Reports of the Elder Law Task Force Committees

COMMITTEE REPORT

Guardians and Counsel

Judge Joseph D. O'Keefe, Chair
Senior Judge Penny L. Blackwell, Vice Chair
Keelin S. Barry, Esquire
Drew Grivna
Neil E. Hendershot, Esquire
Jeffrey R. Hoffman, Esquire
Stephen P. Paschall, Esquire
Raymond Pepe, Esquire
Paul Stefano, Esquire

AOPC Staff:
Owen Kelly, Esquire
Patricia Ranieri, Esquire

Guardians and Counsel Committee Findings and Recommendations

Introduction

The concepts of guardians and guardianships are quite broad and encompass minors, the mentally incapacitated, and elders. The Guardians and Counsel Committee recognized that each of these populations has their own distinct issues; however, for the purposes of these recommendations, the Committee focused solely on issues that affect elders.

I. Sources of Guardians

A. Issue Statement

The Committee was asked to address the issue of available sources of guardians of the person and guardians of the estate, and to make recommendations for creating a uniform approach to providing the courts in each county with a ready pool of candidates to serve as guardian of an incapacitated person ("IP"). Based on the Committee's research and discussions, it appeared that there was no unified approach among the counties on this issue, and counties created their own approaches, which, in many instances, have been hampered by funding problems.

B. Committee Findings

1. The courts of each county routinely favor the appointment of a family member to serve as guardian of the person. In all instances, however, the courts do not routinely favor the appointment of a family member as guardian of the estate when the estate consists of substantial assets, unless the proposed guardian of the estate posts a bond.

2. With regard to the appointment of a family member, courts have been willing to consider appointing both immediate family members and non-immediate family members who demonstrate that they are willing to take on such a responsibility.

3. If a guardian of the person and/or estate is needed for an alleged incapacitated person ("AIP") and there is no family member available or qualified to serve as such, the various counties look to other county organizations, if available. If there is no such organization available, the courts have been left to their own creativity to create sources of guardians.

4. It is even more difficult for an institution such as a nursing home or hospital filing a petition to have one of its residents declared incapacitated when there is no established list of available and approved persons or entities to serve as guardian of the person from which to select.

C. Committee Recommendations

1. Practices and Procedures

The Committee, pursuant to its findings in (I)(B), recommends as follows:

a. Guardian of the Person

i. When a guardian of the person is required, the courts should favor the appointment of a family member whenever possible. The Committee recommends, however, that the term "family member" not be limited to immediate family, but rather, attempts to contact other relatives and friends of the IP should be encouraged. In determining who should act as guardian, the Committee recommends that the courts be encouraged to consult 20 Pa.C.S. § 5461(d)(1) for guidance.[1] Specifically, courts should generally favor

an individual designated by the IP as a health care representative who is reasonably available unless it determines that the individual should be disqualified or the IP's selection should not otherwise be followed for "cause shown" pursuant to § 5461(e). In this event, the court should consult the following hierarchy set forth in § 5461(d)(1) for further guidance:

(i) The spouse, unless an action for divorce is pending, and the adult children of the principal who are not the children of the spouse.

(ii) An adult child.

(iii) A parent.

(iv) An adult brother or sister.

(v) An adult grandchild.

(vi) An adult who has knowledge of the principal's preferences and values, including, but not limited to, religious and moral beliefs, to assess how the principal would make health care decisions.[2]

ii. When family and friends are not a viable option, the Committee recommends that each county have a list of individuals and agencies qualified to act as guardian of the person, and that their contact information be made available. The list should be created, maintained, and expanded as described in (I)(C)(2) below and may include local attorneys, individuals, private agencies (both for-profit and as non-profit), and public agencies.

b. Guardian of the Estate

i. The Committee recommends that when a guardian of the estate is required for an individual, the courts should favor the appointment of a family member when the estate consists of minimal assets, or when the proposed guardian has the skills and experience necessary to manage the estate and is able to obtain a bond or provide other assurance of financial responsibility.

ii. In all other instances, the Committee recommends that a qualified attorney, accountant, financial advisor, institutional trustee, individual, or agency be proposed as the guardian of the estate. Each county should have in place a list of individuals and agencies qualified to act as guardians of the estate, and their contact information should be made available. This list should be created, maintained, and expanded as described in (I)(C)(2) and may include local attorneys, individuals, private agencies (both for-profit and non-profit), and public agencies.

2. Implementation of Recommendations

a. Recommendations (I)(C)(1)(a)(i) and (b)(i) should be implemented by rule of court.

b. The recommendation that lists of qualified guardians of the person or estate be created should be implemented through court rule. Creation of the lists in each county should be as follows:

i. Creation of the lists in each county should be coordinated by the Office of Elder Justice in the Courts ("OEJC") in conjunction with the local guardianship support agency ("GSA"), if one exists and is able to do so. If a GSA is not available or is unwilling or unable to assist, the OEJC should work with the local interdisciplinary teams recommended in (II)(C)(1)(d). If a local interdisciplinary team has not been created, the OEJC and the President Judge of the judicial district (or his/her designee) should create the list in conjunction with a work group composed of persons and entities active in guardianship matters in the county.

ii. Once the list has been created, its maintenance and expansion should be overseen by a local non-profit agency such as a GSA. If such a non-profit agency is not available, the list should be overseen by the local interdisciplinary team or, if there is no local interdisciplinary team, by the President Judge (or designee) with the assistance of the work group described above.

Model Program:

In Lehigh County, the local guardianship support agency, GSA, Inc. ("GSAI") was created in 2004. GSAI accepts court appointments to serve as guardian, provides "guardianship-like" services for decision-impaired individuals (e.g., serving as representative payee for benefits, helping with housing, medical, and financial assistance), supports and trains professional and volunteer staff required to perform its functions, provides support to other individuals acting as guardians, and accepts appointments to serve as other types of fiduciaries such as personal representatives and special needs trustees. GSAI is funded by a combination of public funds, private donations, and fees for some services for clients who can afford to pay.[3]

c. The education and training of individuals and agencies qualified to act as guardian should be as recommended in Section (X)(C)(2).

D. Timing and Impact

The recommendation to create lists of qualified guardians can be enacted fairly quickly and should have significant impact on improving the supply of guardians. The expansion of the lists, as well as the ongoing training and education needed for these persons, will require a significant amount of time to implement, and guidelines should be set forth by the OEJC that provide flexibility in both implementation and maintenance.

E. Fiscal Impact

The most significant fiscal impact of the creation of guardian lists will be in establishing the program that will provide the necessary training and education to qualify guardians, the fiscal impact of which is discussed in (X)(E)(1). Flexibility in implementing the recommendations set forth in this section may allow for the utilization of existing resources, which could reduce the overall fiscal impact.

F. Additional Comments

Ideally, each county would have a GSA create a list of qualified guardians, establish a volunteer guardianship program, and provide training, education, and oversight to augment the list. If, this is not feasible in the near future, the OEJC should work with the local interdisciplinary team recommended in (II)(C)(1)(d). If there is no local interdisciplinary team, the OEJC and President Judge (or his/her designee) should convene a work group consisting of a partnership with the local bar association and attorneys routinely coming before the court on guardianship matters, as well as existing agencies and/or businesses who currently provide guardianship services, to create an available list of qualified individuals. Such a list can be maintained and expanded over time.

II. Powers, Duties and Responsibilities of Guardians

A. Issue Statement

The Committee was asked to examine whether the lack of clarity, consistency, and understanding of the powers, duties, and responsibilities of a guardian affect the quality of guardianship services and, if so, to determine what could be done to remedy the situation.

B. Committee Findings

1. Once an individual is placed under guardianship, there is little guidance beyond basic reporting requirements as to how a guardian should fulfill his or her duties and responsibilities.

2. The guardianship statutes are largely silent on some of the most important duties of the guardian.

3. Different Pennsylvania jurisdictions, and even judges within the same judicial district, have varying expectations of a guardian's duties and responsibilities.

4. Guardian monitoring is weak, if it occurs at all.

5. Training is not mandated for professional or non-professional guardians.

6. Non-professional guardians are not adequately advised as to the duties and responsibilities of managing the affairs of an IP.

7. There are currently no programs for certifying professional guardians in Pennsylvania as there are in some other states.[4] A state certification program would give courts assurance that a professional guardian possesses sufficient knowledge of Pennsylvania guardianship law and procedure.

8. The duties of a guardian are interdisciplinary, requiring financial management, health care coordination, communication, conflict resolution, medical decision-making, and other skills.

9. The quality of guardianship services varies widely, placing our most vulnerable citizens at great risk.

10. The Committee recognized and endorsed the preference for limited guardianships expressed by the General Assembly in 20 Pa.C.S. § 5512.1(a)(6), which states that the court "shall prefer limited guardianship."[5] The Committee found, however, that in reality many limited guardianships are impractical and create controversy and confusion. Moreover, there is little, if any, education and training for judges or attorneys to allow them to ascertain when a limited guardianship would be appropriate under the circumstances and how a limited guardianship could be made effective in circumstances where it is appropriate. Lack of judicial education and training may be related to greater use of plenary guardianships in situations where a limited guardianship would be more appropriate.[6] The Committee, therefore, found that education and training would advance the General Assembly's preference for limited guardianships by making their use more effective.

11. The Committee found that the National Guardianship Association's Standards of Practice ("NGA Standards") contain much useful information to guide guardians in their powers and duties.[7] (*See* Appendix A). Due to significant differences between the NGA Standards and Pennsylvania law and practice, the Committee could not recommend their adoption in Pennsylvania beyond the specific recommendation in II(C)(1)(a). The Committee, however, found that provisions of the NGA Standards could be incorporated into future education and training for guardians to the extent they are consistent with Pennsylvania law and practice.

12. The Committee found that the National Guardianship Association's Model Code of Ethics for Guardians ("Model Code") contains much useful information to guide guardians in their powers, duties, and ethical responsibilities.[8] (*See* Appendix B). Due to significant differences between the Model Code and Pennsylvania law and practice, the Committee could not recommend its wholesale adoption in Pennsylvania. The Committee, however, found that provisions of the Model Code could be incorporated into future education and training for guardians to the extent they are consistent with Pennsylvania law and practice.

C. Committee Recommendations

1. Practices and Procedures

a. The Committee, pursuant to its findings in (II)(B)(1) - (6) and (11), recommends the following NGA Standards be adopted in Pennsylvania by statute or by court rule as Supreme Court recommended best practices.

NGA Standard 12 – Duties of the Guardian of the Person

I. The guardian shall have the following duties and obligations to the person under guardianship unless the order of appointment provides otherwise:

A. To see that the person is living in the most appropriate environment that addresses the person's goals, needs, and preferences.

1. The guardian shall have a strong priority for home or other community based settings, when not inconsistent with the person's goals and preferences.

2. The guardian shall authorize moving a person to a more restrictive environment only after evaluating other medical and health care options and making an independent determination that the move is the least restrictive alternative at the time, fulfills the current needs of the person and serves the overall best interest of the person.

3. The guardian shall consider the proximity of the setting to those people and activities that are important to the person when choosing a residential setting.

4. At a minimum the guardian shall report to a court before a move to a more restrictive residential setting, and the justification for the move.

5. When the guardian considers involuntary or long-term placement of the person in an institutional setting, the bases of the decision shall be to minimize the risk of substantial harm to the person, to obtain the most appropriate placement possible, and to secure the best treatment for the person.

B. To ensure that provision is made for the support, care, comfort, health, and maintenance of the person.

C. To make reasonable efforts to secure for the person medical, psychological, therapeutic, and social services, training, education, and social and vocational opportunities that are appropriate and that will maximize the person's potential for self-reliance and independence.

D. To keep the affairs of the person confidential, except when it is necessary to disclose such affairs for the best interests of the person.

E. To seek specific judicial authority when a civil commitment, the dissolution of a marriage, or another extraordinary circumstance is being addressed.

F. To file with the court, on a timely basis but not less often than annually, all reports required by state statute, regulations, court rule, or the particular court pursuant to whose authority the guardian was appointed.

G. To adhere to the requirements of Standard 17 - Duties of the Guardian of the Estate . . . to the extent that the guardian of the person has been authorized by the court to manage the person's property.

H. To petition the court for limitation or termination of the guardianship when the person no longer meets the standard pursuant to which the guardianship was imposed, or when there is an effective alternative available.

I. To promptly report to the appropriate authorities abuse, neglect and/or exploitation as defined by state statutes.[9]

NGA Standard 17 – Duties of the Guardian of the Estate

I. The guardian, as a fiduciary, shall manage the financial affairs of the person under

guardianship in a way that maximizes the dignity, autonomy, and self-determination of the person.

II. When making decisions the guardian shall:

A. Give priority to the goals, needs and preferences of the person, and

B. Weigh the costs and benefits to the estate.

III. The guardian shall consider the current wishes, past practices, and reliable evidence of likely choices. If substantial harm would result or there is no reliable evidence of likely choices, the guardian shall consider the best interests of the person.

IV. The guardian shall assist and encourage the person to act on his or her own behalf and to participate in decisions.

V. The guardian shall use reasonable efforts to provide oversight to any income and assets under the control of the person.

VI. The guardian shall, consistent with court order and state statutes, exercise authority only as necessitated by the limitations of the person.

VII. The guardian shall act in a manner above reproach, and his or her actions will be open to scrutiny at all times.

VIII. The guardian shall provide competent management of the person's property and, shall supervise all income and disbursements of the estate.

IX. The guardian shall manage the estate only for the benefit of the person.

X. The guardian shall keep estate assets safe by keeping accurate records of all transactions and be able to fully account for all the assets in the estate.

XI. The guardian shall keep estate money separate from the guardian's personal money; the guardian shall keep the money of individual estates separate unless accurate separate accounting exists within the combined accounts.

XII. The guardian shall make claims against others on behalf of the estate as deemed in the best interest of the person and shall defend against actions that would result in a loss of estate assets.

XIII. The guardian shall apply state law regarding prudent investment practices, including seeking responsible consultation with and delegation to people with appropriate expertise when managing the estate.

XIV. The guardian shall employ prudent accounting procedures when managing the estate.

XV. The guardian shall determine if a will exists and obtain a copy to determine how to manage estate assets and property.

XVI. The guardian shall obtain and maintain a current understanding of what is required and expected of the guardian, statutory and local court rule requirements, and necessary filings and reports.

XVII. The guardian shall promptly report to the appropriate authorities abuse, neglect and/or exploitation as defined by state statute.[10]

b. The Committee took no position regarding any of the NGA Standards, other than 12 and 17, or regarding the Model Code of Ethics. As discussed in (II)(B)(11)&(12), the Standards and Model Code contain much useful information to guide guardians in their powers and

duties. Although the Committee recommends adoption of only NGA Standards 12 and 17, it was not opposed to the use of other provisions of the NGA Standards or the Model Code by the OEJC for purposes of education and training of guardians to the extent they are consistent with Pennsylvania law and practice.

c. The Committee, pursuant to its findings in (II)(B)(1) - (6), (8) - (12), recommends that training be required for guardians and that training be developed for and made available to judges who hear guardianship cases, court administrative staff, attorneys, and others involved in guardianship matters. In addition, training for judges and attorneys should be developed to allow them to ascertain when a limited guardianship would be appropriate under the circumstances and how to make them effective in circumstances where they are appropriate.

d. The Committee, pursuant to its finding in (II)(B)(8), recommends that local courts be encouraged to develop interdisciplinary teams modeled after the Office of Children and Families in the Courts' ("OCFC") Pennsylvania Children's Roundtable Initiative pioneered by Pennsylvania Supreme Court Justice Max Baer to advise and support guardians and the court, based on the following rationale:

i. Several states report that interdisciplinary teams have been critical to implementation of successful guardianship reform.

ii. In Pennsylvania, there is precedent in the Children's Roundtable Initiative system, which has successfully implemented dependency court reform. *See* textbox below for a description of the Children's Roundtable Initiative.

iii. Guardianship and dependency are both interdisciplinary.

iv. Local community-based interdisciplinary advisory groups can link guardians to local resources and help the courts to implement guardianship reform recommendations.

Model Program:

The Children's Roundtable Initiative was pioneered by Justice Max Baer of the Supreme Court of Pennsylvania in 2006. The goal of the Children's Roundtable Initiative is to gather, disseminate, and implement best practices by way of a three-tiered statewide communication infrastructure.

The first tier is comprised of the local Children's Roundtables in each of Pennsylvania's 60 judicial districts. The Children's Roundtables are convened by a judge and consist of supervisory and dependency judges, children and youth professionals, county solicitors, child and parent advocates, academic experts, and anyone interested in making a positive contribution to the functioning of the dependency system at the local level.

The second tier is comprised of eight Leadership Roundtables divided into groups based on size. Each Leadership Roundtable is comprised of three members from the Children's Roundtables within its area. The three members include a dependency judge, the Children and Youth administrator, and one additional Children's Roundtable member. The Leadership Roundtable provides a forum for its members to identify, discuss, and share concerns and solutions.

The final tier is the State Roundtable comprised of at least two members of each Leadership Roundtable and others with specific expertise in child dependency matters. The State Roundtable addresses issues identified at Leadership Roundtable meetings, facilitates intrastate communication, and sets priorities for dependency court improvement efforts. The State Roundtable also stays involved in the national dependency reform movement to keep Pennsylvania informed of evolving trends and best practices. The State Roundtable also has a number of Workgroups to address issues identified by it as priorities.[11]

e. The Committee, pursuant to its findings in (II)(B)(1) - (6), recommends that the creation of local GSAs be encouraged by the OEJC, and that the GSAs be relied upon to take an active role in supporting local guardianship improvement and in implementing education and training. Pennsylvania statutes encourage the creation of GSAs.[12]

f. The Committee, pursuant to its finding in (II)(B)(7), recommends that the OEJC, with input from experienced guardians, develop a program for the certification of professional guardians appropriate to Pennsylvania guardianship law and practice.

2. Implementation of Recommendations

a. Adoption of the NGA Standards recommended in (II)(C)(1)(a) should be implemented as follows:

i. To the extent that the recommended NGA standards are consistent with existing Pennsylvania statutes, these standards should be adopted as soon as is practicable as Supreme Court recommended best practices and disseminated to all judicial districts in the Commonwealth. The Committee believes that many of these practices may be implemented by court rule.[13]

ii. Best practices should be adopted through legislation or court rule, as the Advisory Council on Elder Justice in the Courts ("Advisory Council") deems appropriate, to ensure statewide continuity among the counties.

iii. To the extent that the NGA Standards recommended in (II)(C)(1)(a) are inconsistent with existing Pennsylvania statutes, and to the extent that the Advisory Council deems appropriate, Pennsylvania statutes should be made consistent with the recommended NGA Standards through proposed legislation as in (II)(C)(2)(a)(iv) immediately below.

iv. The Advisory Council and the OEJC should approach the General Assembly to recommend review and adoption of these standards where legislative changes are appropriate.

v. These best practices should be presented through training sessions for judges, court staff, guardians, attorneys, and others involved in guardianship matters.

b. The recommendation that education and training be required for guardians should be implemented by rule of court. The education and training should be implemented as stated in (X)(C)(2).

c. The Supreme Court, through the OEJC, should encourage local courts to develop local interdisciplinary teams to advise and support guardians and the court.

d. The Supreme Court, through the OEJC, should encourage local courts to support creation of GSAs in their communities.

e. Training for judges should be implemented as stated in (X)(C)(2)(d).

f. The OEJC, with input from experienced guardians, should develop criteria for the certification of professional guardians appropriate to guardianship law and practice in the Commonwealth of Pennsylvania.

D. Timing and Impact

1. Incorporation of the NGA Standards recommended in (II)(C)(1)(a) should be initiated as soon as is practicable with the understanding that complete adoption of these standards will be a multi-phase, multi-year project. Incorporation of these standards promises to raise the standard of guardianship services in Pennsylvania, in part, because the courts and the guardians will have the same understanding of a guardian's duties and responsibilities. Such standard language will provide consistency and more meaningful consideration.

2. The timing and impact of the education and training recommendations in (II)(C)(1) should be as stated in (X)(D).

3. As soon as is practicable, the OEJC should assemble a working group of experienced guardians to develop the program for certification of professional guardians. The creation of such a program will have a substantial impact by providing courts with reassurance that all professional guardians possess sufficient knowledge of Pennsylvania guardianship knowledge and practices.

4. Formation of the interdisciplinary teams at the local and state level will help to incorporate Task Force recommendations and allow for local input into statewide changes. The OEJC, with the participation of local courts, should initiate the formation of the local teams. The OEJC should facilitate formation of a state level interdisciplinary team.

