

## GUARDIAN ACCOUNTABILITY THEN AND NOW: TRACING TENETS FOR AN ACTIVE COURT ROLE

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Adult guardianship can be viewed as having a “front end” (the determination of incapacity and appointment of a guardian) and a “back end” (accountability of the guardian and court monitoring). The Associated Press, in its landmark 1987 report *Guardians of the Elderly: An Ailing System* disparaged both.<sup>1</sup> It

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1. *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. Print 100-639, at 13–39 (Dec. 1987).

charged that guardianship in the United States “regularly puts elderly lives in the hands of others with little or no evidence of necessity, then fails to guard against abuse, theft and neglect.”<sup>2</sup> The guardianship system cannot function effectively unless both “ends” are in working order. This paper is about the “back end.” The Authors review the Associated Press’s charge, the 1988 American Bar Association (ABA) Wingspread conference recommendations on guardianship monitoring,<sup>3</sup> and what has occurred since then. It asks where we stand now, what barriers block effective monitoring, and what imaginative, yet practical steps we can take to bolster guardian accountability.

### I. BACKGROUND

The Associated Press Report (AP Report) released in September 1987 was a clear indictment of the guardianship monitoring process by probate- and general-jurisdiction courts throughout the country. Its examination of 2200 randomly selected guardianship court files showed that forty-eight percent of the files were missing at least one annual accounting; only sixteen percent of the files had personal-status reports on the incapacitated person; and thirteen percent of the files were empty, except for the opening of the guardianship.<sup>4</sup> The report, replete with poignant anecdotes, contended that “overworked and understaffed court systems frequently break down, abandoning those incapable of caring for themselves,” and that courts “routinely take the word of guardians and attorneys without

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2. Fred Bayles & Scott McCartney, *Declared “Legally Dead” by a Troubled System*, in *Guardians of the Elderly: An Ailing System*, AP Special Report, in *Abuses in Guardianship of the Elderly and Infirm: A National Disgrace*, H.R. Comm. Print 100-639, at 13.

3. ABA Commn. on the Mentally Disabled & Commn. on Leg. Problems of the Elderly, *Guardianship: An Agenda for Reform — Recommendations of the National Guardianship Symposium and Policy of the American Bar Association* (ABA 1989) [hereinafter *Wingspread Recommendations*]. The conference, sponsored by the ABA Commissions on the Mentally Disabled and Legal Problems of the Elderly, is known informally as the “Wingspread” conference, after the Johnson Foundation’s Wingspread Conference Center in Wisconsin where the conference was held.

4. *AP Turned to Legal Counsel to Gain Access to Guardianship Files*, AP Special Report, in *Abuses in Guardianship of the Elderly and Infirm: A National Disgrace*, H.R. Comm. Print 100-639, at 19; Bayles & McCartney, *supra* n. 2; Fred Bayles & Scott McCartney, *Part III: Lack of Safeguards Leaves Elderly at Risk*, in *Guardians of the Elderly: An Ailing System*, AP Report, in *Abuses in Guardianship of the Elderly and Infirm: A National Disgrace*, H.R. Comm. Print 100-639, at 31-32 [hereinafter Bayles & McCartney, *Lack of Safeguards*].

independent checking or full hearings.”<sup>5</sup> In short, it claimed that, sometimes, the courts responsible for overseeing guardianship cases “ignore their wards.”<sup>6</sup>

The AP Report triggered the ABA’s interdisciplinary Wingspread conference the following year. Wingspread drew on the expertise of thirty-eight invited participants — judges, attorneys, guardianship-service providers, physicians, aging-network staff, mental-health experts, ethicists, academicians, and others.<sup>7</sup> The conference included a working group on accountability of guardians, which made six recommendations that were adopted by the plenary and later endorsed by the ABA House of Delegates as Association policy.<sup>8</sup> These recommendations were built on monitoring provisions in two earlier ABA efforts — the 1979 Model Guardianship and Conservatorship Statute<sup>9</sup> and the 1986 *Statement of Recommended Judicial Practices*, which was adopted by the National Conference of the Judiciary on Guardianship Proceedings for the Elderly.<sup>10</sup>

In turn, the Wingspread recommendations launched a comprehensive study of guardianship monitoring by the ABA Commission on the Mentally Disabled and the Commission on Legal Problems of the Elderly with support from the State Justice Institute (SJI).<sup>11</sup> The 1991 study included a national survey of monitoring practices and six intensive site visits.<sup>12</sup> The resulting report outlined ten recommended “monitoring steps” drawn from actual practices that were in place and working in diverse jurisdictions.<sup>13</sup>

At the same time, two additional SJI-funded projects shed further light on the monitoring process. The Legal Counsel for the Elderly at the American Association of Retired Persons (now

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5. Bayles & McCartney, *supra* n. 2; Bayles & McCartney, *Lack of Safeguards*, *supra* n. 4, at 31.

6. Bayles & McCartney, *Lack of Safeguards*, *supra* n. 4.

7. ABA Commn. on the Mentally Disabled & Commn. on Leg. Problems of the Elderly, *supra* n. 3, at iv.

8. *Id.*

9. Model Guardianship & Conservatorship Stat. (1979) (reprinted in Bruce Sales et al., *Disabled Persons and the Law: State Legislative Issues* (Plenum Press 1982)).

10. *Statement of Recommended Judicial Practices* (Erica F. Wood, compiler, ABA Commn. on Leg. Problems of the Elderly & Natl. Jud. College 1986).

11. Sally Balch Hurme, *Steps to Enhance Guardianship Monitoring* 10–11 (ABA 1991).

12. *Id.*

13. *Id.* at 1–3.

AARP) initiated a National Guardianship Monitoring Project featuring the use of trained volunteers to be the “eyes and ears” of the court and serving as court visitors, auditors, and records researchers.<sup>14</sup> AARP supported the program for seven years, fostering volunteer monitoring projects in fifty-three courts throughout the country.<sup>15</sup> The School of Law and the School of Medicine at St. Louis University developed a national model for judicial review of guardians’ performance, based on “a statutory, operations, cost, and outcome analysis of monitoring in six courts reputed to be conducting effective monitoring.”<sup>16</sup>

In 1993, the *National Probate Court Standards* provided clear procedures for guardianship monitoring.<sup>17</sup> In 1997, the revision of the Uniform Guardianship and Protective Proceedings Act included a section on reports and monitoring,<sup>18</sup> and the commentary highlighted the importance of “[a]n independent monitoring system . . . for a court to adequately safeguard against abuses.”<sup>19</sup> During the 1990s, the rush to update state guardianship laws included an emphasis on accountability and monitoring, with many jurisdictions making changes in the use of bonds, the frequency and content of accountings and guardian reports, the nature of court review, and sanctions for guardians who breach their fiduciary duty or fail to report to the court.<sup>20</sup>

Despite these advances, a recent flurry of newspaper headlines highlights instances in which monitoring procedures remain lax and incapacitated persons are subject to risk. The *Rocky Mountain News* series “Stolen Blind” examined problems in the Denver court.<sup>21</sup> The *Detroit Free Press* asked, “Who Is

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14. Susan Miler & Sally Balch Hurme, *Guardianship Monitoring: An Advocate’s Role*, 25 Clearinghouse Rev. 654, 654–655 (1991).

15. Morris A. Fred, *Illinois Guardianship Reform Project: Final Report* 32 (Equip for Equality 2001).

16. George Zimny et al., *A National Model for Judicial Review of Guardians’ Performance: Final Report* (Sch. of L. & Sch. of Med., St. Louis Univ. 1991).

17. Commn. on Natl. Prob. Ct. Stands., *National Probate Court Standards* (Natl. Ctr. for St. Cts. 1993).

18. Unif. Guardianship & Protective Proc. Act §§ 317, 420, 8A U.L.A. §§ 5-317, 5-420 (West Supp. 2001).

19. *Id.* § 317 cmt.

20. *Infra* app. A (Sally Balch Hurme & Erica Wood, *Monitoring Following Guardianship Proceedings* (ABA Commn. on Leg. Problems of the Elderly 2001)).

21. Lou Kilzer & Sue Lindsay, *Rocky Mountain News, The Probate Pit: Busted System, Broken Lives* <[http://rockymountainnews.com/drmn/local/article/0,1299,DRMN\\_15\\_246760,00.html](http://rockymountainnews.com/drmn/local/article/0,1299,DRMN_15_246760,00.html)> (Apr. 7, 2001).

Watching the Guardians?”<sup>22</sup> In Arizona, the headline read, “Checks and Imbalances: How the State’s Leading Private Fiduciary Helped Herself to Funds of the Helpless.”<sup>23</sup> The *New York Daily News* reported on “Seniors Taken for Millions: Lawyers Rack Up Fat Fees as Guardians to the Helpless.”<sup>24</sup> An extensive article in the *California Bar Journal* details the difficulty an attorney, conservator, and private detective had in getting action on widespread abuse.<sup>25</sup> The press stories are an indication that, although the standards and statutes may be in place, the practices may be lagging behind — there is a gap between the paper and the reality, or as one expert in the AP Report put it over a decade earlier, “There’s the way it should be, and there’s the way it is.”<sup>26</sup>

Although it may be that these are isolated instances and that most guardians are well-intentioned, there is little data upon which to draw valid conclusions on the effectiveness of the laws, the frequency of abuses, or the quality of guardianship services. Moreover, as the population continues to age, guardianship caseloads will grow and the need for monitoring will intensify.

Although some courts may be reluctant to devote scarce resources to monitoring, reasons for doing so are convincing. First, historically courts have had a *parens patriae* duty to protect those unable to care for themselves.<sup>27</sup> *Parens patriae* is the fundamental basis for guardianship and the primary justification for curtailing civil rights. The court appoints the guardian to carry out this duty and the guardian is a fiduciary bound to the highest standards.<sup>28</sup> “In reality,” observed one judge, “the court is

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22. Wendy Wendland-Bowyer, *Detroit Free Press*, *Who’s Watching the Guardians?* <[http://www.freepress.com/news/mich/guard24\\_20000524.htm](http://www.freepress.com/news/mich/guard24_20000524.htm)> (May 24, 2000).

23. Paul Rubin, *Phoenix New Times*, *Checks & Imbalances: How the State’s Leading Private Fiduciary Helped Herself to the Funds of the Helpless* <<http://www.phoenixnewtimes.com/issues/2000-06-15/feature2.html>> (June 15, 2000).

24. Thomas Zambito, Russ Buettner & Joe Calderone, *New York Daily News*, *Seniors Taken For Millions: Lawyers Rack up Fat Fees As Guardians to the Helpless* <<http://www.nydailynews.com/archives.html>> (May 20, 2001).

25. Christopher Manes, *Guardian Angels*, *Cal. Law.* 35, 35–36 (Jan. 2000).

26. Bayles & McCartney, *Lack of Safeguards*, *supra* n. 4, at 33.

27. Michael D. Casasanto et al., *A Model Code of Ethics for Guardians* (Natl. Guardianship Assn. (NGA) 1988) (available online at NGA, *NGA Membership, Publications* <<http://www.guardianship.org/pdf/ModelCodeofEthics.PDF>> (accessed Jan. 1, 2002)). The publication is also available from the NGA, 1604 North County Club Road, Tucson AZ 85716-3102.

28. *Id.*

the guardian; an individual who is given that title is merely an agent or arm of that tribunal in carrying out its sacred responsibility."<sup>29</sup> Second, unlike with decedents' estates, the incapacitated person is a living being whose needs may change over time. This argues for a more active court role in oversight. Third, monitoring can be good for the guardian by offering guidance and support in the undertaking of a daunting role. Fourth, monitoring can be good for the court by providing a means of tracking guardianship cases and gauging the effect of court orders. Finally, monitoring can boost the court's image and inspire public confidence.

With all of these rationales in mind, this paper traces the history and status of eight related elements of guardianship-accountability and monitoring: (1) guardian orientation and training; (2) guardian standards, licensing, and certification; (3) guardianship plans; (4) guardian reports; (5) court review; (6) the role of judges; (7) public awareness; and (8) funding.

## II. GUARDIAN ORIENTATION AND TRAINING

### A. History

Serving as a guardian is "one of society's most serious and demanding roles."<sup>30</sup> As the Wingspread report observed,

[A] good guardian [must] be knowledgeable about housing and long-term care options, community resources, protection and preservation of the estate, accounting, medical and psychological treatment, public benefits and communication with elderly and disabled individuals. A guardian should develop advocacy skills; assume "case management" functions; monitor the ward's living situation; make decisions that are, to the greatest extent possible, in accord with the ward's values; avoid any conflict of interest; and regularly report to the court.<sup>31</sup>

In light of the knowledge and skills that every guardian should manifest, the Wingspread conferees identified three provisions that would improve guardian performance and accountability:

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29. *Kicherer v. Kicherer*, 400 A.2d 1097, 1100 (Md. 1979).

30. *Wingspread Recommendations*, *supra* n. 3, at 23.

31. *Id.*

**Model Training Materials** – Model guardian training and orientation handbooks and videos should be developed and distributed for use at the state level.

**Mandatory Guardian Training** – Before a guardianship order is signed, the judge should require that, at a minimum, the guardian see any video and read any handbook the court has prepared or endorsed.

**Ongoing Assistance** – The court should develop programs for ongoing training and assistance of guardians.<sup>32</sup>

At the time of Wingspread, orientation or training materials for guardians were “lacking, quantitatively as well as qualitatively.”<sup>33</sup> Twenty-eight probate judges surveyed in 1986 reported that in eighty percent of their jurisdictions, no training was available. In the remaining twenty percent of jurisdictions, guardians could receive an instruction sheet or brief instructions from the clerks.<sup>34</sup> The 1986 *Statement of Recommended Judicial Practices* likewise called upon courts to “encourage orientation, training and ongoing technical assistance for guardians,” including an outline of a guardian’s duties and information concerning the availability of community resources.<sup>35</sup>

The call for court-supported training was repeated in the 1991 ABA recommendations to enhance guardianship monitoring.<sup>36</sup> By “[p]roviding the guardian[s] with written instructions, training sessions and/or videos explaining the guardian[s]’ responsibilities,”<sup>37</sup> courts would facilitate the guardian’s reporting and other fiduciary responsibilities. Out of 197 guardianship practitioners surveyed in 1990 in preparation for making these recommendations, ninety-five chose lack of guardianship training as a serious problem, with fifty-five identifying it as the most important monitoring problem.<sup>38</sup> Despite the perceived importance of training, these same practitioners, representing twenty-five states, reported that little

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32. *Id.* at 23 Recommendation V-A.

33. *Id.* at 23 Recommendation V-A commentary.

34. *Id.* The ABA Commission on Legal Problems of the Elderly conducted the study and surveyed twenty-eight probate court judges. *Id.*

35. ABA Commn. on Leg. Problems of the Elderly & Natl. Jud. College, *supra* n. 10, at 53, § IV(B)(1).

36. Hurme, *supra* n. 11, at 25, step III.

37. *Id.*

38. *Id.* at 28.

training assistance was available in their jurisdictions.<sup>39</sup> When asked to rate on a scale of 1 (lowest) to 6 (highest) the availability of assistance to guardians, the average score was below 3.<sup>40</sup> Similarly, Wisconsin probate registers surveyed in 1989 by the Center for Public Representation found that the single largest problem in the Wisconsin guardianship system was “untrained, uninformed guardians — who are not properly prepared to fulfill their responsibilities on behalf of their wards.”<sup>41</sup>

### B. State Recommendations

Typically, states form working groups or study commissions prior to major revisions of their guardianship codes. These review groups typically identify the need for guardian training. For example, the Oregon Guardianship Work Group recommended that “[o]ngoing training programs . . . occur at the state and local level to educate attorneys and judges regarding the guardianship process and alternatives to guardianship.”<sup>42</sup>

In Illinois, this review process was undertaken by Equip for Equality, the state protection and advocacy agency, which spearheaded the Guardianship Reform Project.<sup>43</sup> As one who testified at a public hearing held by Equip for Equality said, “Guardianship is an enormous responsibility, and I think we owe it to those family members and friends who are willing to take it on, and to do it with care, at least some orientation as to their duties and legal responsibilities.”<sup>44</sup> The Illinois Task Force recommended disseminating to prospective guardians a manual that would be available online and would include all forms.<sup>45</sup> Additionally, new Illinois guardians would be encouraged to take training courses, with courts having the power to mandate training when necessary.<sup>46</sup>

The Virginia Guardianship Task Force held ten town meetings across the state the year before recommending reform

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39. *Id.*

40. *Id.* at 25.

41. Hurme, *supra* n. 11, at 28 (quoting L. Johnson, *Guardianship of the Estate: Survey of Registers in Probate in 18 Wisconsin Counties 2* (1989)).

42. *Adult Guardianships in Oregon: A Survey of Court Practices 6* (Guardianship Work Group 1999).

43. Fred, *supra* n. 15.

44. *Id.* at 38 (citing testimony from a public hearing).

45. *Id.* at 43.

