53. *Id.* at 169-70.

54. Godfrey, *supra* note 26, at 84.

55. A. Frank Johns, *Ten Years After: Where Is the Constitutional Crisis with Procedural Safeguards and Due Process in Guardianship Adjudication?*, 7 *ELDER L.J.* 33, 40 (1999).

56. Sydney J. Sell, *A Potential Civil Death: Guardianship of Persons with Disabilities in Utah*, 2019 *UTAH L. REV.* 215, 216.

57. Nicole M. Arsenaault, *Start with a Presumption She Doesn't Want to Be Dead: Fatal Flaws in Guardianships of Individuals with Intellectual Disability*, 35 *MINN. J. L. & INEQ.* 23, 26 (2017).

58. *See* Sell, *supra* note 56, at 216-17 (explaining that the practice of *parens patriae* began when the monarch assumed authority over estates of orphaned individuals and persons deemed as incompetent).

*parens patriae*.<sup>59</sup> The legal system recognizes the power and obligation of the state to protect vulnerable citizens from abuse and neglect.<sup>60</sup> In England, the King was deemed to be the “parent of the country” and therefore someone who had a fiduciary duty to protect mentally impaired individuals.<sup>61</sup> The United States assumed the power of *parens patriae* by taking on the role of protecting mentally disabled individuals.<sup>62</sup> In 1890, this doctrine was expressly endorsed by the Supreme Court.<sup>63</sup> The Court described the *parens patriae* power in the case of *Late Corp. of Church of Jesus Christ of Latter-Day Saints v. United States*,<sup>64</sup> stating:

This prerogative of *parens patriae* is inherent in the supreme power of every State, whether that power is lodged in a royal person or in the legislature, and has no affinity to those arbitrary powers which are sometimes exerted by irresponsible monarchs to the great detriment of the people and destruction of their liberties. On the contrary, it is a most beneficent function, and often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves.<sup>65</sup>

The history of guardianships has not come without its scandals.<sup>66</sup> Historically, guardianships were used to deceive Native American

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59. Salzman, *supra* note 45, at 164. However, the *parens patriae* approach can at times exploit the ward instead of protecting and helping them. Jan Ellen Rein, *Preserving Dignity and Self-Determination of the Elderly in the Face of Competing Interests and Grim Alternatives: A Proposal for Statutory Refocus and Reform*, 60 GEO. WASH. L. REV. 1818, 1826-27 (1992). Under this principle, a guardian is supposed to make decisions that would be in the ward’s best interest or what the ward would prefer; however, decisions made by the court are oftentimes contrary to what the individual would have wanted. *Id.* at 1826. Oftentimes, this power is used to benefit societal interests as opposed to the ward’s best interest. *Id.* at 1826-27. For example, hospitals or nursing homes will resort to guardianships as a means to collect on outstanding bills or evict elderly individuals from their facilities. *Id.* at 1827.

60. Salzman, *supra* note 45, at 166.

61. Tricia M. York, *Conservatorship Proceedings and Due Process: Protecting the Elderly in Tennessee*, 36 U. MEMPHIS L. REV. 491, 501 (2006). The focus during these times was not on the mentally impaired person but instead on their property. *Id.*

62. Jennifer L. Wright, *Protecting Who from What, and Why, and How?: A Proposal for an Integrative Approach to Adult Protective Proceedings*, 12 ELDER L.J. 53, 58 (2004).

63. *Late Corp. of Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 56-57 (1890).

64. *Id.*

65. *Id.* at 57. The Court in this case distinguished the United States’ power of *parens patriae* from that of England by stating that it was the legislature rather than the monarch that took on this role. Arsenault, *supra* note 57, at 26-27.

66. See Andrea Seielstad, *The Disturbing History of How Conservatorships Were Used to Exploit, Swindle Native Americans*, CONVERSATION (Aug. 13, 2021, 9:58 AM), <https://theconversation.com/the-disturbing-history-of-how-conservatorships-were-used-to-exploit-swindle-native-americans-165140> (detailing the disturbing history of guardianship abuse to exploit Native Americans).

communities out of their lands.<sup>67</sup> County courts found Native Americans incompetent to handle their financial affairs and appointed guardians without a finding of mental incapacity.<sup>68</sup> While one would hope that such turbulent history does not repeat itself, stories of guardianship abuse and exploitation like Spears' demonstrate its prevalence today.<sup>69</sup>

### C. *The Current Guardianship System*

It is difficult to know exactly how many individuals are under a guardianship in each state.<sup>70</sup> Many states do not keep such extensive recording systems.<sup>71</sup> In fact, when the Government Accountability Office conducted a report on guardianships and elder abuse, they noted that “[w]hile courts are responsible for guardianship appointment and monitoring activities, among other things, court officials from the six selected states that we spoke to were not able to provide exact numbers of guardians for older adults or of older adults with guardians in their states.”<sup>72</sup> However, it is estimated that roughly 1.5 million individuals are under a guardianship according to a 2013 AARP report.<sup>73</sup> Guardianships have an extensive effect on an individual's life, and ensuring that each state establishes an exhaustive system of comprehensive guardianship guidelines is essential.<sup>74</sup>

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67. *Id.*

68. *Id.* This abuse and exploitation was later combated by Congress' enactment of the Indian Reorganization Act of 1934 which put Indian land back into tribal ownership and within the security of the United States. *Id.*

69. *Id.* (using Britney Spears' conservatorship battle as an example of the double-edged sword of conservatorships and its troubled history).

70. Emily Gurnon, *Guardianship in the U.S.: Protection or Exploitation?*, FORBES (May 23, 2016, 10:47 AM), <https://www.forbes.com/sites/nextavenue/2016/05/23/guardianship-in-the-u-s-protection-or-exploitation/?sh=7e1a94c43b49>.

71. *Id.*

72. Kenneth Heisz, *Beware of the Con in Conservatorships: A Perfect Storm for Financial Elder Abuse in California*, NAELA NEWS + J. (March 2021), <https://www.naela.org/NewsJournalOnline/OnlineJournalArticles/OnlineMarch2021/Conservatorships.aspx?subid=1191>. Subsequent reports by the federal government in 2018 and 2020 revealed a remaining lack of information on guardianship abuse and financial exploitation. *Id.* The Congressional Research Service explained that while federal efforts have been made toward gathering this data, the difficulty lies in the interstate discrepancies and lack of uniform reporting system across states. *Id.*

73. Richard Eisenberg, *Beware the Con Game of Conservatorships*, FORBES (May 15, 2015, 12:39 PM), <https://www.forbes.com/sites/nextavenue/2015/05/15/beware-the-con-game-of-conservatorships/?sh=441eb958a89b>.

74. Emery T. Sloan, *Help! I've Fallen and I Can't Get a Guardian: Rethinking South Carolina's Need for a Public Guardianship Program*, 71 S.C. L. REV. 943, 952 (2020) (“The problem is that these [guardianship] programs are often limited in their scope as a result of deficient structuring or, more critically, insufficient funding.”).



As a result of a lack of an overarching federal regulation, the Uniform Law Commission (“ULC”) stepped in to deal with the interstate guardianship law inconsistencies.<sup>75</sup> Its purpose was to draft model legislation that states could choose to enact.<sup>76</sup> This uniform act was drafted at a conference in 2017 and is called the Uniform, Guardianship, Conservatorship, and Other Protective Arrangements Act (“UGCOPAA”).<sup>77</sup> So far, only two states, Washington and Maine, have enacted this uniform act in its entirety.<sup>78</sup> The overall goals of the UGCOPAA consist of person-centered individualized planning, increased use of less-restrictive alternatives, and enhanced procedural rights.<sup>79</sup> Such reform is critical because in jurisdictions with lenient guidelines and nonexistent oversight, mistreatment by guardians is plentiful.<sup>80</sup>

### 1. Appointing a Guardian

A guardian will be appointed if the court deems an individual to be incapacitated physically, mentally, or both.<sup>81</sup> While there is no national guideline for appointing a guardian, some common elements exist in every state.<sup>82</sup> A guardianship proceeding can either be commenced by the court or a person that petitions to become a guardian.<sup>83</sup> Most states

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75. Wallin, *supra* note 27, at 450.

76. *Id.* Some states have enacted it in its entirety while others have chosen to use some of it in a revised manner. *Id.*

77. See generally UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT (UNIF. L. COMM’N 2017) (outlining ideal guardianship laws that should be used in all states).

78. *Guardianship, Conservatorship, and Other Protective Arrangements Act*, UNIF. L. COMM’N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=2eba8654-8871-4905-ad38-aabbd573911c> (last visited July 25, 2022).

79. See Uniform Law Commission, *Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA)*, YOUTUBE (Aug. 7, 2018), <https://www.youtube.com/watch?v=bbOt06kHa4g&t=209s> (describing the benefits of the UGCOPAA and the need for reform as guardianship issues become more prevalent).

80. Kimberly Guilfoyle, *Guardianship Abuse Is Elder Abuse*, NEWSWEEK (June 28, 2021, 8:00 AM), <https://www.newsweek.com/guardianship-abuse-elder-abuse-opinion-1603966>.

81. Sloan, *supra* note 74, at 949-50. An astonishing eighty-three percent of petitions for guardianships are granted. See Sarah Cohen et al., *Rights and Funds Can Evaporate Quickly*, WASH. POST (June 16, 2003), [https://www.washingtonpost.com/archive/politics/2003/06/16/rights-and-funds-can-evaporate-quickly/2d0f1066-0b6c-46e1-9a71-bc860582709c/?utm\\_term=.6300828c60bd](https://www.washingtonpost.com/archive/politics/2003/06/16/rights-and-funds-can-evaporate-quickly/2d0f1066-0b6c-46e1-9a71-bc860582709c/?utm_term=.6300828c60bd) (examining various cases where wards were financially exploited, and guardianships put in place against the ward’s wishes).

