

## Amending the UGPPA to Implement the 3rd National Guardianship Summit

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### *Abstract*

*The Third National Guardianship Summit, which was held in 2011, recommended the adoption of 70 standards and recommendations relating to guardianship law and practice. The author of this article, who was one of the Summit participants, analyzes the standards and recommendations that might best be implemented by statutory change. In particular, the article focuses on how the standards and recommendations might be applied in the current project to amend the Uniform Guardianship and Protective Proceedings Act, various versions of which have been enacted in a significant number of states.*

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Guardianship law in the US is one of many legal subjects that are controlled by state, not federal law. There are therefore separate guardianship laws for each of the 50 states and the District of Columbia. To reduce the resulting inconsistencies among state laws, the Uniform Law Commission (ULC) was formed and held its first meeting in 1892.<sup>1</sup> The ULC drafts model acts that states are free to enact or not enact. The hope is that if these laws are widely enacted, the laws of the states will over time become more uniform. But even if not enacted by a state in their entirety, states often borrow from uniform laws when revising or enacting particular provisions.<sup>2</sup>

The ULC has long been involved in the drafting of guardianship laws. The ULC first addressed the subject of guardianship in 1969, when it approved the Uniform Probate Code (UPC), Article V of which is devoted to guardianship.<sup>3</sup> Under the UPC, a “guardian” is appointed by the court to make decisions concerning personal care, and a “conservator” is appointed by the court to manage property. The appointment of a conservator is part of a broader category known

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<sup>1</sup> For the history of the Uniform Law Commission, see Robert A. Stein, *Forming a More Perfect Union: A History of the Uniform Law Commission* (2013).

<sup>2</sup> For an example of such influence, see Roger W. Andersen, *The Influence of the Uniform Probate Code in Nonadopting States*, 8 U. Puget Sound L. Rev. 599 (1985).

<sup>3</sup> The text of this and all other uniform acts are available at <http://www.uniformlaws.org>.

as a “protective proceeding,” which may also include other court orders for the protection of property. But in many states, the court-appointed manager is referred to as either a “guardian of the person” or “guardian of the property.” This essay will generally use the term “guardian” when referring to both roles, and to “conservator” when referring only to the management of property.

Article V of the UPC was amended in 1982 to add the concept of limited guardianship.<sup>4</sup> At the same time, Article V was published separately from the UPC in the form of the Uniform Guardianship and Protective Proceedings Act (UGPPA). The UGPPA, and corresponding UPC provisions, were further revised in 1997. The philosophy of the 1997 revision has been described as:

The overriding theme of the 1997 UGPPA is that a guardian or conservator should be appointed only when necessary, only for so long as necessary, and only with such powers as are necessary. The Act views guardianship and conservatorship as a last resort, emphasizes that limited guardianships or conservatorships should be used whenever possible, and requires that the guardians or conservator consult with the ward or protected person, to the extent feasible, when making decisions.<sup>5</sup>

Much of the energy for guardianship reform in the US has been generated by national conferences at which experts convene and issue recommendations. The first conference was held in 1988 and is known as “Wingspread,” the name of the conference center at which it was held. The conference was convened in response to a series of articles in the Associated Press critical of guardianship practice.<sup>6</sup> Among the themes in the report published following the conclusion of the Wingspread Conference: (1) appointment procedures should be tightened; (2) there should be emphasis on limited guardianship; (3) counsel for respondent should be appointed in all cases; (4) guardians should receive training; and (5) the ward's choices and substituted judgment should be emphasized.<sup>7</sup>

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<sup>4</sup> See Unif. Guardianship & Protective Proceedings Act prefatory note (1997) [hereinafter cited as “UGPPA (1997)”. In this article, unless citation is made to a specific section that was subsequently amended, uniform acts will be cited by the date of their original approval, not by the date of the last section amended. If a particular section being cited has been amended, the date of amendment is also shown.

<sup>5</sup> David M. English & Rebecca C. Morgan, *The Uniform Guardianship and Protective Proceedings Act (1997)*, 11(2) NAELA Q. 3, 4 (1998).

<sup>6</sup> *Guardians of the Elderly: An Ailing System, AP Special Report (Sept. 1987)*, in *Abuses in Guardianship of the Elderly and Infirm: A National Disgrace*, H.R. Comm. Pub. 100-639, at 13 (Dec. 1987), available at [eric.ed.gov/?id=ED294080](http://eric.ed.gov/?id=ED294080) (last visited Feb. 14, 2015).

<sup>7</sup> Am. Bar Ass’n Comm’n on the Mentally Disabled & Comm’n on Legal Problems of the

The goals of Wingspread were not totally achieved in the 1997 revision of the UGPPA. Although appointment procedures were tightened<sup>8</sup> and a preference created in favor of limited guardianship,<sup>9</sup> the other goals were not achieved. Unlike Wingspread, the 1997 revision did not mandate the appointment of counsel to represent the subject of the proceedings. The 1997 revision instead contains optional provisions on the appointment of counsel. The enacting state may choose to require the appointment of counsel for the respondent in all cases, or the enacting state may leave the appointment of counsel to the court's discretion.<sup>10</sup> The statute is also ambiguous on the extent to which substituted judgment is recognized, used here in the sense that the guardian must make the decision that the person under guardianship would have made if competent and not under guardianship. The UGPPA contains language suggesting that a substituted judgment standard applies. The guardian must encourage the person under guardianship to participate in decisions.<sup>11</sup> A guardian, in making decisions, must also consider the expressed desires and personal values of the person under guardianship.<sup>12</sup> On the other hand, the UGPPA then retreats from a substituted judgment standard by stating that "[a] guardian at all times shall act in the ward's best interests and exercise reasonable care, diligence, and prudence."<sup>13</sup> The final Wingspread goal, adequate training of guardians, is more an issue of funding and court practice than of statutory enactment.

The second national conference, which was held in at the Stetson College of Law in 2001 and which is known as Wingspan, produced a series of recommendations largely reinforcing and

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Elderly, *Guardianship: An Agenda For Reform* (1989), available at [http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011\\_aging\\_gship\\_agda\\_refrm.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011_aging_gship_agda_refrm.authcheckdam.pdf) (last visited Feb. 14, 2015).

<sup>8</sup> See generally English & Morgan, *supra* note 5, at 3.

<sup>9</sup> "The court, whenever feasible, shall grant to a guardian only those powers necessitated by the ward's limitations and demonstrated needs and make appointive and other orders that will encourage the development of the ward's maximum self-reliance and independence." UGPPA (1997) § 311(b).

<sup>10</sup> *Id.* § 305(b) (amended 1998).

