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# A CALL FOR STANDARDS: AN OVERVIEW OF THE CURRENT STATUS AND NEED FOR GUARDIAN STANDARDS OF CONDUCT AND CODES OF ETHICS

Karen E. Boxx & Terry W. Hammond\*

## I. INTRODUCTION

*With few exceptions, trust is essential to economic prosperity: Thousands of people contribute to the sustenance and comfort of each of us, our dress and lodging, transportation and communications, education, and entertainment. If we could not rely on the wholesomeness of the food we buy, the expertise of our physicians and lawyers, the honesty of our banks and mutual funds, or, as Sweeney Todd noted, the trustworthiness of the barber with his sharp shaving razor, our lives would be far more primitive. . . . Trust saves time and money. It allows people to believe other persons' statements without checking their truth, and to rely on other persons' promises, without demanding guarantees. It allows people to use the talents of strangers.<sup>1</sup>*

The role of trust in guardianships is rarely discussed, perhaps because of the assumption that court supervision of guardians reduces their power to act in any way other than trustworthy. However, as the number of persons needing guardianship protection increases while the resources available to courts to finance supervision decreases, the role of guardian is starting to become a more conventional fiduciary relationship complete with a hallmark downside—lack of supervision. Because of this trend, the concept of delineated standards for performance of a guardian's duties has taken on critical importance.

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<sup>1</sup> TAMAR FRANKEL, TRUST AND HONESTY: AMERICA'S BUSINESS CULTURE AT A CROSSROAD 49 (2006).

The 2001 Wingspan Conference, the second national conference on guardianship reform since the need for reform was publicized in 1987,<sup>2</sup> included Recommendation 45, directing states to adopt “minimum standards of practice for guardians, using the National Guardianship Association *Standards of Practice* as a model.”<sup>3</sup> This recommendation came from the conference working group on Agency Guardianship, whose primary focus was on professional agencies and individuals providing guardianship services, either through a governmental agency or for a fee.<sup>4</sup> The recommendation applied to all guardians, and recognized the need for standards that could offer guidance to acting guardians and could judge their performance. The progress on this recommendation has been very slow; and whether the same standards should apply to all guardians and whether standards ought to be considered best practices or minimum standards has yet to be determined.

The focus of the 2011 conference is postappointment issues, and the role of uniform, delineated standards of conduct for guardians<sup>5</sup> when administering guardianship is the necessary starting point. This paper will first explore in Part II how the duties of a guardian have been defined in the past and discuss the increasing call for delineated standards for guardians, due in part to the inability of courts to monitor guardianships adequately. Part III will discuss existing standards and codes of ethics for guardians and the extent to which they are being put into use in specific states. Part IV will then raise questions about the content and role of standards for guardians, asking how courts have used existing standards and how they should be used; whether there should be different standards for professional and family guardians; and whether standards should be used only as educational

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<sup>2</sup> Sally Hurme & Erica Wood, *Introduction*, 2012 UTAH L. REV. 1257; see also *infra* notes 21–22 and accompanying text (discussing the AP report that spurred the movement for guardianship reform in 1987).

<sup>3</sup> Symposium, *Wingspan—The Second National Guardianship Convention, Recommendations*, 31 STETSON L. REV. 595, 604 (2002).

<sup>4</sup> See A. Frank Johns & Charles P. Sabatino, *Introduction*, *Wingspan—The Second National Guardianship Conference*, 31 STETSON L. REV. 573, 591–92 (2002).

<sup>5</sup> A note on terminology: In this paper, we refer to both guardians and conservators as “guardian,” and the incapacitated person who is the subject of the guardianship as the “ward.” We use the term “professional guardian” to refer to guardians who are in the business of providing guardianship services and the term “family guardian” to refer to guardians who serve as guardian because of a preexisting relationship with the ward. The use of the terms “family” and “professional” guardian was discussed at length during the Family Guardian Focus Group calls. The Family Guardian Focus Group was a group of persons who had been involved in guardianships for family members and who have stayed active in the guardianship community. The authors were participants in the calls. The group expressed some dissatisfaction with the terms, because “professional” has negative connotations for guardians who do not offer guardianship services as their primary business, and “family” is too narrow a term for those who become guardians for nonfamily members. We recognize that the terms “professional” and “family” guardian are imprecise and to some extent misleading but we use them here because those terms are used in state statutory schemes and the guardianship literature.

tools or whether guardians should be judged on their compliance with standards. Finally, Part V will discuss the role of standards in governing all fiduciary conduct and the need for standards as a way to define the fiduciary obligations of a guardian. The purpose of the article is to give conference delegates and those charged with enactment the necessary background to discuss and draft recommendations that will implement Wingspan Recommendation 45 and further focus the role of standards in guardianship administration.

## II. HISTORY OF STANDARDS OF CONDUCT FOR GUARDIANS

The discussion of specified standards refers to codes of conduct for guardians to follow when carrying out guardianship administration. Currently, state statutes usually specify certain qualifications that all guardians must possess, for example, being over the age of eighteen, being free of felony convictions, and not being an employee of a health care facility where the incapacitated person receives care.<sup>6</sup> However, it is rare for state statutes to specify standards regarding what a guardian does once appointed. Duties of a guardian specified in state statutes are usually limited to filing reports and similar ministerial matters.<sup>7</sup> In addition, statutes may include broad statements about protecting the guardianship estate and caring for the incapacitated person in the least restrictive environment—all without specific guidelines as to how to carry out these broadly stated duties.<sup>8</sup>

Initially, the United States followed the British concept of guardianship as a public responsibility. Guardianship proceedings date back to ancient Rome.<sup>9</sup> The British adopted the idea that the crown had responsibility for incompetent persons, under the doctrine of *parens patriae*, or “parent of the country.”<sup>10</sup> Originally, the British system would appoint one person as guardian over the person of the incompetent, and an heir would be given management of the estate—both would answer to the Court of Chancery.<sup>11</sup> The United States adopted the *parens patriae* approach, using courts to appoint and supervise guardians of incompetent persons.<sup>12</sup> Statutes establish the duties of a guardian in minimal terms as a

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<sup>6</sup> See, e.g., WASH. REV. CODE § 11.88.020(1) (2010); UNIF. GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT § 310 (1997).

<sup>7</sup> See, e.g., WASH. REV. CODE § 11.92.040 (2010 & Supp. 2012); UNIF. GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT § 418 (1997).

<sup>8</sup> See, e.g., WASH. REV. CODE §§ 11.92.040(5), .043(4) (2010 & Supp. 2012).

<sup>9</sup> Peter M. Horstman, *Protective Services for the Elderly: The Limits of Parens Patriae*, 40 MO. L. REV. 215, 218 (1975) (citing AM. BAR FOUND., THE MENTALLY DISABLED AND THE LAW 1 (rev. ed. 1971)).

<sup>10</sup> See *id.* at 218–19; *Late Corp. of the Church of Jesus Christ of Latter-day Saints v. United States*, 136 U.S. 1, 57–58 (1890) (quoting an English case explaining the *parens patriae* doctrine); Neil B. Posner, Comment, *The End of Parens Patriae in New York: Guardianship Under the New Mental Hygiene Law Article 81*, 79 MARQ. L. REV. 603, 604 (1996) (providing an English translation of *parens patriae*).

<sup>11</sup> Horstman, *supra* note 9, at 219.

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

court-appointed and supervised fiduciary. Individual cases largely define these duties as the courts supervising guardians and articulate what constitutes breach of an individual guardian's duties. As a stopgap for failures of the court to prevent abuse or neglect, guardians are usually required to post bond or otherwise secure the financial assets of the ward.<sup>13</sup>

While the states nominally maintain the approach of *parens patriae* by requiring court appointment of guardians, requiring the guardians to report to the court, and requiring them to obtain advance authority for certain actions<sup>14</sup>—states have begun to move away from an active governmental role. The Associated Press issued a landmark report in 1987, entitled “Guardians of the Elderly: An Ailing System,” which found, among other problems, that courts “ignore their wards.”<sup>15</sup> A recent study by the Government Accountability Office looked at twenty closed guardianship cases and found that in twelve of the cases, the courts failed to oversee the guardians once appointed, allowing the vulnerable adults to be subject to both financial and physical abuse.<sup>16</sup>

In 2007, a task force in Washington State formed by the State Bar Association surveyed the state courts’ monitoring of guardianships.<sup>17</sup> The responses revealed that fifteen of the state’s thirty-nine counties (thirty-three of which responded to the survey) had no procedures for monitoring guardian compliance, and only five counties had relatively active monitoring procedures, such as reminding guardians of upcoming deadlines and verifying information in reports.<sup>18</sup> Anecdotal evidence of courts’ failure to monitor guardians is regularly reported in the media, such as a case of a guardian’s failure to account for \$140,000 in a final report, which went unnoticed by the court.<sup>19</sup> The number of active guardianship cases in the United States is impossible to verify but a recent estimate based on available data puts the number at 1.5 million, although the potential for variation results in a range from less than 1 million to over 3 million cases.<sup>20</sup> This overwhelming number of

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<sup>13</sup> See, e.g., CAL. PROB. CODE § 2320 (West 2002).

<sup>14</sup> See, e.g., CAL. PROB. CODE § 2620 (West 2002); 755 ILL. COMP. STAT. 5/11a-18 (2011).

<sup>15</sup> Fred Bayles & Scott McCartney, *Lack of Safeguards Leaves Elderly at Risk*, SPARTANBURG HERALD-J., Sept. 23, 1987, at A5.

<sup>16</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-1046, GUARDIANSHIPS: CASES OF FINANCIAL EXPLOITATION, NEGLECT, AND ABUSE OF SENIORS 8 (2010).

<sup>17</sup> WASH. STATE BAR ASS’N ELDER LAW SECTION, REPORT OF THE GUARDIANSHIP TASK FORCE TO THE WSBA ELDER LAW SECTION EXECUTIVE COMMITTEE (2009).

<sup>18</sup> *Id.* at 10.

<sup>19</sup> Maureen O’Hagan & Cheryl Phillips, *Missing Money Points Up Flaws in State Oversight of Guardians*, SEATTLE TIMES (Apr. 21, 2010), [http://seattletimes.nwsource.com/html/yourcourtstheirsecrets/2003459423\\_guardianshipside03m.html](http://seattletimes.nwsource.com/html/yourcourtstheirsecrets/2003459423_guardianshipside03m.html).

<sup>20</sup> Brenda K. Uekert & Richard Van Duizend, *Adult Guardianships: A “Best Guess” National Estimate and the Momentum for Reform*, in NATIONAL CENTER FOR STATE COURTS, FUTURE TRENDS IN STATE COURTS 2011: A SPECIAL FOCUS ON ACCESS TO JUSTICE 109 (2011), available at <http://www.ncsc.org/sitecore/content/microsites/future-trends/home/Special-Programs/~/media/Microsites/Files/Future%20Trends/Author%20PDFs/Uekert%20and%20Van%20Duizend.ashx>.

outstanding cases illustrates the inability of state courts to monitor guardianships with any thoroughness.

Whether through the failure of legislative bodies to appropriate necessary funds to maintain a viable guardianship system, the unwillingness of the executive branch to regulate guardians, or simply an overwhelmed court system without resources to monitor guardianship cases, the result is a diminished role of the court as enforcer and punisher when misconduct has been brought to its attention rather than as a supervisor. As a result, without guidance and supervision, guardians are largely on their own, either free to neglect or exploit the incapacitated person until irreparable harm is caused, or left to guess at the parameters of their duties, hoping that the ultimate court review of their actions will be favorable.

In light of the failure of courts and bonding companies to prevent mismanaged guardianships, calls for guardianship reform have included proposals to create and adopt specific standards of conduct and codes of ethics for guardians. The Associated Press (AP) report in 1987 began a movement of reform that included a report from the Subcommittee on Housing and Consumer Interests of the House Select Committee on Aging, which proposed standards based on those developed by the Center for Social Gerontology.<sup>21</sup> The AP report and the Congressional report led to the convening of the first Wingspread Conference and the formation of guardianship associations, most notably the National Guardianship Association.<sup>22</sup> The Wingspread conferees insisted that guardian standards of conduct were essential, because "the absence of guardian performance standards . . . makes it difficult to measure guardian performance. . . . [M]odel guardian performance standards would be useful in setting out basic principles, duties and requirements."<sup>23</sup> Ironically, despite the efforts of private guardianship organizations to improve guardianship systems over the course of nearly two decades, the United States Senate Special Committee on Aging conducted a hearing on September 7, 2006, entitled "Exploitation of Seniors: America's *Ailing* Guardianship System,"<sup>24</sup> using the same term, "ailing," that the Associated Press used to describe guardianships almost twenty years earlier.

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<sup>21</sup> CHAIRMAN OF SUBCOMM. ON HOUSING AND CONSUMER INTERESTS OF H. SELECT COMM. ON AGING, 100TH CONG., SURROGATE DECISIONMAKING FOR ADULTS: MODEL STANDARDS TO ENSURE QUALITY GUARDIANSHIP AND REPRESENTATIVE PAYEESHIP SERVICES, at ix, two-1 to two-69 (Comm. Print 1988).

<sup>22</sup> Symposium, *Guardianship: An Agenda for Reform, Recommendations of the National Guardianship Symposium and Policy of the American Bar Association*, 13 MENTAL & PHYSICAL DISABILITY L. REP. 271, 274 (1989) [hereinafter WINGSPREAD RECOMMENDATIONS]; Pamela B. Teaster et al., *Wards of the State: A National Study of Public Guardianship*, 37 STETSON L. REV. 193, 197–98, 232 (2007).

<sup>23</sup> WINGSPREAD RECOMMENDATIONS, *supra* note 22, at 298; Sally Balch Hurme & Erica Wood, *Guardian Accountability Then and Now: Tracing Tenets for an Active Court Role*, 31 STETSON L. REV. 867, 885 (2002).

<sup>24</sup> *Exploitation of Seniors: America's Ailing Guardianship System: Hearing Before the S. Special Comm. on Aging*, 109th Cong. 1 (2006).

