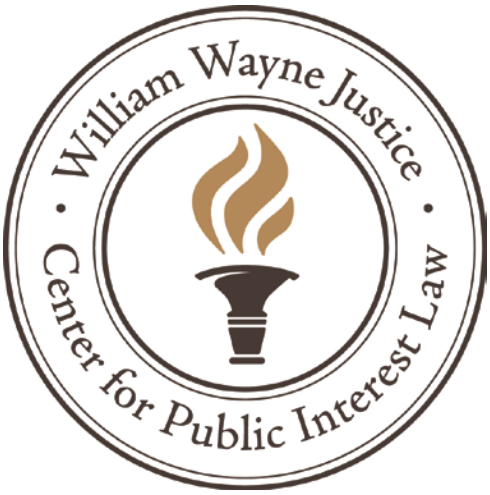
# Emerging Trends in Adult Guardianship: Review of State Practices and Summary of Findings for Texas

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[1] The opinions and conclusions expressed here are solely those of the author and do not represent the opinion or policy of the William Wayne Justice Center for Public Interest Law, the University of Texas School of Law, or The University of Texas at Austin. All questions should be directed to Helen Gaebler, Senior Research Attorney, the William Wayne Justice Center for Public Interest Law (hgaebler@law.utexas.edu). The author thanks P. Casey Mathews, Texas Law '16, for his significant contribution to this project.

## I. INTRODUCTION

The population of individuals over sixty-five years of age in the U.S. is expected to nearly double over a 20 year span, increasing from 40 million in 2010 to an estimated 72.1 million by 2030. [2] Texas is no exception to this trend, with the over sixty-five population in Texas also expected to double by 2040 (from approximately 2.85 million to more than 6 million). [3] Included in this growth is an increase in the percentage of persons over 75 years of age, including those living with Alzheimer's disease and the many other illnesses frequently associated with the "very old."

In addition to this growing elderly population, it is estimated that between 1.5% and 2.5% of the U.S. population lives with an intellectual or developmental disability.[4] In Texas specifically, it is estimated that there are roughly 475,000 individuals in the developmental disability community alone. [5] Guardianship plays a critical role in efforts to support both the aging population and individuals living with developmental and intellectual disabilities.

This report looks at adult guardianship in Texas, focusing on two key concerns: (1) adequacy of the initial consideration of less restrictive alternatives to guardianship (LRAs) and the role of limited guardianship; and (2) adequacy of ongoing oversight for those individuals who are placed into guardianship (either full or limited).[6] Because guardianships inherently involve the removal of liberty and autonomy from individuals and consume considerable court resources, this report focuses on ways to ensure that guardianship is not over-used as a resource and that

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[2] U.S. DEP'T OF HEALTH AND HUMAN SERVS., ADMINISTRATION ON AGING, A PROFILE OF OLDER AMERICANS: 2011, at 3 (2011), *available at* http://www.aoa.gov/Aging_Statistics/Profile/2011/docs/2011profile.pdf.

[3] DAVID SLAYTON, DIRECTOR'S REPORT, TEXAS JUDICIAL COUNCIL 3 (February 2014), *available at* http://www.txcourts.gov/media/414267/Directors-Report-February-2014.pdf.

[4] BETHESDA INSTITUTE, HOW PREVALENT ARE INTELLECTUAL AND DEVELOPMENTAL DISABILITIES IN THE UNITED STATES? 1 (2012), *available at* http://bethesdainstitute.org/document.doc?id=413.

[5] TEXAS COUNCIL FOR DEVELOPMENTAL DISABILITIES, TEXAS BIENNIAL DISABILITY REPORT 2012, at 13 (2012), *available at http://tcdd.texas.gov/wp-content/uploads/2012/12/2012_biennial_report.pdf*.

[6] Examples of less restrictive alternatives include powers of attorney, trusts, joint bank accounts, representative payees for certain benefits, advanced directives for health care, and supported decision-making agreements.

the rights and wishes of individuals under guardianship are protected to the maximum extent possible when guardianship *is* implemented.

Beginning with a review of selected state practices, this report contrasts Texas' current adult guardianship[7] requirements with reforms and changes made in a number of states that have recently modified their guardianship procedures. The report next identifies a series of best practices that have emerged in recent years across the U.S. The report concludes by highlighting opportunities to further strengthen Texas' adult guardianship system.

## II. BACKGROUND

Guardianships are intended to support individuals who lack the capacity to adequately manage their affairs by removing some or all legal decision-making power from the individual and placing it in a third party. Texas law authorizes the appointment of guardians in one of two ways. A judge with probable cause to believe a person is incapacitated may initiate proceedings to determine if the individual is in need of a guardian's support. Alternatively, and more commonly, a third party may file a petition in court, asking for a guardian to be appointed for an individual thought to be incapacitated.

Texas law spreads guardianship jurisdiction across three different court systems: statutory probate courts, county courts at law, and constitutional county courts.[8] Statutory probate courts are governed by different standards and requirements than county courts. For example, judges in statutory probate courts must execute a bond in the amount of $500,000 conditioned on the faithful performance of the

[7] This report focuses primarily on guardianships of the person, not guardianships of the estate.
[8] As of 2014, Texas' court system included 18 statutory probate courts, 249 legislatively authorized county courts at law, and 211 constitutional county courts. Notably, only 11% of the 254 county judges in Texas were licensed to practice law. LAURA UPCHURCH AND WENDY J. YATES, TEXAS PROBATE JUDGES SURVEY, PRESENTATION FOR THE STATE BAR OF TEXAS 38TH ANNUAL ADVANCED ESTATE PLANNING & PROBATE COURSE 3 (JULY 10-12, 2014) (*citing* TEXAS JUDICIAL SYSTEM SUBJECT MATTER JURISDICTION, OFFICE OF COURT ADMINISTRATION).

duties of office, whereas the bond amount for all other judges is between $1,000 and $10,000. Tex. Gov't Code §§ 25.00231, 25.006, 26.001. Statutory probate courts also receive funding for additional staff, such as court investigators, to assist with probate and guardianship specific tasks. Tex. Gov't Code §§ 25.0024, 25.0025, 25.00251. These standards were designed at a time when the statutory probate courts heard 80% or more of all guardianship cases filed in Texas. In contrast, 40% or more of all Texas guardianship petitions today are filed in the state's county-level courts.

When a guardianship petition is filed in statutory probate court, the court must receive a physician's evaluation of the allegedly incapacitated person and a court investigator must determine the availability of less restrictive alternatives to guardianship. Tex. Estates Code §§ 1101.103, 1054.151. Notably, the requirement to engage in an LRA determination applies only to statutory probate courts.

Following this initial evaluation, the court will hold a hearing to hear evidence of the alleged incapacity of the person who is the subject of the petition. Tex. Estates Code § 1101.051. After the hearing, the court will issue an order (1) granting a full guardianship, (2) granting a limited guardianship in which the guardian receives limited decision-making authority and the person under guardianship retains select rights, or (3) denying the guardianship petition altogether. Once created, the person named as guardian may change, but the guardianship itself remains in effect until the individual under guardianship dies or is found, by the court, to no longer require a guardian's support (i.e., a restoration of rights). Tex. Estates Code §§ 1101.151, 1101.152, 1101.155.