<sup>11</sup> *Id.* § 314(a).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* For a discussion of this provision, see Lawrence A. Frolik & Linda S. Whitton, *The UPC Substituted Judgment/Best Interest Standard For Guardian Decisions: A Proposal For Reform*, 45 U. Mich. J. L. Reform 739 (2012). See also *infra*, Part 3, Standards for Guardian Decisions.

refining the recommendations made in the Wingspread report.<sup>14</sup> The Wingspread report had a major influence on guardianship reform, including the drafting of the 1997 UGPPA. The influence of Wingspan has been more muted. The most significant Wingspan recommendation was Recommendation 1, which encouraged the development of procedures to resolve interstate jurisdiction controversies over which state's court has jurisdiction to appoint a guardian. The recommendation also encouraged states to develop procedures to facilitate the transfer of existing guardianship cases among jurisdictions.<sup>15</sup> Influenced by this recommendation, the ULC in 2005 appointed a drafting committee to draft the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, which was approved in 2007. This Act has since been enacted in 40 states and in the District of Columbia.<sup>16</sup>

But the focus of this article is on the Third National Guardianship Summit and the extent to which the UGPPA should be revised in light of the 70 recommendations and standards approved by the Summit participants. The Third National Guardianship Summit was held at the University of Utah in October, 2011. The Summit recommendations and standards and accompanying law review articles were published in the *Utah Law Review*.<sup>17</sup>

The Third Summit was organized by the National Guardianship Network (NGN), which is a group of national organizations dedicated to effective adult guardianship law and practice.<sup>18</sup>

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<sup>14</sup> For the recommendations, see *Wingspan-The Second National Guardianship Conference, Recommendations*, 31 *Stetson L. Rev.* 595 (2002). For an overview of the conference proceedings and the articles written as background for the conference, see A. Frank Johns & Charles P. Sabatino, *Wingspan-The Second National Guardianship Conference, Introduction*, 31 *Stetson L. Rev.* 573 (2002).

<sup>15</sup> For the text of Recommendation 1, see *Wingspan-The Second National Guardianship Conference, Recommendations*, *supra* note 14.

<sup>16</sup> For a list of the enacting jurisdictions, see Legislative Fact Sheet-Adult Guardianship and Protective Proceedings Jurisdiction Act, available at <http://www.uniformlaws.org> (last visited Feb. 14, 2015).

<sup>17</sup> For the text of the recommendations and standards, see *Third National Guardianship Summit Standards and Recommendations*, 2012 *Utah L. Rev.* 1191. For an overview of the recommendations and standards, see Sally Hurme & Erica Wood, *Third National Guardianship Summit: Introduction*, 2012 *Utah L. Rev.* 1157. Several of the law review articles prepared as background papers for the various conference working groups are cited later in this article.

<sup>18</sup> The NGN organizations at the time of the Summit were the AARP Public Policy Institute; the American Bar Association Commission on Law and Aging; the American Bar Association Section of Real Property, Trust and Estate Law; the Alzheimer's Association; the

Also participating in the Summit were an array of other groups concerned with issues of aging, intellectual disability, and mental illness.<sup>19</sup> Unlike the Wingspread and Wingspan conferences, the Third Summit focused primarily on post-appointment issues. The Wingspread and Wingspan conferences focused more on issues concerning appointment of guardians.

During the Summit, the participants were divided into working groups.<sup>20</sup> In addition to a standards overview group there were working groups on five substantive areas; guardian relationship with the courts, health care decisions, residential decisions, financial decisions, and guardian fees. There was also a state interdisciplinary group charged with determining how the Summit recommendations and Standards could best be implemented across the country. Each of the working groups produced a set of recommendations that were debated in a final plenary session. Following the conclusion of the conference, the Summit organizers were charged with harmonizing the final product. The 43 recommendations directly affecting guardian's standards of practice were classified as Standards, and the 21 recommendations directed more at courts, legislators, and guardianship organizations were classified as Recommendations. There were also six recommendations directed at how best to implement the Third National Summit results. There was some overlap among the recommendations of the working groups. For example, references to the importance of ascertaining the present and past wishes of the person under guardianship appeared in the recommendations of several of the working groups and also made its way into many of the final Standards and Recommendations.<sup>21</sup>

Following the conclusion of the Summit, NGN appointed an Implementation Committee, on which this author served. One of the charges to the Implementation Committee was to classify the 70 recommendations and standards into four categories; statutory, practice, educational, and other. The 26 Standards and 10 Recommendations that the Implementation Committee deemed to

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American College of Trust and Estate Counsel; the Center for Guardianship Certification; the National Academy of Elder Law Attorneys; the National Center for State Courts; the National College of Probate Judges; and the National Guardianship Association. *Id.* 1166 n.60. The National Disability Rights Network has subsequently joined NGN.

<sup>19</sup> Among these groups were the American Bar Association Commission on Disability Rights; the Arc; the Center for Social Gerontology; the National Adult Protective Services Association; the National Association of State Long-Term Care Ombudsman Programs; the National Association of State Mental Health Program Directors; the National Committee for the Prevention of Elder Abuse; the National Disability Rights Network; and the Bazelon Center for Mental Health. *Id.* 1166 n.61.

<sup>20</sup> The process by which the Summit was conducted is more fully described in *id.* 1166-68.

<sup>21</sup> See *infra* Part 3, Standards for Guardian Decisions.

be relevant to the revision of the UGPPA are attached as Appendix A. Based on the Implementation Committee's report, the NGN then recommended to the ULC that a drafting committee be appointed to revise the UGPPA. The ULC agreed and a drafting committee was appointed in 2014 with this author as Chair and Nina Kohn of Syracuse University as the Reporter. The charge to the Committee is to "revise selected portions of the UGPPA in order to implement some of the recommendations of the Third National Guardianship Summit and otherwise update the act."<sup>22</sup>

The significance of the Third Summit is not limited to the project to amend the UGPPA.<sup>23</sup> The National Guardianship Association has incorporated the Summit standards into the NGA Standards of Practice for Guardians.<sup>24</sup> The National Academy of Elder Law Attorneys has incorporated the Standards and Recommendations into its public policy guidelines.<sup>25</sup> The Conference of Chief Justices adopted a resolution urging state courts to review and consider the Standards and Recommendations.<sup>26</sup> The American Bar Association House of Delegates approved a resolution adopting the Standards and Recommendations as Association policy.<sup>27</sup> Perhaps more significantly, to implement the Standards and Recommendations six states have formed what are called WINGS (Working Interdisciplinary Network of Guardianship Stakeholders).<sup>28</sup> These are

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<sup>22</sup> Webpage on Guardianship and Protective Proceedings Act Committee, at [www.uniformlaws.org](http://www.uniformlaws.org) (last visited Feb. 14, 2015).

<sup>23</sup> For a summary of the developments described in this paragraph of the text, see Erica F. Wood, *Taking WING: Next Steps in Guardianship Reform*, 23(2) *Experience* 4 (2013).

<sup>24</sup> See *NGA Standards of Practice* (4th ed. 2013), available at [www.guardianship.org/documents/Standards\\_of\\_Practice.pdf](http://www.guardianship.org/documents/Standards_of_Practice.pdf) (last visited Feb. 14, 2015).

<sup>25</sup> See *Guardianship*, in *NAELA Public Policy Guidelines*, available at [www.naela.org/Public/Advocacy\\_Public\\_Policy/Public\\_Policy/Guardianship.aspx](http://www.naela.org/Public/Advocacy_Public_Policy/Public_Policy/Guardianship.aspx) (last visited Feb. 14, 2015).

