

PERSONAL AND LEGAL RIGHTS • 12

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PERSONAL AND LEGAL RIGHTS

INTRODUCTION

All Americans have the right to be free from discrimination, crime, physical and emotional abuse, neglect, intimidation, and financial exploitation. Older people may experience violations of their personal and legal rights in many settings—in the community and in institutions—and in many roles—as citizens, spouses, parents, grandparents, patients, parties to disputes, and residents of local communities.

Older people, like other citizens, need effective mechanisms to assert their rights. These mechanisms include enforcement of rights by federal and state agencies that oversee programs for older people, as well as the ability to seek redress for rights violations by bringing suit on their own behalf. Sometimes the manner and consequences of rights infringement are more severe for older people who are unable to protect themselves than they are for others. Thus additional efforts are necessary to protect vulnerable older people.

PERSONAL AND LEGAL RIGHTS

AARP PRINCIPLES

AARP's policies on personal and legal rights are guided by six principles.

Protections against discrimination—strong and expansive legal protections against discrimination

Freedom from exploitation and abuse—strong legal protections against, and effective protective services addressing, all forms of exploitation and abuse of incapacitated and vulnerable adults

Safeguarding rights—strong procedural and substantive safeguards to protect individual rights

Choice—legal sanction for the right of competent adults to protect their wishes and desires in the event they are no longer able to make or express their own decisions

Enforcement—rigorous enforcement of civil rights and other statutes protecting the rights and safety of individuals

Redress and support for victims—full availability of the court system to obtain redress for rights violations, not limited by circumstances such as disability or ability to pay

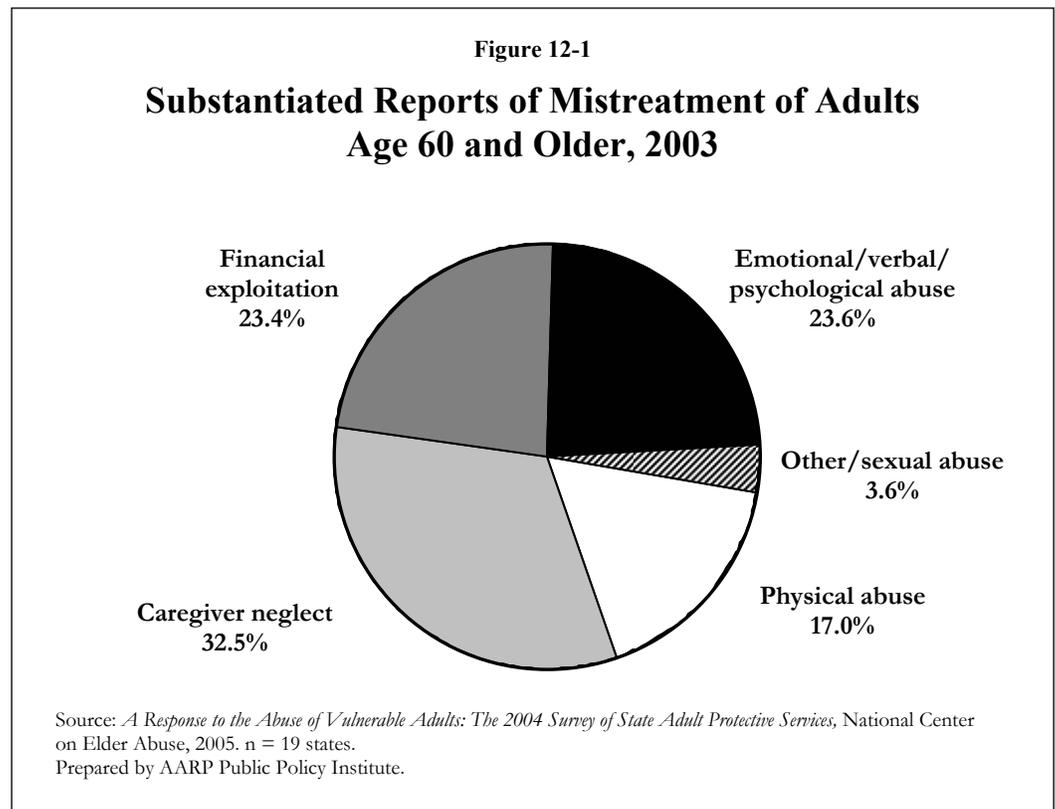
ELDER ABUSE AND PROTECTIVE SERVICES

Background

State elder abuse laws generally provide protections for people who are age 60 (or 65) and over and who cannot protect themselves from physical and emotional abuse, neglect, intimidation, or financial exploitation. Elder abuse, like many other forms of domestic abuse, is an often hidden phenomenon that affects hundreds of thousands of older Americans. A 2004 survey of state adult protective services (APS) agencies revealed that they collectively received 565,747 reports of elder and vulnerable adult abuse in domestic and institutional settings during fiscal year (FY) 2003. This represents a 19.7 percent increase over the 472,813 reports to APS agencies in FY 2000. Reported cases are only the tip of the iceberg.

Elder abuse occurs without reference to race, religion, income, education, place of residence or living arrangement. Because abuse commonly is not reported, information on who is likely to suffer a particular type of abuse is unavailable. It is known that physical abuse is more likely from a spouse, adult child or other family member than from a nonrelative.

Elder abuse can be physical, financial or psychological and may take place in a home or an institutional setting (Figure 12-1).



Incapacitated elders are at risk of abuse, neglect and exploitation by guardians, agents under durable powers of attorney, and other fiduciaries with the authority to make surrogate personal and financial decisions. Guardianship monitoring by courts is critical to ensure the welfare of wards by identifying abuses when they exist and removing guardians who abuse or neglect their wards through action or inaction. Power of attorney abuse is an equally serious problem, and individuals granted powers of attorney are not subject to oversight by a court or government agency. Advocates for older Americans and court personnel report that serious problems persist in the area of fiduciary abuse.

Increasing awareness among the general public and professionals is the most effective factor in identifying elder abuse, according to experts. Most significant in preventing and treating abuse of the frail elderly are in-home services such as meals-on-wheels or home health care, which can prevent the first occurrence of abuse. These services may prevent the deterioration of the health and environment of older people who otherwise might become dependent on others for care and connections to needed services outside the home. A toll-free directory assistance and online service, the Eldercare Locator, is sponsored by the Administration on Aging to provide information and referrals to in-home and other aging services nationwide. The rapid increase in the number of older people needing care will require the development and improvement of a variety of protective services, ranging from simple household-chore services to money management and guardianships. Community-based programs, which provide services such as counseling, information and referrals, and personal money management can help prevent and stop abuse. Multidisciplinary teams, composed of varied professionals, address elder abuse issues that cannot be effectively resolved by workers in a single discipline (e.g., fiduciary abuse specialist teams composed of accountants, banking professionals and attorneys can address financial abuse, and fatality review teams that include police, medical examiners, attorneys and others can conduct retrospective review of deaths resulting from elder abuse).

All 50 states, the District of Columbia, Puerto Rico, the US Virgin Islands and Guam have laws addressing elder abuse in domestic and institutional settings. These laws generally specify the protected population, categories of individuals who are mandated to report abuse (if any), the method and timing of reports, the agencies that administer the laws, and the timing and method for investigating reports. Typically APS laws enable protective services agencies to offer a variety of remedial services to a victim. In addition statutes impose criminal penalties for various forms of elder abuse. These statutes may be part of the APS law or of separate criminal laws. A state's basic criminal laws also can be used to prosecute perpetrators of abusive acts against older people. Civil actions against abusers may also deter the victimization of vulnerable individuals. Furthermore these cases may provide the only real remedies that an elderly victim has available. For example victims of financial exploitation who can recover their assets may preserve independence and autonomy.