46. *Id.*



legislation.<sup>47</sup> “One of the clearest themes throughout all ten Town Meetings was the need for education and training — of guardians, professionals, and the public.”<sup>48</sup> As one Virginia guardian testified, “We’re not certain what’s expected of us . . . we’re running blind.”<sup>49</sup> The Task Force considered education as the “most hard-hitting, direct and cost-effective way to comprehensively strengthen the Commonwealth’s system of guardianship and alternatives.”<sup>50</sup>

### C. Judicial Concurrence

The *National Probate Court Standards* also suggest that probate courts “develop and implement programs for the orientation and training of guardians.”<sup>51</sup> The judges suggest that “[t]he office of state court administrator may assist the court in developing materials.”<sup>52</sup> Once developed, the materials could be made available through “recognized continuing legal education courses and community adult continuing education” programs or as self-study materials provided by the clerk or through the court library.<sup>53</sup> The materials should be in print-and-videotape format and in a language other than English when appropriate.<sup>54</sup> The *National Probate Court Standards* go so far as to recommend that courts enforce this provision by requiring guardians to certify that they understand the nature of their duties and have reviewed any written materials or viewed any videotape as part of the “Oath of Acceptance of Appointment.”<sup>55</sup>

### D. Recent Impressions: Survey of Practitioners

To get a better idea of the progress that has been made in heeding these multiple statements of the need for courts to facilitate guardian performance by providing assistance and

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47. Va. Guardianship Task Force, *Virginia Voices on Guardianship and Alternatives: Report on the Town Meetings of the Virginia Guardianship Task Force* preface (Sept. 1993).

48. *Id.* at 10. A “1993 survey of Virginia Commissioners of Accounts found that 66% of guardians have ‘difficulty setting forth an acceptable account.’” *Id.*

49. *Id.* at 11 (quoting a deputy sheriff from Montgomery County).

50. *Id.* at 10.

51. *Commn. on Natl. Prob. Ct. Stands.*, *supra* n. 17, at stand. 3.3.13.

52. *Id.* at 72.

53. *Id.*

54. *Id.*

55. *Id.*

training, the Authors conducted a survey throughout the year of 2000 of ninety guardianship practitioners from twenty-five states. We took advantage of annual meetings held by the National Academy of Elder Law Attorneys, the National Guardianship Association, and the National Aging and Law Conference, to recruit as participants self-identified persons knowledgeable about guardianship practices in their respective jurisdictions.

The survey included questions to determine how jurisdictions assist guardians in carrying out their reporting responsibilities.<sup>56</sup> A basic tool courts use to monitor guardian performance is periodic reports on the personal status of the ward. Logically, it should be easy for guardians to access a form or model for such reports. How readily available are the appropriate forms? Respondents representing twenty-five jurisdictions reported that forms are routinely available or provided in sixty percent of those jurisdictions.<sup>57</sup> In fifteen percent of the jurisdictions, forms are available only if the guardian knows where to look, and in fifteen percent, forms are not available or not required.<sup>58</sup>

It also seems logical that, in addition to facilitating access to the forms, courts should give guardians some idea of how to fill them out. This could be done by providing examples of a satisfactorily-prepared report or accounting. How frequently do courts provide samples or explanations of how to fill out the reports? What guidance do courts give guardians in what they expect to see in a personal status report, inventory, or accounting? Only five out of eighty-one respondents said that such aid was readily available; nine said this useful information was available only if the guardian knew where to look; ten said it was inconsistently available; twenty-three said that providing samples was not required, suggesting that, if the court does not have to provide samples, it will not do so.<sup>59</sup>

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56. Erica Wood & Sally Balch Hurme, *Retracing Our Steps in Guardianship Monitoring* (2000) (unpublished survey results) (copy on file with the *Stetson Law Review*). Although this is not a scientific sample, it is one of the few snapshots we have of the current state of affairs.

57. *Id.* at question 9.

58. *Id.*

59. *Id.* at question 10; e.g. Betsy Abramson, Helen Marks Dicks & Laura Salerno, *Do It Yourself Guide to Guardianship and Protective Placement* (Ctr. for Pub. Representation, Inc. 1991) (containing samples of how to complete Wisconsin accountings, status reports, and inventories along with a concise guide explaining who prepares each form and the form's purpose).

In a welcome inverse of the 1986 survey, in the 2000 survey, sixty percent of respondents reported that some written instructions, training sessions, videos, or other aids are available to guardians;<sup>60</sup> ten percent said that guardians in their jurisdictions received extensive assistance. Nevertheless, twenty-eight percent said that guardians had no training aids.<sup>61</sup>

#### E. Not Whether, But How

Clearly, “the issue is not whether guardians need training, but rather, whether the training should be mandatory or voluntary,” and “how the training should be developed[, delivered,] and financed.”<sup>62</sup> Determining what will be covered in the training is a complex process that requires balancing the level of detail and degree of expertise desired with the amount of time that trainers and participants can be expected to dedicate to training. Other issues include who should receive the training, whether any group of guardians should be exempt from a training requirement, and whether training should focus on family guardians or professional guardians or both.

Recognizing the need for orientation and training, Florida and New York have statutorily-mandated guardianship training.<sup>63</sup> Florida requires eight hours of instruction and education within one year after appointment.<sup>64</sup> Courses must be “approved by the chief judge of the circuit court and be taught by a court-approved organization,” such as a community college, guardianship organization, or the local bar association.<sup>65</sup> Training expenses can be paid out of the ward’s estate.<sup>66</sup> The judge may waive the training requirement on a case-by-case basis, considering the guardian’s experience, education, and duties, as well as the ward’s needs.<sup>67</sup> Florida professional guardians, those who receive compensation for providing services to more than two wards,<sup>68</sup> have a much more extensive education requirement.<sup>69</sup>

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60. Woods & Hurme, *supra* n. 56, at question 11.

61. *Id.*

62. Hurme, *supra* n. 11, at 27–28.

63. Fla. Stat. § 744.3145(3) (2001); N.Y. Mental Hygiene Law § 81.39 (McKinney 2001).

64. Fla. Stat. § 744.3145(3).

65. *Id.*

66. *Id.* § 744.3145(4).

67. *Id.* § 744.3145(5).

68. *Id.* § 744.102(15).

Professional guardians must take forty hours of instruction within a year after becoming a professional guardian and a minimum of sixteen hours of continuing education every two years.<sup>70</sup> These courses are approved or offered by the state-wide Public Guardianship Office and cannot be paid for from the wards' estates.<sup>71</sup> As one new professional guardian explained, she enrolled in a course at a local community college.<sup>72</sup> She primarily viewed state-wide training videos on her own time, met with the instructor if she had questions, and took tests halfway through and at the end.<sup>73</sup> Florida-licensed lawyers are exempt.<sup>74</sup>

New York also requires guardians to complete a training program, but does not specify the number of hours required.<sup>75</sup> The statutorily-mandated course content is similar to Florida's: guardian's duties and responsibilities, ward's rights, community resources, and report preparation, but adds orientation to medical terminology and procedures for diagnosis and assessment.<sup>76</sup> Although the state bar association<sup>77</sup> has taken the lead in offering training, local bar associations, the New York State ARC,<sup>78</sup> and the Practising Law Institute<sup>79</sup> have also developed their own curricula, normally a day-long program.

In Texas, the Tarrant County Probate Court #2 has developed exemplary guardian orientation material.<sup>80</sup> Petitioners

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69. *Id.* § 744.1085(3).

70. *Id.*

71. *Id.*

72. In-person interview with a student at the Fla. St. Guardian Assn. Mtg. (Aug. 3, 2001).

73. *Id.*

74. Fla. Stat. § 744.1085(3).

75. N.Y. Mental Hygiene Law § 81.39.

76. *Id.* The Law Revision Commission notes, "Guardians should be trained so that they understand what is expected of them and how to best serve the incapacitated person." *Id.* cmt.

77. *E.g.* N.Y. St. B. Assoc., *Guidelines for Guardians: A Guide to Responsibilities and Procedures* <<http://www.nysba.org/sections/elder/guidelines.html>> (Oct. 2000).

78. The *New York State ARC Manual* is focused on family guardians for those with developmental disabilities, which under New York law follows a different statute.

79. The Practising Law Institute has separate tracks for attorneys, social workers, and families.

80. Tarrant County Probate Court #2, *Guardian Handbook* (Mar. 2000) (copy on file with the *Stetson Law Review*). The *Guardian Handbook* contains sections such as "Ward Information" and "Resources," and many addition handouts, such as "Helpful Phone Numbers," "Step by Step Guide for the Court Visitor," and sample reports, are available from the court. Much of the *Handbook* is not paginated; consequently, footnotes 81–86 will

are provided a flowchart of the steps of the guardianship process and what to expect at the hearing, including the reminder to arrive at the courthouse fifteen-to-thirty minutes before the scheduled hearing and to bring the personal surety bond.<sup>81</sup> Upon appointment, each guardian is given a three-ring binder containing reporting forms, a place to keep the guardianship order, and additional practical information.<sup>82</sup> Included in the binder are forms for keeping track of personal information about the ward, such as the names of each doctor, caseworker, and dentist, recording visits and calls with the ward, and noting doctors' appointments and medical decisions.<sup>83</sup> Additional pages cover how to include the ward in decision-making, in making medical decisions, asking questions about medications, interviewing personal-care or assisted-living facilities, and discerning poor care in residential facilities.<sup>84</sup> A flowchart of a typical nursing home chain-of-command is included along with local telephone numbers for assistance.<sup>85</sup> Each guardian also receives a plain-English guide to duties and responsibilities that opens with an invitation to call the judge or staff if the guardian has questions.<sup>86</sup> The guardians are also encouraged to take free training provided by Guardian Services, Incorporated, a not-for-profit agency that provides volunteer guardians.<sup>87</sup>

In addition to court-produced aids,<sup>88</sup> departments on aging, non-profit advocacy groups, guardianship associations, and public-guardian offices have produced much of the educational material available for guardians.<sup>89</sup> For example, the Alaska State

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not contain pinpoint references.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. Guardianship Servs., Inc., *Program, Program Activities* <<http://www.guardianshipservices.org/program.htm>> (accessed Feb. 2, 2002).

88. *E.g.* Bradley Geller, Washtenaw County Prob. Ct. Counsel, *Handbook for Guardians of Adults* (7th ed. 2001) (containing fifty pages of questions and answers including powers and duties as well as paying for Medicare care, visiting the ward, guardian liability, and ward's death); Prob. Ct. Div., Hennepin County Dist. Ct., *Guardianship/Conservatorship Procedures in Hennepin County* (Hennepin County, Minn. 1991); *Serving as Guardian and Conservator* (Mich. Jud. Council, Lang Telecomm. 1989) (videotape).

89. Me. Dept. of Human Servs. Bureau of Elder & Adult Servs., *Five Families:*

Association of Guardianship and Advocacy developed a training curriculum and video,<sup>90</sup> the Virginia Guardianship Association prepared the Virginia handbook,<sup>91</sup> and the Law and Health Care Program at the University of Maryland School of Law produced its state's guardian handbook.<sup>92</sup> The Partners in Guardianship program of the North Dakota Catholic Family Service has an excellent handbook that includes not only the guardian's duties to the court, but also extensive material on dealing with the ward as a whole person, decision-making, behavior management, and conflict management.<sup>93</sup> The Washington State Aging and Adult Services Administration recently compiled a comprehensive *Volunteer and Family Guardian's Handbook*, still in draft form,

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*Becoming a Guardian or Conservator in Maine* (Tobey Levine Multi-Media Prods. 1992) (videotape) (This videotape describes the ward-guardianship relationship through a series of still photos with a voice-over, which discusses the concerns of guardians. It explains guardianship through a series of five vignettes about "a day in the life" of a guardian and a ward. Contact the Maine Bureau of Elder and Adult Services at (207) 624-5335 or (800) 262-2232 for this free video.); Minn. Dept. of Human Servs. Guardianship Off., *Video on Conservatorship and Guardianship* (ARC Minn. 1990) (videotape); *Serving As Guardian and Conservator* (Idaho Commn. on Aging 1994) (videotape) (Six guardians and conservators describe their duties and challenges they have faced. Contact Omar Valverde, Adult Protection Coordinator, Idaho Commission on Aging, 3380 Americana Terrace, Suite 120, P.O. Box 83720, Boise ID 83720-0007, (877) 471-2777.); *Serving As Guardian and Conservator* (Mich. Off. of Servs. to the Aging, LTS Video Prods. 1989) (videotape) (thirty-five minutes of in-personal interviews in which practicing guardians and conservators describe their duties and challenges they have faced. Contact Cherie Mollison, Office of Services to the Aging, P.O. Box 30026, Lansing MI 48909, (517) 373-4072.).

90. *Becoming a Guardian or Conservator* (Alaska St. Assn. for Guardianship & Advocacy) (videotape). In this twenty-five minute video, judges and the Alaska State Association for Guardianship and Advocacy President describe the guardianship process and duties, as illustrated in various settings. Available for \$10 from the Alaska State Association for Guardianship and Advocacy, P.O. Box 212773, Anchorage AK 99521.

91. John T. Molumphy, III & Harriette H. Shivers, *Virginia Handbook for Guardians and Conservators: A Practical Guide for Court-Appointed Guardians and Conservators of Adults* (2d ed., Va. Guardianship Assn. 1998).

92. Joan L. O'Sullivan, *The Guardianship Handbook: A Guide to Adult Guardianship and Guardianship Alternatives in Maryland* (Univ. of Md. Sch. of L., L. & Health Care Program 2000).

93. *Partners in Guardianship* (Catholic Family Serv., 2735 S. University Drive, Fargo, ND 58103, (701) 235-4457). Sample sections include "Approaches to Worship and Prayer for People with Alzheimer's," "Everyone Needs to Be Valued," "Depression in the Elderly," "Qualities of a Good Decision," "Modifying Behavior through Environmental Change," "Talking When One Can't Talk," and "The Difference between Helping and Rescuing." A workbook accompanies the handbook with exercises, worksheets, and model problems to assist the new guardian to keep records, include the ward in decision-making, and solve behavior problems.

designed to make this special group of guardians more effective.<sup>94</sup>

The Kansas Guardianship Program, a state-wide program that relies exclusively on volunteers to serve as guardians, provides new volunteers one-on-one training.<sup>95</sup> When a new volunteer is about to be appointed guardian, one of the program's seven regional coordinators meets individually with the volunteer.<sup>96</sup> Using a checklist of topics, the coordinator will spend at least two hours with the individual, talking about responsibilities, resources, and reporting procedures.<sup>97</sup> Each guardian then signs the checklist to acknowledge the material covered and receives a comprehensive manual for later reference.<sup>98</sup>

National and state guardianship associations also play a substantial role in offering educational opportunities for guardians. The National Guardianship Association (NGA) has held annual, two and one-half day conferences for its members since 1988.<sup>99</sup> Typically, the twenty-to-twenty-five sessions at each conference cover a broad range of topics from ethics to business practices.<sup>100</sup> Recognizing the need to educate all guardians, the October 2001 NGA Conference in Florida included special sessions for family members and volunteers who serve as guardians.<sup>101</sup> NGA also has produced a manual for family and volunteer guardians.<sup>102</sup> Those states with state guardianship associations also have annual conferences to provide ongoing training for their members.

When classroom orientation is not feasible or practical, guardians in some jurisdictions can still get some orientation to their responsibilities through alternative formats. In the District

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94. Hank Hibbard, *The Volunteer and Family Guardian's Handbook* (Wash. St. Dept. of Soc. Servs., Aging & Adult Servs. Administration, unpublished manuscript Mar. 2002) (copy on file with author of handbook).

95. Telephone Interview with Jean Krahn, Dir., Kan. Guardianship Program (Aug. 1, 2001). Approximately 150 new volunteers receive this training each year. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. On average, 260 members attend each year's conference. Association membership is fairly equally divided between public and private guardians and also includes judges, court staff, and family guardians. Telephone Interview with Vickie Palmer, NGA Staff (July 24, 2001).

100. *Id.*

101. *Id.*

102. NGA, *The New Family and Volunteer Guardian Guidebook* (NGA 2000). Order from the NGA, 1604 North Country Club Road, Tucson AZ 85716-3102.

of Columbia, new guardians can observe a short video, *What Do I Do Now?*, at a kiosk in the clerk's office as part of a series of videos on court procedures.<sup>103</sup> In Pima County, Arizona, new guardians are required to view a video immediately preceding the petition hearing.<sup>104</sup>

#### F. Training Content

Whether the orientation is by video, manual, or lecture, determining what must be conveyed to the guardian is problematic. What core content should the guardian be expected to understand? The range varies from a simple brochure with optional eight-minute video seen in the clerk's office, to all-day lectures by experienced practitioners, or forty hours of videotaped presentations.