<sup>26</sup> See Resolution 6, *Encouraging Consideration of the Standards and Recommendations from the Third National Guardianship Summit*, available at [ccj.nscs.org/Policy-Resolutions.aspx](http://ccj.nscs.org/Policy-Resolutions.aspx) (last visited Feb. 14, 2015).

<sup>27</sup> House of Delegates Resolution 106B, approved at the 2012 ABA Annual Meeting, available at [www.americanbar.org](http://www.americanbar.org) under ABA House of Delegates, 2012 Chicago Annual Meeting (last visited Feb. 14, 2015).

<sup>28</sup> The six states are Missouri, New York, Ohio, Oregon, Texas, and Utah. Wood, *supra* note 23, at 6. For the experience of the Ohio WINGS, which was the first, see Julia R. Nack, Carolyn L. Dessin & Thomas Swift, *Creating and Sustaining Interdisciplinary Guardianship Committees*, 2012 *Utah L. Rev.* 1667.

multi-disciplinary task forces that will continually evaluate guardian practice in their respective states.<sup>29</sup>

The remainder of this article will analyze the 36 recommendations and standards of relevance to the amendment of the UGPPA. The Recommendations and Standards will be grouped into the following seven categories:

1. Preference for People-First Language
2. Role of Courts
3. Standards for Guardian Decisions
4. Health Care Decisions
5. Residential Decisions
6. Financial Decisions
7. Guardian Fees

### **1. Preference for People-First Language**

Recommendation 1.7 advises that where possible, the term “person under guardianship” should replace terms such as “incapacitated person”, “ward”, or “disabled person.” This Recommendation is consistent with the advocacy movement to use person-first when referring to individuals with disabilities. The theory is that one should focus on the individual instead of on the individual’s condition.<sup>30</sup> While the use of people-first language is a long-time priority of many advocacy groups, not all groups share this view.<sup>31</sup>

The UGPPA uses three terms that might violate people-first percepts. The least objectionable is “protected person,” which refers to a person for whom a conservator has been appointed or other protective order entered.<sup>32</sup> The ones to which greater objection is made are “incapacitated person” and “ward.” The term “ward” refers to a person for whom a guardian has

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<sup>29</sup> For further discussion of the role of WINGS, see Wood, *supra* note 23, at 4, 5-6.

<sup>30</sup> For examples of people-first language, see *Using People-First Language*, available at <http://www.directionservice.org/cadre/exemplar/artifacts/PA-264%20People-First-Language%20Publication.pdf> (last visited Feb. 14, 2015).

<sup>31</sup> See Kenneth Jerigan, *The Pitfalls of Political Correctness: Euphemisms Excoriated*, Braille Monitor, March 2009, available at <http://nfb.org/images/nfb/Publications/bm/bm09/bm0903/bm090308.htm> (last visited Feb. 14, 2015).

<sup>32</sup> UGPPA (1997) § 102(11).

been appointed.<sup>33</sup> Before a guardian may be appointed, an individual must be determined to be an “incapacitated person.”<sup>34</sup>

A complete substitution of people-first language in the revision of the UGPPA will be difficult. To the author’s knowledge, no US state has achieved people-first language across the board in its adult guardianship laws. The closest may be the 1993 South Dakota Guardianship and Conservatorship Act,<sup>35</sup> a project for which this author served as the Committee Chair and Reporter. The South Dakota Act, which drew partially on the 1982 version of the UGPPA, avoids the terms “incapacitated person” and “ward.” For “incapacitated person,” it substitutes the concept of “person alleged to need protection.”<sup>36</sup> For “ward,” it substitutes “protected person,” which under the South Dakota Act refers to a person for whom either a guardian or conservator has been appointed.<sup>37</sup> Considerably greater drafting difficulties would have been encountered had an attempt been made to substitute the terms “person under guardianship” and “person under conservatorship” in the South Dakota enactment. That effort, even if successful, might have resulted in a considerable loss of clarity.

## 2. Guardian’s Relationship to the Courts<sup>38</sup>

Several of the Third National Guardianship Summit Standards and Recommendations relate to the guardian’s required reporting to the court and to the court’s monitoring of the guardian’s performance.

Under Standard 2.2, a guardian or conservator must keep the court informed about the well-being of the person and the status of the estate through personal and financial plans, inventory and appraisals, and annual reports and accountings. The UGPPA complies with Standard 2.2 other than for the requirement that a conservator obtain formal appraisals, an

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<sup>33</sup> *Id.* § 102(15).

<sup>34</sup> “Incapacitated person” means an individual who, for reasons other than being a minor, is unable to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance.” *Id.* § 102(5).

<sup>35</sup> 1993 S.D. Sess. Laws ch. 213, codified at S.D.Codified Laws ch. 29A-5 (2014).

<sup>36</sup> *Id.* § 29A-5-102(9).

<sup>37</sup> *Id.* § 29A-5-102(10).

<sup>38</sup> For the background paper on this topic, see Mary Joy Quinn & Howard S. Krooks, *The Relationship Between the Guardian and the Court*, 2012 Utah L. Rev. 1611.

expensive and often unnecessary step. Under the UGPPA, the guardian of the person must file a report within 30 days after appointment and annually thereafter.<sup>39</sup> Among the required contents of the report is a statement on the guardian's plans for future care.<sup>40</sup> Conservators of the estate must file an inventory,<sup>41</sup> a conservatorship plan,<sup>42</sup> and an annual report.<sup>43</sup>

For both guardians and conservators, the court is required to establish a system for monitoring the guardian's and conservator's compliance with the filing requirements.<sup>44</sup> However, merely stating that a court must establish a monitoring system and actually having an effective monitoring system are of course two different things. Recommendation 2.3 describes in considerable detail the elements of an effective monitoring system.<sup>45</sup>

The Third National Summit Standards and Recommendations emphasize a philosophy of the least restrictive alternative. Recommendation 2.2 encourages the court to issue orders that implement the least restrictive alternative and maximize the person's right to self-determination and autonomy. Also listed are steps that the court might take to implement the Recommendation. A least restrictive alternative philosophy is already an important element of the UGPPA. In appointing a guardian for an adult, the court must determine that no less restrictive alternative is available.<sup>46</sup> Also, the court, whenever feasible, shall grant the guardian or conservator only those powers necessitated by the limitations and demonstrated needs of the person under guardianship or conservatorship. Furthermore, the court shall make appointive and other orders that will encourage the development of the person's self-reliance and independence.<sup>47</sup> The least restrictive alternative philosophy as applied to specific types of decisions are described in the later sections

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<sup>39</sup> UGPPA (1997) § 317(a).

<sup>40</sup> *Id.* § 317(a)(6).

<sup>41</sup> *Id.* § 419(a).

<sup>42</sup> *Id.* § 418(c).

<sup>43</sup> *Id.* § 420(a).

<sup>44</sup> *Id.* §§ 317(c) (guardians), 420(d) (conservators).

<sup>45</sup> See also Sally Balch Hurme & Erica Wood, *Guardian Accountability Then and Now: Tracing Tenets for an Active Court Role*, 31 Stetson L. Rev. 867 (2002).

<sup>46</sup> UGPPA (2007) §§ 311(a)(1)(B) (guardian).