The Estates Code provides for ongoing monitoring of any guardianship, including the filing of annual reports for guardianships of the person and annual accountings

for guardianships of the estate.[9] Annual reports must be filed with the court once each year for the duration of the guardianship. Tex. Estates Code § 1163.101. The court must review the report and exercise "reasonable diligence" to determine if the guardian is performing all of the required duties and whether the guardianship should be continued, modified, or terminated. Tex. Estates Code §§ 1201.001, 1201.002, 1201.052. Whereas statutory probate courts are given specific instructions regarding the review process, county courts "may use any method . . . that is determined appropriate by the court according to the court's caseload and available resources." Tex. Estates Code § 1201.053.

## III. REVIEW OF STATE PRACTICES

Guardianship statutes in seventeen states were reviewed to better understand what other states are doing to strengthen guardianship protection and oversight.[10] Each of these states has been identified in the guardianship literature as having enacted reforms to address key areas of concern. The following summary highlights six areas of possible reform.

### 1. Early Consideration of Less Restrictive Alternatives to Guardianship

All of the surveyed states require the court to consider less restrictive alternatives to guardianship at some point in the process of petitioning and granting a guardianship over an incapacitated person. Wide variation exists, however, in how each state directs its courts' consideration.

[9] It is worth noting that additional court oversight is required for guardianships of the estate. For example, Texas law provides that an inventory and appraisal typically must be filed with the court not later than the 30th day after the date a guardian of an estate is qualified, after which the court must affirmatively approve or disprove the claims. Tex. Estates Code §§ 1154.051, 1154.054. Likewise, except as otherwise provided, a court order is required for the sale of any property owned by the individual. Tex. Estates Code § 1158.001.

[10] The following 17 states were included in this review: Arizona, Colorado, Connecticut, Florida, Georgia, Hawaii, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, New York, Ohio, Oklahoma, Rhode Island, and Tennessee. *See* Appendix A *infra* at p. 20 for a chart summarizing each state's statutory requirements. Three of these states, Colorado, Hawaii, and Massachusetts, have adopted all or substantially all provisions of the Uniform Guardianship and Protective Proceeding Act (UGPPA).

***State Review***

The approaches taken by the surveyed states as to when and how LRAs are considered fall into three general categories:

→ **Mandatory consideration prior to filing the petition.**

Rhode Island, New York and Arizona require the initial guardianship petition to describe either the less restrictive alternatives to guardianship that have already been considered or the resources available to the allegedly incapacitated person that could help the individual with his or her needs.[11]

→ **Mandatory consideration prior to ruling on the petition.**

Nine states[12] have statutory procedures allowing the court to investigate the abilities of the allegedly incapacitated individual. The procedures vary from state to state, but all involve an independent investigation by either a physician, psychologist, social worker, or court employee. All nine states couple this investigative procedure with a requirement that the investigator file a report with the court, along with a requirement that the court must not grant a guardianship unless LRAs are unavailable.[13]

→ **Guardianship allowed only after a finding that LRAs are not available, but no guidance on timing of that consideration.**

The remaining five states[14] mandate that the court may not grant a guardianship unless it first finds that there are not less restrictive alternatives to guardianship available. These states do not have a statutorily proscribed point in time where a court must investigate the availability of less restrictive alternatives to guardianship.[15]

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[11] For sample statutory language, *see* R.I. Gen. Laws Ann. § 33-15-2.
[12] Colorado, Florida, Georgia, Hawaii, Louisiana, Minnesota, Ohio, Oklahoma, and Tennessee
[13] For sample statutory language, *see* Colo. Rev. Stat. § 15-14-305; Haw. Rev. Stat. §§ 560:5-306.
[14] Connecticut, Maryland, Massachusetts, Missouri, and Nebraska
[15] For sample statutory language, *see* Conn. Gen. Stat. Ann. § 45a-650(f); Mo. Ann. Stat. § 475.075.

***The Texas Approach***

Texas uses an approach that is similar to the states that require the court to consider LRAs prior to granting a petition. Upon the filing of a guardianship petition, the Texas Estates Code requires that a court investigator examine the "circumstances alleged in the application to determine whether a less restrictive alternative to guardianship is appropriate." Tex. Estates Code § 1054.151. However, Texas does not statutorily require courts to rule out the availability of LRAs prior to instituting a guardianship. Additionally, the "court investigator" can only be appointed by a statutory probate judge and no equivalent role exists in county courts at law or constitutional county courts. Courts other than statutory probate courts may set up "court visitor" programs, where the court may, at its discretion, send a visitor to meet with the allegedly incapacitated person and then file a report regarding the allegedly incapacitated person's mental and physical health, and need for a guardianship. Tex. Estates Code §§ 1054.103, 1054.104. The court visitor programs, however, are discretionary in all courts but the statutory probate court and operate in accordance with the "financial abilities of the area the court serves." Tex. Estates Code § 1054.102.

***Discussion***

Texas should first require that guardianship petitions contain specific references to LRAs that are available to the allegedly incapacitated person, as well as a description of any LRAs that have been unsuccessful in providing the necessary support. This will put the initial onus for investigating LRAs on petitioners—thus alleviating some of the burdens on the court—as well as ensure that guardianship is sought only as a last resort.

Texas should institute a statutory requirement that a court cannot grant a guardianship without a separate finding that less restrictive alternatives are either unavailable or inadequate. This will help to further ensure that guardianship is used only as a last resort—a particularly important concern given the significant judicial resources that may be expended on long term monitoring of guardianships.

Additionally, Texas should provide additional resources so that all courts—not just statutory probate courts—can hire court investigators. An estimated 40% of guardianship petitions in Texas are now heard in county courts, and not in statutory probate courts. This will help to ensure that adequate resources are devoted to considering the availability and appropriateness of guardianship alternatives, so that guardianship is only used when absolutely necessary.

### *2.* Court Findings in Guardianship Orders

Limited judicial resources notwithstanding, two states have added to the requirements of the court order establishing guardianship.

#### *State Review*

Florida and Oklahoma specifically require the court order establishing a guardianship to set out the factual basis that the court used in determining that less restrictive alternatives to guardianship were either unavailable or inadequate.[16]

#### *The Texas Approach*

Texas does not require the consideration of LRAs, except by court investigators in statutory probate courts. Instead, Texas judges use a preponderance of the evidence standard in determining whether the allegedly incapacitated person is "totally without capacity . . . to care for himself or herself and to manage his or her property; or . . . lacks the capacity to do some, but not all, of the tasks necessary to care for himself or herself or to manage his or her property." Tex. Estates Code § 1101.101. Such a finding must be made prior to instituting guardianship.

#### *Discussion*

In addition to requiring the consideration of LRAs, discussed above, Texas should require court orders implementing a guardianship to set out the specific factual basis for determining that LRAs are either unavailable or insufficient to address the

[16] For sample statutory language, *see* Fla. Stat. Ann. § 744.331; Okla. Stat. Ann. tit. 30, § 3-111.

needs of the person under guardianship. Like requiring additional consideration of LRAs, requiring specific factual findings supporting the court order will help to ensure that guardianship is used only as a last resort. It will also help to promote full and careful consideration of the available alternatives to guardianship.

## 3. Guardianship Monitoring and Review

One of the most resource intensive and time-consuming aspects of guardianship is the periodic review of existing guardianships. Though time and resource intensive, guardianship monitoring and review is an essential aspect of ensuring that guardianship remains a last resort, that the needs of persons under guardianship are being met, and that when it is used it is used in a manner that gives the greatest possible degree of personal freedom and autonomy to the person under guardianship.