"My lack of training" is a primary source of stress expressed by guardians.<sup>105</sup> Clearly, at a minimum, guardians need to know what is expected when reporting to the courts. They require knowledge of the law and the resources that may be available to assist them in caring for wards.<sup>106</sup> They should be educated "in the use of defined guardian performance standards and written individual guardianship plans."<sup>107</sup> As the Oregon Guardianship Work Group noted, ongoing "[t]raining programs should include the legal and social principles underlying Oregon's guardianship statutes, [the] appropriate use of limited guardianships and alternatives to guardianships, mediation, and effective respondent representation."<sup>108</sup> A thorough appreciation of a guardian's fiduciary responsibilities in managing someone else's money is critical to prevent the disastrous breaches too frequently seen in headlines reporting guardian misconduct.<sup>109</sup>

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103. AARP, *What Do I Do Now?* (An eight-minute video in which actors portray duties involved in being a guardian. Copies may be borrowed from the lending library of the National Training Project, AARP Foundation, 601 E Street NW, Washington, DC 20049, (202) 434-2122.).

104. Pima County, Ariz., Super. Ct., *Instructions for Guardians and Conservators* (Video Imagination Television 1990) (videotape).

105. Pat M. Keith & Robbyn R. Wacker, *Older Wards and Their Guardians* 107 (Praeger 1994).

106. Fred, *supra* n. 15, at 42.

107. Norman Fell, *Guardianship and the Elderly: Oversight Not Overlooked*, 25 Toledo L. Rev. 189, 204 (1994).

108. *Supra* n. 42, at 6.

109. See *supra* nn. 21-25 (synopsizing newspaper articles on guardianship abuses); *but*



Because responsibility for the well-being of an incapacitated person is never easy, guardians need to be well-versed in the physiology of aging and disability and how to communicate effectively with an individual with diminished capacity. The Illinois Guardianship Report noted that guardians need to be made aware of the emotional challenges they face, how to cope with deterioration of the ward's condition, and the pressures of surrogate decision-making, time constraints, and contentious family relationships.<sup>110</sup> In light of the inherent tension between protecting the ward and enhancing the ward's independence,<sup>111</sup> guardians need to be versed in how best to include the ward in as many decisions as possible.<sup>112</sup> Perhaps more than learning how to fill out reporting forms, guardians need "practical direction for surmounting difficulties in encouraging 'the development of maximum self-reliance and independence' and for overcoming the emotional and psychological problems faced in actualizing . . . substituted judgment."<sup>113</sup>

### G. Training Barriers

The cost of training is a substantial barrier. One advocate poignantly explained the situation in North Dakota, in which the courts are struggling financially and the state has an aging population in many sparsely-populated counties.<sup>114</sup> Although one judge in a more populous county frequently requires new guardians to take the training developed by the Catholic Family Service, other courts are concerned about committing to training that could disappear due to lack of ongoing funding.<sup>115</sup> The Catholic Family Service has been unable to develop a stable

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see Paula L. Hannaford & Thomas L. Hafemeister, *The National Probate Court Standards: The Role of the Courts in Guardianship and Conservatorship Proceedings*, 2 Elder L.J. 147, 154 (1994) (questioning whether the "few highly publicized, notorious, and particularly heinous examples of guardians' abuse and neglect of wards . . . constitute the exceptions or the rule of how guardianships actually function").

110. Fred, *supra* n. 15, at 40.

111. *Id.* at 39.

112. Saidy Barinaga-Burch et al., *Guardianship & Alternatives: A Guide to Personal, Health Care & Financial Management Options* 115 (Ctr. for Soc. Gerontology 1995); Lori A. Steigel, *Alternatives to Guardianship: Part I — Substantive Training Materials for Professionals Working with the Elderly and Persons with Disabilities* 13 (ABA 1992).

113. Fred, *supra* n. 15, at 40 (quoting 755 Ill. Comp. Stat. 5/11a-17(a) (2000)).

114. Telephone Interview with Andrea Boyea, N.D. Catholic Fam. Serv. (Aug. 1, 2001).

115. *Id.*

source of funding to conduct its training programs.<sup>116</sup> Funding bills for training have been defeated in the last three legislative sessions.<sup>117</sup>

#### H. Practical Training Solutions

Many jurisdictions have put together a variety of low-cost ways to get needed information to new guardians. Judges participating in the May 2001 meeting of the National College of Probate Judges offered a number of practical suggestions. One judge suggested that having guardians watch videos or attend a training session a couple of months after appointment as more productive because the guardians have had an opportunity to develop more practical experience with the problems they face.<sup>118</sup> Courts also look to community resources, such as area agencies on aging and state guardianship associations, to develop guardian-training programs and materials.<sup>119</sup> Attorneys, professional guardians, and public guardians may be tapped to participate in training development and presentation as a pro bono service to the court. The judges emphasized that the training needs to be affordable and offered at convenient times and locations to be accessible for family guardians.<sup>120</sup> It was also suggested that courts could require a certificate of training completion, using a tickler system to ensure that the required training is completed in the first few months after appointment.<sup>121</sup>

Other practical ways to assist guardians are to arrange for new guardians to have a point of contact to answer questions and/or lists of resources to turn to for answers to questions regarding social and community services.<sup>122</sup> Of course, legal questions should be directed to the guardian's attorney, but a court clerk, probate counsel, volunteer supervisor, professional-guardian mentor, state-guardianship association, or public guardian could also be identified (and funded) to provide basic

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116. *Id.*

117. *Id.*

118. Commn. on Natl. Prob. Ct. Stands. & Advisory Comm. on Interstate Guardianships, *National Probate Court Standards* 76 (2d ed., Natl. College of Prob. Judges & Natl. Ctr. for St. Cts. 2001) (available online at <[www.ncpj.org/standard.html](http://www.ncpj.org/standard.html)>).

119. *Id.*

120. Fred, *supra* n. 15, at 39–40.

121. Commn. on Natl. Prob. Ct. Stands., *supra* n. 17, at 74.

122. *Wingspread Recommendations*, *supra* n. 3, at 23.

answers. The Illinois project has proposed that the State Office of Guardian have a toll-free number and Web site to provide state-wide access to information, particularly for family guardians who cannot afford legal counsel.<sup>123</sup>

Considering the amount of training material already developed in many states, most of the materials could be readily tailored, requiring only minor, state-specific modifications. Orienting new guardians to their responsibilities could be the least budget-breaking and most high-impact method to ensure that guardians, whether family or professional, do not feel they are running blind.

### III. GUARDIAN STANDARDS, LICENSING, AND CERTIFICATION

#### A. History

An essential component of guardianship monitoring is the standard by which guardian performance is judged. Statutes provide only rudimentary guidance to judges and guardians as to how guardians should carry out their duties.

The Wingspread conferees concluded that the absence of guardian performance standards . . . makes it difficult to measure guardian performance . . . [and] that model guardian performance standards would be useful in setting out basic principles, duties and requirements.<sup>124</sup>

They recommended that “[m]odel guardian performance standards should be developed and distributed nationally and adapted for local use.”<sup>125</sup>

Various guardianship associations, often in cooperation with the legislature and judiciary, have taken the initiative to create codes of professional ethics and standards of practice to promote the quality of guardians.<sup>126</sup> The Center for Social Gerontology developed an early code of ethics for guardians that provided a basis for later versions.<sup>127</sup> Michael Casasanto, Director of the

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123. Fred, *supra* n. 15, at 43.

124. *Wingspread Recommendations*, *supra* n. 3, at 25.

125. *Id.* Recommendation V-D.

126. Penelope A. Hommel & Lauren B. Lisi, *Model Standards for Guardianship: Ensuring Quality Surrogate Decision Making Services*, 23 *Clearinghouse Rev.* 433, 434 (1989).

127. *Id.*

Office of Public Guardian, and other New Hampshire advocates also developed a code of ethics.<sup>128</sup> The National Guardianship Association officially adopted the New Hampshire version and widely distributes it to members, courts, and legislatures.<sup>129</sup> In addition to advocating a code of ethics, NGA has also developed *Standards of Practice*.<sup>130</sup> The practice standards are designed to provide detailed guidance to guardians on how to carry out their responsibilities, along the lines of “this is how you should,” as distinguished from the more direct “you shall” of the ethics code.<sup>131</sup> As part of its legislative policy, the NGA Board is urging state legislatures to adopt the *Code of Ethics* and *Standards of Practice* to evaluate guardian performance.

### B. Registration

Another step a few states have taken to enhance the quality of professional guardianship services is to require registration. Professional guardians register with the courts by disclosing information that might reveal either incapability or unsuitability for appointment. California requires “private professional conservators”<sup>132</sup> or guardians to report annually on the extent of their practices, submit to a fingerprint check, and disclose any removal from a guardianship case.<sup>133</sup> Texas also has a registration process for “private professional guardians,” defined as anyone, “other than an attorney or a corporate fiduciary, who is engaged in the business of providing guardianship services.”<sup>134</sup> The Florida State-

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128. Casasanto et al., *supra* n. 27.

129. *Id.* § I(A).

130. NGA, *Standards of Practice* <<http://www.guardianship.org/pdf/sofp.pdf>> (NGA 2000).

131. *Id.* at 3–4.

132. Cal. Prob. Code § 2341(a) (West 2001). The California regulations apply to the person or entity appointed over the person or estate or both of two or more unrelated persons. *Id.*

133. *Id.* § 2342(a)–(c). The annual report must contain the following information for each person or staff of an entity who serves as conservator: name and telephone numbers, educational background, three professional references, names of current conservatees being served, aggregate dollar value of assets being managed, whether removed or resigned from a case, and the case names and numbers of all closed cases. *Id.*

134. Tex. Prob. Code Ann. § 601(24) (2001). Attorneys and corporate fiduciaries are exempt. *Id.* Private professional guardians must give a statement of educational background and professional experience; provide three professional references and a list of all incapacitated persons servicing; and disclose the aggregate fair market value of property being managed and whether ever removed or resigned from a case. *Id.* §

wide Public Guardianship Office maintains a registry of professional guardians who have completed the forty-hour training.<sup>135</sup>

### C. State Certification

Washington has also developed an extensive certification program that goes further than just registration. The Supreme Court of Washington has adopted the recommendations of a study group convened by the Office of the Administrator for the Court to establish a Professional Certified Guardian Board.<sup>136</sup> The program features an application process, certification guidelines, training requirements, practice standards, and disciplinary procedures.<sup>137</sup> To be appointed, professional guardians must be certified.<sup>138</sup> Certification applicants must state whether any criminal complaint or unsatisfied lien has been filed against them, if they have been convicted, plead guilty, or pled no contest to any felony or misdemeanor, filed on a bond guarantee, have been disciplined by an administrative or licensing board, had a driver's license suspended, filed for bankruptcy, or, if an attorney, had any bar complaints or disbarment proceedings filed.<sup>139</sup> The King and Spokane County Bar Associations and the University of Washington collaborated to develop the required training materials.<sup>140</sup> A certifying examination and continuing-education requirements are still being considered. The cost of developing and implementing a certifying examination was considered prohibitive, requiring specific budget allocation.<sup>141</sup>

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697(a)(1)–(6) (2001).

135. Fla. Stat. § 744.703(1) (2001).

136. Wash. Rev. Code § 11.88.008 (2000). "Professional guardian" is defined as one who is court-appointed and acts as guardian for a fee for three or more non-family members. *Id.*

137. NGA, *supra* n. 130, at 4 (explaining that the *Standards of Practice* are based on the NGA Model Code of Ethics, the Wingspread Conference, and the United States Senate Select Committee on Aging hearings). Wash. Prof. Guardian Certification Prog., *Disciplinary Regulations for Certified Professional Guardians* <<http://www.courts.wa.gov/programs/guardian/regulations.cfm>> (accessed Jan. 6, 2002).

138. Wash. Rev. Code § 11.88.020 (2000); *see supra* n. 136 (defining a professional guardian).

139. Wash. St. Certified Prof. Guardian Bd., *Application for Individual Certification 2*, 4–6 <<http://www.courts.wa.gov>> (revised May 2001).

140. Wash. Cts., *2001 Washington State Professional Guardian Certification Training Program* <<http://www.courts.wa.gov/programs/guardian/training.cfm>> (accessed Jan. 12, 2002).

141. Wash. Cts., *Regulations on Training and Testing Including Continuing Education*

Washington's disciplinary process for handling any complaints against a certified professional guardian encompasses substantial due-process and review procedures.<sup>142</sup> The Office of the Administrator for the Courts screens initial complaints and forwards complaints to the Board, which reviews the matter in executive session after the guardian has had an opportunity to provide an explanation.<sup>143</sup> The Board can ask a review panel to hold hearings or to settle and dispose of complaints without a hearing.<sup>144</sup> Sanctions for violation of the *Standards of Practice* include decertification, prohibition against taking new cases, a letter of reprimand, or other remedies, such as changes in practice methods or additional training.<sup>145</sup>

Arizona<sup>146</sup> has implemented the most comprehensive state-certification program for all fiduciaries other than family members who serve as a guardian or conservator.<sup>147</sup> The statute requires each private fiduciary to register with the state supreme court before being appointed.<sup>148</sup> The registration process includes submitting to a fingerprint check, posting a bond,<sup>149</sup> attending training, and passing an examination.<sup>150</sup> Persons who have been

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<<http://www.courts.wa.gov/programs/guardians/regulations.cfm>> (accessed Jan. 12, 2002).

142. Wash. Prof. Guardian Certification Prog., *supra* n. 137, at 3–21.

143. *Id.* at 3–4.

144. *Id.* at 5.

145. *Id.* at 15–16.

146. An earlier version of this section previously appeared in Sally Balch Hurme, *Progress in Guardian Certification*, 11 Natl. Guardian 1, 1–3 (Fall 1998) [hereinafter Hurme, *Progress*], and Sally Balch Hurme, *Progress in Guardian Certification*, 32 Clearinghouse Rev. 344, 344 (1998).

147. Ariz. Rev. Stat. § 14-5651 (Supp. 2000).

A person who for a fee serves as a court appointed guardian or conservator for one or more persons who are unrelated to the fiduciary[, or a] person who for a fee serves as a court-appointed personal representative and who is not related to the decedent, is not nominated in a will or by power conferred in a will and is not a devisee in the will.

*Id.* § 14-5651(J)(2)(a)–(b) (stating that financial institutions, their trust departments, and independent trust companies were exempted from certification in a 2001 amendment). *Id.* § 14-5651(G); *see generally* Cal. Prob. Code § 2341(a) (discussing California's private professional conservator registration requirement exempts banks or state agencies that serve as conservators and public conservators); Wash. Rev. Code Ann. § 11.88.020 (2000) (exempting certain financial institutions from the state's certification requirements).

148. Ariz. Rev. Stat. § 14-5651(B).

149. *Id.* § 14-5651(A)(2), (B). The bonding is to compensate the judicial system for any expenses incurred in investigating the fiduciary, in addition to any bonding to secure the ward's estate.

150. *Id.* § 14-5651(C)(4).

convicted of a felony or “found civilly liable in an[y] action[s] . . . involv[ing] fraud, misrepresentation, material omission, misappropriation, theft or conversion” are ineligible to register.<sup>151</sup>

The registration form also calls for information about the number of previous appointments as guardian and [whether] the registrant has ever failed to file a court report, been removed as guardian, received a gift over \$100 from the ward, or has any interest in any enterprise providing services to the ward.<sup>152</sup>

“Certified fiduciaries [must] renew [their certificate] every two years and complete six hours of biennial continuing education.”<sup>153</sup> The Fiduciary Advisory Committee has recommended that applicants be required to disclose more personal financial history and that the program coordinator be authorized to conduct credit checks, if necessary.<sup>154</sup>

The Arizona fiduciary-training curriculum and manual, developed by court services and professional fiduciaries, includes office and accounting practices, case management, decision-making, ethics, and reporting requirements.<sup>155</sup> Guardians attend a twelve-hour, two-day program with presentations by judges and local experts and take a fifty-question, multiple-choice test.<sup>156</sup> The extensive scope of the training is intended to enhance the business skills of guardians with a social-service background, as well as to provide those with a financial background greater insight regarding the social aspects of making decisions for an incapacitated person. The training agenda will be expanded to eighteen hours to give more coverage of business practices, ethical considerations, and practical experience in writing personal-care and estate-management plans.<sup>157</sup> The examination is being revised to better test for fiduciary knowledge and screen out those

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151. *Id.* § 14-5651(C)(2)–(3).

152. Hurme, *Progress*, *supra* n. 146, at 2 (citing Ariz. Rev. Stat. § 14-5651).

153. Ariz. Sup. Ct., Administrative Off. of the Cts., *Final Report of the Fiduciary Advisory Committee to the Arizona Judicial Council* 5 (June 2001). The recommendation is to raise the continuing education requirement to eighteen hours. *Id.* at 6.

154. *Id.* at 5–6.

155. *Id.* at 6.

