

Silver alerts (cont'd.)	STATE	<ul style="list-style-type: none"> <li>The alert system protects the privacy, dignity, independence, and autonomy of the subject of the alert.</li> </ul>
Data collection on elder abuse	STATE	States should establish mechanisms to measure the occurrence of all forms of elder abuse, neglect, and exploitation including financial by collecting data (such as reports to APS agencies) and incidence and prevalence studies, and address issues of cultural diversity in data collection and programs to combat elder abuse and neglect.
Social Services Block Grant and Older Americans Act programs	FEDERAL	Funding for Social Services Block Grant and Older Americans Act programs that deal with abuse must respond to the increasing number of extremely vulnerable elderly people. Additional sources of funding should be developed.

## ADVANCE PLANNING AND GUARDIANSHIP

With people living longer and increased age often accompanied by diminished decisionmaking ability, older people must engage in advance planning. When someone is incapable of managing his or her personal decisions or property, there are several alternatives for authorizing another person or corporate entity to act on his or her behalf. While still capable of decisionmaking, a person may grant such authority voluntarily, utilizing powers of attorney, health care proxies, trusts, and other devices. These allow individuals to specify how personal and financial decisions will be made and by whom, potentially avoiding court intervention. When an individual loses capacity and has not delegated authority for decisionmaking, a court may appoint a guardian or conservator with specified decisionmaking powers. All of these arrangements carry risks and require careful scrutiny and monitoring. Risks range from mismanagement of fiduciary responsibility to physical harm to the incapacitated individual. Thus powers of attorney, trusts, and guardianship arrangements should be monitored and authority ended for those who abuse or neglect, either through action or inaction, the people in their charge.

**Powers of attorney**—A power of attorney is a signed document or other record in which a principal appoints another person to act as his or her agent. The grant of authority can be limited, for a particular purpose or period of time, or general, allowing the agent to act indefinitely with regard to all matters. Increasingly, such powers are made “durable” by an express statement that the principal intends the authority to remain effective even if he or she subsequently becomes disabled or incapacitated.

Frequently durable powers of attorney are “springing” and do not take effect until the individual granting the power becomes incapacitated.

States do not have uniform standards and regulations to protect the rights of people granting such powers. In 2006 the National Conference of Commissioners on Uniform State Laws (NCCUSL), now the Uniform Law Commission, approved a revised Uniform Power of Attorney Act, which includes a presumption that the document is “durable,” safeguards against and remedies for abuse by agents, provisions to encourage acceptance of an agent’s authority by banks and other institutions, and other provisions to address numerous concerns raised by existing state laws. By 2012, 13 states and the US Virgin Islands had adopted the act and others were considering adoption.

Sometimes an agent acting for an elderly or disabled person (with or without a power of attorney) may be appointed a representative payee by the Social Security Administration (SSA), thereby gaining authority to oversee and manage the individual’s Social Security benefits on behalf of the beneficiary. As a matter of policy the SSA declines to recognize powers of attorney and makes its own appointment of representative payees, determining their rights and responsibilities. The Department of Veterans Affairs also declines to recognize powers of attorney and appoints its own fiduciaries.

**Trusts**—Trusts are sometimes seen as alternatives to powers of attorney and guardianship. A person forms a trust when he or she transfers property to another person “in trust” for his or her own benefit or for the benefit of others (“beneficiaries”). A trust

may be established in an inter vivos agreement with a trustee by a person while living (these “living trusts” are effective during the person’s lifetime) or in a last will and testament (a “testamentary” trust, for the administration of property after the individual dies). Trusts are commonly used to provide for property management in the event of incapacity; to avoid probate, as part of an individual’s estate plan to stipulate terms upon which heirs will benefit from an estate; and in some instances to obtain favorable tax consequences.

While the use of trusts has been increasing, they can also pose problems for older individuals. Living trusts may in fact provide a means for managing property during a person’s lifetime. But too often such trusts are touted as a means for avoiding probate upon death, are not properly funded during life, and are established for individuals who neither need them nor understand the costs and procedures involved. State laws governing trusts vary considerably, and this inconsistency may present problems for people who move to another state upon retirement. In many states much of the law governing the rights and responsibilities of trustees is traditionally found in court decisions rather than in legislation.

In 2000 the Uniform Law Commission adopted a Uniform Trust Code to help improve the certainty and predictability of trust interpretation by the courts and reduce trust preparation costs for consumers. However, adoption of the uniform code by state legislatures is proceeding slowly because of resistance from corporate trust companies and some attorneys who oppose court oversight.

**Guardianship**—In guardianship proceedings (known as “conservatorship” in some states), a court oversees the transfer of authority for property or personal decisionmaking (or both) when an individual is deemed incapable of managing his or her own affairs. Adults placed under guardianship, often referred to as wards, and incapacitated individuals may lose their basic civil liberties, such as the right to vote and marry and to make decisions about where to live, how to spend their money, and what type of medical treatment they should have. The protection for these rights varies by state. As the need for guardians has grown, courts have found it more difficult to find family members or friends able and willing to accept the responsibilities of guardianship. As a result states have significant unmet needs for public guardianship and other surrogate decisionmaking services. Public guardianship programs are frequently understaffed and underfunded, and oversight and accountability of public guardianship is uneven.