82. Arsenault, *supra* note 57, at 32.

83. Lisa Zammiello, *Don’t You Know that Your Law Is Toxic? Britney Spears and Abusive Guardianship: A Revisionary Approach to the Uniform Probate Code, California Probate Code, and Texas Estates Code to Ensure Equitable Outcomes*, 13 EST. PLAN. CMTY. PROP. L.J. 587, 593 (2021).

allow any interested individual to petition to assume guardianship of an adult.<sup>84</sup> Some elements that must be included in the petition are the nature of the person deemed to be incapacitated, the guardian's proposed qualifications, and an inventory of the property owned by the person deemed to be incapacitated.<sup>85</sup> After a petition is filed, notice must be given to the respondent, and in some states, notice must also be given to spouses, adult children, or next of kin.<sup>86</sup> Most jurisdictions mandate the appointment of counsel to an individual deemed to be incapacitated, but in some states, appointment is permissive and not required.<sup>87</sup> Nonetheless, forty-four percent of wards are not represented by counsel at their own hearing.<sup>88</sup>

If the guardianship is uncontested, hearings can be very brief.<sup>89</sup> In fact, an astounding forty-nine percent of wards do not attend their own guardianship hearings.<sup>90</sup> A majority of guardians are family members of the individual.<sup>91</sup> If no private guardian is available, a public guardian will be appointed.<sup>92</sup> While the public guardianship system is well-intentioned, it has also led to devastating results.<sup>93</sup> These paid

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84. Arsenault, *supra* note 57, at 32. Most states have liberal requirements for the initial filing of the petition which makes it easy to begin the process. *Id.*

85. *Id.* at 32-33.

86. *Id.* at 34. Some advocates for guardianship reform have highlighted due process concerns regarding how a prospective ward receives such notice because of their proposed disability or incapacity. Sally B. Hurme, *Current Trends in Guardianship Reform*, 7 MD. J. CONTEMP. L. ISSUES 143, 146 (1996). Subsequently, some states have requirements that notice be accommodating to that individual's condition that has made them in need of a guardian. *Id.* at 146-47. Comparatively, courts are split on whether failing to give notice to the respondent makes the appointment of their guardian void or voidable. *Id.* at 148.

87. Arsenault, *supra* note 57, at 34. While in some states appointment of counsel is permissive, courts nonetheless are bound to appoint counsel if it is requested or necessary for that individual. *Id.*

88. Fred Bayles, *Guardians of the Elderly: An Ailing System Part I: Declared 'Legally Dead' by a Troubled System*, ASSOCIATED PRESS (Sept. 19, 1987), <https://apnews.com/article/1198f64bb05d9c1ec690035983c02f9f>.

89. Naomi Karp & Erica F. Wood, *Guardianship Monitoring: A National Survey of Court Practices*, 37 STETSON L. REV. 145, 148 (2007).

90. Bayles, *supra* note 88.

91. Meta S. David, *Legal Guardianship of Individuals Incapacitated by Mental Illness: Where Do We Draw the Line?*, 45 SUFFOLK U. L. REV. 465, 475 (2012). "Courts typically prefer to appoint a family member to act as guardian over an incapacitated relative." *Id.*

92. *Id.* at 475.

93. Ann Brenoff, *The System of Court-Appointed Guardians Continues to Fail the Elderly*, HUFFPOST (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). For example, a former cab driver and convicted bank robber was granted guardianship of a customer with Alzheimer's. Sharyl Attkisson, *Investigation into Guardianship Abuse*, CBS NEWS (Dec. 13, 2010, 12:21 PM), <https://www.cbsnews.com/news/investigation-into-guardianship-abuse>. Moreover, he embezzled more than \$640,000 from that individual. *Id.*

professional guardians are put in charge of an individual's estate with little to no training.<sup>94</sup>

All state laws mandate that once the circumstances for a guardianship have materially changed, courts must review the guardianship to confirm whether it is still required and if alternatives can be used.<sup>95</sup> Unfortunately, once a guardianship is put in place, it usually remains permanently.<sup>96</sup> Individuals put under a guardianship incur great difficulty in retaining legal counsel, leading to a hinderance in challenging decisions made by their guardians and restoring some of their legal rights.<sup>97</sup> Likewise, guardians are not obligated to help the protected individual restore their rights, and common law allows a guardian to oppose a petition for restoration of legal rights so long as they do so in good faith.<sup>98</sup> Consequently, a system designed to safeguard vulnerable people has done little to protect their interests and substantive due process rights.<sup>99</sup>

## 2. State Practice Case Studies

Requirements for guardian eligibility, screening, and training vary drastically across state lines ranging from moderate requirements to some states lacking any requirements at all.<sup>100</sup> Defining legal incapacity varies greatly throughout the states so much so that an individual could be deemed incapacitated in one state and found to be functional in another.<sup>101</sup> In California, characteristics considered in determining incapacity include being unable to properly provide for personal needs such as physical health, food, and shelter.<sup>102</sup> California also looks at whether that individual is unable to manage their own financial

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94. Brenoff, *supra* note 93. Notably, Pamela B. Teaster, director of the Center for Gerontology at Virginia Tech, stated that “[i]n most states around the country, it is easier to qualify as a guardian than it is to become a hairdresser.” *Id.*

95. Annemarie M. Kelly et al., *A 50-State Review of Guardianship Laws: Specific Concerns for Special Needs Planning*, 75 J. FIN. SERV. PRO. 59, 60 (2021). “According to the U.S. National Council on Disability, guardianships are often procedurally difficult to overturn.” *Id.*

96. *See id.* at 60 (detailing the procedural difficulty in overturning guardianships).

97. Jenica Cassidy, *Restoration of Rights in the Termination of Adult Guardianship*, 23 ELDER L.J. 83, 102 (2015).

98. *Id.* at 106. Contesting a court proceeding with no support from their guardian is an extremely difficult matter for someone with virtually no rights or access to funds. *Id.* In fact, only thirty-three percent of petitions for restoration of rights that were opposed by a guardian were granted. *Id.* at 107.

99. *See* Kristin Booth Glen, *The Perils of Guardianship and the Promise of Supported Decision Making*, 48 CLEARINGHOUSE REV. J. POVERTY L. & POL’Y 17, 18 (2014) (detailing the drawbacks of the guardianship system and need for increased use of alternative remedies).

100. Kelly et al., *supra* note 95, at 61.

101. *Id.* at 62.

102. *Id.* at 63.

resources or resist undue influence.<sup>103</sup> Moreover, Texas considers similar factors but also includes analyzing the individual's physical or mental condition and the necessity of a guardianship to protect rights or property.<sup>104</sup>

Qualifications to serve as a guardian also vary greatly throughout the states.<sup>105</sup> For example, California has more stringent qualifications than Texas.<sup>106</sup> California requires that guardians go through a fingerprint, background, and credit check.<sup>107</sup> Additionally, individuals must complete a pre-licensing thirty-hour educational course.<sup>108</sup> Some other requirements include being at least twenty-one years of age, not having been convicted of a crime related to the duties of a fiduciary, and not having been removed as a professional fiduciary by a court.<sup>109</sup>

Conversely, Texas is much more lenient in vetting their professional guardians in that no background check of any kind, including a credit check, is required for appointment.<sup>110</sup> Equally relevant, Texas does not require their prospective guardians to undergo any formal training but only requires that the individuals demonstrate at least two years of guardianship experience.<sup>111</sup> To become a guardian in Texas, a person must be twenty-one years of age or older, have two or more years of relevant guardianship experience in addition to a GED or high school diploma.<sup>112</sup>

The disparities in the language of state statutes also demonstrate a variation in how guardians approach decision-making for their ward.<sup>113</sup> California's statute directs a guardian to make decisions by reference to the guardian's belief about what is in the best interest of the protected person.<sup>114</sup> California's statute specifically states, "the conservator shall make the decision in accordance with the conservator's determination of

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103. *Id.*

104. *Id.* at 66.

105. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-1046, GUARDIANSHIPS: CASES OF FINANCIAL EXPLOITATION, NEGLECT, AND ABUSE OF SENIORS at 45-52 (2010) (detailing the various qualifications needed for professional guardians and conservators in different states).

106. See *id.* (comparing the varied qualifications and license requirements for guardians in differing states).

107. *Id.* at 47.

108. *Id.*

109. *Id.* Other qualifications include possessing a bachelor's degree, an associate's degree, or a higher level of education and at least three years of work experience as a fiduciary. *Id.*

110. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 105, at 52.

111. *Id.*

112. *Id.*

113. Angela Haddon & Sarah Winston, *How Do Guardians Make Up Their Minds*, AM. BAR ASS'N (Oct. 1, 2018), [https://www.americanbar.org/groups/law\\_aging/publications/bifocal/vol-40/issue-1-september-october-2018/guardians-make-up-minds](https://www.americanbar.org/groups/law_aging/publications/bifocal/vol-40/issue-1-september-october-2018/guardians-make-up-minds).

