

THE VIRTUES OF CORPORATE AND PROFESSIONAL GUARDIANS

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I. INTRODUCTION

An estimated one-fourth of guardians for aged and disabled adults are corporate employees, or other professionals or practitioners, rather than family members.¹ Many are lawyers, who may practice individually, in limited-liability corporations, or in partnerships. Non-lawyers also may establish guardianship practices.² Some are social workers or accountants by profession, but most states require no such professional affiliation.³ In addition, states now provide public-guardian services for those who have no voluntary assistance and cannot pay.⁴ Any guardianship organization may utilize volunteers to provide services to individual wards, and then the volunteers become the agents of the organization.

1. Phillip B. Tor & Bruce D. Sales, *A Social Science Perspective on the Law of Guardianship: Directions for Improving the Process and Practice*, 18 L. & Psychol. Rev. 1, 35 (1994). The National Guardianship Association refers to such workers as "private professional guardians," and defines them as persons who provide guardianship services for more than one ward for a fee. Natl. Guardianship Assn., *NGA 2001 Legislative Packet 2* (adopted Feb. 14, 2001) [hereinafter *NGA 2001 Legislative Packet*].

2. *Infra* nn. 68–113 and accompanying text.

3. *Infra* nn. 145–148 and accompanying text.

4. *Infra* nn. 208–215 and accompanying text.

Often, guardians and advocates wishing to emphasize quality and reliability of guardian services speak of “professional” guardians. Seeking to avoid confusion when discussing the specifics of professionalism, this Article will discuss guardians who provide services to more than one unrelated person as “practicing guardians.”

The law of guardianship⁵ prefers service by a family member or another person with a personal relationship to the ward. However, an alternative view of the qualifications of a guardian emphasizes the guardian’s expertise. More affluent elderly persons have long utilized banks and trust companies to assure the good management of their assets.⁶ Lawyers traditionally have overseen the issues of later life for their clients as an extension of their roles as family and business counselors. In more recent years, a specialty in elder law that may include guardian services has arisen in the Bar, and an independent movement to professionalize non-lawyer guardianship practitioners has developed.⁷ Yet, the nature of knowledge and ethics that are fundamental to sound guardianship practice remains unclear.⁸

The need for access to guardianship services has received much attention over the past two decades. The widespread phenomenon of an extended old age has created an unprecedented need for financial planning and management of resources to provide for a long interval of post-retirement living.⁹ Also, advances in medical care have resulted in higher survival

5. This Article works within the treacherous landscape of guardianship language of the states and commentators as follows: first, “guardian” is preferred to the less common language “conservator” or “committee.” A “guardian of the person” typically has authority to make personal decisions regarding lifestyle and services, including medical services, to the ward. A “guardian of the property” has authority to make decisions regarding spending or conservation (hence, the frequent designation “conservator”) of the ward’s assets. A “plenary guardian” is one who has all the powers that can be given by the court over the choices of a ward, while a “limited guardian” has some identified restrictions.

6. One commentator on a draft of this Article asked for a distinction between “guardians of the person” and “guardians of the property,” in the context implying that the requirements for each role should be different. As I have noted since 1987, control of finances is the equivalent of control of personal decision-making because choices in living arrangements, health-care providers, and treatments can be controlled by decisions regarding spending. Alison Patrucco Barnes, *Florida Guardianship and the Elderly: The Paradoxical Right to Unwanted Assistance*, 40 U. Fla. L. Rev. 949, 968 (1987). Thus, no distinction is explored herein, though there may be specific circumstances or issues where such an inquiry would be useful.

7. *Infra* nn. 139–158 and accompanying text.

8. *Infra* nn. 159–195 and accompanying text.

9. *Infra* nn. 24–33 and accompanying text.

rates for people with chronic impairments that compromise mental capacity, including individuals with developmental disabilities, infants with genetic and birth-related disorders, and trauma victims.¹⁰ Many such persons need guardianship services, but have no one willing and able to serve.¹¹

Equally urgent is the need to assure quality in guardianship services.¹² In response to journalists' investigations in the early 1980s, many states have reviewed and revised their guardianship statutes.¹³ Yet, recurring abuses of guardians' powers and lax court procedures persist.¹⁴ Thus, consideration of the requirements for guardians is an essential component of quality assurance for services and protection of wards. Professional standards for ethics, training, and accountability for guardians may be a very desirable means to assure quality of services and service-provider integrity.¹⁵

This Article examines the nature and role of the practicing guardian and the circumstances in which such guardian services might be equally desirable, or preferred to, a family guardian. First, it discusses the evolving role of guardians given the longer lives and expanded lifestyle choices of incapacitated people.¹⁶

10. Lawrence A. Frolik & Alison Patrucco Barnes, *Elderlaw* 18 (Michie Co. 1992).

11. *Infra* nn. 27–30 and accompanying text.

12. *Infra* nn. 107–126 and accompanying text.

13. *Infra* nn. 117–124 and accompanying text.

14. Fortunately, the responsibilities for documenting the current state of guardianship law and practice are shared with the other invited authors for Wingspan — The Second National Guardianship Conference, convened in 2001. Primary sponsors of the Wingspan Conference were the National Academy of Elder Law Attorneys, Stetson University College of Law, host of the Conference, and the Borchard Center of Law and Aging. Co-sponsors were the ABA Commission on Legal Problems of the Elderly, the National College of Probate Judges, the Supervisory Council of the ABA Section on Real Property, Probate and Trusts, the National Guardianship Association, the Center for Medicare Advocacy, the Arc of the United States, and the Center for Social Gerontology, Inc. Topics from the Conference to be addressed by others in this Symposium include: Diversion/Mediation: Avoiding Guardianship and (Guardianship) Alternatives; Due Process Initiation, Petitioning (including the Role of Counsel); Adjudication (including Adversarial Guardianship Litigation and Lawyer Liability); Judges and Decision-makers (Limited Guardianships from the Judicial Perspective); Termination of Guardianship; Accountability of Guardians and Monitoring of Wards; and Legal Ethics and Guardianship (including the newly revised American Bar Association Model Rule 1.14). While this Article must touch on many of these topics, it will seek to restrict its scope to the special issues of corporate and professional guardians.

15. *NGA 2001 Legislative Packet, supra* n. 1, at 2 (Arizona and Washington require private professional guardians to be both registered and certified before appointment by a court).

16. *Infra* nn. 22–48 and accompanying text.

Next, it considers the law's preference in terms of relationship of the guardian to the ward, and the differing strengths family and professional or corporate guardians may offer.¹⁷ Third, the Article discusses the components of quality in guardianship as expressed in law, and the possible reasons guardianship reform has failed to meet the expectations of its proponents.¹⁸ Further, the implications of professionalism for quality of services are explored.¹⁹ The discussion turns to the attributes of corporate and professional guardians as revealed in survey information, state statutory requirements, professional organizational ethics and standards, and innovations by providers.²⁰ Finally, the Article considers whether guardianship providers can and should offer services without a declaration of incompetency as implied by legal requirements for the least restrictive alternative form of services.²¹

II. THE NEED FOR THE GOOD GUARDIAN

Who should be the guardian for a specific incapacitated person depends on the nature of decisions to be made and the persons available to make them. Thus, the choices may differ depending on whether the prospective ward is elderly or young, whether the ward's prognosis is stability, improvement or deterioration, whether the ward is institutionalized or living in the community, and the extent to which the ward is likely to engage in independent interactions, such as working. The

17. *Infra* nn. 49–106 and accompanying text.

18. *Infra* nn. 107–128 and accompanying text.

19. *Infra* nn. 128–181 and accompanying text.

20. *Infra* nn. 196–226 and accompanying text.

21. *Infra* nn. 227–232 and accompanying text. The National Guardianship Symposium, convened in 1988 and known as Wingspread, asserted a number of general recommendations for public guardians, including the creation of standards for staff training, qualifications, and minimum service levels. These standards seem equally applicable to corporate and professional guardians. The Wingspread recommendations included provisions for adequate public funds for guardianship services, including reimbursements under federal and state public-benefit programs. It also recommended that guardians offer alternatives to guardianship services to implement the goal of the least restrictive alternative form of assistance. Commn. on the Mentally Disabled & Commn. of Leg. Problems of 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 Johnson Foundation's Wingspread Conference Center in Wisconsin hosted the National Guardianship Symposium, which was sponsored by the ABA Commissions on Legal Problems of the Elderly and on Mental Disability.

decisions most likely to be important and difficult include choice of residence and activities, associates or companions, caregivers, and medical treatments.²²

The more variable the circumstances of the ward's life, the more challenging the guardian's decision-making is likely to be. In addition, the ward's participation in decision-making complicates choices whenever the ward's view differs from the guardian's.²³ Thus, if an elderly ward is institutionalized in stable condition, has few assets, and devotes income to the cost of care, few decisions are required. In contrast, changes of residence and care with different amenities and costs, or recurring health crises from multiple conditions with choices of treatments, risks, and results can be a full-time job for any guardian.

A. The Need for Guardians Generally

The sheer number of older people in need of guardianship has grown with the rapid increase in the very aged population,²⁴ because the incidence of mental incapacity rises with age to a rate of perhaps twenty-five percent after age eighty-five.²⁵ The longer

22. In telephone and e-mail discussions of guardianship services conducted for this Article in July and August 2001, providers most often cited as difficult decisions those that may require consultation with experts within or outside the organization: amputations, end of life health-care measures such as life support, DNR orders, and tube feeding. They also cited home sale and change of residence almost as prominently. One provider identified intra-family conflicts as difficult decisions. Curiously, one discussant noted no difficult decisions, and another stated that "uncertainty is very rare with five hours basic training of how to go about resolving conflicts." Survey compiled by Alison Barnes, n.p. (Aug. & Sept. 2001) (tabulated results on file with the *Stetson Law Review*) [hereinafter *Guardianship Services Survey*].

23. Providers reported that they employ substituted judgment or, if the ward's wishes are unknowable, the standard of best interests. *Id.* Such decision-making values are endorsed by the National Guardianship Association. Natl. Guardianship Assn., *Standards of Practice*, 7 (2000) (Standard No. 5 – The Process of Decisionmaking) [hereinafter *NGA Standards*]; Michael D. Casasanto, Mitchell Simian, & Judith Roman, *A Model Code of Ethics for Guardians*, 11 Whittier L. Rev. 543, 545–549 (1989) [hereinafter *NGA Model Code*] (adopted by the NGA and also available in PDF format at www.guardianship.org).

24. Fed. Interagency Forum on Aging-Related Statistics, *Older Americans 2000: Key Indicators of Well-Being, Indicator 12: Life Expectancy*, <<http://www.agingstats.gov/>> (accessed Jan. 14, 2002) [hereinafter *Older Americans 2000*] (showing a steady rise in life expectancy at birth throughout the twentieth century. Life expectancy at advanced ages has also risen, so that an individual age eighty-five in 2000 would live on average another seven years).

25. *Id.* at *Indicator 15: Memory Impairment* (showing the percentage of persons age eight to eighty-four as having an incidence of moderate or severe memory impairment between nineteen percent (for women) and twenty-three percent (for men). Among those age eighty-five and older, the incidence of such memory impairment was thirty-five

lives of individuals with developmental disabilities and other life-long conditions leaves an aging population that has depended on parents and others in an older generation, who now need special financial and living arrangements.²⁶

An unprecedented number of older people have no available helpers, even in the event of short-term need. A 1988 study showed that nearly one-fourth of Americans over the age of sixty-five live alone, and seventy-seven percent of those individuals were women.²⁷ The majority of those living alone are in the age group eighty-five years of age or older²⁸ and, therefore, are more likely to need assistance because of physical or mental impairments. Among those living alone, more than one-fourth had no living child or sibling,²⁹ and a similar proportion declared they had no one who would help them to meet their basic needs in the event of disability.³⁰ Unfortunately, the absolute number of helpers available for the very old is very limited.

B. Lifestyle Choices for Wards

A societal shift in modes of care creates many more choices in the living circumstances of potential wards with disabilities. Because the shift represents a reversal from institutional to community care, the choices must be examined carefully. Society may be prone to strong action from mixed motives, particularly with regard to the living circumstances and decision-making of people with mental, emotional, or cognitive impairments. Specifically, arrangements that provide security from harm for the ward represent both a limitation that might be unnecessarily restrictive to the ward's choices, and an assurance that society will be free from confrontations with risk or guilt that might come from fresh knowledge of the ward's real condition.

The philosophy underlying legislation and the elder-care industry includes considerable attention to permitting and assisting individuals to be active members of society.³¹ Assuring

percent (for women) and thirty-seven percent (for men)).

26. Lawrence A. Frolik & Alison McCrystal Barnes, *Elderlaw* 18–19 (2d ed., Matthew Bender 1999).

27. Judith D. Kasper, *Aging Alone: Profiles and Projections* 26, 28 (Cmmw. Fund. Commn. on Elderly People Living Alone 1988).

28. *Id.* at 26.

29. *Id.* at 67.

30. *Id.* at 62.

31. See *NGA Standards*, *supra* n. 23 (providing standards for least restrictive alternative, decision-making, and informed consent).

that individuals participate in decisions about their lives to the greatest extent possible and assuring individuals the opportunity to participate in society in the least restrictive environment have become predominant movements for individuals with disabilities.³²

C. Diversification of Health-Care Interventions

Health-care decisions also have grown more complex over the past two decades. Prescription drugs, surgeries, and other treatments are far more powerful against both auto-immune diseases, such as cancer, and various organ failures due to excessive wear or poor health habits, such as many heart conditions. The possible options for intervention in many conditions have multiplied, creating differing chances of sickening side effects and progress toward health.

The twin horrors of health care in the shadow of disability are, on the one hand, the inability to get the care that is most suited to the aged or disabled patient, and, on the other, the inability to stop aggressive intervention and let merciful death proceed. Thus, elderly wards in medical crisis may have a critical need for an advocate to advance their preferences. Choice might dictate the best cardiac intervention, however costly. Alternatively, choice might be to refuse the next surgery because life afterward will be too great a shock and sorrow. In either case, when the patient is incapable of articulating and advocating his or her views, having access to the intervention of a guardian may be essential.³³

D. The Need for Financial Management

The need for a legally-appointed guardian depends in part on the elder's finances, for reasons generally corresponding to the complexity of financial management, which might involve

32. *E.g. The Americans with Disabilities Act*, 42 U.S.C. §§ 12101–12213. The ADA provided the first broad prohibition against disability discrimination to employers, the states, and public accommodations. With regard to institutionalization and less restrictive community-based care, see *Olmstead v. L.C.*, 527 U.S. 581, 606 (1999) (holding that states cannot create a system that determines the least restrictive alternative appropriate to an institutionalized individual without providing some reasonably timely transition to that alternative to institutional care).

33. Advance directives can play a significant part in health-care decision-making. However, relatively few older people have such directives, and in a significant array of circumstances the patient's choice may be unclear despite the directive.

investment and tax management for a wealthy individual or eligibility for benefits for a destitute individual. In recent years, a significant number of modest-income retired professionals have had the need for financial management that might be provided by a guardian.

If finances are very simple, the individual can maintain independence longer or an agent can fulfill the requirements without a determination of incompetency. The simplest form of financial management can be provided for a Medicaid-eligible nursing-home resident, because assets are minimal and thus planning is uncomplicated. In these and other relatively straightforward financial circumstances, the ward's need for a decision-maker is likely to arise mainly in the realm of health-care decisions. Nevertheless, an older person in need of services from public programs with financial-eligibility standards is more, not less, likely to have a guardian appointed, if only because the social-services providers wish to confirm their authority to act in case of the need for emergency decisions.³⁴

People with substantial assets often have turned to institutions that offer financial management according to traditional terms that favor asset conservation. Management by financial institutions is most appropriate when asset management is independent of the allocation for the ward's personal expenses, as may be true with the very wealthy. However, whether the financial manager's decisions are truly independent of the ward's personal means is less often clear now that health-care costs can greatly exceed available coverage for elderly and disabled Medicare beneficiaries.

Finally, a segment of the middle class has a greatly complicated need for financial, lifestyle, and health-care planning. This group of potential wards has retirement income from well-paid blue-collar occupations or modestly-paid professional work that, through savings, pension, and social security, provides a steady income sufficient for community living in retirement years. Such income and assets do not, however, support expenditures for institutional long-term care for a prolonged period. As a result, a significant minority of prospective

34. *Older Americans*, *supra* n. 24, at *Indicator 6: Poverty* (showing that for those age eighty-five and older, fourteen percent of the population lived in poverty in 1998). In contrast, thirty-five percent of persons age sixty-five and older have "medium incomes," between 200% and 399% of the federal poverty level. *Id.* at *Indicator 7: Income Distribution*.

wards and their families undertake Medicaid planning to assure eligibility and allocate assets as desired.³⁵

In sum, the affluent, the poor, and a growing segment of middle-income individuals are more likely than in the past to need someone to make choices on their behalf to manage finances. The diversification of living circumstances and the complexity of financial need make it increasingly advantageous to appoint a guardian with knowledge of the community's resources within the means of the ward, the health-care choices preferred or best for the well-being of the ward, what residence and associates are likely to be suitable for the ward, and the government benefits for which the ward might be eligible.

III. WHO MIGHT SERVE AS GUARDIAN?

The choice of guardian for an incapacitated person has changed over time to reflect both the concerns of the court with jurisdiction over the matter and the socially-determined responsibilities of the family. Thus, in England after the Norman conquest, when the courts of law had jurisdiction over lands governed by a new system of inheritance, primogeniture, only landholders were subject to determination of incompetency.³⁶ Lands were committed to the care of the King, who had the responsibility to maintain them, distribute the income, and return them to the landholder should he regain capacity.³⁷ As a jurisdictional matter, the courts had no concern with the person of the incapacitated landholder, who was committed to the care of the family and, in keeping with the social structure of the time, to the church's charity and courts.³⁸ Church courts had jurisdiction over all matters of family and morals.³⁹ Thus, the King became the first limited guardian, charged with care of the property only.