Some states have adopted enhanced criminal penalties in order to deter abuse, neglect and exploitation of vulnerable adults. The premise of these penalties is that society should punish more severely those behaviors that are particularly repugnant. Some states may specify, for example, that enhanced penalties apply when the vulnerable individuals are unable by reason of mental or physical incapacity to protect themselves from abuse, neglect or exploitation or to provide for their own health, safety or welfare.

Prosecutions of alleged abusers are difficult for numerous reasons: Victims may be unable or unwilling to testify as a result of incapacity, fear, shame or misguided loyalty, and law enforcement and prosecutors may lack training, interest and resources for these often-difficult cases. However, a number of states and local jurisdictions have made significant progress in introducing and implementing new techniques for investigating and prosecuting abuse cases, increasing the chances for successful prosecutions. Training for law enforcement and prosecutorial staff is a key component of this strategy.

In recent years Congress has not significantly increased federal resources to help states protect vulnerable adults and has decreased some funding sources. Among other gaps there is inadequate federal support for protective services for at-risk people in institutional settings, for enhancement of guardianship monitoring, and for the development of models for state-local coordination to prevent, identify and treat abuse victims. The benefits of such cooperation among public agencies and/or private organizations are evident in programs providing shelter, legal assistance and peer counseling to victims of domestic violence.

The Older Americans Act Amendments of 2006 authorize the Assistant Secretary on Aging of the Department of Health and Human Services to coordinate federal elder justice activities, including annual data collection on elder abuse, neglect and exploitation. The law also requires a national incidence and prevalence study. Other proposed federal elder justice activities remain unaddressed in federal law.

FEDERAL POLICY

ELDER ABUSE AND PROTECTIVE SERVICES

Congress should enact comprehensive legislation to implement a coordinated approach to the problems of elder abuse and neglect. The legislation should establish a multiagency federal infrastructure; develop a public-awareness strategy; support research, training and technical assistance; fund services; and coordinate the work of federal, state and local governments and organizations.

Federal agencies, including the Department of Health and Human Services and the Department of Justice, should assist state and local agencies in preventing, detecting and prosecuting all forms of elder abuse. These efforts should include facilitating uniform definitions of abuse, neglect and exploitation; collecting data on abuse prevalence; providing victim assistance;

and supporting training of law enforcement and judicial personnel to increase the quality of investigations and prosecutions.

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.

The federal government should encourage the expansion of:

- programs that provide alternative protective arrangements less restrictive than guardianship (such as representative payment);
- educational and support programs to assist guardians, particularly family members, in carrying out their responsibilities; and
- effective programs to monitor guardians and other fiduciaries to ensure that they utilize their authority and fulfill their responsibilities appropriately.

STATE POLICY

ELDER ABUSE AND PROTECTIVE SERVICES

States should enact and implement adult protective services (APS) laws that apply in the community and in long-term care settings and provide for:

- prompt investigation;
- access to the alleged victim by agency personnel, law enforcement and other relevant entities;
- intervention in emergency and nonemergency situations of abuse, neglect and/or exploitation of vulnerable individuals;
- use of the least restrictive protective action that meets the specific needs of the vulnerable individual; and
- balancing the individual's autonomy and self-determination with the state's need to protect those people who cannot protect themselves.

States should:

- enact and enforce laws that make it a criminal offense, with enhanced penalties, to abuse, neglect or exploit a vulnerable individual;
- enact laws that provide victims and their legal representatives adequate civil procedures and remedies (including a shift in the burden of proof, award of attorney's fees and costs, expedited hearings, and posthumous recoveries for pain and suffering) against perpetrators of abuse, neglect and/or exploitation;
- establish programs for abusive family members and caregivers aimed at curbing future abuse;
- develop public awareness programs and expand in-home services, including respite care, to help prevent, identify and address cases of elder abuse;
- establish mechanisms to measure the occurrence of all forms of elder abuse and neglect including collection of data (such as reports to APS agencies) and incidence and prevalence studies;

- work to ensure that domestic violence and APS agencies are responsive to the particular needs of older abused spouses and partners;
- enact laws making institutions liable for criminal and civil penalties for victimization of those in their care (see also Chapter 7, Long-Term Services and Supports: Quality and Consumers' Rights);
- support the training of professionals from a variety of disciplines (including prosecutors, police officers and sheriffs, lawyers, and employees of financial institutions and APS agencies) to improve detection, investigation and enforcement regarding cases of abuse, neglect and exploitation;
- support the formation and on-going operation of multidisciplinary teams to address elder abuse issues that cannot be effectively resolved by a single discipline; and
- address issues of cultural diversity in data collection and programs to combat elder abuse and neglect.

ADVANCE PLANNING, GUARDIANSHIP AND PROBATE

Background

Current demographic trends indicate that people are living longer and that increased age often is accompanied by multiple chronic conditions as well as an increased likelihood of diminished decisionmaking capacity due to dementia and other causes. With an array of important decisions to be made, older people will have a significant need for advance planning.

When an individual 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 vehicles such as powers of attorney, health care proxies and trusts. These advance planning devices allow individuals to specify how personal and financial decisions will be made and by whom and to potentially avoid the necessity for court intervention. When the individual loses capacity and has not conveyed authority for decisionmaking, a court may appoint a guardian or conservator with specified decisionmaking authority.

All of these arrangements carry risks and require careful scrutiny and monitoring. Fiduciaries granted authority under powers of attorney or trusts may neglect their responsibilities or abuse their authority, causing harm to the individuals who voluntarily conveyed decisionmaking powers. Similarly guardianships take away the basic civil liberties of incapacitated people, and guardians may neglect, abuse or exploit the individuals they are appointed to protect.

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 July 2006 the National Conference of Commissioners on Uniform State Laws (NCCUSL) 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.

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, thereby gaining authority to oversee and use the individual’s Social Security benefits. As a matter of policy the Social Security Administration 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, for management of property, 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, trusts can also pose problems for older individuals. Living trusts may in fact provide a means for management of 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 NCCUSL 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. People placed under guardianship, often referred to as wards or incapacitated people, 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.

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. 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 NCCUSL has convened a committee to draft an act that addresses the issue of jurisdiction with regard to guardianships. Jurisdictional issues become even more complex in the international arena. 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.

States do not have consistent standards to protect the rights of wards or prevent abuse in guardianship proceedings. Some state statutory protections include the requirement that a health care professional verify whether an individual is incapacitated, the right of the elderly person to be present when the guardianship hearing takes place, the right to counsel at the hearing, and a prohibition against allowing convicted felons to be appointed guardians.

After a guardian has been appointed, courts are responsible for monitoring their performance and ensuring that incapacitated wards are treated appropriately and protected. 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.

State constitutions and laws also conflict on the issue of whether incapacitated people with guardians can retain their right to vote. While statutes in seven states require guardianship courts specifically to determine whether an individual loses the right to vote when a guardian is appointed, many state constitutions and statutes make clear that a person under guardianship is summarily deprived of the right to vote.

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. Almost all states are attempting to fill this gap by authorizing state agencies or private organizations to act as public guardians. While the number of public guardianship programs is increasing, a 2005 national study of public guardianship by the University of Kentucky and the American Bar Association Commission on Law and Aging found that states have significant unmet needs for public guardianship and other surrogate decisionmaking services, that public guardianship programs are frequently understaffed and underfunded, and that oversight and accountability of public guardianship is uneven.

To improve the quality of guardianship and prevent abuses, a few states have developed standards 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 guardians are better informed about their responsibilities and the requirements for caring for incapacitated people.