5. Local GSAs should be encouraged and relied upon to assist with the implementation of standards and training as soon as is practicable.

   a. GSAs can provide another strong tool for implementation of reform.

   b. With support from the court and interdisciplinary team members, local GSAs can be expected to have a strong impact in implementing proposed reforms given the anticipated high volume of guardianships.

   c. The Supreme Court through the OEJC should encourage local courts to support the formation of such agencies.

E. Fiscal Impact

1. Adoption of the NGA Standards recommended in (II)(C)(1)(a) will require minimal financial commitment, such as disseminating the NGA Standards to local courts as best practices. Similarly, encouraging passage of the recommended NGA Standards as part of the guardianship statute, or as a court rule, will have minimal fiscal impact.

2. The fiscal impact of education and training programs will be as stated in (X)(E)(1).

3. Development of local interdisciplinary teams will have limited fiscal impact as team members will be volunteers. Members attending periodic statewide meetings would incur expenses for travel, lodging, and food. There would also have to be some funds available to pay for materials and speakers at the local and state levels.

4. Local GSAs should be funded outside the court, for example, by the potential sources of funding identified in the Overarching Findings and Recommendations of the Elder Law Task Force Concerning Court Administration, Judicial Education, Funding, and Public Awareness. Local courts should work with interested non-profits or other interested parties to support creation of these agencies.

Regarding fees to finance these agencies, the Committee generally does not favor the imposition of filing fees because of their potential negative impact on litigants' right of access to the courts, and believes they should only be a last resort. If other funding sources have been thoroughly explored, however, and are found to be unavailable, the Committee believes that a graduated fee structure, similar to the approach used by Register of Wills' offices around the state, could impose a "filing fee surcharge for elder protection" in guardianship cases on petitions for adjudication of incapacity and/or inventories based on the amount of assets under guardianship. In cases with significant assets, a graduated fee could be imposed. The Committee believes that such an approach would balance the need for funding with litigants' right of access to the courts. The OEJC should be responsible for considering and developing the graduated fee structure.

5. Development of a program for certification of professional guardians could have significant costs. In determining the structure such a program should have, the OEJC and Advisory Council should consider the potential costs and develop a program that is fiscally sustainable.

III. Guardian's Scope of Liability

A. Issue Statement

The Committee was asked to address the scope of a guardian's liability. The Committee noted that currently there is no mandatory training for guardians regarding their ethical obligations and potential liabilities, and, as a consequence, many guardians may be unclear about these issues. In addition, there is pending legislation that may alter the liability of a guardian of the person in a problematic manner.

B. Committee Findings

1. There is presently no mandatory training for individual guardians on matters of liability and ethics.

2. There is a pending legislative change to 20 Pa.C.S. § 5521(g), Senate Bill 117 of 2013, Pr. No. 73 ("Senate Bill 117"),[14] that would reduce a non-agency guardian of the person's liability by requiring proof of gross negligence before the guardian can be held liable for his/her actions as guardian.

3. To the extent that Senate Bill 117 would lower the standard for liability of a non-agency guardian of the person, the Committee found the proposed change to § 5521(g) to be problematic for the following reasons:

   a. The IP would immediately have less protection.

   b. Because the standard of liability would be lowered, the guardian of the person would no longer have to act in the best interests of his/her charge; rather, the guardian of the person must simply refrain from committing gross negligence.

   c. The current fiduciary duty standard is not an onerous standard of liability given the broad powers a guardian of the person is granted.

   d. Attracting people who will only serve if they have less responsibility is not in the best interests of the IP.

   e. Social science experiments with our most vulnerable elders may be ill-advised and be accompanied by unintended consequences.

   f. If the standard of liability is presumably being lowered to attract potential guardians of the person, there is no evidence to support the conclusion that more individuals would serve as guardians of the person if only they were not exposed to fiduciary liability.

   g. No change would be required and no potential financial impact felt if the General Assembly would remove this change while the new legislation is still pending. If the pending legislation goes into effect, however, there could be significant costs associated with increased harm done to IPs, who would then be less likely to recover from their guardian of the person.

   h. In "A Call for Standards: An Overview of the Current Status and Need for Guardianship Standards of Conduct and Code of Ethics," Karen E. Boxx and Terry W. Hammond underscore the application of fiduciary law to reduce the risks of delegation.[15] There is no reason that the standard imposed on a guardian of the person acting under court appointment for someone incapable of monitoring their performance should be lower than that of agents acting under a power of attorney who are serving voluntarily for persons who are often capable of monitoring their performance.

NOTE: There was a strong and substantial minority view regarding the finding in (III)(B)(3). A significant number of Task Force members believed that where a guardian of the person is making difficult health care decisions as an agent of the court, he or she should enjoy the limited immunities in the proposed legislation; otherwise family members might be unwilling to take on such difficult responsibilities. In addition, the minority believed that the proposed legislation merely levels the playing field by giving individual, non-agency guardians of the person the same immunity enjoyed by local government units, nonprofit corporations, and GSAs under the current version of § 5521(g). Finally, these members concluded that giving limited immunities to individual guardians of the person was analogous to statutory immunities currently offered in other contexts.[16] Consequently, a significant minority of Task Force members did not agree with finding (III)(B)(3) or recommendation (III)(C)(1)(b).

C. Committee Recommendations

1. Practices and Procedures

a. The Committee, pursuant to its finding in (III)(B)(1), recommends some form of mandatory education and training for individual guardians on matters of liability and ethics.

b. The Committee, pursuant to its findings in (III)(B)(2) - (3), recommends that the proposed change to 20 Pa.C.S. § 5521(g) be removed from Senate Bill 117.

2. Implementation of Recommendations

a. Implementation of the requirement that guardians have education and training on matters of liability and ethics should be by rule of court. The education and training programs themselves should be implemented as stated in (X)(C)(2).

b. The recommendation in (III)(C)(1)(b) above should be communicated by the OEJC to the General Assembly as soon as is practicable after the Task Force Report is released.

D. Timing and Impact

1. Development of education and training for guardians on ethics and liability should begin as soon as is practicable. The requirement that the training be mandatory can be implemented by rule of court once the education and training programs are ready.

2. A copy of the Task Force Report should be delivered to the General Assembly as soon as is practicable following its release, to communicate the Committee's recommendation regarding the amendment to 20 Pa.C.S. § 5521(g).

E. Fiscal Impact

1. The fiscal impact of the education and training recommended in (III)(C)(1)(a) will be as stated in (X)(E)(1).

2. Recommendation (III)(C)(1)(b) regarding the amendment to 20 Pa.C.S. § 5521(g) will have no fiscal impact.

IV. Qualifications and Screening of Guardians

A. Issue Statement

The Committee addressed the statutory qualifications, if any, for guardians in Pennsylvania, as well as whether screening or training of a guardian is required.

B. Committee Findings

1. Pursuant to 20 Pa.C.S. § 5511(f), "[t]he court may appoint as guardian any qualified individual, a corporate fiduciary, a nonprofit corporation, a guardianship support agency under Subchapter F (relating to guardianship support) or a county agency." Section 5511 (f) further states that: "The court shall not appoint a person or entity providing residential services for a

fee to the incapacitated person or any other person whose interests conflict with those of the incapacitated person." [17]

2. Section 5511(f) does not, however, define what constitutes a "qualified" individual. In addition, while § 5511(e) requires that the "qualifications" of the proposed guardian be set forth in the guardianship petition, there are no mandated qualifications in the statute, and presumably any individual over age 18 would qualify, provided there is no interest adverse to the IP.[18] The statute does not require that a guardian have a minimum education level or prior experience. Moreover, the statute does not require that proposed guardians be certified by the state or a national guardianship organization or that the guardian be licensed or required to attend any training before being appointed. The statute also does not require a proposed guardian to undergo any specified screening process before being appointed.

3. No uniform practice is followed in the counties with respect to minimum qualifications of guardians or the screening mechanism employed by the courts. In most counties, it is left to the sole discretion of the presiding judge to determine on a case-by-case basis the qualifications of the proposed guardian. The screening, if any, typically takes place on the day of the hearing when the judge has the opportunity to question the proposed guardian. The Committee found, however, that in several counties, administrative or judicial staff conducts criminal and/or civil background checks on proposed guardians, but this procedure was not mandated by any local court rules governing guardianship practice and may not be consistently followed in each guardianship case.

4. The National Probate Court Standards recommend that courts consider a variety of factors in assessing a prospective guardian's qualifications to serve, including familiarity with health care decision-making, residential placements, and social services benefits, as well as the guardian's access to qualified legal, financial, and health care experts to assist the guardian in his or her decision making.[19]

5. As discussed in Section V below, the decision whether to require a bond is at the discretion of the presiding judge. The Committee believes that this approach should be maintained but finds that in situations where a bond is not required, the proposed guardian should submit a credit report as stated in (IV)(C)(1)(b).

6. The Committee finds that there is not currently a requirement that a court determine whether a prospective guardian has the willingness and ability to visit with the AIP on a regular basis and be available at all times to confer with the AIP's physicians, nurses, and other care providers.

C. Committee Recommendations

1. Practices and Procedures

a. The Committee, pursuant to its findings in (IV)(B)(2) - (3), recommends that all individual guardians, family and professional, be required to undergo criminal background checks similar to those used in foster care and adoption cases, i.e., a Pennsylvania State Police criminal record check and a Federal Bureau of Investigation ("FBI") clearance check.

b. The Committee, pursuant to its findings in (IV)(B)(5), recommends that in all guardianship matters where the court does not require a bond, the proposed guardian should be required to submit a current credit report. This requirement should be an ongoing one and, after appointment, the guardian should be required to supply a current credit report each year together with the annual report. The guardian's credit reports should be kept confidential and not be publicly available. For good cause shown, the court may waive the requirement of a credit report. If the court waives the requirement of a credit report, however, it should still require an assurance of financial responsibility as recommended in (V)(C)(1)(d).

c. The Committee, pursuant to its findings in (IV)(B), recommends that, in addition to not having any interest adverse to the AIP, the proposed guardian should have the willingness

and ability to visit with the AIP on a regular basis and be available at all times to confer with the AIP's physicians, nurses, and other care providers. Ideally, the proposed guardian should have some education and/or experience in guardianship or in providing services to elders or the disabled. In lieu of adopting specific requirements concerning minimum education and/or experience for all guardians, the Committee believes that the goal of assuring that qualified guardians are appointed would similarly be met by mandating that all guardians undergo training before assuming their duties.

2. Implementation of Recommendations

In order to ensure statewide uniformity, these recommendations should be implemented by appropriate changes to the Supreme Court Orphans' Court Procedural Rules.[20] All local courts would therefore be required to follow the same procedures regarding qualifications and screening of proposed guardians (i.e., criminal and civil background searches and mandatory training). Implementation of the education and training should be as stated in (X)(C)(2).

D. Timing and Impact

While the Committee believes that the above recommendations could theoretically be implemented immediately, since it is recommended that the changes be implemented via rule changes, sufficient time will be required to allow the Orphans' Court Procedural Rules Committee to meet, adopt pertinent rules, and comply with all relevant rule-making requirements. The recommendation should significantly increase protection of IPs. The timing and impact of the education and training component in (IV)(C)(1)(c) will be as stated in (X)(D).

E. Fiscal Impact

Additional costs would be incurred for criminal background searches and/or credit reports. The cost of credit reports should be negligible as consumers are entitled to a certain number of free credit reports per year. The fiscal impact of the education and training programs is as stated in (X)(E)(1).

V. Bonding of Guardians

A. Issue Statement

The Committee addressed the question of whether current law concerning bonding of guardians is adequate or needs to be changed. Current law gives the presiding judge discretion to decide whether to require that a bond be posted. There is pending legislation, Senate Bill 117, that would affect bonding requirements.[21] The Committee addressed the question of whether the proposed legislation is advisable and whether, in the absence of requiring a bond, the presiding judge should require some other form of financial assurance.

B. Committee Findings

1. A proposed statute, 20 Pa.C.S. § 5515.3 in Senate Bill 117 would require a bond be set for every guardian of an estate.[22] Specifically, the proposed legislation would initially remove the court's discretion to set a bond but reserve discretion to waive the bond requirement if there is "cause shown."[23]

2. The Committee cannot recommend proposed new § 5515.3 without additional clarification as described in (V)(C)(1).

3. The Committee does not believe that a bond should be mandated for guardians of the estate in all cases but rather that the decision as to whether or not to require a bond should remain at the court's discretion, except that no bond should be required if the prospective guardian is a bank or trust company.

4. The Committee found, however, that the court should require in all cases an assurance of financial responsibility.

5. The Committee found that online bonding services may help alleviate access to bond issues.

C. Recommendations

1. Practices and Procedures

a. The Committee, pursuant to its findings in (V)(B)(1) - (2) above, recommends that the General Assembly provide guidance as to what factors the courts should consider regarding "cause shown" and whether such determinations of "cause shown" are appealable.

b. The Committee, pursuant to its finding (V)(B)(3), further recommends that the General Assembly should set a minimum total value for an estate before making a bond mandatory in every situation for the following reasons:

i. While bonding may be the best way to prevent a guardian from misappropriating the funds of an IP, it must be recognized that most bonding companies have minimum amounts below which they will not provide bonding services.

ii. Bonding companies require credit checks, and mandatory bonds may eliminate a large percentage of potential guardians, which could also lead to a problem in recruiting new guardians and retaining current guardians.

iii. Bonding companies may not want to provide bonding services if the standard of liability of guardians is lowered by the proposed changes to 20 Pa.C.S. § 5521(g), which are also proposed in Senate Bill 117. (*See* III. Guardians Scope of Liability).

c. The Committee, pursuant to its finding (V)(B)(3), recommends that the decision whether to require a bond when a guardian of the estate is appointed should remain at the discretion of the court.

d. The Committee, pursuant to its finding (V)(B)(4), further recommends that in all cases where a guardian of the estate is appointed, the court should require an assurance of financial responsibility. To that end, legislative authorization is necessary to allow for the acceptance of forms of financial security for guardians other than bonds. The submission of an assurance of financial responsibility does not eliminate the need for the proposed guardian to provide a credit report as recommended in (IV)(C)(1)(b) unless the court waives that requirement.

e. The Committee, pursuant to its finding (V)(B)(5), recommends that courts, particularly those in counties with limited access to bonding sources, consider online bonding as an alternative, providing that the online bonding companies are on the list of approved sureties.

2. Implementation of Recommendations

The recommendations in (V)(C)(1)(a) – (d) should be communicated to the General Assembly by the OEJC as soon as is practicable after the Task Force Report is released. In addition, the OEJC should work with the General Assembly to draft legislation which would grant the authorization in recommendation (V)(C)(1)(d). The recommendation that courts consider online bonding should be communicated by the OEJC to the courts.

D. Timing and Impact

The recommendations can be implemented as soon as is practicable after the release of the Task Force Report. The OEJC can begin working with the General Assembly as soon as is practicable following its creation. The impact of keeping bonding at the discretion of the court should be minimal as it retains the existing status quo. The impact of allowing assurances of financial responsibility in lieu of a bond presumably could be significant as it may allow individuals who could not otherwise serve as guardians because they could not obtain a bond to do so while at the same time offering protection to IPs.

E. Fiscal Impact

The recommendations in this section should have little or no fiscal impact.

VI. Retention of Guardians

A. Issue Statement

The Committee explored the question of how best to retain guardians and what sort of incentives or benefits could be offered to induce guardians to continue to serve.

B. Committee Findings

1. Retention of guardians is one of the primary concerns of guardianship policy around the country. A survey of Area Agencies on Aging ("AAAs") conducted by the Working Group on Guardianships of the Joint State Government Commission ("JSGC") found that 84.1 percent of responding AAAs stated that current guardianship programs and services will not be able to meet future need.[24] As is often the case, funding will be the main problem in this area.

2. The Committee found that providing financial and/or other types of benefits or incentives to guardians could result in higher retention rates.

C. Recommendations

1. Practices and Procedures

In order to retain existing guardians, the Committee, pursuant to its findings in (VI)(B) above, recommends consideration of the following:

a. Identifying funding sources, such as the state lottery, to develop guardianship support services;

b. Providing continuing legal education ("CLE") credit for *pro bono* service to attorneys who provide guardianship services;

c. Providing small tax deductions to guardians for certain guardianship expenses;

d. Equipping and assisting local agencies to develop methods to retain guardians;

e. Assisting agencies handle a greater number of guardianships rather than relying on ill-equipped family members;

f. Encouraging and expanding the use of GSAs which are already favored under Pennsylvania law;

g. Providing free training for non-attorney guardians to show them how, what, and when to file required guardianship documents;

h. Limiting appointment to a guardianship of the person for some to avoid potential intra-familial disagreements as well as any financial responsibility of a potential guardian;

i. Placing "how to" videos online to answer questions and provide more detailed instructions for the completion of guardianship tasks such as filing reports and inventories; and

j. Strongly encouraging a dialogue with representatives of federal agencies that administer representative-payment and fiduciary programs such as, but not limited to, Social Security Administration ("SSA"), Department of Veterans Affairs ("VA"), the Railroad Retirement Board ("RRB"), and the Office of Personnel Management ("OPM") to develop training for guardians regarding the management of an IP's benefits.

2. Implementation of Recommendations

a. The recommendations in (VI)(C)(1)(g),(i) and (j) should be implemented as stated in (X)(C)(2).

b. The recommendations in (VI)(C)(1)(a) and (c) should be studied by the Advisory Council and the OEJC which should determine how best to implement them.

c. The recommendations in (VI)(C)(1)(d)–(f) should be implemented by the OEJC.

d. The recommendations in (VI)(C)(1)(b) and (h) should be implemented by rule of court.

D. Timing and Impact

Most of the recommended changes will have to be implemented over time but will likely have a significant impact, since retention is one of the most important aspects of guardianship policy.

E. Fiscal Impact

Some of the recommended changes will require significant fiscal resources, e.g., funding local agencies, and providing training and CLEs, etc. The fiscal impact of funding local agencies is as stated in (II)(E)(4). The fiscal impact of education and training programs is as stated in (X)(E)(1).

VII. Right to Appointed Counsel

A. Issue Statement

The Committee addressed the question of whether all AIPs should have appointed counsel or, if the current statutory case-by-case "appropriateness" standard continues, whether specific criteria should be adopted to determine when appointment of counsel is appropriate. If counsel is appointed in all cases, how will they be paid?

B. Committee Findings

1. Current Pennsylvania law invokes a case-by-case "appropriateness" standard, but there is no statutory requirement for counsel on behalf of an AIP in all cases and no guidance as to circumstances making appointment of counsel appropriate:

> Petitioner shall be required to notify the court at least seven days prior to the hearing if counsel has not been retained by or on behalf of the alleged incapacitated person. In appropriate cases, counsel shall be appointed to represent the alleged incapacitated person in any matter for which counsel has not been retained by or on behalf of that individual.[25]

2. The petitioner's attorney typically bears the responsibility of determining whether to recommend appointment of counsel for a Pennsylvania guardianship respondent.

3. In Pennsylvania, appointed counsel for the AIP is paid for by the AIP or where the AIP has insufficient assets, by the Commonwealth:

> If the alleged incapacitated person is unable to pay for counsel or for the evaluation, the court shall order the county to pay these costs. These costs shall be reimbursed by the Commonwealth in the following fiscal year.[26]

4. The National Probate Court Standards recommend a case-by-case appropriateness standard, but assume that an independent court visitor will meet with the respondent and evaluate whether appointment is appropriate.[27]

5. The Uniform Guardianship and Protective Proceedings Act of 1997[28] proposes two separate options for counsel: (1) independent court visitor, similar to that recommended in the National Probate Court Standards; or (2) appointment of counsel in every case.

6. Some jurisdictions appoint counsel for a guardianship respondent in every case where the respondent has not retained private counsel.

7. Pennsylvania is a leader in the national movement to address the “civil justice gap,” which includes discussion of a potential civil right to counsel in areas of basic human need. Chief Justice Ronald D. Castille, Honorary Chair of the Pennsylvania Civil Legal Justice Coalition, remarked at a May 23, 2013 hearing of the Senate Judiciary Committee: “The unfortunate and often tragic fact is that many Pennsylvanians face formidable legal situations in our civil courts where those citizens may face dire consequences as the result of a civil legal matter that can greatly impact their lives or their futures. The vast majority of those citizens are left to fend for themselves in an unfamiliar courtroom without legal representation.”[29] The Chief Justice further remarked that the Commonwealth should treat civil legal services for indigent individuals, families, and elders as an important government service.[30]

8. Requiring an AIP to have counsel in all proceedings involving a determination of capacity is consistent with the Chief Justice’s remarks above. If the AIP does not have his or her own counsel, then counsel should be appointed.