35. See generally Hal Fliegelman & Debora C. Fliegelman, *Giving Guardians the Power to Do Medicaid Planning*, 32 Wake Forest L. Rev. 341, 342-349 (1997) (tracing the development of guardianship powers to include the power to allocate assets and income to facilitate Medicaid eligibility); A. Frank Johns, *Fickett's Thicket: The Lawyer's Expanding Fiduciary and Ethical Boundaries When Serving Older Americans of Moderate Wealth*, 32 Wake Forest L. Rev. 445 (1997) (discussing a lawyer's ethical duties to persons other than the client/ward).

36. Alison Barnes, *Beyond Guardianship Reform: A Reevaluation of Autonomy and Beneficence for a System of Principled Decisionmaking in Long-Term Care*, 41 Emory L.J. 633, 651 (1992).

37. *Id.*

38. *Id.*

39. *Id.*

Toward the close of the nineteenth century, states created conservatorship, a form of substitute decision-making triggered by need rather than by determination of incompetency, which was applied specifically to the growing population of elderly persons and their younger family members who sought control of family assets.⁴⁰ Family members seeking control of their elder's assets were required to show the need for substitute management of the property, but not the prospective conservatee's incompetency.⁴¹

The treatment of others with mental impairments in the courts was quite mixed. Denial of all decision-making powers to relatively capable persons with low intelligence or poor ability to communicate was common.⁴² However, legal process, including a jury trial, was considered appropriate before an individual could be deprived of independent decision-making powers.⁴³ Throughout the twentieth century, in contrast, courts in large measure have deferred to medical findings to determine whether a prospective ward could manage his or her affairs. The few cases that go to trial can invoke formal legal processes, but the norm is extremely informal.⁴⁴ Anyone with an interest in the ward can petition for the creation of a guardianship, and anyone willing to serve might be appointed.⁴⁵

A. Failure of Family and Informal Supports

The need for a guardian has a strong inverse correlation to the availability of informal assistance, typically provided by family or other long-trusted helpers.⁴⁶ That is, a legal determination of incapacity can be avoided if someone can meet the elder's needs without express legal authority. If fewer

40. *Id.* at 652.

41. *Id.*

42. *E.g. In re Alleged Lunacy of Perrine*, 5 A. 579, 581 (N.J. Ch. 1886) (holding incompetent a deaf and mute young woman).

43. *E.g. Simon v. Craft*, 182 U.S. 427 (1901) (jury trial for a younger woman with a mental disability).

44. *E.g. Dahl v. Akin*, 645 S.W.2d 506 (Tex. App. 7th Dist. 1982) (jury trial in a competency dispute).

45. *See e.g.* D.C. Code Ann. § 21-2043 (1997) (allowing "any qualified person" to be appointed guardian).

46. Jan Ellen Rein, *Preserving Dignity and Self-Determination of the Elderly in the Face of Competing Interests and Grim Alternatives: A Proposal for Statutory Refocus and Reform*, 60 Geo. Wash. L. Rev. 1818, 1848-1859 (1992) (cataloging the changes in the traditions of wealth transmission and caregiving between family generations).

decisions or less complex decisions were needed, an informal helper might enable and encourage the impaired person to make or endorse a choice that family and friends can support. If the individual's choice is unacceptable, then helpers may refuse to continue, and the lack of assistance makes it essential to appoint a substitute decision-maker.

Elders are less likely than in the past to have family members living nearby who can provide assistance. The age cohort now eighty-five years and older were young adults in the Great Depression, when the birth rate was very low, and were unlikely to add to their families in the late 1940s with the start of the babyboomer generation.⁴⁷ Even the limited help of elderly siblings is likely to be lacking, because the gift of extreme old age is given to a few, and mostly to women.⁴⁸ Family members of those with developmental disabilities, mental illnesses, and traumatic disabilities assume the role of guardian during the individual's early life. In later years, however, parents are deceased and siblings — if there are any — may have relocated or become otherwise unavailable to assume this responsibility.

In general, fewer family members than in earlier generations are available to provide care and assistance. Women, the traditional caregivers, have entered the job market in great numbers. Perhaps even more influential to prospective caregivers is the low value placed by society on their work, which earns no financial security in the present or future, no right to time off, and only limited access to assistance with their duties through benefits programs typically designed to respond to the health-care needs of the primary patient.

B. Who Is Preferred and Prohibited?

A growing number of states have expressed a preference among family members as guardians.⁴⁹ Statutes that prioritize persons who might serve, often provide for spouse, offspring,

47. Barnes, *supra* n. 36, at 641.

48. *Older Americans 2000*, *supra* n. 24, at *Indicator 3: Marital Status*. This site shows that at age eighty-five and older, about fifty percent of men and thirteen percent of women are married. Women are more likely to be widowed because they tend to live longer, marry men older than themselves, and remarry less often.

49. *E.g.* D.C. Code Ann. § 21-2043(c) (priority order is spouse, adult child, parent, any relative with whom the incapacitated individual has resided for more than six months prior to the filing of the petition, and any other person).

parent, and other relatives.⁵⁰ A person nominated by the prospective ward may receive first consideration by the court.⁵¹ Although a few states bar appointment of a non-resident as guardian,⁵² the more current view is that a non-resident might serve, provided that he or she can fulfill the requirements of the role.⁵³

Categories of persons who are considered to pose unresolvable conflicts of interest are excluded from appointment as guardians. The Arkansas statute provides a fairly comprehensive review:

No person whom the court finds to be unsuitable No Sheriff, clerk of a probate court, or deputy of either, nor a probate judge [N]o public agency or employee of any public agency [N]o employee of a public agency which provides direct services to the incapacitated person.⁵⁴

Provisions regarding corporations vary considerably. Typically, a corporation qualified to be appointed as guardian must be licensed in the state.⁵⁵ Many states restrict appointment to non-profit corporations,⁵⁶ though for-profit corporations might be acceptable.⁵⁷

The law may prohibit appointment of corporations or institutions providing services to the individual or who are creditors of the individual.⁵⁸ However, state statutes may be

50. *Id.*

51. *E.g.* Ariz. Rev. Stat. § 14-5311 (2001) (providing for appointment of a person nominated by the incapacitated person in writing prior to incapacity; the nominee of one who is paying benefits to the incapacitated person also is listed, followed by a private fiduciary, professional guardian or conservator or the department of veterans' services); Colo. Rev. Stat. § 15-14-311 (1997) (calling for appointment of a person nominated by the incapacitated person in writing prior to incapacity, spouse, adult child, parent or any person nominated by will or other writing signed by a deceased parent, any relative with whom the incapacitated has resided for more than six months prior to filing of the petition, and a person nominated by the person who is caring for the incapacitated person).

52. *E.g.* Vt. Stat. Ann. tit. 14, § 2603 (2001).

53. *E.g.* Ark. Code Ann. § 28-65-203(e) (LEXIS L. Publg. 1987).

54. *Id.* at § 28-65-203 (f)–(h).

55. *But see e.g. id.* at § 28-65-203(a)–(d) (statute ambiguous regarding appointment of a non-resident corporation, though a corporation authorized by the state is qualified).

56. *E.g.* Cal. Prob. Code § 2104 (West 1991) (restricting appointment to non-profit corporations registered in the state).

57. *E.g.* Ark. Code Ann. § 28-65-203(d)(1) (statute silent as to non-profit corporations).

58. *E.g.* Fla. Stat. § 744.309(5) (2001) (“[A] nonprofit corporation organized for religious or charitable purposes . . . under the laws of this state may be appointed

incomplete in their restrictions, as with the Arkansas statute,⁵⁹ which fails to address the appointment of private corporations that may have conflicts similar to those of public guardians and service agencies.

Few restrictions apply to natural persons who might serve as guardians. Among family and friends, a person generally need only be of legal majority, capable of fulfilling the requirements of a guardianship plan, and have no conflicts of interest implied by employment or affiliation with a service provider to the ward or conviction of any crime that implicates the well-being of the ward.⁶⁰ In general, statutes seek to identify and exclude from appointment any person or entity considered to have a conflict of interest or indication of a propensity to exploit the assets of a ward.

C. Family Guardians versus Practicing Guardians

The law assumes the wisdom of relying on family members as guardians. To understand fully the merits of private professional guardians, however, it is useful to consider why the law prefers family members as guardians.

1. *Affection versus Expertise As Quality Assurance*

Assumptions in favor of the unpaid guardian include the inference that the appointee cares about the incapacitated person and that the guardian's decisions will be based primarily on either knowledge of the ward's wishes or empathy based on affection.

Professional and corporate guardians, in contrast, have knowledge about appropriate options to meet the ward's needs and wishes based on repeated experiences with wards, access to professional advisors and resources, and reliance upon professional ethics and standards. The more complex those choices, such as choosing among community-based facilities for a ward with fairly early-stage Alzheimer's Disease, the more useful is a professional guardian's expertise. They also may be presumed to use objectivity and professional ethics in assessing the ward's

guardian." However, no person may be appointed if he or she "provides substantial services to the proposed ward in a professional or business capacity, or [is] a creditor of the proposed ward [unless the prior relationship is dissolved.]" *Id.* at § 744.309(3).

59. Ark. Code Ann. § 28-65-203.

60. *E.g. id.*

values and making decisions for the ward, because they lack the confusion of roles that arises in family relationships.

There is also increasing recognition of a professional standard of decision-making on the basis of substituted judgment and empowerment of the individual to make or participate in decision-making to the greatest extent possible.

2. Knowledge from Intimacy

One important reason for favoring family guardians is to allow for decisions to forego life-sustaining treatment. Traditionally, a professional guardian making decisions based on the ward's objective best interests in life and health could not make a decision intended to lead to decline and an earlier death. However, although all such decisions still are difficult, few defend the "latest date on the tombstone" as a goal to be pursued. Either the professional guardian or family member might choose to withhold or withdraw unwanted care.

Family members may not know the incapacitated person well, and even those who do often have no knowledge of the ward's desires with regard to important treatment issues. Family members typically also have conflicts of interest with regard to expenditures for care, because unspent assets are likely to devolve to some family member(s) at the ward's death. Equally important, some family members act on personal feelings of guilt or fear of death by seeking more care, rather than less. Family members may be absent from the area, such that visits may be infrequent and decisions may be delayed; or the family members may be only marginally capable of caregiving activities, such that the decisions may in fact be made by health-care staff, either by intent or default. Also, greater acceptance and utilization of durable powers of attorney for health care has reduced the need for guardianship appointments specifically to address end-of-life situations.

Family members may be reluctant to encourage or accept the ability of an individual, particularly one with a life-long impairment like mental retardation, to participate in decision-making. Family members are much more likely to make paternalistic decisions on the basis of the ward's best interests as they see them. In contrast, professional and corporate guardians, relying upon articulated standards for decision-making, are committed to making decisions on the basis of substituted judgment, thereby assuring the ward of the greatest possible

recognition in participation.

3. Suspicion Regarding Economic Motivation

A recurring concern is that practicing guardians will be motivated to maximize their compensation and minimize their services, perhaps taking on more cases than can be handled responsibly. Conflicts of interest also may arise when guardians depend for their income on the ward's continuing need for services. The evidence of abuses is found in anecdote and experience.⁶¹ The law responds in two ways: by its fundamental assumption that a family member is preferred as guardian, and by disallowing social and residential services providers from guardianship appointments.⁶² Also, many states situate the office of the public guardian in a division separate from the state entity that provides care to the individuals under guardianship.⁶³

Concern with the economic motivation of professional guardians tends to overshadow the fact that many families have an even more significant economic stake in the elderly ward's assets. The actions and decisions of family members of an individual who has significant assets may be motivated more by a desire for those assets than by assuring the well-being of their ward. The risk to the ward frequently is significantly higher when the guardian is also a resident caregiver, receiving free room and board and having unsupervised knowledge of and access to the ward's assets. Unfortunately, court oversight of family-member guardians tends to be minimal.

Protection for family privacy and the very existence of intimate family ties and personal privacy make it inevitable that family guardianships are harder to monitor than any non-family arrangements.⁶⁴ Intrusion by monitors is the very antithesis of

61. See generally *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 (Dec. 1987) [hereinafter *Abuses in Guardianship*] (exploring widespread abuse in the guardianship system).

62. See *supra* nn. 49-60 and accompanying text.

63. See *infra* n. 195 (noting that Illinois houses the office of public guardian in the agency responsible for social-services delivery).

64. Alison Barnes, *The More Things Change: Principles and Practices of Reformed Guardianship*, in *Older Adults' Decision-Making and the Law* 254, 255-256 (Michael Smyer et al. eds., Springer Publ. Co. 1996) (describing three reasons guardianship reforms go largely unimplemented: 1) the reforms are too rigid in their process requirements to suit the typical participants, who are family members seeking to respond to a family dilemma, 2) the requirements of limited guardianship are not legal enough in

intimacy and family. The family home is constitutionally protected as no residential facility can be. To justify intrusion, the family guardian and caregiver must be found to engage in abuse or some other crime to which the ward cannot consent.⁶⁵ Thus, there are some distinct advantages to a professional guardianship relationship.

4. *Efficiency As a Conflict of Interest*

One way to increase income with no intention to exploit is to adopt extreme efficiency standards, spending little time on the interaction that develops human understanding in any professional relationship. This motivation differs from the motivation of economic gain generally, because it focuses on a guardian's desire to minimize the time and work devoted to the ward's needs in favor of other interests and activities, without regard to whether the favored activity generates additional income.

It would appear that family members and private professional guardians may both fall prey to providing the ward too little time for a strong human relationship. For corporate and professional guardians, just how such conflicts arise depends on the nature of compensation. One discussant reported that her uncompensated service to wards was in the nature of "relationship building."⁶⁶ Organizations that utilize or hoped to utilize volunteers identified visits, typically monthly, as the principal activity in which they would engage.⁶⁷ Undoubtedly, family guardians also might be inclined to provide merely instrumental services and minimize time invested in contact with the ward.

Generalizations regarding the better choice of guardian are simply elusive. A family guardianship that deprives the ward of

that they fail to recognize the changing capacity of aged wards; as opposed to persons with lifelong, physically-based impairments to capacity, and 3) society is reluctant to accord to persons with predictably-limited lifespan the authority to change lifelong intra-family agreements on distribution of family assets.) My arguments were discussed in Winsor C. Schmidt, *Revising Revisionism in Guardianship: An Assessment of Legal Reform of Decisional Incapacity*, in *Older Adults' Decision-Making Capacity and the Law* 269 (Michael Smyer et al. eds., Springer Publ. Co. 1996).

65. See *Hodge v. Jones*, 31 F.3d 157, 163-164 (4th Cir. 1994) (stating that family privacy "may be outweighed by a legitimate governmental interest," such as abuse (citing *Moore v. E. Cleveland*, 431 U.S. 494 (1977))).

66. *Guardianship Services Survey*, *supra* n. 22.

67. *Id.*

company and support is more likely to be protected by the privacy of the family and the presumption that the guardian is well intentioned. Such a situation should be avoided when possible. On the other hand, many family guardians go to great lengths to maintain a relationship with their relative and ward. Such support cannot be replaced in professional services, no matter how skilled and empathetic the caregiver may be.

5. *Weighing the Choice of Guardian*

By this assessment, the services of a conscientious, high-quality guardianship program might be more desirable for the ward in many instances. Family members might also be relieved to commit many decisions and services to a professional, though many might wish to be consulted about major decisions or might feel guilty for failing to fill the guardian role themselves. The professional worker might provide more options to the ward because of his or her greater knowledge of the needs of people with similar disabilities and of the community's resources. However, advice to a family member serving as court-appointed guardian would usually prompt consideration of these options at a lower cost.

It is reasonable to view the preference for family guardians as one based in thrift and societal endorsement of the familial relationship. Yet, there is no essential conflict between the strength and intimacy of the family and the activities of a private, professional guardian, provided the concerns of family members are addressed in an ethical manner. When cost is not a deterrent or when the relationships and services needs are complex, on-going skilled professional services are very desirable.

D. A Little Knowledge about Practicing Guardians

Four categories of persons or entities having no prior relationship with the ward might provide guardianship services: professionals in private practice,⁶⁸ for-profit or non-profit

68. NGA guidelines exclude non-trained, non-certified lawyers from their recommendations for private, professional guardians. *NGA 2001 Legislative Packet, supra* n. 1, at 1. This Article does not exclude law practitioners with other guardianship entities for some purposes, including training and standards of practice. *See e.g. Betraying the Helpless*, N.Y. Times A30 (Dec. 12, 2001) (citing systemic corruption in appointment of lawyers as guardians for elderly and disabled in New York State and financially abusive fees charged to wards' assets). Law teaching is unlikely to provide new attorneys with the knowledge essential to sound guardianship practice. The profile of NGA members,

corporations, and public guardians.⁶⁹ Each brings somewhat different strengths and motivations to guardianship-service delivery. The duties of volunteers, which might be utilized by any guardianship agency or practice, are also considered. The following section presents some survey information and commentary regarding the most significant issues in the choice of a guardian.

In 1998, the National Guardianship Association (NGA) conducted what it termed a Survey of Private Professional Guardians, which asked for voluntary self-reporting.⁷⁰ Members who responded are categorized into four groups: private, for-profit organizations (thirty-nine); private, non-profit organizations (sixty); public organizations (forty-one); and solo practitioners (thirty-eight).⁷¹ It is unknown to what extent the responders are representative of the proportion of like entities in the NGA membership or the larger group of non-member corporate and professional guardians. Also, the categories sometimes fail to capture the complexity of the funding and services of each entity. For example, many non-profit organizations provide substantial services under contract with the state, making them, in significant part, public guardians.⁷² “Solo” practitioners may not practice alone, but may rather have various other workers to deliver guardianship services, and may be either lawyers or non-lawyer guardians.⁷³ Thus, generalities are merely indications of

considered below, includes law practices devoted to guardianship services.