<sup>47</sup> *Id.* §§ 311(b) (guardian), 409(b) (conservator).

of this article.<sup>48</sup>

Summit Standard 1.4 requires that the guardian promptly inform the court of any change in the capacity of the person that warrants an expansion or restriction of the guardian's authority. While the required report of the guardian and conservator requires that the guardian or conservator report on the recommended need for continued guardianship or conservatorship and any recommended changes in the scope of the guardianship or conservatorship,<sup>49</sup> changes in capacity are not specifically mentioned. Requiring a prompt report on changes of capacity could place a burden on guardians and conservators, but a statement on changes in capacity could certainly be added as one of the required statements in the annual report.

Issues concerning the court's role in approving a guardian's or conservator's compensation, supervising the conservator's financial management of the estate and the guardian's making of health care and residential care decisions, are addressed in the sections of this article devoted to these topics.

### 3. Standards for Guardian Decisions

The most significant portion of the Third Summit report is the portion relating to the standard by which a guardian's decisions are to be judged. At the heart of these recommendations is adoption of "person-centered" planning,<sup>50</sup> a concept which originated from experts working with individuals with intellectual disabilities.<sup>51</sup> The theory here is that the plan of care will be directed by the person with a disability, and that in developing the plan the person will receive "support" or "assistance" from a network of family and professionals.<sup>52</sup> Another model is "co-

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<sup>48</sup> See *infra* Part 4, Health Care Decisions; Part 5, Residential Decisions; Part 6, Financial Decisions.

<sup>49</sup> See UGPPA (2007) §§ 317(a)(7) (guardian), 420(b)(3) (conservator).

<sup>50</sup> Standard 1.1 requires that a guardian develop and implement a plan emphasizing a "person-centered philosophy." Standard 6.4 requires that a guardian, when making residential decisions, must implement a person-centered plan. Standard 6.5 requires that the guardian shall wherever possible seek to ensure that the person leads the residential planning process.

<sup>51</sup> See generally A. Frank Johns, *Person-Centered Planning in Guardianship: A Little Hope for the Future*, 2012 Utah L. Rev. 1541.

<sup>52</sup> There are numerous variations and different philosophies. See Nina A. Kohn, Jeremy A. Blumenthal & Amy T. Campbell, *Supported Decision-Making: A Viable Alternative to Guardianship*, 117 Penn. St. L. Rev. 1111 (2013).

decision-making,” under which the individual’s decision requires the consent of another person.<sup>53</sup>

Person-centered planning and the related concepts of supported or co-decision-making is not yet recognized expressly in the adult guardianship statute of any US state but is recognized in several European countries, in Japan, and in a number of the Canadian provinces.<sup>54</sup> The provision of adequate supports is also required under the UN Convention on the Rights of Persons with Disabilities.<sup>55</sup> Person-centered planning is not without concerns. It assumes that supporters are available, which is sometimes not the case. There is also a concern that safeguards may be needed to minimize the risk of abuse.<sup>56</sup>

The UGPPA could recognize an effective person-centered plan or supported decision-making as an alternative to guardianship or conservatorship. Person-centered planning or supported decision-making could also be integrated into the UGPPA itself. The guardian or conservator could be required to arrange for the appropriate supports and either follow the person’s decision in appropriate situations or otherwise grant that decision great weight.<sup>57</sup>

There are numerous Summit Standards relevant to the issue of person-centered planning and supported decision-making. Standard 1.1 requires that the guardian develop a plan emphasizing a “person-centered philosophy,” and Standard 6.5 requires that the person, whenever possible, lead the residential planning process. Several of the Standards encourage the guardian to follow the person’s decision where feasible.<sup>58</sup> Several of the other Standards encourage the person

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<sup>53</sup> See Shih-Ning Then, *Evolution and Innovation in Guardianship Laws: Assisted Decision-Making*, 35 Sydney L. Rev. 133, 151-54 (2013).

<sup>54</sup> See *id.* at 148-54.

<sup>55</sup> Article 12(3) of the Convention provides: “States Parties shall take appropriate measures to provide access by persons with disabilities to the support that they may require in exercising their legal capacity.” See Michael L. Perlin, “*Strikers for the Guardians and Protectors of the Mind*”: *The Convention on the Rights of Persons with Mental Disabilities and the Future of Guardianship Law*, 117 Penn. St. L. Rev. 1159 (2013); Robert D. Dinerstein, *Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road From Guardianship to Supported Decision-Making*, 19(2) Human Rights Brief 8 (2012).

<sup>56</sup> Possible safeguards are discussed in Then, *supra* note 53, at 160-62.

<sup>57</sup> The alternative approaches are described in Kohn et al., *supra* note 52, at 1124-26.

<sup>58</sup> Standards 5.2 and 5.3 (health care decisions); 6.1 (residential decisions).

under guardianship to participate in decisions,<sup>59</sup> and still other Standards require that the person's current preferences be at least considered.<sup>60</sup> The guardian or conservator must otherwise promote the self-determination of the person and exercise authority only as necessitated by the person's limitations.<sup>61</sup> Also, when possible, the conservator must assist the person to develop or regain the capacity to manage the person's financial affairs.<sup>62</sup>

But in many situations, the person under guardianship will be unable to participate in decisions. In that event, the Third Summit working groups on health care and residential decisions recommend that a guardian follow a multi-level test for making decisions that was derived originally from the case law of withholding or withdrawal of treatment.<sup>63</sup> The guardian must first act in accordance with the person's prior directions, expressed desires, and opinions, or to the extent those are unknown or ascertainable, must act in accordance with the person's prior general statements, actions, values and preferences, or to the extent these are also unknown or unascertainable, must act in the person's best interests.<sup>64</sup>

To implement this Standard, the Third Summit recommends that state statutes and the UGPPA be amended to emphasize a preference for self-determination and substituted judgment.<sup>65</sup> However, the Third Summit working group on financial decisions was less definitive in its advocacy of substituted judgment, suggesting that more of a balancing test should be applied. While the conservator must give priority to the needs and preferences of the person, the conservator must also weigh the costs and benefits to the estate and apply state law regarding prudent investment practices.<sup>66</sup>

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<sup>59</sup> *Id.* 4.4 (financial decisions); 5.1 and 5.2 (health care decisions); 6.1 (residential decisions).

<sup>60</sup> *Id.* 4.2 and 4.8 (financial decisions); 6.8 (residential decisions).

<sup>61</sup> *Id.* 4.1, 4.3 (financial decisions); 6.6 (residential decisions).

<sup>62</sup> *Id.* 4.5 (financial decisions).

<sup>63</sup> For the development of this test, see David M. English, *Defining the Right to Die*, 56 *Law & Contemp. Probs.* 255 (1993).

<sup>64</sup> Standard 5.3 (health care decisions). *See also* Standard 6.1 (residential decisions).

<sup>65</sup> Recommendation 1.5.

<sup>66</sup> Standard 4.8. The conservator must also consider current wishes, past practices, reliable evidence of likely choices, and best interests of the person. Standard 4.2.