C. Committee Recommendations

1. Practices and Procedures

a. The Committee, pursuant to its findings in (VII)(B)(7) - (8), recommends that in all cases where the AIP does not have private counsel, counsel should be appointed.

b. The Committee, pursuant to its findings in (VII)(B)(1) - (2), also recommends that the Orphans’ Court Procedural Rules be amended to require counsel for an AIP to enter his or her appearance as soon as possible to allow the court to quickly identify when counsel needs to be appointed.

c. The Committee, pursuant to its findings in (VII)(B)(3), (7) - (8), recommends that counsel fees be paid by the AIP whenever possible and, if resources are insufficient, then by the Commonwealth as under the existing approach.

2. Implementation of Recommendations

a. The Orphans’ Court Procedural Rules should be amended to require counsel in all petitions for appointment of a guardian as recommended in (VII)(C)(1) above.

b. The Orphans’ Court Procedural Rules should be amended to require private counsel to enter their appearance so that the court may quickly ascertain whether court appointed counsel is necessary.

D. Timing and Impact

1. The Orphans’ Court Procedural Rules should be amended as soon as is practicable following release of this Report.

2. The impact of the proposed recommendations should be immediate in protecting the rights of AIPs.

E. Fiscal Impact

1. Funding for counsel for AIPs whose estates cannot cover the cost of counsel will be required.

2. It is unclear if the existing funding system of 20 Pa.C.S. § 5511(c) (see (VII)(B)(3)) will be sufficient to cover this cost.

3. If the existing funding system proves to be insufficient, the OEJC should explore funding sources for the recommendations in this section.

VIII. Role of Counsel

A. Issue Statement

The Committee was asked to address the role of counsel in guardianship matters. The role of counsel, both during hearings on capacity and after a guardian is appointed, is confusing. Should counsel for a respondent be a zealous advocate for the respondent's stated position, or should counsel exercise his or her own judgment in pursuit of the respondent's best interests? Does petitioner's counsel have a heightened responsibility because the respondent allegedly lacks capacity? Given the potential risk to vulnerable persons, is training and guidance on the role of counsel necessary?

B. Committee Findings

1. Roles of counsel: There are at least six different roles that attorneys assume with regard to proceedings involving determinations of capacity, some of which need clarification, including:

a. Representation of diminished capacity client

The Pennsylvania Rules of Professional Conduct provide excellent and adequate guidance.[31] To the extent reasonably possible, the attorney should maintain a normal client-attorney relationship, but if the attorney reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken and cannot adequately act in the client's own interest, the attorney may take reasonably necessary protective action. This rule is a national standard for conduct of attorneys, based on the American Bar Association's Model Rules of Professional Conduct.[32]

b. Representation of respondent during proceedings to adjudicate incapacity

The attorney must balance both best interests and zealous advocacy. Pa.R. Prof'l Conduct 1.14, including comments, provides an excellent roadmap for the appropriate application of each standard.[33]

c. Representation of guardianship respondent after adjudication

Following adjudication of incapacity, the role of the attorney retained or appointed to represent a respondent during guardianship proceedings is unclear. Generally, no withdrawal as counsel is filed. It is not clear whether appointed or retained counsel should continue to represent the respondent after appointment of a guardian.

d. Representation of petitioner in incapacity proceedings

Petitioner's counsel has a heightened responsibility, different from when the respondent is presumed to have capacity. Pennsylvania's current guardianship statute directs petitioner's counsel to request that the court appoint counsel for the person with diminished capacity, if appropriate, and provide notice in a manner most likely to be understood given the nature and extent of the guardianship respondent's diminished capacity.[34] In proceedings involving a determination of capacity, even the petitioner's attorney has a duty to protect the best interests of the respondent.

e. Representation of the guardian

There is little guidance in Pennsylvania statutes, court rules, or case law to define the role of counsel for a guardian.

f. Attorney serving as guardian

Guardianship services vary substantially according to the needs of the individual IP. While some courts prefer to appoint attorneys as guardians, the work of a guardian is different from the typical work of an attorney. Attorneys who serve as guardians must ensure that non-legal needs of the guardianship client are addressed.

C. Committee Recommendations

1. Practices and Procedures

The Committee, pursuant to its findings in (VIII)(B), recommends:

a. Discussions among attorneys and judges to better define the roles of counsel should be encouraged. The Pennsylvania Bar Association ("PBA") and local bar associations should be invited to participate in these discussions at the state and local levels.

b. Attorneys serving as guardians should complete the same training and other requirements as professional guardians, unless the court specifically waives that obligation. CLE credit, including ethics credit, should be available to attorneys for this training.

c. Support, advice, and ethical counsel for attorneys wanting to assume any of the above roles should be available through either the PBA, local bar association, the local AAA, or GSA.

d. Attorneys serving in any of the roles above should have an affirmative responsibility to clarify to the client, the court, and all other interested parties the role or roles counsel is assuming. Specifically, counsel should be required to have a letter of engagement stating who is being represented and describing counsel's role, and counsel should restate this role to the court when entering an appearance with the court.

e. Where the court appoints counsel to represent an AIP, the court should indicate whether, except for pursuing rights of appeal, counsel for the AIP is discharged or is to continue representing the person now under guardianship in the event the petition is granted and a guardian is appointed.

f. Model language, pertaining to the retention or discharge of counsel, should be developed and inserted into a final decree of incapacity and appointment of a guardian.

g. Guardians and IPs should have access to legal counsel for consultation following adjudication.

2. Implementation of Recommendations

The foregoing recommendations should be implemented as follows.

a. The OEJC should encourage discussions among attorneys and judges to better define the roles of counsel. The PBA and local bar associations should be invited to participate in these discussions at the state and local levels.

b. The requirement of attorney training should be implemented by rule of court and/or disciplinary rules, as appropriate. The training sessions themselves should be developed as stated in (X)(C)(2).

c. The OEJC should work with the PBA, local bar associations, local AAAs, and GSAs to ensure that at least one of these entities is available in each county to provide support, advice, and ethical guidance for attorneys wanting to assume any of the roles identified in (VIII)(B).

d. The requirement that attorneys serving in any of the roles above have an affirmative responsibility to clarify his/her role should be implemented by rule of court and/or disciplinary rule, as appropriate.

e. The requirement that a court appointing counsel indicate whether, except for pursuing rights of appeal, counsel for the AIP is discharged or is to continue representing the person now under guardianship in the event the petition is granted and a guardian is appointed, should be implemented by rule of court.

f. The Orphans' Court Procedural Rules Committee should develop model language, pertaining to the retention or discharge of counsel, which can be inserted into a final decree or adjudication of incapacity and appointment of a guardian.

g. The recommendation that guardians and IPs have access to legal counsel for consultation following adjudication should be implemented by rule of court.

D. Timing and Impact

1. The OEJC should commence implementation of recommendations (VIII)(C)(1)(a) and (c) as soon as is practicable after the release of this Report.

2. The OEJC should consult with the PBA and local bar associations as soon as is practicable after the release of this Report.

3. The OEJC should communicate with the Supreme Court regarding requested directions to the appropriate rules committees regarding proposed rules changes in (VIII)(C)(2)(d)-(g) as soon as is practicable after the release of this Report.

E. Fiscal Impact

The fiscal burden of implementing these recommendations is limited to the administrative costs of developing the recommended education and training. The fiscal impact of developing the education and training will be as stated in (X)(E)(1).

IX. Guardian and Counsel Fees

A. Issue Statement

The Committee was asked to address the issue of guardian and counsel fees and to determine what improvements could be made. Reasonable compensation — or lack thereof — is tied to retention of good guardians, the quality of guardianship services, and premature placement of persons under guardianship in nursing homes. The Committee also addressed what can be done regarding Pennsylvania's current fee standard to strengthen the quality of guardianship services, to allow for more effective monitoring of guardians, and to reduce fee disputes.

B. Committee Findings

1. Although the guardianship statutes are silent on the matter of guardian fees, a review of case law shows that Pennsylvania, like most other states, compensates guardians based on each trial judge's assessment of what constitutes "reasonable" compensation.[35]

2. Some jurisdictions have established fees based on either a percentage of the estate assets or an hourly rate for services performed.[36]

3. Setting fees based on a percentage of assets is easier to evaluate and calculate. This approach, however, has been criticized as unfair where there is a large estate and the services provided are routine and few.[37] Moreover, basing fees on assets also could be unnecessarily unfair to those with small estates having a need for intensive services and an asset, such as a house that could be sold to retroactively pay for those intensive guardianship services. Basing fees on the gross estate could have a chilling effect by encouraging a guardian to move the person living in a community into a nursing home.

4. Some jurisdictions periodically set an hourly rate for guardianship services. The hourly rate is based on a local survey or on the recommendation of a work group. Additional guidance as to whether certain items are billable, i.e., travel, faxes, etc., is also included. The rates reward additional years of experience.[38]

5. The Third National Guardianship Summit Standards and Recommendations § 3.1 - 3.8[39] state that guardians are entitled to reasonable compensation for their services and support a fee determined by a weighing of factors. Pennsylvania's approach is similar, but the

factors generally relied upon in Pennsylvania pertain to all estates and are not restricted to guardianship matters.

6. Some jurisdictions include time expectations or time caps in the fee schedule. For example, in Florida's Thirteenth Judicial Circuit, the court anticipates that each guardian will visit each IP monthly, the guardian will accompany the IP to non-routine doctor's appointments, will spend up to two hours a month on bill paying, will spend up to two and one half hours per month shopping for an IP who lives in the community or up to one hour per month shopping for a nursing home resident, and provide up to one hour a month of clerical work.[40]

7. Arizona's Supreme Court Committee on Improving Judicial Oversight and Processing of Probate Matters encourages each guardian to disclose fees soon after appointment to reduce "sticker shock" when fees are requested later.[41]

8. A recent survey found that guardian fees charged in Pennsylvania vary from $0 per hour to $160 per hour.[42] Individual courts' determinations of what is reasonable vary as widely as the type of fees charged.

9. Family members who serve as guardians do so at considerable personal financial and emotional cost, and compensation for this time and effort should be awarded where possible and appropriate.

10. Professionalization of guardians in Pennsylvania will improve the quality of services, set clear standards and expectations, and better facilitate monitoring.

11. Reasonable, predictable and documented fees are a prerequisite to professionalizing the field of guardianship and are likely to reduce the number of fee disputes.

12. A public funding mechanism (e.g., public guardianship program) could help to ensure reasonable fees.

13. GSAs, allowed under current Pennsylvania law, could provide a mechanism for securing charitable support to pay reasonable fees for guardianship services and other guardianship support services such as training, managing volunteers, and community outreach regarding guardianship prevention.

C. Committee Recommendations

1. Practices and Procedures

a. The Committee, pursuant to its findings in (IX)(B), recommends that a fee schedule be developed and offered to local courts as a model uniform court rule by the OEJC with the help of a working group composed of guardianship stakeholders, preferably the guardianship advisory system.[43]

b. The Committee, pursuant to its findings in (IX)(B), recommends that the fee schedule establish reasonable amounts of time which may be spent on specific guardianship tasks.

c. The Committee, pursuant to its findings in (IX)(B), recommends that the fee schedule should be presumed "reasonable," although the court should be permitted to adjust fees upward or downward based upon special circumstances.

d. The Committee, pursuant to its findings in (IX)(B)(5), recommends that where a judge deviates from the fee schedule, an explanation should be provided, as advocated in the Third National Guardianship Summit Recommendations § 3.6.[44]

e. The Committee, pursuant to its findings in (IX)(B), recommends that assets of the IP be used for the purpose of maintaining the best possible quality of life for the IP.

f. The Committee, pursuant to its finding in (IX)(B)(5), recommends that the Third National Guardianship Summit Standards and Recommendations §§ 3.1 - 3.8, pertaining to fees, should be adopted in the State of Pennsylvania, to the extent appropriate.[45]

g. The Committee, pursuant to its finding in (IX)(B)(12), recommends that a fund be established to pay for guardianship services for those with limited resources.

h. The Committee, pursuant to its finding in (IX)(B)(11), recommends that fee disputes be resolved in a timely, efficient manner.

2. Implementation of Recommendations

a. The OEJC should supervise the implementation of the recommendations in this section.

b. A fee schedule should be developed by the OEJC with the help of a working group composed of guardianship stakeholders.

c. Annual reports of guardians of the estate should include guardian fees, and their method of computation. This information should be forwarded to and compiled by the Administrative Office of Pennsylvania Courts ("AOPC") for analysis and use in clarifying what constitutes reasonable guardian fees in a manner to be determined by the OEJC.

d. The OEJC should work with local courts and other stakeholders to develop GSAs as permitted by current law.

e. The Advisory Council and the OEJC should explore the feasibility of asking the General Assembly to establish a fund to pay for guardianship services for those with limited available resources.

f. The recommendations in (IX)(C)(1)(a)-(e) and (h) should be implemented by rule of court.

g. The Advisory Council and the OEJC should study the Third National Guardianship Summit Standards and Recommendations §§ 3.1 – 3.8 and determine to what extent — and, if so, in what manner — these should be adopted in Pennsylvania.[46]

D. Timing and Impact

1. The fee schedule should be developed and provided to local courts as soon as is practicable following the release of this Report. The fee schedule should be reviewed and updated by the OEJC in alternate years.

2. The impact of the creation of the fee schedule should be significant by strengthening the quality of guardianship services, helping to retain guardians, allowing better monitoring of guardians and reducing fee disputes. Ensuring reasonable fees will also improve the quality of guardianship services, including allowing IPs to age in place.

E. Fiscal Impact

1. The fiscal impact of developing a fee schedule will be limited to the costs of convening a working group to develop the fee schedule, to distribution of the fee schedule, and to advocating for implementation of the schedule.

2. Ensuring reasonable fees will improve the quality of guardianship services, including allowing IPs to age in place. Aging in place will save taxpayers significant amounts of money because community-based services are less costly to the Commonwealth than skilled nursing home services.

X. Guardianship Education and Training for Judges, Court Staff, Guardians, Attorneys, and Others

A. Issue Statement

The Committee was asked to consider whether current education and training for judges, court staff, guardians, attorneys, and others interested in guardianship matters is adequate and, if not, how it can be improved.

B. Committee Findings

1. As described in (II)(B), there is little guidance for guardians, judges, court staff, attorneys, and others on the powers, duties, and responsibilities of guardians.

2. Moreover, as found in (IV)(B)(2), 20 Pa.C.S. § 5511(f)[47] does not define what constitutes a "qualified" individual. The statute also does not require a proposed guardian to undergo any specific screening process before being appointed.

3. As found in (II)(B)(10), the lack of training for judges and attorneys on limited guardianships may result in such guardianships being under-utilized and thus less effective.

4. The appointment of an emergency guardian pursuant to 20 Pa.C.S. § 5513 is useful, particularly in situations of suspected financial exploitation.[48] There is, however, little or no training for judges on the proper use of emergency guardianships, especially the need to appoint an emergency guardian of the estate, as well as review and supervise any outstanding powers of attorney in situations of suspected financial exploitation. In addition, there is currently no training for financial institutions on how to deal with an emergency guardianship. Education and training for judges and financial institutions on emergency guardianships would rectify this situation.

5. The Committee found that there is little or no coordination between Pennsylvania's courts and agencies that administer representative-payment or fiduciary programs such as the SSA, VA, RRB, and OPM. Although these agencies may give consideration to an applicant's status as a guardian, they are not obligated to select that person as representative payee.[49] Moreover, there may be situations where the applicant for representative payee benefits is not the guardian and the federal agency is unaware that a guardian has been appointed.

The Committee further found that there is little or no training for guardians on their responsibilities for management of an IP's benefits when they are appointed as representative payees.

Consequently, the Committee agreed with Resolution 4 of the Conference of Chief Justices/ Conference of State Court Administrators ("CCJ/COSCA") which urges improved coordination between state courts and state and federal agencies that administer representative-payment and fiduciary programs in order to protect vulnerable adults placed under a guardianship.[50] The Committee found that a collaborative approach to education and training by the courts and federal agencies that administer these programs would be helpful to further the goal of Resolution 4.

C. Committee Recommendations

1. Practices and Procedures

a. The Committee, pursuant to its findings in (X)(B)(1) - (4), recommends that training be required for guardians and also that training be developed for, and made available to, judges who hear guardianship cases, court administrative staff, attorneys, and others involved in guardianship matters (e.g. financial institutions, health care providers, etc.).

b. The Committee, pursuant to its finding in (II)(B)(7), recommends that professional guardians, i.e., those guardians with more than two guardianships at the same time, should

be certified by the professional guardian certification program recommended in (II)(C)(1)(f) as a means of ensuring their adequate education and training.

c. The Committee, pursuant to its findings in (X)(B)(1) - (2), recommends that the required training for guardians be divided into pre-service training and some form of continuing education that would cover the powers, duties, and responsibilities of the guardian, including reporting requirements. In addition, training for guardians on matters of ethics and liability should be part of the required curriculum.

d. The Committee, pursuant to its findings in (II)(B)(1) - (6), recommends that creation of local GSAs be encouraged, and that the GSAs be relied upon to implement standards and training.

e. The Committee, pursuant to its findings in (VI)(B), recommends that free training be provided for non-attorney guardians to show them how, what, and when to file required guardianship documents.

f. The Committee, pursuant to its findings in (VI)(B), recommends that “how to” videos be placed online to answer questions and provide more detailed instructions for the completion of guardianship tasks such as filing reports and inventories.

g. The Committee, pursuant to its findings in (VI)(B) and (X)(B)(5) respectively, recommends that the OEJC collaborate and coordinate with SSA, VA, RRB, and OPM representatives to develop training to address questions guardians may have regarding the management of an IP’s benefits.

h. The Committee, pursuant to its findings in (VIII)(B) and (X)(B)(1) respectively, recommends that attorneys serving as guardians complete the same training and other requirements as professional guardians, unless the court specifically waives that obligation. CLE credit, including ethics credit, should be available to attorneys for this training.

i. The Committee, pursuant to its finding in (II)(B)(10), recommends that education and training for judges and attorneys include information on how to ascertain when a limited guardianship is appropriate and on how to make one effective when they are appropriate.

j. The Committee, pursuant to its findings in (II)(B) and (X)(B)(1) respectively, recommends that a guardianship bench book be developed to assist judges handling guardianship matters.

k. The Committee, pursuant to its finding in (X)(B)(4), recommends that training be developed for judges and financial institutions on emergency guardianships.

2. Implementation of Recommendations

a. The best practices based on the NGA Standards referred to in (II)(C)(1)(a) should be presented through training sessions for judges, court staff, guardians, and attorneys involved in guardianship matters.

b. The education and training programs for guardians should be developed as follows:

i. The York County Guardianship Education/Training Advisory Board training module, which will cover basic reporting and other responsibilities, should be required of all new guardians and guardians not complying with reporting requirements across the Commonwealth.