69. It is estimated that twenty-five percent of guardians were non-family members of the wards. Tor & Sales, *supra* n. 1, at 35 (citing *Guardians of the Elderly: An Ailing System*, AP Special Report (Sept. 1987)). Attorneys accounted for five percent; friends, seven percent; public guardians, two percent; banks, four percent; and unknown, three percent. *Id.* No non-lawyer professional guardians were counted. *Id.*

70. Natl. Guardianship Assn., *Agency Directory* (1998) (cataloging results of a membership survey with the following respondents: thirty-nine for-profit organizations; sixty non-profit organizations; forty-one public guardians; and thirty-eight solo practitioners). A study more recently undertaken by The Center for Social Gerontology had no results available for analysis in September 2001. The Illinois Guardianship Reform Project issued its final report in February 2001. Morris A. Fred, *Illinois Guardianship Reform Project Final Report* (Equip for Equality Feb. 2001). Researchers report findings and recommendations that respond to the question why guardianship fails to provide all wards with high quality guardianship services and protection from abuse, despite “skilled and dedicated guardians as well as vigilant and resourceful judges.” *Id.* at 1. The Project’s findings on guardian accountability, guardian training, and public and private programs are referenced herein.

71. *Agency Directory*, *supra* n. 70, at § 1, 1; § 2, 1; § 3, 1; § 4, 1.

72. *Guardianship Services Survey*, *supra* n. 22.

73. *Agency Directory*, *supra* n. 70, at § 4, 2.

the likely business, motivations, and values of the participants.

The survey nevertheless provides a wealth of information about guardianship providers. With regard to services provided, for example, the most common primary service was personal guardianship.⁷⁴ It appears that the designated guardian might be either the individual professional guardian, or a corporate entity.⁷⁵ The profile of services by for-profit corporations differed from other providers in that the second-most-prevalent service by for-profits was care management;⁷⁶ for non-profits and public organizations, the second service was characterized as social services.⁷⁷ The implied (but not defined) distinction appears to be between private- and public-services programs. For-profits listed their third service as the financial-service-representative payee.⁷⁸ While adult protective services ranked last among for-profits and solo practitioners, non-profit and public entities provided adult protective services at a higher rate.⁷⁹

Typically, guardianship entities did not provide services only to specific groups, although services providers such as social workers often have training targeted to the emotional and social needs of specific groups. Nevertheless, most organizations indicated a willingness to serve persons with developmental disabilities, mental illness, brain injury, dual diagnoses (of mental retardation and mental illness), and advanced age; as well as veterans and children. In all cases, the great majority of wards were adults.⁸⁰

Most organizations were very small. Most for-profits (twenty-four of thirty-nine) had one to five employees.⁸¹ Although non-profits generally were larger, twenty-four of sixty had one to five employees.⁸² Ten had as many as twenty employees.⁸³ Many public entities were small (thirteen of forty-one having one to five

74. *Id.* at § 4, 1.

75. One discussant in interviews for this Article indicated her discomfort with services provided under a power of attorney because it is in her name individually, while the guardianship appointment would name the organization. *Guardianship Services Survey*, *supra* n. 22.

76. *Agency Directory*, *supra* n. 70, at § 1, 1.

77. *Id.* at § 2, 1; § 3, 1.

78. *Id.* at § 1, 1.

79. *Id.* at § 1, 1; § 2, 1; § 3, 1; § 4, 1.

80. *Id.*

81. *Id.* at § 1, 2.

82. *Id.* at § 2, 2.

83. *Id.* at § 3, 2.

employees), but the largest entity had over 200 employees.⁸⁴ Most likely, the viable scale represents at least one of two possible differences: a concentrated urban population; or, more likely, a public entity authorized to provide services to paying clients.

Budgets varied. Among for-profits, fifteen of thirty-nine budgeted \$100,000 to \$500,000 annually, in a rough bell curve.⁸⁵ Between eighty percent and one hundred percent came from client fees, the average fee per case being \$1,000 to \$5,000.⁸⁶ In contrast, non-profits charted a flat majority clustered between \$50,000 and \$500,000.⁸⁷ One-third, or sixteen of sixty, reported average fees of less than \$1,000; twenty-eight of sixty reported average fees of \$1,000 to \$5,000.⁸⁸ The average fee of the non-profit was lower than that of the for-profit, and the reasons are unclear.

Some public entities had much larger budgets,⁸⁹ while almost one-half who called themselves solo providers had services budgets under \$50,000.⁹⁰ Nineteen of forty-one solo providers reported average per-case fees of less than \$1,000.⁹¹

The breakdown of personnel in entities of various types is simply confusing, perhaps reflecting the fact that some guardianship services can be provided effectively by persons of various backgrounds, including volunteers with no specific relevant background. In any case, the greater proportion of persons with college and masters degrees is found in the public guardianship entities, perhaps reflecting public-sector hiring practices that favor advanced education credentials.⁹² Most prevalent expertise on staff included social workers and nurses.⁹³ Non-profits had the smallest proportion of attorneys, while the most common external consulting arrangement involved legal counsel.⁹⁴

Volunteers are utilized sparsely: only one agency of the

84. *Id.*

85. *Id.* at § 1, 1.

86. *Id.* at § 1, 3-4.

87. *Id.* at § 2, 1.

88. *Id.* at § 2, 4.

89. *See id.* at § 3, 1 (indicating four entities with budgets over \$10,000,000).

90. *Id.* at § 4, 1.

91. *Id.* at § 4, 3.

92. *Id.* at § 3, 3.

93. *Id.* at § 1, 2; § 2, 3; § 3, 3; § 4, 3.

94. *Id.* at § 2, 2-3.

thirty-nine for-profits utilized volunteers,⁹⁵ eleven of sixty non-profits,⁹⁶ seven of forty-one public entities,⁹⁷ and five of thirty-five solo practitioners.⁹⁸ As the public sector has found for many years, it is difficult to utilize volunteers consistently in situations of intense need and limited human feedback.⁹⁹

Caseloads vary within certain limits, with an apparent correlation between ample resources and a smaller caseload. Among for-profit entities, virtually all reported caseloads of forty or fewer, and twenty-seven of thirty-nine reported caseloads of twenty or fewer.¹⁰⁰ With regard to the guardian's mandated work, organizations' requirements for contact between guardian and ward often called for monthly visits.¹⁰¹ Some requirements derive from statutes, but many states and organizations designated no time frame for required visits.¹⁰² The length of visit was never specified.

Quality assurance and staff training, closely interrelated investments of staff time and resources, are quite minimal. Common quality-assurance activities include having written procedures, periodic case review, and client-satisfaction surveys.¹⁰³ Private non-profits were most likely to provide quality-assurance in the form of training (forty of sixty).¹⁰⁴ Thirteen of sixty of the private non-profits reported providing six to ten hours of training, while others provided less.¹⁰⁵

Any analysis based on this survey by self-report must be treated with caution. Yet, a number of generalizations can be offered that contribute to an understanding of professional and corporate guardianship. First, most organizations are quite modest in size. Those on the larger end of the scale are likely to provide guardianship services for both private and public payment. Once providing guardianship for private pay, an organization might better serve some clients by providing

95. *Id.* at § 1, 3.

96. *Id.* at § 2, 4.

97. *Id.* at § 3, 4.

98. *Id.* at § 4, 3.

99. *Infra* nn. 216–226 and accompanying text.

100. *Agency Directory, supra* n. 70, at § 1, 4.

101. *Id.* at 1, 4; § 2, 5; § 3, 5; § 4, 4.

102. *Id.*

103. *Id.* at § 1, 5; § 2, 6; § 3, 6; § 4, 5.

104. *Id.* at § 2, 6.

105. *Id.*

financial services in addition to basic bill paying.¹⁰⁶ Beyond this, it is difficult to say what might be the ideal mix of workers and services to meet the needs of an organization's clients. However, because most organizations serve all in need of guardianship, education for professionals must include material about the various sources of disability and the various needs of persons with disabilities over the course of life. The benefit of some greater standardization of caseload sizes is clear, and more quality-assurance measures, including education in practices and ethics, are needed in most, if not all, organizations.

IV. DEFINING QUALITY IN GUARDIANSHIP SERVICES

The search for quality in guardianship services calls for a review of the legal standards for quality and the nature of their implementation.

A. The Assessment of Guardianship Reform

In 1987, the Associated Press reported a massive study of the guardianship system, confirming a number of earlier, scholarly studies.¹⁰⁷ Sixty-seven reporters and editors examined over 2,200

106. "Financial services" reported by for-profit providers are not defined for purposes of the survey.

107. *Abuses in Guardianship*, *supra* n. 61. Earlier studies include George Alexander & Travis Lewin, *The Aged and the Need for Surrogate Management* (1972) (reviewing 572 cases in New York State and concluding that guardianship provided no benefit that could not be achieved without an adjudication of incompetence and that in almost every case the elderly ward was in a worse position after adjudication than before; incompetence was found whenever divestiture was in the interest of some third person or institution); Margaret Blenker et al., *Final Report — Protective Services for Older People: Findings from the Benjamin Rose Institute Study* (1974) (provision of enriched protective services, including guardianship, to an experimental group failed to prevent or slow the ward's deterioration or death; the rate of institutionalization — found in other studies to have a positive correlation with mortality — was higher for wards). The National Senior Citizens Law Center also examined 1,000 guardianship and conservatorship cases filed in Los Angeles in 1973–1974 to determine the type of evidence presented, how many wards attended their hearings, and the outcomes. Peter M. Horstman, *Protective Services for the Elderly: The Limits of Parens Patriae*, 40 Mo. L. Rev. 215, 235–236 n. 81 (1975).

Other studies include Leon County (Tallahassee) Florida (1977–1982); Pennsylvania State University Study of three counties (1983); San Mateo County (California) study, reviewing at intervals in 1982, 1984, and 1986 (finding discrimination or prejudice against elderly persons by third parties such as convalescent homes which refused to accept a solitary, unsupervised and injured resident without a conservatorship). Winsor Schmidt, Jr., *Quantitative Information about the Quality of the Guardianship System: Toward the Next Generation of the Guardianship Research*, in *Guardianship: The Court of Last Resort for the Elderly and Disabled* 181, 190–193 (Carolina Academic Press 1995).

guardianship case files in every state and the District of Columbia.¹⁰⁸ They found that only three-fourths of wards had a hearing and fewer than one-half were present.¹⁰⁹ Only forty-four percent were represented by counsel,¹¹⁰ leaving a substantial proportion of adjudications with no one to speak on behalf of the prospective ward. The time that elapsed between notice and hearing date, in any case, left little opportunity for the respondent and counsel to prepare, and the average length of the hearing was only a few minutes.¹¹¹ Evidence of the ward's capabilities at making and carrying out decisions was offered in opinions of physicians of various specialties besides psychiatry or geriatrics (e.g., plastic surgeons, gynecologists, urologists); and by lawyers,¹¹² social workers, and petitioners themselves.¹¹³

Although laws in forty-four states required guardians to file regular financial accountings, nearly half of the files examined lacked complete records.¹¹⁴ Only sixteen percent of files reviewed included reports on the ward's health and well-being.¹¹⁵ One file in ten had no guardian reports at all.¹¹⁶

The undeniable and disturbing failure of guardianship law and practice to provide even a minimum of fair treatment to so many incapacitated people led to debates in most state legislatures and extensive statutory reforms in many states.¹¹⁷ The new statutes

108. *Abuses in Guardianship*, *supra* n. 61, at 13, 19. For a description of legal precedents and process, emphasizing the concept of least restrictive alternative derived in reform guardianship statutes from civil commitment case law (*Lake v. Cameron*, 364 F.2d 657, 659-660 (D.C. Cir. 1966)); minimum constitutionally-acceptable procedural due process (*Lessard v. Schmidt*, 339 F. Supp. 1078, 1101 (E.D. Wis. 1972), *vacated*, 414 U.S. 473 (1974)); and the components of the guardianship process from petition and notice to the respondent, to annual oversight by court representatives, see Pat M. Keith & Robbyn R. Wacker, *Older Wards and Their Guardians* 25-28, 34-35 (Pragu Publishers 1994). This volume also includes commentary on the pre-reform guardianship system from the popular press, health-care literature, and the views of ethicists. *Id.* at 22-25.

109. *Abuses in Guardianship*, *supra* n. 61, at 24.

110. *Id.* The survey of Los Angeles court records by the National Senior Citizens Law Center found that fully ninety-six percent of respondents lacked counsel. *Id.* at 26.

111. *Id.* at 15.

112. *Id.* at 26 (prospective ward's attorney waived hearing, stating his client was "arrogant" and "in my lay opinion . . . in the beginning-to-middle stages of Alzheimer's disease").

113. *Id.* at 13.

114. *Id.*

115. *Id.* at 32.

116. *Id.* at 13.

117. Fred Bayles & Scott McCartney, *Move under Way to Reform Laws Covering Guardianship of the Elderly*, L.A. Times 2-4 (Jan. 17, 1988).

were based primarily on one of two model statutes: the Uniform Guardianship and Protective Proceeding Act and the model developed by the American Bar Association Commission on the Mentally Disabled.¹¹⁸ Each model extended to prospective wards more rights to legal process.¹¹⁹

The goal of reform advocates was to provide for every prospective ward the least restrictive alternative in assistance, and the assurance of quality assistance.¹²⁰ It was anticipated that a larger proportion of limited guardianships would be requested, and that still more would be awarded, even though the petitioner might plead for plenary powers.¹²¹ The stigma of adjudication of incompetency, advocates hoped, would be greatly diminished in favor of a view of guardianship services as providing helpful legal and personal assistance to maximize the independent function of persons with disabilities.¹²²

Beginning in 1992, the results of the first local and national studies of guardianship-reform implementation were completed in an effort to understand the impact of reform on the courts and participants in the guardianship system.¹²³ The unavoidable conclusion is that guardianship reform has had quite limited success in achieving its goals. Extensive anecdotal evidence and limited research data show that the positive effects that were anticipated are not widespread.¹²⁴

118. A. Frank Johns, *Guardianship Folly: The Misgovernance 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.* 1, 46 (1997).

119. *Id.* at 41 (referring to the ABA's model statute).

120. Keith & Wacker *supra* n. 108, at 175.

121. *Id.*

122. Lawrence A. Frolik, *Plenary Guardianship: An Analysis, a Critique and a Proposal for Reform*, 23 *Ariz. L. Rev.* 599, 629–633 (1981) (citing the probabilities of erroneous decisions and their likely consequences). For an overview of state reforms, see Judith McCue, *The States Are Acting to Reform Their Guardianship Statutes*, 131 *Trusts & Ests.* 32 (July 1992). For a state-by-state comparison of significant provisions, see Sally Balch Hurme & Erica Wood, *Guardian Accountability Then and Now: Tracing Tenets for an Active Court Role*, 31 *Stetson L. Rev.* 867, app. at 930–940 (2002) (providing a chart of guardianship statutory reforms titled, *Monitoring Following Guardianship Proceedings*).

123. See *infra* nn. 124–127 (covering studies of guardianship reform).

124. Keith & Wacker, *supra* n. 108, at 179–181; Pat M. Keith & Robyn R. Wacker, *Guardianship Reform: Does Revised Legislation Make a Difference in Outcomes for Proposed Wards?*, 4 *J. Aging & Soc. Policy* 139, 151–152 (Nos. 3/4 1992); Herbert Kritzer & Helen Marks Dicks, *Adult Guardianships in Wisconsin: An Empirical Assessment — A Report Prepared for the Center for Public Representation and Elder Law Center Coalition of Wisconsin Aging Groups*, 19 Jan. 1992; see Herbert M. Kritzer, Helen Marks Dicks & Betsy J. Abramson,

Frank Johns asserts that recurring waves of reform have occurred without creating a guardianship foundation and structure “capable of serving the wave of unprotected, poor baby boomers” of the future.¹²⁵ John Regan attributed the lack of change after legal reforms to “failures in the linkages between judicial administration of guardianships . . . and older Americans who constitute the vast majority of [wards].”¹²⁶ This Author has posited reasons for the immovability of the judiciary, the Bar, and the clients, as to the differences between groups of wards — elders, persons with chronic disabilities, persons with trauma or disease — and to the reluctance of caregivers and society to implement rules that assure elderly wards of effectuating their financial and lifestyle choices.¹²⁷

Many have written condemning the failure to implement reforms, and do so in this volume.¹²⁸ This Article intends to identify the sources of guardianship services for a growing number of elderly and disabled people, with emphasis on the highest quality in every possible case. Thus, for the moment, the discussion turns away from the perplexing failures of the law and the courts and looks to professionalization as a means of assuring knowledgeable and ethical services by practicing guardians.

B. Professionalization As Quality Assurance

Workers often are termed “professionals” without regard for whether their occupation has the elements that comprise the attributes of a true profession.¹²⁹ At most, an occupation so named

Adult Guardianships in Wisconsin: How Is the System Working? 76 Marq. L. Rev. 549, 569–571 (1993) (noting that more research needs to be completed to determine the status of guardianship reform).

125. Sally Balch Hurme, *Current Trends in Guardianship Reform*, 7 Md. J. Contemp. Leg. Issues 143 (1995/1996) (providing examples of both implementation and failure of guardianship reform principles); Johns, *supra* n. 118, at 67.

126. Johns, *supra* n. 118, at 5.

127. Barnes, *supra* n. 64, at 259–266.

128. E.g. Lawrence A. Frolik, *Promoting Judicial Acceptance and Use of Limited Guardianship* 31 Stetson L. Rev. 735 (2002) (arguing for the need for judges to implement reforms dealing with individuals of diminished capacity).

129. Just why “professionalism” and “acting professionally” are so frequently referenced as standards for behavior is beyond the scope of this Article. Yet, it is useful to consider that the language reflects in part wishful thinking on the part of workers for the status of professionals and among consumer/clients for conscientious service from a person with strong ethical standards. The worker, of course, might seek the status without behaving with the concomitant ethical standards, allowing the opportunity to exploit the unwary public. The client, similarly failing the test of the professional relationship, may seek professional services yet remain unwilling to cooperate fully with the advice received, as

might function for some of its members as a “calling requiring specialized knowledge.”¹³⁰ Few occupations require “long and intensive preparation including instruction in skills and methods as well as in the scientific, historical, or scholarly principles underlying such skills and methods.”¹³¹ Only with time did traditional professions begin to “maintain by force of organization or concerted opinion high standards of achievement and conduct, and committing its members to continued study and to a kind of work which has for its prime purpose the rendering of a public service.”¹³² Commentary on professionalism for physicians provides an enlightening analogy. The professional-health-care-provider model requires professional self-regulation, commitment among members to high standards of quality, and de-emphasis of economic issues.¹³³ If guardianship is to provide the protection of professionalism for wards, it must develop and implement similar components of regulation and must hold guardians accountable.

