

Legislative Fact Sheet

Guardianship and the Right to Visitation, Communication, and Interaction



Introduction

Defining the right to visitation, communication, and interaction under guardianship is an important issue in elder and disability rights law. This issue recently gained media attention when the adult children of incapacitated celebrities such as Casey Kasem and Peter Falk petitioned the courts for the right to visit their parents over a guardian's objections, and then advocated for legislative change. These high-profile visitation cases highlight an unknown but anecdotally frequent number of instances nationally. In addition, as more state legislatures codify protections for the rights of people with guardians, and the public becomes more aware of the potential risks of guardianship — including isolation from friends, family, and community — more states are debating hotly contested visitation bills.

Estrangement from family, friends, and acquaintances can be a precursor and a consequence of guardianship. The factors that led to the appointment of a guardian — mental illness, dementia, poverty, abuse, and exploitation — may have also led to unwanted isolation. Family, friends, and professionals should all be aware of the potentially devastating effects of isolation on the

person; loss of ties to friends, family, and social networks can have a negative effect on anyone's physical and mental health.¹

Traditionally, a guardian has the power to encourage or limit important relationships and connections. Recently, national standards and state laws have charged guardians with encouraging and supporting visitation in accordance with a person's values and preferences. Still, a guardian may have to weigh the important benefits of visitation with the need to restrict contact due to family dysfunction, undue influence, neglect, abuse, and/or financial exploitation.

The American Bar Association's Commission on Law and Aging, with generous funding from the Borchard Foundation Center on Law and Aging, offers this Legislative Fact Sheet to help lawyers, bar associations, allied professionals, legislative staff, and advocates make policy recommendations, improve practice, and raise professional awareness. For further information on visitation, communication, and interaction in guardianship, contact dari.pogach@americanbar.org. More information on [guardianship law, policy, and research](#) is available on the Commission on Law and Aging's [website](#).

Visitation FAQs

1. Does a person subject to guardianship have the right to visit, communicate, and interact with others? Yes and no. This difficult question embodies the larger debate over guardianship: how can a guardian preserve as much of an individual's autonomy as possible while ensuring protection from harm and exploitation? Historically, guardianships transferred most or all of an individual's rights to a guardian, including the right to visitation, communication, and interaction. Recent guardianship reforms, national standards, an increasing number of state statutes, and a key model law reject the wholesale transfer of visitation and communication rights to the guardian. These reforms and laws charge guardians with balancing the tension between autonomy and protection, and maximizing communication according to the person's values and preferences if possible.

2. What are the guardianship standards of practice for visitation and communication?

Under the [National Guardianship Association \(NGA\) Standards of Practice](#) the guardian shall:

¹ Isolation leads to an increased risk for depression, cognitive decline and dementia, and even premature death. Julianne Holt-Lunstad, [The Potential Public Health Relevance of Social Isolation and Loneliness: Prevalence, Epidemiology, and Risk Factors](#). Public Policy & Aging Report, *The Gerontological Society of America*, Vol. 27 No. 4 at 128 (2017).

- Promote social interactions and meaningful relationships consistent with the preferences of the person and encourage and support the person in maintaining contact with family and friends, as defined by the person, unless it will substantially harm the person. (Standard #4).

Supporting this priority on visitation and communication are other NGA Standards that require the guardian to:

- Identify and advocate for the person’s goals, needs, and preferences. (Standard #7).
- Ask the person what he or she wants. (Standard #7).
- Weigh the risks and benefits and develop a balance between maximizing the independence and self-determination of the person and maintaining the person’s dignity, protection, and safety. (Standard #8).
- Encourage the person to participate, to the maximum extent of the person’s abilities, in all decisions that affect him or her. (Standard #9).
- Acknowledge the person’s right to interpersonal relationships. (Standard #10).
- Consider the proximity of those people and activities that are important to the person when choosing a residential setting. (Standard #12).

3. What recent state legislation has addressed the right to visitation and

communication? From 2015 - 2018, several states addressed the right to visitation and communication in legislation. State laws differ widely in approach. Several states expressly grant the right to visitation to people subject to guardianship. Others do not use the language of “rights” at all, instead focusing on the need to maintain connections.

- 2015: Texas, Iowa, and California (and provisions in Florida and Ohio).
- 2016: Arizona, Hawaii, Illinois, Indiana [study], Louisiana, New York, South Dakota, Tennessee, Utah, Virginia.
- 2017: Nebraska, Nevada, Rhode Island, Virgin Islands, West Virginia.
- 2018: Maine, New Mexico, Nebraska.²
- For a more detailed description of these laws, see the Commission on Law and Aging’s [annual guardianship legislative summaries](#).