### III. CURRENT STATUS OF ADOPTION AND APPLICATION

#### A. National Guardianship Association Standards

The National Guardianship Association (NGA) was formed in 1988 to improve the system of guardianships, provide education and networking to guardians, and to provide guidance in legislative reform.<sup>25</sup> From its inception, it began creating standards of conduct for guardians. The first set of standards was issued in 1991, and that original set of eight standards was expanded in 2000 to the current set of twenty-five standards, which were amended in 2002 and 2007.<sup>26</sup> A copy of the current version of the NGA Standards is appended to this article. These are considered the most thorough expression of standards for guardians and are frequently referred to or adopted wholesale by government agencies, courts, and other organizations looking for benchmarks to guide and judge guardians' performance.<sup>27</sup> What follows is a brief review of the scope and content of the NGA Standards. Some of them are addressed more specifically in the following articles in this conference.<sup>28</sup> The intent of this discussion is to give a sense of the scope and content of the standards and what role they can play in improving guardianship performance.

The twenty-five standards are categories of the guardian's role, each with a subset of specific statements on how to carry out that duty. Standard One is "Applicable Law" and simply notes that the guardian must comply with federal and state statutes applicable to guardianships and comply with the court orders creating the guardianship. Professional or certified guardians must comply with any additional requirements mandated by that status. Standard Two is "The Guardians' Relationship to the Court," and states the basic premises that the guardian must comply with court orders, stay within the authority granted by the

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<sup>25</sup> See *About NGA*, NAT'L GUARDIANSHIP ASS'N, <http://www.guardianship.org/overview.htm> (last visited Mar. 12, 2012).

<sup>26</sup> STANDARDS OF PRACTICE, at pmb (Nat'l Guardianship Ass'n 2000) (amended 2007), available at [http://www.guardianship.org/documents/Standards\\_of\\_Practice.pdf](http://www.guardianship.org/documents/Standards_of_Practice.pdf) (also available *infra* at appendix).

<sup>27</sup> See, e.g., ALASKA STAT. § 13.26.001 (2010) (specifically referencing the National Guardianship Association standards in requiring state agency to adopt standards); STANDARDS OF PRACTICE 9.E (Nat'l Ass'n of Geriatric Care Managers 1990) (amended 2011), available at <http://www.caremanager.org/about/standards-of-practice/> (stating that if a geriatric care manager is appointed guardian, it is recommended that the care manager be knowledgeable of and adhere to the National Guardianship Association Standards of Practice).

<sup>28</sup> See, e.g., Robert B. Fleming & Rebecca C. Morgan, *Standards for Financial Decision-Making: Legal, Ethical and Practical Issues*, 2012 UTAH L. REV. 1275; Kim Dayton, *Standards for Health Care Decision-Making: Legal and Practical Considerations*, 2012 UTAH L. REV. 1329; Naomi Karp & Erica Wood, *Choosing for Someone Else: Guardian Residential Decision-Making*, 2012 UTAH L. REV. 1445; Linda S. Whittom & Lawrence A. Frolik, *Surrogate Decision-Making Standards for Guardians: Theory and Reality*, 2012 UTAH L. REV. 1491.

court, report to the court as required by the law and by the court (but in no event less frequently than annually), and recognize that payment to the guardian must comply with applicable laws and court orders and is subject to court review. This standard corresponds to a trustee's duty to account and keep beneficiaries informed, and a general fiduciary's duty to provide information.<sup>29</sup>

Standard Three is "The Guardian's Professional Relationship with the Ward," and prohibits personal relationships with the ward and the ward's family and friends unless the guardian is a family member or those relationships existed before the guardianship. This standard also prohibits sexual relationships with the ward unless the guardian is the ward's spouse or the intimate relationship existed before the guardianship. This standard parallels the prohibition against sexual relationships with a lawyer's clients<sup>30</sup> and the prohibition on such relationships with a physician's patients,<sup>31</sup> but no other fiduciary is prohibited from developing personal relationships with the beneficiary of the relationship.

Standard Four is entitled "The Guardian's Relationship with Family Members and Friends of the Ward." This standard requires the guardian to protect and encourage the ward's relationship with family members and friends, to give family members an opportunity to obtain any assets of the ward that the guardian is considering disposing of, to consider the ward's estate plan when disposing of assets, and to keep family members informed about medical issues and get their input when appropriate. These obligations are subject to confidentiality duties in Standard Eleven. This standard illustrates the unique position of the guardian as fiduciary, because there is nothing comparable in other fiduciaries' duties, except perhaps for attorneys-in-fact, whose duties are still largely undefined.<sup>32</sup> The Uniform Power of Attorney Act recognizes the attorney-in-fact's duty to take into account an incapacitated principal's estate plan if known,<sup>33</sup> but if the attorney-in-fact does not have access to the principal's estate plan the principal's attorney would be prevented from providing that information due to the attorney's duty of confidentiality.<sup>34</sup> The guardian may, however, have greater access to the ward's confidential information.

Standard Five is entitled "The Guardian's Relationship with Other Professionals and Providers of Service to the Ward." Under this standard, the guardian is required to stay informed of available services in the community that

<sup>29</sup> See 3 AUSTIN WAKEMAN SCOTT & MARK L. ASCHER, SCOTT AND ASCHER ON TRUSTS § 17.5 (5th ed. 2006).

<sup>30</sup> MODEL RULES OF PROF'L CONDUCT R. 1.8(j) (2011).

<sup>31</sup> The prohibition is found in the Hippocratic Oath. M. Campbell, *The Oath: An Investigation of the Injunction Prohibiting Physician-Patient Sexual Relations*, 32 PERSPECTIVE IN BIOLOGY & MED. 300, 300–01 (1989).

<sup>32</sup> See Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 GA. L. REV. 1, 26, 42–56 (2001); Carolyn L. Dessin, *Acting as Agent Under a Financial Durable Power of Attorney: An Unscripted Role*, 75 NEB. L. REV. 574, 585 n.50, 589–96 (1996).

<sup>33</sup> UNIF. POWER OF ATTORNEY ACT § 114(b)(6) (2006).

<sup>34</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6 (2011).

may be helpful to the ward, to ensure that the ward is receiving high quality services, and to hire professionals (medical, legal, or financial) as necessary for the ward's needs. The standard also prohibits guardians who are not family members from providing direct services to the ward, stating, "[a] guardian who is not a family member guardian *shall not* provide direct service to the ward. The guardian shall coordinate and monitor services needed by the ward to ensure that the ward is receiving the appropriate care and treatment."<sup>35</sup>

This standard has numerous parallels with trustees' duties. The traditional rule was that a trustee had a duty not to delegate, which meant that to the extent the trustee delegated any duties, the trustee was strictly liable for any errors or malfeasance on the part of the delegated service provider.<sup>36</sup> The more modern rule, however, is that a trustee has a duty to delegate responsibly, recognizing that a trustee likely does not have all the requisite skills to manage a trust and invest its assets, and as long as a trustee is responsible in selection of professionals to assist in management of the trust, the trustee will not be liable.<sup>37</sup> This modern iteration of the duty is comparable to the standard set forth in Standard Five, though there is no language in Standard Five requiring responsible selection of professionals. This gap may be explained by the fact that hiring and payment of fees to professionals are likely to require court approval.

The prohibition on providing direct services to the ward is similar to the prohibition on a trustee's self-dealing,<sup>38</sup> however, most modern trust statutes give significant exceptions for financial institutions that serve as trustee and also provide financial and investment services.<sup>39</sup>

Standard Five is therefore perhaps more stringent than the standards applicable to professional trustees. Perhaps this stringency is due to the more personal nature of the guardian relationship and the fact that the financial services provided by professional trustees are more conventional and the services are offered to the general public.<sup>40</sup> Nevertheless, a professional guardian that serves as financial manager for the ward and manages funds of numerous wards is more restricted under Standard Five than a professional trustee (and for clients of the professional guardian whose assets are managed in a trust rather than a guardianship). Standard Five has presented practical challenges for guardians who, due to limited community resources or lack of funding, must provide direct services to a person under guardianship.

Standard Five even prohibits the guardian from providing legal services. It is understandable for there to be a prohibition on the guardian providing housing

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<sup>35</sup> STANDARDS OF PRACTICE 5.IV (Nat'l Guardianship Ass'n 2000) (amended 2007) (emphasis added) (also available *infra* in the appendix).

<sup>36</sup> See RESTATEMENT (SECOND) OF TRUSTS § 171 (1959).

<sup>37</sup> See UNIF. TRUST CODE § 807 (2000) (amended 2010).

<sup>38</sup> SCOTT & ASCHER, *supra* note 29, § 17.2.

<sup>39</sup> UNIF. TRUST CODE § 802 (2005); SCOTT & ASCHER, *supra* note 29, § 17.2.

<sup>40</sup> Scott and Ascher note that the exceptions for corporate trustees are most likely a result of the recognition of the benefits of allowing certain types of self-dealing. SCOTT & ASCHER, *supra* note 29, § 17.2.

(with exceptions available to family guardians) and medical care, due to the overly personal nature of those services and the potential for conflict. The requirement that an attorney appointed by a court to serve as professional guardian must then hire outside counsel for all legal work for the guardianship presents practical and financial challenges. While there is a potential for a conflict if the lawyer commits malpractice, the cost savings and efficiency of having the guardian/attorney perform the services coupled with the court supervision as a check on the conflict issue arguably outweighs conflict concerns. Standard Five would benefit from a comparison with permissible activities by a trustee and potential revision, so that the threat of conflict of interest does not eliminate the opportunity for efficiencies.<sup>41</sup>

Standard Six relates to the decision-making factors available to the guardian for the ward. It is entitled “Informed Consent” and is unique to a guardian fiduciary.<sup>42</sup> It gives the guardian thorough guidelines on how to evaluate medical decisions and how to fully exercise the ward’s right to informed consent when making decisions on behalf of the ward. No other fiduciary, except perhaps the holder of a power of attorney for medical issues, has authority to make such personal decisions for the beneficiary of the fiduciary relationship.

Standard Seven, “Standards for Decision-Making,” is addressed in detail in another paper in this conference.<sup>43</sup> It requires that a guardian use substituted judgment, which is what the ward would have decided if asked when competent, except when that judgment would result in substantial harm to the ward or when the ward’s wishes cannot be known. When an exception applies, the guardian must use the “best interests of the ward” standard, which requires consideration of the least intrusive and restrictive and most normalizing options, while still considering the ward’s expressed wishes.<sup>44</sup>

Standard Eight, “Least Restrictive Alternative,” expands on the requirements of a guardian to balance the ward’s independence and choices with protection and safety of the ward.<sup>45</sup> Standard Nine, “Self-Determination of the Ward,” requires the guardian to maximize the participation of the ward in decision-making and assist the ward in regaining capacity and control over their affairs as much as possible.<sup>46</sup> Standards Eight and Nine reference progressive concepts that have been incorporated into more recent statutory reforms in some states, but the principles of “least restrictive alternative” and “self-determination” are cornerstones of limited

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<sup>41</sup> See TAMAR FRANKEL, FIDUCIARY LAW 146–52 (2011) (discussing whether conflict of interest should be prohibited unconditionally for all fiduciaries). Whether this strict prohibition in the NGA Standards is advisable is discussed below in the coverage of Standard Sixteen. See *infra* notes 62–68 and accompanying text.

<sup>42</sup> See STANDARDS OF PRACTICE 6 (Nat'l Guardianship Ass'n 2000) (amended 2007) (available *infra* in the appendix).

<sup>43</sup> See generally Whitton & Frolik, *supra* note 28 (discussing how guardians made decisions concerning their wards).

<sup>44</sup> STANDARDS OF PRACTICE 7.

<sup>45</sup> *Id.* at 8.

<sup>46</sup> *Id.* at 9.

guardianship and should be considered for inclusion in Summit recommendations.<sup>47</sup>

Standard Ten, "The Guardian's Duties Regarding Diversity and Personal Preference of the Ward," emphasizes the guardian's duty and obligation to understand the ward's customs, values, religious beliefs, and cultural community practices.<sup>48</sup> The guardian is required under this standard to investigate the ward's attitudes regarding end-of-life issues. These requirements underpin Standard Seven's requirement for substituted judgment as the basis of decision-making whenever possible.<sup>49</sup> Standard Ten also requires a guardian to acknowledge and allow the ward to engage in personal intimate relationships and sexual expression, while protecting the health of the ward and preventing victimization of the ward.<sup>50</sup>

All of these standards relating to personal, nonfinancial decision-making do not have parallels in other fiduciary arrangements because such fiduciaries do not generally have responsibilities that relate to the beneficiaries' personal values and desires. There is a general fiduciary duty to carry out the purposes of the arrangement that includes following the wishes of the person setting up the terms of the relationship,<sup>51</sup> however, and these standards are a natural extension of that duty in the realm of guardianship.

Standard Eleven addresses the duty of confidentiality.<sup>52</sup> Under this standard, a guardian has a general duty to keep the affairs of the ward confidential. Disclosure is permitted only to the extent necessary. Disclosure of "sensitive" information to family members is allowed if beneficial to the ward. Some, but not all, other fiduciaries have similar duties of confidentiality (for example attorneys<sup>53</sup> and agents<sup>54</sup>). The guardian's duty of confidentiality as described in this standard is very similar to that of an attorney when dealing with an incapacitated client.<sup>55</sup>

The next five standards relate to duties of a guardian of the person. Standard Twelve is the general statement of the duties of a guardian of the person and specifies that the guardian must ensure that ward's residential arrangements are optimal, all medical and other services beneficial to the ward are pursued, court approval for extraordinary steps such as divorce is sought when appropriate, all required reports are filed, and termination or limitation of the guardianship is requested if appropriate.<sup>56</sup>

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<sup>47</sup> See Kathleen Harris, *Guardianship Reform*, 79 MICH B.J. 1658, 1661 (2000).

<sup>48</sup> STANDARDS OF PRACTICE 10 (Nat'l Guardianship Ass'n 2000) (amended 2007) (available *infra* in the appendix).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> See, e.g., RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. b (2006); UNIF. TRUST CODE § 801 (2005).

<sup>52</sup> STANDARDS OF PRACTICE 11.

<sup>53</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6 (2011).

<sup>54</sup> RESTATEMENT (THIRD) OF AGENCY § 8.05.

<sup>55</sup> MODEL RULES OF PROF'L CONDUCT R. 1.14.

<sup>56</sup> STANDARDS OF PRACTICE 12.