Professionalization entails significant shifts in social and economic power to the members of the profession. To those qualified to join, the establishment of a profession awards a monopoly, or at the least a dominant role, in delivering the types of services included in the licensing or certification.¹³⁴ The practitioners are removed from, or distinguished within, the marketplace of competition. Such a step reduces the number of available providers and can cause an increase in the fees for services. To justify a monopoly, therefore, the public must be in need of protection from unethical providers.

The public needs protection when the recipients of services

with a patient who ignores doctor’s advice or a client who engages in shady business arrangements after warning from his or her attorney. The client might also dispute or ignore the bill.

130. *Webster’s Third New International Dictionary of the English Language Unabridged* 1811 (Philip Babcock Gore ed., G & C Merriam Co. 1981).

131. *Id.*

132. *Id.*

133. James F. Blumstein, *Health Care Reform and Competing Visions of Medical Care: Antitrust and State Provider Cooperation Legislation*, 79 *Cornell L. Rev.* 1459, 1465 (1994).

134. *Id.* at 1466–1468 (physicians have sought to promote monopoly by opposing proposals to restrain costs by instituting a two- or three-tier marketplace with less-educated and skilled providers for certain purposes). The principal theorist in the study of professions generally is Emile Durkheim. See generally *Professional Ethics and Civil Morals* (Cornelia Brookfield trans., Free Press 1958) (describing the similar and competing interests of the workers and the public in the professionalization of an occupation).

cannot effectively monitor the quality and appropriateness of services or knowledgeably compare prices. In health-care, for example, a patient often cannot tell whether the physician's treatments are valuable in managing the patient's sickness. Thus, traditional health-care providers are deemed to be professionals, requiring long and rigorous education, licensing to protect their market from quacks, and regulation by those with similar education and licensing.

The model contrasted with professionalism is commercialism, which calls for competition among providers for a portion of market share, and thus a greater emphasis on financial interests. For most goods and services, the market is the most desirable way to determine price and assure quality. In addition to its quick response to supply-and-demand changes that might be unrecognized by regulators, commercialism implies recognition of those alternative providers of better or less costly services, and emphasis on the professional's duty to the client or patient. Further, the process of monitoring the quality of commercial services is more open to laymen whose opinions are considered valuable at least in some situations. The practice of including members of the greater community on professional disciplinary boards, for example, illustrates the influence of commercialism on traditional professional self-regulation.

When the consumer cannot determine the quality of the goods, however, the market becomes distorted. If, as with guardianship, the services fill a basic need, the need will be left unmet (i.e., an incapacitated person with decision-making assistance will be left to luck and the kindness of the community) or will be met by the available means, albeit poorly suited to the actual need (i.e., often, permanent institutionalization with no regard for changing needs). The consumer cannot decline to buy without severe loss in terms of lifestyle, health, or perhaps life itself, and therefore must purchase services of questionable or variable quality.

Each model, professionalism and commercialism, has negative attributes, given current social values. Traditional professionalism has endorsed elitism and paternalism by distancing the professional from the client and seeking to act according to professional values with little regard for any differing values held by the client.¹³⁵ Commercialism opens the

135. Clark C. Havighurst et al., *Health Care Law and Policy* 301-305 (2d ed., Found.

door to undesirable aspects of economic competition. For example, patients whose care is tightly controlled by managed-care organizations have found economic motives to interfere in unacceptable ways with necessary care and the doctor/patient relationship of trust and confidentiality. Some managed-health-care entities are competing on price without due regard for quality, considering the importance of their product. One strategy employed by the states to control health-care competition is to limit the number of providers based on an assessment of the numbers of consumers. For example, hospitals were required to obtain state permission, in the form of a certificate of need, before purchasing costly new technology.¹³⁶ Thus, the state could prevent too many hospitals in a locality from acquiring expensive, duplicative equipment. The strategy assured that the technological resource would be well utilized by identifying the consumer population. It preempts the development of a “price war” between hospitals to attract patients for the cheaper services because, in goods such as health care that cannot readily be evaluated for their quality, cheaper is not always better.

Professionalization must be imposed on an existing market. The need for professionalization might be avoided if the consumer of services can choose a provider who is known to be reliable by a community of individuals who can identify a pattern of delivering quality services.¹³⁷ Such an arrangement allows for discussion of concerns about price as well as quality.¹³⁸ Most wards are not capable of such negotiation. It might be argued, however, that many wards do not need professional quality assurance because relatives or friends can and do identify a person in the community who holds forth as providing guardianship services and negotiate the costs of recommended and desired services. The quality of most services provided by guardians is at least arguably discernable to laypersons. The possible exception is complex financial management typically done by banks and trust departments, which have well-developed professional standards

Press 1998).

136. See generally Scott D. Malar, *Antitrust Immunity under Florida's Certificate of Need Program*, 19 Fla. St. U. L. Rev. 149 (1991) (discussing the impact of certificate of need programs on economic competition).

137. Michael Burrage, *Lawyers and Politics Escaping the Dead Hand of Rational Choice: Karpik's Historical Sociology of French Advocates*, 24 L. & Soc. Inquiry 1083, 1100 (1999) (describing conversion of the guardianship and supervision department of the French Ministry of Justice to “part statutory monopoly”).

138. *Id.* at 1096–1098.

for many aspects of their work.

On the other hand, most wards have no one in a position to hold a guardian to provide quality services over time. Typically, a friend or relative has no authority to require that the guardian be accountable outside of a petition for court review. Thus, a quick resolution of problems is unlikely and, in any case, the choice of a successor guardian may be problematic. It is reasonable to conclude that, for most prospective wards, professionalization would provide non-duplicative protection from poor-quality services.

The regulation of the professions of health care and law each illustrate the evolution in recent years to more commercialism and, some would say, less professionalism on the part of practitioners. Clearly, if professional guardianship is fully institutionalized in any state, ethics and oversight inevitably would include aspects of both traditional professionalism and commercialism. That is, professionalized guardianship would have to include some traditional professional standards, including intensive education and self-regulation of ethics and practices. It would include commercialism in the form of some competition based on quality and price, in accord with the evolution of the health care and legal professions to accommodate broader dissemination of information and concerns with personal services costs.

If successful, the mix might cancel out the negative attributes of each model: paternalism and excess competition resulting in poor quality. The increase in prestige associated with professionalism might draw more qualified, dedicated people to work as guardians, ideally compensating for more rigorous entry standards without a drastic rise in costs. Achieving the ideal is unlikely, however. Thus, questions remain about how to assure an adequate supply of good quality services at a fair price.

V. PROFESSIONALIZATION OF PRACTICING GUARDIANS

The search for quality in guardianship services has led to the proposal that guardianship should be recognized and treated as a profession. Although, as noted, guardians who serve for payment for non-relatives are sometimes referenced by law or commentary as "professional guardians," the discussion that follows is more exacting and explicit. The attributes of professionalism discussed above are compared with the requirements of the states and the values and practices advocated by the National Guardianship

Association and Foundation to determine whether and how existing standards might advance professional qualities in guardian services. Finding room for doubt, the Article concludes with discussion of whether the services of guardianship and practicing guardians can be appropriate for the designation of “profession.”

A. Education, Testing and Licensing

Central to the identification of professionals is a course of education, a demonstration of knowledge and skill, and licensing or certification by the state to engage in practice of the profession.

1. Education of Guardians

Guardian education received significant attention in the 1988 Wingspread Symposium.¹³⁹ Education is also the most important factor in creating professional membership, since the course of education is the source of a common knowledge generally unavailable to laypersons. It also creates a sense of collegiality among those who study together and imparts ethical principles that the profession will require of its members.

Typically, professional education leads to a demonstration of the knowledge and skills acquired, which must be successfully completed before a license or certification will be issued to engage in practice. In medicine and law, for example, novices undergo extensive testing in skills and ethics. In medicine, and sometimes in law, some demonstration of skill, in moot court or clinic, has already been imposed in the education curriculum.

Most attention has been directed toward the education of laypersons to serve as guardians for a relative or friend. The training generally provides practical knowledge of the barebones dictates of statutes for maintaining separate financial records and reporting to the court. Those serving relatives have not been in need of certification, and courts have had no expectation of great knowledge and skill. Extensive training in the ethics of personal decision-making has not been considered necessary to intra-family assistance.

Additional education has been considered an option that should be available. The Illinois Guardianship Reform Project report, for example, cites with approval a county project in

139. See Johns, *supra* n. 35, at 319 (discussing the goals of the Wingspread Symposium to create “clearly defined roles and performance standards”).

Michigan that provides probate counsel to guide petitioners and others in the guardianship system.¹⁴⁰ The Project also advocates opportunities for interested professionals, including attorneys, judges, and physicians, to educate practicing guardians at conferences.¹⁴¹

Apart from very basic training for all guardians that has been implemented in some courts, the only curriculum offered to prepare practicing guardians originated with the National Guardianship Foundation (NGF), which was founded in 1998 to develop a system of certification for guardians.¹⁴² The NGF provides a course of training to assist in preparation for its test.¹⁴³ However, no course is mandatory to register with, and be certified by, the NGA, provided one can pass the test.¹⁴⁴

140. Fred, *supra* n. 70, at 53 (citing Bradley Geller, *The Long and Winding Road: Guardianship Reform in Michigan*, 1 Elder L.J. 177, 194–196 (1994)).

141. *Id.* at 54. The report recommends as useful information: “1) providing the courts with the means for interpreting the latest data on disability in order to create effective limited guardianships; 2) providing physicians with information on how to complete the forms on decisional impairment” to show whether, and to what extent, a respondent is in need of a guardian; “and 3) providing attorneys with opportunities to closely analyze and compare their roles as guardians ad litem and advocates for potential wards.” *Id.* (footnotes omitted).

142. *NGA 2001 Legislative Packet*, *supra* n. 1, at 1. An advanced designation, Master Guardian, is recognized by the NGF, *id.* at 3–4, though not by any state. Qualifications for Master Guardian include more experience and testing, a demonstration of good reputation among other guardians, and possibly more education. *Id.* at 3. An applicant for Master Guardian must provide guardianship services to two or more incapacitated persons for an average of sixteen hours per week of guardianship practice during three of the past five years, including the most recent year. *Id.* The education requirements apparently refer to NGA requirements for twenty hours of continuing education in a two-year period, rather than to any initial or additional education specific to the designation. The applicant must pass a four-hour examination consisting of multiple-choice and essay questions, and submit an essay that demonstrates an advanced level of experience in varied and complex guardianship issues. *Id.* at 3–4.

Only twenty Master Guardians have been designated in 2001. *Id.* at 4. It is too soon to determine whether there is a need for a separate designation for experienced or specialist guardians. Further, the requirements suggest the designation is at once an honor and a grandfathering clause for experienced guardians. Unlike medical specialties, for example, the additional education requirements are minimal. The minimal practicing hours required suggests the intention to attract lawyers who provide guardianship services as a part of a broader practice. In general, Master Guardian designation seems at present to have more to do with promoting the NGA and NGF than with any public need.

143. See *infra* nn. 154–158 and accompanying text (discussing the testing of prospective guardians).

144. *NGA 2001 Legislative Packet*, *supra* n. 1, at 3.

2. Registration and Certification

Licensing of guardians by the states may take two forms: registration and certification.¹⁴⁵ Four states, Arizona, California, Texas, and Washington, require registration of certain personal information, but not certification as a guardian.¹⁴⁶ Arizona guardians, for example, must report certain personal data and be fingerprinted and bonded.¹⁴⁷ Certification, akin to licensing, is even more uncommon than registration. Only Arizona and Washington require guardian certification as a condition for court appointment.¹⁴⁸

Independent of state requirements, the NGF has registered and certified around 400 guardians, seeking to identify a superior level of quality and reliability in guardianship services.¹⁴⁹ The NGA requirements may exceed those of any state.¹⁵⁰ To qualify, an individual must be twenty-one or older and have a high school diploma and one year of guardianship experience¹⁵¹ or a college degree in a related field.¹⁵² A registered guardian must have no felony convictions.¹⁵³ The applicant must pass the test for registration and certification, with or without the preparation course.¹⁵⁴

3. Testing Prospective Guardians

The National Guardianship Foundation provides a test of the knowledge of applicants for certification as guardians.¹⁵⁵ The exam is “a comprehensive test consisting of True/False and

145. *Id.* at 2.

146. *Id.*

147. Ariz. Rev. Stat. § 14-5651. Bonding might be seen as a substitute for professional status and self-policing by the profession.

148. *NGA 2001 Legislative Packet, supra* n. 1, at 2. The NGA also seeks legislation on “portability” or state reciprocal recognition of competency findings and guardianship appointments. *Id.* at 9–10. Though this is an important matter, it potentially affects all guardians. Thus, it is outside the scope of this Article.

149. *NGA 2001 Legislative Packet, supra* n. 1, at 3.

150. *NGA Standards, supra* n. 23, at 4.

151. National Guardianship Found., *Application Process for Registered Guardians* <<http://www.guardianship.org/>> (accessed Jan. 24, 2002). It is unclear how the individual can get one year of experience without registration if registration is required by the state as a prerequisite for practice. Presumably, one could work under the supervision of a registered guardian.

152. *Id.*

153. *Id.*

154. *NGA 2001 Legislation Packet, supra* n. 1, at 3.

155. National Guardianship Found., *supra* n. 152.

multiple choice questions related to guardianship of the person and estate including, but not limited to, fiduciary ethics, duties and responsibilities of guardians and property management.¹⁵⁶ A score of seventy-five percent is required to pass.¹⁵⁷ Again, states have been reluctant to adopt or endorse NGF testing. In Arizona, although training is required, ultimately, no testing has been implemented.¹⁵⁸

4. Assessing States and Qualifications

The record for persuading states and organizations to adopt or endorse a system for guardian education and certification is quite dismal.¹⁵⁹ Because an effective system for training and identifying practicing guardians would in itself seem to be a positive step toward prevention of abuse and exploitation, the possible reasons for the failure should be reviewed and addressed, if possible.

First, states might not adopt education requirements for practicing guardians because legislators believe the path to certification is a poor assurance of improved quality. This view might reflect two different perspectives, either that education is useless in improving guardian practice, or that the type, quality and intensity of education is unlikely to lead to better practices. In the first instance, regarding the fundamental efficacy of education, the doubter believes that individuals who will be exploitative or negligent guardians do so by intention rather than from ignorance of good practices. In the second, doubts might be addressed by more or different curricula. Indeed, the requirements advanced by advocates for guardian certification are quite minimal. Even the brief course for test preparation is optional.¹⁶⁰ Further, the 75% pass requirement seems to make no provision for assuring that important ethical information has been transmitted.

Second, rejection of the proffered requirements overall suggests that states are more concerned with creating an adequate number of guardians for appointment. This concern

156. *Id.*

157. *Id.*

158. Ariz. Rev. Stat. § 14-5651(c)(4) (requiring training but omitting a testing requirement).

159. See *NGA 2001 Legislation Packet*, *supra* n. 1, at 2 (noting that only Arizona and Washington require guardian education and certification).

160. See *id.* at 3 (offering, but not requiring, a training class).

should not be dismissed as trivial or purely self-interested on the part of legislators with other agenda. Rather, it must be taken seriously given the observation that most guardians are apparently pretty good guardians. Only very few engage in abuse or exploitation of any kind. Perhaps a larger number lack expertise or energy that would benefit their wards, but fill a need that might otherwise go unmet. The loss of this second group, and perhaps deterring new guardians by creating difficulties in qualification, could create a crisis in some states where guardianship reform requires appointment. If a state must acknowledge and address such a crisis, it must take steps to provide guardians. By such steps, it acknowledges that the responsibility for an adequate supply of practicing guardians lies, at least in part, with the state. Although many states allocate funds for some public guardian services, providing for the needs of all who have no family guardian is a larger, and potentially burdensome, task.

Third, the lack of registration requirements suggests still another impediment to state endorsement of practicing guardians: states are apprehensive about affirming that they have any responsibility for the quality of services provided by any guardians other than the public guardian. Although a state may well be immune from suit for providing or facilitating negligent or reckless services that cause a ward harm, legislators and administrators fear public blame. States apparently do not want to know in any comprehensive way who the guardians are (in that only four are willing to register guardians' personal information¹⁶¹ and still fewer want to maintain a list of guardians known to the state (in that only two certify guardians).¹⁶² By maintaining such information, the state might be held responsible to supply better guardian services in reaction to some egregious breach by a registered, certified guardian.¹⁶³

If states are to be persuaded that qualification requirements for guardians are necessary, it is possible that the course of guardian education must become more extensive and demanding.

161. *Supra* nn. 145–147 and accompanying text.

162. *Supra* n. 148 and accompanying text.

163. The state's dilemma is somewhat analogous to that which hampered effective licensing of board and care facilities and their administrators. States were reluctant to set any standards for board and care administrators of such non-medical residential facilities because of the large number of facilities and placement of the poor at state expense with some marginal facilities.

Through repetition, example, and perhaps apprenticeship experience, education for practicing guardians should inculcate the values of the professional community. Emphasis should include the scientific basis for different types of incapacity and means of communication with seriously impaired clients or, if that is not possible, alternate means for determining the ward's wishes as expressed in lifestyle and past choices. Great emphasis should be placed on the problematic matter of articulating when and why the ward's choices can or cannot be known. Further, if there are circumstances in which the ward's choice cannot be respected because it departs from his or her objective best interests in health, safety, and welfare, each guardian should be able to articulate the reasons for this deviation from acknowledged NGA standards of best practice. This element is particularly important because statutes and case law sometimes endorse the ward's best interests when substituted judgment is in conflict.