The UGPPA already incorporates some of the above themes but in a manner less definitive than the Third Summit. The UGPPA makes no mention of person-centered planning or supported decision making, but there is considerable language supportive of a substituted judgment standard. A guardian or conservator may exercise authority only as necessitated by the ward's limitations, and, to the extent possible, must encourage persons under guardianship or conservatorship to participate in decisions, to act on their own behalf, and develop or regain capacity.<sup>67</sup> A guardian must also consider the person's expressed desires and personal values.<sup>68</sup> However, the language supportive of a substituted judgment standard is then subsumed within the general statement that "[a] guardian at all times shall act in the ward's best interest and exercise reasonable care, diligence, and prudence,"<sup>69</sup> implying that the ultimate test is best interests. At a minimum, the UGPPA should give increased weight to substituted judgment.<sup>70</sup>

On a different issue, the Third Summit requires a guardian to make a good faith effort to cooperate with other surrogate decision-makers for the person, such as a trustee or agent.<sup>71</sup> When different persons serve as guardian or conservator, failure of a guardian or conservator to work together can lead to deadlock.

#### 4. Health Care Decisions<sup>72</sup>

Under the UGPPA, the authority of a guardian to make health care decisions is limited to a brief reference in Section 314,<sup>73</sup> which is the Section specifying all of the duties of the guardian. The NGN Implementation Committee concluded that the subject of health care was important enough that it should be addressed in a separate statutory section. As mentioned in the previous section, the Third Summit recommends a multi-level test for health care decision-making.<sup>74</sup> First,

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<sup>67</sup> UGPPA (1997) §§ 314(a) (guardians), 418(b) (conservators).

<sup>68</sup> *Id.* § 314(a).

<sup>69</sup> *Id.*

<sup>70</sup> *See* Frolik & Whitton, *supra* note 13.

<sup>71</sup> Standard 1.3.

<sup>72</sup> For the background paper on this topic, see Kim Dayton, *Standards for Health Care Decision-Making: Legal and Practical Considerations*, 2012 Utah L. Rev. 1329.

<sup>73</sup> "Except as otherwise limited by the court, a guardian shall make decisions regarding the ward's support, care, education, health, and welfare." UGPPA (1997) § 314(a).

<sup>74</sup> *See supra* Part 3, Standards for Guardian Decisions.

the guardian is charged with maximizing the participation of the person under guardianship.<sup>75</sup> This includes encouraging and supporting the person under guardianship in understanding the facts and directing a decision.<sup>76</sup> If the person is unable to direct the decision, the Third Summit applies the three-part test described above of expressed wishes, substituted judgment, and finally best interests.<sup>77</sup> The best interests test includes consideration of consequences for others that an individual in the person's circumstances would consider.<sup>78</sup>

The Third Summit recommends that guardianship statutes be amended to provide that a health care power of attorney remains in effect unless the court determines that the agent is unable, unwilling, or unsuitable to perform the agent's duties.<sup>79</sup> This Recommendation is consistent with the UGPPA, which already addresses this subject in considerable detail. Under the UGPPA, if the principal has not nominated anyone, the agent is granted a priority for appointment as guardian or conservator.<sup>80</sup> To assure that the agent will be in a position to assert this priority, the UGPPA requires that the agent receive notice of the proceeding.<sup>81</sup> Furthermore, until the Court has acted to approve the revocation of that authority, the UGPPA provides that the authority of an agent for health-care decisions takes precedence over that of the guardian.<sup>82</sup> "The agent is granted a preference on the theory that the agent is the person the respondent would most likely prefer to act. The nomination of the agent will also make it more difficult for someone to use a guardianship to thwart the authority of the agent."<sup>83</sup>

## 5. Residential Decisions<sup>84</sup>

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<sup>75</sup> Standard 5.1.

<sup>76</sup> *Id.* 5.2(c).

<sup>77</sup> *Id.* 5.3.

<sup>78</sup> *Id.* 5.3(b).

<sup>79</sup> Recommendation 4.1.

<sup>80</sup> UGPPA (1997) § 310(a)(3) (guardians); § 413(a)(3) (conservators).

<sup>81</sup> *Id.* §§ 102(5), 304(b)(4), 309(b) (guardians); §§ 102(5), 403(b)(6), 404(b) (conservators)..

<sup>82</sup> *Id.* § 316(c) (guardians); § 411(d) (conservators).

<sup>83</sup> *Id.* § 310 comment.

<sup>84</sup> For the background paper on this topic, see Naomi Karp & Erica Wood, *Choosing Home for Someone Else: Guardian Residential Decision-Making*, 2012 Utah L. Rev. 1445.

The UGPPA empowers a guardian to take custody of the person under guardianship and to determine the person's place of physical residence.<sup>85</sup> The guardian must notify the court of any change in physical residence<sup>86</sup> but court approval is required only if the guardian seeks to establish the physical residence in another state.<sup>87</sup> Several of the Summit Standards on residential decisions are duplicative of the general standards for decisions discussed above. This includes deferring to the individual's wishes and otherwise (1) following the person's prior express wishes, if any, (2) making the decision the person would have wanted, if that can be ascertained, or (3) making the decision that is in the person's best interests.<sup>88</sup> The Summit Standards also include a requirement that the guardian implement a person-centered plan.<sup>89</sup> At a minimum, the guardian must ensure that the person participate in the planning process.<sup>90</sup>

Standards applicable specifically to residential decisions include a priority for home or other community-based placements,<sup>91</sup> a requirement that the guardian seek court review by the court or court-designated third party before moving the person to a more restrictive setting,<sup>92</sup> and a requirement that the guardian monitor the residential setting on an ongoing basis.<sup>93</sup> The Implementation Committee concluded that these Summit Standards require further discussion before a recommendation can be made on if and how to incorporate these standards on residential decisions into the UGPPA.

## **6. Financial Decisions<sup>94</sup>**

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<sup>85</sup> *Id.* § 315(a)(2).

<sup>86</sup> *Id.* § 314(a)(6)

<sup>87</sup> *Id.* § 315(a)(2).

<sup>88</sup> Standard 6.1.

<sup>89</sup> *Id.* 6.4. This Standard is similar to *id.* 1.1.

<sup>90</sup> *Id.* 6.5.

<sup>91</sup> *Id.* 6.3.

<sup>92</sup> *Id.* 6.7.

<sup>93</sup> *Id.* 6.8.

<sup>94</sup> For the background paper on this topic, see Robert B. Fleming & Rebecca C. Morgan, *Standards for Financial Decision-Making: Legal, Ethical, and Practical Issues*, 2012 Utah L. Rev. 1275.

Many of the Standards recommended for guardians also apply to conservators. The conservator must manage the financial affairs of the protected person in a way that maximizes the dignity, autonomy, and self-determination of the person.<sup>95</sup> A conservator must promote the self-determination of the person and exercise authority only as necessitated by the limitations of the person.<sup>96</sup> The conservator shall encourage and assist the person to act on his or her own behalf and to participate in decisions.<sup>97</sup> When possible, the conservator shall assist the person to develop or regain the capacity to manage the person's financial affairs.<sup>98</sup> The UGPPA already contains similar language.<sup>99</sup>

More generally, while the conservator is directed to give priority to the needs and preferences of the person when making decisions, the Summit Standards require that the conservator also consider the costs and benefits to the estate and the law regarding prudent investment practices.<sup>100</sup> This Standard diverges from the decision-making standards for health care,<sup>101</sup> for residential decisions,<sup>102</sup> and from the decision-making standard for guardians in general,<sup>103</sup> all of which give greater weight to making a decision in accordance with the person's current and past preferences.