Model Program:

York County, through the assistance of the State Justice Institute, the Supreme Court of Pennsylvania, and the York County Courts, has developed an educational program for individuals and/or professional guardians. Training will be provided to these entities to assure compliance with the statute governing guardianships. The intent is to assure that all guardians fully understand the role of being designated a limited or plenary guardian of the person and/or of the estate of an IP. Training will be through seminars which are open to the public. Curriculum for physicians, bankers, attorneys, and others is being developed for presentation.

ii. The OEJC should support the completion of this basic module and make it available to all guardians across the state. This module may be made available by live training, webinar or videoconference, as recommended by the York County Guardianship Education/Training Advisory Board.

iii. The OEJC should monitor and support the development of additional training modules which focus on the NGA Standards recommended in (II)(C)(1)(a) and the application of these standards.

iv. Training development should involve interdisciplinary teams, including, but not limited to, elder advocacy groups (e.g., GSAs, AAAs, American Association of Retired Persons ("AARP"), Center for Advocacy for the Rights and Interests of the Elderly ("CARIE"), SeniorLAW Center ("SLC"), etc.), disability rights advocates (e.g., National Association for Retarded Citizens ("ARC"), etc.), medical professionals, financial abuse specialists, and others.

v. Attorneys representing parties in guardianship matters should be trained through the Pennsylvania Bar Institute ("PBI") and other CLE providers and should receive CLE credit. The OEJC should assist in the development of such training programs.

vi. Court administrative staff should be trained through the OEJC.

vii. The OEJC should collaborate with the appropriate federal agencies that administer representative payee and fiduciary programs on developing training for guardians on their duties as a representative payee.

c. Local GSAs should be encouraged and relied upon to help implement standards and training.

i. Pennsylvania statutes encourage the creation of GSAs.[51]

ii. The Supreme Court through the OEJC should encourage local courts to support creation of GSAs in local communities to the extent possible given current budgetary constraints.

iii. GSAs should take an active role in supporting local guardianship improvement.

iv. Ideally, a GSA should oversee the training and education of guardians at the local level. If a GSA is not available, education and training should be overseen by the local interdisciplinary team or, if there is no local interdisciplinary team, by the President Judge (or designee) with the assistance of the work group described in (I)(C)(2)(b)(i).

d. Training for judges who hear guardianship cases recommended in (X)(C)(1) should be developed by the AOPC Judicial Education Department in consultation with the interdisciplinary teams or, if interdisciplinary teams are not available, practicing guardians. In addition, the OEJC and the AOPC Judicial Education Department, in consultation with either the interdisciplinary teams or practicing professional and non-professional guardians, should develop a Guardianship Bench Book. The training should be provided as follows:

i. New judges' training should include introductory information about the unique challenges of guardianship cases and the NGA Standards recommended in (II)(C)(1)(a).

ii. At least once a year, perhaps at the semi-annual judicial conferences, training should be available to all judges working with guardianship matters.

e. The OEJC should approach financial industry groups such as the Pennsylvania Bankers Association or similar entities to encourage them to collaborate on developing education and training programs for financial institutions on guardianship matters.

f. The training for non-professional guardians should be conducted at the following time intervals:

i. Proposed guardians should be provided with written information about the duties and responsibilities of a guardian either prior to filing of the petition for adjudication of incapacity or when the petition is filed. These written materials should be sent to the proposed guardian.

ii. Within six weeks of appointment as a guardian, the non-professional guardian should be trained in the NGA Standards recommended in (II)(C)(1)(a) on how to prepare and file the inventory, the duty to produce the will, bank account management, real property management, the budget, the care plan, the mail, substituted judgment versus best interest decision-making, record keeping, limits of authority, and other topics critical during this transition to guardianship.

iii. Between six months and eleven months after appointment, the guardian should receive training and support in filing the first annual reports.

iv. During and after the initial training cycle, guardians should have access to ongoing training, peer support or discussion groups as facilitated by local courts or GSAs.

D. Timing and Impact

1. Education and training for judges, court administrative staff, attorneys, and others involved in guardianship matters will have the strongest impact in incorporating the NGA Standards recommended in (II)(C)(1)(a) and in otherwise improving and making consistent guardianships in Pennsylvania.

2. The training for non-professional guardians by the OEJC should be developed as soon as is practicable.

3. The timing and impact of the creation of a certification program for professional guardians will be as stated in (II)(D)(3).

4. Training for judges who hear guardianship cases should be developed by the OEJC and the AOPC Judicial Education Department as soon as is practicable, in consultation with the interdisciplinary teams or, if interdisciplinary teams are not yet available, practicing guardians. Training for judges will have a substantial impact on improving guardianships (plenary and limited) and protecting IPs.

5. Training for administrative court staff should be developed as soon as is practicable by the OEJC.

6. The timing and impact of GSA involvement in implementing standards and training will be as stated in (II)(D)(5).

7. Collaboration by the OEJC with the federal agencies that administer representative-payment and fiduciary programs can begin immediately once contact persons at these agencies are identified. This collaboration will enhance coordination between the courts and these agencies on educating and training guardians on their responsibilities when appointed as representative payees.

8. Limited guardianship training can be instituted as part of the judicial education and attorney education programs. The impact of such training should be significant in increasing the use of limited guardianships and making them more effective.

9. Education and training of judges on emergency guardianships can be instituted as part of judicial education programs as mentioned above. Emergency guardianship training will improve the effectiveness of emergency guardianships.

10. Education and training for financial institutions could be developed as soon as is practicable. Collaboration between the OEJC and financial institutions on education and training regarding guardianships and financial abuse of elders could begin as soon as contact persons at these entities are identified.

E. Fiscal Impact

1. As a result of the recommendations for education and training, significant funding will be needed for the development of such training. Potential sources of funding are identified in the Report and Overarching Findings and Recommendations of the Elder Law Task Force Concerning Court Administration, Judicial Education, Funding and Public Awareness. Once training modules are developed, the cost of providing training will depend upon whether the training is online, live, or in another format. The training programs could also be funded by a surcharge added on the guardianship filing fee (similar to the technology fee) on petitions for adjudication of incapacity and/or inventories, or could be borne by the OEJC, local courts or an agency, depending upon the specific training program. Regarding the imposition of filing fees or surcharges, the Committee generally does not favor them because of their potential negative impact on litigants' right of access to the courts, and believes they should be used only as a last resort. If other funding sources have been thoroughly explored, however, and are found to be unavailable, the Committee believes that a graduated fee structure referred to in (II)(E)(4) can balance the need for funding with litigants' right of access to the courts.

2. Development of local interdisciplinary teams will have a limited fiscal burden. Team members will be volunteers. Local team representatives attending periodic statewide meetings will incur expenses for travel, lodging, and food. Ideally, there will be funds available to pay for materials and speakers at the local and state levels.

3. The fiscal impact of local GSAs will be as stated in (II)(E)(4).

4. The fiscal burden of implementing the recommendations related to the proposed Guardianship Bench Book is limited to the administrative costs of developing same.

5. The fiscal impact of outreach to federal agencies pursuant to recommendation (X)(C)(1)(g) should be minimal.

6. The fiscal impact of collaborating with financial industry groups to develop education and training programs for financial institutions on guardianship matters will vary depending upon the type of program developed and whether volunteer presenters can be obtained.

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Standards of Practice

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NATIONALGUARDIANSHIPASSOCIATION
Phone: 877-326-5992
www.guardianship.org
Email: info@guardianship.org

National Guardianship Association

Standards of Practice

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Preamble

Developing standards for guardians has been an ongoing challenge for the National Guardianship Association (NGA). Not only has the profession undergone rapid change since the original seven standards were written in 1991, but the basic issues have been, and remain, imprecise and difficult to define for a national, membership-based organization. A basic philosophical element complicating the process has been the need to strike a consistent balance between standards that represent an ideal and those that recognize practical limitations, whether for a family guardian or for a professional guardian.

In July of 1991, the NGA adopted a previously published Code of Ethics to guide guardians in their decision-making process. The next task of the NGA was to formulate specific standards to be applied in the day-to-day practice of guardianship. The seven original standards of practice that were written and adopted by the NGA in 1991 have now been expanded to cover more of the duties and responsibilities that face court-appointed guardians today.

The same lengthy discussions that took place in 1991 occurred again during each updating of the standards. These discussions centered on the need to state what is "right" versus the need to recognize and accept the inevitability of the status quo-- too many clients, not enough funding or staff. While we all agree that such restrictions are all too commonplace, we also feel that little is gained by simply accepting a substandard or unacceptable state of affairs. NGA has, therefore, adopted standards that we feel reflect as realistically as possible the best or highest quality of practice. In many cases, best practice may go beyond what state law requires of a guardian.

In reading this document, it is important to recognize that some of the standards enunciate ideals or philosophical points, while others speak to day-to-day practical matters. Both approaches are critically important. It is not our ambition to prescribe a precise program description or management manual. Rather, we have sought to shape a mirror that practitioners and funders can use to evaluate their efforts. The standards also reflect the mandate that all guardians must perform in accordance with current state law governing guardianships and certification of guardians.

To ensure consistency in the way the standards are applied, the following constructions are used: "shall" imposes a duty, "may" creates discretionary authority or grants permission or a power, "must" creates or recognizes a condition precedent, "is entitled to" creates or recognizes a right, and "may not" imposes a prohibition and is synonymous with "shall not." The guidelines that appear in some standards are suggested ways of carrying out those standards.

This document embodies practices and standards from a number of professional sources. As such, it sometimes makes unavoidable use of legal and medical "terms of art" where they would commonly and most accurately be used by professionals who work in the particular area. In addition, the field of guardianship itself makes use of terms that vary widely from state to state. "Guardian" and "person under guardianship" or "person" are the terms used here to simplify the many references to these roles. Where points apply to professional, as opposed to family, guardians, they are indicated. "Guardian," as used in the standards, means guardian of the person, guardian of the estate or guardian of the person and estate, depending on the standard being addressed.

In this work we have drawn on a number of collective sources. First and foremost have been NGA members who have contributed extensive time and energy and valuable input into the development of these standards. The *Model Code of Ethics for Guardians*, developed by Michael D. Casasanto, Mitchell Simon, and Judith Roman and adopted by the NGA, has formed the

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foundation from which the standards were developed. Other very important sources that helped in the creation of our standards of practice are the U.S. Administration on Aging, the AARP, the Center for Social Gerontology, the Michigan Offices of Services for the Aging, and the state associations from Arizona, Washington, California, Illinois, Minnesota, and Michigan. We thank everyone listed above and others for their ongoing commitment to the profession of guardianship.

The *NGA Standards of Practice for Guardians* were first adopted by the NGA Board of Directors and ratified by the membership in 2000. The 2003 edition of the *Standards* incorporates language that came forth from Wingspan 2001, the National Conference on Guardianship Reform. The 2007 edition provides minor clarification of the language in the earlier editions without any substantive changes. These *Standards* were used as a starting point by the 2011 Third National Guardianship Summit in developing new standards. The 2013 edition incorporates the Summit Standards.

Please be advised that any entity adopting these standards should give attribution to NGA.

Check the NGA Website (www.guardianship.org) for the most current edition of the *NGA Standards of Practice*.

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NGA Standards of Practice

✪ NGA Standard 1 – Applicable Law and General Standards

I. The guardian shall perform duties and discharge obligations in accordance with current state and federal law governing guardianships.

II. The guardian who is certified, registered, or licensed by the Center for Guardianship Certification or by his or her state should be guided by professional codes of ethics and standards of practice for guardians.

III. In all guardianships, the guardian shall comply with the requirements of the court that made the appointment.

IV. Every guardian should be held to the same standards, regardless of familial relationship, except a guardian with a higher level of relevant skills shall be held to the use of those skills.

✪ NGA Standard 2 – The Guardian's Relationship to the Court

I. The guardian shall know the extent of the powers and the limitations of authority granted by the court and-all decisions and actions shall be consistent with that court order.

II. The guardian shall obtain court authorization for actions that are subject to court approval.

III. The guardian shall clarify with the court any questions about the meaning of the order or directions from the court before taking action based on the order or directions.

IV. The guardian shall seek assistance as needed to fulfill responsibilities to the person under guardianship.

V. All payments to the guardian from the assets of the person shall follow applicable federal or state statutes, rules, and requirements and are subject to review by the court.

VI. The guardian shall submit reports regarding the status of the guardianship to the court as ordered by the court or required by state statute, but no less often than annually. Ways that guardians of the person and of the estate keep the court informed about the well-being of the person and the status of the estate include but not limited to:

A. Personal care plans and financial plans,

B. Inventories and appraisals, and

C. Reports and accountings.

VII. The guardian shall use available technology to:

A. File the general plan, inventory and appraisal, and annual reports and accountings,

B. Access responsible education and information about guardianships, and

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C. Assist in the administration of the estate.

VIII. The guardian shall promptly inform the court of any change in the capacity of the person that warrants an expansion or restriction of the guardian's authority.

✪ NGA Standard 3 – The Guardian's Professional Relationship with the Person

I. The guardian shall treat the person under guardianship with dignity.

II. The guardian shall avoid personal relationships with the person, the person's family, or the person's friends, unless the guardian is a family member, or unless such a relationship existed before the appointment of the guardian.

III. The guardian may not engage in sexual relations with a person unless the guardian is the person's spouse or in a physical relationship that existed before the appointment of the guardian.

V. The guardian shall seek ongoing education concerning the following:

A. Person-centered planning,

B. Surrogate decision-making,

C. Responsibilities and duties of guardians,

D. Legal processes of guardianship, and

E. State certification of guardians.

NGA Standard 4 – The Guardian's Relationship with Family Members and Friends of the Person

I. The guardian shall promote social interactions and meaningful relationships consistent with the preferences of the person under guardianship.

A. The guardian shall encourage and support the person in maintaining contact with family and friends, as defined by the person, unless it will substantially harm the person.

B. The guardian may not interfere with established relationships unless necessary to protect the person from substantial harm.

II. The guardian shall make reasonable efforts to maintain the person's established social and support networks during the person's brief absences from the primary residence.

III. When disposing of the person's assets, the guardian may notify family members and friends and give them the opportunity, with court approval, to obtain assets (particularly those with sentimental value).

IV. The guardian shall make reasonable efforts to preserve property designated in the person's will and other estate planning devices executed by the person.

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V. The guardian may maintain communication with the person's family and friends regarding significant occurrences that affect the person when that communication would benefit the person.

VI. The guardian may keep immediate family members and friends advised of all pertinent medical issues when doing so would benefit the person. The guardian may request and consider family input when making medical decisions.

Note: Refer to Standard 11 as it relates to confidentiality issues.

NGA Standard 5 – The Guardian's Relationship with Other Professionals and Providers of Service to the Person

I. The guardian shall treat all professionals and service providers with courtesy and respect and shall strive to enhance cooperation on behalf of the person.

II. The guardian shall develop and maintain a working knowledge of the services, providers and facilities available in the community.

III. The guardian shall stay current with changes in community resources to ensure that the person under guardianship receives high-quality services from the most appropriate provider.

IV. A guardian who is not a family member guardian may not provide direct service to the person. The guardian shall coordinate and monitor services needed by the person to ensure that the person is receiving the appropriate care and treatment.

V. The guardian shall engage the services of professionals (attorneys, accountants, stock brokers, real estate agents, physicians) as necessary to appropriately meet the goals, needs, and preferences of the person.

VI. The guardian shall make a good faith effort to cooperate with other surrogate decision-makers for the person. These include, where applicable, any other guardian, agent under a power of attorney, health care proxy, trustee, VA fiduciary and representative payee.

VII. The guardian may consider mentoring new guardians.

NGA Standard 6 – Informed Consent

I. Decisions the guardian makes on behalf of the person under guardianship shall be based on the principle of Informed Consent.

II. Informed Consent is an individual's agreement to a particular course of action based on a full disclosure of facts needed to make the decision intelligently.

III. Informed Consent is based on adequate information on the issue, voluntary action, and lack of coercion.

IV. The guardian stands in the place of the person and is entitled to the same information and freedom of choice as the person would have received if he or she were not under guardianship.

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V. In evaluating each requested decision, the guardian shall do the following:

A. Have a clear understanding of the issue for which informed consent is being sought,

B. Have a clear understanding of the options, expected outcomes, risks and benefits of each alternative,

C. Determine the conditions that necessitate treatment or action,

D. Encourage and support the person in understanding the facts and directing a decision,

E. Maximize the participation of the person in making the decision,

F. Determine whether the person has previously stated preferences in regard to a decision of this nature,

G. Determine why this decision needs to be made now rather than later,

H. Determine what will happen if a decision is made to take no action,

I. Determine what the least restrictive alternative is for the situation,

J. Obtain a second medical or professional opinion, if necessary,

K. Obtain information or input from family and from other professionals, and

L. Obtain written documentation of all reports relevant to each decision.

✪ NGA Standard 7 – Standards for Decision-Making

I. Each decision made by the guardian shall be an informed decision based on the principle of Informed Consent as set forth in Standard 6.

II. The guardian shall identify and advocate for the person's goals, needs, and preferences. Goals are what are important to the person under guardianship, whereas preferences are specific expressions of choice.

A. First, the guardian shall ask the person what he or she wants.

B. Second, if the person has difficulty expressing what he or she wants, the guardian shall do everything possible to help the person express his or her goals, needs, and preferences.

C. Third, only when the person, even with assistance, cannot express his or her goals and preferences, shall the guardian seek input from others familiar with the person to determine what the individual would have wanted.

D. Finally, only when the person's goals and preferences cannot be ascertained, may the guardian make a decision in the person's best interest.

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III. Substituted Judgment

A. Substituted Judgment is the principle of decision-making that substitutes the decision the person would have made when the person had capacity as the guiding force in any surrogate decision the guardian makes.

B. Substituted Judgment promotes the underlying values of self-determination and well-being of the person.

C. Substituted Judgment is not used when following the person's wishes would cause substantial harm to the person or when the guardian cannot establish the person's goals and preferences even with support.

IV. Best Interest

A. Best Interest is the principle of decision-making that should be used only when the person has never had capacity, when the person's goals and preferences cannot be ascertained even with support, or when following the person's wishes would cause substantial harm to the person.

B. The Best Interest principle requires the guardian to consider the least intrusive, most normalizing, and least restrictive course of action possible to provide for the needs of the person.

C. The Best Interest principle requires the guardian to consider past practice and evaluate reliable evidence of likely choices.

✪ NGA Standard 8 – Least Restrictive Alternative

I. The guardian shall carefully evaluate the alternatives that are available and choose the one that best meets the personal and financial goals, needs, and preferences of the person under guardianship while placing the least restrictions on his or her freedom, rights, and ability to control his or her environment.

II. The guardian shall weigh the risks and benefits and develop a balance between maximizing the independence and self-determination of the person and maintaining the person's dignity, protection and safety.

III. The guardian shall make individualized decisions. The least restrictive alternative for one person might not be the least restrictive alternative for another person.

IV. The following guidelines apply in the determination of the least restrictive alternative:

A. The guardian shall become familiar with the available options for residence, care, medical treatment, vocational training, and education.

B. The guardian shall strive to know the person's goals and preferences.

C. The guardian shall consider assessments of the person's needs as determined by specialists. This may include an independent assessment of the person's functional ability, health status, and care needs.

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✪ NGA Standard 9 – Self-Determination of the Person

I. The guardian shall provide the person under guardianship with every opportunity to exercise those individual rights that the person might be capable of exercising as they relate to the personal care and financial needs of the person.

II. The guardian shall attempt to maximize the self-reliance and independence of the person.

III. The guardian shall encourage the person to participate, to the maximum extent of the person's abilities, in all decisions that affect him or her, to act on his or her own behalf in all matters in which the person is able to do so, and to develop or regain his or her own capacity to the maximum extent possible.

IV. The guardian shall make and implement a plan that seeks to fulfill the person's goals, needs, and preferences. The plan shall emphasize the person's strengths, skills, and abilities to the fullest extent in order to favor the least restrictive setting.

V. The guardian shall wherever possible, seek to ensure that the person leads the planning process; and at a minimum to ensure that the person participates in the process.

✪ NGA Standard 10 – The Guardian's Duties Regarding Diversity and Personal Preferences of the Person

I. The guardian shall determine the extent to which the person under guardianship identifies with particular ethnic, religious, and cultural values. To determine these values, the guardian shall also consider the following:

A. The person's attitudes regarding illness, pain, and suffering,

B. The person's attitudes regarding death and dying,

C. The person's views regarding quality of life issues,

D. The person's views regarding societal roles and relationships, and

E. The person's attitudes regarding funeral and burial customs.

II. The guardian shall acknowledge the person's right to interpersonal relationships and sexual expression. The guardian shall take steps to ensure that a person's sexual expression is consensual, that the person is not victimized, and that an environment conducive to this expression in privacy is provided.

A. The guardian shall ensure that the person has information about and access to accommodations necessary to permit sexual expression to the extent the person desires and to the extent the person possesses the capacity to consent to the specific activity.

B. The guardian shall take reasonable measures to protect the health and well-being of the person.

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C. The guardian shall ensure that the person is informed of birth control methods. The guardian shall consider birth control options and choose the option that provides the person the level of protection appropriate to the person's lifestyle and ability, while considering the preferences of the person. The guardian shall encourage the person, where possible and appropriate, to participate in the choice of a birth control method.

D. The guardian shall protect the rights of the person with regard to sexual expression and preference. A review of ethnic, religious, and cultural values may be necessary to uphold the person's values and customs.

✪ NGA Standard 11 - Confidentiality

I. The guardian shall keep the affairs of the person under guardianship confidential.

II. The guardian shall respect the person's privacy and dignity, especially when the disclosure of information is necessary.

III. Disclosure of information shall be limited to what is necessary and relevant to the issue being addressed.

IV. The guardian may disclose or assist the person in communicating sensitive information to the person's family and friends, as defined by the person, unless it will substantially harm the person.

V. The guardian may refuse to disclose sensitive information about the person where disclosure would be detrimental to the well-being of the person or would subject the person's estate to undue risk. Such a refusal to disclose information must be reported to the court.