### *State Review*

With the exception of Oklahoma,[17] none of the surveyed states explicitly requires subsequent reconsideration of LRAs after guardianship has already been instituted. Nearly all of the surveyed states, however, require filing a guardianship report at least annually, and this report must consider the continued appropriateness of the guardianship. The specific content requirements for the reports vary from state to state, but generally all of the surveyed states that require annual reports require some mix of the following:

(1) basic demographic information (e.g. any changes in residence for the person under guardianship, contact information for the person under guardianship, etc.),

(2) an evaluation of the mental and physical condition of the person under guardianship,

[17] Oklahoma requires the filing of an annual guardianship report that must, among other things, state why the guardianship should be continued and why no LRAs will provide the necessary resources for the person under guardianship to care for themselves. Okla. Stat. Ann. tit. 30, § 4-305.

(3) an account of any major decisions made on behalf of the person under guardianship during the reporting period,

(4) documentation of guardian visits, and

(5) a recommendation as to whether the guardianship should be continued, altered to increase or decrease the guardian's powers, or discontinued altogether.

***The Texas Approach***

Texas follows the approach of these other states in requiring an annual report to be filed by every guardian, and requires the judge who instituted the guardianship to annually review the guardianship to determine if the guardianship should continue, be modified, or be terminated. Like the other states though, Texas does not require explicit consideration of the availability of less restrictive alternatives to guardianship. Additionally, Texas courts regularly encounter extremely low compliance with the reporting requirements, and experience great difficulty in enforcing the reporting requirements—though judges are statutorily authorized to issue fines, revoke bonds, or remove guardians if they fail to file the annual report. Tex. Estates Code § 1163.151.[18] Part of the reason for this minimal reporting is the difficulty courts encounter in tracking cases and determining filing deadlines for each individual case. Guardians also may not renew their letters of guardianship (which expire annually) unless their guardianship report has been filed and approved by the court. Tex. Estates Code § 1106.003.

[18] According to a recent sample of Texas courts, an initial annual report was only filed in 28% of cases, with reporting rates declining significantly after the first year. DAVID SLAYTON, OFFICE OF COURT ADMINISTRATION, TEXAS GUARDIANSHIP CASES: IMPROVING COURT PROCESSES AND MONITORING PRACTICES IN TEXAS COURTS 9 (2014) *available at* http://www.txcourts.gov/media/700159/GUARDIANSHIP-STUDY_11-12-14-Final.pdf. A 2014 survey of state probate judges revealed similar concerns. LAURA UPCHURCH AND WENDY J. YATES, TEXAS PROBATE JUDGES SURVEY, PRESENTATION TO THE STATE BAR OF TEXAS 38TH ANNUAL ADVANCED ESTATE PLANNING & PROBATE COURSE 3 (JULY 10-12, 2014).

***Discussion***

On this particular element, Texas is on par with the surveyed states in requiring an annual report, from the guardian, that evaluates the continued necessity of the guardianship. While Texas is similar to the surveyed states in this respect, the Estates Code should be strengthened by requiring the annual guardianship report to specifically address the availability of LRAs and whether any new, non-guardianship based resources have become available in the preceding year that would provide the support needed for the person under guardianship.

Additionally, Texas should either create a statewide electronic case monitoring system for guardianships that individual courts can opt into, or Texas should provide resources to county and probate courts to implement their own computer-based case management systems. Providing resources to create electronic case monitoring systems would aid courts in more efficiently tracking filing deadlines, and would allow courts to use "tickler" systems that provide alerts to the court when reporting deadlines are approaching or have passed. Instituting electronic monitoring requires an initial financial investment, but would save significant court resources later in the oversight process and ensure better and more consistent protection for those individuals living under guardianship.

**4. Guardianship Plans**

Consistent with meaningful guardianship monitoring and review, it is important that a specific plan is created at the outset of a guardianship to ensure that the person under guardianship is properly cared for while also allowing for the maximum possible degree of personal freedom and autonomy. An emerging trend is for states to require guardians to create and file specific plans at the immediate outset of the guardianship, to inform and guide the monitoring process.

***State Review***

Both Florida and Oklahoma require that the proposed guardian submit a plan that details the needs of the individual under guardianship and how the guardian will take care of those needs. Oklahoma requires the guardianship plan to set out how the guardian intends to share decision-making authority with the individual. Florida requires that the guardianship plan be consistent with the wishes of the individual under guardianship, to the maximum extent possible. Florida also requires the guardian to file a new guardianship plan each year, setting out how the guardian intends to care for the incapacitated person in the following year.[19]

***The Texas Approach***

Texas law does not require a guardian to create any kind of guardianship plan detailing how the person under guardianship will be cared for or how the guardian will share decision making authority with the person under guardianship.

***Discussion***

Texas should require a guardian to submit a guardianship plan at the start of every guardianship. The plan should detail the specifics of where the individual under guardianship will live, how his or her specific needs will be taken care of, and the level of involvement the individual will have in making decisions. Adding this requirement can help to accomplish two goals: (1) it flags for the court any potential problems with the guardianship at the outset, thus providing notice of potential conflicts, and (2) it assists in the annual guardianship evaluation by providing a clear benchmark for future review. As for this second goal, Texas should also consider requiring guardians to seek court permission when deviating from the initial guardianship plan. In particular, deviations from the guardianship plan relating to residency, medical care, and access to friends and family should trigger a more searching review from the court. This sort of heightened oversight would

[19] For sample statutory language, *see* Fla. Stat. Ann. § 744.363 (requiring an initial guardianship plan); Fla. Stat. Ann. § 744.3675 (requiring an annual guardianship plan every year thereafter); Okla. Stat. Ann. tit. 30, § 3-120.

bring guardianships of the person in line with what already is statutorily required for guardianships of the estate in terms of inventories, accountings, and court monitoring.

### 5. Guardian Decision-Making Standards

Yet another concern is the manner in which a guardian exercises his or her authority on behalf of the person under guardianship. Traditionally, states have used a "best interest" standard, though that appears gradually to be changing. Under a best interest standard, a guardian—when making decisions on behalf of the individual—simply evaluates the options and chooses the one that will, in the guardian's opinion, best improve the welfare of the person under guardianship. The standard by which a guardian makes decisions, though, has a profound effect on the person under guardianship. And the statutory standard a state employs can play a strong role in determining a guardian's decision-making style.[20]

#### *State Review*

Many states still require a guardian to make decisions that are in the individual's "best interests," but the trend is toward some form of substituted decision-making.[21] Under a substituted decision-making standard the guardian determines, or attempts to determine, the wishes and desires of the person under guardianship, and then makes a decision that most closely aligns with what that individual would have chosen for himself or herself.

Seven of the surveyed states[22] use a hybrid decision-making standard, where the guardian has a duty to act in the best interests of the individual, but must also take into account the person's wishes to the maximum extent possible.[23] Connecticut

[20] Linda S. Whitton & Lawrence A. Frolik, *Surrogate Decision-Making Standards for Guardians: Theory and Reality*, 2012 UTAH L. REV. 1491 (2012).

[21] Many states utilize a two-step process – using substituted decision-making as a first option and then moving to a best interest standard if there is no information available or when substituted decision-making would cause harm.

[22] Arizona, Colorado, Florida, Georgia, Hawaii, Massachusetts, and New York

[23] For sample statutory language regarding the hybrid decision making standard, *see* Ariz. Rev. Stat. Ann. § 14-5312; N.Y. Ment. Hyg. Law § 81.20.

provides the most precise and robust substituted decision-making standard. Connecticut's guardianship laws set out in specific terms how the guardian is supposed to include the individual in decision-making.[24] Three of the surveyed states[25] create an affirmative duty for the guardian to encourage and assist the incapacitated person to develop or regain the ability to manage his or her own affairs.[26]

***The Texas Approach***

Texas has no statutorily required decision-making standard for guardians. The guardian has a duty to provide care, supervision, and protection for the person under guardianship, in addition to providing food, clothing, medical care and shelter. Some guardianship guides in Texas recommend including the individual in the decision-making process,[27] though it appears that in practice Texas employs a best interest standard.