114. *Id.*

the conservatee's best interest."<sup>115</sup> In contrast, Texas' statute leaves great discretion to the guardian in stating that the guardian should "encourage[] the development or maintenance of maximum self-reliance and independence in the incapacitated person."<sup>116</sup> Regardless of the varying statute definitions and prerequisites for becoming a guardian, both state systems have incurred exploitation because of the issues within the guardianship system as a whole.<sup>117</sup> Such disparity in state practices coupled with the lack of federal guidance or financial support has clearly demonstrated that federal uniformity to specific issues in the guardianship system is critical for effective reform.<sup>118</sup>

### III. THE CURRENT REGULATION OF GUARDIANSHIPS

This Part discusses the current legislation proposed in Congress to allow individuals under a guardianship to petition for a public guardian and the overarching issues with the current state-run system.<sup>119</sup> Subpart A will discuss the current proposal of the FREE Act, which intends to allow individuals to petition the court for a public guardian, and the inadequacies of this bill.<sup>120</sup> Subpart B will discuss another bill being proposed in the Senate titled the Guardianship Accountability Act of 2021, which aims to increase transparency of guardianships through state guardianship databases.<sup>121</sup> Subpart C will discuss the inconsistencies of screening and monitoring guardians in various states and how that has allowed individuals with felony criminal convictions relating to financial crimes to oversee an individual's estate.<sup>122</sup> Subpart D will analyze the popular practice by state courts of using plenary guardianships as opposed to less restrictive alternatives even when such control over a ward's person or estate is not necessary.<sup>123</sup>

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115. CAL. PROB. CODE § 2355(a) (West 2016).

116. TEX. EST. CODE ANN. § 1151.351 (West 2020).

117. See U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 105, at 6 (summarizing various cases of guardianship exploitation in different states including California and Texas). Public guardians appointed to an eighty-eight-year-old woman with dementia sold her property below market value to a guardian's family member and moved her into a nursing home. *Id.* In Texas, the guardian, who was the victim's son, misappropriated over \$300,000 of his father's veterans' benefits to himself. *Id.* at 39.

118. See generally Kelly et al., *supra* note 95 (detailing the vast differences between various state guardianship laws).

119. See *infra* Part III.

120. See *infra* Part III.A.

121. See *infra* Part III.B.

122. See *infra* Part III.C.

123. See *infra* Part III.D.

A. *Proposal of The Freedom and Right to Emancipate from Exploitation Act*

After a controversial fight to end her conservatorship, Spears' story inspired the House of Representatives to take action and introduce the FREE Act.<sup>124</sup> The bill proposes that individuals under a private guardianship should be able to petition the court to receive a state guardian that is free from any financial conflict of interest.<sup>125</sup> Representative Charlie Crist exclaimed in sponsoring this bill that, "we don't know how many people are being held captive against their will under the broken guardianship system. We do know, however, that we need federal safeguards to protect persons under guardianship from abuse and exploitation."<sup>126</sup>

The FREE Act is not the first time that Congress has discussed the guardianship system and its susceptibility to corruption.<sup>127</sup> During a 1987 House Subcommittee hearing concerning guardianships, they were described as "the most punitive civil penalty that can be levied against an American citizen."<sup>128</sup> Recently, in 2018, the Senate Special Committee on Aging released a report on guardianships recommending that increased monitoring among state courts and promotion of alternatives should be more widely used.<sup>129</sup> The bipartisan support for this bill indicates the importance of this issue and the significance of the federal government stepping in to aid state courts.<sup>130</sup>

The main feature of the FREE Act that has received media attention consists of the opportunity for an individual under the control of a private guardian to petition for a public guardian under the employment of the court.<sup>131</sup> Another feature of the Act includes improving the lack of oversight through grants to states to help fund caseworker programs and

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124. Veronica Stracqualursi, *Lawmakers Unveil Bipartisan Bill to 'Free Britney,' Targeting Conservatorships' Abuse*, CNN (July 20, 2021, 12:40 PM), <https://www.cnn.com/2021/07/20/politics/free-act-conservatorships-britney-spears/index.html>.

125. FREE Act, H.R. 4545, 117th Cong. § 2(b)(2) (2021).

126. Press Release, Congresswoman Nancy Mace, Reps. Mace, Crist Introduce FREE Act to Protect Rights of Those in Conservatorships (July 20, 2021).

127. Marianne Levine et al., *'This is Freaking Ridiculous': Britney Spears Inspires Lawmakers to Tackle Toxic Conservatorships*, POLITICO (July 12, 2021, 4:30 AM), <https://www.politico.com/news/2021/07/12/britney-spears-congress-conservatorship-498930>.

128. *Id.*

129. *Id.*

130. See Judy Kurtz, *Lawmakers Introduce Bipartisan Free Britney Act*, THE HILL (July 20, 2021, 11:09 AM), <https://thehill.com/blogs/in-the-know/in-the-know/563865-lawmakers-introduce-bipartisan-free-britney-act> (noting the various bipartisan support from citizens and individuals throughout the nation concerning the importance of tackling the problems that deeply affected Spears).

131. FREE Act, H.R. 4545, 117th Cong. § 2(b)(2) (2021).

hire additional state guardians.<sup>132</sup> States are eligible for grants if they maintain up-to-date databases concerning all legal guardianships that have been established in their state, inquire if individuals wish to petition the court for a public guardian, and keep up with financial disclosure requirements.<sup>133</sup> Nevertheless, while this proposed Act offers various important reforms, it fails to address the full range of issues at hand.<sup>134</sup>

Two major shortfalls of the FREE Act include the failure to address training of guardians prior to their appointment and the push to use alternatives in situations where a plenary guardianship is too restrictive.<sup>135</sup> While modernizing statutes brings about some change, effective reform will not occur with a lack of funding for training.<sup>136</sup> Navigating the responsibilities that a guardianship entails can be challenging if a guardian fails to have any support or education in their new role.<sup>137</sup> Moreover, while guardianship systems vary throughout the states, virtually all state agencies report a lack of funding and insufficient training for their guardians.<sup>138</sup> In the 2018 report, the U.S. Senate Special Committee exclaimed that the problems with guardianships that they identified were pervasive, requiring a nationwide focus.<sup>139</sup> An overwhelmed state court system along with the lack of resources and funds to monitor guardians has led to mismanaged guardianships.<sup>140</sup> The FREE Act's failure to address less restrictive

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132. *Id.*

133. H.R. 4545 § 2(b)(1). Additionally, the grants come with their own disclosure requirements on the part of the state. *Id.* Within ninety days of the fiscal year, the state must provide to Congress a written report of how the funds were used, the numbers of adults under a guardianship, the number of petitions for a public guardian, the ratio of individuals in a guardianship compared to state-employed legal guardians, and the number of individuals emancipated from a legal guardianship. H.R. 4545 § 2(e)(1)–(5).

134. See Jessica Contrera, *With the Movement's Future Uncertain, 'Free Britney' Campaign Returns to the White House*, WASH. POST (Oct. 23, 2021, 6:35 PM), <https://www.washingtonpost.com/dc-md-va/2021/10/23/free-britney-campaign-white-house> (detailing that the entire guardianship system allows for such abuse to occur and demanding that reform go beyond the proposed “FREE” Act).

135. See generally H.R. 4545 (outlining the proposed bill and the various issues it addresses while failing to tackle training of guardians and less restrictive alternatives).

136. Godfrey, *supra* note 30.

137. See *Training and Education*, PROJECT GUARDIANSHIP, <https://projectguardianship.org/our-work/training-and-education> (last visited July 25, 2022) (emphasizing the importance of training for guardians taking on such an intricate role that concerns reporting requirements and fiduciary obligations).

138. Marguerite Angelari, *Adult Guardianship: Protecting the Elderly or Shielding Abusers?*, 8 PUB. INT. L. REP. 6, 8 (2003).

139. Rachel M. Cohen, *Forced Assistance*, THE INTERCEPT (July 6, 2020, 10:30 AM), <https://theintercept.com/2020/07/06/coronavirus-assisted-living-guardianship>.

140. See Karen E. Boxx & Terry W. Hammond, *A Call for Standards: An Overview of the Current Status and Need for Guardian Standards of Conduct and Codes of Ethics*, 2012 UTAH L. REV. 1207, 1211 (“Whether through the failure of legislative bodies to appropriate necessary funds

alternatives and their insufficient use addresses a critical problem that oftentimes guardianships remove more rights than necessary.<sup>141</sup> Inadequate funding affects all facets of the guardianship system; continuing to issue reforms with no financial assistance results in a continuance of inadequate guardian screenings and scarce use of alternatives.<sup>142</sup> The most effective reform must include the federal government incentivizing training for guardians and the use of alternatives to guardianships.<sup>143</sup>

### B. Senate Proposes Guardianship Accountability Act of 2021

In September 2021, Senators Collins and Casey presented the Guardianship and Accountability Act of 2021 to the Committee on Health, Education, Labor, and Pensions.<sup>144</sup> The bill's purpose encompasses increasing oversight and data collection by the states.<sup>145</sup> The bill outlines its three main objectives as "(1) designating a National Resource Center on Guardianship; (2) authorizing grants for the purpose of developing State Guardianship Databases; and (3) establishing procedures for sharing background check information related to appointed guardians with other jurisdictions."<sup>146</sup> The bill's main method of facilitating such goals includes the creation of a National Resource Center on Guardianships that would collect data on state guardianships, promote less restrictive alternatives, and post model standards for

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to maintain a viable guardianship system, the unwillingness of the executive branch to regulate guardians, or simply an overwhelmed court system without resources to monitor guardianship cases, the result is a diminished role of the court as enforcer and punisher when misconduct has been brought to its attention rather than as a supervisor.").