Standard Thirteen, “Guardian of the Person: Initial and Ongoing Responsibilities,” expands on these duties by specifying steps the guardian must take immediately upon appointment, including meeting with the ward, gathering information from third parties, and steps to manage the ongoing relationship. These steps include preparation of a written guardianship plan, maintenance of a separate file for the ward containing specified documents, and a schedule of at least monthly visits with the ward and communication with all caregivers.<sup>57</sup>

Standard Fourteen, “Decision-Making About Medical Treatment,” sets forth general guidelines for medical decisions, such as seeking second opinions when reasonable, and determining whether the ward had signed any advance directives on health care.<sup>58</sup> This standard refers to Standard Six, regarding informed consent, and Standard Seven, setting forth standards for decision-making, as necessary considerations when a guardian makes health care decisions for the ward.<sup>59</sup> Extraordinary procedures, such as psychosurgery, experimental treatments, sterilization, abortion and electroshock therapy, require court approval unless clearly authorized by the ward in an advance directive. Standard Fifteen addresses decision-making about withholding and withdrawal of medical treatment, and begins with a presumption of continued medical treatment.<sup>60</sup> The guardian is instructed to follow the wishes of the ward if known to the guardian, and if the ward is now expressing wishes that conflict with previous statements from the ward, the guardian is directed to consult with an ethics committee or the court. This standard also requires the guardian to follow the requirements of Standard Six, Informed Consent, and Standard Seven, Standards for Decision-Making.<sup>61</sup>

Standard Sixteen, “Conflict of Interest: Ancillary and Support Services,” provides an extensive list of the potential scenarios where a conflict of interest between the guardian of the person and the ward may arise.<sup>62</sup> Standard Five prohibits the guardian from providing ancillary services such as housing, medical or legal services,<sup>63</sup> and this standard repeats that general prohibition but lists limited exceptions. Avoidance of even the appearance of impropriety is consistent with the fiduciary duty of loyalty. This requires a fiduciary to act in the sole interests of the beneficiary of the relationship,<sup>64</sup> and imposes a heightened penalty for any self-dealing that usually excludes the excuse that the transaction was fair.<sup>65</sup> The purpose of the strict penalties for breach of duty of loyalty is deterrence,

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<sup>57</sup> *Id.* at 13.

<sup>58</sup> *Id.* at 14.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 15.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 16.

<sup>63</sup> See *supra* notes 35–41 and accompanying text.

<sup>64</sup> FRANKEL, *supra* note 41, at 108.

<sup>65</sup> RESTATEMENT (THIRD) OF AGENCY § 801 cmt. d (2006); SCOTT & ASCHER, *supra* note 29, § 17.2.14.6. Corporate fiduciaries, such as directors and officers, however, have a less stringent duty of loyalty and can engage in self-dealing if the transaction is shown to be fair. *See id.*

because the temptation and the opportunity to serve one's own interest is ever-present and the possibility of detection is often low, therefore the penalty for a breach must be high.<sup>66</sup>

Standard Sixteen complies with the general approach of fiduciary law in trying to minimize breaches of the fiduciary's loyalty by its blanket prohibition on any type of self-dealing with only very limited exceptions.<sup>67</sup> The exceptions may be too limited, however, and may forfeit potential efficiencies and cost savings when the guardian has special expertise. Financial and legal services are routinely provided by trustees who have skills in those areas, even though trustees are held to the highest standards of loyalty.<sup>68</sup>

Standards Seventeen through Twenty deal with the duties of the guardian of the estate. Standard Seventeen sets out the general duties of the guardian of the estate and includes the general fiduciary standard that the guardian shall manage the estate "only for the benefit of the ward."<sup>69</sup> Several obligations referenced in this standard mirror certain duties of trustees, such as the duty to segregate and earmark property of the ward,<sup>70</sup> the duty to keep and render accounts,<sup>71</sup> and the duty to enforce claims against others and defend against claims.<sup>72</sup> The standard requires that the guardian apply the Prudent Person Rule and the Prudent Investor Rule when investing the ward's assets. Those rules are defined terms in the standards and correspond to investment standards imposed on trustees by statute in most states.<sup>73</sup> The standard also requires the guardian to obtain a copy of the ward's will, if it exists, as a guide to management of the ward's property. This may present difficulties to the guardian if the will is only available from the ward's attorney and confidentiality rules limit the attorney's ability to turn over the will to the guardian.

Standard Eighteen sets forth the steps that must be taken immediately upon appointment, such as securing the ward's property, insuring the property, taking other steps to protect the property, meeting with the ward, preparing a financial

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<sup>66</sup> Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 NYUL. REV. 1045, 1045 (1991).

<sup>67</sup> See SCOTT & ASCHER, *supra* note 29, § 17.2.

<sup>68</sup> See, e.g., State Bar of Ariz. Comm. on Rule of Prof'l Conduct, Formal Op. 96-07 (1996) (allowing attorney to serve as trustee but noting that it would be unethical to receive trustee fees for legal work for which the lawyer has already been paid).

<sup>69</sup> STANDARDS OF PRACTICE 17 (Nat'l Guardianship Ass'n 2000) (amended 2007) (available *infra* in the appendix).

<sup>70</sup> SCOTT & ASCHER, *supra* note 29, § 17.11.

<sup>71</sup> *Id.* § 17.4.

<sup>72</sup> *Id.* § 17.9–17.10.

<sup>73</sup> UNIF. PRUDENT INVESTOR ACT § 2 (1995). The "prudent man" standard was removed from the Uniform Principal and Income Act, because that act deals with allocations of principal and income between income and remainder beneficiaries, and a prudent person would not consider interests of successive beneficiaries when making investment decisions. UNIF. PRINCIPAL & INCOME ACT § 103 cmt. (2003); see Fleming, *supra* note 28, at 1287–89.

plan and budget, posting bond, and preparing an inventory.<sup>74</sup> These duties correspond to similar duties of a trustee to protect trust property.<sup>75</sup> In addition, the guardian also has duties to obtain public and insurance benefits available to the ward and protect the ward's eligibility for such benefits.

Standard Nineteen, entitled "Property Management," limits the guardian's authority to dispose of any property of the ward.<sup>76</sup> The general rule is that the guardian must have judicial or other independent review before disposing of any property. The guardian cannot sell, encumber, or otherwise transfer the ward's property unless such transfer is consistent with the ward's views before commencement of the guardianship, and if the ward's views are not known, then transfer can only occur if in the best interest of the ward. The guardian must determine the ward's best interest by considering specific factors, such as the ward's estate plan, tax consequences, effect on eligibility for public benefits, and future maintenance needs. These requirements are much stricter than a trustee's relatively unrestricted power to sell trust assets unless otherwise restricted by the trust agreement.<sup>77</sup>

Standard Twenty addresses conflicts of interest and is the parallel to the conflicts standard relating to guardians of the person.<sup>78</sup> The standard has a blanket prohibition against all transactions that would constitute self-dealing and is a broader prohibition than that stated in the Uniform Trust Code for trustees,<sup>79</sup> because it prohibits transactions with coworkers, employees, agents, attorneys, and other associates of the guardian without allowing a defense that the transaction did not harm the ward.<sup>80</sup> This standard also limits the guardian's use of the ward's funds for third persons (for example, dependents of the ward) to situations where prior approval is obtained or there is evidence that the expenditures are not detrimental to the ward. Other transactions that are allowed only with court approval include loans of the ward's property, loans from the guardian to the ward, the guardian competing with the ward's estate, or the guardian profiting from any transactions made on behalf of the ward. The standard refers to transactions that can be approved by a court, implying that a court cannot authorize self-dealing transactions that are not included in the reference to court approval. This is in contrast to the rule applicable to trustees that the trustor, the court, or the beneficiaries may authorize any act of self-dealing even though normally prohibited.<sup>81</sup> State statutory provisions often hold a guardian accountable for making decisions that might be considered a conflict of interest, but these

<sup>74</sup> STANDARDS OF PRACTICE 18 (Nat'l Guardianship Ass'n 2000) (amended 2007) (available *infra* in the appendix).

<sup>75</sup> SCOTT & ASCHER, *supra* note 29, § 17.7–8.

<sup>76</sup> STANDARDS OF PRACTICE 19.

<sup>77</sup> SCOTT & ASCHER, *supra* note 29, § 18.1.4.

<sup>78</sup> See *supra* notes 62–68 and accompanying text.

<sup>79</sup> UNIF. TRUST CODE § 802 (2005).

<sup>80</sup> *Id.* (transactions with affiliates of the trustee, including the trustee's spouse, are presumed to be conflicts of interest and prohibited, but presumption may be rebutted).

<sup>81</sup> SCOTT & ASCHER, *supra* note 29, §§ 17.2.11–13.

provisions generally do not define conflicts of interest or provide guidance to the guardian on how to avoid conflicts of interest or the appearance of impropriety.

Standard Twenty-One, “Termination and Limitation of the Guardianship/Conservatorship,” reiterates the goal of limiting the guardianship’s reach and maintaining the ward’s autonomy as much as possible.<sup>82</sup> The guardian is required to limit or terminate the guardianship if the ward has regained capacity, if there are less restrictive alternatives available, when the ward intends to challenge the guardianship, when the ward has died, or “when the guardianship no longer benefits the ward.”<sup>83</sup>

Standard Twenty-Two addresses fees. Guardians are entitled to reasonable fees, but all fees must be documented and approved by the court.<sup>84</sup> The reasonableness of fees is judged based on a list of considerations, similar to the factors used to assess reasonableness of attorneys’ fees.<sup>85</sup> Fees are addressed more fully in another conference paper.<sup>86</sup>

The final three standards relate primarily to professional guardians with multiple wards. Standard Twenty-Three, entitled “Management of Multiple Guardianship Cases,” requires that guardians keep their caseloads to a reasonable size and that guardians evaluate what is a reasonable caseload based not only on number of cases but also the complexity of cases.<sup>87</sup> Standard Twenty-Three does not, however, provide or recommend a case-weighting mechanism.<sup>88</sup> Standard Twenty-Four, entitled “Quality Assurance,” requires that professional guardians have an independent review of their performance at least once every two years, and that the review include a representative sample of cases.<sup>89</sup> Standard Twenty-Five sets forth a procedure for the sale of a guardianship practice and is similar to the ethical rule governing sale of law practices.<sup>90</sup> One particular similarity is the requirement that the guardian sell all or substantially all of its guardianship practice, rather than just a few files.

In addition to the NGA Standards, the NGA has promulgated two other documents: a Code of Ethics for Guardians<sup>91</sup> and Standards for Agencies and Programs Providing Guardianship Services (“Agency Standards”).<sup>92</sup> The Code of

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<sup>82</sup> STANDARDS OF PRACTICE 21 (Nat'l Guardianship Ass'n 2000) (amended 2007) (available *infra* in the appendix).

<sup>83</sup> *Id.*

<sup>84</sup> STANDARDS OF PRACTICE 22.

<sup>85</sup> MODEL RULES OF PROF'L CONDUCT R. 1.5 (2011).

<sup>86</sup> Catherine Seal & Spencer J. Crona, *Standards for Guardian Fees*, 2012 UTAH L. REV. 1575 (2012).

<sup>87</sup> STANDARDS OF PRACTICE 23.

<sup>88</sup> *See id.*

<sup>89</sup> STANDARDS OF PRACTICE 24 (Nat'l Guardianship Ass'n 2000) (amended 2007) (available *infra* in the appendix).

<sup>90</sup> MODEL RULES OF PROF. CONDUCT R. 1.17.

<sup>91</sup> A MODEL CODE OF ETHICS FOR GUARDIANS (Nat'l Guardianship Ass'n 1988).

<sup>92</sup> STANDARDS FOR AGENCIES AND PROGRAMS PROVIDING GUARDIANSHIP SERVICES (Nat'l Guardianship Ass'n 2007).

Ethics covers many of the issues in the NGA Standards. It contains a more in-depth discussion of a guardian's decision-making process and the respect and consideration a guardian must give to the ward's self-determination. It addresses the fiduciary role of a guardian more fully than the NGA Standards and gives examples of fact patterns where the guardian should consider various factors. For example, the Code of Ethics raises the potential appearance of a conflict of interest when the guardian is a potential heir of the ward, and the guardian's actions might therefore be interpreted "as an attempt to protect a future inheritance."<sup>93</sup> The Code recommends that in those circumstances, the guardian should seek court approval so that the guardian can avoid those allegations.<sup>94</sup> The Code offers the guardian advice rather than a list of specific tasks required of a guardian. Summit delegates should consider the advantages and disadvantages of recommending adoption of a Code of Ethics in addition to Standards of Practice, with consideration given to the unique aspect of each document.

The Agency Standards were adopted by the NGA in 2007 and are directed to both public agencies providing guardianship services and private professional guardianship organizations. These standards are inapplicable to family guardians, and specify practices required for running a business of providing guardianship services. Topics addressed include hiring, training and supervision of employees, entity organization, fiscal controls, case management practices, emergency policies, and recordkeeping.<sup>95</sup> The standards require that agencies and their managers comply with the Code of Ethics and the Standards of Practice, but are not applicable to nonagency guardians.

#### *B. Adoption of Standards in Particular States*

Despite the call for adoption of standards, and the comprehensive model produced by the National Guardianship Association, only a handful of states have taken action to incorporate standards for guardians in their regulatory scheme. Only two states have applied the standards to all guardians: Alaska and North Dakota.<sup>96</sup> Alaska is the only state with a statutory mandate for standards for all guardians. The statute was added in 2004 and states:

It is the policy of the state that all guardians and conservators, when making decisions for their wards or protected persons, shall abide by the

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<sup>93</sup> A MODEL CODE OF ETHICS FOR GUARDIANS § II.5 cmt. 19 (Nat'l Guardianship Ass'n 1988).

<sup>94</sup> *Id.*

<sup>95</sup> See generally STANDARDS FOR AGENCIES AND PROGRAMS PROVIDING GUARDIANSHIP SERVICES (Nat'l Guardianship Ass'n 2007) (providing "guidance for programs striving to provide quality guardianship services").

<sup>96</sup> ALASKA STAT. § 13.26.001 (2010); N.D. DEP'T OF HUMAN SERVS., NORTH DAKOTA STANDARDS OF GUARDIANSHIP PRACTICE FOR ADULTS (2006) [hereinafter NORTH DAKOTA GUARDIANSHIP], available at <http://www.nd.gov/dhs/info/pubs/docs/aging/guardianship-standards.pdf>.

highest ethical standards of decision making and shall consider the standards of practice adopted by the department by regulation. The department [of Commerce, Community and Economic Development] shall adopt standards of practice for guardians and conservators and, before doing so, shall review the standards of practice adopted by a national organization with expertise in the area of standards of practice for guardians and conservators, such as the National Guardianship Association.<sup>97</sup>

It does not appear that any standards applicable to all guardians has in fact been adopted by the Department of Commerce, Community and Economic Development,<sup>98</sup> so presumably they are using the National Guardianship Association standards, referenced in the statute, by default. The language of the statute only requires guardians to “consider” the standards, so it is unclear if a guardian that fails to comply with a standard’s requirements would be subject to any liability or court discipline. Alaska requires professional guardians to be licensed,<sup>99</sup> and a licensed guardian who has not complied with the standards established by the Department of Commerce, Community and Economic Development can be disciplined by the Department or lose its license.<sup>100</sup> The standards are therefore mandatory for professional guardians in Alaska.