***Discussion***

Texas should follow the trend of other states and adopt a clear statutory decision-making standard that requires guardians to account for the wishes of persons under guardianship when making decisions on their behalf. Additionally, Texas should impose an affirmative duty on guardians to encourage and assist the individual to develop or regain the ability to manage his or her own affairs. Both of these changes will ensure that guardianships, when used, are used in the least restrictive manner possible and recognize, to the greatest degree possible, the individual's continued autonomy. Enhancing the individual's role may also help to alleviate burdens on the guardianship system by reducing the period of time spent under guardianship.

[24] Conn. Gen. Stat. Ann. § 45a-656.
[25] Georgia, Hawaii, and Massachusetts
[26] For sample statutory language regarding the affirmative duty, *see* Ga. Code Ann. § 29-4-22; Haw. Rev. Stat. § 560:5-314; Mass. Gen. Laws Ann. ch. 190B § 5-309.
[27] *See, e.g.*, HARRIS COUNTY PROBATE COURT, HARRIS COUNTY PROBATE COURTS GUARDIANSHIP OF THE PERSON AND ESTATE HANDBOOK 7.

## 6. Guardian Training and Certification

Charged with core decision-making authority for another individual, it is imperative that all newly appointed guardians understand the full extent of their duties to the court and to the person under guardianship. Implementing meaningful training requirements for all guardians is a necessary first step toward ensuring statutory compliance.

### *State Review*

Florida requires that a newly appointed guardian receive a minimum of 8 hours of training regarding the duties of a guardian, the rights of a person under guardianship, the resources available to the guardian and person under guardianship, and the preparation of guardianship reports and plans. Nebraska also requires all newly appointed guardians to undergo training, but allows the Public Guardian (a public office tasked with providing training, education and support to guardians and conservators) to develop and implement the training program for new guardians.

### *The Texas Approach*

Texas requires training and certification for professional guardians and employees of the Department of Aging and Disability Services, but does not mandate training for family or friends who are appointed as a guardian.

### *Discussion*

Texas should expand its guardianship training requirements so that all new guardians are required to undergo the same (or similar) training that professional guardians must undergo. Guardians' duties are far reaching and critical to the health and well-being of the person under guardianship. To this end, it is essential that all newly appointed guardians – professional and non-professional alike – receive training to ensure that they safely and competently fulfill all statutory obligations. Expanded guardianship training would be of particular benefit to the numerous county courts that are overseeing guardianships without the added support of court

visitor programs or court investigators. Training could be provided by individual courts, the Texas State Bar, or a statewide guardianship program or organization for little or no cost.

## IV. AN EMERGING CONSENSUS AROUND BEST PRACTICES

Guardianship laws have undergone significant change over the past twenty-five years. Increased awareness of the risks from lax oversight and efforts to bring heightened protection and understanding to the entire guardianship process has led to a surge of state reforms.[28]

In their 2007 report *Guarding the Guardians: Promising Practices for Court Monitoring*, Naomi Karp, of the AARP Public Policy Institute, and Erica Wood, of the ABA's Commission on Law and Aging, offer a summary of promising practices based, in part, on a review of a 2005 national survey of guardianship experts and then-current state practices. Among the identified practices: (1) enhanced reporting, accounting, and planning requirements (including prospective guardianship plans and advance court approval for certain actions); (2) streamlined reporting obligations; (3) mandated court review of annual reporting documents; (4) greater utilization of court investigators (including volunteer advocates, court visitor programs, or social work interns); (5) additional resources to support court technologies that can increase research and monitoring capabilities; (6) creation of an interdisciplinary collaboration among a range of stakeholders, researchers,

[28] In both 2012 and 2013, for example, almost half of all state legislatures enacted at least one adult guardianship bill. ERICA WOOD, STATE ADULT GUARDIANSHIP LEGISLATION: DIRECTION OF REFORM – 2012, COMMISSION ON LAW AND AGING, AMERICAN BAR ASSOCIATION *available at* http://www.americanbar.org/content/dam/aba/administrative/law_aging/2012_state_adult_guardianship_legislation.authcheckdam.pdf; ERICA WOOD, STATE ADULT GUARDIANSHIP LEGISLATION: DIRECTION OF REFORM – 2013, COMMISSION ON LAW AND AGING, AMERICAN BAR ASSOCIATION *available at* http://www.americanbar.org/content/dam/aba/administrative/law_aging/2013_final_guardianship_legislative_update_12-18-13.authcheckdam.pdf. Most recently, Pennsylvania's Supreme Court issued a 285-page report, including 12 pages of recommendations that encompass the state's entire guardianship system. THE SUPREME COURT OF PENNSYLVANIA, REPORT AND RECOMMENDATIONS OF THE ELDER LAW TASK FORCE (2014) *available at* http://www.pacourts.us/courts/supreme-court/committees/supreme-court-boards/elder-law-task-force.

organizations and others working in the field; and (7) increased training and educational resources for guardians.

The trajectory of past reform is well documented in this and similar reports, with the recurring message that, as the number of existing guardianships increases, so too, the need for greater innovation and creative use of resources grow.

## V. SUMMARY OF FINDINGS

The guardianship system encompasses a complicated mix of competing interests and limited resources. Guardianships are resource intensive for both courts and guardians, and they severely limit the rights and personal autonomy of the individuals placed under guardianship. At the same time, with the increasing size of the elderly population and the continuing needs of people with intellectual and developmental disabilities, the guardianship system is a necessary resource that must be strengthened to meet the growing needs of Texas citizens. And as the number of guardianships filed in county courts continues to increase, there is a need for additional support and expertise across the state.

This brief review of state trends and "promising practices" suggests that Texas' guardianship system, even today, falls short of what is needed. Accordingly, a broad coalition of stakeholders in the guardianship system is actively evaluating proposals to shore up the current system. Particular note should be given to the Texas Judicial Council's Elder Committee, the Texas Office of Court Administration, and the Working Interdisciplinary Network of Guardianship Stakeholders (WINGS), all of which have been considering ways to improve both the laws and the administration of guardianships in Texas.[29]

[29] *See, e.g.*, TEXAS JUDICIAL COUNCIL ELDERS COMMITTEE, RECOMMENDATIONS (2014), *available at* http://www.txcourts.gov/media/699881/Elders-Legislative-Recommendations-Report-FINAL.pdf. These efforts should be uniformly endorsed insofar as they address key gaps in the system and seek to provide critical resources to county court systems.