✪ NGA Standard 12 – Duties of the Guardian of the Person

I. The guardian shall have the following duties and obligations to the person under guardianship unless the order of appointment provides otherwise:

A. To see that the person is living in the most appropriate environment that addresses the person's goals, needs, and preferences.

1. The guardian shall have a strong priority for home or other community-based settings, when not inconsistent with the person's goals and preferences.

2. The guardian shall authorize moving a person to a more restrictive environment only after evaluating other medical and health care options and making an independent determination that the move is the least restrictive alternative at the time, fulfills the current needs of the person and serves the overall best interest of the person.

3. The guardian shall consider the proximity of the setting to those people and activities that are important to the person when choosing a residential setting.

4. At a minimum the guardian shall report to a court before a move to a more restrictive residential setting, and the justification for the move.

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5. When the guardian considers involuntary or long-term placement of the person in an institutional setting, the bases of the decision shall be to minimize the risk of substantial harm to the person, to obtain the most appropriate placement possible, and to secure the best treatment for the person.

B. To ensure that provision is made for the support, care, comfort, health, and maintenance of the person.

C. To make reasonable efforts to secure for the person medical, psychological, therapeutic, and social services, training, education, and social and vocational opportunities that are appropriate and that will maximize the person's potential for self-reliance and independence.

D. To keep the affairs of the person confidential, except when it is necessary to disclose such affairs for the best interests of the person.

E. To seek specific judicial authority when a civil commitment, the dissolution of a marriage, or another extraordinary circumstance is being addressed.

F. To file with the court, on a timely basis but not less often than annually, all reports required by state statute, regulations, court rule, or the particular court pursuant to whose authority the guardian was appointed.

G. To adhere to the requirements of Standard 17 - Duties of the Guardian of the Estate and Standard 18 - Guardian of the Estate: Initial and Ongoing Responsibilities, to the extent that the guardian of the person has been authorized by the court to manage the person's property.

H. To petition the court for limitation or termination of the guardianship when the person no longer meets the standard pursuant to which the guardianship was imposed, or when there is an effective alternative available.

I. To promptly report to the appropriate authorities abuse, neglect and/or exploitation as defined by state statutes.

NGA Standard 13 – Guardian of the Person: Initial and Ongoing Responsibilities

I. With the proper authority, initial steps after appointment as guardian are as follows:

A. The guardian shall address all issues of the person under guardianship that require immediate action.

B. The guardian shall meet with the person as soon after the appointment as is feasible. At the first meeting, the guardian shall:

1. Communicate to the person the role of the guardian;

2. Explain the rights retained by the person;

3. Assess the person's physical and social situation, the person's educational,

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vocational, and recreational needs, the person's preferences, and the support systems available to the person; and

4. Attempt to gather any missing necessary information regarding the person.

C. After the first meeting with the person, the guardian shall notify relevant agencies and individuals of the appointment of a guardian and shall complete the intake process by gathering information and ensuring that certain evaluations are completed, if appropriate. The guardian shall:

1. Obtain an evaluation of the person's condition, treatment, and functional status from the person's treating physician or appropriate specialist, if a comprehensive medical evaluation was not completed as part of the petitioning process, or has not been done within the past year.

2. Obtain a psychological evaluation, if appropriate.

3. Obtain an inventory of advance directives. Such statements of intent would include, but are not limited to, powers of attorney, living wills, organ donation statements and statements by the person recorded in medical charts.

4. Establish contact with and develop a regular pattern of communication with the guardian of the estate or any other fiduciary for the person.

II. The guardian shall develop and implement a written guardianship plan setting forth short-term and long-term objectives for meeting the goals, needs and preferences of the person.

A. The plan shall emphasize a "person-centered philosophy."

B. The plan must address medical, psychiatric, social, vocational, educational, training, residential, and recreational goals, needs and preferences of the person.

C. The plan must also address whether the person's finances and budget are in line with the services the person needs and are flexible enough to deal with the changing status of the person.

D. Short-term goals must reflect the first year of guardianship, and long-term goals must reflect the time after the first year.

E. The plan must be based on a multidisciplinary functional assessment.

F. The plan must be updated no less often than annually.

III. The guardian shall maintain a separate file for each person. The file must include, at a minimum, the following information and documents:

A. The person's name, date of birth, address, telephone number, Social Security number, medical coverage, physician, diagnoses, medications, and allergies to medications;

B. All legal documents involving the person;

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C. Advance directives;

D. A list of key contacts;

E. A list of service providers, contact information, a description of services provided to the person, and progress/status reports;

F. A list of all over-the-counter and prescribed medication the person is taking, the dosage, the reason why it is taken, and the name of the doctor prescribing the medication;

G. Documentation of all client and collateral contacts, including the date, time, and activity;

H. Progress notes that are as detailed as necessary to reflect contacts made and work done regarding the person;

I. The guardianship plan;

J. An inventory, if required;

K. Assessments regarding the person's past and present medical, psychological, and social functioning;

L. Documentation of the person's known values, lifestyle preferences, and known wishes regarding medical and other care and service; and

M. A photograph of the person.

IV. The guardian shall visit the person no less than monthly.

A. The guardian shall assess the person's physical appearance and condition and assess the appropriateness of the person's current living situation and the continuation of existing services, taking into consideration all aspects of social, psychological, educational, direct services, and health and personal care needs as well as the need for any additional services.

B. The guardian shall maintain substantive communication with service providers, caregivers, and others attending to the person.

C. The guardian shall participate in all care or planning conferences concerning the residential, educational, vocational, or rehabilitation program of the person.

D. The guardian shall require that each service provider develop an appropriate service plan for the person and shall take appropriate action to ensure that the service plans are being implemented.

E. The guardian shall regularly examine all services and all charts, notes, logs, evaluations, and other documents regarding the person at the place of residence and at any program site to ascertain that the care plan is being properly followed.

F. The guardian shall advocate on behalf of the person with staff in an institutional setting and other residential placements. The guardian shall assess the overall

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quality of services provided to the person, using accepted regulations and care standards as guidelines and seeking remedies when care is found to be deficient.

G. The guardian shall monitor the residential setting on an ongoing basis and take any necessary action when the setting does not meet the individual's current goals, needs and preferences, including but not limited to:

1. Evaluating the plan;

2. Enforcing residents' rights, legal and civil rights; and

3. Ensuring quality of care and appropriateness of the setting in light of the feelings and attitudes of the person.

V. The guardian shall fully identify, examine, and continue to seek information regarding options that will fulfill the person's goals, needs, and preferences.

A. Guardians shall take full advantage of professional assistance in identifying all available options for long term services and supports.

B. Sources of professional assistance include but are not limited to area agencies on aging, centers for independent living, protection and advocacy agencies, long-term care ombudsmen, developmental disabilities councils, aging and disability resource centers, and community mental health agencies.

VI. The guardian shall obtain and maintain a current understanding of what is required and expected of the guardian, statutory and local court rule requirements, and necessary filings and reports.

VII. The guardian shall become educated about the nature of any incapacity, condition and functional capabilities of the person.

✪ NGA Standard 14 – Decision-Making About Medical Treatment

I. The guardian shall promote, monitor, and maintain the health and well-being of the person under guardianship.

II. The guardian shall ensure that all medical care for the person is appropriately provided and that the person is treated with dignity.

III. The guardian shall seek to ensure that the person receives appropriate health care consistent with person-centered health care decision-making.

IV. The guardian, in making health care decisions or seeking court approval for a decision, shall:

A. Maximize the participation of the person,

B. Acquire a clear understanding of the medical facts,

C. Acquire a clear understanding of the health care options and the risks and benefits of each option, and

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D. Encourage and support the individual in understanding the facts and directing a decision.

V. Use the substituted judgment standard with respect to a health care decision unless the guardian cannot determine person's prior wishes.

VI. The guardian shall determine whether the person, before the appointment of a guardian, executed any advance directives, such as powers of attorney, living wills, organ donation statements and statements by the person recorded in medical charts. On finding such documents, the guardian shall inform the court and other interested parties of the existing health care documents.

VII. To the extent the person cannot currently direct the decision, the guardian shall act in accordance with the person's prior general statements, actions, values, and preferences to the extent actually known or ascertainable by the guardian.

VIII. If the person's preferences are unknown and unascertainable, the guardian shall act in accordance with reasonable information received from professionals and persons who demonstrate sufficient interest in the person's welfare, to determine the person's best interests, which determination shall include consideration of consequences for others that an individual in the person's circumstances would consider.

IX. Absent an emergency or the person's execution of a living will, durable power of attorney for health care, or other advance directive declaration of intent that clearly indicates the person's wishes with respect to a medical intervention, a guardian who has authority may not grant or deny authorization for a medical intervention until he or she has given careful consideration to the criteria listed in Standards 6 and 7.

X. In the event of an emergency, a guardian who has authority to make health care decisions shall grant or deny authorization of emergency medical treatment based on a reasonable assessment of the criteria listed in Standards 6 and 7, within the time allotted by the emergency.

XI. The guardian shall seek a second opinion for any medical treatment or intervention that would cause a reasonable person to do so or in circumstances where any medical intervention poses a significant risk to the person. The guardian shall obtain a second opinion from an independent physician.

XII. Under extraordinary medical circumstances, in addition to assessing the criteria and using the resources outlined in Standards 6 and 7, the guardian shall enlist ethical, legal, and medical advice, with particular attention to the advice of ethics committees in hospitals and elsewhere.

XIII. The guardian shall speak directly with the treating or attending physician before authorizing or denying any medical treatment.

XIV. The guardian may not authorize extraordinary procedures without prior authorization from the court unless the person has executed a living will or durable power of attorney that clearly indicates the person's desire with respect to that action. Extraordinary procedures may include, but are not limited to, the following medical interventions:

A. Psychosurgery,

B. Experimental treatment,

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C. Sterilization,

D. Abortion, and

E. Electroshock therapy.

XV. The guardian shall seek to ensure that appropriate palliative care is incorporated into all health care, unless not in accordance with the person's preferences and values.

XVI. The guardian shall keep individuals that are important to the person reasonably informed of important health care decisions.

✪ NGA Standard 15 – Decision-Making About Withholding and Withdrawal of Medical Treatment

I. The NGA recognizes that there are circumstances in which, with the approval of the court if necessary, it is legally and ethically justifiable to consent to the withholding or withdrawal of medical treatment, including artificially provided nutrition and hydration, on behalf of the person under guardianship. In making this determination there shall in all cases be a presumption in favor of the continued treatment of the person.

II. If the person had expressed or currently expresses a preference regarding the withholding or withdrawal of medical treatment, the guardian shall follow the wishes of the person. If the person's current wishes are in conflict with wishes previously expressed when the person had capacity, the guardian shall have this ethical dilemma reviewed by an ethics committee and if necessary, submit the issue to the court for direction.

III. When making this decision on behalf of the person, the guardian shall gather and document information as outlined in Standard 6 and shall follow Standard 7.

✪ NGA Standard 16 – Conflict of Interest: Ancillary and Support Services

I. The guardian shall avoid all conflicts of interest and self-dealing or the appearance of a conflict of interest and self-dealing when addressing the needs of the person under guardianship. Impropriety or conflict of interest arises where the guardian has some personal or agency interest that can be perceived as self-serving or adverse to the position or best interest of the person. Self-dealing arises when the guardian seeks to take advantage of his or her position as a guardian and acts for his or her own interests rather than for the interests of the person.

II. The guardian shall become fully educated as to what constitutes a conflict of interest and self-dealing, and why they should be avoided.

III. Rules relating to specific ancillary and support service situations that might create an impropriety or conflict of interest include the following:

A. The guardian may not directly provide housing, medical, legal, or other direct services to the person. Some direct services may be approved by the court for family guardians.

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1. The guardian shall coordinate and assure the provision of all necessary services to the person rather than providing those services directly.

2. The guardian shall be independent from all service providers, thus ensuring that the guardian remains free to challenge inappropriate or poorly delivered services and to advocate on behalf of the person.

3. When a guardian can demonstrate unique circumstances indicating that no other entity is available to act as guardian, or to provide needed direct services, an exception can be made, provided that the exception is in the best interest of the person. Reasons for the exception must be documented and the court notified.

B. A guardianship program must be a freestanding entity and must not be subject to undue influence.

C. When a guardianship program is a part of a larger organization or governmental entity, there must be an arm's-length relationship with the larger organization or governmental entity and it shall have independent decision-making ability.

D. The guardian may not be in a position of representing both the person and the service provider.

E. A guardian who is not a family guardian may act as petitioner only when no other entity is available to act, provided all alternatives have been exhausted.

F. The guardian shall consider all possible consequences of serving the dual roles of guardian and expert witness. Serving in both roles may present a conflict. The guardian's primary duty and responsibility is always to the person.

G. The guardian may not employ his or her friends or family to provide services for a profit or fee unless no alternative is available and the guardian discloses this arrangement to the court.

H. The guardian shall neither solicit nor accept incentives from service providers.

I. The guardian shall consider various ancillaries or support service providers and select the providers that best meet the needs of the person.

J. A guardian who is an attorney or employs attorneys may provide legal services to a person only when doing so best meets the needs of the person and is approved by the court following full disclosure of the conflict of interest. The guardian who is an attorney shall ensure that the services and fees are differentiated and are reasonable. The services and fees are subject to court approval.

K. The guardian may enter into a transaction that may be a conflict of interest only when necessary, or when there is a significant benefit to the person under the guardianship, and shall disclose such transactions to interested parties and obtain prior court approval.

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NGA Standard 17 – Duties of the Guardian of the Estate

I. The guardian, as a fiduciary, shall manage the financial affairs of the person under guardianship in a way that maximizes the dignity, autonomy, and self-determination of the person.

II. When making decisions the guardian shall:

A. Give priority to the goals, needs and preferences of the person, and

B. Weigh the costs and benefits to the estate.

III. The guardian shall consider the current wishes, past practices, and reliable evidence of likely choices. If substantial harm would result or there is no reliable evidence of likely choices, the guardian shall consider the best interests of the person.

IV. The guardian shall assist and encourage the person to act on his or her own behalf and to participate in decisions.

V. The guardian shall use reasonable efforts to provide oversight to any income and assets under the control of the person.

VI. The guardian shall, consistent with court order and state statutes, exercise authority only as necessitated by the limitations of the person.

VII. The guardian shall act in a manner above reproach, and his or her actions will be open to scrutiny at all times.

VIII. The guardian shall provide competent management of the person's property and, shall supervise all income and disbursements of the estate.

IX. The guardian shall manage the estate only for the benefit of the person.

X. The guardian shall keep estate assets safe by keeping accurate records of all transactions and be able to fully account for all the assets in the estate.

XI. The guardian shall keep estate money separate from the guardian's personal money; the guardian shall keep the money of individual estates separate unless accurate separate accounting exists within the combined accounts.

XII. The guardian shall make claims against others on behalf of the estate as deemed in the best interest of the person and shall defend against actions that would result in a loss of estate assets.

XIII. The guardian shall apply state law regarding prudent investment practices, including seeking responsible consultation with and delegation to people with appropriate expertise when managing the estate.

XIV. The guardian shall employ prudent accounting procedures when managing the estate.

XV. The guardian shall determine if a will exists and obtain a copy to determine how to manage estate assets and property.

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XVI. The guardian shall obtain and maintain a current understanding of what is required and expected of the guardian, statutory and local court rule requirements, and necessary filings and reports.

XVII. The guardian shall promptly report to the appropriate authorities abuse, neglect and/or exploitation as defined by state statute.

✪ NGA Standard 18 – Guardian of the Estate: Initial and Ongoing Responsibilities

I. With the proper authority, the initial steps after appointment as guardian are as follows:

A. The guardian shall address all issues of the estate that require immediate action, which include, but are not limited to, securing all real and personal property, insuring it at current market value, and taking the steps necessary to protect it from damage, destruction, or loss.

1. The guardian shall ascertain the income, assets, and liabilities of the person.

2. The guardian shall ascertain the goals, needs and preferences of the person.

3. The guardian shall coordinate and consult with others close to the person.

B. The guardian shall meet with the person under guardianship as soon after the appointment as feasible. At the first meeting the guardian shall:

1. Communicate to the person the role of the guardian;

2. Outline the rights retained by the person and the grievance procedures available;

3. Assess the previously and currently expressed wishes of the person and evaluate them based on current acuity; and

4. Attempt to gather from the person any necessary information regarding the estate.

II. The guardian shall become educated about the nature of any incapacity, condition and functional capabilities of the person.

III. The guardian shall develop and implement a financial plan and budget for the management of income and assets that corresponds with the care plan for the person and aims to address the goals, needs and preferences of the person. The guardian of the estate and the guardian of the person (if one exists) or other health care decision-maker shall communicate regularly and coordinate efforts with regard to the care and financial plans, as well as other events that might affect the person.

A. Guardian shall value the well-being of the person over the preservation of the estate.

B. Guardian shall maintain the goal of managing, but not necessarily eliminating, risks.

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C. The financial plan shall emphasize a "person-centered philosophy".

IV. The guardian shall take all steps necessary to obtain a bond to protect the estate, including obtaining a court order.

V. The guardian shall obtain all public and insurance benefits for which the person is eligible.

VI. The guardian shall thoroughly document the management of the estate and the carrying out of any and all duties required by statute or regulation.

VII. The guardian shall prepare an inventory of all property for which he or she is responsible. The inventory must list all the assets owned by the person with their values on the date the guardian was appointed and must be independently verified.

VIII. All accountings must contain sufficient information to clearly describe all significant transactions affecting administration during the accounting period. All accountings must be complete, accurate, and understandable.

IX. The guardian shall oversee the disposition of the person's assets to qualify the person for any public benefits program.

X. On the termination of the guardianship or the death of the person, the guardian shall facilitate the appropriate closing of the estate and submit a final accounting to the court.

XI. The guardian may monitor, provide oversight or manage the personal allowance of the person.

XII. The guardian shall, when appropriate, open a burial trust account and make funeral arrangements for the person.

✪ NGA Standard 19 – Property Management

I. The guardian may not dispose of real or personal property of the person under guardianship without judicial, administrative, or other independent review.

II. In the absence of reliable evidence of the person's views before the appointment of a guardian, the guardian, having the proper authority, may not sell, encumber, convey, or otherwise transfer property of the person, or an interest in that property, unless doing so is in the best interest of the person.

III. In considering whether to dispose of the person's property, the guardian shall consider the following:

A. Whether disposing of the property will benefit or improve the life of the person,

B. The likelihood that the person will need or benefit from the property in the future,

C. The previously expressed or current desires of the person with regard to the property,

D. The provisions of the person's estate plan as it relates to the property, if any,

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E. The tax consequences of the transaction,

F. The impact of the transaction on the person's entitlement to public benefits,

G. The condition of the entire estate,

H. The ability of the person to maintain the property,

I. The availability and appropriateness of alternatives to the disposition of the property,

J. The likelihood that property may deteriorate or be subject to waste, and

K. The benefits versus the liability and costs of maintaining the property,

IV. The guardian shall consider the necessity for an independent appraisal of real and personal property.

V. The guardian shall provide for insurance coverage, as appropriate, for property in the estate.

✪ NGA Standard 20 – Conflict of Interest: Estate, Financial, and Business Services

I. The guardian shall avoid all conflicts of interest and self-dealing or the appearance of a conflict of interest and self-dealing when addressing the needs of the person under guardianship. Impropriety or conflict of interest arises where the guardian has some personal or agency interest that can be perceived as self-serving or adverse to the position or best interest of the person. Self-dealing arises when the guardian seeks to take advantage of his or her position as a guardian and acts for his or her own interests rather than for the interests of the person.

II. Rules relating to specific situations that might create an impropriety or conflict of interest include the following:

A. The guardian may not commingle personal or program funds with the funds of the person, except as follows:

1. This standard does not prohibit the guardian from consolidating and maintaining a person's funds in joint accounts with the funds of other persons.

2. If the guardian maintains joint accounts, separate and complete accounting of each person's funds shall also be maintained by the guardian.

3. When an individual or organization serves several persons, it may be more efficient and more cost-effective to pool the individual estate funds in a single account. In this manner, banking fees and costs are distributed, rather than being borne by each estate separately.

4. If the court allows the use of combined accounts, they should be permitted only where the guardian has available resources to keep accurate records of the exact amount of funds in the account, including allocation of interest

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and charges attributable to each estate based on the asset level of the person.

B. The guardian may not sell, encumber, convey, or otherwise transfer the person's real or personal property or any interest in that property to himself or herself, a spouse, a coworker, an employee, a member of the board of the agency or corporate guardian, an agent, or an attorney, or any corporation or trust in which the guardian has a substantial beneficial interest.

