
How the Guardianship System Can Help Address Gun Violence

Nina A. Kohn

A 2019 nation-wide poll of adults found that 86% would support “a law allowing the police to take guns away from people who have been found by a judge to be a danger to themselves or others.”¹ A Quinnipiac poll of registered voters conducted a month earlier found that 80% would support “allowing the police or family members to petition a judge to remove guns from a person who may be at risk for violent behavior.”²

Consistent with this broad public support, many states are adopting “Red Flag” or “Extreme Risk Protection Order” (ERPO) laws that allow police, family members, and, in some states, healthcare professions and educators, to petition a judge for temporary removal of guns from persons who present a risk of danger to themselves or others.³ While ERPOs are an important tool for addressing gun violence, there is an overlooked body of law already present in all fifty states that complements ERPOs, and that can be used to accomplish much of what ERPOs are designed to do in states that have yet to adopt legislation authorizing them. Specifically, probate courts and other courts with jurisdiction to do so could use existing state guardianship law to remove the right to possess guns from certain people who are at risk because they cannot make appropriate decisions about guns.

Use of the Guardianship System to Directly Restrict Gun Rights

Guardianship is a process by which a court appoints another person to make decisions for an adult who

the court finds cannot make decisions for himself or herself and consequently has unmet needs. Guardianship law is rooted in the ancient doctrine of *parens patriae*, and the longstanding recognition that states have a right and duty to care for vulnerable citizens unable to care for themselves. The guardianship process, although not without problems,⁴ provides individuals subject to a petition for guardianship with substantial due process guarantees. For example, a guardian — with limited exceptions — may only be appointed following notice and a hearing before a judge.

Guardianship goes by a variety of names. This article uses “guardianship” as an umbrella term to refer to processes by which courts appoint others to make decisions for adults found incapable of making those decisions for themselves, but many states call a person appointed to make financial decisions a “conservator” and one appointed to make personal decisions for another a “guardian.” Other states call both types of appointees “guardians,” and several call both types “conservators.” Louisiana uses altogether different terms: “curator” and “tutor.”⁵

The appointment of a guardian can result in limitations on gun rights. Some states statutorily bar an individual subject to guardianship from possessing or purchasing a firearm.⁶ Even in states without those restrictions, if a judge finds after notice and hearing that an individual is at substantial risk because the individual cannot make safe decisions about firearms, the judge could appoint a guardian to control the individual’s relevant possessions (guns), finances (gun purchases), and activities (gun use). With such a finding, the court could also explicitly remove the individual’s right to possess or purchase guns and to engage in gun-related activities.

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In addition, in some states, the guardianship system could be used to limit rights related to firearms without actually appointing a guardian. Under the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (“UGCOPAA”) — which has been adopted by Washington⁷ and Maine⁸ — a court may enter an order of limited scope in lieu of guardianship where the limited order would meet the needs that would otherwise warrant appointment of a guardian.⁹ This could enable a court to order firearms removed from individuals who, due to cognitive limitations, are at significant risk if they possess

Thus, whether an individual at risk for perpetrating gun violence will meet the criteria needed for the court to use guardianship systems to restrict gun rights varies by state. States with criteria that focus on the risk posed or faced by the individual,¹⁵ and not simply on the individual’s abilities to provide self-care,¹⁶ are better situated to use their guardianship systems to address gun-related risk. Nevertheless, even those states that focus on self-care may capture a sizeable portion of those prone to gun violence. In the United States, the majority of those who commit suicide use a firearm to do so.¹⁷ Suicide by firearm is a

Like the use of an ERPO, using the guardianship system to remove the right to possess guns is consistent with the type of tailored, individualized determinations that have broad bipartisan support and clearly pass constitutional muster. The requirement that a court only appoint a guardian or enter an alternative order after notice and hearing, as well as the right of an individual subject to guardianship to petition to have rights restored, provides ample due process to protect the underlying Second Amendment right. This is especially true where the court makes an affirmative finding as to whether the individual has the ability to retain access to firearms.

a firearm, and prohibit them from acquiring firearms without otherwise limiting their ability to engage in transactions or activities. While the UGCOPAA allows for a significantly broader array of protective orders in lieu of guardianship than are available in most states, other states also permit targeted orders short of guardianship that could include an order to remove guns and prohibit their acquisition.¹⁰

The standard that must be met to use guardianship systems to limit gun possession varies by state. Under the UGCOPAA, an appointment of a guardian or protective arrangement in lieu of guardianship may only be ordered if a court finds that an individual “lacks the ability to meet essential requirements for physical health, safety, or self-care” because of an inability to “receive and evaluate information or make or communicate decisions.”¹¹ In addition, under the UGCOPAA, a guardian may not be appointed if the individual’s needs can be met by less restrictive alternatives.¹² By contrast, some jurisdictions expand the basis for an order by, for example, allowing for guardian to appointed for individuals with broader functional needs or abilities.¹³ And some limit imposition of guardianship to situations in which the individual has particular disabilities or conditions (e.g., mental illness, chemical dependency).¹⁴

particularly common method of suicide among older adults,¹⁸ a class already disproportionately subject to guardianship.