A 2004 report by the Government Accountability Office noted that although state courts and federal agencies are responsible for protecting many of the same incapacitated older people, coordination occurs only on a case-by-case basis. This may leave incapacitated people without the protection of responsible guardians and representative payees.

Policy recommendations of multidisciplinary groups include: Medicare and Medicaid funding of functional assessments; uniform data collection within all areas of the guardianship process; increased training and technical assistance for guardians, judges, attorneys, families and fiduciaries; and research aimed at measuring successful guardianship practices. Of continuing importance is the preference for appointing limited rather than plenary guardians—guardians appointed to exercise the legal rights and powers specifically designated by court order upon a finding that the ward lacks capacity to perform some, but not all, of the tasks necessary to care for his or her person or property.

Guardianship cases involve highly personal information about vulnerable, incapacitated older people, such as psychological and psychiatric evaluations, health records, and guardian *ad litem* or court investigator reports, as well as other personal information such as Social Security numbers and financial records. In some states or local jurisdictions guardianship case files or parts of those court records are sealed or otherwise protected from public access; in other jurisdictions the files are available for public viewing. Privacy and protective concerns take on a new dimension as more jurisdictions make court files available electronically. In light of technological innovations enabling courts to broadcast information in court records on the Internet, numerous state courts and legislatures have examined the issue of how to balance public access, personal privacy and public safety. California resolved this balancing act in a 2005 court rule that requires electronic guardianship case records to be accessible electronically at the courthouse itself but not

remotely. The Supreme Court of Florida's Committee on Privacy and Court Records recommended in 2005 that psychosocial evaluations, psychological evaluations, and guardian *ad litem* reports be placed under seal by the clerk of court.

Probate Laws—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 the process of transferring property at death. Delays and costs in the state probate process 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 (see also Chapter 7, Long-Term Services and Supports: Access to Long-Term Services and Supports—Strengthening Financial Protections for Medicaid Beneficiaries and Their Families, on estate planning and recovery for Medicaid).

The UPC has been adopted in whole or in 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 inheritances or debts of decedents.

Some states have enacted legislation authorizing nonprobate transfers of real property using transfer on death deeds (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 NCCUSL will begin drafting a uniform transfer on death deed statute in 2007.

FEDERAL & STATE POLICY

ADVANCE PLANNING, GUARDIANSHIP AND PROBATE

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.

FEDERAL POLICY

ADVANCE PLANNING, GUARDIANSHIP AND PROBATE

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.

Congress should allocate funds:

- to train guardians, agents under durable powers of attorney, judges, and court personnel regarding their powers, duties and ethical standards;
- for demonstration projects on model guardianship monitoring practices;
- for provision of authorized fiduciaries, including public guardians;
- for study of state fiduciary laws, including guardianship and power of attorney laws;
- for study of the roles and responsibilities of government entities regarding fiduciaries; and
- for a uniform system of data collection on key aspects of the guardianship process.

The federal government should convene an interagency-interstate court study group to develop options for improved information sharing and coordination.

STATE POLICY

ADVANCE PLANNING, GUARDIANSHIP AND PROBATE

States should expand their laws on durable powers of attorney to deter wrongdoing by agents under powers of attorney, 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.

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.

States should enact guardianship and conservatorship laws that protect older people's due process rights. These safeguards should include, at a minimum:

- a mandated right to legal counsel (including a right to have counsel appointed by the court and have counsel present at all proceedings);
- timely notification of proceedings in understandable language;
- 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;
- 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;
- investigation of the background and qualifications of prospective guardians and conservators;
 - protections against conflicts of interest in the selection of guardians and conservators;
 - periodic thorough oversight of guardianship by the court, and appropriate civil or criminal penalties for guardian malfeasance;
 - retention by the ward of all rights and authority except those expressly delegated to the guardian due to the ward's functional limitations; and
 - 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.

States should establish and adequately fund public guardianship programs to provide free or nominal-cost services for needy elderly people 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.

States also should enact laws or court rules that:

- require all guardians to receive adequate training and information about their duties and responsibilities;
- mandate certification of guardians who serve multiple, unrelated incapacitated people (certification programs should include training, testing and accountability requirements);
- protect the privacy of alleged incapacitated people and wards by prohibiting electronic posting of sensitive information in guardianship case records; and
- address the need for clear procedures when wards, their property or their care have ties to more than one jurisdiction or state—Procedures should address issues such as the initial jurisdiction to decide capacity, recognition of foreign guardians' authority, and transfer of cases when wards or guardians move.

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 include allowing informal or administrative (rather than adjudicative) procedures for probating wills and appointing personal representatives, and providing oversight for the unsupervised or independent handling of estates.

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 personal property transfers include the Uniform TOD (Transfer on Death) Security Registration Act, the Uniform Multiple-Person Accounts Act, and the Uniform Custodial Trust Act. States should also enact legislation that authorizes Transfer on Death Deeds (Beneficiary Deeds) to enable revocable nonprobate real property transfers.

CIVIL RIGHTS

Background

AARP believes in the fundamental right of all people to be free from discrimination. This right is protected by various civil rights laws that prohibit discriminatory conduct by federal, state and local governments and in some instances by private people and businesses on the basis of age, gender, race, ethnicity, religion, disability, sexual orientation or other similar forms of group identity.

The effectiveness of antidiscrimination provisions frequently depends on the implementation of policies or programs that provide equal opportunities to groups that have suffered or are suffering discrimination. It is also important for enforcement agencies (such as the Equal Employment Opportunity Commission) to collect data on discriminatory practices in order to identify problems and devise effective remedies.

Discrimination takes many forms. It may be manifested in acts against groups or individuals that deny access to valuable opportunities or benefits such as work, credit, or public or private goods or services (see Chapter 4, Employment, regarding Title VII and the Americans with Disabilities Act). It may take the form of prejudicial targeting of groups or individuals for harsh or unequal treatment (for example, predatory financial products or even hate crimes). Discrimination also may consist of policies or practices that appear neutral but whose effects are grossly unequal, at least where an alternative and equally effective approach is available and less unfair in result. One example of this kind of discrimination would be the failure of a community to provide accessible transportation to people with disabilities when it otherwise provides transportation service to its residents (for related policy see Chapter 9, Transportation: Private Transportation Services). Private enforcement is an appropriate and necessary complement to government enforcement in achieving a society without discrimination.

FEDERAL, STATE & LOCAL POLICY

CIVIL RIGHTS

Government agencies should vigorously enforce the fundamental right of all people to be free from discrimination. Civil rights statutes should be vigorously enforced to assist in the elimination of practices, such as predatory

financial practices, that target specific groups and communities for exploitation. Data on discriminatory practices should be collected to identify problems and assist in developing effective remedies.

Government agencies and entities should comply with all applicable federal, state and local civil rights laws. State governments should waive their sovereign immunity to suits for damages under these laws to ensure that their own employees are protected to the same degree that fair employment laws protect all other employees.

Policies and programs that seek to redress past and current discrimination through active measures to ensure equal opportunity in all areas of American life should be enacted and enforced.

Government agencies should provide for outreach to bilingual communities to educate and inform them about how to obtain enforcement of their civil rights.

Government agencies should nominate and appoint to enforcement or implementation positions only people who have a commitment to vigorous enforcement and meaningful implementation of civil rights laws.

Legislation should be enacted to address hate crimes and strengthen existing laws against such crimes.