C. The guardian may not sell or otherwise convey to the person property from any of the parties noted above.

D. The guardian may not loan or give money or objects of worth from the person's estate unless specific prior approval is obtained.

E. The guardian may not use the person's income and assets to support or benefit other individuals directly or indirectly unless specific prior approval is obtained and a reasonable showing is made that such support is consistent with the person's goals, needs and preferences and will not substantially harm the estate.

F. The guardian may not borrow funds from, or lend funds to, the person unless there is prior notice of the proposed transaction to interested persons and others as directed by the court or agency administering the person's benefits, and the transaction is approved by the court.

G. The guardian may not profit from any transactions made on behalf of the person's estate at the expense of the estate, nor may the guardian compete with the estate, unless prior approval is obtained from the court.

NGA Standard 21 – Termination and Limitation of Guardianship

I. Limited guardianship of the person and estate is preferred over a plenary guardianship.

II. The guardian shall assist the person under guardianship to develop or regain the capacity to manage his or her personal and financial affairs.

III. The guardian shall seek termination or limitation of the guardianship in the following circumstances:

A. When the person has developed or regained capacity in areas in which he or she was found incapacitated by the court,

B. When less restrictive alternatives exist,

C. When the person expresses the desire to challenge the necessity of all or part of the guardianship,

D. When the person has died, or

E. When the guardianship no longer benefits the person.

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✪ NGA Standard 22 – Guardianship Service Fees

I. Guardians are entitled to reasonable compensation for their services.

II. The guardian shall bear in mind at all times the responsibility to conserve the person's estate when making decisions regarding providing guardianship services and charging a fee for those services.

III. All fees related to the duties of the guardianship must be reviewed and approved by the court. Fees must be reasonable and be related only to guardianship duties.

IV. The guardian shall:

A. Disclose in writing the basis for fee (e.g., rate schedule) at the time of the guardian's first appearance in the action,

B. Disclose a projection of annual fiduciary fees within 90 days of appointment,

C. Disclose fee changes,

D. Seek authorization for fee-generating actions not contained in the fiduciary's appointment, and

E. Disclose a detailed explanation for any claim for fiduciary fees.

V. A guardian shall report to the court any likelihood that funds will be exhausted and advise the court whether the guardian intends to seek removal when there are no longer funds to pay fees. A guardian may not abandon the person when estate funds are exhausted and shall make appropriate succession plans.

VI. A guardian may seek payment of fiduciary fees from the income of a person receiving Medicaid services only after the deduction of the personal needs allowance, spousal allowance and health care insurance premiums.

VII. Factors to be considered in determining reasonableness of the guardian's fees include:

A. Powers and responsibilities under the court appointment;

B. Necessity of the services;

C. The request for compensation in comparison to a previously disclosed basis for fees, and the amount authorized in the approved budget, including any legal presumption of reasonableness or necessity;

D. The guardian's expertise, training, education, experience, professional standing, and skill, including whether an appointment in a particular matter precluded other employment;

E. The character of the work to be done, including difficulty, intricacy, importance, time, skill, or license required, or responsibility undertaken;

F. The conditions or circumstances of the work, including emergency matters requiring urgent attention, services provided outside of regular business hours,

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potential danger (e.g., hazardous materials, contaminated real property, or dangerous persons), or other extraordinary conditions;

G. The work actually performed, including the time actually expended, and the attention and skill-level required for each task, including whether a different person could have rendered the service better, cheaper, faster;

H. The result, specifically whether the guardian was successful, what benefits to the person were derived from the efforts, and whether probable benefits exceeded costs;

I. Whether the guardian timely disclosed that a projected cost was likely to exceed the probable benefit, affording the court the opportunity to modify its order in furtherance of the best interest of the estate;

J. The fees customarily paid, and time customarily expended, for performing like services in the community, including whether the court has previously approved similar fees in another comparable matter;

K. The degree of financial or professional risk and responsibility assumed;

L. The fidelity and loyalty displayed by the guardian, including whether the guardian put the best interests of the estate before the economic interest of the guardian to continue the engagement; and

M. The need for a local availability of specialized knowledge and the need for retaining outside fiduciaries to avoid conflict of interest.

VIII. Fees or expenses charged by the guardian shall be documented through billings maintained by the guardian. If time records are maintained, they shall clearly and accurately state:

A. Date and time spent on a task,

B. Duty performed,

C. Expenses incurred,

D. Collateral contacts involved, and

E. Identification of individual who performed the duty (e.g., guardian, staff, volunteer).

IX. All parties should respect the privacy and dignity of the person when disclosing information regarding fees.

✪ NGA Standard 23 – Management of Multiple Guardianship Cases

I. The guardian shall limit each caseload to a size that allows the guardian to accurately and adequately support and protect the person, that allows a minimum of one visit per month with each person, and that allows regular contact with all service providers.

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II. The size of any caseload must be based on an objective evaluation of the activities expected, the time that may be involved in each case, other demands made on the guardian, and ancillary support available to the guardian.

A. The guardian may institute a system to evaluate the level of difficulty of each guardianship case to which the guardian is assigned or appointed.

B. The outcome of the evaluation must clearly indicate the complexity of the decisions to be made, the complexity of the estate to be managed, and the time spent. The guardian shall use the evaluation as a guide for determining how many cases the individual guardian may manage.

✪ NGA Standard 24 – Quality Assurance

I. Guardians shall actively pursue and facilitate periodic independent review of their provision of guardianship services.

II. The independent review shall occur periodically, but no less often than every two years, and must include a review of a representative sample of cases.

III. The independent review must include, but is not limited to, a review of agency policies and procedures, a review of records, and a visit with the person and with the individual providing direct service to the person.

IV. An independent review may be obtained from:

A. A court monitoring system,

B. An independent peer, or

C. An CGC national master guardian.

V. The quality assurance review does not replace other monitoring requirements established by the court.

✪ NGA Standard 25 – Sale or Purchase of a Guardianship Practice

I. Guardianship is a fiduciary relationship and as such is bound by the fiduciary obligations recognized by the community and the law.

II. A guardianship practice is defined as private, professional guardianship services provided to two or more individuals found by a court to be incapacitated and in need of a guardian.

III. A professional guardian may choose to sell all or substantially all of a guardianship practice, including goodwill, subject to the following guidelines:

A. A professional guardian considering the sale of a guardianship practice shall ensure that the persons are considered in the sale process and that guardianship responsibilities continue to be met during the transition.

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B. The professional guardian shall require documentation of the purchaser's references pertaining to qualifications to serve as guardian, as defined by state statutes.

C. Sale of a guardianship practice to a purchaser engaged in serving or representing any interest adverse to the interest of the persons is not appropriate.

D. The sale price for the guardianship practice must not be the sole consideration in selecting the purchaser.

E. The professional guardian shall provide formal written notice of the proposed sale to the court, to the persons, and to other interested parties, even if not required by state statutes.

F. Consideration should be given to requesting that the court appoint a guardian ad litem, or another third party reviewer, to protect the interests of the persons.

G. All parties to the sale of the guardianship practice shall take steps to ensure the continuity of care and protection for the persons during the period of the sale and transfer of ownership.

H. The professional guardian may not disclose confidential information regarding a person for the purpose of inducing a sale of a guardianship practice.

I. The fees charged to existing persons may not be increased by the purchaser of a guardianship practice solely for the purpose of financing the purchase.

IV. Admission to, employment by, or retirement from a guardianship practice, retirement plans or similar arrangements, or sale of tangible assets of a guardianship practice may not be considered a sale or purchase under this standard.

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Definitions

ADVANCE DIRECTIVE - A written instruction, such as a living will or durable power of attorney for health care, which guides care when an individual is terminally ill or incapacitated and unable to communicate his or her desires.

ADVOCATE - To assist, defend, or plead in favor of another.

ARM'S-LENGTH RELATIONSHIP - A relationship between two agencies or organizations, or two divisions or departments within one agency, which ensures independent decision-making on the part of both.

BEST INTEREST - The course of action that maximizes what is best for a person and that includes consideration of the least intrusive, most normalizing, and least restrictive course of action possible given the needs of the person.

CAPACITY - Legal qualification, competency, power, or fitness. Ability to understand the nature and effects of one's acts. (Black's)

CONFLICT OF INTEREST - Situations in which an individual may receive financial or material gain or business advantage from a decision made on behalf of another. Situations that create a public perception of a conflict should be handled in the same manner as situations in which an actual conflict of interest exists.

COURT - An arm of the government, belonging to the judicial department, whose function is the application of the laws to controversies brought before it and the public administration of justice. (Black's)

COURT ORDER - A legal document issued by the court and signed by a judge. Examples include a letter of guardianship spelling out directions for the care of the person and the estate and an authorization or denial of a request for action.

COURT-REQUIRED REPORT - A report that the guardian is required by statute or court order to submit to the court relative to the guardianship.

DESIGNATION OF GUARDIAN - A formal means of nominating a guardian before a guardian is needed.

DIRECT SERVICES - These include medical and nursing care, care/case management and case coordination, speech therapy, occupational therapy, physical therapy, psychological therapy, counseling, residential services, legal representation, job training, and other similar services.

ESTATE - Both real and personal property, tangible and intangible, and includes anything that may be the subject of ownership.

EXTRAORDINARY MEDICAL CIRCUMSTANCE - Includes abortion, removal of life support, sterilization, experimental treatment, and other controversial medical issues.

FIDUCIARY - An individual, agency, or organization that has agreed to undertake for another a special obligation of trust and confidence, having the duty to act primarily for another's benefit and subject to the standard of care imposed by law or contract.

FREESTANDING ENTITY - An agency or organization that is independent from all other agencies or organizations

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FUNCTIONAL ASSESSMENT - A diagnostic tool that measures the overall well-being of an individual and provides a picture of how well the person is able to function in a variety of multidimensional situations. (Eric Pfeiffer, M.D., Director, University of South Florida Gerontology Department)

GUARDIAN – A person or entity appointed by a court with the authority to make some or all personal decisions on behalf of an individual the court determines lacks capacity to make such decisions. The term includes conservators and certified private or public fiduciaries. All guardians are accountable to the court.

> **Conservator** is a person or entity appointed by a court with the authority to make some or all financial decisions on behalf of an individual the court determines needs assistance in making such decisions.
>
> **Emergency/Temporary Guardian** is a guardian whose authority is temporary and who is usually appointed only in an emergency.
>
> **Foreign Guardian** is a guardian appointed in another state or jurisdiction.
>
> **Guardian of the Estate** is a guardian who possesses any or all powers and rights with regard to the property of the individual.
>
> **Guardian of the Person** is a guardian who possesses any or all of the powers and rights granted by the court with regard to the personal affairs of the individual.
>
> **Limited Guardian** is a guardian appointed by the court to exercise the rights and powers specifically designated by a court order entered after the court finds that the person lacks capacity to do some, but not all, of the tasks necessary to care for his or her person or property, or after the person voluntarily petitions for appointment of a limited guardian. A limited guardian may possess fewer than all of the legal rights and powers of a plenary guardian.
>
> **Plenary Guardian** is a person appointed by the court to exercise all delegable rights and powers of the person after the court finds the person lacks the capacity to perform all of the tasks necessary to care for his or her person or property.
>
> **Pre-Need Guardian** is a guardian who is formally nominated before a guardian is needed.
>
> **Standby Guardian** is a person, agency, or organization whose appointment as guardian becomes effective without further proceedings immediately upon the death, incapacity, resignation, or temporary absence or unavailability of the initially appointed guardian.
>
> **Successor Guardian** is a guardian who is appointed to act upon the death or resignation of a previous guardian.

INFORMED CONSENT - A person's agreement to allow something to happen that is based on a full disclosure of facts needed to make the decision intelligently, i.e., knowledge of risks involved, alternatives, etc.

LEAST RESTRICTIVE ALTERNATIVE - A mechanism, course of action, or environment that allows the person to live, learn, and work in a setting that places as few limits as possible on the person's rights and personal freedoms as appropriate to meet the needs of the person.

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PERSON UNDER GUARDIANSHIP OR SIMPLY "PERSON" - A person the court has determined requires assistance in making some or all decisions, and for whom the court has appointed a guardian and/or conservator. Synonyms include Conservatee, Disabled Person, Protected Person, Incapacitated Person and Ward.

PERSON-CENTERED PLANNING[1] - A family of approaches designed to guide change in a person's life. This type of planning is carried out in alliance with the person, their family and friends and is grounded in demonstrating respect for the dignity of all involved. Recognized approaches seek to discover, understand and clearly describe the unique characteristics of the person, so that the person:

- Has positive control over the life he/she desires and finds satisfying;
- Is recognized and valued for their contributions (current and potential) to their communities; and
- Is supported in a web of relationships, both natural and paid, within their communities.

PRUDENT INVESTOR RULE - All investments must be considered as part of an overall portfolio rather than individually. No investment is inherently imprudent or prudent. The rule recognizes that certain nontraditional investment vehicles may actually be prudent and the guardian who does not use risk-reducing strategies may be penalized. Under most circumstances, the person's assets must be diversified. The guardian is obligated to spread portfolio investments across asset classes and potentially across global markets to both enhance performance and reduce risk. The possible effects of inflation must be considered as part of the investment strategy. The guardian shall either demonstrate investment skill in managing assets or shall delegate investment management to another qualified party.

SELF-DETERMINATION - A doctrine that states the actions of a person are determined by that person. It is free choice of one's acts without external force.

SOCIAL SERVICES - These services are provided to meet social needs, including provisions for public benefits, case management, money management services, adult protective services, companion services, and other similar services.

SUBSTITUTED JUDGMENT - The principle of decision-making that requires implementation of the course of action that comports with the individual person's known wishes expressed before incapacity, provided the individual was once capable of developing views relevant to the matter at issue and reliable evidence of those views remains.

[1] Personal communication with Michael Smull, Mary Lou Bourne & Leigh Ann Kingsbury, Support Development Associates, LLC (May 2, 2012). *See* Michael Smull, The Learning Community for Person Centered Practices, www.learningcommunity.us (April 2012). *See also* John O'Brien & Connie Lyle O'Brien, eds., *A Little Book About Person Centered Planning,* Inclusion Press (2000).

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NGA and CGC Qualifications for Court-Appointed Guardians

Corporate Guardian - A corporate guardian is a corporation that is named as guardian for an individual and may receive compensation in its role as guardian with court approval. Corporate guardians may include banks, trust departments, for-profit entities, and nonprofit entities.

Guidelines:

A corporate guardian:

1. Shall follow the *Model Code of Ethics for Guardians*.
2. Shall follow the *NGA Standards of Practice*.
3. Should strive to have decision-making staff become national certified guardians and national master guardians.

Family Guardian - A family guardian is an individual who is appointed as guardian for a person to whom he or she is related by blood or marriage. In most cases when there is a willing and able family member who has no conflict with the prospective person, the court prefers to appoint the family member as guardian. On court approval, a family guardian may receive reasonable compensation for time and expenses relating to care of the person.

Guidelines:

A family guardian:

1. Is encouraged to recognize the resources available through the NGA.
2. Shall follow the *Model Code of Ethics for Guardians*.
3. Shall follow the *NGA Standards of Practice* when carrying out guardianship responsibilities.

Individual Professional Guardian - An individual professional guardian is an individual who is not related to the person by blood or marriage and with court approval may receive compensation in his or her role as guardian. He or she usually acts as guardian for two or more individuals.

Guidelines:

An individual professional guardian:

1. Shall follow the *Model Code of Ethics for Guardians*.
2. Shall follow the *NGA Standards of Practice*.
3. Should strive to become a national certified guardian and national master guardian, if applicable.

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National Master Guardian - A national master guardian is an individual who has met the qualifications established by the Center for Guardianship Certification.

Guidelines:

A national master guardian:

1. Shall meet the Master guardian qualifications as established by the Center for Guardianship Certification.
2. Shall follow the *Model Code of Ethics for Guardians*.
3. Shall follow the *NGA Standards of Practice*.

Public Guardian - A public guardian is a governmental entity that is named as guardian of an individual and may receive compensation in its role as guardian with court approval. Public guardians may include branches of state, county, or local government.

Guidelines:

A public guardian:

1. Shall follow the *Model Code of Ethics for Guardians*.
2. Shall follow the *NGA Standards of Practice*.
3. Should strive to have decision-making staff become national registered guardians and national master guardians.

National Certified Guardian - A national certified guardian is an individual who has met the qualifications established by the Center for Guardianship Certification.

Guidelines:

A national certified guardian:

1. Shall meet the National certified guardian qualifications as established by the Center for Guardianship Certification.
2. Shall follow the *Model Code of Ethics for Guardians*.
3. Shall follow the *NGA Standards of Practice*.
4. Should strive to become a national master guardian.

Volunteer Guardian - A volunteer guardian is a person who is not related to the person by blood or marriage and who does not receive any compensation in his or her role as guardian. The guardian may receive reimbursement of expenses or a minimum stipend with court approval.

Guidelines:

A volunteer guardian:

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Standards of Practice, National Guardianship Association

1. Shall follow the *Model Code of Ethics for Guardians*.
2. Shall follow the *NGA Standards of Practice*.
3. Is encouraged to become a national certified guardian and national master guardian, if applicable.

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a model code of ethics for guardians

AUTHORED BY

Michael D. Casasanto

Mitchell Simon

Judith Roman

Adopted by the National Guardianship Association

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National Guardianship Association

174 Crestview Drive
Bellefonte, PA 16823-8516
877-326 5992 • info@guardianship.org
www.guardianship.org

a model code of ethics for guardians*

About the authors.....

Michael D. Casassanto

J.D., 1978; past president and 12-year member of the National Guardianship Association. Executive director of the Office of Public Guardian, Inc., 1977 to present.

Mitchell Simon

J. D., 1997; former staff attorney, director of the Elder Law Project and litigator director for the New Hampshire Legal Assistance. Assistant professor and, since 1990, full professor of law, Franklin Pierce Law Center.

Judith Roman

J.D. 1989; former associate attorney in the firm of Epstein, MacIntosh, Burke and Devico. She is now a solo practitioner focusing her practice on family law.

National Guardianship Association

174 Crestview Drive
Bellefonte, PA 16823-8516
877-326 5992 • info@guardianship.org
www.guardianship.org

I. Introduction

The concept of guardianship has a very early origin. The literature from Rome at the time of Cicero notes procedures to protect the property of incompetent persons; no such provisions were made for protection of the person. Under our Anglo-Norman legal tradition, the King, acting under the doctrine of parens patriae, was the protector of his subjects. While guardianship in England applied both to the person and the estate, the primary purpose of the power was to prevent incompetent persons from becoming public charges or squandering their resources to the detriment of their heirs.[1]

It is not surprising in light of this genesis that reform of the basic process by which guardianships are imposed has been a relatively recent development[2]. While much scholarly and judicial time has been devoted to the debate over the procedural protections to be afforded incompetent persons prior to imposition of a guardianship, insufficient work has been done to guide the actions of guardians who are charged with the enormous responsibility of substituting their judgment for that of another human being. The purpose of the Model Code is to suggest ethical and legal standards designed to simplify and improve this decision making process.

Since the Model Code is designed to address the guardian-ward relationship, we have assumed that the underlying adjudication of incompetency is accurate and made in accordance with procedural due process[3]. Therefore, the question of whether a guardianship should have been imposed at all is beyond the scope of this article[4].

We have not, however, assumed that all guardianships are necessarily limited to those functions that the individual is incapable of actually performing, since "limited guardianship" is not the norm in all states. In a survey conducted in 1984, Casasanto, Newman and Saunders found that the forty-one states responding to their survey, thirteen had no provision for limited guardianship[6] . Therefore, the Model Code provides a framework for making decisions both on behalf of individuals who are deemed incompetent under a statute providing for plenary guardianship but who clearly retain the functional ability to make certain decisions, and for individuals, with a narrowly limited guardianship. This distinction is significant since the ability of the ward to participate in a decision making process will vary depending on the situation. For example, the Model Code suggests that an ethical guardian should look more closely at, and possibly defer to, the expressed wishes of a ward with an overbroad guardianship in those areas where functional competence still exists. Based on the above, the Code, in some situations, adopts what may on first blush look like an anomalous position by mandating deference to the currently expressed wishes of a legally incompetent person. We believe, however, this is mandated by the important ethical precept that the individual's rights of self-determination should be observed whenever possible.

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1. S. Brakel & R. Rock, *The Mentally Disabled and the Law* 250 (Rev. ed. 1971).