The UGPPA provisions on conservators are located in Article 4. Although some of these provisions were updated in the 1997 revision, many of them date back to the original 1969 Act. Since 1969, the ULC has approved several major fiduciary Acts, including the Uniform Prudent Investor Act of 1994,<sup>104</sup> the Uniform Trust Code of 2000,<sup>105</sup> and the Uniform Power of Attorney

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<sup>95</sup> Standard 4.1.

<sup>96</sup> *Id.* 4.3.

<sup>97</sup> *Id.* 4.4.

<sup>98</sup> *Id.* 4.5.

<sup>99</sup> *See* UGPPA (1997) § 418(b).

<sup>100</sup> Standard 4.8.

<sup>101</sup> *Id.* 5.1-5.3.

<sup>102</sup> *Id.* 6.1.

<sup>103</sup> Recommendation 1.5.

<sup>104</sup> For background on this Act, see John H. Langbein, *The Uniform Prudent Investor Act and the Future of Trust Investing*, 81 Iowa L. Rev. 641 (1996).

Act of 2006.<sup>106</sup> These other more modern acts should be consulted in the current project to update the UGPPA.

The Third Summit recommended that state guardianship statutes specify the mandatory duties of the guardian with respect to financial decisions and do so with greater clarity.<sup>107</sup> The UGPPA specifies the conservator's duties with respect to the filing of plans,<sup>108</sup> inventories,<sup>109</sup> and annual reports.<sup>110</sup> It also specifies in detail the duties of the conservator with respect to distributions.<sup>111</sup> But the UGPPA is otherwise quite cryptic in describing the conservator's fiduciary duties. Under the UGPPA, the overriding obligation of the conservator is to observe the standards of care applicable to trustees.<sup>112</sup> This would seem to imply that at a minimum the conservator has a general obligation to act with prudence.<sup>113</sup> However, it is uncertain to what extent the "standards of care applicable to trustees" subjects the conservator to the specific provisions of the Uniform Prudent Investor Act and the many other duties of the trustee, such as the many duties codified in the Uniform Trust Code.<sup>114</sup>

The Uniform Power of Attorney Act, which was approved in 2006, may offer a path forward. The predecessor Uniform Durable Power of Attorney Act was quite short,<sup>115</sup> largely

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<sup>105</sup> For background on this Act, see David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 Mo. L. Rev. 143 (2002).

<sup>106</sup> For background on this Act, see Linda S. Whitton, *Navigating the Uniform Power of Attorney Act*, 3 NAELA J. 1 (2007).

<sup>107</sup> Recommendations 1.1, 1.3.

<sup>108</sup> UGPPA (1997) § 418(c).

<sup>109</sup> *Id.* (1997) § 419(a).

<sup>110</sup> *Id.* § 420.

<sup>111</sup> *Id.* § 427.

<sup>112</sup> *Id.* § 418(a).

<sup>113</sup> For the obligation of a trustee to act with prudence, see Unif. Trust Code (2000) § 804.

<sup>114</sup> See David English, *The Fiduciary Duties and Powers of a Trustee Under the Uniform Trust Code*, 20 Trusts & Trustees 52 (2014).

<sup>115</sup> The text of the predecessor Uniform Durable Power of Attorney Act is available at <http://uniformlaws.org/Act.aspx?title=Durable+Power+of+Attorney> (last visited Feb. 14, 2015).

leaving the duties of the agent to the common law of agency. Under the 2006 Act, the duties of the agent are specified in detail. While other Acts like the Uniform Trust Code served as a model, the Power of Attorney Act modifies these duties in a way appropriate for agents.<sup>116</sup> It is suggested that the drafting committee to the UGPPA consider the same process. The duties of a conservator under the UGPPA should be made more complete. While the other Uniform Acts can serve as models, provisions borrowed from these other Acts should be modified in a way appropriate for conservators.

The Third Summit recommended a number of other Standards relating to financial decisions. The Third Summit recommends that a conservator be able to delegate responsibilities as appropriate to people with appropriate expertise.<sup>117</sup> The UGPPA already contains a delegation provision,<sup>118</sup> which was copied from the comparable provision of the Uniform Prudent Investor Act.<sup>119</sup> The Third Summit report contains a standard for when a conservator may or may not enter into a transaction that involves a conflict of interest or self-dealing.<sup>120</sup> The UPGGA already contains a provision specifying when transactions with close family and other affiliated parties are presumed to be a violation<sup>121</sup> but it does not deal with the subject more generally as does the Uniform Trust Code.<sup>122</sup>

An important issue for a prospective conservator is whether the conservator will be required to furnish bond, which normally involves the purchase of a fiduciary bond from a surety company, an expense that will be charged to the estate. The Third Summit report contains a Standard requiring that a conservator take all steps necessary to obtain a bond to protect the estate.<sup>123</sup> Under the UGPPA, bond is discretionary with the court.<sup>124</sup> The US state guardianship

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<sup>116</sup> See Linda W. Whitton, *Durable Powers as an Alternative to Guardianship: Lesson We Have Learned*, 37 Stetson L. Rev. 7, 23-34 (2007).

<sup>117</sup> Standard 4.12.

<sup>118</sup> UGPPA (1997) § 426.

<sup>119</sup> Unif. Prudent Investor Act (1994) § 9.

<sup>120</sup> Standard 4.7.

<sup>121</sup> UGPPA (1997) § 423.

<sup>122</sup> See Unif. Trust Code (2000) § 802 (amended 2003).

<sup>123</sup> Standard 4.9.

<sup>124</sup> See UGPPA (2007) § 415.

and conservatorship statutes are split over whether bond is required.<sup>125</sup> Waiving bond can save considerable expense. On the other hand, without a bond there may be no protection against loss if the conservator lacks personal assets. The National College of Probate Judges recently recommended that bond be required, reversing its prior position that the issue of bond should be left to the discretion of the court.<sup>126</sup>

## 7. Guardian Fees<sup>127</sup>

The UGPPA provides that a guardian or conservator is entitled to reasonable compensation,<sup>128</sup> which is the approach taken in a majority of US states.<sup>129</sup> The UGPPA does not specify the factors the court must consider in setting compensation. Instead, that issue is addressed in the official comment which lists factors relevant to fiduciaries generally.<sup>130</sup> The Third Summit working group on fees developed a long list of factors tailored to guardianship.<sup>131</sup> That list should be considered for the official comment to the UGPPA if not for the statute itself.

Even if reasonable, the amount of compensation can be a surprise if there is a lack of advance notice. For this reason, the Third Summit recommends that a guardian: (1) disclose in writing the basis for fees at the time of the guardian's appointment, (2) disclose a projection of annual fiduciary fees within 90 days of appointment; and (3) disclose fee changes.<sup>132</sup> Requiring

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<sup>125</sup> See Katherine Gorski, *Conservatorship and Guardianship Bonds: State Statutory Requirements*, 35 BiFocal 133 (2014), available at [www.americanbar.org/groups/law\\_aging.html](http://www.americanbar.org/groups/law_aging.html) (last visited Feb. 15, 2015).