CIVIL RIGHTS

Background

Age Discrimination

The Age Discrimination Act of 1975 prohibits discrimination on the basis of age in federally funded programs. Congress intended the act to apply broadly to all federally funded areas, such as education, health services, housing and social services. Undercutting the act's effectiveness, however, is the fact that Congress failed to provide victims of age discrimination with adequate means to enforce their rights under the act. As a result victims of age discrimination have used the act infrequently.

FEDERAL POLICY

CIVIL RIGHTS

Age Discrimination

Congress should amend the Age Discrimination Act to strengthen the law's definition of "discrimination" and ensure that victims of age discrimination in federally funded programs have available to them all appropriate forms of relief, including money damages and a direct cause of action in federal court.

CIVIL RIGHTS

Background

Protections for People with Disabilities

The incidence of disability increases with age. The Americans with Disabilities Act of 1990 (ADA) protects people of all ages who have physical or mental disabilities. The ADA prohibits discrimination in employment, public services, public accommodations, transportation and telecommunications—protections equivalent to those granted under prior civil rights laws to people facing bias on the grounds of race, color, gender, religion or national origin. The ADA also requires employers, public officials and private entrepreneurs to make reasonable adjustments in their policies and practices to accommodate people with disabilities (for further discussion of the ADA, see Chapter 4, Employment; Chapter 7, Long-Term Services and Supports; Chapter 8, Housing; and Chapter 9, Transportation). In June 1999 the US Supreme Court ruled in *Olmstead v L.C. and E.W.* that the ADA requires states to undertake efforts to provide care for people with disabilities in community settings (for further discussion of *Olmstead*, see Chapter 7, Long-Term Services and Supports: Access to Long-Term Services and Supports).

Other important laws designed to prohibit discrimination against people with disabilities include the Fair Housing Amendments Act of 1988, which mandates access for people with disabilities in all new multifamily housing (see Chapter 8, Housing); Sections 501, 503 and 504 of the Rehabilitation Act of 1973, which prohibit discrimination in federally funded programs; and provisions of the Air Carrier Access Act that prohibit limitations on access to air travel by individuals with disabilities. While these laws allow individuals to bring suit to enforce their rights, civil rights offices in federal agencies such as the Department of Housing and Urban Development and the Department of Education are charged with ensuring compliance by agencies and people under each federal agency's jurisdiction.

In 2001 the US Supreme Court ruled in *Board of Trustees v Garrett* that workers may not sue employers for damages under the ADA. In 2004 disability rights advocates succeeded in persuading the Supreme Court not to extend *Garrett's* reasoning. In *Tennessee v. Lane* the Supreme Court approved damages suits against state courts that discriminate against people with disabilities in their services and programs. Expansion of *Tennessee* would benefit people with disabilities by permitting full relief in suits challenging other forms of disability bias in state programs and services. Thus far, many federal courts, but not all, have allowed victims of disability bias by state agencies to bypass *Garrett* and sue state entities for damages under Section 504 of the Rehabilitation Act.

Protections for People with Disabilities

Congress should provide adequate funding and personnel for the effective enforcement of the Americans with Disabilities Act (ADA).

The federal government should broadly interpret and require vigorous enforcement of the ADA. Regulators should also vigorously enforce the Fair Housing Amendments Act of 1988; Sections 501, 503 and 504 of the Rehabilitation Act of 1973; and the Air Carrier Access Act.

The federal government should encourage and expedite funding for priority research, demonstration projects and referral programs for the design and distribution of technological devices that assist people with disabilities in leading meaningful and independent lives.

The federal government should make federally funded buildings and programs accessible to people with disabilities and should enforce the accessibility obligations of private providers of public accommodations, transportation and telecommunications.

Civil Rights

Background**Federal and State Identification and Verification Requirements**

Congress has enacted or considered several provisions that would create stricter standards, procedures and requirements for proving identity and other prerequisites for accessing certain government services or for other federal purposes, such as boarding a commercial aircraft, entering a federal building, receiving certain federal or federally funded benefits (such as Medicaid), voting, and maintaining employment at US ports. States also have enacted or considered similar identification and verification requirements.

Under these provisions individuals would have to provide proof of vital personal information, such as citizenship (or legal presence in the country), address, date of birth, and Social Security number by producing specific documents, such as birth certificates, utility bills, bank statements or Social Security cards. In some cases these documents would be necessary to obtain an identification card that would then be used to prove citizenship or legal residence. Individuals who are unable to meet these stricter standards for proving their identity would not be issued federally compliant identification cards and would therefore be denied certain government services.

Providing required documents could prove difficult for many individuals, particularly older, lower-income, minority or rural individuals. A 2006 survey by the Center on Budget and Policy Priorities found the following:

- About 11 million US citizens have neither a birth certificate nor a passport in their home.
- Low-income people are nearly twice as likely to lack these documents as people with higher incomes.
- Elderly residents are much more likely to lack these documents than the non-elderly.
- African-Americans are much more likely to lack these documents than whites.
- Rural residents are more than twice as likely to lack a birth certificate or passport as nonrural residents.

FEDERAL & STATE POLICY

CIVIL RIGHTS

Federal and State Identification and Verification Requirements

Congress, state legislatures, and federal and state administrative agencies should devise requirements that address eligibility and security concerns but are not so restrictive as to hamper access to government-issued identification or government programs and services by otherwise eligible individuals.

PATIENTS' RIGHTS

Background

Hospital patients are routinely subject to policies and practices that infringe on their fundamental and personal rights, thereby denying them the freedom and dignity to which they are entitled under law. Such practices include barring patients' participation in and control over decisions about their care plan and medical treatment, denying them the right to control their personal and financial affairs, and violating confidentiality in such matters.

Hospitals sometimes discriminate against patients by refusing to admit or care for them on the basis of race, income or source of payment. Hospitals that received federal Hill-Burton construction funds are obligated under law to care for indigent patients, but states—not the federal government—generally have the authority to regulate hospitals.

Patients also sometimes suffer from discrimination at the hands of health insurance providers that attempt to limit coverage based on preexisting conditions. For example a worker with insurance coverage on one job might face denial of coverage for a preexisting or continuing condition when moving to another job and enrolling with a new insurance provider. Title I of the Health Insurance Portability and Accountability Act for group and

individual coverage protects against discrimination of this sort (see Chapter 6, Health: Health Care Coverage—Private Health Insurance—Private-Market Regulation).

The personal nature of medical treatment decisions and the importance of autonomy in the health care arena are central to recent debates over health care. Respect for autonomy and self-determination is as critical for the dying individual as for the patient who is expected to recover. Ethicists and patient advocates have defined a protected sphere of autonomy that allows individuals to live in accordance with their own religious, philosophical and personal values, even when these differ from values held by others. There is increasing evidence, however, that health care providers and institutions fail to implement the decisions of competent patients.

Who makes treatment decisions? Sometimes illness, injury or disability can render adults unable to make or communicate their own treatment decisions. When adults lack decisionmaking capacity or the ability to communicate their decisions, the duty to decide on treatment falls to others. Although this may raise ethical considerations, concern for the individual's wishes, values and welfare remains at the heart of surrogate decisionmaking. The most crucial questions are who should make treatment decisions for incapacitated adults and what criteria should they employ in making those decisions.

The Patient Self-Determination Act requires health care providers to inform individuals about their rights under state law to make decisions about their own health care and to formulate advance directives. The act has no provisions allowing individuals to file a legal complaint or grievance if an obligation is unmet.

Currently every state permits competent adults to execute advance directives: living wills and/or durable powers of attorney for health care. These documents allow people to make known their treatment wishes under specific medical circumstances and/or appoint a surrogate decisionmaker to act for them should they become incapacitated. There are, however, gaps in the laws, confusion as to which type of directive is most appropriate, and questions about the implementation of advance directives by health care providers. The National Conference of Commissioners on Uniform State Laws has adopted model legislation (the Uniform Health Care Decisions Act) that takes a comprehensive approach to health care decisionmaking.