141. See Sen. Susan M. Collins & Sen. Robert P. Casey, *Ensuring Trust: Strengthening State Efforts to Overhaul the Guardianship Process and Protect Older Americans*, U.S. SENATE SPECIAL COMM. ON AGING (Nov. 2018), [https://www.aging.senate.gov/imo/media/doc/Guardianship\\_Report\\_2018\\_gloss\\_compress.pdf](https://www.aging.senate.gov/imo/media/doc/Guardianship_Report_2018_gloss_compress.pdf) (examining the various issues with the guardianship system including oversight, insufficient use of alternatives to guardianships, and lack of data).

142. Godfrey, *supra* note 26, at 84.

143. See Godfrey, *supra* note 26, at 85 (outlining the various recommendations made by the Senate Special Committee on Aging including training for guardians and an emphasis on alternatives to guardianships).

144. Guardianship Accountability Act of 2021, S. 2881, 117th Cong. (2021).

145. S. 2881 § 2(b). Senator Casey said in a statement, "Unfortunately, we don't know much about how many guardianships are occurring, how they're managed or how much fraud or abuse is happening. This bill would help provide accountability and oversight into guardianships, promote best practices, and provide funding and training to spot abuse." Kimberly Bonvissuto, *Senate Committees Look for Solutions to Improve Guardianship, Conservatorship Systems*, MCKNIGHTS SENIOR LIVING (Sept. 30, 2021), <https://www.mcknightsseniorliving.com/home/news/senate-committees-look-for-solutions-to-improve-guardianship-conservatorship-systems>.

146. S. 2881 § 2(b)(1)–(3).



guardianship cases.<sup>147</sup> Another major issue that the bill seeks to rectify is the lack of a national database that publishes information on state laws regarding various aspects of a guardianship.<sup>148</sup>

The overall idea of the bill centers around its drive to increase transparency of the guardianship system and make accessible materials to better train and educate prospective guardians.<sup>149</sup> However, while such educational materials are critical to better preparing guardians, the availability of such material, including guardianship certification programs, already exists and is available for states to implement.<sup>150</sup> Similarly, posting model standards for guardianship cases is already something that the Uniform Law Commission has achieved through creating a uniform law on guardianships addressing such issues as less restrictive alternatives and procedural rights.<sup>151</sup> The states have access to such information that this bill intends to make more easily accessible on a national scale, however the main issue lies in the lack of financial incentives that states have to adopt and fund such initiatives.<sup>152</sup> Advocates of reform emphasize that one of the main reasons guardianship reform has failed to make meaningful improvements is a consequence of the federal government's lack of guidance or financial support to states.<sup>153</sup>

### C. *Inconsistent Screening and Monitoring of Guardians*

A lack of funding on the part of state courts to instill programs to screen prospective guardians, oversee, and train them has led to mounting cases of guardianship abuse.<sup>154</sup> Without any guidance or

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147. S. 2881 § 4(b)(1)–(3). The data that the bill's intended center would collect includes: the number of individuals subject to a guardianship, duration of guardianships, amount of financial assets under a guardianship and the relationship of the guardian to the ward. S. 2881 § 4(5)(A)–(E)(ii).

148. S. 2881 § 4(6)(A)–(E). This national database would display information regarding the state's requirement of least restrictive alternatives, documentation by appointed guardians, oversight, and restoration of rights of an individual subject to a guardianship. *Id.*

149. *See generally* S. 2881 (outlining the bill's initiative of publishing training materials for court appointed guardians relating to their duties and obligations and sharing state guardianship information among federal agencies).

150. *About Certification*, CTR. FOR GUARDIANSHIP CERTIFICATION, <https://guardianshipcert.org/about-certification/#1513107911462-4e6a55cc-5822> (last visited July 25, 2022).

151. *Guardianship, Conservatorship, and Other Protective Arrangements Act*, *supra* note 78.

152. Cohen, *supra* note 139.

153. *Id.* Dari Pogach, a senior staff attorney at the American Bar Association Commission on Law and Aging, emphasized, "I hope we can learn from this pandemic that we need to prioritize support and services for the elderly and people with disabilities, [a]nd that must include funding for state adult guardianship reform." *Id.*

154. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 105, at 8.

training, guardians are largely left on their own to neglect their ward or left hoping that the parameters of their duties will be viewed favorably if reviewed by the courts.<sup>155</sup> Although all fifty states have enacted guardianship laws, a lack of national statutory consistency results in widespread issues throughout the guardianship system.<sup>156</sup>

Such variation between state laws in screening guardians prior to appointment has led to individuals with criminal convictions and financial problems being appointed as guardians.<sup>157</sup> Take for example the disparities in screening prospective guardians in North Carolina as opposed to California.<sup>158</sup> North Carolina requires a certification program as part of their pre-screening of prospective guardians; however, it does not require background checks or credit checks.<sup>159</sup> Instead, North Carolina requires that to apply for a guardianship, individuals disclose any misdemeanor or felony convictions and any actions dealing with fraud.<sup>160</sup> Accordingly, a guardian was able to embezzle over \$330,000 from their ward because of the state's failure to properly screen this guardian and discover that they had incurred two suspensions for Veterans Affairs benefits because of a failure to file accountings.<sup>161</sup> In contrast, California conducts a fingerprint background check and a credit check prior to appointing an individual as guardian.<sup>162</sup> Along with a background check free from criminal convictions, California also requires that the individual not have been removed from a fiduciary position because of fraud or deceit.<sup>163</sup> Such vast differences by states in the practice of screening prospective guardians incentivizes individuals with ill intent to "forum shop" for the ideal state to discreetly exploit a vulnerable individual without consequence.<sup>164</sup>

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155. Boxx & Hammond, *supra* note 140, at 1211.

156. Mike E. Jorgensen, *The Convicted Felon as a Guardian: Considering the Alternatives of Potential Guardians with Less-Than-Perfect Records*, 15 ELDER L.J. 51, 55 (2007). Henceforth, a combination of legal variation and society's increased mobility has led to forum shopping of guardians. *Id.* at 56.

157. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 105, at 7. In one case study, the GAO found that a Certified Public Accountant with known financial problems was appointed as a guardian and misappropriated \$167,325 from two seniors. *Id.* at 12. He did so through writing twenty-one checks ranging from \$2,000 to \$25,000 from one victim's estate. *Id.* During this time of exploitation, the guardian failed to pay for the senior's rent or medication. *Id.*

158. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 105, at 47.

159. *Id.* at 50.

160. *Id.*

161. *Id.* at 38.

162. *Id.* at 47.

163. *Id.*

164. Jorgensen, *supra* note 156, at 56.

Monitoring of guardians is another vital segment of ensuring proper care of wards.<sup>165</sup> However, scarce financial resources allocated to such measures has been identified as an issue with only twenty percent of judges indicating that sufficient financial resources are available.<sup>166</sup> Court budget cuts and various demands for services result in minimal post-appointment monitoring.<sup>167</sup> Having turned over complete control of an individual, the court may have no way of identifying whether the guardian's power is being used to exploit or abuse the person they are overseeing.<sup>168</sup> In particular, guardianship reports are typically self-reported and conflicts of interests or abuses of power will go unnoticed unless the guardian brings it to the court's attention.<sup>169</sup>

In 2020, the National Center for State Courts surveyed guardians, judges, and other individuals to analyze the current state court monitoring practices of guardianships.<sup>170</sup> Seventy-nine percent of respondents noted that the court required accounting reports annually.<sup>171</sup> However, in some states such requirement is stipulated on the value of the estate, with some states only requiring such reporting if an estate is worth more than \$10,000 and other states waiving such a requirement if the estate is worth less than \$50,000.<sup>172</sup> In looking at continued monitoring of guardianship accountings, most states assign this responsibility to court auditors.<sup>173</sup> In Virginia, respondents expressed

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165. See *Guardianship Survey Shows Courts Have Made Progress but Must Do More*, NAT'L CTR. FOR STATE CTS., <https://www.ncsc.org/newsroom/at-the-center/2021/guardianship-survey> (last visited July 25, 2022) (identifying common challenges that state courts face in improving their guardianship system and overseeing such cases).

166. *Id.*

167. Glen, *supra* note 99, at 18.

168. *Id.* Despite the good work of volunteers whom in some states monitor guardianships, the system itself has failed to fulfill its goal of protecting liberty interests and procedural due process. *Id.*

169. Judge David A. Hardy, *Who Is Guarding the Guardians? A Localized Call for Improved Guardianship Systems and Monitoring*, 4 NAT'L ACAD. ELDER L. ATT'YS 1, 18 (2008). "Monitoring of individual guardianships provides the best mechanism for balancing state intervention with personal autonomy, and active judicial oversight is necessary to ensure protection is available and autonomy is preserved." *Id.* at 18-19.

170. NAT'L CTR. FOR STATE CTS., ADULT GUARDIANSHIP MONITORING: A NATIONAL SURVEY OF COURT PRACTICES 4 (2021), [https://www.eldersandcourts.org/\\_data/assets/pdf\\_file/0035/65969/Guardianship-Monitoring-Survey-Report.pdf](https://www.eldersandcourts.org/_data/assets/pdf_file/0035/65969/Guardianship-Monitoring-Survey-Report.pdf). "Five hundred forty-two people completed the survey. One-third of survey respondents were guardians or conservators. APS staff members provided 18% of the responses. Forty-three judges (8%) responded to the survey and 52 (9%) court administrators responded." *Id.* at 5.