Texas would benefit by enhancing its guardianship system with the addition of the following protections:

1. *Require consideration of Less Restrictive Alternatives at the earliest possible opportunity*. *Require the Court to create a record supporting the LRA determination, including why available LRAs are insufficient to address the individual's needs and any efforts made to identify additional LRA resources.*

*2. Require Guardianship Plans that outline anticipated significant decisions to be made during the coming year and filed with the Court within 30 days of the guardian's appointment. Deviation from the Guardianship Plan with regard to place of residence, health care decisions, or contact with family and friends, would require advance judicial notice and approval, unless undertaken in response to a documented emergency.*

*3. Require guardianship annual reporting to expressly identify efforts made during the preceding year to identify LRAs and the results of those efforts.*

*4. Create uniform guardianship pleadings and related documents to ensure uniform guardianship standards and implementation across counties, and to streamline training for judges, attorneys, and guardians.*

*5. Create a new statutory provision expressly setting forth a substituted decision-making standard for all guardians, including a definition of the standard means and how it should be implemented.*

*6. Require at least 4 hours of guardianship training for all newly appointed non-professional guardians. Training must be completed prior to appointment or, at a minimum, within 30 days of the appointment.*

Texas also would benefit greatly from creation of a Permanent Guardianship Commission.[30] The complex mix of issues, interests, and stakeholders involved at every stage of the guardianship process suggests a need for a single statewide entity charged with identifying priorities for strengthening the state's guardianship system; creating comprehensive training and educational resources for lawyers, judges, families, and advocates alike; undertaking research to identify gaps in the state's guardianship systems and gathering the evidence necessary to make informed decisions regarding utilization of resources; and capturing expertise from around the state to fully inform the conversation.

[30] A Permanent Guardianship Commission could function similarly to the Texas Supreme Court's Permanent Judicial Commission for Children, Youth and Families, which has provided critical ongoing support to stakeholders on equally complex issues. Indeed, a threshold recommendation in the recent Pennsylvania Guardianship Report was the creation of an Office of Elder Justice in the Courts and related Advisory Council tasked with implementing that report's numerous recommendations. *See* ELDER LAW TASK FORCE REPORT, *supra* note 27, at 220.

## VI. APPENDIX A: STATE CHART

| State | At what point in the process must LRAs be considered and addressed? | Is the guardian required to submit a guardianship plan to the court? | Are LRAs reconsidered at any point after implementing a guardianship? | What is the decision making standard for the guardian? | Is the allegedly incapacitated person required to be at the hearing? | Are there licensing/training requirements for guardians? | Notes |
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| Arizona | The initial petition for a guardianship must "state that other alternatives have been explored." Ariz. Rev. Stat. Ann. § 14-5303.<br><br>Additionally, the court may only appoint a guardian if it finds by clear and convincing evidence that the allegedly incapacitated individual's needs cannot be met by LRAs. Ariz. Rev. Stat. Ann. 14-5303. | No | A guardian must submit an annual report with the court detailing, among other things, "the guardian's opinion as to whether the guardianship should be continued." Ariz. Rev. Stat. Ann. § 14-5315. However, no specific consideration of LRAs is required in the report. | A guardian has a general duty to act and make decisions in the best interests of the ward, but in considering what the best interests of the ward are, the guardian is required to take into consideration the "particular desires of the individual" and the ward's "values and wishes." Ariz. Rev. Stat. Ann. § 14-5312.<br><br>When deciding whether or not to refuse medical treatment, a guardian should look to the incapacitated person's past wishes and desires. Where not discernable, the guardian should use a "best interests" test, looking at objective criteria such as "relief from suffering, preservation or restoration of functioning, and quality and extent of sustained life." *Rasmussen by Mitchell v. Fleming* , 741 P.2d 674, 689 (Ariz. 1987). | No. The allegedly incapacitated person is entitled to be present at the hearing, but is not required to be present. Ariz. Rev. Stat. Ann. § 14-5303. | No. | |
| Colorado | After filing a petition, the court must send a visitor to interview the allegedly incapacitated individual. The visitor must file a report detailing the availability of LRAs and the appropriateness of guardianship. Colo. Rev. Stat. § 15-14-305.<br><br>The court must also consider the availability of LRAs, and can only grant a guardianship if it finds by clear and convincing evidence that LRAs are not available. Colo. Rev. Stat. § 15-14-311. | No. | A guardian is required to file a report with the court at least annually, detailing the status of the incapacitated person. The report must include "a recommendation as to the need for continued guardianship and any recommended changes in the scope of the guardianship," but no specific consideration of LRAs is statutorily required. Colo. Rev. Stat. § 15-14-317. | The guardian has an overarching duty to act in the best interests of the incapacitated person. However, the guardian must also consider the expressed desires and personal values of the incapacitated person when making decisions on his or her behalf. Colo. Rev. Stat. § 15-14-314. | Yes, the allegedly incapacitated person must be present at the hearing, unless dismissed by the court for good cause. Colo Rev. Stat. § 15-14-308.<br><br>The allegedly incapacitated person has the right to present evidence, subpoena witnesses and documents, and examine witnesses. *Id* .<br><br>The individual petitioning for the guardianship must make "every reasonable effort to secure the respondent's attendance at the hearing." *Id.* | No. | Courts appear to ignore wholesale the requirement that a guardian consider (to the maximum extent possible/known) the desires and wishes of the incapacitated person, and instead treat the standard as strictly best-interest. *People ex rel. Morgan Cnty. Dep't of Human Servs. ex rel. Yeager* , 93 P.3d 589 (Colo. 2004) (admitting evidence regarding probability of survival and prognosis for survival in ordering a guardian to enter a DNR order for his ward, and explicitly stating that the evidence was relevant to whether the guardian would act in the ward's best interest); *Mofett v. Life Care Centers of America* , 219 P.3d 1068 (Colo. 2009) (comparing the duty of a person with power of attorney to that of a guardian, stating that the duty is a legally enforceable duty to act in the principle's best interests) |
| Connecticut | The notice that must be given to the allegedly incapacitated person upon filing a petition for guardianship must spefically detail that the court must consider the availability of LRAs. Conn. Gen. Stat. Ann. § 45a-649.<br><br>The court is required to consider LRAs that can meet the needs of the allegedly incapacitated person, though it is unclear at what point in the guardianship process the court must make such consideration. Conn. Gen. Stat. Ann. § 45a-650(g).<br><br>The court may only appoint a guardian upon finding by clear and convincing evidence that guardianship is the least restrictive means of meeting the allegedly incapacitated person's needs. Conn. Gen. Stat. Ann. § 45a-650(f)(1)-(2). | No. | The guardian file a report with the court at least annually that details "the efforts made to encourage the independence of the conserved person and the conservator's statement on whether the appointment of the conservator is the least restrictive means of intervention for managing the conserved person's needs." Conn. Gen. Stat. Ann. § 45a-656(c).<br><br>Additionally, the court must review the guardianship within the first year of initiating the guardianship, and no less frequently than every three years thereafter. Conn. Gen. Stat. Ann. § 45a-660(c). During this review, the court shall receive various sources of evidence and testimony, including a report from a court appointed physician who must examine and interview the incapacitated person. Id. In order to continue the guardianship, the court must find by clear and convincing evidence that the incapacitated individual is still incapable of managing his or her affairs, and that guardianship is still the least restrictive alternative. If the court fails to find this by clear and convincing evidence, then it must terminate the guardianship. Conn. Gen. Stat. Ann. § 45a-660(d). | The guardian has a general duty to include the ward in the decision making process to the maximum extent possible. In particular, the law provides that the guardian shall: "(1) assist the conserved person in removing obstacles to independence, (2) assist the conserved person in achieving self-reliance, (3) ascertain the conserved person's views, (4) make decisions in conformance with the conserved person's reasonable and informed expressed preferences. . . . The conservator shall afford the conserved person the opportunity to participate meaningfully in decision-making in accordance with the conserved person's abilities and shall delegate to the conserved person reasonable responsibility for decisions affecting such conserved person's well-being. Conn. Gen. Stat. Ann. § 45a-656. | No. However, if the allegedly incapacitated person notifies the court that he or she wishes to attend the hearing but is unable to do so, the court must schedule the hearing at a place that would facilitate that attendance. Conn. Gen. Stat. Ann. § 45a-645c. | No. | In the event of an incapacitated individual being placed on life-support (or similar life-sustaining treatment), the right of privacy allows the guardian to exercise substituted judgment with regard to the life-sustaining treatment. *Foody v. Manchester Memorial Hosp.* , 482 A.2d 713, 720 (Conn. 1984). The test is a subjective one, where the guardian and family must determine the wishes of the incapacitated individual to the greatest extent possible. *Id.*<br><br>Where there has been no expression of the individual's wishes, the test is a straightforward best-interest test when making healthcare decisions for an incapacitated individual. *Id.* at 721. |