156. *Id.*

157. *Id.*; Telephone Interview with J.R. Rittenhouse, Priv. Fiduciary Certification Project Dir., Ariz. Admin. Off. of the Cts. (Aug. 5, 2001). The first group of fiduciaries was certified in Spring 1999. *Id.* As of June 2001, 308 fiduciaries had been certified. *Id.*

who do not meet the minimum standards of the profession.<sup>158</sup>

#### D. National Certification

The NGA, through its National Guardianship Foundation (NGF), has a nation-wide process to certify guardians.<sup>159</sup> Interested persons must demonstrate eligibility to sit for a qualifying examination.<sup>160</sup> The certification examination is offered periodically at regional locations, frequently in conjunction with state guardianship association events, and always at NGA national meetings. Those who meet the eligibility requirements and pass the examination may identify themselves as Registered Guardians (RGs).<sup>161</sup> During the two-year certification period, the RG must take a minimum of ten hours of continuing education.<sup>162</sup> To apply for recertification, the RGs must document their substantial continued involvement with guardianship matters and re-affirm their good standing.<sup>163</sup>

For more experienced guardians, NGF provides a Master Guardian (MG) certification.<sup>164</sup> To sit for the examination, a Master Guardian applicant must be a RG, have a substantial combination of higher-education and professional-guardianship

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158. Ariz. Sup. Ct., *supra* n. 153, at 6.

159. NGA, *National Guardianship Foundation (NGF)* <<http://www.guardianship.org/ngf/index.htm>> (accessed Dec. 30, 2001).

160. NGA, *NGF, Registered Guardian Certification Qualification & Application* § IV(2) <<http://www.guardianshp.org/pdf/Application1.pdf>> (accessed Dec. 30, 2001). The eligibility requirements include twenty-one-years of age or older, high school graduate (or GED) with one year of guardianship experience or a degree in a field related to guardianship; no felony conviction or no contest plea, never civilly liable in an action involving fraud, turpitude, theft, conversion; never relieved of responsibility by a court, employer or client for fraud, turpitude, theft, conversion; attestation of bonding in accord with state and local laws or practices; and attestation of not being found liable in a bond subrogation action. *Id.* at § IV(1)(a)–(h).

161. *Id.* § IV(1). There are approximately 600 Registered Guardians (RGs) from thirty-five states and twenty-one Master Guardians (MGs) representing thirteen states. NGA, *NGF, List of Current Registered Guardians, State Listing of Registered Guardians and Phone Numbers as of January 17, 2002* <<http://www.guardianship.org/pdf/Rglist.pdf>> (last revised Jan. 17, 2002); NGA, *NGF, List of Current Master Guardians, Master Guardians as of January 17, 2002* <<http://www.guardianship.org/ngf/mglist.htm>> (last revised Jan. 17, 2002).

162. NGA, *supra* n. 160, at § IV(3)(b).

163. *Id.* § IV(3)(a).

164. NGA, *NGF, Master Guardian Certification Qualifications & Application, National Guardianship Foundation Rules and Regulations Regarding Certification and Recertification of Master Guardians* <<http://www.guardianship.org/pdg/booklet.pdf>> (Spring 1999).



experience, and submit four peer recommendations.<sup>165</sup> A significant part of the application is an essay that sets out the applicant's competence in managing complex guardianship cases, handling significant financial estates, serving in a supervisory position, and participating in professional development or community outreach.<sup>166</sup> Qualified applicants must pass an all-day test to demonstrate their ability to resolve complicated guardianship issues.<sup>167</sup> MG certifications are renewable every three years with a ten-hour-per-year continuing-education requirement.<sup>168</sup>

To preserve the integrity of the two certifications, the NGF Board of Trustees has the authority to deny or remove a certificate.<sup>169</sup> The board process relies on the community to raise concerns about the actions, inactions, or honesty of an RG or MG;<sup>170</sup> it does not initiate investigative or disciplinary procedures.<sup>171</sup> Rather it relies primarily on the findings of others, such as courts or employers, before initiating the process to remove a certificate.<sup>172</sup> Reasons for removing a certificate could include making false representations or misstatements on the application regarding prior criminal, civil, or other disciplinary actions that reflect negatively on the guardian's ability to carry out fiduciary responsibilities.<sup>173</sup>

State or national certification is potentially the wave of the future, providing a minimum level of confidence to the community and to the courts that professional guardians have demonstrated a basic understanding of fiduciary responsibilities, professional practices, and business acumen. As the need for guardians increases and the availability of family-member guardians and funding for public guardians declines, certified professional guardians fill the vacuum. Thus, certification assists the public in its assessment of guardians who expect

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165. *Id.* § IV(A)(1)–(2).

166. NGA, NGF, *Master Guardian Certification Qualifications & Application, Master Guardian Certification Qualifications & Application* question 14 <[http://www.guardianship.org/pdf/application\\_pd.pdf](http://www.guardianship.org/pdf/application_pd.pdf) (accessed Dec. 30, 2001).

167. NGA, *supra* n. 164, at § IV(B).

168. *Id.* § V(A)–(B).

169. *Id.* § VII; *see* NGA, *supra* n. 160, at § III(A) (providing similar requirements for RGs).

170. NGA, *supra* n. 164, at § VII(B).

171. *Id.*

172. *Id.*

173. *Id.* § VII(A)(3).

compensation for their services. However, the focus on professional certification does not address needs of family members or community volunteers who are called upon to serve as guardians with little preparation or understanding of fiduciary responsibilities and surrogate decision-making.

#### IV. GUARDIANSHIP PLANS

##### A. History

In 1979, the Model Guardianship Statute, created by the ABA Commission on the Mentally Disabled, set out a novel idea to strengthen accountability: it requires the guardian to submit to the court a forward-looking plan describing the proposed care of the ward, in addition to a report on past care.<sup>174</sup> The Model Statute called for development of “an individual guardianship plan” involving the incapacitated person “to the maximum extent possible,” and specifying necessary services, the means for obtaining these services, and the manner in which the guardian “will exercise and share decision-making authority” with the incapacitated person.<sup>175</sup> The plan would be submitted to court thirty days after the dispositional order, with copies sent to the incapacitated person, his or her attorney, the conservator, if any, the individual having custody, and relatives named in the petition, “to reduce the likelihood of misunderstandings and further assure accountability.”<sup>176</sup> The commentary noted that such a plan would “encourage a goal-oriented rather than a maintenance approach” and clarify exactly what the guardian will be doing.<sup>177</sup>

The idea of a guardianship plan is compelling. A plan helps the court by providing a tool to measure the guardian’s future performance. “Probate courts are familiar with the value of an inventory to establish the baseline against which later accountings can be measured. A guardianship plan is like an inventory. It establishes a basis for comparing later personal status reports.”<sup>178</sup> Plans help the guardian as well, by setting out a blueprint concerning medical care, living arrangements, and

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174. Model Guardianship & Conservatorship Stat. §§ 17(2)(a) (reprinted in Sales et al., *supra* n. 9, at 562–563).

175. *Id.*

176. *Id.* § 17(2)(b) (reprinted in Sales et al., *supra* n. 9, at 563).

177. *Id.* § 17(2)(a) (reprinted in Sales et al., *supra* n. 9, at 562–563).

178. Hurme, *supra* n. 11, at 21.

services.<sup>179</sup> Plans cause the guardian to sit down early in the game and chart a course of action. Finally, they help the incapacitated person to understand and to participate, if possible, in critical decisions about future living arrangements, health-care services, and social and recreational activities. Indeed, development of a guardianship plan conceivably could trigger the kind of inclusive care-planning meeting that is required by federal law for nursing-home residents.<sup>180</sup>

The concept of a guardianship plan has been included in every major set of guardianship recommendations since the 1979 ABA Model Statute. The Wingspread Conference in 1988 urged that “[g]uardianship plan forms should be developed locally and their use required by the courts.”<sup>181</sup> The ABA’s 1991 monitoring study recommended that “[g]uardians should be required to file a written plan of how the guardian proposes to enhance the ward’s well-being . . . within 60 days of appointment,” and that the annual report “should explain deviations from and amendments to the plan.”<sup>182</sup> In the same year, the St. Louis University model for judicial review included a requirement for the guardian “to submit a general plan for the care of the person and for the management of the estate of the ward.”<sup>183</sup> The commentary observed that “[t]he basic question to be answered by the plans is ‘What do you intend to do with respect to . . . .’?”<sup>184</sup>

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179. This may now include decisions to move from institutional settings to community based settings under *Olmstead v. L.C.*, 527 U.S. 581, 587 (1999), in which the Supreme Court ruled that it is a violation of the Americans with Disabilities Act for states to discriminate against people with disabilities by providing services in institutions, when the individual could be served more appropriately in a community-based setting. A plan may help guardians to sort out the costs and benefits, as well as the ward’s preferences, for any community placement that may become available, and could inform the court about the guardian’s decision-making on this issue.

180. 42 U.S.C. § 1396r(b)(2) (1992 & Supp. 2001).

181. *Wingspread Recommendations*, *supra* n. 3, at 25 Recommendation V-D.

182. Hurme, *supra* n. 11, at 21; see generally *Court-Related Needs of the Elderly and Persons with Disabilities: A Blueprint for the Future, Recommendations of the 1991 Conference* § IV(E)(1)(a) (ABA & Natl. Jud. College 1991) [hereinafter *Court-Related Needs of the Elderly*] (the 1991 Conference on Court-Related Needs of the Elderly and Persons with Disabilities sponsored by the ABA Commission on Legal Problems of the Elderly and Commission on the Mentally Disabled with the National Judicial College, recommended that the guardian should file “a guardianship plan that includes a statement of the ward’s views and preferences, and a plan for restoring or maximizing the ward’s mental and physical capacities”).

183. Zimny et al., *supra* n. 16, at 6.

184. *Id.*

Consistent with the ABA and St. Louis University recommendations, in 1993 the *National Probate Court Standards* formulated a statute, "A guardian should be required to file with the probate court a guardianship plan."<sup>185</sup> The text explains that "[r]equiring an initial plan for personal management will help guardians perform their duties more effectively," but cautions that the court's approval of the plan "does not relieve [guardians] of their duty to monitor the situation and make adjustments when necessary."<sup>186</sup> The *National Probate Court Standards* envision that minor changes in the plan could be implemented without consulting the court, but that any substantial adjustments would necessitate prior approval.<sup>187</sup> The Uniform Guardianship and Protective Proceedings Act includes "plans for future care" as a component of guardian reports to the court, both within thirty days after appointment and at least annually thereafter.<sup>188</sup> In 2000, the updated *Standards of Practice* by the NGA required that

[t]he guardian should develop and monitor a written plan setting forth short and long-term goals for the ward's personal care, including residential and all medical/psychiatric concerns. Short-term goals should reflect the first year of guardianship and long-term goals should be beyond the first year. The guardianship plan should be updated no less often than annually.<sup>189</sup>

### B. State Law

A number of states have responded to these multiple calls for use of guardianship plans. Plans may be required with the petition, following the appointment, or with the annual report. Florida law provides that "[e]ach guardian of the person must file

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185. Commn. on Natl. Prob. Ct. Stands., *supra* n. 17, at 72 stand. 3.3.14. Also, note that a draft set of informal "Best Practices in Guardianship Monitoring" stemming from the May 2001 meeting of the National College of Probate Judges (NCPJ) urged courts to "review or create a separate form for a guardian plan for future care of the ward, due at the time of appointment or shortly after, and to be updated regularly with the status report." *Best Practices in Guardianship Monitoring: Working List from May 2001 NCPJ 1* (May 2001) [hereinafter *Best Practices*] (copy on file with the *Stetson Law Review*).

186. Commn. on Natl. Prob. Ct. Stands., *supra* n. 17, at 73.

187. *Id.*

188. Unif. Guardianship & Protective Proc. Act § 317(a)(6), 8A U.L.A. § 317(a)(6) (describing time requirements for future care plans).

189. NGA, *supra* n. 130, at 11 stand. 12.

with the court an annual guardianship plan which updates information about the condition of the ward.<sup>190</sup> The annual plan must specify the current needs of the ward and how those needs are . . . to be met in the coming year.”<sup>191</sup> The statute details information the guardian must submit concerning the residence of the ward, medical condition and needs, and social needs.<sup>192</sup> Each plan also must address restoration of the ward’s rights, including activities designed to increase the ward’s capacity and “[a] statement of whether restoration of any rights will be sought.”<sup>193</sup>

Oklahoma law calls for the guardian to submit “a proposed plan for the care and treatment of the ward” within ten days of appointment (with an extension of up to thirty days),<sup>194</sup> and for a guardian of the property to submit “a proposed plan for the management of the financial resources of the ward that are under his management” within two months.<sup>195</sup> The statute includes plan forms.<sup>196</sup> In Alaska, the court order appointing a guardian must “adopt[ ] a guardianship plan”<sup>197</sup> that is “designed to encourage a ward to participate in all decisions that affect the ward.”<sup>198</sup> Within ninety days after appointment, the guardian must submit a report to the court that describes “the guardian’s program for implementing the guardianship plan.”<sup>199</sup> Washington law requires the guardian to file a “specific plan for meeting the identified and emerging personal care needs of the incapacitated person” within three months after appointment.<sup>200</sup> In Colorado, the guardian must file a care plan within sixty days after appointment and also file a care plan with the annual report.<sup>201</sup> In Maryland and New Hampshire, the guardian must file a plan with the annual report.<sup>202</sup>

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190. Fla. Stat. § 744.3675 (2001).

191. *Id.*

192. *Id.* § 744.3675(1)(a)–(c).

193. *Id.* § 744.3675(2)(c).

194. Okla. Stat. Ann. tit. 30, § 3-120A (West 2001).

195. *Id.* § 3-122A.

196. *Id.* § 3-120.

197. Alaska Stat. § 13.26.116(a)(3) (LEXIS L. Publg. 2000).

198. *Id.* § 13.26.116(c).

199. *Id.* § 13.26.117.

200. Wash. Rev. Code § 11.92.043(1)(b) (2000).

201. Colo. Rev. Stat. Ann. § 15-14-317(1) (West 2001).

202. Md. Est. & Trusts Code Ann. § 13-708(1) (2001); N.H. Rev. Stat. Ann. § 464-A:35(I) (Supp. 2001).

In Maine, the petitioner, rather than the appointed guardian, must file a plan outlining the proposed living arrangement, as well as the means of meeting the ward's financial, medical and social needs.<sup>203</sup> To prevent the potentially-destructive isolation of the ward, the plan also must address means to maintain "the ward's continuing contact with relatives and friends."<sup>204</sup> Tennessee, the District of Columbia, and Virginia also include limited wording directing the petitioner, under certain circumstances, to create plans concerning the respondent.<sup>205</sup>

State-guardianship-study committees also have considered requiring a guardianship plan. For example, the 2001 Illinois Guardianship Reform Project recommended that personal guardians "should develop an initial guardianship plan and submit it to the court within 60 days," and that there should be "a notice system for those failing to present plans within the required time period."<sup>206</sup> In the Authors' 2000 survey of guardianship practitioners, sixty-nine percent reported that care plans were not required by statute or court rule in their jurisdiction.<sup>207</sup>

### C. Use of Plans in Practice

Are such guardianship plans actually in use? Are they practical? Have they proven to be beneficial? Little data exists. At the time of the Wingspread conference in 1988, the Guardianship Program of Dade County, Inc. and the Guardianship Program of Lutheran Ministries, both in Florida, were identified as pioneers in the use of plans.<sup>208</sup> In the Authors' 2000 survey of guardianship practitioners, few respondents commented on use of plans, and a mere fifteen percent of those responding noted that the filing of

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203. 18-A Me. Rev. Stat. Ann. § 5-303(a) (1998).

204. *Id.*

205. Tennessee Code Annotated Section 34-13-104(9)(A)(iv) requires the petitioner to file "[a] description of the proposed plan for the management of the respondent's property" if financial information is known. District of Columbia Code Annotated Section 21-2065(b) calls for the conservator to "develop an individual conservatorship plan together with the guardian and to the maximum extent possible, the incapacitated individual." Code of Virginia Annotated Section 37.1-134.8(B)(5) states that the petition must include "where appropriate, a recommendation as to living arrangement and treatment plan."

206. Fred, *supra* n. 15, at 36 (referring to Appendix D on page 68, which provides a Model Initial Guardianship Plan).

207. Wood & Hurme, *supra* n. 56, at question 6.

208. *Wingspread Recommendations*, *supra* n. 3, at 25.

plans was rigorously enforced.<sup>209</sup> Thus, it is unclear to what extent plans are in use — and are useful. One Florida practitioner observed that plans help to keep her “on track.”<sup>210</sup> She uses them as “reminders of things to do” concerning, for example, dental or vision care, but questions whether they are of real use to the court in a monitoring capacity.<sup>211</sup>

One barrier to the use of guardianship plans may be simply the added review time for court staff, when resources for any monitoring at all are scant. A possible way around this might be sending the plan to individuals listed in the notice. Their scrutiny could offer valuable perspective to the court. A second barrier may be that plans cannot keep pace with the changing condition and circumstances of the ward. Another Florida guardianship practitioner noted that “the reality of caring for an individual in changing circumstances” leaves the plans far behind, and that a very brief monthly update might better serve the ward, court, and guardian.<sup>212</sup> An open question is the extent to which court approval is required for deviation from the plan. Requiring continual approval for frequent deviations when circumstances are in flux is untenable. A third obstacle may be the greater inherent difficulty of assessing plans to meet medical and social needs compared with budget plans and financial reports. Judicial personnel may require additional training before personal-care plans can become a workable tool.