After a guardian has been appointed, courts are responsible for monitoring his performance and ensuring that incapacitated wards are protected and treated appropriately. Although all states have laws requiring periodic reporting and accounting by guardians, a 2006 AARP Public Policy Institute study found that oversight practices vary dramatically. More than 40 percent of survey respondents said no one is assigned by their court to visit the ward, and over one-third stated that no one is designated to verify the information in reports and accountings. Although many states recently have reformed their guardianship laws, some older people continue to be placed under guardianship with little or no evidence of need and as a first, rather than last, resort. Moreover once people become wards, courts may lose track of them, their money, and their guardians.

To improve the quality of guardianship and prevent abuses, a few states have developed standards of practice and certification requirements for guardianship services programs. Advocates for incapacitated people are focusing new attention on the need to train guardians and certify professional guardians to ensure that all are better informed about their responsibilities and the requirements for caring for incapacitated people. The Third National Guardianship Summit held in 2011 established clearer standards for guardians for adoption by state courts or state guardianship associations.

An added problem is that guardianship laws are unclear on which state has jurisdiction when the proposed ward has ties to more than one state. The Uniform Law Commission has adopted the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA) to address the issue of jurisdiction with regard to guardianships. This act aims to provide uniformity and reduce conflicts among the states. The UAGPPJA will also save time for those who are serving as guardians and conservators, allowing them to make important decisions for their loved ones as quickly as possible. To maximize the act’s effect, all states need to adopt the measure. By 2012, 34 states and the District of Columbia had adopted it and numerous other states were considering adoption.

Jurisdictional issues become even more complex internationally. Although there are no established procedures to resolve international disputes concerning the authority of guardians and agents with financial or health care powers of attorney, the US Department of State has negotiated an international convention that establishes policies and protocols for the recognition of other countries’ orders and laws.

ADVANCE PLANNING AND GUARDIANSHIP: Policy		
Durable powers of attorney	STATE	States should expand their laws on durable powers of attorney to deter wrongdoing by agents, to provide legal remedies for such wrongdoing, and to provide third parties with incentives to rely on the powers without fear of liability, except for their own wrongdoing. These protections and remedies should be at least as stringent as those in the updated Uniform Power of Attorney Act.
Uniform trust code	STATE	States should codify, simplify, and clarify trust laws by modeling them on the Uniform Trust Code promulgated by the National Conference of Commissioners on Uniform State Laws.
Effective guardianship	FEDERAL STATE	<p>The federal government should encourage the expansion of:</p> <ul style="list-style-type: none"> <li>• programs that provide alternative protective arrangements less restrictive than guardianship (such as representative payment);</li> <li>• educational and support programs to assist guardians, particularly family members, in carrying out their responsibilities; and</li> <li>• effective programs to monitor guardians and other fiduciaries to ensure that they utilize their authority and fulfill their responsibilities appropriately.</li> </ul> <p>States also should enact laws or court rules that:</p> <ul style="list-style-type: none"> <li>• require all guardians to receive adequate training and information about their duties and responsibilities;</li> <li>• mandate certification of guardians who serve multiple, unrelated incapacitated people (certification programs should include training, testing, and accountability requirements);</li> <li>• protect the privacy of alleged incapacitated people and wards by prohibiting electronic posting of sensitive information in guardianship case records;</li> <li>• create clear guidelines for how guardians should make decisions; and</li> <li>• provide clear procedures when wards, their property, or their care has ties to more than one jurisdiction or state by adopting the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act. The act addresses the initial jurisdiction to decide capacity, recognition of foreign guardians' authority, transfer of cases when wards or guardians move, and related issues.</li> </ul>
Protecting due process rights	STATE	<p>States should enact guardianship and conservatorship laws that protect older people's due process rights. These safeguards should include, at a minimum:</p> <ul style="list-style-type: none"> <li>• a mandated right to legal counsel (including a right to have counsel appointed by the court and present at all proceedings);</li> <li>• timely notification of proceedings in understandable language;</li> <li>• consideration by the court of less-restrictive alternatives to guardianship (such as money management, powers of attorney, advance directives, and trusts) in determining whether appointment of a guardian is necessary;</li> <li>• a process for emergency proceedings that includes actual notice to the respondent, mandatory appointment of counsel, proof of respondent's emergency, appropriate limitations on emergency powers, and termination upon showing that the emergency no longer exists;</li> </ul>