Examples of recent additions or amendments to statutory visitation laws:

- California: “Every adult in this state has the right to visit with and receive mail and telephone or electronic communication from whomever he or she so chooses, unless a court has specifically

² Visitation provisions were included in bills adopting the Uniform Guardianship Conservatorship and other Protective Arrangements Act (UGCOPAA).

ordered otherwise. The control of the conservator does not reach to visitation, unless directed to do so by the court.” Cal. Prob. Code §§ 2351 & 2361.

- Arizona: A guardian shall encourage and allow contact between the person with a guardian and other individuals. The guardian should include the person in decisions to allow or limit contact if the person has the mental capacity to make an “intelligent decision.” If the guardian denies contact, the person or another individual can petition the court for a contact order. Ariz. Rev. Stat. § 14-5316.
- Nevada: A guardian cannot, with several exceptions, restrict the right of a person subject to guardianship to communicate, visit or interact with a relative or a “person of natural affection.” Modes of communication include telephone, mail, and electronic means. Nev. Senate Bill 433 (to be codified in Nev. Rev. Stat. 159).
- New Mexico: A guardian shall not restrict the ability of a person to communicate, visit, or interact with another person. If the guardian has good cause to restrict contact, the guardian may do so for no more than seven days with family members or someone with a pre-existing social relationship or no more than 60 days with someone who is not family nor had a pre-existing social relationship. NM Stat. § 45-5-312(f)(effective July 2018).

4. Which states have passed broad-based bills of rights for people subject to guardianship that include the right to communication?

At least five states have enacted such bills of rights, including communication rights. These rights are not absolute — there are always exceptions when a guardian or court may prohibit visitation if it would cause harm to the person. Some states vest the guardian with the authority to restrict visitation, while others require a court order (see below):

- Florida: A person who has been found incapacitated retains the right to visits and communication. However, the right to make decisions about social environment and other social aspects of life may be removed and delegated to the guardian. Fl. Stat. §§ 744.3215(1)(m), (3)(g).
- Minnesota: The protected person retains all rights not restricted by court order and these rights must be enforced by the court, including: “communication and visitation with persons of the ward's or protected person's choice, provided that if the guardian has found that certain communication or visitation may result in harm to the ward's or protected person's health, safety, or well-being, that communication or visitation may be restricted but only to the extent necessary to prevent the harm.” Minn. Stat. § 524.5-120 (10).
- Nevada: A “Wards’ Bill of Rights” guarantees the right to telephone calls, personal mail, and visitors, unless the guardian and court determine that correspondence with a particular visitor would cause harm. Nev. SB 360 (to be codified in Nev. Rev. Stat. 159).

- South Carolina: The Court vests the guardian with the right to consent or refuse consent to visitation. The statute does not include a standard, as many other states laws do, that the guardian must first find such visits would cause substantial harm before restricting them. S.C. Prob. Code § 62-5-304A(B)(3)(effective January 2019).
- Texas: A person with a guardian retains all rights under law, unless subject to court order, including the right to “unimpeded, private, and uncensored” visits and communication. If the guardian determines certain interactions would cause harm, the guardian may restrict visitation, but only to the extent necessary to prevent substantial harm. The person subject to guardianship may request a court hearing to remove restrictions. Tex. Estates Code §§ 1151.351 (a), (b)(16).

5. How does the new Uniform Law address visitation and communication? The [Uniform Law Commission](#) develops and promotes for adoption by state legislatures model laws that bring “clarity and stability to critical areas of state statutory law.” In 2017, the Commission approved a new model law on guardianship, replacing an earlier 1997 version. The new act is called the Uniform Guardianship, Conservatorship and Other Protective Arrangements Act (UGCOPAA). UGCOPAA prioritizes visitation as important to the well-being of people subject to guardianship. The Act’s Prefatory Note states:

“[R]ecognizing that individuals subject to guardianship and conservatorship benefit from visitation and communication with third parties, the Act sets forth specific rights to such interactions. In recent years, some family members of individuals subject to guardianship have raised concerns that guardians have unreasonably restricted the ability of individuals subject to guardianship to receive visitors and communicate with others, and family advocates have encouraged legislative responses to address this concern. The Act includes a variety of provisions addressing this concern.” Prefatory Note, p. 3.

The Act’s strong provisions on visitation, communication and interaction include §§ 311, 314, 315, 316, 502, 503. Of note, the Act:

- Sets out the right of the individual to receive notice of the right to communicate, visit or interact with others, including in-person visits, phone calls, personal mail, electronic communications, and social media. § 311(b)(6).
- Prohibits the guardian from restricting visitation, unless: (1) the restriction is authorized by court; (2) there is a protective order or protective arrangement that limits contact; or (3) the guardian “has good cause to believe the restriction is necessary – Because interactions with a specified person poses a risk of significant physical, psychological or financial harm,” AND the restriction is for no more than seven business days if the person with whom contact is restricted has a family or pre-existing social relationship or for 60 days if a family or social relationship does not exist. §§311(b)(6); 315(c).