It includes provisions for:

- oral and written instructions;
- single advance directives that permit health care instructions, as well as for choosing an agent to make decisions and appointing a surrogate decisionmaker in the absence of a more complete advance directive;
- compliance by health care providers and institutions;
- procedures for dispute resolution; and
- portability of advance directives between states.

FEDERAL POLICY

PATIENTS' RIGHTS

The federal government should play a strong role in protecting patients' rights.

Congress should enact legislation that sets minimum standards for hospitals and other facilities with regard to patient treatment (both medical and nonmedical), including a requirement that all nonprofit hospitals have an obligation to care for indigent patients.

Federal legislation should require that all Medicare and Medicaid providers inform patients, both orally and in writing, of their rights upon admission. Written consent forms should be detailed and specific, so that a patient's consent is truly informed, and should clearly provide patients with the right to refuse certain medical practices without fear of reprisal or discontinuation of medical treatment.

Federal legislation should include:

- a mechanism that allows patients and residents to play an independent role in enforcing the law and regulations,
- penalties severe enough to protect those who complain and to deter offensive conduct, and
- a grievance mechanism with an appropriate appeals procedure.

(See Chapter 6, Health, and Chapter 7, Long-Term Services and Supports, for a discussion of health care reform proposals, information on state and local ombudsman programs that help enforce laws protecting patient rights, and a statement of AARP's principles regarding the rights of Medicaid and Medicare patients. Chapter 7 also discusses ensuring quality in nursing homes, home care and supportive housing.)

STATE POLICY

PATIENTS' RIGHTS

States should enact legislation that protects the right of a terminally ill patient to be treated at all times with dignity, respect and kindness; maintained in a comfortable state without pain; and permitted to refuse medical treatment.

States should enact laws with a comprehensive approach to health care decisionmaking, such as the provisions in the Uniform Health Care Decisions Act. State law should allow competent adults to execute advance directives (living wills, health care powers of attorney, or combined forms) that allow patients to communicate their medical treatment wishes and/or appoint a surrogate to make treatment decisions for them in the event of their incapacity. Covered treatment decisions should include (but not be limited to) the use, withholding or withdrawal of artificial nutrition and hydration.

Legislation should authorize nonjudicial surrogate decisionmaking in the event that an incapacitated patient has not executed an advance directive. Such legislation should:

- include a definition of and nonjudicial process for determining incapacity;
- detail who, in order of priority, may make health care decisions for the incapacitated individual, including provisions for “unbefriended” patients without relatives or friends to serve as decisionmakers;
- establish the standard that surrogates should use in making decisions—preferably the patient’s expressed wishes, the “substitute judgment test” (i.e., what the patient would have wanted, if the wishes were known to the surrogate), or if those wishes are not known, the patient’s best interests, based on all relevant information available to the surrogate;
- include provisions for the resolution of disputes that may arise; and
- provide that a surrogate decisionmaker’s authority is equal to that of an agent or proxy appointed in an advance directive.

In addition states should enact laws that:

- establish a nonjudicial means (such as mediation) for resolving disputes that may arise in the implementation of advance directives,
- provide guidelines for advance directives—such as nonhospital “do not resuscitate” orders—that protect incapacitated adults’ rights to refuse life-sustaining treatment when they are not in a health care facility, and
- ensure that any advance directives accompany an incapacitated individual moved from one facility to another.

States should require that patients be informed, both orally and in writing, of their rights upon admission to a facility. Written consent forms must be provided to patients and nursing facility residents so that they may give truly informed consent and have real freedom of choice regarding their medical care—not simply generalized consent—and the right to refuse certain medical practices without fear of reprisal or discontinuation of medical treatment. Such legislation must include:

- an enforcement mechanism that allows patients and residents to play an active role in enforcing the law and regulations,
- penalties severe enough to protect those who complain and to deter offensive conduct, and
- a mediation mechanism with an appropriate appeals process.

INDIVIDUAL ENFORCEMENT OF LEGAL RIGHTS

Background

The legal doctrines and standards governing civil damage suits have been the subject of “reform” proposals on both the federal and state levels. Such proposals include:

- alternatives to the present court system, such as mandatory arbitration;

- limits on attorney’s fees;
- limits on punitive damages and awards for pain and suffering;
- changes in the legal doctrine governing such civil wrongs as personal injury (both in tort and product liability law), including replacing “joint and several liability” (under which each and every defendant is liable for all the damages a plaintiff suffers) with liability that is several only; and
- prohibitions on “frivolous” lawsuits.

The common law of torts permits individuals to sue for damages if they have been hurt as a result of the negligence of another person (or corporation). The National Center for State Courts estimates that 10 percent of cases (approximately one million) filed in state courts of general jurisdiction were tort cases. A 2004 Bureau of Justice Statistics Bulletin states that 1.9 percent of tort cases that go to trial are product liability cases. Most tort cases are resolved before trial.

Tort reform is controversial. Reform proponents (including many corporations, municipalities, professionals and insurance companies) argue that courts and legislatures have greatly broadened defendants’ liabilities and thus increased the costs of doing business. These advocates propose restricting plaintiffs’ abilities to seek joint and several liability and bring class actions in either state or federal court. They would also limit the size and type of awards that should be available to plaintiffs. Some consumer advocates and lawyers’ groups argue that the increased numbers and amounts of jury awards reflect a growing and more mobile, educated and heterogeneous population and that larger awards are logical given higher inflation, rising medical costs and longer life expectancy. Conversely other consumer advocates, along with lawyers’ groups and research institutes, have presented evidence that neither the number nor the size of jury verdicts has increased. These advocates fear that some proposed reforms might jeopardize the rights of injured people to seek redress. In particular, consumer advocates believe that restrictions on joint and several liability could leave injured parties without effective remedies. The issue of allegedly frivolous lawsuits is best left for judges and juries to determine.

Consumer advocates also argue that punitive damages are important to product liability because they provide a critical economic incentive for manufacturers to produce safe products and remedy discovered defects. The legal principle is that punitive damages punish liable parties and are unrelated to the actual value of the plaintiff’s loss. Compensatory damages, on the other hand, are based on the value of the loss and include such factors as loss of companionship and support, loss of society (for instance, what a grandchild might have learned from a grandparent), and loss of future enjoyment of avocational activities. Elderly litigants may receive low or reduced awards due to a number of factors, including assumptions about the value of an older person’s life and the failure to substitute a relevant factor for one that no longer pertains to an older person, such as lost earning capacity (see Chapter 4, Employment: Age Discrimination in Employment, for a discussion of federal taxation of punitive damage awards).

Consumer protection laws may provide individuals with a right of action. This allows an individual to bring suit in order to remedy violations of personal rights established by that law. If the law does not provide a private right of action, the individual consumer must depend on federal or state officials and regulatory schemes for enforcement. In these cases the efforts and resources expended for enforcement may depend on the political climate, leaving the individual uncertain about obtaining remedies for violations of rights.

US Supreme Court decisions in *Alexander v Sandoval* (2001) and *Gonzaga University v Doe* (2002) significantly restricted the availability of private rights of action to enforce federal laws. In *Sandoval* the court clarified that a plaintiff who brings suit directly under a statute, based on an implied right of action, must demonstrate that Congress intended to create not only a private right but also a private remedy. In addition the court held that while plaintiffs may sue to enforce federal regulations, such a right of action proceeds directly from the authorizing statute and not independently from the regulation. In *Gonzaga* the court disregarded significant precedent and held that in determining whether a private right of action exists, a plaintiff must demonstrate Congress's unambiguous intent to create a federal cause of action. These decisions significantly narrow private citizens' access to the courts to seek judicial enforcement of the range of federal programs upon which people with disabilities, the aged and others depend. The decisions also underscore the importance of—and the need for Congress and state legislatures to explicitly provide—private rights of action in legislation intended to protect individuals.