## V. GUARDIAN REPORTS

### A. History

After guardianship has been established, the primary way that courts are informed about the ward’s status is through periodic reports.<sup>213</sup> Due to the probate roots of guardianship, probate courts are historically familiar with requiring and auditing accounts from executors and guardians of the estate. However, under the original Uniform Probate Code of 1978 (UPC), conservators were required to account only on resignation

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209. Wood & Hurme, *supra* n. 56, at question 6.

210. Telephone Interview with Vicki Alkire, MG, Viable Alts., Inc., Sarasota, Fla. (Aug. 30, 2001).

211. *Id.*

212. Telephone Interview with Theresa Barton, RG, Guardian Care & Geriatric Servs., Longwood, Fla. (Aug. 29, 2001).

213. Commn. on Natl. Prob. Ct. Stands., *supra* n. 17, at 73.

or removal with no review of the guardianship of the person.<sup>214</sup> Requiring reports on personal information, in addition to financial information, has been somewhat problematic for both courts and guardians. But this innovation is now generally accepted in courts across the country.

The Wingspread conferees recommended that “[a] standard annual report form should be developed and required for guardianship of the person as well as guardianship of the property.”<sup>215</sup> The 1979 ABA Model Statute also suggested the need for such personal status reports.<sup>216</sup> It recommended that the guardian of the person inform the court of changes in the ward’s capacity, services the guardian had provided, any actions taken, significant problems relating to the guardianship, and reasons why the guardianship should not be terminated or why there was no less restrictive alternative to the guardianship.<sup>217</sup>

The 1991 ABA monitoring study reinforced the need for the guardian of the person to report at least annually,<sup>218</sup> as well as calling for guardians of the estate (conservators) to report on the personal status of the ward, in addition to accounting for funds under the conservator’s control.<sup>219</sup> Although the Uniform Guardianship and Protective Proceedings Act requires annual reports and accounts, it calls on conservators only to list services provided to the protected person.<sup>220</sup> The *National Probate Court Standards* also reflect the judges’ need to receive annual reports on the ward’s condition.<sup>221</sup> Such timely information enables the court “to determine whether the guardian is appropriately carry-

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214. Unif. Prob. Code § 5-418 (1982); Unif. Guardianship & Protective Proc. Act § 420(a), 8A U.L.A. § 5-420(a) (demonstrating that the Uniform Guardianship and Protective Proceedings Act now calls for conservators to report annually “unless the court otherwise directs, upon resignation or removal, upon termination of the conservatorship, and at other times as the court directs”).

215. *Wingspread Recommendations*, *supra* n. 3, at 23 Recommendation V-B.

216. Model Guardianship & Conservatorship Stat. §§ 17(b), 18(7) (reprinted in Sales et al., *supra* n. 9, at 567, 572).

217. *Id.* §§ 17(b)(ii)–(iv), (vi)–(vii), 18(7)(b).

218. Hurme, *supra* n. 11, at 1.

219. *Id.* at 82. New Hampshire courts have discontinued requiring guardians of the estate to file a personal status report with the annual accounting and holding automatic in-court hearings on annual accounts. *Id.*; Telephone interview with Linda Mallon, Exec. Dir. Off. of Pub. Guardian (Aug. 13, 2001).

220. Unif. Guardianship & Protective Procs. Act §§ 316(a)(3), 420(b)(2), 8A U.L.A. §§ 5-316(a), 5-420(b)(2).

221. Commn. on Natl. Prob. Ct. Stands., *supra* n. 17, at 72 stand. 3.3.14.



ing out the guardian's assigned duties and responsibilities."<sup>222</sup>

### B. Progress

In 1979, the ABA Developmental Disability State Legislative Project determined that ten states had statutory reporting requirements.<sup>223</sup> The ABA's 1991 survey of state statutes found that thirty-nine states and the District of Columbia required periodic financial accountings.<sup>224</sup> Forty-three states and the District of Columbia required personal reports, with eight states requiring guardians of property to report on the personal well-being of their wards.<sup>225</sup> As shown in the statutory chart at Appendix A, by 2000, only three states did not statutorily require personal status reports and all but Massachusetts required periodic accountings.<sup>226</sup>

Despite then-existing statutory requirements for accountings and personal status reports, the AP reporters found some guardianship files virtually empty in 1987.<sup>227</sup> The ABA's 1991 survey of guardianship practitioners confirmed that, in many instances, the reporting requirements were not vigorously enforced.<sup>228</sup> By 2000, the Authors found more vigorous enforcement of the reporting requirements, in that nearly half of the practitioners said that personal status reporting was rigorously enforced in their jurisdictions, with seventy-seven percent filing these reports annually.<sup>229</sup> Only twelve percent said that conservators were required to report on personal status in addition to financial accountings.<sup>230</sup>

### C. Report Content

Because status reports are the primary means by which

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222. *Id.* at 72 commentary.

223. Sales et al., *supra* n. 9, at 496–498.

224. Hurme, *supra* n. 11, at 7. Of those states, thirty-three required annual accounts, three were biennial, two were triennial, two were biennial after an initial account on the anniversary and eleven were discretionary. *Id.* at 16–17.

225. *Id.* at 7. Of those states, thirty required annual reports, one was annual then biennial, four were biennial, one was semi-annual, seven were as the court required. *Id.* at 17.

226. *See infra* app. A (specifically, Delaware, Louisiana, and Massachusetts).

227. Bayles & McCartney, *supra* n. 2.

228. Hurme, *supra* n. 11, at 17.

229. Wood & Hurme, *supra* n. 56, at questions 1–2.

230. *Id.* at question 4.

courts are appraised of the ward's well-being, the contents of the reports are crucial.<sup>231</sup> Each report must be sufficiently detailed to reflect accurately both the ward's condition and the care the guardian is providing, so that the court can determine whether any modifications in the guardianship are appropriate.<sup>232</sup> As judges have stated, the reports need to be simple enough to be prepared without the assistance of an attorney, yet comprehensive.<sup>233</sup> How do practitioners view the reports? Sixty-three percent of the Authors' survey respondents said their reports call for limited or brief responses, while only eighteen percent consider them comprehensive.<sup>234</sup>

A scan of the 2000 statutes shows general consensus in the type of information required.<sup>235</sup> Typically, guardians must report on the ward's living arrangements and current status, services and medical treatment provided, number of guardian visits, and the guardian's opinion on whether the guardianship needs to be continued.<sup>236</sup> New York requires a physician's evaluation of the ward's functional level, an evaluation of the appropriateness of the ward's residential placement, and the guardian's plan for

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231. Bayles & McCartney, *supra* n. 2, at 14. "[F]iles are critical to the court's knowledge that wards are being cared for and that their money is being spent properly. Without the files, the door is open to abuse." *Id.*

232. Hurme, *supra* n. 11, at 19; *e.g.* Commn. on Natl. Prob. Ct. Stands., *supra* n. 17, at 73 (documenting that guardians should not deviate from court-approved plans, except in emergencies). The Uniform Guardianship and Protective Proceedings Act requires guardian reports to include the current mental, physical, and social condition of the ward; living arrangements; medical, educational, vocations, and other services provided to the ward and the guardian's opinion as to the adequacy of the ward's care; a summary of the guardian's visits and activities on the ward's behalf; the extent to which the ward is included in decision-making; whether the guardian considers the current plan for care, treatment, or habilitation to be in the ward's best interest; plans for future care; and a recommendation as to the need for continued guardianship or any changes in the guardianship's scope. Unif. Guardianship & Protective Procs. Act § 316(a)(1)–(7), 8A U.L.A. § 316(a)(1)–(7). The conservator's report must list assets, receipts, disbursements, and distributions, the services provided, and recommendation of changes or need to continue. *Id.* § 420(b)(1)–(3).

233. Commn. on Natl. Prob. Ct. Stands., *supra* n. 17, at 72.

234. Wood & Hurme, *supra* n. 56, at question 5.

235. *Infra* app. A.

236. Commn. on Natl. Prob. Ct. Stands., *supra* n. 17, at 73. The National Probate Court Standards recommend that guardians include a comprehensive description of the ward's physical condition, the services and care provided to the ward, significant actions taken by the guardian, expenses incurred in providing these services, and any major anticipated changes in the ward's treatment and care. *Id.*

treatment.<sup>237</sup> Florida judges are informed as to whether the ward's living arrangement is best suited to the ward's needs.<sup>238</sup> Georgia, Oklahoma, and Wisconsin ask for the guardian's recommendation for an alternative intervention (the least-restrictive alternative).<sup>239</sup> North Dakota's statute seeks information on the nature of the ward's care, changes in the ward's living situation, a summary of medical decisions, and the guardian's plan for the ward's well-being.<sup>240</sup> This report must be given to the ward along with a notice that the ward has the right to alter, limit, or terminate the guardianship "at anytime."<sup>241</sup>

To some degree, self-completed reports may not bring to light inappropriate actions by guardians who abuse their responsibilities and conceal negligent care; however, the reporting process has its own utility, in that guardians realize that they will have to answer to the court, and that the court cares about how they are fulfilling their duties as the court's agent.<sup>242</sup> The very process of filling out the report can have a sentinel effect.

## VI. COURT REVIEW

### A. History

Sentinel effects aside, no matter how artfully designed and conscientiously completed, the annual report serves little purpose if no one looks at it.<sup>243</sup> As one commentator observed, "[i]f an annual guardian report is merely going to be placed in a file, unread or at most given a cursory review, it is nothing but a palliative that squanders the guardian's time and energy."<sup>244</sup> As some guardians have expressed, they would rather get feedback from

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237. N.Y. Mental Hygiene Law § 81.31(b)(5).

238. Fla. Stat. § 744.3675(1)(a)(4).

239. Ga. Code Ann. § 29-5-3(b)(10)(B) (2001); Okla. Stat. Ann. tit. 30, § 4-305(7) (West 2001); Wis. Stat. Ann. § 880.38(3) (West 2001); see *supra* nn. 225-227 (asking for a recommendation on the least restrictive living arrangement for the ward).

240. N.D. Cent. Code § 30.1-28-12(8)(e)-(g) (2001).

241. *Id.* § 30.1-28-12(9).

242. Hurme, *supra* n. 11, at 18.

243. "Specific contents and timely filing of guardianship reports will be of little value, however, if the report is not thoroughly reviewed to assure the use of the least restrictive arrangement . . . and . . . that guardians are not abusing the ward and/or wards' assets." *Wingspread Recommendations*, *supra* n. 3, at 24 Recommendation V-B commentary.

244. Lawrence A. Frolik, *Abusive Guardians and the Need for Judicial Supervision*, 130 Tr. & Est. 41, 44 (July 1991).

the court than wonder whether anyone looked at the report.<sup>245</sup> Therefore, courts need to have in place procedures and personnel to review the reports and take action if something is amiss.

The Wingspread participants recommended that courts “vigorously enforce timely filing of all required reports,” and increase frequency and quality reviews.<sup>246</sup> Given the serious loss of liberty and vulnerability of the incapacitated ward, it is essential that the court regularly receives and reviews basic information about the ward’s well-being, utilization of funds, and guardian’s actions. Recognizing the burden on court resources, but emphasizing the importance of tracking whether the guardian’s activities reflected the purpose of the guardianship, they suggested that “volunteers, review boards and investigators [should be used] to verify the contents of the report and the circumstances of the ward.”<sup>247</sup> The 1991 ABA study of monitoring built on the Wingspread recommendation by identifying several components of an effective and consistent review process: designated judges responsible for review, designated financial auditors, and examiners of the personal status reports, and established review criteria.<sup>248</sup>

The *National Probate Court Standards* also recognized the need to “have written policies and procedures to ensure prompt review of [guardian] reports and requests,”<sup>249</sup> and specified that judges should be prepared to investigate those situations in which a guardian fails to file a report and take prompt action if the guardian has violated any provision of the original order, or if any complaints against the guardian are brought to the court’s attention.<sup>250</sup> In addition, the *National Probate Court Standards* recognize that courts must be able to examine sua sponte the need to continue the guardianship and not be limited by any established review dates.<sup>251</sup> The Uniform Guardianship and Protective Procedures Act calls for the court to establish a system for monitoring guardianship, including the filing and review of

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245. *Wingspread Recommendations*, *supra* n. 3, at 24 Recommendation V-B commentary.

246. *Id.* at 23 Recommendation V-B.

247. *Id.* at 24.

248. Hurme, *supra* n. 11, at 37, step V.

249. Commn. on Natl. Prob. Ct. Stands., *supra* n. 17, at 73 stand. 3.3.15.

250. *Id.* at 73.

251. *Id.* at 74 stand. 3.3.16 & commentary; Hannaford & Hafemeister, *supra* n. 109, at 164.

annual reports.<sup>252</sup>

### B. Tracking

Before the review can be conducted, the reports must be filed. This necessitates that courts have in place the technology required for an effective tracking-or-tickler system.<sup>253</sup> Notoriously lacking are court data systems to even inventory the opened and closed cases.<sup>254</sup> For example, in Arizona, data systems provide only limited information, have restricted tracking capability, and are not consistent from one county to the next regarding the coding or information collected.<sup>255</sup> This prevents easy identification of cases assigned to particular guardians, monitoring of reporting compliance, or analysis of risk factors. To address these problems, the Arizona Supreme Court recently recommended that all Superior Courts use uniform-case-management software with a specialized probate module developed by the Pima County court for guardianship-case tracking.<sup>256</sup>

When technological aids are lacking, courts are finding practical ways to accomplish tracking and review, even in the face of constrained budgets. Judges at the May 2001 meeting of the National College of Probate Judges offered a variety of best practices. To assist monitoring of the guardian's whereabouts, one court requires guardians to provide the court with two points of contact,<sup>257</sup> and another includes change-of-address and notice-of-ward's death forms with the new guardian packet.<sup>258</sup> If guardians have e-mail, those addresses should be recorded and

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252. Unif. Guardianship & Protective Procs. Act § 316(c), 8A U.L.A. § 316(c).

253. *Wingspread Recommendations*, *supra* n. 3, at 24; *e.g.* Commn. on Natl. Prob. Ct. Stands., *supra* n. 17, at 74 (implying the viability of a tickler system as a method of notifying the court when a report is due).

254. Victor E. Flango & David B. Rottman, *Court Data on the Elderly and Persons with Disabilities*, in *Court-Related Needs of the Elderly*, *supra* n. 182, at 204; *e.g.* A. Frank Johns, *Guardianship Folly: The Misgovernment of Parens Patriae and the Forecast of Its Crumbling Linkage to Unprotected Older Americans in the Twenty-First Century — A March of Folly? Or Just a Mask of Virtual Reality?*, 27 *Stetson L. Rev.* 79–80 (1997) (“A database for the states or the federal government would provide empirical data by which caseloads could be more carefully forecast . . . [and] funding could [be] provide[d] for sufficient staff, the cost of training and enforcement.”).

255. *Ariz. Sup. Ct.*, *supra* n. 153, at 8.

256. *Id.* at 9.

257. *Best Practices*, *supra* n. 185, at 1.

258. *Id.*

used to send filing reminders.<sup>259</sup> Although the reporting requirement is found in the statute and may be included in the guardianship order, some courts find it effective to remind guardians of due dates by sending a notice and copy of the reporting form a couple of months before the deadline.<sup>260</sup> The Seventeenth and Sixth Circuit Courts in Florida have instituted online filing of inventories, accountings, and plans.<sup>261</sup> This innovative online system was instituted to enable the judges to do a more efficient job of case management and to help standardize the review of those documents. New Mexico clerks no longer send courtesy notices of late filing.<sup>262</sup> If the report is not timely filed, the guardian receives a default notice and must pay a twenty-five-dollar fine and file the report within thirty days.<sup>263</sup> Should the guardian fail to respond, the guardian receives a citation with a fifty-dollar fine and an order to appear at a show-cause hearing.<sup>264</sup>

### C. Review Process

Once the reports are filed, what happens to them? The answers are as varied as the number of states, courts and judges. In many instances, the answer is "very little," in others the review is thorough. The Wingspread participants found review "lacking, qualitatively as well as quantitatively."<sup>265</sup> As A. Frank Johns, past president of the National Academy of Elder Law Attorneys, commented, "Most states provide little or no oversight of the guardians' actions, reviewing only accountings and reacting to petitions or other accusations. Most states offer no proactive oversight that determines whether the quality of the lives of wards or conservatees are maintained, let alone enhanced."<sup>266</sup> The

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259. *Id.*

260. *Id.*

261. Seventeenth Jud. Cir. of Fla., *Probate and Guardianship, Guardianship Forms, Guardianship Reporting Software*, <[http://www.17th.flcourts.org/guardianship\\_reporting-software.html](http://www.17th.flcourts.org/guardianship_reporting-software.html)> (accessed Feb. 1, 2002); Sixth Jud. Cir. of Fla., *Guardianship Forms, Guardianship Accounting & Plan Forms* <<http://www.jud6org/Probate/forms.htm>> (accessed Feb. 1, 2002).