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| Florida | Upon receiving a petition for guardianship, the court must appoint a three member committee to evaluate the allegedly incapacitated person. At least one member of the committee must be a physician or psychologist. Each member of the committee must submit a report to the court detailing the abilities and limitations of the allegedly incapacitated person, though no specific discussion of LRAs is required. Fla. Stat. Ann. § 744.331.<br><br>Additionally, the court order appointing a guardian must state whether there are alternatives available to meet the allegedly incapacitated person's needs. If the court finds that LRAs are available, it may not appoint a guardian. Fla. Stat. Ann. § 744.331. | Yes. The guardian must file an initial guardianship plan that details how the incapacitated person will be cared for. Fla. Stat. Ann. § 744.363.<br><br>Each year thereafter, the guardian must file an annual guardianship plan detailing how the incapacitated person will be cared for in the coming year. Fla. Stat. Ann. § 744.3675 | Yes. In addition to the annual guardianship plan that the guardian must submit, the court is also required to annually review the appropriateness and extent of all existing guardianships. Fla. Stat. Ann. § 744.3657(1)(b)(2). | The guardian has a general duty to make decisions in the best interests of the incapacitated person. Fla. Stat. Ann. § 744.3715(1). However, in drafting the initial guardianship plan, the guardian is required to consult the incapacitated person, and to "the maximum extent reasonable, the plan must be in accordance with the wishes of the ward." Fla. Stat. Ann. § 744.363. | Yes. The allegedly incapacitated person must be present at the hearing, unless the allegedly incapacitated person or his or her attorney waives this right, or good cause is shown for his or her absence. Fla. Stat. Ann. § 744.331. | Yes. Any guardian (except for a parent guardian of a minor child) must receive a minimum of 8 hours of training and instruction on (1) the legal duties/responsibilities of the guardian, (2) the rights of the incapacitated person, (3) the availability of local resources to aid the incapacitated person, and (4) the preparation of habilitation plans and annual guardianship reports. This training must be completed within 4 months of being appointed as a guardian. Fla. Stat. Ann. § 744.3145 | Where an individual left a living will directing that life-sustaining treatment should be stopped if she were diagnosed with a terminal illness, the individual's guardian was allowed to remove life support from the patient after she became incapacitated. *In re Guardianship of Browning* , 568 So.2d 4 (Fla. 1990). Specifically, when the incapacitated individual has left instructions regarding life-support and end of life treatment, the guardian is obligated to make the choice that the incapacitated individual would have made if competent. *Id.* at 13. |
| Georgia | The court may only grant a guardianship after a determination that LRAs are either not available or not appropriate. Ga. Code Ann. § 29-4-1. However, it is unclear at what point in the guardianship process LRAs must be considered.<br><br>The court must appoint a physician, psychologist or social worker to interview the allegedly incapacitated person. This interviewer must file a report detailing his or her findings, but the report does not need to directly address the availability of LRAs. Ga. Code Ann. 29-4-11. | No. | The guardian must file an annual report with the court that details any "recommendations for any alteration in the guardianship order," but it does not have to include any information regarding whether LRAs have become appropriate. Ga. Code Ann. § 29-4-22(b)(9). However, the guardian has a duty at all times to "promptly notify the court of any changes in the ward's condition that in the opinion of the guardian might require modification or termination of the guardianship." Ga. Code Ann. § 29-4-22(b)(10). | The guardian has an overarching duty to always act in the best interests of the incapacitated individual, but is also required, "to the maximum extent possible," to include the incapacitated individual in decision making, and to encourage him or her to develop or regain the capacity to manage his or her own affairs. Ga. Code Ann § 29-4-22. | No. The allegedly incapacitated individual or his or her attorney may waive the allegedly incapacitated individual's presence at the hearing. Ga. Code Ann. § 29-4-12(d)(1). | No. | |
| Hawaii | Upon receiving a petition for guardianship, the court must appoint an investigator to interview the allegedly incapacitated individual. The investigator must file a report with the court detailing the mental and physical condition of the allegedly incapacitated person, and must include a consideration of the availability and appropriateness of LRAs. Haw. Rev. Stat. § 560:5-306.<br><br>Additionally, the court may only appoint a guardian upon finding by clear and convincing evidence that LRAs cannot meet the needs of the allegedly incapacitated person. Haw. Rev. Stat. § 560:5-311. | No. | The guardian is required to file a report with the court at least annually that gives a "recommendation as to the need for continued guardianship and any recommended changes in the scope of guardianship." Haw. Rev. Stat. § 560:5-317(a)(7). However, the report is not required to specifically consider the availability of LRAs.<br><br>The court may also, at its discretion, appoint an investigator to review the report and interview the guardian and ward. Haw. Rev. Stat. § 560:5-217(b). | The guardian has an overarching duty to always act in the best interests of the incapacitated individual. However, he or she is also required, to the maximum extent possible, to include the incapacitated person in decision making and to encourage him or her to develop or regain the capacity to manage his or her own affairs. Haw. Rev. Stat. § 560:5-314. | Yes, the allegedly incapacitated person must be present at the hearing, unless dismissed by the court for good cause. Haw. Rev. Stat. § 560:5-308.<br><br>The allegedly incapacitated person has the right to present evidence, subpoena witnesses and documents, and examine witnesses. *Id* . | No. | |