Class action lawsuits are an important tool for the resolution of multiple lawsuits with common claims. Recent class action suits have challenged age discrimination in employment, sweepstakes and telemarketing fraud, unfair lending practices, poor access to affordable medication, neglect and abuse of nursing home residents, and denials of contractually guaranteed pension benefits. Most of these cases, which resulted in significant relief for those affected, were decided in state courts, based on state law. Some proposals would mandate that class action litigation be moved from the state courts where they are filed to federal court. Opponents have argued that this change would congest the federal court dockets, create complex legal disputes regarding jurisdiction, and raise concerns about appropriate notification.

In 2005 Congress enacted the Class Action Fairness Act, which permits defendants in many class action suits based on state law to remove cases to federal court. Unfortunately this law is based on a small and unrepresentative number of “horror stories” involving state courts' handling of nationwide class actions. It has resulted in a highly counterproductive nationwide reorganization of state law class action suits. Although some suits will be allowed to proceed in state court (e.g., if more than two-thirds of the plaintiffs reside in the same state and are suing defendants located in that state), many other worthy suits will be readily removed to federal courts by defendants. While federal courts may be able to handle these suits, the new

approach has myriad problems: lack of familiarity with state law in the federal courts; reluctance among the federal judiciary to interpret state law broadly to favor plaintiffs, even where it is clearly warranted; and a lack of resources to decide state law class actions in federal court as quickly as they would have been in state court.

FEDERAL & STATE POLICY

INDIVIDUAL ENFORCEMENT OF LEGAL RIGHTS

The civil justice system should encourage fair and noncoercive settlements, improve access for people with small claims, and generally streamline the judicial process, making it less costly and more effective for all parties.

The courts, not legislatures, should decide whether a lawsuit is frivolous and should dispose of cases that lack merit before either party incurs significant expense.

Congress and state legislatures should not limit the amount of punitive damages or joint and several liability or create unreasonable limits on damage awards for pain and suffering.

Courts and juries should determine damage awards free from all forms of age bias, including devaluation of the quality of an older person's life or the value of his or her nonremunerative activities.

Congress and state legislatures should explicitly provide a private right of action in all legislation intended to protect individual rights.

Congress and state legislatures should not restrict the rights of individuals to engage in class action suits. Legislative and regulatory strategies that would limit access to remedies now available and delay the time for resolving class action suits, including those mandating a change of venue to federal court, should be opposed. Congress should either repeal the Class Action Fairness Act or amend it significantly to restore the rights of consumers and discrimination victims to seek full relief in state courts under state consumer protection and antidiscrimination laws.

The federal government should provide for outreach to bilingual communities to educate them on how to obtain enforcement of their civil rights.

STATE & LOCAL POLICY

INDIVIDUAL ENFORCEMENT OF LEGAL RIGHTS

States and localities should endeavor to make their justice systems more accessible, less expensive and easier to use for people seeking enforcement of their rights.

STATE POLICY

INDIVIDUAL ENFORCEMENT OF LEGAL RIGHTS

States should:

- provide for outreach to bilingual communities to educate and inform them of basic civil rights, including the right to vote;
- adopt legislation, such as the Uniform Marital Property Act, that treats all property (except gifts and inheritance) acquired during marriage as the joint property of both spouses, regardless of who holds title to it; and
- ensure that judicial proceedings are fair, both in the administration of justice and in the calculation of damages in civil proceedings.

LEGAL RIGHTS OF GRANDPARENTS

Background

An area of civil justice of particular concern to older people is the legal authority they may have as grandparents. This issue also pertains to other relatives raising children not their own. Many such caregivers have partial or total responsibility for children but none of the legal authority necessary to provide care. For example caregiver relatives do not always have the authority to enroll a child in school even if the child resides with the relative full time. Only about half of the states have laws giving relative caregivers authority to obtain medical treatment for the children in their care, and about a fifth of the states provide statutory authority for educational consent. And caregiver relatives with long experience providing full-time care frequently find themselves left out of consideration when decisions are made about permanent child placement.

Similarly in some states grandparents and other relatives may have limited standing to petition a court for visitation, even though it may be in the child's best interest to have a continuing relationship with these relatives. State statutes can specify limited circumstances in which a grandparent or other relative may file a petition for visitation, such as divorce, custody proceedings, or a parent's incarceration or death. The constitutionality of visitation statutes has been challenged in numerous state courts. The US Supreme Court has ruled that very broad visitation laws are unconstitutional but left open whether more narrowly drawn statutes might meet constitutional requirements.

AARP research shows that today's grandparents are very involved in their grandchildren's lives. Large majorities of surveyed grandparents report that they have visited or spoken by phone with a grandchild in the past month, and more than half say they usually see a grandchild at least weekly. They often provide child care and support to working parents and otherwise play a vital role in the lives of their grandchildren.

An increasing number of children are living with their grandparents or other relatives. According to the 2000 census, the number of children residing in grandparent-headed households was about 4.5 million. Another 1.5 million children are living with other relatives. More than 2.4 million grandparents report that they are responsible for most of the basic needs of grandchildren living with them. Nineteen percent of these grandparents are living in poverty. About one-third of these families have no parent present in the home. These relatives are key providers of care and can be a stabilizing force for children whose parents have divorced, become incapacitated or died (see Chapter 5, Low-Income Assistance, regarding programs for children in the care of grandparents and other relatives).

STATE POLICY

LEGAL RIGHTS OF GRANDPARENTS

States should adopt legislation that:

- provides a range of alternatives by which grandparents and other relatives may obtain and exercise the legal authority to make decisions for the children in their care and
- allows grandparents to petition courts for visitation with grandchildren in cases of divorce, separation of parents, parental incapacity or long-term incarceration, or the death of one or both parents—particularly in instances where the two generations have formed deep bonds that are critical to the children’s well-being.

ALTERNATIVE DISPUTE RESOLUTION

Background

Alternative dispute resolution (ADR) mechanisms provide ways of resolving conflicts other than through the court system. The two major forms of ADR are mediation and arbitration, which differ widely in process and content. Whether litigation or ADR is appropriate in a particular situation depends on many factors, including the issues involved, the relief sought, whether the parties will need to maintain an ongoing relationship, and the need to establish legal precedent. These considerations also are relevant in deciding what form of ADR is appropriate.

Mediation involves a trained, neutral third party who helps the disputing parties reach their own decisions. As a process mediation is less formal and less costly than litigation. Typically the parties choose mediation after a dispute has arisen. It allows them more active participation and control over the outcome and helps them preserve their relationship. In arbitration a third party or panel makes a decision after hearing arguments and reviewing evidence—a process that is more formal and more expensive than mediation. Arbitration is not always less costly than litigation; an individual often has to pay more to pursue arbitration.

Increasingly industries are implementing arbitration practices that could harm consumer interests. One practice, known as mandatory arbitration, requires that consumers agree to submit all future disputes to arbitration as a condition of doing business. Mandatory arbitration clauses appear increasingly in contracts and agreements involving, among other activities, purchasing or leasing goods and services, obtaining and retaining employment and related benefits, and securing health care (including insurance coverage and levels of care and in medical malpractice claims).