171. *Id.* at 6. "Some courts require an accounting after the first year but less frequently after that, particularly if the person has few assets. One respondent reported that their court only recently resumed requiring annual accountings, which had ceased due to budgetary concerns." *Id.* at 6-7.

172. *Id.* at 6.

173. *Id.* at 13.

that while the Commission of Accounts is responsible for reviewing financial reports, there does not seem to be an in-depth review.<sup>174</sup> North Dakota, for instance, requires accountings but only reviews a select few chosen on a random basis.<sup>175</sup>

When looking at post-appointment visits, the most common response indicated that thirty-nine percent of individuals noted that no one from the court visited them or the individual to whom they were appointed as guardian.<sup>176</sup> Notably, only three percent of responses specified that a volunteer or other court-appointed official visited them on a regular basis or as needed.<sup>177</sup> In Alaska, a visit occurs during the three-year review, but in California, an investigator visits annually.<sup>178</sup> Similarly, review hearings regarding the need to modify or continue guardianships only occurred in forty-two percent of cases upon a request.<sup>179</sup> California holds review hearings annually while New Mexico only holds such hearings every ten years.<sup>180</sup> Such vast variation in guardianship monitoring between states makes it easier for guardians to abuse their wards in some states at a greater rate where there is lenient oversight.<sup>181</sup>

#### *D. Insufficient Use of Less Restrictive Alternatives*

Traditionally, complete guardianship authority was applied over all wards, even though an individual's capacity is subjective.<sup>182</sup> Courts were more inclined to appoint overly broad guardianships in order to minimize the need for future court appearances.<sup>183</sup> This total grant of

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174. *Id.*

175. *Id.*

176. *Id.* at 14-15.

177. *Id.* at 14.

178. *Id.* at 15.

179. *Id.* at 18. This percentage was gathered from responses of over 500 individuals in over forty-six states. *Id.* at 2.

180. *Id.* at 18.

181. *See id.* at 12-17 (detailing the monitoring practices in the United States and the commonplace leniency in oversight by many states).

182. Hardy, *supra* note 169, at 17.

183. NAT'L COUNCIL ON DISABILITY, BEYOND GUARDIANSHIP: TOWARD ALTERNATIVES THAT PROMOTE GREATER SELF-DETERMINATION 104 (2018). Conversely, there is an argument for the financial benefits of overly broad guardianships:

Indeed, having to return to court in a guardianship case can have the effect of depleting the resources of the individual subject to guardianship, because unless indigent, he or she is ultimately on the hook for paying all the costs associated with guardianship. In several states there is a requirement that the individual be represented by counsel whenever they are faced with losing rights under guardianship. This means that, at a minimum, their estate will have to pay for two lawyers—one representing the person who is already under a limited guardianship but who allegedly lacks capacity in an additional area, as

power is oftentimes referred to as a plenary guardianship.<sup>184</sup> The current view is that plenary guardianships are overused because the capability of individuals with mental impairments to manage their affairs is “diverse and amenable to growth and development.”<sup>185</sup> While most states have statutorily mandated the use of limited guardianships, or less restrictive alternatives to a general guardianship, they are rarely executed.<sup>186</sup> This preference towards plenary guardianships is evidenced throughout the entire guardianship system and is not specific to a certain state.<sup>187</sup>

A 2007 study found that in an estimated ninety percent of guardianship proceedings, alleged incapacitated individuals were completely deprived of their legal rights.<sup>188</sup> Courts favor granting a plenary guardianship over alternative remedies in a majority of cases.<sup>189</sup> Judges prefer giving wholesale grants of power to guardians because it reduces the likelihood of any future hearings from guardians every time an instance arises where the guardian may need an expansion of their power if alternatives were used.<sup>190</sup> While appointing a plenary guardianship is “best” for the court and those involved, it should not trump the purpose of a guardianship: to protect and advance the life of the incapacitated person.<sup>191</sup> Exploration of alternatives to a plenary guardianship has lacked both as a result of imposing a guardianship as a

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well as the guardian’s lawyer, who would normally be urging the court to expand the guardian’s authority—and for the fees assessed for the examination that would be required to determine the individual lacked capacity in an additional area. It is easy to see how this can quickly become a costly endeavor.

*Id.* at 104-05. However, a guardianship that removes more rights than needed from an individual is not a legal justification even if it financially makes sense. *Id.* at 105.

184. See Lawrence A. Frolik, *Promoting Judicial Acceptance and Use of Limited Guardianship*, 31 STETSON L. REV. 735, 742-43 (2002) (describing the overarching power that plenary guardians have such as total control over a ward’s finances and the benefits and drawbacks of such an arrangement).

185. Hardy, *supra* note 169, at 17.

186. *Id.* at 18.

187. See Frolik, *supra* note 184, at 741-44 (detailing the court’s preference towards plenary guardianships despite the option of a limited guardianship or other alternatives).

188. Glen, *supra* note 99, at 18.

189. Frolik, *supra* note 184, at 741-44.

190. *Id.*

191. *Id.* at 745. “The operation of a guardianship should not be a compromise to alleviate the concerns of the various parties, nor should it be some utilitarian system with the goal of bringing the greatest good to the greatest number.” *Id.* at 744-45. Guardians that are given plenary guardianships over less restrictive alternatives do not have to worry about what is within their power. *Id.* at 741-44. Likewise, such expansive power helps assure the court that they are not inundated with similar cases of guardians asking for their legal rights to be expanded. *Id.* at 744.

universal answer when an individual faces struggles as well as a lack of funding to promote alternatives.<sup>192</sup>

A major issue with the commonplace practice of instituting plenary guardianships is the difficulty in restoring the legal rights of individuals under a guardianship.<sup>193</sup> Persons under a guardianship face a “catch-22” in attempting to regain their independence.<sup>194</sup> For an individual in a guardianship to speak with an attorney and receive legal advice, such interaction would need to be approved by the guardian.<sup>195</sup> Since the guardian is in charge of the individual’s finances, the guardian must approve the individual retaining an attorney and then the attorney would be paid by the guardian.<sup>196</sup> While many states have enacted laws to ensure that legal counsel is given to individuals entering a guardianship, that is not the case in all states.<sup>197</sup> Indiana allows petitioners to obtain a consent form signed by the individual under consideration for the appointment of a guardianship to effectively waive their right to contest the hearing.<sup>198</sup> Such variety in the way that guardianship cases are treated is due in part to the fact that they are handled by county-level courts, leading to a variation of time and resources.<sup>199</sup> Such difficulty in dissolving a plenary guardianship, and the reluctance by local courts to first enforce less restrictive alternatives, illustrate the necessity for an

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192. Godfrey, *supra* note 26, at 84. Supported decision making is rapidly evolving as an alternative to plenary guardianships, but it has not received much support. *Id.* Supported decision making creates a system that empowers individuals to work with people they choose to help manage their affairs. *Id.*

193. See Cassidy, *supra* note 97, at 95-96. (“The study indicates that petitions for restoration are uncommon but do occur and have moderate success.”).

194. Carter Barrett, *Conservatorship System Is Slow to Change, Despite Availability of Less Restrictive Options*, WFYI (Nov. 22, 2021), <https://www.wfyi.org/news/articles/conservatorship-system-slow-change-despite-availability-less-restrictive-options>.

195. *Id.* Nicholas Clouse is a major advocate for guardianship reform after he sustained a traumatic brain injury and was put under the guardianship of his parents. *Id.* However, after Mr. Clouse attempted to regain his legal rights years after his injury to care for his family, his parents opposed the dissolution of the guardianship. *Id.* Clouse had to retain an attorney to fight for his rights but had to do so with the approval of his guardians. *Id.*

196. *Id.*

197. *Id.*

198. See Barrett, *supra* note 194. Indiana Disability Rights attorney Justin Schrock stated, “I’ve seen over and over again, these guardians’ attorneys will have the individual sign this consent form, file it along with a petition, oftentimes with no medical evidence, [a]nd some of these courts are just looking at that and saying, ‘OK,’ and then granting guardianship without ever having even laid eyes on this individual.”

*Id.*

199. *Id.* Larger counties can apportion more resources to such hearings because of their access to probate-specific courts. *Id.* Smaller county courts see a wide range of cases while their judges have limited expertise to a specific field. *Id.*

incentive by the federal government to use less restrictive alternatives in guardianship proceedings.<sup>200</sup>

#### IV. PROPOSED SOLUTION

While guidelines exist about best practices on guardianships,<sup>201</sup> and a federal law exists on elder abuse,<sup>202</sup> no federal guidelines mandate standards by which state courts must abide when instituting guardianships.<sup>203</sup> Unfortunately, cases like Spears', consisting of a pattern of exploitation and disregard for an individual's best interest, are not hard to find.<sup>204</sup> A combination of different state practices and limited

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200. Cassidy, *supra* note 97, at 96.

201. See generally UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT (UNIF. L. COMM'N 2017) (detailing the recommendations made for the current guardianship system that include person-centered planning and promoting an adult's participation in decisions); see also Erica Wood, *New Uniform Act Boosts Guardianship Reform*, AM. BAR ASS'N (Oct. 15, 2018), [https://www.americanbar.org/groups/law\\_aging/publications/bifocal/vol--39/issue-1--october-2017/-new-uniform-act-boosts-guardianship-reform](https://www.americanbar.org/groups/law_aging/publications/bifocal/vol--39/issue-1--october-2017/-new-uniform-act-boosts-guardianship-reform) (demonstrating the desire to reform the guardianship system through the creation of the Uniform Code).