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| State | At what point in the process must LRAs be considered and addressed? | Is the guardian required to submit a guardianship plan to the court? | Are LRAs reconsidered at any point after implementing a guardianship? | What is the decision making standard for the guardian? | Is the allegedly incapacitated person required to be at the hearing? | Are there licensing/training requirements for guardians? | Notes |
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| Louisiana | After filing a petition, the court has the discretion to appoint an examiner to interview the allegedly incapacitated person. The examiner must then file a report with the court. The court may, but does not have to, require that the report include consideration of LRAs. La. Code Civ. Proc. Ann. Art. 4545.<br><br>Additionally, the court may only appoint a guardian if it finds that the allegedly incapacitated person's needs cannot be met by less restrictive means. La. Civ. Code Ann. Art. 389−390. | No. | No. The guardian must file an annual report with the court detailing the location and condition of the incapacitated person, but the report does not need to discuss the continued appropriateness of guardianship or the availability of LRAs. La. Civ. Code Ann. Art. 4569. | It is unclear what the exact decision making standard is for a Louisiana guardian, except that the relationship is same as that between a "minor and a tutor." La. Code Civ. Proc. Ann. Art. 4566. A tutor has the duty to "see that the minor is properly reared and educated in accordance with his station in life." La. Code Civ. Proc. Ann. Art. 4261. No other clear decisionmaking standards are present in Louisiana statutes. | Yes. The allegedly incapacitated person has a right to be present at the hearing, and the court may not conduct the hearing in his or her absence without a determination of good cause to do so. La. Civ. Proc. Ann. Art. 4547. | No. | |
| Maryland | It is unclear at what point in the process the court must consider the availability of LRAs, but the court must only appoint a guardian of the person if "no less restrictive form of intervention is available which is consistent with the person's welfare and safety." Md. Code Ann., Est. & Trusts § 13-705. | No. | The court may, at its discretion, require the guardian to file annual reports detailing “the need for the continuance or cessation of the guardianship or for any alterations in the powers of the guardian.” However, these reports do not need to specifically address the availability of LRAs. Md. Code Ann., Est. & Trusts § 13-708(b)(7). | The duties of a guardian are set out in broad terms, and do not speak specifically to whether the guardian is to act in the best interests of the ward or to enact some sort of substituted decisionmaking plan. Md. Code Ann., Est. & Trusts § 13-708. | No. The allegedly incapacitated person has the right to be present at the hearing and to present evidence. But this right may be knowingly and voluntarily waived by the allegedly incapacitated person, or may be waived by the court if he or she cannot be present due to physical or mental incapacity. Md. Code Ann., Est. & Trusts § 13-705. | No. | |
| Massachusetts | The court may only grant a guardianship after finding that the allegedly incapacitated person's needs cannot be met by LRAs. Mass. Gen. Laws Ann. ch. 190B, § 5-306. It is not clear at what point in the guardianship process the court must consider the availability and appropriateness of LRAs. | No. | The guardian must file an annual report with the court that includes "a recommendation as to the need for continued guardianship and any recommended changes in the scope of the guardianship." Mass. Gen. Laws Ann. ch. 190B § 5-309. However, the report does not need to specifically address LRAs or their availability. | The guardian has an overarching duty to always act in the best interests of the incapacitated individual, but is also required, "to the maximum extent possible," to include the incapacitated individual in decision making, and to encourage him or her to develop or regain capacity to manage his or her own affairs. The guardian must also consider the incapacitated person's expressed desires and personal values. Mass. Gen. Laws Ann. ch. 190B § 5-309. | No. | No. | |
| Minnesota | Upon receiving a petition for guardianship, the court has the discretion to appoint a visitor to interview the allegedly incapacitated person. The visitor must then file a report with the court that evaluates the appropriateness of guardianship and the availability of LRAs. Minn. Stat. Ann. § 524.5-304.<br><br>Additionally, the court may only appoint a guardian upon a finding by clear and convincing evidence that the allegedly incapacitated person's needs cannot be met by LRAs. Minn. Stat. Ann. § 524.5-310 | No. | The guardian must file an annual report with the court that includes "a recommendation as to the need for continued guardianship and any recommended changes in the scope of the guardianship." Minn. Stat. Ann. § 524.5-316 However, the report does not need to specifically address LRAs or their availability. | There is no general duty for the guardian to take into account the wishes or values of the ward, except that in giving consent to medical treatment of the ward the guardian may not consent to medical care that the guardian knows to be in violation of the ward’s conscientious, religious or moral beliefs. Outside of this limitation, the guardian’s duty appears to be to make best interest decisions. Minn. Stat. Ann. § 524.5-313. | Yes, the allegedly incapacitated person must be present at the hearing, unless dismissed by the court for good cause. Minn. Stat. Ann. § 524.5-307.<br><br>The allegedly incapacitated person has the right to present evidence, subpoena witnesses and documents, and examine witnesses. *Id*. | No. | |

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| Missouri | Upon filing of a petition for guardianship, the court has the discretion to appoint a physician to examine/evaluate the respondent. The physician, if appointed, must file a report on his findings, but no specific discussion of LRAs is required. Mo. Ann. Stat. § 475.060.<br><br>However, the court's order must apply what the law calls "the least restrictive environment principle," where guardianships are the last resort, and the court must evaluate the respondent's abilities and the spectrum of LRAs available, and make a determination of the least restrictive option that will meet the respondent's needs. Mo. Ann. Stat. § 475.075. | No. | The court is required to review, at least annually, the status of the incapacitated person, and whether or not the incapacity or disability has ceased. Mo. Ann. Stat. § 475.082(1).<br><br>In conjunction with this review, the guardian must file an annual report detailing, among other things, the "opinion of the guardian as to the need for the continuation of the guardianship and whether it is necessary to increase or decrease the powers of the guardian." Mo. Ann. Stat. § 475.082(2)(7). The court may also order a mental status evaluation of the incapacitated person as a part of this annual review. Mo. Ann. Stat. § 475.082(3).<br><br>If the court finds that the guardianship may no longer be necessary, then it must appoint an attorney to file a petition for termination of the guardianship on behalf of the incapacitated person. Mo. Ann. Stat. § 475.082(4). | The guardian has a duty to act in the best interests of the ward, and no consideration of the ward's wishes or values is required. Mo. Ann. Stat. § 475.120. | No. The allegedly incapacitated person has the right to be present at the hearing, but is not required to be there. Mo. Ann. Stat. § 475.075. | No. | |
| Nebraska | The court may only grant a guardianship if it is the least restrictive alternative available. Neb. Rev. Stat. § 30-2620. It is unclear, however, at what point in the guardianship process LRAs must be considered. | No. | The guardian must file, at least annually, a report with the court detailing the condition of the incapacitated person and his or her estate. This report does not need to discuss the continued need for guardianship or the availability of LRAs. Neb. Rev. Stat. § 30-2628(a)(6). However, upon filing this report, the court must receive comments from any interested person regarding the need for continued guardianship or amendment of the guardianship order. Id. If the court finds that additional rights should be returned to the guardian, then it must hold a hearing on the issue. Id. | The guardian has a duty to act in the best interests of the ward, and no consideration of the ward's wishes or values is required. Neb. Rev. Stat. § 30-2628. | No. The allegedly incapacitated person has the right to be present at the hearing and to present evidence and examine witnesses, but is not required to do so. Neb. Rev. Stat. § 30-2619. | Yes. The guardian is required to complete a traning program approved by the Public Guardian within three months of being appointed as a guardian. Neb. Rev. Stat. § 30-2627. | |
| New York | The petition for guardianship must include a description of "available resources, if any, that have been considered by the petitioner" that would assist the allegedly incapacitated person with his or her needs. N.Y. Ment. Hyg. Law § 81.06.<br><br>Upon receiving a petition, the court must appoint an investigator to evaluate the allegedly incapacitated person. The investigator must file a report detailing whether there are alternative resources available that would meet the needs of the allegedly incapacitated person. N.Y. Ment. Hyg. Law § 81.09.<br><br>If the court does find the individual to be incapacitated, it then has the discretion to either appoint a guardian or to judicially implement less restrictive alternatives. N.Y. Ment. Hyg. Law § 81.16(b). | No. | The guardian is required to file an annual report with the court detailing any facts that indicate the need to terminate the guardianship, or to alter the powers of the guardian in any way. No specific consideration or discussion of LRAs is required, though. N.Y. Ment. Hyg. Law § 81.31(b)(10). | A guardian of the person must give the ward "the greatest amount of independence and self-determination with respect to personal needs in light of that person's functional level, understanding and appreciation of that person's functional limitations, and personal wishes, preferences and desires with regard to managing the activities of daily living." N.Y. Ment. Hyg. Law § 81.20. Apart from this, it appears that New York implements a best-interest decision making standard. | Yes. The hearing must be conducted either in the courthouse or in the residence of the allegedly incapacitated person, if they cannot be present in the courthouse. The court may only conduct the hearing in the absence of the allegedly incapacitated person if (1) the person is not present in the state, or (2) the information before the court clearly indicates that the person would not be able to meaningfully participate in the hearing. N.Y. Men. Hyg. Law § 81.11.<br><br>If the court conducts the hearing in the absence of the allegedly incapacitated person, the the court's order appointing a guardian must set out the factual basis for why the allegedly incapacitated person was not present. *Id.* | No. | |