In North Dakota, the Aging Services Division of the Department of Human Services has adopted the NGA Standards as “North Dakota Guardian” or NDG Standards, and the Department’s document states, “[a]ll NDG standards apply to professional guardians, corporate guardians or family guardians unless otherwise indicated.”<sup>101</sup> There is no indication, however, whether the standards are considered mandatory or aspirational.

Several states have adopted standards that apply to professional guardians only, and these borrow heavily from the NGA Standards. Arizona has a comprehensive licensing program for all fiduciaries, and all guardians who serve for a fee and are not related to the ward must be licensed.<sup>102</sup> Standards of conduct are specified in the Arizona Code of Judicial Administration, adopted by the Arizona Supreme Court.<sup>103</sup> These standards are much less detailed than the NGA Standards. The Arizona standards are mandatory; failure to comply can result in loss of one’s fiduciary license and other sanctions, including civil penalties.<sup>104</sup>

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<sup>97</sup> ALASKA STAT. § 13.26.001.

<sup>98</sup> See ALASKA DEP’T OF COMMERCE, COMMUNITY, & ECON. DEV., <http://www.dced.state.ak.us/> (last visited Mar. 12, 2012).

<sup>99</sup> ALASKA STAT. § 08.26.010.

<sup>100</sup> *Id.* § 08.26.130(2).

<sup>101</sup> NORTH DAKOTA GUARDIANSHIP, *supra* note 96, at 1.

<sup>102</sup> ARIZ. REV. STAT. ANN. § 14-5651(J)(1)(a) (2005).

<sup>103</sup> ARIZ. CODE JUD. ADMIN. § 7-202(J) (2009).

<sup>104</sup> ARIZ. REV. STAT. ANN. § 14-5651(D) (2006).

California also licenses professional fiduciaries under statutes adopted in 2007 in consultation with the NGA.<sup>105</sup> All licensed fiduciaries, which include professional guardians, must abide by the Professional Fiduciaries Code of Ethics, adopted by administrative rule.<sup>106</sup> The Code of Ethics contains standards similar to the Arizona standards, again covering the same issues and philosophy as the NGA Standards but with much less detail.<sup>107</sup> Violation of the Code of Ethics can result in administrative citations, fines, probation, and license suspension or revocation.<sup>108</sup>

In Texas, there is a statutory requirement that the Guardianship Certification Board issue minimum standards for professional guardians.<sup>109</sup> These minimum standards were developed in consultation with the NGA, with modification, omissions, and revisions to comply with existing state law and practice.<sup>110</sup> The Guardianship Certification Board can discipline a professional guardian who fails to comply with the minimum standards.<sup>111</sup>

Washington has a system similar to Texas for licensing professional guardians. Certification is required and there is a Certified Professional Guardian Board appointed by the Washington Supreme Court,<sup>112</sup> which has adopted standards of practice for professional guardians.<sup>113</sup> These standards are similar to those in Arizona and California, with much less detail than the NGA Standards. The standards are minimum, mandatory standards and a professional guardian can be disciplined by the board for failure to comply.<sup>114</sup>

Finally, New Hampshire requires, by court order, that all professional guardians be certified by the Center for Guardianship Certification and that all professional guardians adhere to the NGA Standards and Code of Ethics.<sup>115</sup> In Oregon, professional guardians are not required to be licensed or certified but there is an optional certification process through the Guardianship/Conservator Association of Oregon and the Center for Guardianship Certification (CGC).<sup>116</sup> In order to become certified, the applicant must attest that he or she understands the

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<sup>105</sup> CAL. BUS. & PROF. CODE §§ 6500–6592 (West 2003 & Supp. 2012).

<sup>106</sup> CAL. CODE REGS. tit. 16, § 4470-84 (2011).

<sup>107</sup> See CAL. CODE REGS. tit. 16, § 4470-84 (2011).

<sup>108</sup> CAL. BUS. & PROF. CODE § 6580 (West 2003 & Supp. 2012).

<sup>109</sup> TEX. GOV'T CODE ANN. § 111.041 (West 2005).

<sup>110</sup> *Minimum Standards for Guardianship Services*, TEX. CT. ONLINE (Feb. 11, 2011), <http://www.courts.state.tx.us/gcb/pdf/MinimumStandards.pdf>.

<sup>111</sup> *Complaints/Disciplinary Procedures*, TEX. CT. ONLINE (Mar. 14, 2011), <http://www.courts.state.tx.us/gcb/procedures.asp>.

<sup>112</sup> WASH. REV. CODE §§ 11.88.008, 11.88.020 (2006); WASH. SUP. CT. GEN. RULE 23 (2010).

<sup>113</sup> See *Standards of Practice Regulation*, WASH. CTS. (Jan. 31, 2012), [http://www.courts.wa.gov/committee/?fa=committee.child&child\\_id=30&committee\\_id=117](http://www.courts.wa.gov/committee/?fa=committee.child&child_id=30&committee_id=117).

<sup>114</sup> *Id.*

<sup>115</sup> *State of New Hampshire Probate Court Administrative Order 16*, N.H. JUD. BRANCH (August 28, 2009), <http://www.courts.state.nh.us/probate/padminorders/ao0016.pdf>.

<sup>116</sup> *Professional Guardian Certification*, GUARDIAN/CONSERVATOR ASS'N OR. (Oct. 6, 2011), <http://www.gcaoregon.org/certification.php>.

NGA Standards. The Guardianship/Conservator Association website notes that it is difficult to be appointed guardian without certification, even though it is optional.<sup>117</sup> However, certification is through CGC, and grounds for discipline through CGC's certification process include violation of the NGA Code of Ethics but not the NGA Standards of Practice.<sup>118</sup>

Professional guardians in all states can become certified through CGC regardless of state requirements. CGC credentialed (via examination) nearly 2,000 guardians as "National Certified Guardians" or the more advanced "National Master Guardians" since 1994. The CGC also administers state-specific credentialing exams in Texas, California, Florida, and Oregon. According to the CGC website, a national certified guardian agrees to abide by "universal ethical standards governing a person with fiduciary responsibilities, submits to a disciplinary process, and can demonstrate through a written test an understanding of basic guardianship principles and laws."<sup>119</sup> A person who has been credentialed by the CGC may not be recertified if the person has violated the NGA Code of Ethics.

In Minnesota, there has been no governmental action regarding standards for guardians, but the Minnesota Association for Guardianship and Conservatorship (MAGiC) has developed a comprehensive set of standards (MAGiC Standards). The MAGiC Standards were first drafted in 1989.<sup>120</sup> In 1996, they were revised and a Code of Ethics and a Bill of Rights for Wards and Protected Persons were added.<sup>121</sup> The MAGiC Standards were last revised in 2009.<sup>122</sup> The coverage of issues in the MAGiC Standards is similar to the NGA Standards, but the MAGiC Standards include descriptions and explanations of the duties imposed by Minnesota statutes. The MAGiC Standards also set out substantial detail and examples not contained in the NGA Standards, and there are some variations in emphasis. For example, the MAGiC Standards contain a more extensive discussion about the professional boundaries that the guardian must maintain between the guardian and the ward and between the guardian and the ward's family and friends.<sup>123</sup> The MAGiC Standards specifically warn against accepting gifts from the ward and family members and against the guardian becoming a surrogate

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<sup>117</sup> *Id.*

<sup>118</sup> *Rules and Regulations Regarding Certification and Recertification of National Certified Guardians*, CTR. FOR GUARDIANSHIP CERTIFICATION (Dec. 17, 2011), <http://www.guardianshipcert.org/files/webfiles/NCG%20Rules%20&%20Regulations.pdf>.

<sup>119</sup> *History*, CTR. FOR GUARDIANSHIP (2011), [http://www.guardianshipcert.org/about\\_history.cfm](http://www.guardianshipcert.org/about_history.cfm).

<sup>120</sup> THE MINN. ASS'N FOR GUARDIANSHIP AND CONSERVATORSHIP, available at <http://www.mnnesotaguardianship.org/> (last visited Mar. 18, 2012).

<sup>121</sup> The Minnesota Legislature codified the Bill of Rights in MINN. STAT. ANN. § 524.5-120 (2010).

<sup>122</sup> *Standards of Practice*, MINN. ASS'N FOR GUARDIANSHIP & CONSERVATORSHIP (Nov. 2009), [http://www.mnnesotaguardianship.org/index.php?option=com\\_content&view=category&layout=blog&id=7&Itemid=12](http://www.mnnesotaguardianship.org/index.php?option=com_content&view=category&layout=blog&id=7&Itemid=12).

<sup>123</sup> *Id.* at 7.

family member for the ward.<sup>124</sup> Other differences between the NGA Standards and the MAGiC Standards include:

- The MAGiC Standards allow a professional guardian to sell only a part of its practice,<sup>125</sup> and the NGA Standards allow only a sale of all or substantially all of a practice;
- The NGA Standards stress protection of confidential information of the ward, and the MAGiC Standards do not address confidentiality directly except for a caution in the health care decisions section to “be sensitive to confidentiality issues.”<sup>126</sup>
- The MAGiC Standards regarding investment of the guardianship funds are less specific than the NGA Standards, stating only that the “conservator is subject to fiduciary standards.”<sup>127</sup>
- The NGA Standards recognize the benefit of preserving the ward’s eligibility for governmental benefits, but the MAGiC Standards specify a goal “of avoiding reliance on [governmental reliance] programs.”<sup>128</sup>
- The MAGiC Standards have an extensive section on estate planning for the ward,<sup>129</sup> and the NGA standards only require the guardian to be mindful of the existing estate plan of the ward when managing and disposing of property.
- The Preamble to the MAGiC Standards acknowledges that Minnesota law follows the best interest standard for decision making as opposed to substituted judgment, but states that MAGiC prefers substituted judgment except where wishes of the ward are not known or would be harmful. MAGiC’s expressed preference in the Preamble is consistent with the NGA standards, but in the standards themselves, the substituted judgment standard is less prominent than in the NGA standards.

Other states have pending studies on the adoption of standards of conduct for guardians. For example, in its report to the 2009–2010 state legislature, the Idaho Supreme Court Guardianship and Conservatorship Committee reported:

As specifically directed by the Legislature, the Committee explored options for developing standards of practice for guardians [and conservators]. The Committee discovered that most states with standards have adopted, either outright or with some modification, the Standards of Practice promulgated by the National Guardianship Association (adopted by the National Guardianship Association in 2000, amended in 2007). The Committee has studied and discussed these Standards of Practice

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<sup>124</sup> *Id.* at 8.

<sup>125</sup> *Id.* at 13.

<sup>126</sup> *Id.* at 24.

<sup>127</sup> *Id.* at 33.

<sup>128</sup> *Id.* at 41.

<sup>129</sup> *Id.* at 37–41.

and is working to adapt them as necessary to reflect specific Idaho law and circumstances.<sup>130</sup>

Ohio<sup>131</sup> and Oregon<sup>132</sup> also have existing studies on developing guardian standards. The Nevada legislature recently passed legislation that requires a newly appointed guardian to sign an acknowledgment of a guardian's duties and responsibilities, and the acknowledgment must include:

(1) a summary of the duties, functions and responsibilities of a guardian, including, without limitation, the duty to:

- (I) Act in the best interest of the ward at all times.
- (II) Provide the ward with medical, surgical, dental, psychiatric, psychological, hygienic or other care and treatment as needed, with adequate food and clothing and with safe and appropriate housing.
- (III) Protect, preserve and manage the income, assets and estate of the ward and utilize the income, assets and estate of the ward solely for the benefit of the ward.
- (IV) Maintain the assets of the ward in the name of the ward or the name of the guardianship. Except when spouse of the ward is also his or her guardian, the assets of the ward must not be commingled with the assets of any third party.

(2) A summary of the statutes, regulations, rules *and standards* governing the duties of a guardian.<sup>133</sup>

Presumably a form acknowledgment will be prepared to comply with this new requirement, which will need to set forth asset management standards.

### *C. Standards of Other Organizations*

The State Justice Institute, a nonprofit organization created under federal law to promote justice in state courts,<sup>134</sup> created a Commission on National Probate Court Standards to promulgate standards that could be used as aspirational goals and reference for state courts. The National Probate Court Standards were issued in 1993 and contain several provisions on the role of the court in guardianships. The National Probate Court Standards do not directly address standards applicable to guardians themselves but the NGA Standards are referenced, and the National

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<sup>130</sup> *Guardianship and Conservatorship Monitoring Pilot Projects*, IDAHO SUP. CT., available at <http://www.isc.idaho.gov/links/Guardianship-Conservatorship-FINAL.pdf>.

<sup>131</sup> *Children, Families, & the Courts*, SUP. CT. OF OHIO & OHIO JUD. SYS., <http://www.supremecourt.ohio.gov/JCS/CFC/default.asp> (last visited Mar. 18, 2012).

<sup>132</sup> *Public Guardian and Conservator Taskforce*, OREGON.GOV (Dec. 3, 2010), <http://www.oregon.gov/DHS/spd/adv/gcss/tf/task-force.shtml>.

<sup>133</sup> NEV. REV. STAT. §§ 159.073(1)(c)(1)–(2) (2011) (emphasis added).

<sup>134</sup> *About SJI*, STATE JUSTICE INST., <http://www.sji.gov/about.php> (last updated 2008).