<sup>126</sup> See Nat'l Probate Court Standard 3.3.15 (2d ed. 2013), available at <http://nscs.contentdm.oclc.org/cdm/ref/collection/spcts/id/240> (last visited Feb. 15, 2015).

<sup>127</sup> For the background article on this topic, see Catherine Seal & Spencer Crona, *Standards for Guardian Fees*, 2012 Utah L. Rev. 1575.

<sup>128</sup> UGPPA (1997) § 417.

<sup>129</sup> For the state statutes, see Seal & Crona, *supra* note 127 at 1604-10.

<sup>130</sup> UGPPA (1997) § 417 comment. Citing the Restatement (Third) of Trusts, § 38 cmt. c (2003), the official comment provides: "Among the factors listed are skill, experience and time devoted to duties; the amount and character of the property; the degree of difficulty; responsibility and risk assumed; the nature and cost of services rendered by others; and the quality of the performance."

<sup>131</sup> Recommendation 3.2.

<sup>132</sup> Standard 3.1.

that the guardian project annual fees could be problematic. It is often difficult for guardians to estimate how much time will be required until they have had a chance to assess the situation following appointment. Also, the condition and needs of the person under guardianship may change.

Unless the size of the estate is substantial, the expenses of providing for the care of the person under conservatorship will often exceed the available income. Properly managing a depleting estate is a significant challenge. Even with careful management, estates will often become exhausted. The Third Summit report recommends that the guardian report to the court the likelihood that funds will be exhausted.<sup>133</sup> This requirement could certainly be added to the plans and annual reports already required under the UGPPA.<sup>134</sup> But if the funds run out, the Third Summit report recommends that the guardian be required to remain in office if the guardian has failed to raise the issue of exhaustion of assets with the court and has failed to make appropriate succession plans.<sup>135</sup> The shortage of available guardians for those of modest means is not a problem that a statute alone can solve.

## Conclusion

The revision of the UGPPA will be at least a two-year process. The project will not be completed until 2017 at the earliest. Hopefully, the drafting committee will produce a consensus product that many US states will enact. But even where not enacted, the UGPPA in its current version has greatly influenced the development of US guardianship law. What often counts the most are the ideas expressed, not the exact statutory wording. Hopefully, even if the exact wording is not adopted, the ideas expressed in this newest UGPPA revision will influence guardianship reform far into the future.

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<sup>133</sup> *Id.* 3.2.

<sup>134</sup> UGPPA (1997) § 317 (guardians); §§ 418, 420 (conservators).

<sup>135</sup> Standard 3.2.

## APPENDIX A

### **Third National Guardianship Summit Standards/Recommendations**

#### **Standards/Recommendations Relevant to Amendment of UGPPA**

Omitted are standards/recommendations that are not statutory in nature, including those relating to best practices, education of guardians, and the recommendations relating to the formation by states of Working Interdisciplinary Networks of Guardianship Stakeholders (WINGS).

The Comments written below each of the Standards and Recommendations were written by David English and Linda Whitton, who comprised the subcommittee of the National Guardianship Network charged with determining which of the Standards and Recommendations should be considered in the revision of the UGPPA.

#### **Standards**

##### **1. Core Standards**

###### **Standard 1.1**

The guardian shall develop and implement a plan setting forth short-term and long-term goals for meeting the needs of the person.

- Plans shall emphasize a person-centered philosophy.

Comment: Revise § 317 to incorporate standard; create new Section in Art. 4 that incorporates this requirement and the other inventory and reporting requirements from §418.

###### **Standard 1.3**

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, conservator, agent under a power of attorney, health care proxy, trustee, VA fiduciary and representative payee.

Comment: Revise §§ 314 and 418 to include this objective in an expanded list of duties (see Uniform Power of Attorney Act § 114(b) for similar construct)

###### **Standard 1.4**

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.

Comment: Revise §§ 318 and 431 to track.

##### **2. Guardian's Relationship to the Court**

### Standard 2.2

The guardian and conservator shall keep the court informed about the well-being of the person and the status of the estate through personal care and financial plans, inventory and appraisals, and annual reports and accountings.

Comment : Same recommendation as for Standard 1.1. However, do not require mandatory appraisals—too costly and will drain the assets of the guardianship estate.

### Standard 2.3

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

Comment: Consider adding a statutory provision that would permit a court to grant a guardian the authority to temporarily delegate the guardian's powers. See Uniform Power of Attorney Act §201(a) for similar construct.

## 3. Fees

### Standard 3.1

The guardian, as a fiduciary, shall:

- Disclose in writing the basis for fees (e.g., rate schedule) at the time of the guardian's first appearance in the action
- Disclose a projection of annual fiduciary fees within 90 days of appointment
- Disclose fee changes
- Seek authorization for fee-generating actions not contained in the fiduciary's appointment
- Disclose a detailed explanation for any claim for fiduciary fees.

Comment: Revise § 417 to include these requirements, but perhaps without requiring that guardian attempt to project annual fiduciary fees.

### Standard 3.2

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 funds are exhausted in cases in which the spend-down occurred over several reporting periods and the guardian failed to address the probability of exhaustion with the court and failed to make appropriate succession plans.

Comment: The objective of the first sentence could be handled in the reporting provisions discussed in the recommended revisions for Standard 1.1. The objectives of the second sentence might not be achievable by statute.

## 4. Financial Decision-Making

Comment: Recommend statutory revision to § 418 to incorporate Standards 4.1 thru 4.5. In some instances alternate paragraphs will be needed to distinguish between conservators for adults and conservators for minors.

Standard 4.1

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

Standard 4.2

The conservator shall consider current wishes, past practices, reliable evidence of likely choices, and best interests of the person.

Standard 4.3

A conservator shall, consistent with court order and state statutes, promote the self-determination of the person and exercise authority only as necessitated by the limitations of the person.

Standard 4.4

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

Standard 4.5

When possible, the conservator shall assist the person to develop or regain the capacity to manage the person's financial affairs. The conservator's goal shall be to manage but not necessarily eliminate risk.

Standard 4.7

The conservator shall avoid all conflicts of interest and self-dealing, and all appearances of conflicts of interests and self-dealing.

- [portion of Standard 4.7 not statutory in nature omitted]
- The conservator may enter into a transaction that may be a conflict of interest or self-dealing only when necessary, or when there is a significant benefit to the person under the conservatorship, and shall disclose such transactions to interested parties and obtain prior court approval.

Comment: Recommend including provisions dealing with conflicts of interest in revised §§ 314 & 418. The objectives covered in current § 423 should be moved to § 418. See Uniform Trust Code § 802 and Uniform Power of Attorney Act § 114 for similar constructs.

Standard 4.8

The conservator shall, when making decisions regarding investing, spending, and management of the income and assets, including asset recovery:

- Give priority to the needs and preferences of the person

- Weigh the costs and benefits to the estate
- Apply state law regarding prudent investment practices.

Comment: §§ 418 and 425 should be revised accordingly.