- Requires the guardian to file a mandatory plan for the care of the individual (within 60 days of appointment and when there is a significant change in circumstances or the guardian seeks to deviate significantly from the plan). The plan must include information about persons with whom the individual has a close personal relationship or a relationship involving regular visitation, and how the guardian will facilitate visits. §316(a)(3).
- Allows the court to order a “protective arrangement” instead of a guardianship. Under this Article, the court may direct visitation or supervised visitation; or restrict access “by a person whose access places [the individual] at serious risk of physical or psychological harm” – or by a person who uses fraud, coercion, duress or deception and control.
- Requires 14 days of notice to the person subject to guardianship of any change in dwelling that would result in restrictions on the person’s access to visitors, unless the change is in the guardian’s plan or authorized by court order. §311(b)(4).
- Directs the guardian to prioritize the least restrictive living arrangement that will allow the adult subject to guardianship to interact with people who are important to the adult. §314(e)(2).
- Includes requirements that family members and others receive key information about important changes in the person’s condition or circumstances. The Act “establishes a default that the adult children and spouse of an adult subject to guardianship or conservatorship are entitled to notice of key events, including a change in the adult’s primary residence, the adult’s death, or a significant change in the adult’s condition.” Prefatory Note, p. 3. See §310(e); 411(e).

6. What if the person subject to guardianship cannot consent to visits, communication, and interactions?

A guardian can encourage positive relationships even if the person subject to guardianship cannot consent to visits or express interest in visits. Several states specify that evidence of prior relationships is a sufficient basis to presume consent or refusal to consent to visits.

- South Dakota: Consent or refusal to consent to visits can be presumed based on proof of the nature of the prior relationship with an individual. SDCL § 29A-5-422.
- Virgin Islands: Consent may be presumed based on prior history with the person. 34 Vir. Is. Code § 662.
- Rhode Island: Consent may be presumed based on the prior relationship history with the person. R.I. Gen. Laws. § 33-15-18.1(a).

7. Who has the authority to restrict visits, communication, and interactions – the guardian or court? Traditionally, state statutes gave guardians unfettered authority to restrict visits and communication to protect individuals under their care. However, recent legislation in some jurisdictions gives the court exclusive authority to set the terms of visitation. The guardian must seek a court order to restrict visitation, with limited exceptions. For example:

- South Dakota: The guardian “may not restrict a protected person’s right of communication, visitation or interaction with other persons, including the right to receive visitors, telephone calls, or personal mail, unless the restriction is authorized by a court order.” The guardian may petition the court for a communication restriction. See citation for factors court must consider. SDCL §29A-5.
- Rhode Island: A guardian is prohibited from restricting an individual’s right of communication, visitation or interaction with others...The guardian may move the court to restrict communication/visitation for good cause, including: issuance of a protective order; whether abuse, neglect or exploitation of the individual by the person seeking access has occurred or is likely; and any documented wishes of the individual to reject the communication/visitation. R.I. Gen. Laws. §33-15-18.1.
- Tennessee: The court must specifically remove the individual’s right to communication, visitation, or interaction with persons. Tenn. Code Ann. § 34-3-107(2)(P).

8. Can a guardian be sanctioned for unnecessarily limiting visitation? Several states provide that a guardian may be sanctioned and even removed for preventing a person from visiting, communicating, and interacting with others.

- Louisiana: Failure of the curator (guardian) to allow visitation may result in removal of the curator. La. Code Civ. Proc. Ann. Art. 2995.
- Rhode Island: The court, upon motion or its own initiative, shall sanction a guardian who knowingly isolated a person. Sanctions include an order to pay court costs and reasonable attorneys’ fees of the other party or parties. Sanctions shall not be paid out of the person subject to guardianship’s estate. R.I. Gen. Laws. §33-15-18.1(f)(2).
- Virgin Islands: A guardian who has willfully isolated a person can be discharged and replaced. 34 Vir. Is. Code § 665(b).

9. What are the procedural protections for orders granting or restricting visitation? Protections include the right to a hearing, time limits, notice, standard of proof, attorneys’ fees. For example:

- Nevada: An interested party, including the person subject to guardianship, may petition the court to grant or deny access to the person subject to guardianship, modify the duties of the

guardian or remove the guardian. The court shall schedule a hearing no later than 63 days after the petition was filed. The court may issue an order for an emergency hearing as soon as practicable but no later than 7 days after the petition was filed. Nev. SB 433 (2017)(to be codified in Nev. Rev. Stat. 159).