To protect wards and to confirm the importance of education, all prospective practicing guardians should receive substantial education in financial matters. In accord with a professional paradigm, practicing guardians should know enough about finances and accounting so that no ward's assets are mishandled because of inexperience. Indeed, this part of a guardian curriculum is likely to take up the lion's share of required hours and test questions.¹⁶⁴

A final consideration with regard to state adoption of certification is whether such a step is necessary. Professional standards typically are created by private organizations. Some, like standards for accreditation of hospitals, are adopted by the state, which deems the standards to be sufficient evidence of quality for licensing and payment of benefits. For the moment, guardianship is under the supervision of the state courts, and Medicaid payments for services are a recent innovation. Thus, the time when such adoption is likely to be debated is foreseeable, but has not yet arrived. There is time for lobbying in state legislatures to establish the advantages of standards. To raise the likelihood of more state activities, advocates should carefully review the arguments that persuaded legislators in Arizona, Washington, California, and Texas, in search of those that apply

164. That guardianship training emphasizes financial matters is axiomatic, in that financial accounting is critically important to the job of guardian.

to their own states.

B. Ethical Rules and Standards of Practice

The progress toward professionalization for different occupations, including physicians and lawyers, mirrors the NGA's activities in drafting ethics codes and standards for the professional activities. An important component of quality services is identification of sound values and practices.

The NGA seeks the use by guardians nationwide of a code of Standards of Practice and Model Code of Ethics.¹⁶⁵ In 1991, the organization adopted a previously published Model Code of Ethics for guardians to follow in the execution of their duties.¹⁶⁶ The Code addresses guidelines for decision-making, the relationship between the guardian and the ward, least restrictive alternative, and limited guardianship.¹⁶⁷ The NGA also adopted Standards of Practice for guardians,¹⁶⁸ which were expanded and ratified by the membership in 2000.¹⁶⁹ The Standards of Practice address twenty-three areas of responsibility for guardians, including relationship to the courts; self-determination of ward; informed consent; various aspects of decision-making; confidentiality; least restrictive alternatives; duties of the guardian of the person and the guardian of the estate; conflicts of interest; the guardian's relationship to the ward, the ward's family and friends, and other professionals; and termination and limitation of guardianships.¹⁷⁰ The Standards state that they reflect the best or highest quality of practice in guardianship, and that in many instances the standard goes beyond what state law or funding realities reflect in the delivery of guardianship.¹⁷¹

The NGA Standards and the Ethics Code share many attributes with self-governance of other professional groups, particularly lawyers, who also can provide guardianship services without certification. They include a mix of solid minimum standards, the violation of which might be considered a breach of the professional's duty. On the other hand, they also include statements that cannot reliably be identified with a particular

165. *NGA Standards*, *supra* n. 23, at 3-4.

166. *Id.* at 3.

167. *NGA Model Code*, *supra* n. 23, at 550, 558.

168. *NGA Standards*, *supra* n. 23, at 3.

169. *Id.* at 1, 3.

170. *Id.* at 2-3.

171. *Id.* at 3-4.

behavior. From one provision to the next, the construction leaves the meanings sometimes disjointed and unclear. With the Standards, for example, the mix of practical and ethical statements of such varying weight as compulsion, advice, or precatory statement, makes unclear the behavior that is expected of persons governed by the provisions.

This is not unique in legal standards; a number of similar works, including such ambiguous documents as patients' and residents' bills of rights, show a history of negotiation and group drafting in language that finally cannot be regularized except by specialized legislative counsel.

To be used, the Standards and Ethics for Guardians must meet the requirements of states for a reliable minimum standard of behavior, as well as lead to best practice, particularly if adoption by state legislatures is the goal. To determine what those requirements are, advocates would benefit from knowledge of the politics of change in legal profession standards. The first standard for lawyers was the Model Code of Professional Responsibility, adopted by the American Bar Association in 1959;¹⁷² the second, which has been adopted for lawyers in most states, is the Model Rules of Professional Conduct.¹⁷³ The impetus in the profession and the states to replace the Code derives from its complex structure of three related parts, or levels, of instruction to the lawyer: the Canons, which state the standards of conduct normally expected;¹⁷⁴ the Ethical Considerations, which, based on the Canons, provide guidance toward ideal conduct or goals the attorney should strive for;¹⁷⁵ and the Disciplinary Rules, which state the conduct necessary to avoid disciplinary action.¹⁷⁶ The interaction of the accumulated advice and requirements were widely acknowledged to be confusing.

In contrast, the Model Rules, adopted by the ABA in 1983 and subsequently by most states, consist of mandatory statements (the Rules) by which the attorney must abide by or be subject to disciplinary action.¹⁷⁷ For most Rules, Comments provide the attorney with guidance but do not create ethical

172. Model Code Prof. Resp. (ABA 1980).

173. Model R. Prof. Conduct (ABA 2001).

174. Model Code Prof. Resp. at 1.

175. *Id.*

176. *Id.*

177. Model R. Prof. Conduct at preamble ¶ 17.

obligations or exposure to professional censure.¹⁷⁸

The rules of the legal profession still are no paragon of clarity. Two principal reasons might be cited: first, that there are far more circumstances in professional practice than can be addressed by general rules, and there is strong motivation to allow the qualified professional to act in the situation in accord with personal judgment. That is, a statement in general terms will lead to differing interpretations about its application of specific facts. There are, therefore, limits to the clarity that can be achieved by explanation of the meaning of a standard. Second, any compulsory standard is likely to be construed eventually as a measure by which negligence will be identified. Thus, the number of specific prohibitions must be limited except when a practice is clearly and always unethical or otherwise in conflict with professionalism.

NGA advocates assert that their standards and ethics for guardians cannot be used as an indicator of practitioner negligence.¹⁷⁹ Yet, it would be naïve to think that state legislatures would not want to hold practitioners accountable for harmful practices. Further, the assertion that no negligence is implied is meaningless once a provision can be recognized as a professional standard. Any standard for a profession can be introduced in negotiation or court and, if the interpretation is not clear and obvious, expert testimony can determine the application of the standard to behavior of a member of the profession. The very nature of professional status calls for individual responsibility; to join professional ranks means to answer in court for breaches of professional duty.

Advocates for the Ethical Code and Standards of Practice for guardians have a task more challenging than the bar, in that they are proposing standards in an age when other professional standards have already struggled to become clearer. States, which have an interest in protecting powerless citizens, should be interested in adopting standards for guardians.

To that end, the NGA should at the least simplify the presentation of the Standards and Code as much as possible by adopting parallel sentence constructions from standard to standard, and providing advice that references the code of ethics.

178. *Id.* at ¶ 21.

179. *NGA 2001 Legislative Packet, supra* n. 1, at 8.

Whether the instruction is mandatory, best practice,¹⁸⁰ or some other level of advice should be identified by systematic presentation. And, bearing in mind professionalism as well as client relations, the provisions should address common circumstances and problems of practice.

As with qualifications, state endorsement of a code of ethics and standards of practice may be largely a political problem. Advocates must lay a foundation in each state legislature¹⁸¹ to learn what troubles legislators, whether their concerns can be addressed, and who is a potential advocate for state endorsement.

C. Monitoring Practicing Guardians

Traditionally, monitoring of professional behavior depends primarily on self-regulation. Volunteer board members, mostly members of the profession, sit as an agency of the state to inquire into complaints about individual members. Such boards are central to professional governance because similarly licensed professionals are needed to evaluate the activities of their peers.

Guardianship, in contrast, is monitored by the courts, which are considered the appropriate body because courts appoint and can remove guardians. Further, guardians are fiduciaries, a role that has been extensively governed by the courts. However, the courts' performance is less than satisfactory in that it appears that courts have little knowledge of guardian activities over the course of the guardianship. This is attributable to the very nature of courts: they traditionally are passive hearers of complaints. They are vested with subpoena powers to compel respondents and witnesses and may, in unusual circumstances, take steps to travel to see and hear evidence that cannot be delivered in the courtroom.¹⁸² Courts are, however, generally the recipients of

180. See generally Robert Rubinson, *Constructions of Client Competence and Theories of Practice*, 31 *Ariz. St. L.J.* 121 (1999) (pointing out the need for professionals dealing with incapacitated clients to counter society's paradigm of continuous decrement of aged people, though the expectation of decline has likely been internalized by the client as well).

181. Although federal standards are theoretically possible with the use of federal Medicaid funds for some guardianship services, they are unlikely in the foreseeable future because the states are traditionally responsible for citizens' health, safety, and welfare, and Congress is unlikely to agree to accept federal responsibility for quality.

182. Possibly, active monitoring is perceived as inappropriate by the courts because it calls for adoption of a social work or therapeutic role. Sally Balch Hurme, *Presentation, Guardianship Monitoring* (Fla. Guardianship Assn., St. Petersburg, Fla. Aug. 3, 2001) (citing David Wexler & Bruce Winick, *Essays in Therapeutic Jurisprudence* (1991) (copy on file with the *Stetson Law Review*)).

whatever evidence is proffered by the parties.

Courts have taken steps to be proactive to respond to quality assurance needs in guardianship,¹⁸³ with lukewarm results. In California and New York, for example, a court investigator must visit each ward (called a conservatee in California) after the first year of services to determine whether the guardian (called a conservator in California) is acting in the ward's best interests and whether the guardianship is still needed.¹⁸⁴ Although this is an important step, particularly when all other oversight is lacking, it fails to address problems that become critical within the first year (as might the actions of a ruthlessly abusive guardian), or those that become apparent in the second year and beyond.

Indiana, Oregon, and Michigan have provisions for an investigator in cases that pose questions or problems.¹⁸⁵ Although this is somewhat more adaptable to the needs of the individual case, the model requires some source of knowledge of a problem to trigger the investigation.

Reading the accountings filed by guardians, or even tabulating whether they have been filed, has also been a problem in the courts. The National Probate Court Standards call for written policies and procedures to ensure prompt review. Among those states setting standards in their courts, New York requires that a clerk review guardians' reports within thirty days of filing, and Virginia requires notification to the court if a report is ninety days overdue. A number of other states have specific requirements for reviews, but twenty seven states that mention court review are not specific about the nature and timing of such review.¹⁸⁶

Again, failure to attempt to discern the meaning of guardian reports may be an aspect of the courts' receptive role. A guardian report will nearly always be, on its face, a statement that depicts no problems with guardian services. A ward's funds may become depleted, a ward's health may deteriorate, but only inadvertently will the guardian attribute negative events to his or her own practices. It takes a more careful reading of the reports if they are to provide information to be investigated.¹⁸⁷

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. This is not meant to imply that guardian reports are useful only if the court

Courts have the power to order investigation in the community. Failure to do so has been attributed to lack of funds, overwork, and lack of appropriate staff to undertake an unfamiliar task.¹⁸⁸ Another consideration is that court investigation of a ward at home based on evidence less than sufficient for a legal search raises questions about intrusion into the home of the ward and perhaps into the intra-family relationship between guardian and ward. Thus, investigation would have to be routine, and perhaps random, in the absence of any triggering information. The circle of lack of information leading to lack of investigation begins again. Criticism aimed at the courts for seeming to “sit on” their investigatory powers should be more carefully examined.¹⁸⁹ It is increasingly likely that courts alone are not the appropriate body to be charged with effective guardianship monitoring.¹⁹⁰

There is no reason that one body should be solely responsible for investigating all aspects of guardianship services, and because courts are inept investigators, their work alone should not be relied upon. Other established means to investigate long-term-care quality include government quality-assurance agencies that monitor institutional and community-based long-term care, and the long-term-care ombudsman.

For instance, pre-existing quality-assurance measures in nursing homes provide some measure of monitoring of conditions. Pre-existing measures could regularly identify questionable guardian services, either by interview with the ward or the staff. Therefore, monitors should seek and follow through on information that suggests that an investigation of the guardian's practices is warranted. Follow-through probably includes reporting to the court or to the long-term-care ombudsman who will investigate and report to the court. In any case, only a small proportion of guardian-services problems will be identified by these monitors.

Long-term-care ombudsmen are mandated in every state to

analyzes their content in search of problems. On the contrary, this Author believes that the very act of filing a report with the court promotes conscientious guardian services because misstatements, erroneous choices, and lies are all on record to be discovered.

188. Fred, *supra* n. 70, at 28–29.

189. *See id.* at 30–31 (noting that it is difficult to determine what monitoring is done despite a growing number of reform statutes that explicitly place responsibility with the courts).

190. *See id.* (noting that the ABA plans a comparative study of state monitoring systems).

respond to complaints about quality and satisfaction with long-term care services.¹⁹¹ The ombudsman's scope of responsibilities varies state by state, due to differences in funding and the state's interest in the "watch dog" nature of the office.¹⁹² However, because the ombudsman's first method of intervention after discovering a problem in long-term-care services is persuasion toward better practices,¹⁹³ many situations can be improved by means of ombudsman inquiry.

Long-term-care ombudsmen already have powers to pursue guardian oversight, provided only that the ward receives some long-term-care services.¹⁹⁴ However, persistent lack of funds prevents ombudsmen from addressing any except institutional complaints. Also, the ombudsman, like the courts, is primarily responsive to complaints. Thus, a modest proportion of guardian-services complaints might be identified by the ombudsman, who might refer them to the court or to a state agency responsible for quality in long-term-care services.

State social-services agencies monitor community-based services funded by the state, usually by visiting a sample of clients and reviewing provider files. Guardians are virtually never supervised by a long-term-care services-provider agency, because of potential conflicts of interest for the guardian employed within an agency that lacks sufficient funds to provide the services needed by the ward.¹⁹⁵ That is, guardian services should remain separate from social-services finance and delivery to avoid any conflicts of interest with their allocation of services. At most, state social-services agencies are therefore suspect as monitors of guardians who might impose unwanted responsibilities for services upon the state. At the least, responsibility for monitoring guardian services would impose a heavy new burden of education and responsibility that states will be unwilling to shoulder. Thus, although such monitoring by state social services is possible, it seems a poor fit and should not be

191. Natl. Acad. Press., *Real People Real Problems: An Evaluation of the Long-term Care Ombudsman Programs of the Older Americans Act* <<http://www.nap.edu/readingroom/books/rprp/summary.html>> (accessed Feb. 9, 2002).

192. *Id.*

193. *Id.*

194. Natl. Long Term Care Ombudsman Resource Ctr., *What Does An Ombudsman Do?* <<http://www.ltombudsman.org/ombpublic>> (accessed Feb. 25, 2002).

195. Illinois, however, houses its public guardian office under the umbrella of social services. Ill. Guardianship and Advoc. Commn., *The Office of the State Guardian* <<http://state.il.us/igac/osg/osgfs.html>> (accessed Feb. 9, 2002).

actively pursued. Rather, any and all indications of guardian malpractice discerned by the state in its monitoring should be referred for investigation.

The difficulties with guardian monitoring can be attributed primarily to the fact that few or no persons who are knowledgeable and concerned with quality of services have access to information likely to prevent or curtail guardian abuse and neglect. The situation is the very paradigm of justification for professionalization of services providers. The individual who knows a great deal about the quality of services is the one to be held personally responsible for that quality. The ward, the courts, and society rely on the professional who is deemed to know the most about what should be done for the individual client, the ward.

Upon facing the reality of professional responsibility, many workers might wish to reject the status and respect likely to accompany professionalism to avoid the prospect of liability. However, professional responsibility means primarily that an occupation with professional characteristics chooses to educate and discipline its own ranks to maintain quality and the reputation for quality. It does not mean rigid rules of operation for the greater part of professional work. It does require accountability in terms of sound reasoning and practices. It makes professional guardians responsible for the practices of their peers.

D. For-profit versus Non-profit Corporations¹⁹⁶

Immediately interesting upon reviewing the NGA survey of guardianship providers is the proportion of for-profit providers. This part of the provider market has almost never been recognized, much less discussed in detail. Understanding the for-profit corporate provider and its place in the market will depend upon understanding the different motivations behind non-profit and for-profit providers.

Non-profits differ from for-profit institutions in that they declare their charitable or public service purposes in their application to the state for charter.¹⁹⁷ Examples of traditional

196. States may restrict corporate guardians to non-profit status, a strategy justified by the desire to exclude any corporate guardian with the motivation to generate funds to satisfy the wishes of investors for a distribution of profits.

197. *The Nonprofit Handbook: Management* 894 (Tracy Daniels Connor ed., 3d ed., Wiley & Sons, Inc. 2001).

charitable purposes are services to the poor, education, and health care. The creation of the non-profit depends upon the state's approval of its declared purposes and of the required officers of the corporation and their roles, which must meet the requirements of state law.¹⁹⁸ For-profit corporations, in contrast, are created to raise capital by selling shares of interest in the corporate venture. For-profits strive to gain a market share by offering a desirable service or product to build the corporation itself, and simultaneously to produce profits from their activities that accrue to their investors and invest others.

The non-profit corporation receives favorable tax treatment from the state. Although for-profit corporations are taxed on their profits, generally at high rates,¹⁹⁹ the non-profits essentially declare no profits. Instead, all earnings, including "excess earnings" from the non-profit's activities, must be devoted to the purposes for which the corporation was formed.²⁰⁰ However, the constraints of non-profit purposes do not preclude investment in the business of nearly any kind, including large executive salaries and grand buildings for corporate offices. Thus, a major inducement to form a for-profit corporation is the need to raise capital.

The need to respond to market demands also may affect the choice of for-profit or non-profit form, because management of corporations differs. The non-profit is governed by a board that typically calls for agreement upon changes in policy and significant expenditures and gives direction to an executive director or officer. In contrast, the for-profit has management that is at once more adaptable to change and more difficult to direct or influence. The for-profit's management focuses power on the chief executive officer, who chooses advisors as other officers, a group that is likely to reach agreement quickly.

Professor Whitton has written an excellent review of the virtues of non-profit institutions, particularly guardian organizations.²⁰¹ She notes that non-profits are a response to

198. *Id.* at 894–895.