Probate Court Standards recommend that courts adopt or adapt the NGA Standards as training materials for appointed guardians.<sup>135</sup>

The Council on Accreditation, an international health care accrediting association, has issued standards for accrediting guardianship programs.<sup>136</sup> These standards were developed after consultation with the National Guardianship Association, and follow the intent of the NGA Standards. There are eleven categories of standards:

- Service Philosophy
- Community Outreach
- Screening and Intake
- Assessment
- Guardianship Planning, Monitoring, and Accountability
- Conflict of Interest
- Frequency of Contact
- Guardian of the Person
- Guardian of the Estate
- Case Closing
- Personnel<sup>137</sup>

The National Association of Professional Geriatric Care Managers has adopted Standards of Practice and a Code of Ethics.<sup>138</sup> Standard Nine, entitled “Undertaking Fiduciary Responsibilities,” provides that if the geriatric care manager takes on the role as guardian, it is recommended that the manager “be knowledgeable of and adhere to the National Guardianship Association’s Standards of Practice.”<sup>139</sup>

#### *D. Existing Guidelines in State Statutes*

State guardianship statutes give some guidance to guardians and address some of the issues covered in the NGA Standards, albeit in very broad statements. Many states have some statement of the basis of the guardian’s decision-making. For example, the Uniform Guardianship Proceedings Act provides that “[a] guardian, in making decisions, shall consider the expressed desires and personal values of

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<sup>135</sup> *National Probate Court Standards*, COMM’N ON NAT’L PROB. CT. STANDARDS & ADVISORY COMM. ON INTERSTATE GUARDIANSHIPS, at standards 3.3.13, 3.4.13, available at [http://www.probatect.org/ohioprobatecourts/pdf/national\\_probate\\_standards.pdf](http://www.probatect.org/ohioprobatecourts/pdf/national_probate_standards.pdf) (last visited Jun. 9, 2012).

<sup>136</sup> *Adult Guardianship*, COUNCIL ON ACCREDITATION, [http://www.coastandards.org/standards.php?navView=private&section\\_id=154](http://www.coastandards.org/standards.php?navView=private&section_id=154) (last updated 2008).

<sup>137</sup> *Id.*

<sup>138</sup> *Standards of Practice*, NAT’L ASS’N PROF’L GERIATRIC CARE MANAGERS, <http://www.caremanager.org/about/standards-of-practice/> (last updated 2012).

<sup>139</sup> *Id.*

the ward to the extent known to the guardian. A guardian at all times shall act in the ward's best interest and exercise reasonable care, diligence, and prudence.”<sup>140</sup>

The Uniform Act therefore recognizes both the best interests and substituted judgment standards, but the act does not address how to balance the two standards as the NGA Standards do.<sup>141</sup> Other state statutes specify only a best-interests standard for guardian decision-making.<sup>142</sup>

Other issues addressed by the NGA Standards that are raised in state statutes include the need to protect the ward’s autonomy as much as possible<sup>143</sup> and the need to take steps if the ward regains capacity to an extent that the guardianship should be terminated or limited.<sup>144</sup> The Uniform Act requires that the guardian “become or remain personally acquainted with the ward and maintain sufficient contact” to the extent sufficient to keep informed of the ward’s situation.<sup>145</sup> This language is not as specific as the NGA Standards requirement that the guardian visit once a month, but the need to keep in touch is acknowledged.

Statutory duties are more specific in requiring reporting to the court, and statutes often will address the scope of the guardian’s authority with respect to health care decisions.<sup>146</sup> Several statutes have specific provisions regarding management of property that mirror the NGA Standards. For example, the Uniform Act contains a provision prohibiting transactions involving “substantial conflicts of interest,” defined as any transaction between the guardianship estate and the guardian, the guardian’s spouse or descendant, agent or lawyer, or a corporation in which the guardian has a significant interest, unless the court approves the transaction.<sup>147</sup> The standard is narrower than the NGA’s regulation of a guardian’s dealings with the guardianship estate.<sup>148</sup> State statutes frequently contain other standards regarding financial management, such as a requirement that the guardian follow the prudent investor standard.<sup>149</sup> Guardianship fees and residential decision-making are also addressed in some state statutes.<sup>150</sup> These examples illustrate that state statutes recognize the scope of the guardian’s responsibilities but fall short in giving the guardian specific guidance in what the guardian should do to carry out those duties properly.

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<sup>140</sup> UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 314 (1997).

<sup>141</sup> See *supra* note 51 and accompanying text.

<sup>142</sup> See Frolik & Whitton, *supra* note 28, at 1497 nn.24–30.

<sup>143</sup> See, e.g., WASH. REV. CODE § 11.92.043 (2006 & Supp. 2012).

<sup>144</sup> See, e.g., MINN. STAT. §§ 524.5-310(e), 524.5-409(e) (2010) (requiring guardian to send to ward annual notice of right to request modification or termination of guardianship).

<sup>145</sup> UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 314(b)(1).

<sup>146</sup> See Dayton, *supra* note 28, at 1345–46.

<sup>147</sup> UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 423.

<sup>148</sup> See *supra* Part III(b).

<sup>149</sup> See Fleming & Morgan, *supra* note 28, at 1296–1305.

<sup>150</sup> See Karp & Wood, *supra* note 28, at 1473–80; Seal & Crona, *supra* note 86, at 1604.

#### IV. THE ROLE OF STANDARDS AND ETHICS CODES FOR GUARDIANS

Perhaps the progress on the development of standards has been slow because the role of standards—once adopted—has not been fully explored. Standards are clearly important to give guidance to guardians, particularly family guardians who are inexperienced in the role and professional guardians in states without active state guardianship associations. Training has been regularly stressed as one solution to the failings of the guardianship system,<sup>151</sup> and standards serve as a critical training tool. However, once standards are adopted by a court or legislature, the question becomes whether negative consequences flow from falling short of those standards.

An additional problem is whether the same set of standards, and the same consequences for failure, should apply to all guardians, professional and family, or whether standards should be used in different ways for the different types of guardians. This section first looks at the few instances where courts have looked to existing standards in evaluating guardians' performance, considers the role standards play in administering other fiduciary relationships, and then raises the various issues that must be addressed in order to move forward in promoting widespread use of standards for guardians.

##### *A. Use of Standards by the Courts*

There are only a handful of cases referring to the guardian standards, which is unsurprising since so few jurisdictions have officially recognized any system of standards. In one of the cases, *In re Guardianship of Stephens*,<sup>152</sup> the issue was whether a family member or professional guardian should serve as guardian. The Florida court noted that one advantage of a professional guardian was that it was subject to the NGA Standards whereas a family member was not. The court stated,

We would further note that the appointment of a professional guardian in this case is even more appropriate because such guardians, unlike family members, adhere to objective, national standards under the auspices of the National Guardianship Association, available at <http://www.guardianship.org/pdf/standards.pdf>. Family members, regardless of their good intentions, are not required to adhere to these standards nor do they generally have prior guardian training or experience.<sup>153</sup>

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<sup>151</sup> See, e.g., SEN. GORDON H. SMITH & SEN. HERB KOHL, S. SPEC. COMM. ON AGING, GUARDIANSHIP FOR THE ELDERLY: PROTECTING THE RIGHTS AND WELFARE OF SENIORS WITH REDUCED CAPACITY (2007).

<sup>152</sup> 965 So. 2d 847 (Fla. Dist. Ct. App. 2007).

<sup>153</sup> *Id.* at 851 n.9.

The court recognized the utility of the standards in ensuring good performance by the guardian, and impliedly recognized the problem presented by untrained family guardians who receive little assistance from the court.

The only reported class action suit against a professional guardian is *Tenberg, et al v. Washoe County Public Administrator and Washoe County*.<sup>154</sup> In *Tenberg*, a publicly funded senior law advocacy group representing clients under guardianship with the Washoe County, Nevada, Public Guardian's Office sought declaratory judgment, alleging that "[d]efendants have failed and continue to fail to adequately and properly perform such duties or to provide the level, quantity, nature and/or quality of care, maintenance, education and habilitation that based on current standards of basic case management must be provided to satisfy such statutes and constitutional requirements and or to ensure same."<sup>155</sup>

In the petition, which was filed in 1999 before more recent legislative reform, the plaintiffs alleged the Washoe County Public Guardian's Office failed to meet "current standards of care," and noted that "though Nevada has not yet formally developed any such standards," the Public Guardian nevertheless was obligated to provide "proper" standards of care to its clients.<sup>156</sup> The plaintiffs further alleged that the deficiencies in the operations of the Washoe County Public Guardian's Office resulted in an improper deprivation of liberty under the Nevada Constitution.<sup>157</sup>

Washoe County raised a number of affirmative defenses, and argued that there were no clearly articulated standards for guardians within Nevada statute and that the NGA Standards of Practice were aspirational and not mandatory in nature. Through a process of negotiation and mediation, all issues between the plaintiffs and Washoe County were resolved and the Washoe County Public Guardianship Program undertook a process of quality improvement and reform. The Washoe County Public Guardianship Program is now arguably one of the model public guardianship offices in the United States.

The absence of established standards of practice for all guardians—private or public, family or professional, compensated or uncompensated—raises the potential for similar costly and time-consuming litigation with every court-appointed guardian in every jurisdiction in this country.

In a trio of cases from Minnesota, all involving the same professional guardian, the court considered holding the guardian to the standards of the Minnesota Association of Guardianship and Conservatorship, even though those standards were prepared by a private organization. In *In re Guardianship and Conservatorship of Doyle*,<sup>158</sup> the trial court reviewed billing records and annual accounts filed by the guardian, refused to accept the accounts and held that the fees

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<sup>154</sup> *Tenberg v. Washoe Cnty. Pub. Adm'r & Washoe Cnty.*, No. CV99-01170 (Washoe Cty. Nev. 1999).

<sup>155</sup> Complaint for Declaratory Injunctive and Other Relief at 2, *Tenberg v. Washoe Cnty. Pub. Adm'r & Washoe Cnty.*, No.CV99-01170 (Washoe Cnty., Nev. Mar. 3, 1999).

<sup>156</sup> *Id.* at 10.

<sup>157</sup> *Id.* at 11.

<sup>158</sup> 778 N.W.2d 342 (Minn. Ct. App. 2010).

billed were excessive.<sup>159</sup> It evaluated the practices of the guardian by use of the MAGiC Standards of Practice as well as the fee policy applicable in the county for fees of a guardian of an indigent ward.

The trial court had taken judicial notice of these two standards, and the appellate court held that taking judicial notice of the MAGiC Standards was not proper since they were not a legislative document.<sup>160</sup> The case was remanded and the trial court ordered to include the MAGiC Standards (and the county's fee policy) in the record and give the guardian the opportunity to challenge the standards and present other evidence.<sup>161</sup> Two unreported companion cases decided on the same day, *In re Guardianship and Conservatorship of Hohenauer*,<sup>162</sup> and *In re Guardianship and Conservatorship of Langa*,<sup>163</sup> had identical holdings. The cases are interesting as a rare example of a court evaluating a guardian's performance using a code of standards to indicate industry custom and practice. The trial court used the MAGiC Standards to find that the guardian's accounting and billing fell below the standards, and that the guardian's fees could be denied on that basis.<sup>164</sup>

Finally, in an unreported Washington case also involving a professional guardian, the court applied the Certified Professional Guardian Standards of Practice in evaluating the guardian's performance. As noted above, in Washington, professional guardians are required to be certified, and compliance with the state's Standards of Practice is mandatory.<sup>165</sup> In *In re Guardianship of Stamm*,<sup>166</sup> the guardian was sued by its former ward, who was alleging breach of fiduciary duties and requesting return of all fees paid to the guardian.<sup>167</sup> The ward alleged two violations of the guardianship standards. First, he claimed that the guardian violated the substituted judgment standard<sup>168</sup> because the guardian recommended

<sup>159</sup> *Id.* at 345.

<sup>160</sup> *Id.* at 348–50.

<sup>161</sup> *Id.* at 350.

<sup>162</sup> No. A09-448, 2010 Minn. Ct. App. LEXIS 94 (Minn. Ct. App. Feb. 2, 2010).

<sup>163</sup> No. A09-451, 2010 Minn. Ct. App. LEXIS 90 (Minn. Ct. App. Feb. 2, 2010).

<sup>164</sup> *In re Guardianship & Conservatorship of Hohenauer*, 2010 Minn. Ct. App. 94, at \*2–3; *In re Guardianship & Conservatorship of Langa*, 2010 Minn. Ct. App. 90, at \*3–4.

<sup>165</sup> See *supra* notes 113–115 and accompanying text.

<sup>166</sup> No. 53334-7-I, 2005 Wash. Ct. App. LEXIS 3030 (Wash. Ct. App. Nov. 28, 2005).

<sup>167</sup> *Id.* at \*5–6.

<sup>168</sup> “The primary standard for decision making is the Substituted Judgment Standard. . . . The guardian shall make reasonable efforts to ascertain the incapacitated person’s historic preferences and shall give significant weight to such preferences. Competent preferences may be inferred from past statements or actions of the incapacitated person.” *Standards of Practice Regulation*, WASH. CTS., at standard 405.1 (Jan. 31, 2012), [http://www.courts.wa.gov/committee/?fa=committee.child&child\\_id=30&committee\\_id=117](http://www.courts.wa.gov/committee/?fa=committee.child&child_id=30&committee_id=117); see also *id.* at standard 405.2 (“When the competent preferences of an incapacitated person cannot be ascertained, the guardian is responsible for making decisions which are in the best interests of the incapacitated person. A determination of the best interests of the incapacitated person shall include consideration of the stated preferences of the incapacitated person . . . ”).

that a woman companion be removed from his home. He did not want her to leave, and he argued that the substituted judgment standard required the guardian to "do what the ward would want, not what the guardian would want or what a reasonable person would do."<sup>169</sup> The court held that the guardian properly applied the substituted judgment standard because the guardian is only bound to consider the ward's preferences but not bound to follow them, and in this instance, there were concerns about the woman companion.<sup>170</sup> The ward also alleged that the guardian failed to comply with the standard of practice requiring a guardian to seek out information regarding termination of the guardianship.<sup>171</sup> The court again held that the guardian properly followed the standards because there were no changes in the ward's circumstances that would have triggered the guardian's duty to explore termination.<sup>172</sup> The *Stamm* case is a rare, but useful, example of a court applying mandatory standards to a guardian's conduct.

### B. Optimal Use of Standards

The *Stamm* case and the Minnesota cases illustrate how standards can be a useful tool to measure a guardian's performance when challenged. Without standards, courts are left to judge guardians' actions on an *ad hoc* basis. Other than clear-cut failures by guardians, such as misappropriation of guardianship funds or failure to file required reports, a reviewing court may be reluctant to fault guardians for a failure to perform up to a standard that was not previously communicated to the guardian. Standards also aid guardians, as seen in the *Stamm* case, where the language of the standards supports the course of action taken by the guardian. These cases involved professional guardians, however, and while one relied on mandatory standards, in the Minnesota cases the court was attempting to hold a guardian to standards issued as guidelines by a private organization.