202. See Elder Abuse Prevention and Prosecution Act, 34 U.S.C. § 21711 et seq. (2017) (defining the mechanisms through which the judicial and executive branch combat elder abuse). The bipartisan legislation enhances protection of seniors through increased data collection about fraud and abuse cases, specific training of federal prosecutors, and increased penalties for criminals who target seniors. *President Trump Signs Elder Abuse Prevention and Prosecution Act to Enhance Protections*, AM. BAR ASS'N, [https://www.americanbar.org/advocacy/governmental\\_legislative\\_work/publications/washingtonletter/october2017/elderabuse](https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/october2017/elderabuse) (last visited July 25, 2022). The passing of the legislation sent a clear message from Congress that local law enforcement should make exploitation of elderly citizens a top priority. *Id.* The act intended to target abuse such as physical abuse, neglect, financial exploitation, and sexual abuse. *Id.* Such abuse is said to have no boundaries and is "not defined by socioeconomic, racial or ethnic status, and it occurs with alarming frequency in every state." *Id.* While a motive for enacting this legislation was to combat exploitation by guardians, this legislation focused on other aspects of elder abuse including scammers that preyed on elders. The Karp Law Firm, *New Federal Law Addresses Increasing Incidence of Elder Abuse by Court-Appointed Guardians*, KARP L. FIRM, <https://karplaw.com/new-federal-law-addresses-increasing-incidence-of-elder-abuse-by-court-appointed-guardians> (last visited July 25, 2022). Importantly, the Act amended the federal criminal code to expand prohibited telemarketing fraud to include "telemarketing or email marketing" fraud which aimed to cover measures by scammers to induce investment or commitment to a loan. *Elder Abuse Prevention and Prosecution Act Signed into Law*, WEINER BRODSKY KIDER PC (Nov. 9, 2017), <https://www.thewbkfirm.com/industry/elder-abuse-prevention-prosecution-act-signed-law>. A defendant convicted of committing such a scheme in defrauding a person over the age of fifty-five was subject to enhanced criminal penalty as a result of this act. *Id.*

203. See Adam Walser, *#FreeBritney Movement Inspires Bill to End Exploitation & Abuse in Guardianship and Conservatorship*, ABC ACTION NEWS (July 20, 2021, 5:45 PM), <https://www.abcactionnews.com/news/local-news/i-team-investigates/the-price-of-protection/freebritney-movement-inspires-law-aimed-at-ending-exploitation-and-abuse> (explaining how the FREE Act would be the first federal protection afforded to individuals under guardianship).

204. Lydia Wang, *The Dangers of Conservatorships Go Way Beyond Britney Spears*, REFINERY29 (June 25, 2021, 11:56 AM), <https://www.refinery29.com/en->

data available make it nearly impossible to track conservatees and identify patterns of financial or medical abuse.<sup>205</sup> Guardianships can be beneficial for some individuals, specifically those suffering from severe mental impairments, however recent cases have demonstrated that many people of sound mind are losing their legal rights and life-savings to a system that is underfunded and greatly differs state-by-state.<sup>206</sup> This Note proposes that a federal approach is critical to ensure that guardians are no longer able to escape liability for exploiting the individual they are supposed to protect.<sup>207</sup> The solution consists of the creation of a new federal law expanding the Medicare and Medicaid programs to give states funds with the stipulation that guardians are properly screened and trained, and conservatees are given less restrictive alternatives to guardianships if appropriate.<sup>208</sup>

Subpart A discusses the need for a federal approach to combat issues plaguing the guardianship system.<sup>209</sup> Subpart B discusses that to effectuate change to the guardianship system, the federal government must stipulate acceptance of funds by the states through the creation of a new law that expands Medicare and Medicaid programs.<sup>210</sup> Such a prerequisite would differ from any bill currently being proposed because funds would be dispersed through a program that states already undertake just with additional requirements.<sup>211</sup> Subpart C advocates for the importance of screening prospective guardians and training each guardian to ensure they understand the gravity of their task.<sup>212</sup> Last, Subpart D analyzes the benefits of instilling less restrictive alternatives for individuals that do not need something as restrictive as a guardianship.<sup>213</sup> To ensure that cases of guardianship abuse do not become as commonplace as they currently are, funding must be given to states to screen individuals, train guardians, and offer less restrictive alternatives.<sup>214</sup>

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us/2021/06/10545139/britney-spears-conservatorship-legal-abuse-dangerous. Spears herself mentioned in her June 23, 2021, hearing that she was not the only person in a conservatorship that was “struggling with a lack of autonomy and inability to challenge her conservatorship.” *Id.*

205. *Id.* “Despite it being difficult to identify – and even more complicated to stop – conservatorship abuse is real.” *Id.*

206. See Cohen, *supra* note 139 (describing needless guardianships as a “civil death” and calling for a nationwide focus on such abuse).

207. See *infra* Parts IV.A–C.

208. See *infra* Parts IV.A–C.

209. See *infra* Part IV.A.

210. See *infra* Part IV.B.

211. See *infra* Part IV.B.

212. See *infra* Part IV.C.

213. See *infra* Part IV.D.

214. See *infra* Parts IV.A–D.



### A. Necessity of a Federal Approach

A federal approach to increasing oversight of guardianship abuse because of poorly-trained and ill-screened guardians is needed as a consequence of the lack of funding that state courts have to dedicate to such improvements.<sup>215</sup> The two bills, the FREE Act and the Guardianship Accountability Act, currently proposed in Congress demonstrate that a national approach is needed to combat such prevalent abuse nationwide.<sup>216</sup> In speaking in reference to the proposal of the FREE Act, lawmakers recognized that guardianships are controlled by states but conceded that Congress must help reform the system.<sup>217</sup> In 1987, a House of Representatives hearing was conducted where Representative Claude Pepper contended that the guardianship system had become a loose practice in state courts by subjecting individuals to guardianships that were neither properly managed nor to the benefit of the individual.<sup>218</sup> A federal approach is needed to combat the issues affecting the guardianship system plagued by poorly screened, undertrained guardians<sup>219</sup> inundating an underfunded, overused court system,<sup>220</sup> where the individuals that are meant to be protected by such a system are instead often exploited.<sup>221</sup>

A lack of statutory consistency between state guardianship laws has substantially contributed to overarching issues within the system highlighting the need for federal guidance.<sup>222</sup> The vast differences in

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215. See *supra* Parts III.C–D.

216. See FREE Act, H.R. 4545, 117th Cong. § 2(b)(2) (2021); Guardianship Accountability Act of 2021, S. 2881, 117th Cong. (2021). Rebekah Diller asserted in reference to the proposal of the FREE Act, “[i]t’s a mistake to just think about this as a state issue, because there are significant federal rights at stake, [i]t’s absolutely the job of Congress to step in and try to do something about this situation.” Levine et al., *supra* note 127. “State courts are tasked with monitoring guardianships in order to protect individuals subject to guardianship from abuse, neglect and exploitation. Despite this responsibility, few states are able to provide courts with adequate resources to monitor guardianships effectively and hold guardians accountable.” Press Release, Senator Susan Collins, Senators Collins, Casey Introduce Bipartisan Bill to Protect Individuals Under the Care of Guardians (Sept. 28, 2021).

217. Levine et al., *supra* note 127. “Lawmakers acknowledge that situations like Spears’ are largely controlled by states, not the federal government, but they argue that Congress can still help reform the system she’s shined a light on.” *Id.*

218. CHAIRMAN SUBCOMM. ON HEALTH AND LONG-TERM CARE SELECT COMM. ON AGING, ABUSES IN GUARDIANSHIP OF THE ELDERLY AND INFIRM: A NATIONAL DISGRACE, H.R. REP. NO. 100-641 at 2-4 (1987). Representative Pepper asserted that not only did Congress have the power to reform such a system, but he contended that the federal government had to step in to help by promulgating a uniform system of laws that would protect such individuals from abuse. *Id.* at 3.

219. See *supra* Part III.C.

220. See *supra* Part III.D.

221. See *supra* Parts III.C–D.

222. Jorgensen, *supra* note 156, at 55.

state laws are especially prevalent in guardian screenings, where some states do not conduct background checks to identify felonies or financial problems.<sup>223</sup> While in other situations such a difference in state law may not be an issue, these disparities coupled with the greater mobility of the population to travel from state to state to become a guardian create a grave problem.<sup>224</sup> Given the importance of proper screening of guardians to oversee an individual's entire estate and act on their behalf, this is an issue that would be best addressed by the uniformity that federal guidance could provide.<sup>225</sup>

Moreover, many individuals have guardianships put in place where they are not necessary and less restrictive alternatives could be used.<sup>226</sup> Such actions by the state courts create due process concerns where individuals are being stripped of their rights with no need and at times without them even being present at the hearing.<sup>227</sup> Many of the reasons for appointing a guardian with complete power over person and estate, even when one is not necessary, center around the court's wish to avoid future proceedings or the lack of availability of alternatives to best assist an individual in decision making.<sup>228</sup> These reasons for favoring quick, full grants of power to guardians should not supersede the importance of an individual's due process rights.<sup>229</sup> A federal approach would ensure that such due process rights are protected by providing funds for the implementation of less restrictive alternatives and enforcing screening and trainings of guardians prior to appointment.<sup>230</sup>

### B. Funding Stipulated Through Medicare and Medicaid

Ensuring that states are given the financial resources to screen prospective guardians and recommend less restrictive alternatives is the only way to truly combat the exploitation plaguing the guardianship

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223. *Id.* at 55-56.