262. Telephone Interview from Linda Mallon, Exec. Dir., Off. of Pub. Guardian (Aug. 13, 2001).

263. *Id.*

264. *Id.* New Mexico guardians are fined five dollars for each day reports are overdue. N.M. Stat. Ann. § 45-5-409 (1995).

265. *Wingspread Recommendations*, *supra* n. 3, at 24.

266. Johns, *supra* n. 254, at 77.

Florida Supreme Court Commission on Fairness survey of circuit courts in 2000 found very little in the way of functioning monitoring systems.<sup>267</sup> Public hearings by the Illinois Guardianship Reform Project in 1999–2000 uncovered “frustration with the inconsistency in carrying out statutory monitoring requirements, such as . . . a laxity in closely scrutinizing annual reports.”<sup>268</sup>

A few states have established specific step-by-step flowcharts with deadlines, such as New York’s requirement that court examiners review the reports within thirty days of filing to determine the ward’s condition, care, and finances and then reports to the court “the manner in which the guardian has carried out his or her duties.”<sup>269</sup> Florida clerks have thirty days to check the initial and annual reports to see whether they contain required information and ninety days to audit the financial reports.<sup>270</sup> Judges must review the initial guardianship report within the next sixty days and the annual report within thirty days to determine whether the guardian is meeting the ward’s needs and acting only in the areas in which the ward has been declared incapacitated.<sup>271</sup>

Other states use a variety of procedures and personnel to assist courts in conducting reviews. In North Carolina, a designated agency certifies to the court clerk that it has reviewed the report and may send comments, petition the clerk to order the guardian to perform certain duties, or modify the terms of the order.<sup>272</sup> In Maryland, a volunteer multi-disciplinary committee reviews each public guardianship case at an annual face-to-face meeting.<sup>273</sup> Virginia reports are filed with the Department of Social Services, which must review them and inform the court of any report more than ninety-days delinquent.<sup>274</sup> An imaginative provision introduced in West Virginia proposed a unique method of review — a “citizen guardianship panel” of three to fifteen volunteers, including at least one member with a background in

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267. Fla. Sup. Ct. Commn. on Fairness, Off. of the St. Cts. Administr., *Responses to Guardianship Monitoring Survey* 3, question 4 (2000) (unpublished document) (on file with the *Stetson Law Review*).

268. Fred, *supra* n. 15, at 28.

269. N.Y. Mental Hygiene Law § 81.32(a)(1)–(2) (McKinney 2001).

270. Fla. Stat. § 744.368(2)–(3) (2001).

271. *Id.* § 744.369(1), (4)(a)–(b).

272. N.C. Gen. Stat. § 35A-1243(a), (b)(1), (3)–(4) (2001).

273. Md. Est. & Trusts Code Ann. § 14-404 (2001).

274. Va. Code Ann. § 37.1-137.2(A) (Supp. 2001).

accounting and one with a background in mental health, appointed by circuit court judges to review reports and make recommendations.<sup>275</sup> The Uniform Guardianship and Protective Proceedings Act unimaginatively states merely that “the court may appoint a [visitor] to review a report . . . , interview the protected person or conservator, and make any other investigation the court directs.”<sup>276</sup>

One obvious source of information about the ongoing care of a ward could be other family members. As the probate judges suggest, copies of personal status reports can be sent to “interested persons” who would then have the opportunity to notify the court if they were aware of circumstances not disclosed in the report.<sup>277</sup> “One concern [with] such a notice system is that persons who were not chosen to be guardians [may] complain” about the guardian’s actions without merit or foundation.<sup>278</sup> In the Authors’ 2000 survey, about one-third (thirty-three percent) of the practitioners said that reports are routinely furnished to specific persons.<sup>279</sup> An equal number said that the reports were public documents, available for general public inspection.<sup>280</sup>

Interestingly, judges are more likely to review personal status reports than accountings. Practitioners surveyed in 2000 reported that for financial accounting, sixteen percent were reviewed by judges, forty-two percent by audit staff, and fourteen percent by court personnel who had responsibilities other than auditing.<sup>281</sup> For personal-status reports, twenty-three percent were reviewed personally by judges and thirty percent were reviewed by staff with specific review responsibilities.<sup>282</sup> In addition, seventeen percent of the respondents reported that no one looks at personal status reports in their jurisdictions, while only six percent say accountings are not seen.<sup>283</sup>

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275. W. Va. H. 4672, 75th Leg. (Mar. 11, 2000).

276. Unif. Guardianship & Protective Proc. Act § 420(c), 8A U.L.A. § 420(c).

277. Commn. on Natl. Prob. Ct. Stands., *supra* n. 17, at 74; *e.g.*, Okla. Stat. Ann. tit. 30, § 4-307(A)(1) (West 2001) (requiring the mailing of report copies to parties required to receive notice).

278. Hurme, *supra* n. 11, at 50.

279. Wood & Hurme, *supra* n. 56, at question 22.

280. *Id.*

281. *Id.* at question 16.

282. *Id.* at question 17.

283. *Id.* at questions 16–17.



#### D. Audits and Verification

Because financial mismanagement of wards' assets is of critical concern, systems must be in place to verify and investigate the financial information guardians/conservators provide to courts. In some courts, specific auditors, such as the Maryland Trust Attorney (or Clerk), conduct this review.<sup>284</sup> By court rule, the Trust Attorney is to examine the accounting to see whether it is complete, verify transactions and assets, review investments, and recommend bond.<sup>285</sup> Specifically, the Prince George's County Trust Attorney is looking for cash transactions, spending out-of-line with the ward's assets, or commingling of funds.<sup>286</sup> Many jurisdictions require that supporting documentation, such as cancelled checks or bank statements, accompany the accounting.<sup>287</sup> Another option is to have individual accountings verified by a certified public accountant. Pending funding, Arizona is seeking to have the Administrative Office of Courts hire a roving accountant who would conduct random audits on cases identified by the presiding judge in each county.<sup>288</sup> Volunteers, such as retired CPAs, have also been a valuable resource to courts in reviewing accountings.<sup>289</sup>

The verification of information contained in a personal-status report requires a different sort of process. This is best accomplished by having someone visit the ward to check on the appropriateness of living arrangements, frequency of guardian visits, and implementation of the care plan.<sup>290</sup> In the Authors' 2000 survey, only one in five (twenty-two percent) practitioners reported that their courts have court personnel available to investigate complaints, while over one-third (thirty-six percent) noted that their courts call upon a guardian ad litem as needed

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284. Hurme, *supra* n. 11, at 39.

285. *Id.*

286. *Id.*

287. New Hampshire guardians are required to supply proof of bank balances along with the accounting and to have available all bills, receipts and certified bank statements if questions arise. Telephone Interview with Linda Mallon, Exec. Dir. Off. of Pub. Guardian (Aug. 13, 2001). Minnesota conservators must provide verification from the financial institution of the account balance. Telephone Interview with Kris Maser, Esq., Maser and Admundson, P.A. (Aug. 2, 2001).

288. Admin. Off. of the Cts., Ariz. Sup. Ct., *supra* n. 153, at 11.

289. *Id.*

290. Hurme, *supra* n. 11, at 45.

and one-fourth (twenty-five percent) have no one.<sup>291</sup> These numbers severely decline when practitioners are asked about routine or periodic visits to wards, outside of problematic concerns. More than half (fifty-five percent) of the practitioners said no one was available, but other courts have court personnel (twelve percent), ad litem (twelve percent), or volunteers (eighteen percent) to conduct periodic visits.<sup>292</sup>

### E. Monitoring Personnel

Using volunteers is a possible way to expand the court's ability to be apprised of the ward's condition.<sup>293</sup> The AARP Volunteer Guardianship Monitoring Project successfully used trained AARP members as volunteer court visitors to visit wards and guardians to verify information in personal status reports and to report any observed problems or concerns.<sup>294</sup> Judges, wards, guardians, and volunteers uniformly evaluated the pilot project highly. Unfortunately, the AARP discontinued national support for the project in 1997, although several pilot jurisdictions continue to use retired volunteers.<sup>295</sup> Jurisdictions considering the use of volunteer monitors should heed the advice that,

[t]o be successful, a volunteer program needs program organization and development; procedures for volunteer recruiting, screening, and doing background checks; written mission statements and job descriptions; a coordinator who has administration proficiency, interpersonal skills, and knowledge about the subject matter; and support and commitment to the program by the supervising agency.<sup>296</sup>

California relies on court staff; specifically, the California Court Investigator (CI) is required to visit each ward on the first

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291. Wood & Hurme, *supra* n. 56, at question 19.

292. *Id.* at question 21.

293. Hurme, *supra* n. 11, at 45.

294. *Id.* at 49.

295. Wash. St. Dept. of Info. Servs., *Access Washington, Department of Social and Health Services — People Helping People, AARP/DSHS Volunteer Guardianship Monitoring Program* <<http://www.wa.gov/dshs/aarp/index.html>> (modified Dec. 4, 2000). Washington has continued and expanded its Volunteer Guardianship Monitoring Program to recruit volunteers, set up training, and assist the courts as needed. *See generally* Fred, *supra* n. 15, at 33 (discussing the Spokane County Superior Court's feasibility study).

296. *Id.* (quoting Spokane County Superior Court, *Volunteer Guardianship Monitoring Program: Feasibility Study* 8 (Feb. 2000)).

anniversary to verify information the conservator provided in the personal-status report, determine whether the conservator is acting in the ward's best interest, and ascertain whether the conservatorship is still needed.<sup>297</sup> Termed the "backbone" of the California conservatorship system by the Associated Press,<sup>298</sup> the Court Investigators are the eyes and ears of the court.<sup>299</sup> During the annual review, the CI reviews any medical charts and meets with attending staff, caregivers, or family members.<sup>300</sup> If the CI cannot locate the conservatee, the conservator receives notice to make the conservatee available for the CI interview.<sup>301</sup> The CI's report is sent to the court, the conservator, and the attorney of record.<sup>302</sup> The CI also responds to complaints and allegations of neglect, fraud, or abuse of a conservatee.<sup>303</sup>

The Tarrant County, Texas, Probate Court #2 uses university social-work student interns, referred to as court visitors, to conduct reviews and visit wards personally.<sup>304</sup> These court visitors meet annually with the guardian and the ward to assess the ward's condition and report to the court.<sup>305</sup> The Court Visitor's Report includes responses on frequency of guardian visits, medical prognosis, guardian satisfaction with treating physicians, appropriateness of living conditions, daily activities, intellectual functioning, and physical condition.<sup>306</sup> The reports are also used if a complaint is lodged.<sup>307</sup> If the visitor recommends an increase or decrease in the guardian's powers, the court appoints a court investigator or guardian ad litem to investigate and file any necessary petitions.<sup>308</sup> The college interns are trained to assess risk factors that indicate a need for guardianship or changes in

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297. Cal. Prob. Code § 1851(a) (West 2001).

298. Laura Castaneda & George Garties, *California Court Investigators: Backbone of the Conservatorship System*, in *Guardians of the Elderly: An Ailing System*, AP Special Report, in *Abuses in Guardianship of the Elderly and Infirm: A National Disgrace*, H.R. Comm. Print 100-639, at 34.

299. *Id.*

300. Cal. Prob. Code § 1851(a) (West 2001).

301. *Id.* § 1853(a).

302. *Id.* § 1851(b).

303. Castaneda & Garties, *supra* n. 298.

304. See Tarrant County Probate Court #2, *supra* n. 80 (specifically, on page 5 of a handout titled "A Guide to a Guardian of the Person's Duties and Responsibilities.").

305. Tex. Prob. Code Ann. § 648(b) (Supp. 2000).

306. *Id.* § 648(c)(1)-(8).

307. *Id.*

308. *Id.*

ongoing care.<sup>309</sup>

Although every court has inherent equitable power to investigate matters brought before it, most states authorize judges to call on other personnel to conduct investigations when a problem or “red flag” comes to the court’s attention. Typically, a visitor, investigator, guardian ad litem, or master can be appointed on a case-by-case basis.<sup>310</sup> Indiana identified its Division of Family and Children as the proper agency to investigate problematic cases.<sup>311</sup>

Monitoring assistance can come from other available community resources. One judge suggests referring guardians to freelance probate paralegals to help shape up messy or incomplete accountings, with the guardian being surcharged for this assistance.<sup>312</sup> When a guardian’s bond is at risk, the bonding company investigation will supplement the court’s investigation.<sup>313</sup>

Michigan recently pioneered an inventive approach to review and investigation — a guardianship ombudsman. In 2000, the Michigan Supreme Court appointed a Court of Appeal judge as a state-wide guardianship ombudsman, with a mandate to investigate complaints and problems with individual guardianship cases and to make recommendations to improve the system.<sup>314</sup> But, just seven months after the appointment, the judge returned to the bench when the legislature failed to appropriate funds for the position.<sup>315</sup>

#### F. Review of Need to Continue Guardianship

As an additional monitoring step, the court or a judicially-approved entity can conduct periodic hearings to review the continuing need for guardianship to ensure that the scope of the

309. *Id.*

310. *E.g.* Ariz. Rev. Stat. § 14-5308(B) (West 1995); Fla. Stat. § 744.369(2); 755 Ill. Comp. Stat. Ann. § 5/11a-20(b) (West 2000); 18-A Me. Rev. Stat. Ann. § 5-419(c) (1998); Mich. Comp. Laws Ann. § 700.5310(4) (West 2001); Neb. Rev. Stat. § 30-2623(c) (1995); Ohio Rev. Code Ann. § 2111.49(A)(2) (Anderson 1998); Or. Rev. Stat. Ann. § 125.160 (Supp. 1998); Tex. Prob. Code Ann. § 648; Wis. Stat. Ann. § 880.25(4) (West 2001).

311. Ind. Code § 29-3-9-11 (2000).

312. *Best Practices*, *supra* n. 185, at 2.

313. *Id.*

314. Wendy Wendland-Bowyer, *State Ombudsman Going Back to Court: Legislature Never Ok'd Funds for Guardian Job*, Detroit Free Press 6B (Apr. 25, 2001); Telephone interview with Judge Donald S. Owens, Mich. Ct. App. (May 9, 2001).

315. Wendland-Bowyer, *supra* n. 314.

guardianship is no more extensive than is appropriate. Although a systematic review of each court file can reveal absent reports or other anomalies, an in-court hearing affords an opportunity for the judge to determine whether any modifications should be made due to changes in the ward's level of capacity or the guardian's ability to serve.

The idea of periodic review germinated in the 1979 ABA Model Statute.<sup>316</sup> "The review hearing serves a multifold purpose. It assures that the services, restrictions, duties, and powers remain consistent with the abilities of the [incapacitated person] as they change over time."<sup>317</sup> The ABA monitoring report recommended an evidentiary hearing with notice to the ward to appear with counsel.<sup>318</sup> The guardian would need to prove, by clear and convincing evidence, that no less restrictive alternative to the existing order was available.<sup>319</sup> National Probate Court Standard 3.3.16 concurs: "The probate court should adopt procedures for the periodic review of the necessity for continuing a guardianship. A request by the respondent for a review . . . should be addressed promptly."<sup>320</sup>

At the time of the ABA monitoring report, only three states had statutory requirements to hold periodic review hearings.<sup>321</sup> By 2000, twenty-nine states had some provision requiring or permitting court review of the continuing need for guardianship.<sup>322</sup> Reviews may be held in response to a petition, but a few states provide for regular court evaluation, either as a paper review of reports or through an in-person hearing.<sup>323</sup> For example, Texas judges "shall review annually each guardianship . . . to determine whether the guardianship should be continued, modified, or terminated,"<sup>324</sup> and may conduct a hearing to make this determination.<sup>325</sup> In California, conservatorships shall be reviewed by the court one year after the appointment of the

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316. Model Guardianship & Conservatorship Stat. § 15 (reprinted in Sales et al., *supra* n. 9, at 558–560).

317. *Id.* § 15(1) cmt.

318. Hurme, *supra* n. 11, at 53.

319. *Id.*

320. Commn. on Natl. Prob. Ct. Stands., *supra* n. 17, at 74 stand. 3.3.16.

321. Hurme, *supra* n. 11, at 54 n. 9.

322. *Infra* app. A.

323. *Infra* nn. 324–328 and accompanying text.