These facts illustrate three critical questions about standards that require deliberation and resolution. First, should standards be adopted as mandatory? If so, which governmental body should adopt these standards? Second, should standards be mandatory for all guardians or just professional guardians? Finally, what should be the consequences of violating standards, and how should the consequences affect the content of the standards? If a jurisdiction has not adopted mandatory standards, to what extent can courts rely on standards proposed by private organizations to judge a particular guardian's actions?

The first issue regarding the role of standards as mandatory minimums or aspirational best practices is a central issue that the guardianship community should address directly in the call for the adoption of standards. There is

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<sup>169</sup> *In re Guardianship of Stamm*, 2005 Wash. Ct. App. Lexis 3030, at \*10.

<sup>170</sup> *Id.* at \*10–12. The woman companion was the primary cause for the ward's children to initiate the guardianship proceeding.

<sup>171</sup> *Stamm*, 2005 Wash. App. LEXIS 3030, at \*14 (quoting from Washington Certified Professional Guardianship Standard 407.1).

<sup>172</sup> *Id.*

experience with using standards as mandatory in the context of professional guardians in the states of Washington, Arizona, California, Texas, and New Hampshire.<sup>173</sup> The governing regulations in several of those states spell out the penalties for violation of the standards, including discharge, civil penalties, and revocation of the guardian's license.

There is no reported data on specific disciplinary actions and whether actions are taken against guardians for violations other than egregious acts that would be clearly actionable even in the absence of standards. Guardians could presumably be concerned about discipline from licensing agencies for minor infractions of the standards, which apparently has been an issue in Arizona,<sup>174</sup> but one could hope that most licensing agencies would not have the resources or inclination to pursue such cases. Individual family members of wards may challenge a guardian's performance based on the standards, and may challenge all or part of a guardian's fee on that basis; thus, any failure to meet mandatory standards may threaten the guardian's right to compensation. The NGA Standards are much more detailed than the mandatory standards in Washington, Arizona, and California, but in Texas and New Hampshire, guardians are held to standards substantially the same as the NGA Standards, presumably without creating an undue burden on guardians. There is therefore precedent for mandatory standards.

A review of the standards themselves reveals that the standards are not overly burdensome. Several of them create a duty to consider certain factors, but do not require the guardian to act on those considerations, leaving considerable room for the discretion of the guardian.<sup>175</sup> This was the case in *Stamm*, where the guardian weighed the ward's desires to stay in contact with his companion, but nevertheless petitioned to have the woman removed from the ward's home because of concern for his safety.<sup>176</sup> The language of the NGA Standards makes it difficult to find that a guardian has violated the standard.<sup>177</sup> For example, NGA Standard Eight requires the guardian to "carefully evaluate the alternatives . . . and choose the one that best meets the needs of the ward while placing the least restrictions on his or her freedom, rights and ability to control his or her environment."<sup>178</sup> The standard requires that the guardian weigh risks and benefits and balance the ward's independence, self-determination, and the ward's safety. The guardian "shall strive to know the ward's preferences." Seen as an aspirational best practice, the standard gives the guardian guidelines for the guardian's decision-making. As a mandatory standard, however, violation of the standard would be extremely difficult to

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<sup>173</sup> See *supra* notes 103–115 and accompanying text.

<sup>174</sup> See Fleming & Morgan, *supra* note 28, at 1285.

<sup>175</sup> E.g., STANDARDS OF PRACTICE 4.I-II (Nat'l Guardianship Ass'n 2000) (amended 2007) (available *infra* in the appendix) (encouraging the guardian to help the ward maintain relationships with family and friends but allowing the guardian to make judgments whether such relationships are beneficial).

<sup>176</sup> See *supra* notes 168–173 and accompanying text.

<sup>177</sup> For the NGA Standards that apply to the issue in *Stamm*, see STANDARDS OF PRACTICE 4, 7.

<sup>178</sup> STANDARDS OF PRACTICE 8.I.

establish as long as the guardian had a reasonable basis for making a decision that related to either the guardian's safety or independence.

A review of each specific standard should be made with this type of analysis in mind. Even so, this example illustrates that the standards are written so that they serve as best-practices tools. They can serve as educational material on what an optimal guardian's processes would be, but making them mandatory should not be overly burdensome on the guardian. The types of requirements in the standards that a guardian would likely be held to violate would relate to core practices that should be a minimum standard rather than aspirational. These include visiting the ward once a month, reporting to the court, developing a written guardianship plan, avoiding conflicts of interest, and following specific financial practices when dealing with the ward's assets.

As long as the standards are drafted to give guidance without mandating specific actions except for core responsibilities, making compliance mandatory would not be unreasonable and would have the significant benefit of requiring the guardian to take the standards seriously. If the standards are only aspirational, a guardian, often already overwhelmed by the task, may not make study of the standards a priority. Nonetheless, the recommendation of whether to make standards mandatory must take into account the actual wording of the standards and the specific issues addressed by each standard.

The next issue to consider is the format to adopt standards. Existing models are the statutory mandate, with direction to an agency to adopt standards, standards adopted as agency regulations, and court rules. In the 1988 Congressional Report, "Surrogate Decision-Making For Adults: Model Standards to Ensure Quality Guardianship and Representative Payeeship Services,"<sup>179</sup> Representative Bonker noted that "one effective means" would be to incorporate standards into state legislation.<sup>180</sup> The advantage of including standards in the statutory scheme is that standards would seem more authoritative and binding on guardians. Adoption of standards as statutes has significant disadvantages, however. There are existing minimum standards in statutes now, such as the reporting requirements,<sup>181</sup> but the addition of a comprehensive set of standards into a statutory scheme would be cumbersome and less flexible than the other alternatives. Legislative action is slow and costly, particularly in states where the legislature does not meet annually and in the current economic climate where state legislatures must focus their limited time on budget issues. Therefore, anything more than a statutory mandate for standards, similar to the Alaska statute,<sup>182</sup> would not be recommended.

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<sup>179</sup> S. COMM. ON HOUS. AND CONSUMER INTERESTS, 100TH CONG., SURROGATE DECISIONMAKING FOR ADULTS: MODEL STANDARDS TO ENSURE QUALITY GUARDIANSHIP AND REPRESENTATIVE PAYEESHIP SERVICES (Comm. Print 1988).

<sup>180</sup> *Id.* at v.

<sup>181</sup> See *supra* notes 141–151 and accompanying text.

<sup>182</sup> See ALASKA STAT. § 13.26.001 (2010) ("It is the policy of the state that all guardians . . . shall consider the standards of practice adopted by the department by regulation.").

Agency regulation is used in the states that mandate standards for professional guardians.<sup>183</sup> This approach has the advantage of more flexibility in amendment and allows for some public input in the agency rulemaking.<sup>184</sup> One limitation on agency rulemaking is jurisdiction: generally, the agency promulgating the standards for professional guardians is the agency that licenses such guardians. However, if the standards are applied to all guardians, as opposed to only licensed professional guardians, the state agency is not involved in oversight of private guardians. Agency personnel may not have experience with family guardians and may not be responsive to the needs of family guardians.

The most appropriate source of the standard may be the courts. All guardians are subject to court supervision, and if standards were issued as court rules adopted by state supreme courts, the Supreme Court judges could rely on the experiences of lower court judges in guardianship administration. Another factor weighing in favor of the court rule format is the fact that courts will be the primary enforcers of the standards. In individual cases, it will be the supervising court making the determination that the standards have been violated, although agencies issuing licenses to professional guardians are also responsible for disciplining licensed guardians. The National College of Probate Judges input group for the Summit supported the concept of standards as court rules.<sup>185</sup> While general recommendations can be made, there may be local considerations that make a certain option more advantageous in a particular state. Also, there may be coordination issues in states that license professional guardians. A dual system of standards, one court-adopted set for all guardians and one agency-adopted set applicable to professional guardians, should be avoided, so some cooperation between the licensing agency and the court would be necessary.<sup>186</sup>

The applicability of standards to professional guardians, when standards exist, has been universally accepted, but the extension of those standards to family guardians is much less prevalent. It is understandable that regulators believe professional guardians should be held to higher standards, for several reasons. Professional guardians have a profit motive rather than a personal connection with the ward, so there is a greater need to impose requirements of becoming familiar with the ward's viewpoints and situation and a greater need for protection. Also, family guardians are usually in a "good Samaritan" position, with other demands on their time, so regulators would be reluctant to impose additional duties on them. Finally, just as agents with special expertise are held to higher standards than

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<sup>183</sup> See *supra* notes 103–115 and accompanying text.

<sup>184</sup> See, e.g., REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 306 (2010) (addressing public participation for agency-proposed rules).

<sup>185</sup> Notes of Terry Hammond on National College of Probate Judges Input Session for Third National Guardianship Summit (May 13, 2011) (on file with author).

<sup>186</sup> Note, however, that the courts in Arizona, Texas, California, and Washington enforce the agency-adopted standards when they are applied in individual cases. See, e.g., *In re Stamm*, No. 53334-7-I, 2005 Wash. App. LEXIS 3030 (applying the Washington Certified Professional Guardian Standards of Practice).

inexperienced agents,<sup>187</sup> family guardians will generally have less experience with guardianship administration.

Nevertheless, many family guardians have expressed a preference to be held to the same standards as professionals. The authors of the 1988 Congressional report on guardianship standards noted that when they once suggested that family guardians be held to less stringent standards, they were “immediately reprimanded by a volunteer guardian who felt he should be held to just as strong a standard as a paid guardian.”<sup>188</sup> A Family Guardian Focus Group convened for the purpose of making recommendations to the 2011 conference attendees agreed that the same standards should apply to all guardians.<sup>189</sup> Family guardians are not an organized group so consensus cannot be obtained. The concern expressed by some, however, is that unless family guardians are held to similar standards as professionals, they will garner less respect in the role as guardian, and their decisions and recommendations will not receive the same deference as those of professionals.

Even with a general approach of requiring all guardians to comply with the standards, some standards may apply only to professional guardians, for example, the standards relating to management of multiple guardianship cases. In the review and creation of any set of standards, the optimal approach may be to apply the standards to all guardians except where the standard addresses the peculiar situation of either a professional or family guardian.

The remaining question is the use of standards in evaluating individual guardian performance. If standards are mandatory, a guardian who falls below a particular standard should presumably face some consequences. As noted above,<sup>190</sup> Washington, Arizona, California, and Texas specifically authorize the agency that licenses professional guardians to impose discipline on a guardian that falls below the standards. Sanctions include civil penalties, suspension, and revocation of a guardian’s license.<sup>191</sup> More critical than agency discipline of professional guardians is the issue of court sanctions in individual cases, which would cover both professional and family guardians. The recommendations on this issue are key to a successful response to the general recommendation on adoption of standards. If sanctions are overly harsh, particularly with respect to family guardians, there may be opposition to the adoption of mandatory standards. On the other hand, if there is little or no risk of sanctions for violating mandatory standards, other than the most flagrant violations such as misappropriation of funds, mandatory standards would serve no purpose. The obvious sanctions available to a court include denial of fees, reduction of fees, and removal. Other sanctions may be more remedial, such as requiring additional training or a mentor guardian.

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<sup>187</sup> See RESTatement (THIRD) OF AGENCY § 8.08 (2006).

<sup>188</sup> S. COMM. ON HOUS. AND CONSUMER INTERESTS, *supra* note 179, at ONE-25, ONE-26.

<sup>189</sup> Family Guardian Focus Grp., Recommendations on Guardian Standards Prepared for the Third National Guardianship Summit (Aug. 2011) (on file with author) (agreeing in Standard One that the same standard should apply to all guardians).

<sup>190</sup> See *supra* notes 103–115 and accompanying text.

<sup>191</sup> See *supra* notes 103–115 and accompanying text.

Recommended sanctions may be best addressed in the context of individual standards. Certainly, the courts should play a major role in devising any recommendations with regard to sanctions. A campaign to encourage adoption of standards must, however, include recommendations regarding how those standards would be enforced.<sup>192</sup>

It should also be noted that guardians can benefit from mandatory standards, because they provide a clear measuring tool that can validate their actions. The *Stamm* case is an example of that.<sup>193</sup> The rise of oppositional groups supported by family members disaffected by the guardianship process, including those who have been removed without notice, fined, or required to post high bonds, cannot be dismissed or avoided.<sup>194</sup> Clearly articulated standards for all guardians would provide the guardians, judges, and persons under guardianship with universally understood guidelines for decision-making.

If a jurisdiction has not adopted standards, the standards now available through private organizations either on the national or state level can be used by courts to measure a guardian's performance. In the Minnesota cases discussed above,<sup>195</sup> the court looked to the standards created by the Minnesota Association for Guardianship and Conservatorship as an indication of practice in the industry to judge the particular guardian's performance. The cases were remanded because the judge had merely taken judicial notice of the standards.<sup>196</sup> Assuming that the standards were properly admitted, however, was it proper to hold a guardian to

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<sup>192</sup> The separate issue of how the standards might be used in actions brought by third parties against guardians is not addressed in this Article. Those actions turn on whether the guardian is entitled to immunity from suit as a result of the court appointment, and that law is unsettled and varies from state to state. *See Gross v. Rell*, 585 F.3d 72, 96 (2d Cir. 2009) (questioning whether court-appointed conservator entitled to qualified immunity certified to Connecticut supreme court); WISC. STAT. ANN. § 54.18(4) (West 2006); UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 316 (1997). Note, however, that the *Stamm* case involved a ward suing the professional guardian, and the court applied the standards required of professional guardians to evaluate the claim. *See supra* notes 161–165 and accompanying text.

<sup>193</sup> *See supra* notes 161–165 and accompanying text.

<sup>194</sup> See, e.g., NAT'L ASS'N TO STOP GUARDIAN ABUSE, <http://www.stopguardianabuse.org> (last visited March 13, 2012) (advocating against guardian abuses of power); MARKED FOR DESTRUCTION, <http://www.markedfordestruction.com> (last visited March 13, 2012) (advocating against elder financial fraud and probate court abuse); ESTATE OF DENIAL, <http://www.estateofdenial.com> (last visited March 13, 2012) (advocating against estate management abuse); GUARDIAN REFORM ADVOCATES FOR THE DISABLED & ELDERLY (G.R.A.D.E), <http://www.facebook.com/pages/GRADE-Guardianship-Reform-Advocates-for-the-Disabled-Elderly/152914148068750> (last visited March 13, 2012) (Facebook page of a group advocating for guardian reform).