2. See, e.d., Frolik, "Plenary Guardianship: An Analysis, A Critique and a Proposal for Reform," 23 *Ariz. L. Rev.* 599 (1981). During this session of Congress, the late Congressman Claude Pepper introduced a bill seeking to establish federal procedural protections in guardianship cases. The National Guardianship Rights Act H.R. 1702, 101st Cong., 1st Sess., 135 Cong. Rec. E 1071-01 (1989).

3. For a thorough discussion of some of the procedural questions still presented by many current guardianship statutes, see, for example, Frolik, supra note 2, at 599; "Horstman, Protective Services for the Elderly: The Limits of Parens Patriae," 40 *Mo. L. Rev.* 215 (1975).

4. For a guide to assessing when an individual needs a guardian, see, for example, Casasanto, Covert, Saunders & Simon, "Individual Functional Assessment: An Instruction Manual," 11 *Mental and Physical Disability L. Rep.* 670 (1987).

5. Frolik, supra note 2; Casasanto, Newman, Saunders, *Limited Guardianship: A State Survey (1984)* (Copies available from the New Hampshire Office of Public Guardian, 6 White Street, Concord, NH 03301).

6. Casasanto, Newman, Saunders, supra note 4.

Additionally, we have tried to keep the requirements of the Code limited to fundamental precepts so that it is applicable to family and volunteer guardians, as well as to guardianship organizations. Public guardians and similar organizations should certainly meet the requirements of this Code, but may need to adopt further standards in light of the particular dangers and issues presented in these types of arrangements.[7]

A. Guardianship Models

Scholars and courts have debated at some length whether a guardian should behave like a parent and act in the ward's best interest or attempt to act as a surrogate and make the decision that most closely approximates the decision the ward would have made in the situation at hand. This debate is best put in perspective by closely evaluating the underlying cause of the disability. Only by understanding the current and past functional status of the ward can a guardian apply the proper standards to the decision. The following examples, taken from the files of the New Hampshire Office of Public Guardian, may assist the reader in understanding the methodology of decision making which applies to the major groups in need of guardianship. Individuals with impairments other than those described below can be evaluated by reference to the most closely analogous group.

CASE 1 – Mary L. is a 49-year-old resident of a state institution for the retarded. Her current diagnosis is profound mental retardation with a convulsive disorder. Mary was considered to be developing normally until the age of four when she reportedly "struck her head falling down stairs." Shortly thereafter she had a seizure. Seizure medications were administered; however, she failed to tolerate them. Due to the high degree of care needed, the constant monitoring of her blood levels, and subsequent adjustments in type and dosage of medication, Mary was placed in an institution at the age of five by her family. There has been no family contact since shortly after Mary's placement in the institution. At the present time, Mary can indicate certain preferences for various types of food, but has demonstrated no ability to communicate preferences relating to more complex decisions.

CASE 2 – John L. is a highly intelligent 29-year-old man diagnosed as having bipolar disorder. The preferred course of treatment for John is the drug Lithium Carbonate. When John is taking his prescribed medication, he is a highly functional member of society. He is employed by a computer firm and earns a high salary; he also has an excellent relationship with his family and carries on an active social life. He maintains close contact with his psychiatrist and is reported to have excellent insight into his illness. However, two to three times per year, John discontinues taking his medication. While the reasons for this are unclear, this non-compliance leads to extremely bizarre and erratic behaviors and often concludes with a period of involuntary hospitalization. Examples of such behaviors include John's belief that he is an "operative" in the Central Intelligence Agency who must "clean up" the drug trafficking in New York City. At times John carries firearms and dresses in army fatigues in an attempt to "hunt down" drug dealers. To maintain his "investigative" efforts, John spends money at exorbitant rates, oftentimes writing bad checks and using personal and employer credit cards well beyond credit limits. These behaviors typically bring him to the attention of the police and result in involuntary institutionalization and treatment. Once John receives sufficient medication, he expresses remorse for his behavior and asks that he not be allowed to cease taking his medication in the future. These manic phases have taken a serious toll on John's professional, social and financial life. Nevertheless during the beginning phases of medication noncompliance, John will not heed anyone's requests to continue taking his medication as prescribed.

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7. *Surrogate Decision Making for Adults: Model Standards to Ensure Quality Guardianship and Representative Payeeship Services*, Subcomm. on Housing and Consumer Interests of the House Select Comm. on Aging, 100th Cong., 1st Sess. (Comm. Print 1988).

CASE 3 – Alice H. is a 94-year-old resident of a county nursing home. She raised a family of four children and was an active and vocal participant in community projects. Four years ago, prior to being admitted to the nursing home, Alice fell and suffered a broken hip. She refused all treatment for her condition and consequently became bedridden. Friends and various social service providers ensured Alice's well-being until the combination of her physical and mental condition made this task overwhelming. In 1980 she was admitted to a county nursing home despite her protests. Soon after her admission, she begin to suffer memory loss and seemed to lose her sense of humor. The staff attributed this to the stress caused by her transfer. However, the deficits became worse and after a thorough examination, Alice was diagnosed as having Alzheimer's Disease. She is now in the third stage of the disease and has virtually no ability to make decisions for herself.

1. Best Interest Standard

The Best Interest Standard mirrors the view that the guardian's duties are akin to those imposed on a parent. Under this standard, the charge of the guardian is to make an independent decision on behalf the ward which will be in the ward's best interest as defined by more objective, societally shared criteria[8]. This type of decision making is most appropriate for individuals without previous competency. The profoundly retarded individual described in Case 1, above, seems to meet this standard.

In developing the Model Code, we have been guided by our belief that the use of the Best Interest Standard is a last resort, to be utilized only in cases where there is no previous competency or where the ward gave no indication of preference which could guide the guardian in making the decision. The position finds support in the report of the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research (hereinafter referred to as "Report of the President's Commission")[9]. The Commission stated that:

[When] possible, decision making for incapacitated patients should be guided by the principle of substitute judgment, which promotes the underlying values of self-determination and well-being better than the Best Interest Standard does. When a patient's likely decision is unknown, however, a surrogate decision maker should use the Best Interest Standard and choose a course that will promote the patient's well-being as it would probably be conceived by a reasonable person in the patient's circumstances.[10]

It is important to understand that even in the situation described in Case 1, we do not believe it is ethical to simply use the Best Interest Standard to authorize custodial care and protection. The last decade has reflected a growing belief that all individuals are entitled to assistance in developing their abilities and capabilities.[11] We have tried to incorporate this belief in the Model Code by reflecting an ethical requirement for a guardian to apply the Best Interest Standard in accord with the goal of providing individualized habilitation and education.

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8. Compare Dussult, "Guardianship and Limited Guardianship in Washington State: Application for Mentally Retarded Citizens," 13 *Conz. L. Rev. 585* (1978) with Gauvey, Leviton, Shuger & Sykes, "Informed and Substitute Consent to Health Care Procedures; a Proposal for State Legislation," 15 *Harv. J. Legis.* 431 (1978); See also Matter of Conroy, 98 N.J. 321, 486 A.2d 1209 (1985).

9. President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Deciding to Forego Life-Sustaining Treatment, at 1341 (1983) (hereinafter referred to as Report of the President's Commission).

10. Id. at 136.

11. See Pennsylvania Assn. for Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971); Frolik, supra note 2.

It is now likely in many states that an individual like the one described in Case 1 will be able to live in the community, with the support from various agencies and programs and with the aid of a guardian who, in the absence of family, will be responsible for making best interest decisions for the individual. Such a disabled person is likely to have changing needs as the years go by, and may have expanding capabilities, based on the level of habilitative services available in the community. A guardian in this situation would need to monitor services being provided, develop an on-going relationship with service providers and attempt to maximize opportunities for the ward's personal growth. Such a ward may benefit from a series of placements, depending upon the success of habilitation efforts, each less restrictive than the last, and each allowing more independent functioning than the last. It is incumbent on the guardian for such a developmentally disabled person to encourage personal growth, rather than simply allow the ward to remain static.[12]

2. Substituted Judgement

The principal of substituted judgement requires the surrogate to attempt to reach the decision the incompetent person would make if that person were able to choose[13]. Use of this model for decision making allows the guardian to make decisions in accord with the incompetent person's own definition of well-being. It is critical to note that this model can only be used if the guardian, through available sources of information, is able to determine the prior preferences of the ward[14]. The Model Code, based as it is on the belief that this type of decision making should be utilized if possible, imposes a duty on guardians to attempt to find this information.

Since this model of decision making is ethically preferred, and since a guardian may not have had a prior relationship with the ward, the guardian will often need to look to others for assistance in learning about the ward's preferences. Relatives, friends, caretakers, and other interested persons may provide some insight as to how the ward would feel or behave in a certain set of circumstances. The ward's own behavior and choices prior to the onset of the incapacity may provide some clues, if known or discoverable. The ward, even if unable to participate fully, may indicate certain preferences by verbal or nonverbal communications. To the greatest extent possible, the guardian must exercise substituted decision making in light of all that he or she can learn about the ward's prior feelings and preferences, and should decide based on how the ward would decide if able. It is essential, though, to recognize that the guardian is the only one who makes the decision, and the guardian is the one who bears the ultimate responsibility for the decision made on behalf of the ward. Substituted judgments made after consideration of all available information about the ward are more likely to be decisions which the ward would make if able.

This situation is best understood by reference to Case 3 described above. In this case, the ward was certainly competent prior to the progression of her Alzheimer's Disease and provided much available information on her thought process. Guardians should ethically defer to this in most situations.

B. Intermittent Incompetence

Case 2 presents one of the most difficult dilemmas a guardian may face, that of the individual who has a cyclical impairment such as severe depression. The problem is that neither model of guardianship offers a satisfactory set of principals to guide the guardian.

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12. See *Guardianship of the Mentally Impaired: A Critical Analysis*, National Center for Law and the Handicapped (May, 1977).

13. Report of the President's Comm., supra note 8, at 132.

14. Id. at 133.

Certainly, in this type of case the best interest model does not apply; the individual described in Case 2 has expressed his wishes on numerous occasions. Similarly, the substituted judgment model is not wholly applicable, since the individual is at times functionally, though not legally, competent. Therefore, the ethical principles favoring self-determination seem to dictate that the wishes expressed by the person be adhered to if a person is in a lucid state, despite the judicial determination that he is incompetent. [15]

The Model Code recognizes these situations and reflects the conclusion that a guardian is obligated, in limited situations, to respect the wishes of the ward even if contrary to the guardian's notion of best interest. One could argue that this principle is really just an application of the principle of substituted judgment, with the judgment being based on present competent statements, rather than past expressions. It matters not which concepts are used; the key point is to understand that the Model Code is based in part on the belief that self-determination and encouragement of growth of the ward through increased participation in decision making whenever possible are ethically required.

The above view may create some thorny problems for the guardian. For example, in a state that grants only plenary guardianships, the court would seem to be justified in holding the guardian responsible for the consequences of any decision within the guardian's power. If the guardian defers to the wishes of a ward, resulting in a decision contrary to that thought by the guardian to be the ward's best interest, the guardian may face potential liability. We believe, however, this is not a problem, since even in states with plenary guardianship statutes, there seems to be little dispute that the actual decision is informed by the concept of substituted judgement. [16]

II. The Model Code

Preamble

In its purest form, guardianship represents an exercise of the state's parens patriae authority to protect individuals who are incapable of making decisions for themselves. In theory, the concept of guardianship is rooted in the moral duty of beneficence. Under this theory, individuals subject to guardianship are entitled to enhanced protection from the state. That is, since the imposition of guardianship involves the removal of fundamental rights from the individual ward, the guardian is required to exercise the highest degree of trust, loyalty and fidelity in making decisions on behalf of the ward. Indeed, these requirements can be viewed as a kind of quid pro quo due the ward for such a fundamental imposition on his or her liberty and autonomy. This obligation for enhanced protection has been increasingly recognized in recent years by the on-going revisions to state guardianship statutes which require additional procedural protections for the proposed ward in guardianship hearings and also by the growing trend toward limited guardianship. Such changes are also the result of reported, wide spread abuses in the guardianship process as well as the increased use of guardianship–especially public guardianship–for elderly citizens who, due to advances in medical technology, are living longer lives, but are increasingly subject to chronic illnesses or conditions that oftentimes result in periods of incapacity prior to death.

In its' widest application, the imposition of guardianship bestows grave and far-reaching authority upon the person appointed as guardian. The authority of the guardian may encompass the control of

15. This same analysis may apply to individuals whose guardianships are overbroad due to the lack of a "limited" guardianship statute. See supra notes 5 and 6. On issues in which the ward is functionally able to make an informed decision, the same ethical principles seem to require deference to the ward despite the adjudication of incompetency. Id.

16. See supra notes 7 and 8.

the ward's bodily integrity, place of residence and personal finances. The potential scope of this authority is vast and requires the guardian to act with the greatest degree of care and circumspection. The potential for abuse of this power, whether deliberate or well-meaning, must be appreciated, acknowledged and guarded against. The guardian is in all cases a representative of the interests of the ward and shall represent only the interests of the ward.

The purpose of this Code of Ethics is to provide principles and guidelines for guardians. Since the primary duty of a guardian is to make decisions on behalf of a ward, the first section of this Code addresses general guidelines for decision making. In subsequent sections, specific subject areas are examined. Inasmuch as the areas in which a guardian may be required to make decisions are so broad, it is not possible to address all possible situations in this Code. Rather, the reader should refer to Rule 1 for guidance in situations not specifically addressed in the Code.

Rule 1 - Decision-Making: General Principles:

A GUARDIAN SHALL EXERCISE EXTREME CARE AND DILIGENCE WHEN MAKING DECISIONS ON BEHALF OF A WARD. ALL DECISIONS SHALL BE MADE IN A MANNER WHICH PROTECTS THE CIVIL RIGHTS AND LIBERTIES OF THE WARD AND MAXIMIZES INDEPENDENCE AND SELF-RELIANCE.

1.1 The guardian shall make all reasonable efforts to ascertain the preferences of the ward, both past and current, regarding all decisions which the guardian is empowered to make.

1.2 The guardian shall make decisions in accordance with the ascertainable preferences of the ward, past or current, in all instances except those in which a guardian is reasonably certain that substantial harm will result from such a decision.

1.3 When the preferences of the ward cannot be ascertained, a guardian is responsible for making decisions which are in the best interests of the ward.

1.4 The guardian shall be cognizant of his or her own limitations of knowledge, shall carefully consider the views and opinions of those involved in the treatment and care of the ward, and shall also seek independent opinions when necessary.

1.5 The guardian must recognize that his or her decisions are open to the scrutiny of other interested parties and, consequently, to criticism and challenge. Nonetheless, the guardian alone is ultimately responsible for decisions made on behalf of the ward.

1.6 A guardian shall refrain from decision making in areas outside the scope of the guardianship order and, when necessary, assist the ward by ensuring such decisions are made in an autonomous fashion.

Comment: Decision making is the fundamental responsibility of a guardian. At the inception of, and for the duration of the guardianship, the guardian is empowered to make legally binding decisions on behalf of the ward. While statutes governing guardianship vary from state to state, the obligation of a guardian to make reasoned and principled decisions remains constant. The primary component of such decisions is contained in the duty of the guardian to ascertain the preferences, opinions, and beliefs (hereinafter referred to as solely as "preferences") of the ward and to have these preferences reflected in the decision that is made. The ability of a guardian to ascertain the preferences of the ward may vary according to both the type and nature of the ward's disability. Indeed, it is sometimes not possible to

obtain a reliable indication of the past or present position of the ward concerning the decision at hand. Nevertheless, the guardian has an affirmative obligation to make a diligent effort to involve the ward in the decision making process. This process begins with a thorough investigation of the historical preferences of the ward. Clear statements of choice regarding, for example, medical care are highly desirable but are, in point of fact, rarely available. More often the guardian must go beyond this and extrapolate from information obtained concerning the values and lifestyle of the ward.

When making a decision on behalf of a ward, the guardian also has an obligation to thoroughly investigate the current preferences of the ward. A prerequisite to accomplishing this is the ability to conduct a careful interview of the ward. This requires the guardian to be educated and trained in the field of disabilities as well as in interview techniques, whenever possible. Family members, friends or other non-professional guardians who do not have detailed knowledge of interview techniques should attempt to utilize people with such expertise to acquire the necessary information. The ethical obligations involved in the guardian/ward relationship are discussed in the next section of this Code. However, a fundamental principle of this relationship is that the guardian make every effort to familiarize him/herself with the ward and develop a personal relationship in the event one does not already exist. Limitations on the involvement of the ward in decisions are ethically justifiable only in limited circumstances as discussed herein.

The obligation to inform and involve the ward in decision making increased in direct proportion to the significance of the decision. The determination of the relative significance of the decision must be made from both an objective and subjective point of view. That is, a guardian must recognize that the obligation to inform and involve the ward in decisions does not only increase when the decision is factually significant (e.g., consent to major surgery); the guardian must also view the decision from the ward's standpoint. For example, a request by a nursing home for permission to relocate a ward to a different room may appear minor to the guardian but may, in fact, be critical to the ward. This underscores the importance of the guardian forming as close a personal relationship with the ward and his or her caregivers as is possible under the circumstances.

There are occasions when it may be justifiable for the guardian to override the preferences of the ward. This justification is limited to decisions in which the guardian is reasonably certain that substantial harm will result if a decision is made in accordance with the preference of the ward. The discretion allowed the guardian pursuant to this standard is further limited by the relative capacity of the ward when the preference was voiced.

In situations where the ward is unable to provide any indication of prior or current preferences and reliable or relevant background information does not exist or is not forthcoming, the guardian is responsible for making a decision which is in the best interest of the ward. The guardian should consider what choice or decision a reasonable person in similar circumstances would make. Decisions of this nature should not be made in a vacuum, and the guardian has an affirmative obligation to seek insight from all available sources. The guardian must work closely with the ward's caregivers to obtain information about the decision and its potential impact upon the ward. Also, whenever possible the guardian should look to others who may have expertise about the decision at hand. Furthermore, depending upon the relative significance of the decision, the guardian may be required to request the court with jurisdiction over the guardianship to review the matter. An example of this type of situation might be the decision to withhold food and hydration in a state without settled law on this issue. The guardian may also inform either the ward's attorney or any other representative of the decision so that those persons may have the opportunity to review the guardian's actions. Although this may not be legally required, this type of "third-party" informal review may be ethically required in certain significant decisions. If the ward is not represented by counsel the guardian may want to retain counsel or request that counsel be appointed on behalf of the ward. The guardian shall recognize, however, that unless otherwise addressed by statute, it is the

guardian's responsibility to make the decision and to be accountable for it.

The guardian must be aware of the constraints imposed by the guardianship order and must be careful not to make decisions that are beyond the scope of authority granted by the court. Furthermore, the guardian must recognize that the ward may remain entitled to make legally binding decisions independent of the guardian. Indeed, upon request of the ward, the guardian has an obligation to assist the ward in making such decisions by ensuring that the ward is free from undue influence and has access to as much information as possible concerning the alternatives and likely outcome of his or her decision.

Rule 2 - Relationship Between Guardian and Ward:

THE GUARDIAN SHALL EXHIBIT THE HIGHEST DEGREE OF TRUST, LOYALTY, AND FIDELITY IN RELATION TO THE WARD.

2.1 The guardian shall protect the personal and pecuniary interests of the ward and foster the ward's growth, independence and self reliance to the maximum degree.

2.2 The guardian shall scrupulously avoid conflict of interest and self-dealing in relations with the ward.

2.3 The guardian shall vigorously protect the rights of the ward against infringement by third parties.

2.4 The guardian shall, whenever possible, provide all pertinent information to the ward unless the guardian is reasonably certain that substantial harm will result from providing such information.

Comment: The relationship between a guardian and ward is fiduciary in nature. It is based upon trust and is characterized by the high degree of dependency of the ward and authority of the guardian. With the imposition of guardianship, the ward's legal status is reduced to that of a child. The law places a special trust and confidence in a guardian and requires that his or her actions and motives be beyond reproach. The fiduciary obligation embodied in the guardian/ward relationship has a wide penumbra of meaning and is, of necessity, proportioned to the occasion. A guardian is required to constantly achieve a balance between the seemingly contradictory duties to protect the ward and to respect and encourage the ward's independence. There is no clear formula for achieving or maintaining this balance. Nevertheless, the guardian must always be mindful of the trust inherent in the relationship and always should act in equity and good conscience.