Indirect Impact of Guardianship on Gun Rights

Imposition of guardianship even without court-imposed restrictions on firearm possession can indirectly lead to the loss of firearm-related rights. Imposition of guardianship renders the individual subject to guardianship one “who has been adjudicated as a mental defective,” within the meaning of the federal Gun Control Act of 1968, which prohibits the sale or other “disposal” of firearms to such individuals.¹⁹ Under federal regulations, a person is considered to have been “adjudicated as a mental defective” when a court has determined that the person is “(1) a danger to himself or to others; or (2) [l]acks the mental capacity to contract or manage his own affairs” because of “marked subnormal intelligence, or mental illness, incompetency, condition, or disease.”²⁰ Although the term “incompetence” has generally fallen out of favor in guardianship statutes in favor of either “incapacity” or simply a description of the functional limitations, this language clearly contemplates including those subject to guardianship because guardianship is the

process by which individuals have historically been adjudicated incompetent. Indeed, this reading is sufficiently clear that Texas' statutory code assumes that a person subject to guardianship will lose the right to purchase a firearm indefinitely under 18 U.S.C. § 922(g)(4).²¹ Several states, however, have enacted statutes designed to counteract this effect by requiring a court to determine that an individual for whom a guardian is appointed is "mentally defective" within the meaning of the federal Gun Control Act.²²

Comparison to the ERPO Approach

Like the use of an ERPO, using the guardianship system to remove the right to possess guns is consistent with the type of tailored, individualized determinations that have broad bipartisan support and clearly pass constitutional muster.²³ The requirement that a court only appoint a guardian or enter an alternative order after notice and hearing, as well as the right of an individual subject to guardianship to petition to have rights restored, provides ample due process to protect the underlying Second Amendment right. This is especially true where the court makes an affirmative finding as to whether the individual has the ability to retain access to firearms.

Using the guardianship system to remove the right to control firearms, however, has several potential advantages over using ERPOs. First and foremost, guardianship laws already exist in every state in the nation. By contrast, many states have not adopted ERPOs and some — such as Oklahoma, which enacted the nation's first "Anti-Red Flag Act" in May of 2020²⁴ — have clearly rejected them. Second, the category of persons who may petition for guardianship is substantially broader than the category of persons who may petition for an ERPO. Whereas ERPO laws limit petitioners to police in some states, or police and family members in others, typically anyone with an interest in the welfare of an individual can petition for a guardian for that individual. Thus, teachers, doctors, and other persons who might be aware of an individual's risk would be in a position to petition under guardianship law. Third, guardianship laws may be used to limit risks posed by individuals whose risk level does not rise to the level required for an ERPO. For example, many ERPO laws only allow removal of gun rights where the individual poses an "imminent" risk of violence.²⁵

Nevertheless, guardianship system responses do not obviate the need for ERPO laws because these responses have some significant limitations relative to ERPOs. Most importantly, the criteria for applying ERPOs are better tailored to the risk of gun violence. ERPO laws make danger to others a basis for removal

of guns, whereas guardianship laws often only consider danger to self. Even then, guardianship laws may only consider risk to self created by certain types of disabilities or limitations.

In addition, guardianship system responses should not be seen as a substitute for ERPOs because ERPOs have the advantage of being more targeted. Using the guardianship system to address gun violence risks removal of more rights than are necessary to prevent gun-related harm because it opens the door to the appointment of a guardian who may control far more than gun-related concerns. In states that authorize targeted orders like those created by Article 5 of the UGCOPAA, this risk may be reduced. Such orders offer a targeted approach to removing the right to possess firearms from individuals who pose a risk to themselves, without the additional stigma, expense, and liberty restriction resulting from guardianship.

Conclusion and Recommendations

State guardianship law can further one objective upon which gun control advocates and gun owners typically agree: removal of the right to possess firearms from those adjudicated incapable of safely possessing them.

To facilitate the efficient and fair use of the guardianship system as a tool to prevent gun violence, courts and states legislatures should consider adopting several key policies. First, court systems should make it standard practice to inquire as to whether a respondent in a guardianship proceeding currently possesses or has access to firearms. This will help judges to make a specific, fact-based findings as to an individual's firearm related abilities and risks. Second, states that have not already done so should adopt legislation authorizing limited orders such as those authorized in Article 5 of the UGCOPAA. This will reduce the likelihood that courts seeking to protect individuals from gun violence or other serious risks will unduly limit individuals' liberty by stripping them of more rights than necessary. Third, states should require courts to report individuals found to lack the ability to possess or use firearms to the National Instant Background Checks System (NICS), used to screen would-be firearm purchasers. Currently, approximately one-third of the states explicitly require that individuals subject to guardianship be reported to the NICS.²⁶ Even states that reject the minority approach as overbroad, should embrace a requirement that courts report those individuals explicitly adjudicated to be unable to safely possess or use firearms.

Even with such policy advancements, however, guardianship system interventions will remain only a complement to — not a substitute for — more modern ERPO laws. Guardianship system interventions can

be initiated by a broader range of people, but do not allow for removal of firearms from all individuals who pose a clear and present danger to others.

Note

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