224. *Id.* at 62 (“As the demand for eligible guardians increases and society becomes more mobile, there will likely be an increase in situations where a potential guardian will be ineligible for such an appointment in his or her state of residency, but will be eligible in a different state.”).

225. *See supra* Part III.C.

226. *See supra* Part III.D.

227. *See* Press Release, Senator Ted Cruz, Sens. Cruz, Blumenthal Announce Hearing on Toxic Conservatorships (Sept. 27, 2021). “This hearing will examine harmful, restrictive conservatorships that far too often deny people due process and strip them of their rights to make legal, financial, and even personal decisions.” *Id.*

228. Salzman, *supra* note 45, at 174-77.

229. *See generally* Johns, *supra* note 55 (detailing the various due process issues encountered in the guardianship system).

230. *See infra* Parts IV.B–D.

system.<sup>231</sup> Such a solution would be found through the creation of a new law that expands Medicare and Medicaid to give states funds if they implement proper screening, train prospective guardians, and ensure alternatives to guardianships are implemented if possible.<sup>232</sup> Medicaid is an assistance program for low-income individuals, including those with a disability, to pay for covered medical expenses.<sup>233</sup> Medicare assists individuals sixty-five years or older and those younger individuals with disabilities in the payment of hospital services, various medical services, and prescription drug costs.<sup>234</sup>

Enacting a federal law that gives states funds with specific requirements through the Medicare and Medicaid programs would be the most appropriate as these programs already have certain core federal requirements in return for their participation.<sup>235</sup> This could be effectuated by expanding a specific percentage of Medicare or Medicaid funds to aid state courts with a requirement that such financial resources, if accepted, can only be used to implement improvements to their guardianship system.<sup>236</sup> Such requirements would include: (1) mandating guardians to become nationally certified, which would both screen and train them; (2) conducting yearly monitoring of finances; and (3) implementing alternative methods to a guardianship, if possible.<sup>237</sup> This would not be the first time that a federal law would be passed in order to expand the Medicare and Medicaid programs to try and provide care to a greater number of individuals.<sup>238</sup> In the case of *Nat'l Fed'n of Indep.*

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231. *Exploitation of Seniors: America's Ailing Guardianship System: Hearing Before the S. Special Comm. on Aging*, 109th Cong. 2 (2006) (“Although States have made recent legislative strides to reform guardianship laws and ensure better oversight, experts feel there has been little progress when it comes to actual court practice. What has become clear is that Federal leadership is needed.”).

232. *See infra* Parts IV.C–D.

233. *See generally* *What Is the Difference Between Medicare and Medicaid?*, U.S. DEPT. HEALTH & HUM. SERVS., <https://www.hhs.gov/answers/medicare-and-medicaid/what-is-the-difference-between-medicare-medicaid/index.html> (last visited July 25, 2022); *What Is the Medicaid Program?*, U.S. DEPT. HEALTH & HUM. SERVS., <https://www.hhs.gov/answers/medicare-and-medicaid/what-is-the-medicaid-program/index.html> (last visited July 25, 2022).

234. *What Is the Difference Between Medicare and Medicaid?*, *supra* note 233.

235. *See* Robin Rudowitz et al., *Medicaid Financing: The Basics*, KFF (May 7, 2021), <https://www.kff.org/medicaid/issue-brief/medicaid-financing-the-basics>. For states to participate in a program such as Medicaid, states must provide mandatory benefits, such as hospital or home services, to poor pregnant women and children without enrollment caps. *Id.*

236. *See* Karp & Wood, *supra* note 89, at 175 (“Approximately 43% of respondents stated that funding for monitoring is unavailable or clearly insufficient, about 17% responded that some funding is available, and only 10.9% responded that sufficient funds are available to the court.”).

237. *See infra* Parts IV.C–D.

238. *See generally* *Nat'l Fed'n Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) (deciding that the expansion of the Medicaid program, by completely stripping states of funding if they failed to expand, through the Affordable Care Act was unconstitutional).

*Bus. v. Sebelius*,<sup>239</sup> the Court ruled that giving states additional funds and mandating that they expand the scope of the Medicaid program or lose all Medicaid funds altogether was unconstitutional.<sup>240</sup> However, the proposal of the current federal law would expand the Medicare and Medicaid programs by allowing states to collect an additional percentage of funds if they implement the specified requirements, without any penalty if they choose to forego the additional funds.<sup>241</sup> This proposal would not be deemed unduly coercive as was found by the Court in *Sebelius*, as states have the option to accept the extra funds and implement the specified requirements or obtain no supplementary funds at all.<sup>242</sup>

Advocates for reform of the guardianship system have consistently remarked that the only way that the system would be able to implement monitoring of guardians and promote alternatives to guardianships is through funding available to state courts.<sup>243</sup> Similarly, both the current legislative proposals of the FREE Act and the Guardianship Accountability Act acknowledge that funds are needed to sustain such reform by providing grants to states that implement their requirements.<sup>244</sup> Given the gravity of the issues associated with the increasing oversight of the guardianship system,<sup>245</sup> expanding the Medicare and Medicaid programs and mandating that states can only accept the additional federal funds to improve guardianships through screening, training guardians, and exploring alternatives seems the most appropriate method to tackle such a widespread issue.<sup>246</sup>

### C. Screening, Monitoring, and Training Prospective Guardians

State courts' failure to screen potential guardians has led to individuals with criminal convictions or significant financial problems being appointed as guardians of estates worth thousands of dollars.<sup>247</sup>

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239. 567 U.S. 519 (2012).

240. *Id.* at 580-81.

241. *See infra* Parts IV.C–D.

242. 567 U.S. at 580-81. The Court found that the inducement that Congress proposed through the expansion of Medicaid in the Affordable Care Act was akin to “a gun to the head.” *Id.* at 581.

243. Godfrey, *supra* note 26, at 84-85.

244. *See generally* FREE Act, H.R. 4545, 117th Cong. § 2(b)(2) (2021); Guardianship Accountability Act of 2021, S. 2881, 117th Cong. (2021) (demonstrating that both proposed bills give grants to states in return for their improvement of their guardianship system).

245. *See supra* Parts III.C–D.

246. *See infra* Parts IV.C–D.

247. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 105, at 7-8. For instance, a New York attorney that declared bankruptcy three years prior was appointed as guardian of a senior's estate. *Id.* at 7-8.

This failure to screen possible guardians leads to a greater likelihood of exploitation as a result of the immense responsibility afforded to an individual.<sup>248</sup> The vast discrepancies in state practices of conducting background checks prior to appointing guardians has led to some individuals becoming guardians without disclosing their prior convictions.<sup>249</sup>

The current practice<sup>250</sup> in some states of easily allowing relatively anyone to become a guardian has led to an uptick in financial exploitation of wards.<sup>251</sup> The gravity of the responsibility that guardians gain over another individual's life should not be easily awarded to just anyone that petitions the court for guardianship.<sup>252</sup> Such practice has provided state courts with an ease of overseeing these cases but has done so at the expense of the individual that such a system was built to protect.<sup>253</sup> Consequently, a mandate that states require their prospective guardians to become a "Nationally Certified Guardian" through the Center for Guardianship Certification would help to prevent the kind of exploitation found within the many states that do not conduct background checks.<sup>254</sup> The minimum standards for certification require that the individual submit to a criminal background check and be free of any felony convictions and not be civilly liable for any matter concerning fraud or exploitation.<sup>255</sup>

Many individuals become guardians with good intentions to provide support for their conservatees, but many are given such responsibility without any training.<sup>256</sup> Commencing as a guardian over another individual comes with the immense responsibility to ensure that both their person and estate are cared for.<sup>257</sup> Through the expansion of the Medicare and Medicaid programs, states would be mandated to require their guardians to become certified through the Center for Guardianship Certification.<sup>258</sup> This certification requires that prospective

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248. *Id.* at 7-8.

249. *See supra* Part III.C.

250. *See supra* Part II.C.

251. *See supra* Part III.C.

252. *See supra* Part II.C.

253. *See supra* Part II.B.

254. *About Certification, supra* note 150. Such a certification would have to be renewed every two years, ensuring that the guardian has met those intended requirements each time the certification is renewed. *Id.*

255. *Certification Requirements, CTR. FOR GUARDIANSHIP CERTIFICATION*, <https://guardianshipcert.org/certification-requirements/#1514493569672-7b9442ab-a0a2> (last visited July 25, 2022).

256. *See supra* Part III.C.

257. *See supra* Part II.A.

258. *About Certification, supra* note 150.

guardians pass the training and testing requirements.<sup>259</sup> Such training should also advise guardians as to the type of monitoring the court will conduct throughout the guardianship, as oversight on the part of the court system is a major contributor to the considerable abuse that has gone unscathed throughout the system.<sup>260</sup>

An absence of monitoring guardians throughout the country is a major factor as to why abuse, specifically financial exploitation, is so prevalent and relatively unknown.<sup>261</sup> Even though most state courts require that guardians must disclose financial records of the individual under a guardianship,<sup>262</sup> such accounting either tapers off after the first year or is not required for estates worth less than a specified amount.<sup>263</sup> Consequently, it is critical that to properly monitor all guardians, regardless of the amount of the estate that they supervise, a requirement that state courts collect yearly financial reports from all guardianships would aid in unveiling any financial exploitation.<sup>264</sup> To effect such reform, states would need to acquire funds to hire individuals and put programs in place to collect such data and information from the multitude of guardians within their jurisdiction.<sup>265</sup>

#### D. Less Restrictive Alternatives

Guardianships are supposed to be a means of last resort.<sup>266</sup> They strip an individual of their right to vote, decide whom they visit, and how they spend their money.<sup>267</sup> Even when an individual is deemed “incapacitated,” the court is supposed to only appoint a guardian if no other less restrictive alternatives<sup>268</sup> are available.<sup>269</sup> The guardianship system of today is viewed as a binary system where an individual is either fully capable of making decisions or incapable of doing so.<sup>270</sup> The

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259. *Id.* The state of Alaska is one of the states that currently requires that their guardians obtain such a certification. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 105, at 45.