<sup>195</sup> *See supra* notes 161–165 and accompanying text.

<sup>196</sup> E.g., *In re Guardianship of Doyle*, 778 N.W.2d 342, 350 (Minn. Ct. App. 2010) (“Finally, because they are akin to an expert opinion by a non-official organization about the Standard of Practice, it was error to take judicial notice of them.”).

standards created by an advocacy group that had no binding effect? It is a basic principle of tort law that a professional is held to a standard of care based on what a reasonably prudent professional similarly situated would do.<sup>197</sup> Well-accepted standards in the community, such as the MAGiC Standards in Minnesota and the NGA Standards, should therefore be available to a court to evaluate a professional guardian's performance. A family guardian, however, is not a professional and unless the family guardian has been educated by the court in the prevailing community standards for guardians, a court may be loath to discipline a family guardian for anything other than falling short of the mandated statutory duties.

The issues raised in this section are not new questions, but they have not been sufficiently discussed in the conversation about adoption of standards. A message to states from the guardianship community to adopt standards should address these issues specifically.

## V. THE ROLE OF GUARDIAN IN THE FAMILY OF FIDUCIARY RELATIONSHIPS, AND THE USE OF STANDARDS TO DEFINE A GUARDIAN'S FIDUCIARY DUTIES

As noted above, the Wingspread recommendation of a set of standards was based on a concern about failures in court monitoring, and standards were seen as a critical tool for the court to be able to judge an individual guardian's performance. Recommendations were centered on improved court monitoring, which continues to be desirable. In the more than two decades since the AP report, practice indicates that such monitoring is not practicably attainable, particularly in light of the recent economic crisis. Standards can, however, serve as a backup for the failures of court monitoring in addition to making courts' supervisory role easier.

First, standards can be used to educate well-meaning but inexperienced guardians. Education and training of guardians has been another focus of reform efforts. The move to require certification of professional guardians in some states, to ensure that professional guardians have the necessary skills, is part of that reform effort, but training for lay guardians lags far behind. If guardians were given clear standards not only on the scope of their responsibilities but also the bases and the methodology that should be used in decision-making, guardian performance would improve and monitoring would be less needed. Even the open-ended language found in much of the standards, giving advice and frameworks rather than specified tasks, can improve guardian performance.

Essentially, the standards discussed in this Article are a description of a guardian's fiduciary duties. Much of fiduciary duty is couched in fuzzy common law rules, and Professor Tamar Frankel has noted that "the very risk that fuzzy rules pose for fiduciaries could act as a deterrent to violating the law. After all, more people might then avoid coming close to the absolute bright line if they do not know where it precisely is."<sup>198</sup> In fact, the "fuzziness" is particularly

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<sup>197</sup> Roy Ryden Anderson & Walter W. Steele, Jr., *Fiduciary Duty, Tort and Contract: A Primer on the Legal Malpractice Puzzle*, 47 SMU L. REV. 235, 245 (1994).

<sup>198</sup> FRANKEL, *supra* note 41, at 105.

advantageous because the penalties for breach of fiduciary duty are serious, increasing the risks of a breach.<sup>199</sup> The open-ended language of the standards, coupled with potential consequences for failing to meet those standards, would certainly strengthen the “ailing” American guardianship system.

Fiduciary law in general is an acknowledgment of the costs of delegation. Any time one person delegates handling of her affairs to another person, there are risks that the agent to whom the power is delegated will misuse that power. That risk can be managed by monitoring the agent, but monitoring is usually limited and costly.<sup>200</sup> The risk can also be managed by limiting the agent’s power, such as the traditional lists of permissible investments that trustees had to follow.<sup>201</sup> Fiduciary law steps in to manage the risk while allowing the fiduciary sufficient discretion, by holding the unwatched fiduciary to higher standards of scrutiny. Even though no one is watching, the agent is motivated to act in the principal’s best interest under threat of enhanced damages such as disgorgement.<sup>202</sup>

The fiduciary principle is an alternative to direct monitoring. It replaces prior supervision with deterrence, much as the criminal law uses penalties for bank robbery rather than pat-down searches of everyone entering banks. Acting as a standard-form penalty clause in every agency contract, the elastic contours of the fiduciary principle reflect the difficulty that contracting parties have in anticipating when and how their interests may diverge.<sup>203</sup>

A description of the fiduciary duties of a guardian has been generally absent in the fiduciary literature.<sup>204</sup> This omission may be a result of the assumption that court monitoring reduces the need for a detailed description of duties.<sup>205</sup> Because

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<sup>199</sup> *Id.*

<sup>200</sup> Robert H. Sitkoff, *The Economic Structure of Fiduciary Law*, 91 B.U. L. REV. 1039, 1041 (2011).

<sup>201</sup> John H. Langbein & Richard A. Posner, *Market Funds and Trust-Investment Law*, 1976 AM. B. FOUND. RES. J. 1, 3–4 (1976).

<sup>202</sup> Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045, 1051–53 (1991); Sitkoff, *supra* note 200, at 1043.

<sup>203</sup> Frank H. Easterbrook & Daniel R. Fischel, *Corporate Control Transactions*, 91 YALE L.J. 698, 702 (1982).

<sup>204</sup> General scholarly discussions of fiduciary duty may mention guardians as one class of fiduciaries but do not include any discussion of the fiduciary duties specific to that role. See, e.g., FRANKEL, *supra* note 41, at 42–62 (listing “trustees, corporate directors and officers, partners, and agents [as traditional] fiduciaries,” investment managers, and debtors in possession as other fiduciaries, and spouses and mediators as emerging fiduciaries, but neglects to list guardians).

<sup>205</sup> Cf. RESTATEMENT OF TRUSTS § 7 (1935) (stating “[a] guardianship is not a trust”); SCOTT & ASCHER, *supra* note 29, § 2.3.3 (“The functions and duties of a guardian are narrower than those of a trustee, are fixed by law, and do not depend, as in the case of a trust, on the manifestation of anyone’s intention.”).

courts cannot and have not filled that gap, standards for guardians are as necessary as the extensive and centuries-old common law<sup>206</sup> rules governing trustees, in order to properly direct and regulate these fiduciaries. When the standards are viewed as a description of a guardian's fiduciary duties, the issue of whether they should be mandatory or aspirational tilts towards mandatory. Mandatory standards of conduct for fiduciaries with little or no supervision substitute threat of punishment for the missing monitoring.<sup>207</sup> Without a threat of consequences for failing to abide by the standards, the standards lose the force of fiduciary duty and the fiduciary role of the guardian remains undefined.

This gap creates difficulties, as illustrated by the *Tenberg* litigation.<sup>208</sup> Without defined standards, the public guardian argued that it had violated no duties.<sup>209</sup> Such arguments are unacceptable from a fiduciary, but are plausible under guardianship systems with no standards for guardians. As noted by Professor Frankel, while criminal laws are read strictly in favor of the accused, who are allowed to take advantage of legal loopholes, the benefit of the doubt should always work against fiduciaries because of their position of trust.<sup>210</sup>

In defining the extent of the guardian's fiduciary duties, guardians must be placed in the spectrum of fiduciaries. The level and severity of fiduciary duty varies among the types of fiduciaries, depending on the disparity of power between fiduciary and beneficiary. Professor Scott recognized this variation:

The greater the independent authority to be exercised by the fiduciary, the greater the scope of his fiduciary duty. Thus, a trustee is under a stricter duty of loyalty than is an agent upon whom limited authority is conferred or a corporate director who can act only as a member of the board of directors or a promoter acting for investors in a new corporation.<sup>211</sup>

Guardians must be placed at the stricter end of the scale with trustees, because in spite of the court monitoring and the fact that the guardian does not hold actual title to the ward's property,<sup>212</sup> which theoretically restricts a guardian's discretion, the vulnerability of the ward and the amount of control available to the guardian

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<sup>206</sup> Although trustee duties were created by common law, the modern trend is to codify those duties. *See generally* UNIF. TRUST CODE (2010) (stating that the "Uniform Trust Code (2000) is the first national codification of the law of trusts. . . . [and the Uniform Trust Code] will for the first time provide a uniform rule.").

<sup>207</sup> Robert H. Sitkoff, *Trust Law, Corporate Law, and Capital Market Efficiency*, 28 J. CORP. L. 565 (2003).

<sup>208</sup> *See supra* notes 155–158 and accompanying text.

<sup>209</sup> Answer at 4–8, *Tenberg v. Washoe Cnty. Pub. Adm'r*, No. CV99-01170 (Washoe Cnty. Nev. 1999).

<sup>210</sup> FRANKEL, *supra* note 41, at 105–06.

<sup>211</sup> Austin W. Scott, *The Fiduciary Principle*, 37 CALIF. L. REV. 539, 541 (1949).

<sup>212</sup> *See RESTATEMENT (SECOND) OF TRUSTS* § 7 (1959) (stating that "[a] guardianship is not a trust").

outside of the court's view warrant that placement. Other factors that increase the need for strict fiduciary duties include the ease of the beneficiary to exit the relationship. A corporate stockholder can sell his or her shares if there are problems with the performance of the corporate fiduciaries, the officers and directors, but the beneficiary of a trust cannot remove her beneficial interest in the trust.<sup>213</sup> A corporate shareholder can diversify risks of the fiduciary relationship by investing assets in several different companies, whereas a guardianship ward has his or her entire estate subject to this one fiduciary relationship. This increases the ward's vulnerability and in turn should increase the guardian's duties.<sup>214</sup> Guardians should therefore be expressly recognized as fiduciaries with duties comparable to trustees, allowing courts to apply standards in judging guardians' performance with the same scrutiny given to trustees' performance.

Viewing the standards as an expression of a guardian's fiduciary duty can also inform the content of the standards themselves. A particular fiduciary's duty includes the duty to carry out the purpose of the specific relationship. A trustee has a duty to carry out the terms of the trust as set by the trustor,<sup>215</sup> an executor under a will has a duty to carry out the intentions of the testator,<sup>216</sup> and an agent has a duty to follow the instructions of the principal.<sup>217</sup> The fiduciary purpose of a guardianship has never been analyzed in that context, although the underlying questions have been addressed in the context of decision-making standards.<sup>218</sup> If the fiduciary purposes are determined by the person funding and setting up the fiduciary relationship, such as a testator or trustor, then the purpose of a guardianship must be found in the intentions of both the ward and the court. Analogizing to other fiduciary purposes, the purpose of a guardianship should be to a great extent dictated by the life choices made by the ward when competent, altered only to the extent necessary to protect the ward's best interests. A definition of the guardianship purpose can inform guardian decision-making and the content of standards for guardians. For example, if a ward—when competent—had committed to the preservation of an historic business establishment, even though financially unprofitable, the guardian should be able to consider the desires of the ward rather than making decisions regarding the property solely based on economic considerations. Definition of the guardian as fiduciary thus clarifies that the role of guardian is much more complex than caretaker and financial manager.

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<sup>213</sup> Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 676 (2004).

<sup>214</sup> *Id.* at 654–55.

<sup>215</sup> See RESTATEMENT (SECOND) OF TRUSTS § 164 (1959).

<sup>216</sup> WILLIAM M. MCGOVERN ET AL., WILLS, TRUSTS AND ESTATES: INCLUDING TAXATION AND FUTURE INTERESTS 8 (4th ed. 2010).

<sup>217</sup> See RESTATEMENT (SECOND) OF AGENCY § 14 (1958).

<sup>218</sup> See Frolik & Whitton, *supra* note 28, at 1491–1535.

## VI. CONCLUSION

The call for standards for a guardian's performance has been echoed for decades, but very little progress has been made. One can only speculate as to the reasons for this failure, but one obvious method to move the argument forward and see progress is to better understand the use and benefit of standards for guardians. Standards based on the NGA Standards of Practice have been drafted and circulated, and even adopted in several states. These efforts have been noted and praised, but until all states begin to give the standards the force of law, or some other official status, individual guardians and those they serve are all at risk. The potential for improper and illegal deprivations of liberty and property interests by guardians who are not provided with proper and clearly articulated standards for performance, along with the personal and financial exposure assumed by guardians who do not know the standards by which they may be judged, call for immediate action by Summit delegates and policy-makers to address these inadequacies. The Summit delegates should adopt a complete package of recommendations, including standards for all guardians, the most appropriate means of adoption and modes of application of the standards. By doing so, the Summit delegates will, for the first time in the history of American guardianship, promote adoption of basic universal standards for all guardians, and thereby better protect the property and well-being of all Americans under guardianship.

**APPENDIX**  
**NATIONAL GUARDIANSHIP ASSOCIATION**

**STANDARDS OF PRACTICE**

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## PREAMBLE

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

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

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

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

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

This document em'bodies 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. "Guardian," as used in the standards, means guardian of the person, guardian of the estate, or guardian of the person and estate, depending on the standard being addressed.

In this work we have drawn on a number of collective sources. First and foremost have been NGA members who have contributed extensive time and energy and valuable input into the development of these standards. The Model Code of Ethics for Guardians, developed by Michael D. Casasanto, Mitchell Simon, and Judith Roman and adopted by the NGA, has formed the foundation from which the standards were developed. Other very important sources that helped in the creation of our standards of practice are the U.S. Administration on Aging, the AARP, the Center for Social Gerontology, the Michigan Offices of Services for the Aging, and the state associations from Arizona, Washington, California, Illinois, Minnesota, and Michigan. We thank everyone listed above and others for their ongoing commitment to the profession of guardianship.

NOTE: The Standards of Practice were first adopted by the NGA Board of Directors and ratified by the membership in 2000.

The 2003 edition of the NGA Standards of Practice for Guardians incorporates language that came forth from Wingspan 2001, the National Conference on Guardianship Reform. The NGA Ethics and Standards Committee is proud to announce that the NGA Standards of Practice for Guardians have been acknowledged by this national group of guardianship experts and are being endorsed as the model standards to be followed by all guardians in the United States.

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

The 2007 Edition provides minor clarification of the language in the earlier editions without any changes in content.

Please see the NGA Website ([www.guardianship.org](http://www.guardianship.org)) for the most current edition of NGA Standards of Practice.