- Rhode Island: A person subject to guardianship or any other interested party may request a hearing in court to object to the guardian's decision to limit visits and communication. The court must hold the hearing within 30 days after filing, or within 10 days if the person subject to guardianship is extremely ill and/or death is imminent. The Court may award court costs and reasonable attorneys' fees to the prevailing party, but the fees may not come out of the person's estate. R.I. Gen. Laws. §33-15-18.1.
- Nebraska: A family member who is denied visitation may petition the court. If the individual has a guardian, the petition is to be filed in the county court with jurisdiction over the guardianship case. If the individual's health is in decline, the court shall hold an emergency hearing. Neb. LB 845 (2018)(to be codified in Neb. Rev. Stat. §§42-1302 – 1303).
- Virgin Islands: The court must schedule a hearing on a motion that visitation has been unnecessarily limited within 30 days of filing and 10 days if the person is gravely ill or death may be imminent. If the court issues a scheduling order, it must also issue supervised visitation until the hearing. Notice must be provided to the person with a guardian. The court may award attorneys' fees to the prevailing party, but they may not come out of the person's estate. Vir. Is. Code 34 §§666, 667.
- West Virginia: A relative may petition the court for access to and information about a protected person. The court must schedule a hearing within 60 days of the motion or as soon as practicable if death is imminent. If the court grants the motion it may retain jurisdiction over the matter and modify the order in the best interests of the person subject to guardianship. W. Va. Code §44A-3-17.

10. Do family members or other interested parties have a right to visitation? Some states grant family members the right to petition for visitation in court if it has been denied by the guardian. For example:

- Texas: An adult child of an individual subject to guardianship has the right to file an application for visitation in court and have a hearing. Tex. Est. Code § 1151.055.
- Florida: Interested parties may file for the court to review the guardian's decisions about visitation. Fl. Stat. Ann. §744.3715.
- Arizona: An individual with a significant relationship may petition for a contact order. Ariz. Rev. Stat. § 14-5101.

- Utah: Unless provided otherwise by court order, a guardian may not restrict the right of a person to associate with a relative or qualified acquaintance. Relatives or qualified acquaintances may petition the court to rescind or modify a visitation order. Utah Code Ann. § 75-5-312.5.

11. Do family members have the right to information about significant changes in condition or circumstances of the individual? Even if the guardian must seek the court's consent to restrict visitation, a guardian could achieve the same effect of limiting visits by withholding from family and friends, information about a permanent change of residence, admission to acute or long-term care, or significant changes in health condition. As noted above, the new Uniform Guardianship, Conservatorship and Other Protective Arrangements Act includes a right to information for relatives and/or loved ones. Several states have similar provisions:

- Arizona: A guardian must notify family members if the individual subject to guardianship dies or is in the hospital for more than three days. Ariz. Rev. Stat. Ann. § 14-5317.
- Texas: Relatives have the right to notification of changes in circumstances, provided they "elected in writing to receive the notice..." Changes include: change of residence; admission to a medical facility for acute care for three days or more; location other than residence for more than one week; or; death, funeral arrangements and location of final resting place. Tex. Estates Code §1151.056.
- West Virginia: Relatives who have been granted access by court order to the person subject to guardianship are entitled to notice of death and funeral arrangements, admission to medical facility, and change of location. W. Va. Code §44A-3-18.

12. Do individuals subject to guardianship have the right to visitation in nursing homes? Federal nursing home regulations specify that the resident has the right to visitation, and the facility must provide immediate access to any resident by immediate family members or other relatives, subject to the resident's right to deny or withdraw consent at any time. The resident also has a right to communicate with a long-term care ombudsman, as well as a representative of a protection and advocacy agency. The law does not specify whether the appointment of a guardian transfers these rights to the guardian. Regardless, the nursing facility cannot prohibit visitation. [42 C.F.R. § 483.10](#).

13. Is there a role for mediation in addressing visitation? Yes. A mediator may be able to resolve visitation disputes without going to court. If a dispute cannot be addressed through mediation, a new dispute resolution process called Eldercaring Coordination may be useful in resolving the increasingly common high conflict "family feud" situations. According to the Association for Conflict Resolution, Eldercaring Coordination is "a dispute resolution option specifically for high-conflict cases involving the care, needs and safety of elders." See the Association for Conflict Resolution (ACR) [Guidelines for Eldercaring Coordination](#), which includes ethical principles for Eldercaring Coordinators, training protocols, and a court pilot project template.

Conclusion

Guardians, lawyers, bar associations, professionals, family and friends can preserve and improve the well-being of people with guardians by advocating for their access to visitation, communication, and interaction. This Legislative Fact Sheet offers key background information.

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The mission of the American Bar Association Commission on Law and Aging is to strengthen and secure the legal rights, dignity, autonomy, quality of life, and quality of care of elders. It carries out this mission through research, policy development, technical assistance, advocacy, education, and training. The Commission consists of a 15-member interdisciplinary body of experts in aging and law, including lawyers, judges, health and social services professionals, academics, and advocates.

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