199. For-profit corporation profits are actually taxed twice, first in corporate tax and again when the profits are distributed to the shareholders as income.

200. Notably affluent non-profits, such as Blue Cross/Blue Shield organizations in some states, and the American Association of Retired Persons (AARP) have been criticized for paying extremely high compensation to top executives and building luxuriously appointed buildings.

201. Linda S. Whitton, *Caring for the Incapacitated — A Case for Nonprofit Surrogate Decision Makers in the Twenty-First Century*, 64 U. Cin. L. Rev. 879 (1996). Professor

market failure or, alternatively, contract failure.²⁰² That is to say, the market for a particular good (here, guardianship services) does not respond as a typical market would. Market theory calls for satisfying consumer demand.²⁰³ For guardianship services, however, there is not so much consumer demand (i.e. desire for the service) as there is consumer need.²⁰⁴ Market failure results in an inadequate supply of goods or services, causing a rise in price because of scarcity.²⁰⁵

With regard to contract failure, an agreement between provider and recipient might fail to be consummated. One reason is that the agreement is based on need to purchase, rather than want or choice. Need, therefore, is the compulsion to seek to buy an unwanted good. A classic unwanted good is nursing-home care, and guardianship apparently also is usually an unwanted good. Because consumer need arises without desire or choice, it may not be backed by enough resources to pay.

To prevent serious lapses in support for citizens (i.e., ill elderly people living in subway tunnels or distant relatives' garages), states are likely to facilitate or provide guardian services to negotiate better situations. The subsidized state service is necessary because the market fails to find buyers and sellers able and willing to agree on the terms of their exchange. That is, the elderly incapacitated person cannot find a seller (a guardian) with the right services who will accept what the ward can pay.

Once subsidy is an aspect of services for some, the payers (government and citizens) fear they are paying too much for the service. The price might be too much if people can become eligible for subsidized services even though they have enough money to pay, the cost of a unit of service is too high because too many are seeking it, or the provider invests more paid time or effort in services to a particular individual than is necessary. The most apparent results of this apprehension are that public guardians find themselves chronically working with too little in program resources; eligibility for state-paid services is restricted to a

Whitton also reviews the attributes of non-profit corporate guardianship programs, which is beyond the scope of this Article but may be of interest to readers. *Id.* at 894–903.

202. *Id.* at 889–894.

203. *Id.*

204. *Id.* at 889.

205. *See id.* at 885 (citing Professor Henry B. Hansmann's theory of market failure as a predecessor to public preference of non-profits).

smaller group than those who can actually pay for any significant services; and the nature, scope, and eligibility for the services a publicly-paid guardian provides may be sharply restricted by the state.

Non-profit entities fill the gaps created by market or contract failure by declaring the dedication to a charitable or public purpose rather than to maximizing profits. Given such dedication to the social good, non-profits are more likely than other entities to receive donations and volunteer services. Provided the guardianship non-profit can raise enough income from a combination of earnings and donations to utilize any volunteers and carry out its mission, this form of corporation is desirable for its favored treatment.

Some types of corporations can function only with a for-profit structure. For-profit entities have the advantage not only of agile management decision-making processes, but of being able to raise significant amounts of money at the outset of business (or when necessary) by selling shares that entitle buyers to profits from the corporation's economic growth. This is very desirable for businesses that need control of an infusion of assets, whether the purpose is the purchase of equipment and materials or to meet some other cost.

Whether there is any significance in the choice of non-profit versus for-profit generally is far less clear in the past fifteen years or so, when very large health-care non-profits channeled their financial gains into inflated executive salaries and luxurious office buildings. The so-called excess earnings of the non-profit corporation become a tangible emblem of its success and promote the company's business interests.

It is unknown why a guardian organization would need substantial start-up capital, because there is relatively little equipment or inventory involved in the services. There is no obvious need for quick response by management to market changes, particularly in such small organizations. Nevertheless, a substantial proportion of NGA members have chosen to be for-profit corporations.

Of course, the purpose of the guardianship non-profit, declared at its creation, is a force to keep the corporate entity focused on its service mission. On the other hand, corporations may choose the freedom of for-profit status because charitable donations that capitalize non-profits do not reliably meet their needs. Thus far, it is a matter of circumstances and opinion which

option is more reliable and more likely to generate adequate funds. The choice of many providers to go for-profit should not be ignored. More research is needed to determine what benefits accrue to the for-profit form of guardianship before states are urged to prohibit it.

E. Roles of the Public Guardian

The office of the public guardian is an elusive animal, in that it more often inhabits a private non-profit than a monolithic public entity.²⁰⁶ The issues of supervision of the public guardian's office and issues of conflict of interest with state purposes long have been discussed, though it cannot be said they are well settled.²⁰⁷

For the purposes of this Article, the most significant aspect of public guardians' offices is that they are the locus of consistent delivery of guardian services by professionals (unlike, for example, law offices, which typically provide a range of services). Further, the public guardian has a responsibility above other guardians to respect the ward's autonomy, because of the possibility of conflict between the individual and the state.

The most apparent role for public guardians that has not been widely discussed is that of educator for all guardians. The curriculum for family versus private professional guardians should be considered separately. The project and duty to provide education should be a separate item in the budget of the agency or non-profit that undertakes a program of education, and individuals skilled at teaching should be dedicated to that task for at least a portion of time. Advocates for high-quality guardian services should collaborate with the office of the public guardian in every state, or private providers who receive state funds for low-income guardianship services should review their ability and obligations to educate the public and prospective guardians with the intent of raising the issues of guardianship quality and funding.

206. See Dorothy Siemon, Sally Balch Hurme & Charles P. Sabatino, *Public Guardianship: Where Is It and What Does It Need?*, *Clearinghouse Rev.* 588, 589 n. 7 (1993) (identifying four models of entities through which public guardianship might be delivered).

207. See *id.* at 588 (discussing the variety of public guardian schemes among the states).

F. Payment Sources and Methods

Guardianship entities note that they consistently operate on too little funds, with too few workers for quality services. The problem arises in part from the fact that guardianship services are a need rather than a desire on the part of the consumer,²⁰⁸ and from the fact that politically based appropriations for services often fall short of actual costs over time.²⁰⁹

Private professional guardians are presumably interested in the rates others receive for their services. The brief discussions conducted with a random selection of providers showed a wide variety of payment arrangements. One mode of payment was based on hours of guardianship services, at an hourly rate. Alternatively, guardians might provide services on a capitated basis, which might come from private funds or from the state. One reported receiving \$35 per month regardless of services. This discussant (a private non-profit entity) also received a set-aside from Medicaid, discussed below, and charitable donations from such major ongoing entities as United Way, so determining the actual level of support per hour of service or per case requires complicated calculation. Some received a fixed annual fee, set by the court in some cases. Others reported alternative fee arrangements, either hourly or by percentage set by statute.²¹⁰

Workers might be salaried, and public guardians were most likely to be so.²¹¹ The only information regarding salary for employees providing guardianship services identified a range of \$30,000 to \$55,000.²¹²

Aside from waiting lists of persons in need who cannot be served, perhaps the most significant gap in guardianship funds is neglect of payment for time spent building a relationship with the ward. However, it is unclear how such time should be accounted for to the satisfaction of all funding sources.

A very significant issue in guardianship payments is the allocation of Medicaid funds. Because each state administers its Medicaid program by submitting a state plan for approval by the federal agency,²¹³ and payment for guardianship services requires

208. *Supra* nn. 201–205 and accompanying text.

209. *Supra* nn. 188–190 and accompanying text.

210. *Guardianship Services Survey*, *supra* n. 22.

211. *Id.*

212. *Id.*

213. Frolik & Barnes, *supra* n. 26, at 339–340.

special permission, termed a waiver, of Medicaid statutory rules,²¹⁴ state allocations are quite variable. One discussant for this article received a capitated payment of \$75 per year from Medicaid funds for each public ward.²¹⁵ This low figure indicates that, even in the early years when these payments are available, significant cost shifting to private payers is necessary to cover costs.

The sources of funding for guardianship programs tend to be an amalgam of public and private funds that often fail to meet the perceived need for services in the community. Because many entities have both private and publicly funded clients, some cost-shifting is inevitable. Far more should be known about the best arrangements for ongoing funding sufficient to meet the actual needs of each ward and the number in the community of incapacitated persons who have no one else to serve them. While high incomes are no requirement for professional service providers, a chronic lack of adequate funds for guardianship is at a sharp contrast with the affluence of U.S. society and should not be perpetuated.

Particular attention should be paid to the financial arrangements of for-profit entities. If those entities are taking all wards who have resources sufficient to pay a rate well above the average market rate, particular attention should be given to the additional services provided that make such a provider more desirable.

G. Utilizing Volunteers

Although the literature of volunteerism is replete with examples of volunteer burn-out due to the unlimited need of the service recipient or to negative experiences, some reports of volunteer guardianship services are positive.²¹⁶ In a comparison of the indicators of success in two programs, one with paid staff and one with volunteers, the researchers looked for indications of the potential success of one form of service provision over the other.²¹⁷

Clients in the two programs all had low incomes, but their

214. 42 U.S.C. § 1396n(b) (1994).

215. At a \$75 annual rate of payment, a caseload of 300 clients provides the guardian with gross income of a very modest \$22,550.

216. *E.g.* Pamela B. Teaster et al., *Staff Service and Volunteer Staff Service Models for Public Guardianship and "Alternatives" Services: Who Is Served and with What Outcomes?*, 5 *J. of Ethics L. & Aging* 131 (1999).

217. *Id.*

cognitive capacities could not be compared based on the information available.²¹⁸ Most clients lived alone or had no family members to provide them assistance.²¹⁹

Significantly, the study reports that costs do not differ significantly between the paid and volunteer staff.²²⁰ The nature of services also differed: volunteers spent significantly more time talking with their clients.²²¹ Although many of the other findings are important new information about guardian services, the programs studied are very small and can be considered only as incremental, not definitive, information about volunteer services.

The researchers' recommendations for consideration are useful, however. One is the caveat that guardianship programs take care not to teach bad practices in the community either by personal example or by training volunteers to less than best practices.²²² Another is that volunteer programs should not expect to be significantly cheaper than staff programs, a proposition that has eluded legislatures and funding sources despite a long record of volunteer programs of varying success.²²³ Third, requirements for documentation are essential in all programs.²²⁴ All these recommendations relate to the realization that guardian services, however defined and delivered, are going to be similar if they are to meet the needs of incapacitated persons.

Last, the researchers propose that the designation "guardianship alternative clients" is inappropriate because the clients who are receiving services without adjudication of incompetency are in fact likely to be quite different in their capabilities from wards.²²⁵ Thus, guardianship is not an alternative; rather, services that can be provided by a program that usually serves wards can meet the needs of competent persons as well.²²⁶

218. *Id.* at 135.

219. *Id.* at 136.

220. *Id.* at 142–145.

221. *Id.* at 141.

222. *Id.* at 148.

223. *Id.*

224. *Id.*

225. *Id.* at 148–149.

226. The Illinois Guardianship Reform Project recommended inquiry into alternative measures in Phase II of its work. Fred, *supra* n. 72, at 15.

VI. CAN GUARDIANSHIP PRACTICE ENCOMPASS LESS RESTRICTIVE ALTERNATIVES?

An important issue implied by the use of the least restrictive alternative standard is the endorsement of providing services without an judgment of incapacity. This implies that those most knowledgeable, i.e., the professional and corporate guardians, must be willing to provide services without a declaration of incompetency to those who can agree to and cooperate with the service providers. Typically, such services are strictly limited in time, perhaps from referral because of the individual's need for assistance, to the time of a hearing on the issue of capacity. Typically, guardianship providers are uncomfortable with a mandate to provide services absent an order from the court providing them undisputed authority.

The professionalization of guardians opens the door to a dimension of the least restrictive alternative that has been possible but uneasy.²²⁷ Without a declaration of incapacity, a professional guardian might provide services a frail, perhaps sometimes confused elderly individual has authorized through a durable power of attorney that nominates the guardianship entity to serve. The resulting arrangement for services would represent a less restrictive alternative for the elder because he or she chose the decision-maker and no civil rights are lost. It may also reduce the burden of the volume of cases on public guardians.²²⁸ Further, it would encourage guardianship organizations to declare their values and practices to the community, an important step in principled guardianship practice.

Services without a declaration of incapacity have been provided to frail older people for periods of years.²²⁹ The nature of impediments to replicating this model undoubtedly resonates with reasons the courts do not create limited guardianships. That

227. See generally Paul A. Sturgul, *Wisconsin's Undeclared War between Guardianships and Advance Directives*, 12 Elder L. Rep. 1 (May 2001) (discussing "the war" that has developed in Wisconsin).

228. Whitton, *supra* n. 204, at 905.

229. Winsor C. Schmidt et al., *A Descriptive Analysis of Professional and Volunteer Programs for the Delivery of Public Guardianship Services*, in *Guardianship: The Court of Last Resort for the Elderly and Disabled* 172 (Carolina Academic Press 1995) (reprint of a 1988 article that describes Cathedral Industries of Jacksonville, Florida, a program serving elderly people termed "at risk" of the need for a guardian by providing subsidized apartment housing and other community-based services as well as intensive care management).

is, services to an impaired elder are seldom undertaken without a declaration of incompetency in order to be sure to avoid any unresolvable conflict between the elder and the care provider. The care provider, as guardian, holds the decision-making power.

Conflict also arises from the fact that most states have encouraged advance directives, including durable powers of attorney for health care and for financial management, yet many have not fully resolved the authority of these advance directives if a guardian is appointed.²³⁰ The conflict is particularly sharp in jurisdictions that adhere to a best interests standard for guardian decisions.²³¹ This is an issue that must be resolved in each state, preferably promoting consistency across jurisdictions.

In short, the goal of offering services by agreement to an impaired elder through agencies that provide guardian services has long been a goal. It is considered to be more likely that services without declaration of incapacity will be provided whenever possible if one provider and one process can offer the choice. The proposition has not been critically tested, and some evidence weighs against it. One recent study, for example, notes that wards and “alternative services” recipients have very different characteristics.²³² The structure of services also assumes effective motivation to choose services without legal incapacity. Since the choice is virtually always debatable, and the low proportion of limited guardianships shows that courts have evolved no clear way to distinguish impaired but competent elders from those suited to guardian appointment, it is reasonable to look for sound business practice to support the choice. One example of how that might happen is that payment for alternative services carry a higher per unit payment than guardian services to more impaired wards who require less time for relationship building and persuasion because a ward is incapable of participating fully in the decision. In any case, research is needed on the rare projects that have provided services by agreement to determine who should provide them and who their clients should be.

VII. CONCLUSION

Corporate and practicing guardians offer a desirable form of

230. See Sturgul, *supra* n. 227, at 1 (referring specifically to Wisconsin).

231. See *id.* (citing Wisconsin's reliance on a best interest standard).

232. See *supra* n. 225 and accompanying text.

guardianship that is much needed by a growing proportion of incapacitated persons who have no one who is willing, designated in advance, or designated by the ward, to serve as guardian. The standards and ethics of practicing guardians have been developed somewhat by advocates for professionalization over a decade, and there appears to be some consensus about the broad measures of good service.

The creation of guardians as professionals in the traditional paradigm offers significant safeguards for wards over existing monitoring mechanisms. It may also be a desirable alternative to the appointment of family members who are reluctant to serve and have remote ties to the ward. Such family guardianships are difficult to monitor and raise a significant risk of financial and other forms of exploitation. The professional/client relationship between practicing guardian and ward can include trust and care without the privacy inherent in the family, and thus is more amenable to oversight.

States are reluctant to adopt or endorse measures that set a standard for professional guardians, either because of qualms about the standards or because of other concerns about the responsibilities implicitly adopted along with the quality-assurance measures. Quality assurance through professionalization can progress without state endorsement. However, states should be encouraged to adopt any sound form of guardianship-quality regulation they are willing to adopt, leaving the door open to more effective forms of practice and regulation as they become politically feasible. Concurrently, practicing guardian organizations should promote their standards to the public and prospective members in order to create a public awareness of the nature of high-quality services and the existence of a community of ethical practitioners.

Any consideration of the parameters for guardianship care should consider afresh the least restrictive alternative in services to the incapacitated person. Given the widespread failure of limited guardianship, particularly for older persons, attention should be given to services without a declaration of incompetency, which may best be provided by simplifying decisions for the services recipient and creating strong relationships with care providers. To the extent that guardians achieve professional status, such status and its responsibilities should apply to those who provide services as a guardianship alternative.

Efforts to provide guardianship services must be funded at

least at a minimally adequate level by all payers. Otherwise, providers must engage in cost shifting to clients who are often without bargaining power. It is unclear whether there is any adequate financial base to support such cost shifting, because too few elders with substantial assets to pay a higher fee over the full interval of their need for services may exist in the small market areas. Cost shifting and other financial strategies to create viable guardianship corporations should be discussed by providers and commentators. In any case, fairness should compel policy-makers to minimize such cost shifting due to government underpayment, as it represents a deviation from an honest assessment of the value of the service.

Although guardianship reforms have not fulfilled the hopes of their advocates, guardianship will be provided to aging individuals in great numbers. The first priority is to assure that those services treat each individual ward (or alternative-services client) to excellent services. Most likely, the community of practicing guardians can fill that role for many elders, and it should seriously undertake its work to create awareness of sound guardianship practice and ethical purposes.

STANDARDS OF PRACTICE

National Guardianship Association**

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PREAMBLE

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

In July of 1991, the National Guardianship Association adopted a previously published *A Model Code of Ethics for Guardian*^[233] to guide guardians in their decision-making process. The next task of the NGA was to formulate specific standards to be applied in the day-to-day practice of guardianship. The seven original standards of practice that were

[233. Michael D. Casasanto, Mitchell Simian & Judith Roman, *A Model Code of Ethics for Guardians* (Natl. Guardianship Assn. 1991). A copy of this work is available in PDF format through the National Guardianship Association’s Web site at <<http://www.guardianship.org/ngamembership/index.htm#modelcode>>.]

written and adopted by NGA in 1991 have now been expanded to cover more of the duties and responsibilities that face court-appointed guardians today.