260. *See supra* Part III.C.

261. *See supra* Part III.C.

262. NAT'L CTR. FOR STATE CTS., *supra* note 170, at 2.

263. *See supra* Part III.C.

264. *See supra* Part III.C.

265. *See supra* Part IV.B.

266. Rebekah Diller, *Legal Capacity for All: Including Older Persons in the Shift from Adult Guardianship to Supported Decision-Making*, 43 FORDHAM URB. L.J. 495, 506-07 (2016).

267. Gurnon, *supra* note 70.

268. Sheila E. Shea & Carol Pressman, *Guardianship: A Civil Rights Perspective*, 90 N.Y.S. BAR ASS'N J. 19, 23 (2018). Alternatives could include advanced directives, service coordination, or other supported decision-making tools. *Id.*

269. Diller, *supra* note 266, at 507. Alternatives could include a power of attorney or other resources. *Id.*

270. Wallin, *supra* note 27, at 452.

ease of granting a plenary guardianship to decrease the need for future court hearings has superseded the importance of fostering the right solution for an individual that has encountered difficulties in taking care of themselves and their estate.<sup>271</sup>

Providing states with the funds<sup>272</sup> necessary to inquire into alternative methods of supporting an individual instead of radically restricting their rights through a guardianship is critical to reforming the guardianship system.<sup>273</sup> States that have the necessary financial means to explore less restrictive alternatives would help in ensuring that only those individuals that truly need a guardian are appointed one, as opposed to the commonplace practice of appointing one for convenience.<sup>274</sup> Forcing states, which are now provided with available funds, to inquire into an individual's impairments and abilities in specific enumerated domains prior to the appointment of a guardian would aid in filtering out those individuals that do not need such a drastic measure.<sup>275</sup> States should be required to mandate that anyone that petitions for a guardianship plead that alternatives other than a guardianship were explored, and demonstrate the reasons for declination of such alternatives.<sup>276</sup> While such a requirement may seem lengthy for both petitioner and court, it seems appropriate given the grave constraint a guardianship imposes on an individual, especially when such a measure is taken without a justifiable need.<sup>277</sup>

Advocates for guardianship reform state that the key to effective reform includes less restrictive alternatives such as supported decision-making.<sup>278</sup> Supported decision-making is a less restrictive alternative that recognizes that individuals with diminished capacity will need assistance in making decisions greater than the assistance needed by an individual with full capacity.<sup>279</sup> The goal of supported decision-making is to enhance the individual's autonomous decision-making ability.<sup>280</sup> This model of decision-making identifies

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271. *See supra* Part III.D.

272. *See supra* Part IV.B.

273. *See supra* Part III.D.

274. *See supra* Part III.D.

275. Shea & Pressman, *supra* note 268, at 23.

276. *Id.*

277. *See supra* Part III.D.

278. Cohen, *supra* note 139.

279. Shea & Pressman, *supra* note 268, at 20.

280. Wallin, *supra* note 27, at 453. Supported decision-making can be best described as:  
[A] process of supporting and accommodating an adult with a disability to enable the adult to make life decisions, including decisions related to where the adult wants to live, the services, supports, and medical care the adult wants to receive, whom the adult wants

specific individuals that would help the person in making individual decisions through employing various tools that allow the person with a disability to understand that they are supported in making their own choices.<sup>281</sup> Supported decision-making recognizes most people do not make decisions in a vacuum and argues that older individuals or those with mental impairments, that can no longer make decisions on their own, should not automatically be given a guardian but should be able to make their own decisions with the assistance of another.<sup>282</sup>

Individuals that suffer from some impairments that make decision-making or taking care of themselves or their personal affairs harder should not just automatically be written off as unable to make any decisions at all.<sup>283</sup> In a system that is often referred to as a “civil death,” guardianships have too often become the answer when older individuals and those with mental impairments face any slight difficulty.<sup>284</sup> Providing states with the funds to promote and explore less restrictive alternatives, such as supported decision-making, ensures that courts are well-suited with finding the best option for individuals that are struggling to make decisions on their own or best support themselves without automatically stripping them of their rights.<sup>285</sup>

## V. CONCLUSION

As individuals age or succumb to various mental impairments, they should not have to worry about being taken advantage of by being placed in an unnecessary guardianship.<sup>286</sup> Unfortunately, Spears’ story uncovered the prevalent exploitation occurring throughout the United

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to live with, and where the adult wants to work, without impeding the self-determination of the adult.

*Id.* at 454.

281. *Id.*

282. Shea & Pressman, *supra* note 268, at 20.

283. Wallin, *supra* note 27, at 461-62. Guardianships themselves are not the issue, the frequency at which they are approved in situations in which they are too broad or unnecessary is the critical issue. *Id.* A guardianship is only to be preserved when it is in the individual’s best interest and it is the least restrictive option available. *Id.* The United States has created such a binary legal system in regard to guardianships to where an individual is only given two support options, to either obtain a guardian or have no support at all. *Id.*

284. *See* Cohen, *supra* note 139.

In the worst cases, it’s the guardians themselves who exploit the senior, draining their assets, cutting off contact with friends and family, and confining them to expensive facilities when they just want to remain in their homes. Seniors have described the experience as living a ‘civil death’ or being a ‘legal ghost.’

*Id.*

285. *See supra* Part III.D.

286. *See supra* Parts III.C–D.



States' conservatorship system.<sup>287</sup> This system was created for the state to help those that were unable to take care of themselves.<sup>288</sup> Nevertheless, it has been consistently underfunded, leading to an array of issues harming those it was intended to safeguard.<sup>289</sup> The current system has allowed for individuals to be exploited, abused, and overlooked to the gain of the guardian appointed to make decisions in their best interest.<sup>290</sup>

Many of these cases of exploitation of wards have resulted from the varying discrepancies in state laws.<sup>291</sup> Much of the issue centers around the inability of the states to fund improvements to their guardianship system.<sup>292</sup> Without the necessary funds, states appoint guardians that are not properly screened, are given little to no training, and appoint such guardians without exploring less restrictive alternatives.<sup>293</sup> The increased mobility of citizens<sup>294</sup> and the differing state requirements to become a guardian demonstrate the importance of giving funds to the states to improve their guardianship proceedings while providing them with specific requirements they must meet.<sup>295</sup>

Expanding a specified percentage of the Medicaid and Medicare programs and mandating that states use such funds towards improvements of guardianship proceedings, as a condition of their receipt, would help to ensure that state courts have the finances to implement the relevant mandates.<sup>296</sup> Such funds would be used towards requiring that states direct prospective guardians to retain a National Guardianship Certification.<sup>297</sup> A National Guardianship Certification would both conduct a background check and inform guardians on the responsibilities they are about to obtain.<sup>298</sup> With an increase in funds directed specifically to improving guardianship proceedings, courts will now be required to monitor current guardianships through yearly accountings to identify any financial fraud or exploitation.<sup>299</sup> Individuals have the right to the preservation of their due process rights and should

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287. See generally Wang, *supra* note 204 (emphasizing the overall issues of the guardianship system beyond those issues uncovered by Spears' story).

288. See *supra* Part II.B.

289. See *supra* Parts III.C–D.

290. See *supra* Parts III.C–D.

291. See *supra* Parts III.C–D.

292. Godfrey, *supra* note 26, at 85.

293. Boxx & Hammond, *supra* note 140, at 1211.

294. Jorgensen, *supra* note 156, at 56.

295. See *supra* Parts IV.B–D.

296. See *supra* Part IV.B.

297. See *supra* Part IV.C.

298. See *supra* Part IV.C.

299. See *supra* Part IV.C.

only be appointed a guardian as a last resort.<sup>300</sup> Enforcing that state courts require petitioners to present other alternatives that they explored and their inability to serve as a proper remedy at guardianship hearings ensures that only those individuals that absolutely need a guardian are given one.<sup>301</sup>

As demonstrated by the immense exploitation revealed throughout the nation<sup>302</sup> and the current federal legislation being proposed,<sup>303</sup> a federal solution may be the only way to ensure that individuals under a guardianship are properly protected.<sup>304</sup> As the “baby boomer” generation in the United States becomes older and makes up a large part of the population, people impacted by guardianships will sharply increase.<sup>305</sup> The failure of the state courts, and stories like Spears’, create a compelling argument that federal resources are critically needed to prevent mismanaged guardianships.<sup>306</sup> Ultimately, to attain meaningful reform that prevents further exploitation, the federal government must provide states with both guidance and financial support to mend a system that has become toxic.<sup>307</sup>

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300. *See supra* Part III.D.

301. *See supra* Part IV.D.

302. *See supra* Parts III.C–D.

303. *See supra* Parts III.A–B.

304. *See supra* Parts IV.A–D.

305. Gurnon, *supra* note 70 (“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.”).

306. Boxx & Hammond, *supra* note 140, at 1211.

307. *See supra* Part IV.

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