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| Ohio | Upon filing of a petition for guardianship, the court is required to appoint a probate court investigator to interview the allegedly incapacitated person. The investigator must file a report with the court detailing the appropriateness of either guardianship or LRAs. Ohio Rev. Code Ann. § 2111.03.<br><br>At the hearing evidence may be introduced (but is not required to be introduced) demonstrating the effectiveness of LRAs. The court is required to consider such evidence if introduced, and may deny guardianship on the finding that less restrictive alternatives exist. Ohio Rev. Code Ann. § 2111.02. | No. | The guardian must file a report with the court 2 years after being appointed as a guardian, and every two years thereafter. The report must detail, among other things, "the opinion of the guardian as to the necessity for the continuation of the guardianship." Ohio Rev. Code Ann. § 2111.49(A)(f). It must also include a statement from a physician, psychologist, or social worker who has examined the incapacitated person within the three months prior to filing the report, detailing the professional's opinion as to the need for continuing the guardianship. Ohio Rev. Code Ann. § 2111.49(A)(i). The court must review the report, and if it finds (upon investigation) that it is "necessary to intervene in the guardianship," then it may terminate or modify the guardianship. Ohio Rev. Code Ann. § 2111.49(B). | Ohio has no clear statutory decisionmaking standard for guardians. | No. | No. | |
| Oklahoma | Upon filing of a petition for guardianship, the court has the discretion to order an evaluation of the respondent by a physician, psychologist, social worker, or other expert. The evaluator must file a report detailing their findings with respect to the respondent's mental and physical abilities and limitations, as well as what type of assistance the respondent would likely require. However, no specific discussion of LRAs as opposed to guardianships is required for the report. Okla. Stat. Ann. tit. 30, § 3-108.<br><br>Additionally, the court's order appointing a guardian must detail the factual basis supporting the decision not to impose LRAs on the allegedly incapacitated person. Okla. Stat. Ann. Tit. 30, § 3-111. | Yes. The guardian (or individual who petition's for the guardianship) must create a guardianship plan that must subsequently be approved by the court. The plan must set out the manner in which the ward and the guardian(s) will "exercise and share decision-making authority." Okla. Stat. Ann. Tit. 30, § 3-120. | The guardian must file with the court a report detailing, among other things, the reasons why the guardianship should be continued and why there are no LRAs available for the incapacitated person. Okla. Stat. Ann. Tit. 30, § 4-305. The statute is unclear as to the timing of this report, and whether it must be submitted on a regular basis, for guardians of the person. Okla. Stat. Ann. Tit. 30, § 4-303(D). However, secondary sources seem to indicate that the reports must be filed annually. See, 3 Okla. Prob. Law & Pract., Okla. Prob. Hbk. Div II Pt M. | The guardian has duties amounting to representation of the best interests of the ward, and no consideration of the desires or values of the ward is required of the guardian. Okla Stat. Ann. Tit. 30, § 3-118. | No. The allegedly incapacitated person has the right to be present at the hearing and to present evidence and examine witnesses, but is not required to do so. Okla Stat. Ann. Tit. 30, § 3-106. | No. | |
| Rhode Island | The initial petition must describe what LRAs have already been used to meet the needs of the allegedly incapacitated individual. R.I. Gen. Laws Ann. § 33-15-2.<br><br>Additionally, the court may not appoint a guardian if it finds that the allegedly incapacitated individual's needs are being met or can be met by use of LRAs, and the court must always use the least restrictive means of meeting the needs of the allegedly incapacitated individual. R.I. Gen. Laws Ann. § 33-15-4. | No. | The guardian is required to file with the court an annual report regarding the status of the incapacitated person. The report must detail "any changes the limited guardian or guardian perceives in the decision making capacity of the ward." R.I. Gen. Laws Ann. § 33-15-26.1(a)(3). However, the report does not need to directly consider or opine on if the guardianship is still appropriate or if LRAs have become appropriate in the previous year. See generally R.I. Gen. Laws Ann. § 33-15-26.1. | The guardian has a general duty to exercise his or her authority in the best interest of the ward. No consideration of the desires or values of the ward is required of the guardian. R.I. Gen. Laws Ann. § 33-15-29. | No. The allegedly incapacitated person has the right to be present at the hearing and to present evidence and examine witnesses, but is not required to do so. R.I. Gen. Laws Ann. § 33-15-5. | No. | |

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| Tennessee | The allegedly incapacitated person must be evaluated by a physician or psychologist either 90 days before or after the petition is filed. The evaluating physician must file a report containing an opinion as to whether a conservatorship is necessary, but does not need to explicitly discuss LRAs. Tenn. Code Ann. § 34-3-105.<br><br>Nothing in the court's order must discuss the consideration of LRAs. Tenn. Code Ann. § 34-3-107. However, the guardianship code contains a separate provision stating that the "court has an affirmative duty to ascertain and impose the least restrictive alternatives upon the person with a disability that are consistent with adequate protection of the person with a disability and the property of the person with a disability." Tenn. Code Ann. § 34-1-127. | No. | No. An incapacitated person may petition the court for modification or termination of the guardianship, but absent such a petition no regular review of the guardianship is required. Tenn. Code Ann. § 34-3-108. | The guardian has a general duty to act in the best interests of the ward, and is not required to consider the ward's wishes or values. Tenn. Code Ann. § 34-3-107–108. | No. The allegedly incapacitated person has the right to be present at the hearing and to present evidence, but is not required to be present. Tenn. Code Ann. § 34-3-106. | No. | |
| Texas | Texas generally does not statutorily require any explicit consideration of less restrictive alternatives in guardianship proceedings. See generally Tex. Est. §§ 1101.001–1103.004. However, in Statutory Probate Courts, the court must have a court investigator determine the accuracy of a guardianship petition, and determine if less restrictive alternatives are available. Tex. Est. Code § 1054.151. No such consideration is required for guardianship petitions filed in County Courts. Additionally, in order to establish a guardianship, the court must find, by a preponderance of the evidence, that the allegedly incapacitated person is "totally without capacity . . . to care for himself or herself and to manage his or her property; or . . . lacks the capacity to do some, but not all, of the tasks necessary to care for himself or herself or to manage his or her property." Tex. Est. Code § 1101.101. | No. | No additional considerations of LRAs are required, but the court must annually review each guardianship to determine if the guardianship should continue, be modified, or be terminated. Tex. Est. § 1201.052. Additionally, the guardian must file an annual report with the court detailing the condition of the incapacitiated person, and making a recommendation as to whether the guardian's power should be increased, decreased, or left unaltered. Tex. Ext. Code § 1163.101. | Texas has no discernable statutory standard for decision-making for guardians. See Tex. Estates Code § 1151.051. | Yes, the allegedly incapacitated person must be present unless the court determines, on the record or in the order, that a personal appearance is not necessary. Tex. Est. Code § 1101.051. | Yes, professional guardians and employees of the Department of Aging and Disability Services who are appointed as guardians must be certified. Tex. Est. Code § 1104.251. However, this certification requirement does not apply to family or friends of the incapacitated person. Additionally, the guardian is required to take an oath and to execute a surety bond. Tex. Est. Code § 1105.101. | |