Mandatory arbitration provisions are often found buried in the small print of contracts or agreements, and consumers may be unaware that in signing a contract they are agreeing to forfeit the right to go to court until after they engage in an arbitration process.

Binding arbitration also may not be in the consumer's interest. Under binding arbitration the parties agree to comply with the arbitrator's determination, thereby waiving the right to have a judge or jury ever hear the complaint. Binding arbitration is particularly troublesome when consumers must agree to it as a condition of doing business, before they can possibly evaluate the potential advantages and disadvantages of pursuing litigation, arbitration or other form of dispute resolution. As with mandatory arbitration clauses, binding arbitration clauses in contracts or agreements are often in small print and technical language, and consumers are frequently unaware of their existence or meaning. Most contracts that contain arbitration clauses make the process both mandatory and binding.

The arbitration process itself has many disadvantages for consumers, including:

- high up-front costs, typically much higher than for filing a lawsuit, that may not be recovered by a consumer who wins in arbitration, as they usually are in litigation;
- limited access to documents and other information;
- limited knowledge on which to base the choice of an arbitrator;
- the absence of a requirement that arbitrators follow the law or issue written decisions; and
- the extremely limited grounds for appealing an arbitrator's decision.

Arbitration laws—The primary law governing arbitration is the 1925 Federal Arbitration Act (FAA), which was designed to govern transactions between commercial parties with comparable sophistication and bargaining abilities. The US Supreme Court has issued a considerable number of decisions interpreting the scope and applicability of the FAA that generally limit challenges to arbitration requirements. For example the court ruled that a Montana law requiring that arbitration provisions be disclosed on the first page of a contract undermined the FAA's goals, because the law singled out arbitration provisions for negative treatment. The court decided that the FAA overrules any state statute that treats arbitration more negatively than any other contract provision. Although the FAA governs only transactions involving interstate commerce, the number of purely intrastate transactions is

likely to be fairly small. Since the Supreme Court's ruling, consumers can no longer rely on the protections of the many state laws that either prohibit the use of arbitration in certain types of contracts or mandate particular disclosures or other requirements (large print, separate signatures, etc.).

The Supreme Court has stated, however, that arbitration requirements may be challenged on the same grounds, such as fraud, duress and unconscionability, as any other contract term. The availability of these legal challenges is important since contracts are a matter of consent. Consumers should be able to challenge the applicability of contract terms to which they have not agreed, particularly when they have been misled about the existence of those terms or their implications. These factors underscore the need to ensure the fairness of both the contract formation process and the arbitration process (see also Chapter 4, Employment, regarding age discrimination in employment; Chapter 6, Health, regarding quality care and medical malpractice; and Chapter 10, Utilities: Telecommunications, Energy and Other Services, regarding financial services).

FEDERAL POLICY

ALTERNATIVE DISPUTE RESOLUTION

Voluntary forms of alternative dispute resolution (ADR), such as mediation, should be available to resolve a range of conflicts, including those regarding employment, health care and purchases of goods and services. However, ADR is appropriate only when certain mechanisms are in place to help ensure the fairness of the process. At a minimum they include the following standards:

- Individuals should never be required to agree to use ADR until after a dispute has arisen. ADR should not be required as a condition of doing business, receiving services or obtaining or retaining employment or related benefits.
- Binding mandatory arbitration should be prohibited.
- Parties must receive reasonable notice, an explanation of the rules and consequences, and an opportunity to consent to any ADR procedures.
- Arbitrators and mediators must be neutral, well qualified, trained in the skills of ADR, and knowledgeable about the law(s) involved in the dispute.
- Access to ADR should not be denied on the basis of ability to pay.
- Mediators and arbitrators cannot be affiliated with either party involved in the dispute.
- Parties must have the right to counsel during the proceedings.
- Mediation procedures should ensure confidentiality of both parties.
- Participants must be allowed to engage in reasonable discovery, with an arbitrator authorized to subpoena documents and witnesses.
- Evidentiary protections, including the right to cross-examine witnesses, must be guaranteed to both parties.

- Documentary evidence and a statement of arguments to be used at the hearing must be given to both parties and to the decisionmaker(s) before the proceeding.
- Decisions must be in writing, include findings of fact and the basis for the decision, and be fully accessible to the public, except where a compelling need exists to maintain privacy.
- Court review must be available to either party.

STATE POLICY

ALTERNATIVE DISPUTE RESOLUTION

States should adopt legislation requiring that alternative dispute resolution (ADR) mechanisms contain adequate safeguards for situations in which the parties have unequal bargaining power. Such safeguards are particularly important in those states where the courts or legislature has endorsed obligatory forms of ADR, such as mandatory arbitration. States should adopt legislation to ensure that alternative forums are equivalent forums: that parties subject to mandatory forums are placed on an even playing field with parties who may choose from a panoply of forums, including the judicial arena. Such nonwaivable safeguards should include:

- civil discovery;
- a prohibition against binding mandatory arbitration;
- representation by counsel;
- the right to act individually or seek class certification and class-wide relief;
- the full range of remedies, legal and equitable, afforded by the statute or common law under which the claims arise;
- a written and publicly disclosed decision, with findings of fact and conclusions of law;
- the right to appeal on the basis of errors of fact or law, or abuse of discretion;
- the right to a convenient forum in the parties' home state;
- the right to reasonable forum costs, which should be no greater than those that would be incurred in a state judicial proceeding; and
- all state and federal constitutional rights, except those that have been knowingly, voluntarily and intelligently waived.

CRIMINAL JUSTICE

Background

The aging of America's population, particularly the growth in the numbers of people over 75 years of age, presents some unique challenges for the criminal justice system. Among these are detecting and prosecuting crimes resulting from abuse and neglect, deterring an ever changing variety of frauds and scams aimed at vulnerable older people, and fostering partnerships with an

array of public, private and nonprofit agencies and organizations designed to make communities safer for older people living in all types of settings.

The secrecy, personal embarrassment and fear that often surround abuse and neglect has significant implications for the detection and successful prosecution of such cases. Older victims must be removed from an offender's reach, and specialized techniques are often required when victims are unable to testify on their own behalf due to cognitive impairment or poor physical health. Not too long ago it was difficult, if not impossible, to get an abuse case investigated and prosecuted. Fortunately that situation has changed, but there is still a great need for training of police officers and prosecutors that will facilitate successful prosecutions and encourage further development of case law. There are also many gaps in the network of services for abused and vulnerable adults. These include a lack of emergency temporary housing and in-home care for abuse victims; responsible guardians; coordination between federal, state and local agencies; and reliable national and state data.

Although violent crime receives the most attention, fraud is an increasingly serious crime, and older people are often its target (see Chapter 11, Financial Services and Consumer Products). For example the National Consumer League's National Fraud Information Center reports that half of all complaints of telemarketing fraud made in 2003 were by victims age 50 and older. In addition a recent analysis by the Federal Trade Commission of consumer complaints from its Consumer Sentinel Database shows Internet-related complaints accounted for a significant share of complaints from consumers age 50 and older. Some 41 percent of all reported fraud complaints (excluding identity theft) from consumers age 50 and over were Internet-related in 2004, with monetary losses of more than \$43 million. The Federal Bureau of Investigation also reports that the proportion of individuals losing at least \$5,000 to Internet fraud is higher for victims 60 and older than it is for any other age category. This age group also reported higher average losses for this type of fraud than did any other age group.

The Violent Crime Control and Law Enforcement Act of 1994 allows local governments to use funds from crime prevention block grants for a variety of programs, including efforts based on the "triad" model, which addresses not only street crime but fraud (including telemarketing fraud) and abuse, particularly against older people living in isolation.