The protection of the personal and pecuniary interests of the ward is the foremost obligation of the guardian and must always guide his or her motivations and actions. Acting within the scope of the guardianship order, the guardian has the authority to make legally binding decisions on behalf of the ward. These decisions are broad in scope and may involve the ability to control fundamental aspects of the life of another human being. The authority of a guardian may encompass the ability to make decisions concerning the treatment and care of the ward, where the ward shall live, care and management of the ward's estate, and the exercise of the legal rights of the ward. In short, a guardian is entrusted with the custody and control of the ward's person and estate. In light of these broad and far-reaching powers (which, outside of the context of the authority of government to intervene pursuant to its police powers, are unheard of in the western world), the guardian has an obligation to make well-reasoned decisions and ensure no undue harm befalls the ward.

In addition, the guardian must always act within the limitations and scope of the guardianship order. The guardian must exercise care to avoid intentional or unintentional waiver, surrender, impairment or alteration of the ward's rights outside of the guardianship order.

The guardian must subordinate his or her public or private interests to his or her fiduciary obligation to the ward whenever there is the potential for conflict of interest between guardian and ward. Where the guardian appears to have interests which are adverse to those of the ward, the guardian shall take all necessary measures to remedy the conflict immediately. Also, depending on the nature of the actual or potential harm to the ward resulting from the conflict, the guardian shall take whatever action is necessary to ensure third-party review of the situation. This may involve notifying the court, retaining legal counsel on behalf of the ward, resigning the guardianship, or any other remedy which is just and equitable for the ward.

The guardian is also responsible for protecting the rights of the ward's person and estate from infringement by third parties. When necessary, an attorney or other agent shall be retained by the guardian to represent and advocate on behalf of the ward in negotiations or litigation. In such cases it is the guardian, acting in the interest of the ward, who is the client. Nevertheless, it is the responsibility of the guardian to use due diligence in determining and utilizing the preferences of the ward in accordance with this Code. It is recognized that often a guardian will be a professional person and will have specialized knowledge of the law or of some other substantive area concerning the person or estate of the ward, and may therefore be held to a higher standard of diligence than the lay person guardian. Notwithstanding specialized knowledge, a guardian shall not provide direct services to the ward for a fee without the express knowledge and permission of the court having jurisdiction over the guardianship. Since the guardian, in the eyes of the law, stands in the shoes of the ward for the purpose of making legally binding decisions, this would result in the guardian becoming his or her own client and thus violate the prohibition against conflict of interest.

Inherent in the guardian's obligation to exhibit the highest degree of trust, loyalty and fidelity in relation to the ward is the requirement that the guardian share pertinent information with the ward about his or her condition and financial status as well as any decisions the guardian is contemplating or may have actually made. To the extent the ward is able to participate, there exists an informative duty on the part of the guardian to share relevant information with the ward and thus aim toward the goal of joint decision making. The guardian shall use common sense and tact in sharing information, and shall be mindful of the fact that certain information may be upsetting to the ward. The guardian shall attempt to minimize the negative impact of sensitive information by his or her manner of presentation, and shall anticipate the potential need for support and counseling for the ward who reacts adversely to such information. Maintaining a close working relationship with caregivers and other service providers may be helpful in this regard.

To the extent that the interested ward remains uninformed about the facts of his or her condition and the limitations imposed by that condition, and to the extent that the ward lacks information regarding the various options available, the ward will be unable to participate in even a minimally meaningful way in decisions which affect his or her personal affairs and quality of life. Similarly, to the extent that the guardian remains uninformed about the ward's capabilities, wishes, goals, ideas, and needs, the guardian will be limited in his or her own ability to exercise substituted judgment when this shall be necessary, or even to advocate for the ward's best interest in decision making.

Where advice from experts, input from caregivers, and insight from friends and relatives combine with common sense to dictate that the ward is likely to suffer substantial harm from learning facts relative to his or her condition, the guardian may appropriately withhold such potentially damaging information.

Rule 3 - Custody of the Person; Establishing a Place of Abode:

THE GUARDIAN SHALL ASSUME LEGAL CUSTODY OF THE WARD AND SHALL ENSURE THE WARD RESIDES IN THE LEAST RESTRICTIVE ENVIRONMENT AVAILABLE.

3.1 The guardian shall be informed and aware of the options and alternatives available for establishing the ward's place of abode.

3.2 The guardian shall make decisions in conformity with the preferences of the ward in establishing the ward's place of abode unless the guardian is reasonably certain that such a decision will result in substantial harm.

3.3 When the preferences of the ward cannot be ascertained or where they will result in substantial harm, the guardian shall make decisions with respect to the ward's place of abode which are in conformity with the best interests of the ward.

3.4 The guardian shall not remove the ward from his or her home or separate the ward from family and friends unless such removal is necessary to prevent substantial harm. The guardian shall make every reasonable effort to ensure the ward resides at home or in a community setting.

3.5 The guardian shall seek professional evaluations and assessments wherever necessary to determine whether the current or proposed placement of the ward represents the least restrictive environment available to the ward. The guardian shall work cooperatively with community based organizations which may be available to assist in ensuring that the ward resides in a non-institutional environment.

3.6 The guardian shall have a strong preference against placement of the ward in an institution or other setting which provides only custodial care.

3.7 The guardian shall monitor the placement of the ward on an on-going basis to ensure its continued appropriateness, and shall consent to changes as they become necessary or advantageous for the ward.

3.8 In the event that the only available placement is not the most appropriate and least restrictive, the guardian shall advocate for the ward's rights and negotiate a more desirable placement with a minimum of delay, retaining legal counsel to assist if necessary.

Comment: In establishing the place of abode for the ward, the guardian has an obligation to become as familiar as possible with the available options and alternatives for placement of the ward. The guardian must have a thorough knowledge of community services in order to ensure that the ward's right to live in the least restrictive environment available is upheld. For purposes of this code, the least restrictive environment is considered to be the placement that least inhibits the ward's freedom of movement, informed decision making and participation in the community, while achieving the purposes of habilitation and normalization. The guardian, in establishing the place of abode for the ward, undertakes the difficult task of ensuring the protection of the ward while at the same time maximizing the ward's freedom and independence.

There are many factors to be considered by the guardian in making decisions concerning placement. Foremost, the guardian must determine the preferences of the ward whenever possible. The guardian should bear in mind that, while a decision to change residence is critical for any individual, it is especially so for a disabled person. It is not unusual for a ward to be anxious and upset about a potential change. He or she may be used to the dependency fostered in an institutional setting and react negatively to even the thought of moving. In some instances the ward may be so unhappy in his or her current environment as to be unrealistic about what the move portends. The guardian is therefore cautioned to use care and circumspection in attempting to ascertain the preferences of the ward. Treatment staff, family, friends and others familiar to the ward may prove invaluable in assisting to discern the

ward's position by providing the ward with a sense of the conditions surrounding the placement in terms he or she will understand, and by evaluating his or her reaction to this information. Such individuals may arrange for the ward to visit the proposed placement location to reassure the ward about the transition process. Once the preferences of the ward can be determined, the guardian must make decisions in conformity with such preferences unless the guardian is reasonably certain that substantial harm will result. When preferences of the ward cannot be ascertained, the guardian is required to make decisions which are in conformity with the best interests of the ward. Please see the Comment to Rule 1 for guidance in making such decisions.

In considering a choice of placement location for a ward, the guardian shall also consider the needs of the ward as determined by professionals. This may include assessment of the ward's functional ability, his or her health status, and treatment and habilitation needs. The guardian should not hesitate to request clarification of the assessment or evaluation and should always reserve the right to seek additional and/or independent assessment or evaluation whenever necessary.

The guardian shall not act to remove the ward from his or her home or separate the ward from family and friends unless the guardian is reasonably certain that substantial harm will result unless such action is taken. Whenever such drastic measures become necessary, the guardian shall seek to have his or her actions reviewed by a third-party, even though this may not be required by law. This review shall take place prior to the removal or separation or, if the decision is made pursuant to an emergency, immediately thereafter. The nature of third-party review will vary depending on the particular circumstances. For example, third-party review may be made by the court having jurisdiction over the guardianship or the ward's attorney or other representative. Should none of the above individuals be available or appropriate in a specific case, the review may then be informal, such as an in-depth discussion with an individual knowledgeable about the ward's condition and desires.

Similarly, if not already required by statute or rule, the guardian shall not place the ward in an institution or any other setting which provides only custodial care, without third-party review. A third-party review is required even if the ward consents to the actions of the guardian.

The guardian shall do his or her utmost in ensuring that the ward resides in an optimal setting and shall work closely with community based organizations in achieving this goal. The guardian shall advocate for the ward's right to receive services in the least restrictive environment available and shall not hesitate to retain legal counsel to assist in this effort.

Rule 4 - Custody of the Person: Consent to Care, Treatment and Services

THE GUARDIAN SHALL ASSUME RESPONSIBILITY TO PROVIDE INFORMED CONSENT ON BEHALF OF THE WARD FOR THE PROVISION OF CARE, TREATMENT AND SERVICES AND SHALL ENSURE THAT SUCH CARE, TREATMENT AND SERVICES REPRESENTS THE LEAST RESTRICTIVE FORM OF INTERVENTION AVAILABLE.

4.1 The guardian shall make decisions in conformity with the preferences of the ward when providing consent for the provision of care, treatment and services, unless the guardian is reasonably certain that such decisions will result in substantial harm to the ward.

4.2 When the preferences of the ward cannot be ascertained or will result in substantial harm, the guardian shall make decisions with respect to care, treatment and services which are in conformity with the best interests of the ward.

4.3 In the event the only available treatment, care or services is not the most appropriate and least restrictive, the guardian shall advocate for the ward's right to a more desirable form of treatment, care or services, retaining legal counsel to assist if necessary.

4.4 The guardian shall seek professional evaluations and assessments whenever necessary to determine whether the current or proposed care, treatment and services represent the least restrictive form of intervention available.

4.5 The guardian shall work cooperatively with individuals and organizations which may be available to assist in ensuring the ward receives care, treatment and services which represent the least restrictive form of intervention available and are consistent with the wishes or best interests of the ward.

4.6 The guardian shall not consent to sterilization, electro-convulsive therapy, experimental treatment or service without seeking review by the court or the ward's attorney or other representative.

4.7 The guardian shall be familiar with the law of the state regarding the withholding or withdrawal of life-sustaining treatment.

4.8 The guardian shall monitor the care, treatment and services the ward is receiving to ensure its continued appropriateness, and shall consent to changes as they become necessary or advantageous to the ward.

Comment: The ethical precepts contained in rules 4. 1-4. 5 are simply another application of the decisional factors discussed in the previous sections. A guardian when making treatment decisions, as when making decisions concerning where the ward should live, must gather all available information and must attempt to abide by the preferences of the ward if ascertainable and not likely to cause substantial harm. See Comments to Rules 1-3.

Beyond the basic standards for decision making, this set of rules also recognizes the controversial nature of certain forms of care and singles them out for third-party review. For example, debate has raged in the courts and community concerning whether a woman with developmental disabilities has her "rights" protected or infringed by sterilization. Does sterilization violate her right to procreate? Does it permit a woman who has been unable to properly utilize contraceptives to pursue a full sex life without unwanted pregnancy? This type of treatment also presents an often difficult dilemma for the guardian: is this irrevocable decision truly in the ward's best interest or a device to simplify the guardian's responsibilities to the ward?

Regardless of how these questions are answered, the Model Code requires the ethical guardian to seek some form of appropriate third-party review. The form of this review will vary depending on the particular requirements of state law–for example, the requirement or lack thereof of court approval. If there is no court requirement, an ethical guardian will still seek informal consultation with an appropriate individual, such as the ward's attorney, doctor or family member.

The issue of withholding and withdrawing life support is governed predominantly by state law. Since a guardian who complies with ethical standards which violate state law can still be held liable for his or her actions, we have not attempted to address this issue in the Code. Rather, an ethical guardian in an area such as this, where ethical precepts have been pre-empted by state law, will look to that law for guidance.

Rule 5 - Management of the Estate:

THE GUARDIAN OF THE ESTATE SHALL PROVIDE COMPETENT MANAGEMENT OF THE PROPERTY AND INCOME OF THE ESTATE. IN THE DISCHARGE OF THIS DUTY, THE GUARDIAN SHALL EXERCISE INTELLIGENCE, PRUDENCE AND DILIGENCE AND AVOID ANY SELF-INTEREST.

5.1 Upon appointment, the guardian shall take steps to inform himself or herself of the statutory requirements for managing a ward's estate.

5.2 The guardian shall manage the income of the estate with the primary goal of providing for the needs of the ward, and in certain cases, the needs of the ward's dependents for support and maintenance.

5.3 The guardian has a duty to exercise prudence in the investment of surplus funds of the estate.

5.4 Where the liquid estate of the ward is sufficient, the guardian may make such gifts as are consistent with the wishes or past behavior of the ward, bearing in mind both the foreseeable requirements of the ward and the tax advantages of such gifts.

5.5 There shall be no self-interest in the management of the estate by the guardian; the guardian shall exercise caution to avoid even the appearance of self-interest.

Comment: The requirements imposed on a guardian vary according to the state of appointment. Therefore, a guardian must, at the outset, discover the particular legal requirements governing the guardian's actions. The guardian functions as the arm of the court, and as such, is accountable to the court for his or her actions. Certain obligations exist by virtue of statute and others may be granted or assigned by the court. These rules and comments do not reflect the specific law of any state. Rather, they address some of the broad ethical questions implicit in the role of guardian. A guardian must be sure to check the law of his or her state before relying on the principles contained herein.

The guardian must seek to obtain all available income for the ward. If the ward's own funds are inadequate to provide for the needs of the ward, the guardian will find it both prudent and necessary to seek income supplementation via various income maintenance and insurance programs available through federal, state and local resources. Public benefits may not only be helpful, but essential to the guardian in providing for the needs of the ward. The guardian is, therefore, under a positive obligation to investigate their availability and seek such assistance on behalf of the ward.

Collection of the ward's debts is the responsibility of the guardian. Receipt of funds on the ward's behalf discharges the debtor of his or her obligation. To the extent necessary or appropriate to the individual case, the guardian may employ an attorney to handle the debt collection function on the ward's behalf. In all such cases, transactions are negotiated and carried out in the name of the ward.

The guardian must use the ward's income to provide for his or her needs. The guardian undertakes the responsibility to settle the ward's outstanding accounts, first from the income of the estate, and then via sale of personal property, with license from the court. Only to the extent that debts cannot be covered through these avenues may the guardian seek permission to encumber or sell real estate.

Although possession of the real estate of the ward is in the hands of the guardian, title resides with the ward. Any plan to convey the ward's real estate must be contemplated only as necessary to provide for the care and maintenance of the ward, or in cases where the sale is demonstrably in the ward's best interest.

Exchange or partition of the ward's real estate must be considered only for the purpose of securing the funds necessary for the support of the ward, or for purposes otherwise in the ward's best interests. Since "license" of the court is often needed to dispose of real estate, the guardian should carefully check local requirements prior to selling or encumbering real property.

The guardian may mortgage the property of the ward only in accord with state law and only when necessary, based on insufficiency of the income of the estate to maintain and support the ward; to discharge other obligations, liens and mortgages; to extend the length or reduce the rate of interest of the existing mortgage; or to finance improvement to the property with an eye toward increasing the value of the real estate as an asset of the estate. On the other hand, in most states, the guardian does possess the power and right to lease the property with the goal of maximizing the income of the estate. Such a lease may be made in the name of the guardian and enforced by the guardian. Any warranties, therefore, are made by the guardian, and not by the ward or on his behalf. Any covenants or easements are likewise made by the guardian in his or her own name, and with the expectation that they will terminate upon the termination of the guardianship relationship.

Should there be surplus funds in the estate, the guardian must invest such funds prudently. While caution is essential in choosing non-speculative opportunities for investment, diligent attention should be paid to opportunities which may result in a high rate of return. The prudent guardian will seek such opportunities to maximize the estate. The deposit of funds in interest bearing accounts is a safe investment, but one which may be less likely than others to maximize the return to the estate. Such deposits, and all other investments as well, must be made in good faith and in the name of the ward. Disclosure by the guardian of his fiduciary role is essential evidence of such good faith. In no case should the ward's funds be mingled with those of the guardian, and they must be clearly identifiable at all times.

Funds loaned for investment purposes must be secured by sufficient collateral. Purchase of stock in private corporations, particularly when the guardian is also a stockholder, should be avoided, due to both the risky nature of such investments and the possible appearance of impropriety and self-interest on the part of the guardian. The guardian must exercise absolute good faith, reasonable judgment, discretion, and diligence. He or she must also reject speculative or risky investments as well as those which imply favoritism in favor of opportunities, which are likely to produce an income as large as possible while still being reasonably safe.

Charitable contributions may be made, with court approval in some jurisdictions, in such a manner as to perpetuate the former practices of the ward, or consistent with a substituted judgment as to their benefit to the ward's current or future situation. Non-charitable gifts, such as those gifts which might be made to family members or close friends, may be made from the surplus income of the estate if the guardian is in possession of demonstrable evidence that the ward would make such gifts. Where the guardian himself or herself, is among the potential donees of such gifts, consideration should be given to seeking independent representation for the ward from an attorney or a guardian ad litem, depending on local practice. In any case, court authorization of such a gift should be sought by the prudent guardian to avoid the appearance of any impropriety. In all cases, court authorization of such a gift should be sought by the prudent guardian to avoid the appearance of any impropriety. In all cases, the guardian may be held to a thorough knowledge of the principles and practices of estate planning, including the tax consequences, in the carrying out of planned giving. If the guardian does not have such expertise, he or she must seek professional advise before deciding to make any gifts.

The application of surplus income of the estate to the support and maintenance of the ward's dependents may be an issue of importance in certain cases where the ward is bound by custom, duty, or law to provide for his or her dependents. In such a case, the guardian shall first see to the current and future needs of the ward, and then may apply the surplus to the support of others to discharge the obligations of the ward. A substituted judgment in this regard must be supported by sufficient evidence to demonstrate to the court its propriety. In no case shall a guardian approve or allow support to himself or herself from the income of the ward's estate. Only to the extent that the expenses of the guardianship itself are met by the guardian shall he or she seek reimbursement or approval from the court for such expenses.

While it is understood that the guardian must take responsibility and bear liability for his or her own negligent acts, the prudent guardian will scrupulously avoid even the appearance of self dealing in the decisions he or she makes concerning the financial affairs of the ward. This warning bears special significance for the guardian who is also a relative and future heir of the ward. Efforts to maximize the estate in this situation may be interpreted as an attempt to protect a future inheritance. For this reason, once assuring himself or herself of an absence of self-interest in decisions affecting the financial affairs of the ward, the guardian is well advised to seek court approval or license to avoid any appearance of impropriety.

Rule 6 - Termination and Limitation of the Guardianship:

THE GUARDIAN HAS AN AFFIRMATIVE OBLIGATION TO SEEK TERMINATION OR LIMITATION OF THE GUARDIANSHIP WHENEVER INDICATED.

6.1 The guardian shall diligently seek out information which will provide a basis for termination or limitation of the guardianship.

6.2 Upon indication that termination or limitation of the guardianship order is warranted, the guardian shall promptly request court action, retaining legal counsel if necessary.

6.3 The guardian shall assist the ward in terminating or limiting the guardianship and arrange for independent representation for the ward whenever necessary.

Comment: The guardian shall seek evidence of any change in the capabilities of the ward and shall immediately seek complete or partial restoration of the legal capacity of the ward whenever the situation so dictates. Standards and evidence for restoration to capacity vary from state to state and the guardian is obligated to understand these matters as well as the procedure required for termination or limitation. Whenever necessary, the guardian shall not hesitate to consult with legal counsel and obtain the opinions of other professionals and care providers in making this determination.

In the even the ward expresses the desire to challenge the necessity of all or part of the guardianship, including the individual or agency acting as the guardian, it is the affirmative obligation of the guardian to assist the ward wherever necessary. This may include filing a petition on behalf of the ward, or, where the guardian does not agree with the ward, arranging for representation of the ward by independent legal counsel. The right to retain counsel for the purpose of challenging the guardianship or the actions of the guardian is fundamental and may not be waived or contracted away. Interference by the guardian with the ward's efforts to obtain full or partial restoration of capacity, or to challenge the guardianship in any way, shall constitute a breach of the guardian's fiduciary obligation to the ward.

VII. Conclusion

Individuals acting as guardian for disabled individuals are vested with enormous responsibility. The need to balance the goal of protection of the ward with the goal of minimizing the deprivation of the ward's rights, presents a complex matrix of decisional factors. The Model Code is an attempt to provide some general principles and commentary designed to improve the process of decision making so that individuals will be willing to serve as guardians, for persons in need, and so that the decisions actually made are based upon a set of agreed upon precepts.