Protecting due process rights (cont'd.)	STATE	<ul style="list-style-type: none"> <li>• investigation of the background and qualifications of prospective guardians and conservators, including criminal background checks;</li> <li>• proof that the respondent lacks decisionmaking capacity and requires a guardian by clear and convincing evidence;</li> <li>• protections against conflicts of interest in the selection of guardians and conservators;</li> <li>• periodic accounting and reporting on personal status by guardians and thorough oversight of guardianship by the court, with appropriate civil or criminal penalties for guardian malfeasance;</li> <li>• retention by the ward of all rights and authority except those expressly delegated to the guardian due to the ward's functional limitations; and</li> <li>• assessment by the court of the ward's capacity to vote, and retention of the ward's right to vote unless the court makes a specific finding of incapacity to vote (see Chapter 1, Government Integrity and Civic Engagement, for policy on voting and mental incapacity).</li> </ul>
Public guardianship	STATE	States should establish and adequately fund public guardianship programs to provide free or nominal-cost services for adults with limited resources who lack qualified relatives or others to serve as a guardian or conservator. States should require that these programs meet minimum standards, including limits on the number of wards served, by using specific staff-to-ward ratios; maintenance of adequate liability insurance for the protection of wards and their property; mandatory conflict-of-interest standards; and oversight by the guardianship court tailored to the particular needs of wards served by public guardianship programs.
Coordination on guardianship issues	FEDERAL STATE	<p>Federal-state coordination of federal representative payment programs and guardianship should be strengthened and streamlined through such means as increased communication between and among courts and federal agencies (such as the Social Security Administration and the Department of Veterans Affairs) to ensure appointment of appropriate guardians and representative payees, to monitor the activities of those fiduciaries, and to maximize services to individuals with diminished capacity.</p> <p>The federal government should convene an interagency-interstate court study group to develop options for improved information sharing and coordination.</p> <p>States should convene statewide multidisciplinary networks of guardianship stakeholders to assess the state's guardianship systems, address policy and practice issues, and serve as an ongoing problem-solving network.</p>
International Convention on the Protection of Incapacitated Adults	FEDERAL	After gaining the advice and consent of the Senate, the president should ratify the International Convention on the Protection of Incapacitated Adults negotiated by the US Department of State.
Funding for guardianship and alternatives	FEDERAL	<p>Congress should allocate funds to:</p> <ul style="list-style-type: none"> <li>• train guardians, agents under durable powers of attorney, representative payees, judges, and court personnel regarding their powers, duties, and ethical standards;</li> </ul>

Funding for guardianship and alternatives (cont'd.)	FEDERAL	<ul style="list-style-type: none"> <li>• provide funds for states to conduct background checks on prospective guardians and improve monitoring through electronic filing systems;</li> <li>• enable state courts to assess the effectiveness of current guardianship procedures and implement changes;</li> <li>• create demonstration projects on model guardianship monitoring practices;</li> <li>• provide for authorized fiduciaries, including public guardians;</li> <li>• study state fiduciary laws, including guardianship and power of attorney laws, and the roles and responsibilities of government entities regarding fiduciaries; and</li> <li>• set up a uniform system of data collection on key aspects of the guardianship process.</li> </ul>
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## PROBATE

Probate laws, which govern the transfer of property at death, vary significantly from state to state. The variations in and complexity of such laws contribute to misunderstanding about this process. Delays and costs in state probate processes have generated such dissatisfaction among heirs, beneficiaries, and estate administrators that the Joint Editorial Board for the Uniform Probate Code (UPC) developed uniform model legislation to simplify and clarify the probate system for the average consumer.

The UPC addresses not only transfers of individually owned property at death, but also nonprobate transfers and guardianship. Nonprobate transfers—such as payment-on-death accounts, accounts passing by beneficiary designation, and joint accounts passing by right of survivorship—do not involve the court system and thus give older people a way to transfer control of personal assets without the costs and other unwanted side effects of probate litigation (for a

discussion of estate planning and recovery for Medicaid, see Chapter 8, Long-Term Services and Supports—Medicaid: Strengthening Financial Protections for Beneficiaries and Their Families).

The UPC has been adopted in whole or part by about 20 states. Many additional states recognize the need to simplify their probate systems to facilitate the orderly transfer of property at death, while also addressing equitable assignment of costs, the need for qualified staff, and access to the courts for resolution of disputes involving inheritance or debts of decedents. Some states have enacted legislation authorizing nonprobate transfers of real property using transfer-on-death (or beneficiary) deeds. The real property owner may deed the property to a named beneficiary; the transfer becomes operative on the owner's death (avoiding probate) and is revocable until then. The National Conference of Commissions on Uniform State Laws began drafting a uniform transfer-on-death deed statute in 2007.

PROBATE: Policy		
Simplifying probate	STATE	<p>States should at minimum adopt one of the following options: the 1990 Uniform Probate Code (UPC), suitable legislation, or court rules establishing probate procedures that simplify, expedite, and reduce the costs of settling estates in probate. Changes should allow informal or administrative (rather than adjudicative) procedures for probating wills and appointing personal representatives, and provide oversight for the unsupervised or independent handling of estates.</p> <p>States should enact legislation to simplify, modify, and clarify estate planning. These laws should be modeled after the UPC revised Article II (Uniform Act on Intestacy, Wills and Donative Transfers) and Article VI (Uniform Non-Probate Transfers at Death Act). The statutes on nonprobate property transfers include the Uniform TOD</p>