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

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

This document embodies practices and standards from a number of professional sources. As such, it sometimes makes unavoidable use of legal and medical “terms of art” where they would commonly and most accurately be used by professionals who work in the particular area. In addition, the field of guardianship itself makes use of terms that vary widely from state to state. “Guardian” and “ward” are the terms used here to simplify the many references to these roles. Where points apply to professional, as opposed to family guardians, they are indicated. In this work we have drawn on a number of collective sources. First and foremost has been our own membership who have contributed extensive time, energy, and valuable input into the development of these standards. *A Model Code of Ethics for Guardians*, developed by Michael D. Casasanto, Mitchell Simon and Judith Roman, and adopted by the National Guardianship Association, has formed the foundation from which the standards have been developed. Other very important sources that helped in

the creation of our standards of practice are the US Administration on Aging, the American Association of Retired Persons, the Center for Social Gerontology, the Michigan Offices of Services for the Aging, and the state associations from Arizona, Washington, California, Illinois, Minnesota and Michigan. We thank everyone listed here and others for their ongoing commitment to the profession of guardianship.

NGA Standard 1 – Applicable Law

The guardian shall perform duties and discharge obligations in accordance with the current state and federal law governing guardianships and certification of guardians, if certification is required in the state in which the guardian is appointed. In all guardianships, the guardian shall comply with the requirements of the court that made the appointment.

NGA Standard 2 – The Guardian’s Relationship to the Court

- A. Guardianships are established through a legal process and are subject to the supervision of the court.
- B. The guardianship court order determines the authority and the limitations of the guardian.
- C. The guardian must know the extent of the powers granted by the court and shall not act beyond those powers.
- D. Any questions about the meaning of the order or directions from the court will be clarified with the court before taking action based on the order.
- E. The guardian is responsible for obtaining court authorization for actions that are subject to court approval.
- F. The guardian shall submit reports regarding the status of the guardianship to the court as ordered by the court or required by state statute, but not less than annually.
- G. All payments to the guardian from the assets of the ward shall follow applicable federal or state statute, rules and requirements and are subject to review by the court.

NGA Standard 3 – Self-Determination of Ward

- A. The guardian should provide the ward with every opportunity to exercise those individual rights which the ward might be capable of exercising as they relate to the care of the ward’s person.

- B. The guardian should attempt to maximize the self-reliance and independence of the ward.
- C. The guardian shall have the affirmative duty to understand and to advocate for person centered planning and the least restrictive alternative on behalf of the ward.
- D. The guardian should encourage the ward to participate to the maximum extent of his or her abilities in all decisions which affect him or her, to act on one's own behalf in all matters in which he or she is able to do so, and to develop or regain capacity to the maximum extent possible.

NGA Standard 4 - Informed Consent

- A. Any decision made by the guardian shall be based on the Informed Consent Standard.
- B. An informed consent is based on a full disclosure of facts needed to make the decision intelligently.
- C. In order to provide informed consent three components must exist:
 - 1. Adequate information on the issue.
 - 2. Voluntary action.
 - 3. Lack of coercion.
- D. The guardian stands in the place of the ward and must be given the same information and freedom of choice as the ward would have received if he or she were competent.

Guidelines:

At a minimum, the guardian should evaluate each requested decision using the following criteria:

- 1. What exactly is the request and what does it mean in lay language?
- 2. What condition(s) necessitate the treatment or action?
- 3. Has the ward been informed?
- 4. Are there any preferences of the ward that can be ascertained either currently or prior to the appointment of the guardian?
- 5. What is the expected outcome of this decision?
- 6. What is the benefit of this decision?
- 7. Why now and not later?
- 8. What will happen if no decision is made?
- 9. Are there any alternatives to this request?

10. Is this the least restrictive alternative?
11. What are the risks in this decision?
12. Obtain written documentation of all medical reports.
13. Has a second opinion been rendered?
14. What additional information or input is needed from family members or other professionals to make this decision?

NGA Standard 5 – The Process of Decision-Making

- A. All decisions made by the guardian shall be Informed Decisions. (See Standard Four for the requirements of Informed Consent.)
- B. As a first priority, the guardian should ascertain whether the ward had previously expressed preferences and also establish whether the ward has expressed any current wishes.
 1. This process represents the principle of Substituted Judgment.
 2. Substituted Judgment promotes the underlying values of self-determination and well-being of the ward.
 3. Substituted Judgment entails making the decision the guardian believes the ward would make based on the ward's previously expressed and/or current wishes.
- C. The principle of Substituted Judgment is not used when following the ward's wishes would cause substantial harm to the ward, or when the guardian is unable to establish the ward's prior or current wishes.
- D. The guardian would then employ the principle of Best Interest, as defined by more objective criteria, including, but not limited to, the standards outlined here.

NGA Standard 6 – Decision-Making Regarding Medical Services and Medical Treatment

- A. The guardian has a duty to promote and monitor the ward's health and well-being.
- B. The guardian shall ensure that all necessary medical care needed for the ward is appropriately provided.
- C. The guardian has an affirmative duty to determine whether the ward, prior to the appointment of a guardian, executed any advance directives. Upon finding such documents, the guardian shall follow state law with regard to advance

directives.

- D. Absent an emergency, execution of a living will, durable power of attorney for health care, or other advance directive declaration of intent which clearly indicates the ward's wishes with respect to that action, the guardian having the appropriate authority shall not grant or deny authorization for medical interventions until he or she has given careful consideration to the factors listed in Standard Four, Informed Consent.
- E. In the case of emergency medical treatment, a guardian having proper authority shall grant or deny authorization of medical treatment based on a reasonable assessment of the factors required by Standard Four within the time frame allotted by the emergency.
- F. Under extraordinary medical circumstances, in addition to all other factors and resources outlined in Standard Four, the guardian shall utilize ethical, legal, and medical advice with particular attention to ethics committees in hospitals and elsewhere.
- G. The guardian must consider whether a second opinion is necessary when any medical intervention poses a significant risk to the ward. The guardian shall seek a second opinion for any medical treatment or intervention that would cause a reasonable person to do so. A second opinion shall be obtained from an independent physician.
- H. The guardian shall speak directly with the treating or attending physician before authorizing or denying any medical treatment.
- I. In all instances where state law provides for the performance of additional steps prior to granting or denying authorization for medical intervention or treatment, the guardian shall undertake such additional steps.

**NGA Standard 7 – Decision-Making with
Regard to Withholding or Withdrawing Medical
Care and Treatment**

- A. The National Guardianship Association recognizes that there are circumstances in which it is legally and ethically justifiable to consent to the withholding or withdrawing of medical care, including artificially provided nutrition and hydration, on behalf of the ward.
- B. In making this determination, there will in all cases be a

- presumption in favor of the continued treatment of the ward.
- C. For any cases in which the ward has expressed or currently expresses a preference to continue treatment, the guardian shall not consent to withholding or withdrawing or discontinuing treatment.
 - D. Not all states delegate the authority to withhold or withdraw care and treatment to the guardian. The guardian shall comply with their state law governing withholding or withdrawing medical care and treatment, if it exists.
 - E. When making this decision on behalf of the ward, the guardian shall gather and document information as outlined in Standard Four.

NGA Standard 8 – Confidentiality

- A. The guardian should keep the affairs of the ward confidential.
- B. The guardian should respect the ward's privacy and dignity especially when the disclosure of information is necessary.
- C. Disclosure of information shall be limited to what is necessary and relevant to the issue being addressed.
- D. The guardian will disclose or assist the ward in communicating sensitive information to the ward's family when the disclosure would benefit the ward.
- E. The guardian may refuse to disclose sensitive information about the ward where disclosure is detrimental to the well-being of the ward or would subject the ward's estate to undue risk. Such a refusal to disclose information should be reported to the court in accordance with local practice.

NGA Standard 9 – Least Restrictive Alternative

- A. The guardian shall carefully evaluate the alternatives that are available and choose the one that best meets the needs of the ward and that places the least restrictions on his or her freedom, rights, and ability to control his or her environment.
- B. The guardian shall weigh the advantages and disadvantages, the risks versus the benefits, and develop a balance between maximizing the growth potential of the ward and maintaining his or her safety and security.
- C. When considering the least restrictive alternative, the guardian shall make individualized decisions. The least restrictive alternative for one ward may not be the least

restrictive alternative for another ward.

Guidelines:

In determining the least restrictive alternative for a ward the guardian shall:

1. Become as familiar as possible with the available options in the community regarding the specific decision that needs to be made, such as placement options, different medical services, different vocational and educational services.
2. Know the ward's preferences, if possible. What the ward wants may not be the least restrictive alternative in the eyes of the guardian. However, if what the ward wants meets the balance between safety and independence for the ward and meets or contributes to the well-being of the individual, then this would be the least restrictive alternative.
3. When considering a choice among options available, also consider the needs of the ward as determined by professionals. This may include assessment of the ward's functional ability and the ward's health status.

NGA Standard 10 – Quality Assurance

- A. Guardians shall actively pursue or facilitate periodic independent review of their guardianship program or case management.
- B. The independent review should occur periodically, but no less than annually, and should include a representative sample of cases.
- C. The independent review should include a review of records, a visit with the ward, and meeting with the care-provider staff.
- D. Independent reviews may be obtained from the following:
 1. A court monitoring system.
 2. An independent peer.
 3. An NGA Master Guardian.

Note: Completion of this review does not eliminate the need to comply with any court mandated monitoring without court approval.

NGA Standard 11 – Management

of Multiple Guardianship Cases

- A. The guardian should institute a system to evaluate the level of difficulty of each guardianship assigned or appointed.
- B. The outcome of the evaluation should clearly indicate the complexity of the decisions to be made, and/or the complexity of the estate to be managed. This shall be the guide for determining how many cases any individual guardian may manage.
- C. The guardian shall limit the size of a caseload to the size that allows the guardian to accurately and adequately support and protect the ward, and that allows a minimum of one visit per month with each ward and allows regular contact with all service providers.
- D. The size of any caseload must be based on objective evaluation of the activities expected, the time that may be involved in the case, other demands upon the guardian, and ancillary support to the guardian.

NGA Standard 12 – Guardian of the Person: Ongoing Responsibilities

- A. The guardian who is responsible for the person of the ward should involve the ward, to the extent of the ward's ability, in making decisions about the ward's housing, which shall be the least restrictive environment consistent with the ward's well-being.
 - 1. The guardian shall authorize movement of a ward to a more restrictive environment only after evaluating other medical and health-care options, making an independent determination that the move is the least restrictive alternative at the time, fulfills the current needs of the ward, and serves the overall best interest of the ward.
 - 2. When the guardian considers involuntary or long-term placement of the ward in an institutional setting, the basis of the decision shall be to minimize the risk of substantial harm to the ward, to obtain the most appropriate possible placement and to secure the best treatment for the ward.
- B. The guardian shall ensure that the health care and daily maintenance needs of the ward are provided from every available resource.

- C. Services necessary for the benefit of the ward should be obtained by the guardian when appropriate and available. Whenever possible these services should be paid for through insurance or governmental benefits or services to which the ward is entitled. Such services may include medical care, social services, housing, case management, medical and psychological treatment, education, rehabilitation or vocational training, and home care or transportation.
- D. The guardian should attempt to maximize the social interaction of the ward. This may be achieved through facilitating and encouraging the ward's participation in group and community activities, the use of a friendly visitor, and communication with others via mail, telephone, Internet, and other means of communication.
- E. The 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 and 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.
- F. The guardian shall maintain a client file for each ward. The file should include, at a minimum, the following information and documents:
 - 1. Date of birth, address, social security number, medical coverage, physician, diagnoses, medications, and allergies to medications.
 - 2. Legal documents involving the ward.
 - 3. Advance directives.
 - 4. Key contacts and service providers.
 - 5. Documentation of date, time, and activity regarding all client and collateral contacts.
 - 6. Progress notes, as detailed as necessary to reflect contacts made and work done regarding the ward.
 - 7. Guardianship plan.
 - 8. Inventory, if required.
 - 9. Assessments regarding the ward's past and present medical, psychological, and social functioning.
 - 10. Documentation of the ward's known values, lifestyle preferences, and known wishes regarding medical and other care and services.

11. Photograph of the ward.

- G. The guardian shall file all reports on a timely basis with the court as required by law, but not less than annually. The guardian shall provide thorough documentation of the ward's needs and decisions made affecting the personal status of the ward.
- H. The guardian of the person of a ward, or his or her designee, shall maintain contact with the ward in an amount and frequency to satisfy his or her guardianship duties and responsibilities.

Guidelines:

The guardian or designee shall visit the ward monthly.

1. When communicating with the ward, the guardian should make every effort to ascertain the comfort and satisfaction of the ward in the present living environment, and the current needs and desires of the ward. The guardian should evaluate the present living environment in connection with the ward's needs or any change in the extent of the ward's disability or impairment that may dictate a need to change the ward's living environment.
2. The guardian should maintain substantive communication with service providers, caregivers, or others attending to the ward in the environment in which the ward is living.
3. The guardian shall participate in all care or planning conferences or staff briefings concerning the residential, educational, or rehabilitation program of the ward.
4. The guardian shall require that each service provider develop an appropriate service plan for the ward and shall take appropriate action to ensure that the service plans are being implemented.
5. The guardian shall regularly examine all services, charts, notes, logs, evaluations, and writings regarding the ward at the place of residence and at any program site to ascertain that the care plan is being properly followed.
6. The guardian shall be knowledgeable of the ward's circumstances and shall be prepared to address any issues arising at the conference or with staff.

7. The guardian shall assess the ward's physical appearance and condition, the appropriateness of the ward's current living situation, and the continuation of existing services, taking into consideration all aspects of social, psychological, educational, direct services, and health and personal care needs, as well as the need for any additional services.
8. The guardian shall advocate on behalf of the ward in an institutional setting with administrative staff. The guardian shall assess the overall quality of care provided to the ward in an institutional setting, or by home-based providers, using accepted regulations and care standards as guidelines, seeking remedies when care is found to be deficient.

**NGA Standard 13 – Conflict of Interest:
Ancillary and Support Services**

- A. The guardian shall avoid even the appearance of a conflict of interest or impropriety when dealing with the needs of the ward. Impropriety or conflict of interest arises where the guardian has some personal or agency interest which might be perceived as self-serving or adverse to the position or the best interest of the ward.
- B. Specific ancillary and support service situations that may create an impropriety or conflict of interest include, but are not limited to, the following:
 1. A guardian, other than a family guardian, shall not directly provide housing, medical, or other direct services to a ward.

Guidelines:

- a. The guardian shall keep in mind that his or her duty is to coordinate and assure the provision of all necessary services to the ward or beneficiary rather than to provide those services directly.
- b. To ensure that the guardian remains free to challenge inappropriate or poorly delivered services, and to advocate vigorously on behalf of the ward, the guardian should be independent from all service providers.
- c. An exception may be made when a guardian can

demonstrate unique circumstances indicating that no other entity is available to act as guardian, or to provide needed direct services, provided that such exception be in the best interest of the ward. Reasons for the exceptions should be documented.

2. A guardianship program should be a freestanding entity and should not be subject to undue influence.

Guidelines:

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

3. The guardian shall not be in a position of representing both the ward and the provider of service.
4. The non-family guardian may act as petitioner only when no other entity is available to act, provided all other alternatives have been exhausted.
5. The guardian must consider all possible consequences of serving the dual roles of guardian and expert witness. Serving in both roles may present a conflict. The guardian's primary duty and responsibility is always to the guardian's ward.
6. The guardian shall not utilize his or her friends or family to provide services for a profit (or fee) unless no other alternatives are available and the guardian discloses this arrangement to the court.
7. The guardian shall not solicit or accept kickbacks from service providers.
8. The guardian shall consider various ancillary or support service providers and choose or select the provider(s) that best meets the needs of the individual ward.
9. The guardian who is an attorney, or employs attorneys, may provide legal services to a ward when it best meets the needs of the ward.

**NGA Standard 14 - Duty to Exercise
Reasonable Care and Skill in Managing
the Ward's Estate**

- A. The guardian of the estate shall provide competent management of the ward's property and shall supervise all income and disbursements of the estate in compliance with all statutorily prescribed procedures.
- B. The guardian of the estate shall have the duty to keep the assets of the estate safe by keeping accurate records of all transactions and be able to fully account for all of the assets in the estate.
- C. The guardian of the estate shall keep the estate monies separate from the guardian's personal monies. The guardian shall keep individual estate monies separate from each other unless accurate separate accounting exists within the combined accounts.
- D. The guardian of the estate shall, when appropriate, open a burial trust account and make funeral arrangements for the ward.
- E. The guardian of the estate shall employ prudent accounting procedures when managing the estate of the ward in compliance with applicable statutes, regulations, and policies.

Guidelines:

- 1. The guardian will act in a manner above reproach and will be open to scrutiny at all times.
- 2. The guardian should determine if a will exists and obtain a copy to determine how to manage the assets and property.
- 3. The Prudent Person Rule is an investment standard that considers the reasonableness of an investment based on whether a prudent person of discretion and intelligence, who is seeking a reasonable income and preservation of capital, would make that investment.
- 4. The Prudent Investor Rule states that:
 - a. All investments must be considered as part of an overall portfolio rather than individually.
 - b. No investment is inherently imprudent or prudent. The rule recognizes that certain non-traditional investment vehicles may actually be prudent and guardians of the estate who do not use risk-reducing strategies may be penalized.
 - c. Under most circumstances, the ward's assets must be diversified. Guardians of the estate are obliged to

spread portfolio investments across asset classes and potentially across global markets to both enhance performance and reduce risk.

- d. The possible effect of inflation must be considered as part of the investment strategy. As a result, portfolios likely will include a greater allocation to equities, as opposed to interest-paying bonds, whose value might be eroded by inflation.
- e. Guardians of the estate have a duty to either demonstrate investment skill in managing assets or to delegate investment management to another qualified party.