Standard 4.9

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

Comment: To be realistic, a mandatory bond provision should include court discretion to grant exceptions.

Standard 4.12

The conservator shall, as appropriate for the estate, implement best practices of a prudent conservator, including responsible consultation with and delegation to people with appropriate expertise.

Comment: Include in duties in revised § 418.

**5. Health Care Decision-Making**

Comment: Need new separate statutory section for health standards.

Standard 5.1

The guardian, in making health care decisions or seeking court approval for a decision, shall maximize the participation of the person.

Standard 5.2

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

- Acquire a clear understanding of the medical facts
- Acquire a clear understanding of the health care options and risks and benefits of each
- Encourage and support the individual in understanding the facts and directing a decision.

Standard 5.3

To the extent the person cannot currently direct the decision, the guardian shall act in accordance with the person's prior directions, expressed desires, and opinions about health care to the extent actually known or ascertainable by the guardian; or, if unknown and unascertainable,

- Act in accordance with the person's prior general statements, actions, values and preferences to the extent actually known or ascertainable by the guardian; or, if unknown and unascertainable,
- 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.

In the event of an emergency, the guardian shall grant or deny authorization of emergency health care treatment based on a reasonable assessment of the criteria listed in Standard 5.2.

## **6. Residential Decision-Making**

### Standard 6.1

The guardian shall identify and advocate for the person's goals, needs, and preferences. Goals are what are important to the person about where he or she lives, whereas preferences are specific expressions of choice

- First, the guardian shall ask the person what he or she wants.
- 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.
- Third, only when the person, even with assistance, cannot express his or her goals and preferences, the guardian shall seek input from others familiar with the person to determine what the individual would have wanted.
- Finally, only when the person's goals and preferences cannot be ascertained, the guardian shall make a decision in the person's best interest.

Comment: Above objectives should be covered in the omnibus decision-making standards in revised §§ 314 & 418.

### Standard 6.3

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

Comment: This is also appropriate for Practice and Education.

### Standard 6.4

The guardian shall make and implement a person-centered 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.

Comment: This standard is similar to Standard 1.1. This standard is also appropriate for Practice and Education.

### Standard 6.5

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

Comment: In lieu of adding this entire Standard in the statute, the statement of revised decision-making standards in §§ 314 & 418 could include examples of the types of decisions to which such standards apply (e.g., residential, financial, etc.). This Standard is also appropriate for Practice and Education.

#### Standard 6.6

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

Comment: Should be covered in §§ 314 & 418.

#### Standard 6.7

The guardian shall seek review by a court or other court-designated third party with no conflict of interest before a move to a more restrictive setting.

Comment: This standard requires further discussion before a recommendation can be made.

#### Standard 6.8

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, preferences, and needs including but not limited to:

- Evaluating the plan; enforcing residents' rights, legal and civil rights; ensuring quality of care and appropriateness of the setting in light of the feelings and attitudes of the person; and
- Exploring alternative opportunities for long-term services and supports where necessary to better fulfill the person's goals and preferences.

Comment: This standard requires further discussion before a recommendation can be made.

## **Recommendations**

### **1. Overview of Guardian Standards**

#### Recommendation 1.1

State statutes should set forth the mandatory duties of guardians. Court or administrative rules should set forth guardian standards.

Comment: Should be covered in §§ 314 & 418.

#### Recommendation 1.3

State statutes should clearly express guardian duties and apply the duties to all guardians.

These duties should be enumerated in a clear and succinct statement supplied to guardians at time of appointment.

- These duties should be enumerated in guardian training materials.
- The guardian must acknowledge, in writing, receipt of the information.

Comment: Should be covered in §§ 314 & 418.

#### Recommendation 1.4

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.

Comment: Should be covered in §§ 314 & 418 (see Uniform Trust Code and Uniform Power of Attorney Act for similar constructs)

#### Recommendation 1.5

States should adopt by statute a decision-making standard that provides guidance for using substituted judgment and best interest principles in guardian decisions.

- These standards should emphasize self-determination and the preference for substituted judgment.
- The Uniform Guardianship and Protective Proceedings Act should be revised to embody these objectives.

Comment: Should be covered in §§ 314 & 418.

#### Recommendation 1.7

Where possible, the term person under guardianship should replace terms such as incapacitated person, ward, or disabled person.

Comment: This standard requires further discussion before a recommendation can be made.

## **#2. Guardian's Relationship to the Court**

#### Recommendation 2.2

The court should issue orders that implement the least restrictive alternative and maximize the person's right to self-determination and autonomy.

- The court should develop a protocol to obtain an accurate and detailed assessment of the person's functional limitations.
- The court should conduct a factual investigation and review the assessment to determine the rights to be retained by the person and the powers to be granted to the guardian.
- The factual investigation may include contact with the person, interviews with interested persons and family members, and discussions with court-appointed attorneys and court evaluators or any other court representative.

Comment: Revise §§ 311(b) & 409(b).

#### Recommendation 2.3

The court should monitor the well-being of the person and status of the estate on an on-going basis, including, but not limited to:

- Determining whether less restrictive alternatives will suffice
- Monitoring the filing of plans, reports, inventories and accountings
- Reviewing the contents of plans, reports, inventories and accounting
- Independently investigating the wellbeing of the person and status of the estate
- Ensuring the well-being of the person and status of the estate, improving the performance of the guardian, and enforcing the terms of the guardianship order.

Comment: Revise §§ 317(c) & 420(d).

### **3. Fees**

#### Recommendation 3.2

Guardians should be entitled to reasonable compensation for their services. The court should consider these factors in determining the reasonableness of guardian fees:

- Powers and responsibilities under the court appointment
- Necessity of the services
- 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
- The guardian's expertise, training, education, experience, professional standing, and skill, including whether an appointment in a particular matter precluded other employment
- The character of the work to be done, including difficulty, intricacy, importance, time, skill, or license required, or responsibility undertaken
- The conditions or circumstances of the work, including emergency matters requiring urgent attention, services provided outside of regular business hours, potential danger (e.g., hazardous materials, contaminated real property, or dangerous persons), or other extraordinary conditions
- 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 better, cheaper or faster rendered the service
- The result, specifically whether the guardian was successful, what benefits to the person were derived from the efforts, and whether probable benefits exceeded costs
- Whether the guardian timely disclosed that a projected cost was likely to exceed the probable benefit, affording the court an opportunity to modify its order in furtherance of the best interest of the estate
- 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. The degree of financial or professional risk and responsibility assumed

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

Comment: Reduce recommendations to core principles; revise § 417 to include; construct comparable paragraph for Art. 3.

#### Recommendation 3.4

In the event estate funds are exhausted and the guardian has failed to address the anticipated exhaustion, the court is justified in requiring the guardian to remain serving at least until a succession plan is in place.

Comment: Consider adding a resignation provision in Article 3 and Article 4.

## **4. Health Care Decision-Making**

### Recommendation 4.1

State guardianship statutes should provide that valid health care directives that appoint a health care agent shall remain in effect unless the court determines that the agent is unable, unwilling, or unsuitable to perform the agent's duties under the directive.

Comment: This should be included in the new section on Health Care Decisions. Current § 316(c) should also be included in the new section.