FEDERAL POLICY

CRIMINAL JUSTICE

The federal government should:

- provide greater assistance to states and local agencies for crime prevention and deterrence activities, including programs designed to detect and prosecute crimes resulting from abuse and neglect and to deter fraud;

- foster and fund partnerships designed to make communities safer for residents living in a variety of settings, particularly those who are living alone or are isolated;
- provide assistance to crime victims, including emergency housing and in-home care for abuse victims; and
- assist states and local agencies in improving data collection and coordination, increasing older people's participation in crime prevention programs, and educating law enforcement officials about the special needs of the elderly—especially older minorities and people with disabilities—for protection and support after victimization.

Congress should eliminate gaps in and strengthen enforcement of the Brady Handgun Violence Prevention Act and other federal gun laws.

STATE POLICY

CRIMINAL JUSTICE

States should:

- encourage and sponsor community crime prevention and deterrence programs, including programs designed to detect and prosecute crimes resulting from abuse and neglect and to deter fraud;
- improve training opportunities for law enforcement personnel and adult protective services providers, particularly about dealing with older victims and techniques to assist those victims who are cognitively impaired or in poor physical health, and about the prevention of crimes most frequently committed against this segment of the population;
- establish and improve victim information systems;
- sufficiently fund state victim compensation programs—States also should provide expedited compensation in emergencies and consider the victim's age and physical health in deciding on such payments;
- require consideration of victim-impact statements (oral or written) at critical proceedings such as hearings for bail, charging, sentencing and parole—These statements should be consistent with guidance under the 1982 Federal Victim and Witness Protection Act and contain information concerning any harm to the victim (financial, social, psychological and physical), as well as information concerning restitution needs;
- review criminal codes and court scheduling, sentencing and parole procedures to ensure appropriate opportunities for victim participation and consideration of the consequences of violent crimes against vulnerable victims and of their special needs;
- provide for the training of hospital staff in the collection and preserving of crime evidence and in the special needs of vulnerable victims;
- enact legislation to eliminate gaps in and strengthen enforcement of federal and state gun laws, particularly with regard to possession by juveniles, convicted domestic abusers and those under domestic violence restraining orders; and

States should develop assistance programs for victims of serious crime. Programs to serve victims may be implemented by bills of rights, laws or constitutional amendments that require certain minimum services and rights for all victims of serious crime. Services to crime victims should include:

- counseling referrals and related services to help victims cope with the tragedy of the crime;
- information about how the criminal justice system works, including the roles, rights and obligations of victims, witnesses and defense and trial counsels;
- court accompaniment and support during trials for those severely traumatized by the crime;
- transportation to court and other proceedings for older and disabled victims and witnesses, as required by their particular circumstances;
- intercession with employers and creditors, if required;
- information on major case developments and decisions at all critical proceedings, as well as information on the offender's status from arrest through release (including the minimum time that those convicted must serve if sentenced to incarceration);
- advance notice of court appearance dates, scheduling changes and continuances;
- protections for victims who are threatened or subjected to intimidation; and
- expeditious return of property when no longer needed as evidence.

LEGAL SERVICES

Background

Because of their unique health, income and social problems, older people may need legal services beyond those that the general population requires. Competent legal assistance is necessary when planning personal affairs and trying to obtain basic necessities such as health care, in-home support services, protective services and benefits from programs such as Social Security, Supplemental Security Income and Medicare. This has resulted in the emergence of elder law as a recognizable specialization within the legal profession, with appropriate certification and professional organizations such as the National Academy of Elder Law Attorneys. Because older people are often dependent on services provided by government agencies with complex requirements, older people need to keep up with rapidly changing rules, regulations, guidelines and procedures. Recognizing the need for legal representation tailored to the specific legal situations of older people, the Older Americans Act (OAA) provides funding for such services. In addition low-income older people are eligible for help from Legal Services Corporation (LSC) grantees; in 2000, 10 percent of LSC clients were age 60 and older.

Although there are 20 lawyers for every 10,000 people in the US, the Legal Services Corporation Act has set a “minimum access” goal of two LSC attorneys for every 10,000 people who are at or below the official poverty level. This goal was met for the first and last time in 1981. Funding for the LSC and legal services under the OAA is now estimated to be significantly less than in 1981, after adjusting for inflation, and is far short of the amount needed to meet the minimum access goal. It is important to note that the legal service needs of the institutionalized poor in nursing homes, mental hospitals, and licensed board and care facilities are not included in the calculations for LSC funding. Further, LSC programs have been reorganized, but no assessment has been done to determine whether current needs are being met.

In recent years there have been repeated efforts to eliminate legal services provided through the LSC. While such efforts have failed, tactics to limit the LSC’s effectiveness have taken a toll. Unlike private attorneys Legal Services attorneys are restricted by federal law from initiating or participating in class actions, they may not engage in direct or grassroots lobbying on behalf of their clients, and they are prohibited from challenging or engaging in any activity to influence the welfare system.

Eliminating LSC services would have serious implications for low-income older people. Legal services under the OAA, which would be the primary remaining source of legal assistance for elderly people, would be insufficient, and the present funding level is inadequate to meet current needs. Moreover the OAA program does not require recipients to meet an income standard and does not give priority to such critical programs as housing and public benefits. Finally, OAA legal assistance funds are generally subject to state discretion, despite the recognition that legal assistance receives as a priority service under federal law.

FEDERAL POLICY

LEGAL SERVICES

Legal services programs should remain strong and fully funded. At a minimum Congress should restore funding for legal services programs provided through the Legal Services Corporation (LSC) and the Older Americans Act (OAA) to 1981 inflation-adjusted levels without additional restrictions.

Congress and the LSC should improve and strengthen LSC services by:

- increasing funding to LSC programs;
- establishing a national clearinghouse for legal services;
- developing and maintaining state and national support and training centers;
- removing LSC restrictions on receiving attorney’s fees, on lobbying for indigent clients’ rights, and on the types of low-income clients who can receive assistance, the types of issues LSC lawyers can address, and the use of private funds for providing legal assistance;

- ensuring a fair, competitive bidding process for grants;
- improving the monitoring of LSC grantees; and
- providing funding targeted to institutionalized poor people and those in board and care homes who can be served only through specially designed outreach programs.

Congress should strengthen assurances that legal assistance to the elderly under the OAA serves those most in need and gives priority to securing rights to critical services such as quality health care and treatment, housing, and public benefits.

Federal policymakers should help expand the use of qualified nonlawyer advocates and encourage all attorneys in private practice to serve low-income people through reduced-fee lawyer referrals, pro bono service and education and training programs.

Special outreach efforts should target vulnerable people in institutions, those who cannot leave their homes, and those who are otherwise isolated, especially minorities.

Legal services programs should not be prohibited from bringing class action suits or otherwise be restricted from providing the scope and types of representation available to clients of privately paid attorneys.

STATE POLICY

LEGAL SERVICES

States should:

- support legislation that would require area agencies on aging (AAAs) to allot sufficient Title III-B funding for each legislated priority, including legal services, and ensure that all AAAs comply with the national priorities set out in the Older Americans Act;
- establish legal services programs to assist the low- and moderate-income elderly at reasonable cost and require such programs to utilize trained older people to the extent possible in providing legal services;
- support reforms to legal practices that would reduce clients' costs, such as authorizing legal assistants and paralegals to provide simple legal services at reduced fees;
- encourage law firms to develop active pro bono practices;
- encourage and support the development of alternative mechanisms for funding legal services programs for low-income people; and
- support unrestricted use of Interest on Lawyers' Trust Accounts funds for legal services programs.