NGA Standard 15 – Property Management

- A. The guardian of the estate shall not dispose of property of the ward, either real or personal, unless such sale is subject to judicial, administrative, or other independent review.
- B. In the absence of reliable evidence of the ward's views prior to the appointment of a guardian, the guardian of the estate, having the appropriate authority, shall not sell, encumber, convey, or transfer property of the ward, or an interest therein, unless it is in the best interest of the ward.

Guidelines:

In considering whether it is in the best interest of the ward to sell the ward's property, the guardian of the estate shall consider the following factors:

- 1. The benefit of the disposition of the property to improve the life of the ward.
- 2. The likelihood that the ward will need or benefit from the property in the future.
- 3. The current desires of the ward with respect to the property.
- 4. The provisions of the ward's estate plan as it relates to the property, if any.
- 5. The tax consequences of the transaction.
- 6. The impact of the transaction on the ward's entitlement to public benefits.
- 7. The condition of the entire existing estate of the ward.
- 8. The ability of the ward to maintain the property.

9. The availability and appropriateness of alternatives to the disposition of the property.
 10. The likelihood that such property may deteriorate or be subject to waste.
 11. The benefit versus the liability and costs of maintaining the property.
- C. The guardian has the duty to validate the fair market assessment of value of personal and real property through the process of an appraisal by a licensed appraiser.

**NGA Standard 16 – Guardian of the Estate:
Ongoing Responsibilities**

- A. The guardian shall manage the estate in compliance with applicable statutes, regulations, and policies.
- B. The guardian shall post and maintain a bond with surety sufficient for the protection of the ward's estate.
- C. The guardian shall obtain for the ward all public benefits for which he or she is eligible.
- D. The estate of the ward shall be managed for the benefit of the ward and not for the benefit of the guardian or anyone else personally or professionally related to the guardian.
- E. The guardian should allow the ward the opportunity to manage funds to his or her ability.
- F. The guardian of the estate shall file with the court all reports as required by law, but no less than annually, and otherwise as ordered by the court. The guardian shall thoroughly document management of the ward's estate, carrying out any and all duties required by statute or regulation.
- G. The guardian of the estate shall prepare an inventory of all property for which he or she is responsible and follow state guardianship statutes as to when the inventory is due to the court. This report should list all the assets owned by the ward with their values on the date the guardian was appointed and shall be independently verified.
- H. All accountings shall contain sufficient information to clearly define all significant transactions affecting administration during the accounting period.
- I. All accountings prepared by the guardian of the estate shall be complete, accurate, and understandable.
- J. The guardian, where appropriate, shall oversee the disposition of the ward's assets to qualify the ward for any public

benefits program.

- K. The guardian of the estate shall have the duty to make claims against others on behalf of the estate as deemed in the best interest of the ward and the duty to defend against actions which would result in a loss of assets to the estate.
- L. Upon the termination of the guardianship or death of the ward, the guardian of the estate shall facilitate the appropriate closing of the estate and submit a final accounting to the court.
- M. The guardian shall charge fees that are reasonable and approved by the court or administrative agency.
- N. The guardian should monitor or manage the personal allowance of the institution-based ward.

**NGA Standard 17 – Conflict of Interest:
Estate, Financial, and Business Services**

- A. The guardian shall avoid even the appearance of a conflict of interest or impropriety when dealing with the needs of the ward. Impropriety or conflict of interest arises where the guardian has some personal or agency interest which might be perceived as self-serving or adverse to the position or best interest of the ward.
- B. Specific situations that may create an impropriety or conflict of interest include, but are not limited to, the following:
 - 1. The guardian shall not commingle personal or programs funds with the funds of the ward.
 - a. This standard does not prohibit the guardian from consolidating and maintaining a ward's funds in joint accounts with the funds of other wards.
 - b. If the guardian maintains joint accounts, separate and complete accounting of each ward's funds shall be also maintained by the guardian.
 - c. When an individual or organization serves several wards, it may be more efficient and more cost effective to pool the individuals' funds in a single account. In this manner, banking fees and costs are distributed among the individuals, rather than being borne by each separately.
 - d. If the court allows, the use of combined accounts should only be permitted where the guardian or conservator has available the personnel and the

expertise to keep accurate records of the exact amount of funds in the account, including allocation of interest and charges, which are attributable to each individual ward.

2. The guardian shall not sell, transfer, convey, or encumber real or personal property or any interest therein to himself, a spouse, coworker, employee, member of the Board of the agency or corporate guardian, an agent, an attorney, or any corporation or trust in which the guardian has a substantial beneficial interest. State law may permit guardians to make such transactions; however, it is NGA's position that it is not best practice for the guardian to purchase a ward's real or personal property.
3. The guardian shall not borrow funds from the ward, or lend funds to the ward, unless there is prior notice of the proposed transaction to interested persons and others as directed by the court or agency, and the transaction is approved by the court or the agency administering the ward's benefits.
4. The guardian must not profit in any transactions made on behalf of the estate at the expense of the estate, nor may the guardian compete with the estate of the ward, unless authorized to do so by the court.
5. The non-family guardian shall not encourage the ward to make gifts or bequests that will benefit the guardian, his or her family, or any entity in which the guardian has an interest.
6. The guardian shall not sell or profit from the sale of any guardianship case or file to a successor guardian.

NGA Standard 18 – Guardianship Service Fees

- A. Guardians are entitled to reasonable compensation for their services.
- B. The guardian shall bear in mind at all times the responsibility to conserve the estate of the ward when making decisions regarding the provision of guardianship services and charging a fee for such services.
- C. Factors to be considered in determining reasonableness of the guardian's actions include the following:

1. Powers and responsibilities under the court appointment.
 2. Necessity of the service.
 3. Time and labor required.
 4. Degree of difficulty.
 5. Skill and experience required to carry out the duty.
 6. Needs of the ward.
 7. Costs of alternatives.
- D. Fees or expenses charged by the guardian shall be documented through billings maintained by the guardian. If time records are maintained then they shall clearly and accurately state the following:
1. Time spent on a task.
 2. Duty performed.
 3. Expense incurred.
 4. Collateral contacts involved.
 5. Identification of individual who performed the duty (*e.g.*, guardian, staff, volunteer).
- E. The guardian should only charge for the work directly related to the management of a specific ward.

NGA Standard 19 – The Guardian’s Relationship with Family Members and Friends of the Ward

- A. The guardian will recognize the value of family and friends to the quality of life of a ward. The guardian will encourage and support the ward in maintaining contact with family members and friends, when doing so benefits the ward and is consistent with the desires of the ward.
- B. The guardian should assist the ward in maintaining or re-establishing relationships with family and friends, except when this would not benefit the ward.
- C. When disposing of the assets of the ward, family members and friends will be notified and given the opportunity, with court approval, to obtain assets (particularly those with sentimental value). The guardian should make reasonable efforts to preserve property designated in the ward’s will and other estate planning devices implemented by the ward.
- D. The guardian will maintain communication with the ward’s family and friends regarding significant occurrences that effect the ward when such communication would benefit the ward.

- E. The guardian will keep immediate family members and friends advised of all pertinent medical issues when it would benefit the ward. Family input will be requested and considered in making medical decisions.

Note:

Please refer to Standard Eight as it relates to confidentiality issues.

**NGA Standard 20 – Guardian’s Relationship
with Other Professionals and Providers of
Service to the Ward**

The guardian shall treat all professionals with courtesy and respect and strive to enhance cooperation on behalf of the ward.

- A. It is essential that the guardian develop and maintain a working knowledge of the services, providers, and facilities available in the community.
- B. The guardian should stay current with changes in these community resources, as the guardian is often faced with balancing multiple providers who may be serving a number of wards who are located in a variety of community settings.
- C. The guardian, other than a family guardian, does not provide direct service to the ward. The guardian coordinates and monitors services needed by the ward to ensure that the ward is receiving the appropriate care and treatment.
 - 1. If there are no other alternatives at the time of a needed service and the guardian is able to fulfill the need, then, with proper documentation and disclosure to the court, the guardian may provide the needed service to the ward.
- D. The guardian will engage the services of professionals — for example, attorney, accountant, stockbroker, realtor, and doctors — as necessary to appropriately meet the needs of the ward.

**NGA Standard 21 – The Guardian’s Duties
and Responsibilities Regarding Diversity
and Personal Preference of the Ward**

- A. Ethnic, religious, and cultural values.

1. The guardian shall attempt to determine to what extent the ward identifies with particular ethnic, religious, and cultural values.
 2. In order to determine these values, the guardian should be aware of the following factors:
 - a. The ward's attitudes about illness, pain, and suffering.
 - b. The ward's attitudes about death and dying.
 - c. The ward's view about quality of life issues.
 - d. The ward's view regarding societal roles and relationships.
 - e. The ward's attitudes regarding funeral and burial customs.
- B. Sexual expression.
1. The guardian shall acknowledge the ward's right to interpersonal relationships and sexual expression. A guardian will take steps to assure that a ward's sexual expression is consensual, that the ward is not victimized and that an environment conducive to this expression is provided.
 2. The guardian shall ensure that the ward has information about and access to accommodations necessary to permit sexual expression to the extent the ward desires and to which the ward possesses the capacity to determine the expression consensual.
 3. The guardian shall take reasonable measures to protect the health and well-being of the ward.
 4. The guardian shall ensure that the ward is informed of all birth-control methods. The guardian will consider all birth-control options and choose the option that provides the ward the level of protection appropriate to the ward's life style and ability, while considering the preferences of the ward. The guardian will encourage the ward, where possible and appropriate, to participate in the choice of a birth control method.
 5. The guardian shall protect the rights of the ward in regard to sexual expression and preference. A review of ethnic, religious, or cultural values may be necessary to uphold the ward's values and customs.

NGA Standard 22 – Termination and

Limitation of the Guardianship or Conservatorship

- A. When appropriate and authorized by the court and state law, limited guardianships of the person and estate, rather than plenary (full) guardianships, are preferred.
- B. The guardian has an affirmative obligation to seek termination or limitation of the guardianship whenever indicated.

Guidelines:

Guardianship should be reviewed for possible limitation or termination as prescribed by state law:

- 1. When the ward has developed or regained capacity in areas where he or she was found incapacitated by the court.
- 2. When the ward expresses the desire to challenge the necessity of all or part of the guardianship.
- 3. When the ward has died.

NGA Standard 23 – The Guardian’s Professional Relationship with the Ward

- A. The guardian shall avoid personal relationships with the ward, the ward’s family, or the ward’s friends, that may impair judgment or lead to exploitation.
- B. The guardian shall never engage in sexual relations with a ward. Exceptions may include the ward’s spouse or where a physical relationship existed prior to the appointment of a guardian.
- C. An individual who is paid to provide support or care to a ward shall not engage in sexual relations with a ward. A guardian will take steps to assure that the ward is protected from a situation of this nature.

DEFINITIONS

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

BEST INTEREST – Best Interest is the course of action that

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

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

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

DISABLED PERSON – A person eighteen years of age or older deemed by the court to be lacking sufficient understanding or capacity to make or communicate Informed Decisions concerning the care of his person or financial affairs. See also “Ward.”

FREE STANDING ENTITY – An agency or organization which is independent from all other agencies or organizations.

GUARDIAN – An individual or organization named by order of the court to exercise any or all powers and rights of the person and/or the estate of the person. This definition includes the title conservator and certified private or public fiduciary.

Guardian of the Person is a guardian who possesses any or all the powers and rights granted by the court with regard to the personal affairs of the individual.

Guardian of the Estate is a guardian who possesses any or all the powers and rights with regard to the property of the individual. All guardians are accountable to the court.

Guardian ad Litem is a person appointed by the court to make an impartial inquiry into a situation and report to the court.

Designation of Guardian is a formal means of nominating a guardian prior to the time when a guardian is needed. Also Pre-need Guardian.

Emergency or Temporary Guardian is a guardian whose authority is temporary and usually only appointed in an emergency.

Foreign Guardian is a guardian appointed within another state or jurisdiction.

Limited Guardian is a guardian who has been appointed by the court to exercise the rights and powers specifically designated by a court order entered after the court has found that the ward lacks capacity to do some, but not all, of the tasks necessary to care for his or her person or property, or after the person voluntarily petitioned for appointment of a limited guardian. A limited guardian may possess fewer than all of the legal rights and powers of a plenary guardian.

Plenary Guardian is a person who has been appointed by the court to exercise all delegable rights and powers of the ward after the court has found the ward lacks the capacity to perform all of the tasks necessary to care for his or her person or property.

Stand-By Guardian is a person, agency, or organization whose appointment as guardian shall become effective without further proceedings immediately upon the death, incapacity, resignation, or temporary absence or unavailability, of the initially appointed guardian.

Successor Guardian is a guardian who is appointed to act upon the death or resignation of a previous guardian.

Qualifications of Court-Appointed Guardians

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

Guidelines:

The family member guardian:

1. Is encouraged to recognize the resources available through NGA.^[234]

[234. For example, the NGA's Web site offers information about the NGA's Ethics Hotline, newsletter, brochures on guardianship, and resources for guardianship

2. Shall follow *A Model Code of Ethics for Guardians*.
3. Shall follow the NGA *Standards of Practice* when carrying out the guardianship responsibilities.

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

Guidelines:

The volunteer guardian:

1. Shall follow *A Model Code of Ethics for Guardians*.
2. Shall follow the NGA *Standards of Practice*.
3. Is encouraged to become a certified Registered Guardian and Master Guardian, if applicable.

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

Guidelines:

An individual professional guardian:

1. Shall follow *A Model Code of Ethics for Guardians*.
2. Shall follow the NGA *Standards of Practice*.
3. Should strive to become a certified Registered Guardian and a Master Guardian, if applicable.

Corporate Guardian is a corporation that is named as guardian for an individual and may receive compensation in its role as guardian with court approval. Corporate guardians may include banks, trust departments, for-profit entities, and not for-profit entities.

Guidelines:

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

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

Guidelines:

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

Registered Guardian is an guardian who has met the qualifications established by the National Guardianship Foundation.

Guidelines:

Registered Guardian qualifications, as established by the National Guardianship Foundation, are the following:

1. Must be at least 21 years of age.
2. Must be a high school graduate or possess the GED equivalent.
3. Must have one year of relevant work experience related to guardianship or conservatorship or the following education or training requirements:
 - a. A degree in a field related to guardianship from an accredited college; or
 - b. Completion of a course curriculum or training specifically related to guardianship or conservatorship approved by the National Guardianship Foundation.
4. Must attest that he or she has not been convicted of, or pled guilty or no contest to, a felony.
5. Must attest that he or she has not been civilly or criminally liable for an action that involved fraud, misrepresentation, material omission, misappropriation, moral turpitude, theft, or conversion.
6. Must attest that he or she has not been relieved of responsibilities as a guardian by the court, employer, or client, for actions involving fraud, misrepresentation, material omission, misappropriation, moral turpitude, theft, or conversion.

7. Must attest that he or she is bonded in accordance with state statutes.
8. Must attest that an insurance or bonding agent has not found him or her liable in a subrogation action.
9. Must successfully complete an examination administered by the National Guardianship Foundation.
10. Shall follow *A Model Code of Ethics for Guardians*.
11. Shall follow the NGA *Standards of Practice*.
12. Should strive to become a Master Guardian.

Master Guardian – A master guardian is an individual who has met the qualifications established by the National Guardianship Foundation.

Guidelines:

Master Guardian qualifications, as established by the National Guardianship Foundation, are the following:

1. Must be a Registered Guardian in good standing when submitting an application.
2. Must have a:
 - Graduate degree from an accredited college or university with three (3) years of full time professional guardianship experience.
 - OR
 - Bachelor's degree from an accredited college or university (to include a Registered Nurse) with five (5) years of full time professional guardianship experience.
 - OR
 - Twelve (12) years full time professional guardianship experience.
3. A completed application will include:
 - a. An application form.
 - b. Four (4) professional references.
 - c. Proof of employment and education.
 - d. Sign an affidavit on the number of years of guardianship and number of wards served.
4. Professional guardianship experience is defined to include the following:
 - a. Serving in a position of making decisions serving as court-appointed guardian or as agent for the court-appointed guardian providing guardianship service

- directly to or on behalf of two or more unrelated wards.
- b. Spending an average of at least sixteen (16) hours per week practicing guardianship during at least three (3) of the last five (5) years, including the most recent year.
5. A Master Guardian shall demonstrate experience in at least six of the following, including item a.:
 - a. High degree of competence in managing complex issues.
 - b. Manage significant financial estates.
 - c. Conduct or arrange for comprehensive assessment of ward's needs.
 - d. Provide consultation on a wide range of guardianship issues.
 - e. Provide supervision to staff in a guardianship program.
 - f. Plan, implement, control, direct, fund a professional guardianship program.
 - g. Provide case oversight for less experienced guardians.
 - h. Have experience with more than one disability group.
 - i. Provide training and supervision and mentoring to less experienced guardians.
 - j. Be a professional education presenter on guardianship related topics.
 - k. Provide consultation regarding medical procedures, use of psychotropic medications, and evaluation of behavioral programs.
 - l. Advance the profession through policy development, legislative advocacy, or community outreach.
 - m. Provide consultation or make decisions on end of life issues and other complex or controversial issues.
 - n. Actively advocate for limited guardianship, alternatives to guardianship and restoration of wards' rights.
 6. Successful completion of the Master Guardian Examination administered by the National Guardianship Foundation.
 7. Shall follow *A Model Code of Ethics for Guardians*.

8. Shall follow the NGA *Standards of Practice*.

INCAPACITATED PERSON – Any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, or other cause, to the extent that the person lacks sufficient understanding or capacity to make or communicate responsible decisions.

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

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

PRUDENT PERSON RULE – An investment standard that considers the reasonableness of an investment based on whether a prudent person of discretion and intelligence, who is seeking reasonable income and preservation of capital, would buy.

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

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

SUBSTITUTED JUDGMENT – The principle of decision-making that requires implementation of the course of action that comports with the individual ward's known wishes expressed prior to incapacity.

WARD – A person for whom a guardian has been appointed. Other names for ward are, "Conservatee," "Disabled Person," "Protected Person," and "Incapacitated Person."