324. Tex. Prob. Code Ann. § 672(a) (Supp. 2000).

325. *Id.* § 672(b)(3).

conservator and biennially thereafter.<sup>326</sup> Judges in Connecticut and Kansas must review guardianships every three years, and may order an evidentiary hearing.<sup>327</sup> Colorado judges determine the scope and frequency of review at the time of the appointment, based on the visitor's recommendation, doctor's prognosis, and ward's disability.<sup>328</sup> In several other states, post-appointment hearings are discretionary or may be held in response to a report or investigation.<sup>329</sup> In practice, seventy percent of the 2000 survey respondents said that review hearings were held only on request.<sup>330</sup>

Maryland has established perhaps the most comprehensive system of periodic review; however, only public-guardianship cases receive this close scrutiny.<sup>331</sup> Review boards, comprised of community experts, hold face-to-face hearings attended by the ward, guardian, and ward's attorney.<sup>332</sup> At the hearing, the panel discusses the ward's condition, services, and treatment, paying particular attention to placement and medication issues.<sup>333</sup> Board members, appointed by the county commissioners, include social-services- and department-on-aging representatives, a physician, psychiatrist, public-health nurse, lawyer, and community representatives.<sup>334</sup> The first hearing is held six months after the appointment, with paper reviews or hearings alternating each six months thereafter.<sup>335</sup> Maryland advocates comment that, although this process is very effective in ensuring diligent case management by the guardians, keeping up with the case load and finding enough qualified board members are ongoing challenges.<sup>336</sup>

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326. Cal. Prob. Code § 1850 (West 2001).

327. Conn. Gen. Stat. Ann. § 45a-660(c)-(d) (West 2001); Kan. Stat. Ann. § 59-3035(a)-(b) (2000) (providing for a paper review with an option to order a full hearing); *supra* nn. 331-332 (requiring reviews and hearings).

328. Colo. Rev. Stat. Ann. § 15-14-304(2) (West 2001).

329. *Infra* app. A.

330. Wood & Hurme, *supra* n. 56, at question 23.

331. Vicki Gottlich & Erica Wood, *Statewide Review of Guardianships: The California and Maryland Approaches*, 23 Clearinghouse Rev. 426, 426-432 (1989).

332. *Id.* at 430.

333. *Id.*

334. *Id.*

335. Hurme, *supra* n. 11, at 56.

336. *Id.*

### G. Sanctions

When guardians violate their fiduciary responsibilities, courts have a panoply of sanctions.<sup>337</sup> Probate judges note that possible sanctions “include suspension, contempt, removal, and appointment of a successor.”<sup>338</sup> “Where the court learns of a missing, neglected, or abused respondent, it should take immediate action to ensure the safety and welfare of that respondent.”<sup>339</sup> In some states, guardians can be removed for good cause, if in the ward’s best interest, for failure to perform duties. Oklahoma is perhaps the most specific — guardians can be removed for abuse of fiduciary responsibilities, failure to perform, incapacity to perform, gross immorality, conflict of interest, or becoming insolvent.<sup>340</sup> Oregon guardians can be removed if they fail to use good business judgment or if they place the ward in a mental or nursing facility without court approval.<sup>341</sup> South Dakota and West Virginia guardians face removal if they make a material mistake in the petition, become incapacitated, abuse substances, are convicted of any relevant crime, demonstrate waste, mismanagement, or neglect, have an interest adverse to the ward, or fail to file reports.<sup>342</sup> Fees can be withheld or the guardian or guardian’s bond surcharged for mismanagement of property.<sup>343</sup> Rhode Island guardians can be held accountable for the full value of estate and property, if they fail to comply with a citation to report without sufficient excuse.<sup>344</sup> Criminal sanctions are also always possible if a guardian commits fraud, theft, or embezzlement.<sup>345</sup>

Removal of certification is also a potentially severe sanction, when certification is a prerequisite to appointment. Experiences in Arizona demonstrate how its state certification process plays a dominant monitoring role in the discovery and investigation of

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337. *Infra* app. A.

338. Commn. on Natl. Prob. Ct. Stands., *supra* n. 17, at 75 stand. 3.3.17(a).

339. *Id.* 3.3.17(b).

340. Okla. Stat. Ann. tit. 30, § 4-801 (West 2000).

341. Or. Rev. Stat. Ann. § 125.225(2)–(3) (2000).

342. S.D. Codified Laws § 29A-5-504 (2000); W. Va. Code § 44A-4-4 (2000) (both statutes provide for guardian removal based on an enumerated list of infractions).

343. *See infra* app. A (listing states that provide sanctions for loss of fees or bonds surcharging resulting from findings of mismanagement).

344. R.I. Gen. Laws § 33-15-26 (2000).

345. *See infra* app. A (listing the states that allow for criminal investigation).

fiduciary abuse. When a complaint filed with the Arizona Administrative Office of the Courts (AOC) revealed mismanagement of estate funds by a certified private fiduciary, the office was able to obtain an emergency suspension of the fiduciary's certification.<sup>346</sup> The fiduciary, indicted on charges of theft and racketeering, plead guilty to one count of illegal use of an enterprise.<sup>347</sup> When a Superior Court judge became aware of possible misconduct by a public fiduciary, the judge notified the certification program.<sup>348</sup> The Arizona Auditor General's resulting investigation revealed embezzlement of over one-million dollars.<sup>349</sup> The AOC revoked the fiduciary's certification and the Arizona Attorney General's Office brought an indictment alleging theft, fraud, misuse of public money, conflict of interest, and perjury.<sup>350</sup>

The revelation of fraud of such magnitude highlights legitimate concerns about the adequacy of available methods and resources to monitor guardians. Media exposés, criminal indictments, and civil litigation continue to ferret out dramatic abuses and expose the weaknesses in judicial systems that are not equipped to prevent or halt the exploitation of the vulnerable citizens that the systems should protect.

## VII. ROLE OF JUDGES

### A. History

The key to the quality of guardianship monitoring is the judge. Within the parameters of the statute, the judge often has wide latitude in shaping court practices in guardian oversight. The judge may determine how frequently reports are filed in jurisdictions that allow discretion, what the reports should look like, what assistance guardians will have in preparation of the report, how the reports will be tracked and reviewed, whether investigators will follow up on "red flag" items, whether sanctions will be imposed, how the complaint process will be handled, and whether funds will be sought for resources for monitoring.

The Wingspread conference and all of the other national

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346. Ariz. Sup. Ct., *supra* n. 153, at 1.

347. *Id.*

348. *Id.* at 2.

349. *Id.*

350. *Id.* The fiduciary pled innocent on May 14, 2001. *Id.*



guardianship recommendations, as well as many new state laws, have provided for stronger monitoring. But it is each individual judge in each individual courtroom across the country who can activate these provisions. “Only when judges become acculturated to the existing reforms, and only when they internalize the values embedded in those reforms, will guardianship truly change.”<sup>351</sup> For monitoring reforms to work, judges must understand and identify with the reasoning behind these reforms. Judges who feel that it is simply not worth any significant input of court resources to catch “the few bad apples” likely will not be galvanized to take the steps outlined above. A judge, on the other hand, who sees monitoring as an inherent part of the *parens patriae* responsibility to the ward, as well as to his or her agent — the guardian — may find imaginative and sometimes low-cost ways to tailor the monitoring steps to his or her own jurisdiction.

### B. Judicial Education

The Wingspread recommendations urged that “continuing judicial education should include information about the judge’s role in holding guardians accountable.”<sup>352</sup> According to the commentary, the conference’s working group on accountability “contended that many judges — while admittedly overworked, swamped with cases and understaffed — nonetheless should be more sensitive to the need for accountability in guardianship” and that “some guardianship abuses could be averted by greater judicial awareness of the court’s role in monitoring.”<sup>353</sup> It urged judicial presentations on accountability and ready availability of model materials, such as reporting forms and computerized tickler systems.<sup>354</sup> The drafters of the Wingspread recommendations also maintained that “judges should be encouraged to fulfill their role in accountability efforts,” and that judges who model excellent monitoring techniques “should receive political endorsement and peer, consumer and press recognition.”<sup>355</sup>

Following Wingspread, presentations for judges on the 1991 ABA monitoring study and the AARP Volunteer Guardianship

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351. Lawrence Frolik, *Guardianship Reform: When the Best Is the Enemy of the Good*, 9 Stan. L. & Policy Rev. 347, 355 (1998).

352. *Wingspread Recommendations*, *supra* n. 3, at 26 Recommendation V-F.

353. *Id.* at 26–27 Recommendation V-F commentary.

354. *Id.* at 27 Recommendation V-F commentary.

355. *Id.* at 26 Recommendation V-F.

Monitoring program helped to inform judges about practical ways to strengthen guardian oversight.<sup>356</sup> “In 1990, with funding from the State Justice Institute, the Florida judicial education office and the Florida State University Center for Professional Development sponsored a two-day session on adult guardianship, designed for replication in other states, including a detailed segment on “court supervision.”<sup>357</sup> In addition to scattered state judicial education sessions, the National Association of State Judicial Educators also sponsored guardianship sessions during the 1990s, with some including monitoring topics.<sup>358</sup> Sessions at meetings of the National College of Probate Judges, including a recent session in May 2001, have also targeted monitoring practices.<sup>359</sup> Representatives of the National College have joined with other guardianship associations to form the National Guardianship Network, an organization created to promote networking and cooperation on guardianship issues.<sup>360</sup> Finally, a recent ABA curriculum developed for courts on “State Guardianship and Representative Payment” includes monitoring and highlights ways in which judges can work with the United States Social Security Administration when both representative payment and guardianship are involved.<sup>361</sup>

Despite these activities, a more concerted effort may be necessary to get monitoring on the judicial “radar screen” in some areas and to demonstrate cost-effective approaches. For example, a 2000 survey on guardianship monitoring by the Florida

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356. *Id.* at 27 Recommendation V-F commentary.

357. Erica Wood & Sia Arnason, *Adult Guardianship: Growing Challenge for Courts*, 5 JERITT Bull. 1, 1-2 (Jan./Feb. 1994); Off. of the St. Cts. Administr., Leg. Affairs & Educ. Div., Fla. St. Univ. Ctr. for Prof. Dev., *Tentative Agenda: Guardianship Specialty Course* (Mar. 1-3, 1990).

358. Authors' files include examples of such agendas.

359. Sally Hurme & Erica Wood, Presentation, *Guardianship Monitoring: Retracing Our Steps* (Natl. College of Prob. Judges, Spring 2001) (copy of materials on file with the *Stetson Law Review*).

360. The National Guardianship Network is comprised of representatives of the National Academy of Elder Law Attorneys, National Guardianship Association, National Guardianship Foundation, American Bar Association Commission on Legal Problems of the Elderly, National Center for State Courts, American College of Trust and Estate Counsel, SAVE (an agency that provides volunteer guardians), and the National College of Probate Judges.

361. ABA Commn. on Leg. Problems of the Elderly & Ctr. on Children & the Law, *State Guardianship and Representative Payment: Enhancing Coordination of State Courts with the Federal Representative Payment Program — Model Training Curriculum for Judges and Staffs of Courts* 3 (June 2001).

Supreme Court Commission on Fairness found that, of the eighteen circuit courts responding, five reported they were “not familiar with guardianship monitoring” and an additional five said they “do not believe guardianship monitoring would be beneficial in this jurisdiction.”<sup>362</sup>

### C. Designation of Specialized Judges

The 1991 ABA monitoring study made another critical recommendation about the role of judges: that courts should “designat[e] certain judges to be responsible for guardianship hearings and review procedures.”<sup>363</sup> The report pointed out that “[c]ontinuity in the monitoring process can be gained by . . . having specific judges and other personnel responsible for monitoring activities.”<sup>364</sup> Because of the specialized nature of cases involving incapacitated persons, judges need to be familiar with the complexities of case management and surrogate decision-making for individuals with complicated mental and medical problems. As experienced guardians relate, it takes a long time to “break in” a new judge who comes to the guardianship docket from the criminal side of the court.

Designation of judges and court personnel may be of particular benefit in states where guardianship cases are heard by general jurisdiction judges who address a range of civil and criminal matters along with relatively few guardianship cases, and who may not have the opportunity to develop the expertise of a probate judge with a larger guardianship caseload. With more jurisdictions eliminating specific probate courts in favor of family or general-jurisdiction courts, the availability of experienced judges committed to thorough guardianship monitoring becomes more problematic. Ideally, specific personnel should have the responsibility of reviewing and verifying accountings and reports following consistent criteria. In the Authors’ 2000 survey of guardianship practitioners, forty-four of seventy-seven respondents (fifty-seven percent) indicated that specific judges were assigned to handle guardianship review, but sixteen respondents said that “no judge” is responsible for this function

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362. Fla. Sup. Ct. Commn. on Fairness, *supra* n. 267, at 3 question 6 (asking, “Why doesn’t your circuit court currently have a guardianship monitoring function?”).

363. Hurme, *supra* n. 11, at 37 Recommendation V.

364. *Id.* at 37 Recommendation V commentary.

and thirteen respondents said that “any available judge” performs the review.<sup>365</sup>

#### D. Community Links

The 1991 ABA report included, as the last of its ten “Recommended Steps,” that “courts should be aware of and encourage the efforts of other community groups and agencies that monitor wards’ well-being.”<sup>366</sup> The thrust was that by opening communication channels with other community entities that have regular ward contact, courts could strengthen their “eyes and ears” in the field. If courts and community agencies both monitor the status of clients and keep client files, they could achieve a synergistic effect by working together. Moreover, active courts could play a role in convening community entities to enhance the well-being of incapacitated persons. Such community entities might include the following:

- *Adult Protective Services (APS)*. APS workers routinely investigate possible elder abuse, neglect, or exploitation. A protocol to alert the court when any such investigations concern guardians and wards could trigger timely court review and appropriate sanctions, including potential removal of the guardian if the ward is at risk.
- *Long-term Care Ombudsmen*. Under the Older Americans Act, each state has a long-term-care ombudsman,<sup>367</sup> and many states have local or regional programs as well. Ombudsmen regularly visit long-term-care facilities and seek to resolve complaints. A protocol to alert the court when complaints involve guardians and their wards, could prompt needed court oversight and action.

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365. Wood & Hurme, *supra* n. 56, at question 15. Note that a larger question that is beyond the scope of this paper is whether guardianship is best placed in probate court, general jurisdiction court, or family court. *E.g.* Erica F. Wood & Lori A. Stiegel, *Not Just for Kids: Including Elders in the Family Court Concept*, 30 Clearinghouse Rev. 589 (1996).

366. Hurme, *supra* n. 11, at 67 Recommendation X; *see also*, Fred, *supra* n. 15, at 36–37 (recommending that monitoring efforts include the state guardianship and advocacy commission, the state long-term care ombudsman, the department of human services’ office of inspector general, county public guardians and guardianship associations); *see generally Court-Related Needs of the Elderly*, *supra* n. 182, at 17 Recommendation I (calling for “interdisciplinary coordinating committees” to address court access issues and other court-related needs of those populations).

367. 42 U.S.C. § 3058(g) (1994).

- *State and Area Agencies on Aging.* Under the Older Americans Act, each state has a state unit on aging, divided into local or regional area agencies on aging that coordinate a range of services and advocate for older persons.<sup>368</sup> Knowledge of the aging network and aging-service providers could be helpful to judges in assessing guardianship plans and reviewing guardian reports. Moreover, agencies on aging could aid courts in judicial education on aging and in identifying potential community volunteers to serve as visitors or court monitors.
- *State Bar Grievance Committees.* The ABA report on monitoring suggests that courts should notify state-bar-grievance committees when attorneys who serve as guardians are late in filing reports.<sup>369</sup> The report contends that, “[a]s an officer of the court, an attorney can be held more accountable to meeting statutory filing deadlines than a lay guardian.”<sup>370</sup> The Authors’ 2000 survey of monitoring practices indicated that this practice may be rare and, of the eighty survey responses, thirty-six respondents said grievances are “never filed,” twenty-eight said they did not know whether grievances are filed, and sixteen said grievances are filed either routinely, when appropriate, or rarely.<sup>371</sup>
- *Social Security Field Offices.* An ABA report on *State Guardianship and Representative Payment* notes that when a guardian is also a representative payee, it might be helpful to have the payee’s monitoring report for Social Security Administration (SSA) submitted to court along with the guardian’s report.<sup>372</sup> The report found that  
  
the increasingly important area of court monitoring of guardianship activity and performance could be strengthened by enhanced SSA contact and lines of communication. For

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368. *Id.* §§ 3001–3058ee.

369. Hurme, *supra* n. 11, at 34.

370. *Id.* at 34–35.

371. Wood & Hurme, *supra* n. 56, at question 14.

372. ABA Commn. on Leg. Problems of the Elderly & Ctr. on Children & the L., *State Guardianship and Representative Payment: Enhancing Coordination of State Courts with the Federal Representative Payment Program — Briefing/Best Practices Pamphlet for Judges and Staffs Exercising Guardianship Jurisdiction* 15 (2001).

example, SSA records, if accessible through appropriate “Consents for Release of Information” might be able to identify instances in particular cases involving guardians also serving as [representative payees] of substandard performance, impropriety, or even outright fraud.<sup>373</sup>

### VIII. PUBLIC AWARENESS

Active court practices in guardianship monitoring can be reinforced by an informed public. Simply put, if the community knows what guardians are supposed to do, guardians may be more likely to do it. Community awareness can serve as a “watchful eye” on a day-to-day basis outside of the courtroom. Public awareness of deficiencies and needs in the guardianship system can also mobilize a legislative call for increased funding for monitoring efforts.

The Wingspread recommendations urged that “[s]tate and local public and professional information campaigns should be waged to increase public knowledge of and involvement in the guardianship process.”<sup>374</sup>

The . . . conferees concluded that ‘inadequate public knowledge of and involvement in the guardianship process can hinder guardian accountability’ . . . [and] that improved public knowledge about the guardianship process and its risks will make it more likely that guardians will recognize and honor their fiduciary duty to their wards and their responsibility to the court.<sup>375</sup>

The Wingspread recommendations also stated that one avenue for public education was through public-guardianship agencies, noting that “[g]uardianship agencies . . . should educate the community on the appropriate uses of guardianship.”<sup>376</sup>

Following Wingspread, efforts at the national, state, and local levels sought to educate the community about guardianship. Brochures by the NGA, the National Academy of Elder Law Attorneys, and state guardianship associations give an overview of the process and the fiduciary responsibility of guardians. Senior Internet sites and Web sites by NGA, state bar associa-

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373. *Id.*

374. *Wingspread Recommendations*, *supra* n. 3, at 24 Recommendation V-C.

375. *Id.* at 24–25 Recommendation V-C commentary.

376. *Id.* at 31 Recommendation VI-D.

tions, state guardianship associations, public guardianship programs, and others have expanded public access to knowledge about guardianship.<sup>377</sup> A few guardianship videos have also been directed specifically toward the public.<sup>378</sup>

Alaska has created a position of “Family Guardian Coordinator” to assist families and others to learn about guardianship and conservatorship.<sup>379</sup> The Washtenaw County, Michigan, Probate Counsel is responsible for guiding both laymen and professionals on guardianship issues.<sup>380</sup> The Illinois Guardian Reform Project recently recommended expanding and publicizing the Web site and toll-free telephone line for the Office of State Guardian, as well as developing public-school education on guardianship.<sup>381</sup> A much publicized 2000 book, *The Retirement Nightmare: How to Save Yourself from Your Heirs and Protectors*, sought to alert the public to potential abuses in guardianship by heir-petitioners seeking use of family funds.<sup>382</sup> Projects to involve members of the public as volunteer guardians or volunteer guardianship monitors also expand public knowledge and awareness.

The press, too, plays an important role in guardianship awareness. Recent press exposés drew public attention to guardianship scandals and, in the process, explained the guardianship system and the fiduciary role of guardians.<sup>383</sup> But media can play a preventive role as well, as noted by testimony of

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377. ElderLaw Net Inc., *Elder Law Answers* <<http://www.elderlawanswers.com>> (accessed Jan. 3, 2002); Goldfarb & Abrandt, *SeniorLaw* <<http://www.seniorlaw.com>> (accessed Jan. 3, 2002); KELN.org, *The Kansas Law Network* <<http://www.keln.org>> (updated Nov. 29, 2001); Natl. Gov. Assn. & NGA Ctr. for Best Pract., *National Governors Association Online* <<http://www.nga.org>> (accessed Jan. 3, 2002); SeniorNavigator.com, *Virginia's Resource for Health and Aging* <<http://www.seniornavigator.com>> (accessed Jan. 3, 2002).

378. Ctr. for Gerontology, Va. Polytechnic Inst. & St. Univ., *Presenter's Guide: The Guardianship of Lana Thaxton (An Accompaniment to the Videotape)* (2001); U.S. Health Care Financing Admin., *Living Well: Guardianship and Probate Court* (part of video series on *Living Well: A Guide to Healthy Aging*).

379. Alaska Off. of Pub. Advoc., *Public Guardian Section* <<http://www.state.ak.us/guardianship>> (updated Jan. 8, 2001). The service includes telephone assistance, informational meetings, trainings, and a Web site. *Id.*

380. Washtenaw County Probate Court, contact [gellerb@co.washtenaw.mi.us](mailto:gellerb@co.washtenaw.mi.us).

381. Fred, *supra* n. 15, at 56.

382. Diane G. Armstrong, *The Retirement Nightmare: How to Save Yourself from Your Heirs and Protectors: Involuntary Conservatorships and Guardianships* (Prometheus Bks. 2000) (available at <[www.retirementnightmare.com](http://www.retirementnightmare.com)>).

383. *Supra* nn. 21–25.

a service provider at an Illinois public hearing in 2000: “Public education is a vital component to better guardianship . . . I encounter public misinformation all the time. If we can have infomercials on other subjects why not one on guardianship? Let’s utilize the media better to reach the average citizen.”<sup>384</sup> Indeed, while all of the above activities provide a beginning for better public information, they may have touched but the tip of the iceberg. Guardianship may still remain a largely arcane procedure in the public eye.

### IX. FUNDING

Good monitoring requires sufficient resources. Courts must have funds available for staff, computers, software, training, and materials. “[I]f the rights of wards are going to be adequately protected, financing is going to be a key component of any successful effort.”<sup>385</sup> In reality, however, money for monitoring has not been forthcoming. New legislation has not authorized sufficient funding to support the legislative intent of more proactive investigative and monitoring roles for the judiciary.<sup>386</sup>

Financing for guardianship monitoring, however, must compete with other court needs, as well as other county and state needs, and often is not high on the priority list. The 1991 ABA survey conducted as background for its monitoring study found that fifty-two percent of the participating guardian experts named inadequate state appropriations as a barrier to monitoring, and forty-one percent named inadequate local appropriations.<sup>387</sup> A decade later, in the Authors’ 2000 “Retracing Steps” survey, forty-six percent of participants reported that “no money [was] available” for monitoring, and twenty-seven percent said “some funding” was available.<sup>388</sup> In the 2000 survey of Florida circuit courts, with eighteen of twenty circuits reporting, twelve circuits reported “lack of financial resources” as a barrier to monitoring.<sup>389</sup> In 2001, the Michigan guardianship ombudsman program was thwarted after it had barely begun due to lack of

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384. Fred, *supra* n. 15, at 53 (quoting the Director of Services for Disability, Incorporated).

385. Hurme, *supra* n. 11, at 59.

386. Johns, *supra* n. 254, at 77.

387. Hurme, *supra* n. 11, at 59.

388. Wood & Hurme, *supra* n. 56, at question 26.

389. Fla. Sup. Ct. Commn. on Fairness, *supra* n. 267, at question 6.



funding.<sup>390</sup>

Interestingly, the Wingspread recommendations did not address funding for guardianship monitoring. However, the ABA's 1991 report highlighted funding as a key concern.<sup>391</sup> The report urged "state and local funding agencies [to] provide the courts with sufficient funds or revenues so the court will be able to monitor guardianship cases adequately."<sup>392</sup> The report quoted the observation of an advocate that "[w]ards, second only to criminal defendants, are at the mercy of the judicial system. Courts must accept their responsibility to these vulnerable individuals and accord to them sufficient resources to guarantee not only their basic safety but to ensure them their maximum independence."<sup>393</sup> The report found "that most jurisdictions rely on multiple funding sources to finance their monitoring efforts."<sup>394</sup>

Possible funding sources might include the following:

- *State Appropriations.* Guardianship is a state judicial function and, thus, there is a strong rationale for state financial support of monitoring. "State appropriations . . . are especially critical to avoid discrepancies in the quality of services provided in various counties" due to differences in the tax base of counties, the percentage of persons under guardianship, or the presence of state mental health/mental retardation facilities.<sup>395</sup> In the 2000 "Retracing survey," forty-six percent of participants reported that "no money has ever been appropriated for this purpose" by the state legislature, county commissions, or other governmental bodies.<sup>396</sup> State judicial organizations, as well as state guardianship associations and state bar associations, could play a critical role in drawing attention to the need for adequate state appropriations.
- *Local or County Appropriations.* Judges can exert leadership by seeking necessary funding from county commissioners for monitoring costs. County elected officials may not be aware of

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390. *Infra* nn. 314–315 and accompanying text.

391. Hurme, *supra* n. 11, at 59.

392. *Id.* at 59 Recommendation VIII.

393. *Id.*

394. *Id.*

395. *Id.*

396. Wood & Hurme, *supra* n. 56, at question 27.

the need, and a judicial- or bar-association delegation can explain the court's *parens patriae* responsibility, as well as the vulnerability of wards. One suggestion is to have county commissioners accompany court staff or volunteer monitors on inspection visits with wards to create a better understanding.<sup>397</sup> Some courts, such as the Sixth Circuit in Florida, have been successful in obtaining substantial county funds for monitoring.<sup>398</sup> In other areas, courts have received smaller amounts of funds for targeted monitoring purposes, such as for costs of mileage for volunteers.<sup>399</sup>

- *Ward's Estate.* In the ABA's 1991 monitoring survey, a majority of respondents identified the ward's estate as one primary funding source for monitoring efforts.<sup>400</sup> For example, in California, the cost of court investigators is paid from the estate on an annual basis.<sup>401</sup> For those wards who receive public benefits, the court may defer the assessment until the guardianship is ended, usually by the ward's death. If there are funds at that time, possibly as the result of the sale of a home, an inheritance, or personal-injury lawsuit, the assessment will be ordered.<sup>402</sup> However, many wards have only small estates that are rapidly depleted by long-term care and medical costs, and courts may be reluctant to rely heavily on this as a source for monitoring expenses.
- *Filing Fees or Fines for Late Filings.* The ABA's 1991 *Monitoring Survey* report recommends that the court "use fines for late filing to fund monitoring costs . . . [and] increased filing fees to establish a monitoring fund."<sup>403</sup> From

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397. *Best Practices*, *supra* n. 185, at 2.

398. Fla. Sup. Ct. Commn. on Fairness, *supra* n. 267, at 7 question 17, 9 question 19. The Sixth Circuit reported receiving funds from Pinellas County for monitoring — including \$179,000 for salaries for four full-time staff and one-third salary for the supervisor, and \$16,595 for computer equipment and software. The Tarrant County, Texas, Probate Court #2 employs a Court Investigator, Assistant Court Investigator, and Court Visitor Program Manager for a combined salary allocation of \$135,936. Telephone Interview with the Hon. Pat Ferchill, Tarrant County Prob. Ct. #2 (Aug. 2001).

399. *Best Practices*, *supra* n. 185, at 2.

400. Hurme, *supra* n. 11, at 60.

401. *Id.*

402. Cal. Prob. Code § 1851.5(a) (West 2001); Telephone Interview with Mary Joy Quinn, S.F. Prob. Ct. Investigator (Aug. 28, 2001).

403. Hurme, *supra* n. 11, at 59 Recommendation VIII.

the Authors' survey a decade later, it appears that this may be a very rare practice, but one that nonetheless still could be tapped to bolster monitoring and accountability.<sup>404</sup>

- *Grants for Special Projects.* Courts may seek grants for specific monitoring purposes such as making a guardian-training video, publishing a guardian handbook, supporting a volunteer coordinator, forming a community-review board, paying volunteer expenses, or purchasing computer equipment or software. Courts may apply to the State Justice Institute, legal and judicial organizations, or foundations with an interest in justice issues or in issues of aging and disability issues.
- *Use of Volunteers.* As described above, using trained volunteers as visitors, investigators, auditors, or records researchers will expand the court's monitoring capacity. The proviso, of course, is that support is available for ongoing supervision and training.

#### X. CONCLUSION

Every court looking at its current docket of guardianship cases knows that the case load will only get larger and monitoring will become both more urgent and more difficult as the number of cases increases. Delay in establishing effective monitoring systems will only make the problem that much more complex. Many courts still find it a challenge just to keep track of wards' deaths and guardians' addresses, let alone wards' well-being and financial management.

The case for monitoring is sound, but there are substantial barriers. One is attitudinal. Courts may be aware of few real problems, may not wish to overburden family members with reporting, and may determine that it is simply not worth the effort and expense. The history of the Uniform Probate Code offers a key insight.

When advocates of the Uniform Probate Code (UPC) were promoting its adoption in the 1960's, one of their key selling points was that the UPC lessened the courts' involvement in

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404. Wood & Hurme, *supra* n. 56, at question 28. Of the seventy-four respondents, only three reported that the court uses these sources to pay for monitoring. *Id.*

the day to day administration of decedents' estates. . . . A predominate theory of the UPC was to make probate more administrative than adversarial.<sup>405</sup>

The UPC drafters presented the court's role as "wholly passive until some interested person invokes its power to secure resolution of a matter. . . . [the court] should refrain from intruding into family affairs unless relief is requested, and limit its relief to that sought."<sup>406</sup> Although this hands-off tenet may be appropriate in probate cases, it has no place in guardianship.

Historically, guardianship has been linked as a subset of probate. Guardianship was grafted on as Article V of the UPC, and later achieved some independence as the Uniform Guardianship and Protective Proceedings Act was adopted. But the initial UPC philosophy of court passivity still permeates some codes. This results in a failure to acknowledge that, "[i]nstead of the rather sterile business of an administrator wrapping up the financial affairs of a deceased person . . . a guardian is responsible for the daily personal affairs of the ward."<sup>407</sup> Unlike probate, serving as guardian is a responsibility that may change over time, last for many years, and include excruciatingly complex decisions about medical treatment, placement, and trade-offs between autonomy and beneficence.

Another barrier, of course, is money. Many judges confirm that they would implement monitoring procedures if they could, but they lack the financial support, time, and staff. The problem is a real one, and it requires judges and judicial organizations to exert leadership in making the need more visible and pursuing funding options. The ABA monitoring report cautions, however, against the notion that "nothing can be done to improve monitoring because the courts have insufficient funds," arguing that personal commitment by the judiciary and the bar, as well as court cooperation with governmental and community agencies, can make a difference.<sup>408</sup>

Clearly, substantial funds and much thought need to be dedicated to determining what monitoring is necessary and how

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405. Hurme, *supra* n. 11, at 6.

406. Unif. Prob. Code art. III, gen. cmt., at 28, 8A U.L.A. art. III (1998).

407. Hurme, *supra* n. 11, at 7. "[Critics say] the court system is not a place for the delivery of social services . . . that the court system would be powerless to handle in terms of volume and expertise." Johns, *supra* n. 254, at 78.

408. Hurme, *supra* n. 11, at 61.

that monitoring will take place. Who is going to do it? What are examiners looking for when they review a report or audit? Monitoring should not be a process to nitpick the guardians into frustration and resignation. Nor should it be an avenue to repetitious litigation of the same issues. However, we cannot deny that horrible injustices result when guardians go astray, fail to distinguish the incapacitated person's funds from their own, ignore the ward's rights and autonomy, or neglect their responsibilities. A host of knotty questions go to the heart of the monitoring issue and bear further examination:

### **Training and Standards**

- How and to what extent should state and national groups advance the concept of guardian certification?
- How can guardians be afforded ready technical assistance on an ongoing basis?
- How should training, standards, and technical assistance differ for family and professional guardians?

### **Plans and Reports**

- Would more extensive use of guardianship plans (and involvement of the incapacitated person when possible), similar to the nursing home care planning process, result in better and more tailored guardianships while providing a base point for monitoring?
- How can plans keep pace with the changing needs of wards? Does electronic communication offer new approaches to use of guardianship plans or other ways to update the court on guardian performance? Should plans be public documents?

### **Court Review**

- Is the practice of sending copies of the guardian's report to interested third parties a practical, low-cost, and effective way to make guardians more accountable, or is it an invitation to prolong court wrangling?
- How should court policies and procedures address complaints about guardians? Is the public reluctant to complain to the court? How accessible should the court be — and through what methods — to community concerns?

- What is the potential of guardianship-ombudsman programs or certification procedures for investigating individual complaints and recommending systemic improvements?
- What, if anything, should be the role of public guardianship agencies in aiding courts with monitoring?
- What sanctions should the court apply — and at what points — when guardians fail to file a timely report or account, or breach their fiduciary duty?
- In what ways can the court use volunteers in monitoring efforts? What organizations can be tapped for volunteers, and what kinds of supervision are available or required?
- How can the public better understand the concept of guardianship? How can guardianship “get on the radar screen” of public awareness? How can the public be motivated to insist on adequate funding for monitoring?
- How can localities and states best establish a database of guardianship cases? What should it track and how should it be maintained? Should there be a consistent national-guardianship-case database and, if so, who should maintain it? What privacy concerns must be considered?

### **Role of the Court**

- What training do judges and court staff require for effective monitoring of how guardians carry out their responsibilities concerning their wards’ personal affairs, medical care, and placement, as opposed to financial management? Who will provide, pay for, and determine the training content?
- How can courts best balance the need for oversight of the financial and personal or health-care aspects of guardianship?
- How can judges who see guardianship cases on an occasional basis become attuned to overseeing the complexities of surrogate decision-making by guardians?
- How can the court team up with community agencies for stronger monitoring? Is this type of community outreach antithetical to the traditional, more isolated, role of the court?

- Which of the “best practices” recommended by the 1991 ABA monitoring study have proven effective?
- Ultimately, the overriding question is how proactive should the court be in its *parens patriae* role, in structuring a monitoring system that will oversee guardians responsible for vulnerable wards with changing needs and circumstances?

Questions like these can spur further thinking about good monitoring practices at the “back end” of guardianship, so that incapacitated persons will not be at risk and will thrive to their fullest extent.

