## NGA STANDARDS OF PRACTICE

### *NGA Standard 1—Applicable Law*

The guardian shall perform duties and discharge obligations in accordance with current state and federal law governing guardianships. The guardian who is certified, registered, or licensed by the Center for Guardianship Certification or by his or her state should be guided by professional codes of ethics and standards of practice for guardians. 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*

- I. Guardianships are established through a legal process and are subject to the supervision of the court.
- II. The guardianship court order determines the authority and the limitations of the guardian.
- III. The guardian shall know the extent of the powers granted by the court and shall not act beyond those powers.
- IV. The guardian shall clarify with the court any questions about the meaning of the order or directions from the court before taking action based on the order or directions.
- V. The guardian must obtain court authorization for actions that are subject to court approval.
- VI. The guardian must submit reports regarding the status of the guardianship to the court as ordered by the court or required by state statute, but not less often than annually.
- VII. All payments to the guardian from the assets of the ward shall follow applicable federal or state statutes, rules, and requirements and are subject to review by the court.

### *NGA Standard 3—The Guardian's Professional Relationship with the Ward*

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

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

*NGA Standard 4—The Guardian's Relationship with Family Members and Friends of the Ward*

- I. The guardian shall recognize the value of family and friends to the quality of life of the ward. The guardian shall encourage and support the ward in maintaining contact with family members and friends when doing so benefits the ward.
- II. The guardian must assist the ward in maintaining or reestablishing relationships with family and friends, except when doing so would not be of benefit to the ward.
- III. When disposing of the ward's assets, the guardian may notify family members and friends and give them the opportunity, with court approval, to obtain assets (particularly those with sentimental value).
- IV. The guardian must make reasonable efforts to preserve property designated in the ward's will and other estate planning devices executed by the ward.
- V. The guardian may maintain communication with the ward's family and friends regarding significant occurrences that affect the ward when that communication would benefit the ward.
- VI. The guardian may keep immediate family members and friends advised of all pertinent medical issues when doing so would benefit the ward. The guardian may request and consider family input when making medical decisions.

Note: Please refer to Standard 11 as it relates to confidentiality issues.

*NGA Standard 5—The Guardian's Relationship with Other Professionals and Providers of Service to the Ward*

- I. The guardian shall treat all professionals and service providers with courtesy and respect and strive to enhance cooperation on behalf of the ward.
- II. The guardian shall develop and maintain a working knowledge of the services, providers, and facilities available in the community.

- III. The guardian must stay current with changes in community resources to ensure that the ward receives high-quality services from the most appropriate provider.
- IV. A guardian who is not a family member guardian shall not provide direct service to the ward. The guardian shall coordinate and monitor services needed by the ward to ensure that the ward is receiving the appropriate care and treatment.
- V. The guardian shall engage the services of professionals (attorneys, accountants, stockbrokers, real estate agents, doctors) as necessary to appropriately meet the needs of the ward.

*NGA Standard 6—Informed Consent*

- I. Decisions the guardian makes on behalf of the ward shall be based on the principle of Informed Consent.
- II. Informed Consent is a person's agreement to a particular course of action based on a full disclosure of facts needed to make the decision intelligently.
- III. Informed Consent is based on complete information regarding:
  - A. Adequate information on the issue;
  - B. Voluntary action; and
  - C. Lack of coercion.
- IV. The guardian stands in the place of the ward and is entitled to the same information and freedom of choice as the ward would have received if he or she were competent.
- V. In evaluating each requested decision, the guardian shall do the following:
  - A. Have a clear understanding of the issue for which informed consent is being sought.
  - B. Determine the conditions that necessitate treatment or action.
  - C. Advise the ward of the decision that is required and determine, to the extent possible, the ward's current preferences.
  - D. Determine whether the ward has previously stated preferences in regard to a decision of this nature.
  - E. Determine the expected outcome of each alternative.
  - F. Determine the benefit of each alternative.
  - G. Determine the risks of each alternative.
  - H. Determine why this decision needs to be made now rather than later.
  - I. Determine what will happen if a decision is made to take no action.

- J. Determine what the least restrictive alternative is for the situation.
- K. Obtain a second medical opinion, if necessary.
- L. Obtain information or input from family and from other professionals.
- M. Obtain written documentation of all reports relevant to each decision.

*NGA Standard 7—Standards for Decision-Making*

- I. Each decision made by the guardian shall be an informed decision based on the principle of A Informed Consent. (See Standard 6.)
- II. SUBSTITUTED JUDGMENT
  - A. Substituted Judgment is the principle of decision-making that substitutes, as the guiding force in any surrogate decision made by the guardian, the decision the ward would have made when competent.
  - B. Substituted Judgment promotes the underlying values of self-determination and well-being of the ward.
  - C. Substituted Judgment is not used when following the ward's wishes would cause substantial harm to the ward or when the guardian cannot establish the ward's prior wishes.
- III. BEST INTERESTS OF THE WARD
  - A. Best Interest is the standard of decision-making the guardian should use when the ward has never had capacity or when the ward's wishes cannot be determined.
  - B. The Best Interest standard requires the guardian to consider the least intrusive, most normalizing, and least restrictive course of action possible to provide for the needs of the ward.
  - C. The Best Interest standard is 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. Best Interest decisions include consideration of the ward's current and previously expressed wishes.

*NGA Standard 8—Least Restrictive Alternative*

- I. The guardian shall carefully evaluate the alternatives that are available and choose the one that best meets the needs of the ward while placing the least restrictions on his or her freedom, rights, and ability to control his or her environment.

- II. The guardian shall weigh the risks and benefits and develop a balance between maximizing the independence and self-determination of the ward and maintaining the ward's protection and safety.
- III. The guardian shall make individualized decisions; the least restrictive alternative for one ward might not be the least restrictive alternative for another ward.
- IV. The following guidelines apply in the determination of the least restrictive alternative:
  - A. The guardian shall become familiar with the available options for residence, care, medical treatment, vocational training, and education.
  - B. The guardian shall strive to know the ward's preferences.
  - C. The guardian shall consider assessments of the ward's needs as determined by specialists. This may include an independent assessment of the ward's functional ability, the ward's health status, and the ward's care needs.

*NGA Standard 9—Self-Determination of the Ward*

- I. The guardian shall provide the ward with every opportunity to exercise those individual rights that the ward might be capable of exercising as they relate to the care of the ward's person.
- II. The guardian shall attempt to maximize the self-reliance and independence of the ward.
- III. The guardian shall understand and advocate for person-centered planning and the least restrictive alternative on behalf of the ward.
- IV. The guardian shall encourage the ward to participate, to the maximum extent of the ward's abilities, in all decisions that affect him or her, to act on his or her own behalf in all matters in which the ward is able to do so, and to develop or regain his or her own capacity to the maximum extent possible.

*NGA Standard 10—The Guardian's Duties Regarding Diversity and Personal Preference of the Ward*

- I. Ethnic, religious, and cultural values:
  - A. The guardian shall determine the extent to which the ward identifies with particular ethnic, religious, and cultural values.
  - B. To determine these values, the guardian shall also consider the following:

1. The ward's attitudes regarding illness, pain, and suffering.
  2. The ward's attitudes regarding death and dying.
  3. The ward's views regarding quality of life issues.
  4. The ward's views regarding societal roles and relationships.
  5. The ward's attitudes regarding funeral and burial customs.
- II. Sexual expression:
- A. The guardian shall acknowledge the ward's right to interpersonal relationships and sexual expression. The guardian must take steps to ensure that a ward's sexual expression is consensual, that the ward is not victimized, and that an environment conducive to this expression in privacy is provided.
  - B. 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 the extent the ward possesses the capacity to consent to the specific activity.
  - C. The guardian shall take reasonable measures to protect the health and well-being of the ward.
  - D. The guardian shall ensure that the ward is informed of birth control methods. The guardian shall consider birth control options and choose the option that provides the ward the level of protection appropriate to the ward's lifestyle and ability, while considering the preferences of the ward. The guardian shall encourage the ward, where possible and appropriate, to participate in the choice of a birth control method.
  - E. The guardian shall protect the rights of the ward with regard to sexual expression and preference. A review of ethnic, religious, and cultural values may be necessary to uphold the ward's values and customs.

*NGA Standard 11—Confidentiality*

- I. The guardian shall keep the affairs of the ward confidential.
- II. The guardian shall respect the ward's privacy and dignity, especially when the disclosure of information is necessary.
- III. Disclosure of information shall be limited to what is necessary and relevant to the issue being addressed.
- IV. The guardian may disclose or assist the ward in communicating sensitive information to the ward's family when the disclosure would benefit the ward.

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

*NGA Standard 12—Duties of the Guardian of the Person*

- I. The guardian shall have the following duties and obligations to the ward unless the order of appointment provides otherwise:
- A. To see that the ward is living in the most appropriate environment that addresses the ward's wishes and needs.
    1. The guardian shall authorize moving a ward to a more restrictive environment only after evaluating other medical and health care options and making an independent determination that the move is the least restrictive alternative at the time, fulfills the current needs of the 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 bases of the decision shall be to minimize the risk of substantial harm to the ward, to obtain the most appropriate placement possible, and to secure the best treatment for the ward.
  - B. To ensure that provision is made for the support, care, comfort, health, and maintenance of the ward.
  - C. To make reasonable efforts to secure for the ward medical, psychological, therapeutic, and social services, training, education, and social and vocational opportunities that are appropriate and that will maximize the ward's potential for self-reliance and independence.
  - D. To keep the affairs of the ward confidential, except when it is necessary to disclose such affairs for the best interests of the ward.
  - E. To seek specific judicial authority when a civil commitment, the dissolution of a marriage, or another extraordinary circumstance is being addressed.
  - F. To file with the court, on a timely basis but not less often than annually, all reports required by state statute, regulations, court rule, or the particular court pursuant to whose authority the guardian was appointed.
  - G. To adhere to the requirements of Standard 17—Duties of the Guardian of the Estate and Standard 18—Guardian of the Estate: Initial and Ongoing Responsibilities, to the extent that the guardian of the person has been authorized by the court to manage the ward's property.
  - H. To petition the court for limitation or termination of the guardianship when the ward no longer meets the standard pursuant

to which the guardianship was imposed, or when there is an effective alternative available.

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

- I. With the proper authority, initial steps after appointment as guardian are as follows:
  - A. The guardian shall address all issues of the ward that require immediate action.
  - B. The guardian shall meet with the ward as soon after the appointment as is feasible. At the first meeting, the guardian shall:
    1. Communicate to the ward the role of the guardian;
    2. Explain the rights retained by the ward;
    3. Assess the ward's physical and social situation, the ward's educational, vocational, and recreational needs, the ward's preferences, and the support systems available to the ward; and
    4. Attempt to gather any missing necessary information regarding the ward.
  - C. After the first meeting with the ward, the guardian shall notify relevant agencies and individuals of the appointment of a guardian and shall complete the intake process by gathering information and ensuring that certain evaluations are completed, if appropriate.
    1. Physician's evaluation: If a comprehensive medical evaluation was not completed as part of the petitioning process, or has not been done within the past year, the guardian should obtain an evaluation of the ward's condition, treatment, and functional status from the ward's treating physician, or appropriate specialist.
    2. Psychological evaluation, if appropriate.
    3. An inventory of advanced directives: Such statements of intent would include, but are not limited to, powers of attorney, living wills, organ donation statements and statements in medical charts.
- II. The guardian shall establish contact with and develop a regular pattern of communication with the guardian of the estate or other fiduciary for the ward, if such a person exists.
- III. The guardian shall develop and monitor a written guardianship plan setting for short-term and long-term goals for meeting the ward's needs that are addressed in the guardianship order.
  - A. The plan must address medical, psychiatric, social, vocational, educational, training, residential, and recreational needs of the ward if those needs exist.

- B. The plan must also address whether the ward's finances and budget are in line with the services the ward needs and are flexible enough to deal with the changing status of the ward.
  - C. Short-term goals must reflect the first year of guardianship, and long-term goals must reflect the time after the first year.
  - D. The plan must be based on a multidisciplinary functional assessment.
  - E. The plan must be updated no less often than annually.
- IV. The guardian shall maintain a separate file for each ward. The file must include, at a minimum, the following information and documents:
- A. The ward's name, date of birth, address, telephone number, Social Security number, medical coverage, physician, diagnoses, medications, and allergies to medications;
  - B. All legal documents involving the ward;
  - C. Advance directives;
  - D. A list of key contacts;
  - E. A list of service providers, contact information, a description of services provided to the ward, and progress/status reports;
  - F. A list of all over-the-counter and prescribed medication the ward is taking, the dosage, the reason why it is taken; and the name of the doctor prescribing the medication;
  - G. Documentation of all client and collateral contacts, including the date, time, and activity;
  - H. Progress notes that are as detailed as necessary to reflect contacts made and work done regarding the ward;
  - I. The guardianship plan;
  - J. An inventory, if required;
  - K. Assessments regarding the ward's past and present medical, psychological, and social functioning;
  - L. Documentation of the ward's known values, lifestyle preferences, and known wishes regarding medical and other care and service; and
  - M. A photograph of the ward.
- V. The guardian shall visit the ward no less than monthly.
- A. The guardian shall assess the ward's physical appearance and condition and assess 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.
  - B. The guardian must maintain substantive communication with service providers, caregivers, and others attending to the ward.

- C. The guardian must participate in all care or planning conferences concerning the residential, educational, vocational, or rehabilitation program of the ward.
- D. The guardian shall require that each service provider develop an appropriate service plan for the ward and must take appropriate action to ensure that the service plans are being implemented.
- E. The guardian shall regularly examine all services and all charts, notes, logs, evaluations, and other documents regarding the ward at the place of residence and at any program site to ascertain that the care plan is being properly followed.
- F. The guardian shall advocate on behalf of the ward with staff in an institutional setting and other residential placements. The guardian shall assess the overall quality of services provided to the ward, using accepted regulations and care standards as guidelines and seeking remedies when care is found to be deficient.

*NGA Standard 14—Decision-Making About Medical Treatment*

- I. The guardian shall promote, monitor, and maintain the ward's health and well-being.
- II. The guardian shall ensure that all medical care necessary for the ward is appropriately provided.
- III. The guardian shall determine whether the ward, before the appointment of a guardian, executed any advance directives, such as a living will, a durable power of attorney, or any other specific written or oral declaration of intent. On finding such documents, the guardian shall consider the ward's wishes in the decision-making process. The guardian shall inform the court and other interested parties of the existing documents.
- IV. Absent an emergency or the execution of a living will, durable power of attorney for health care, or other advance directive declaration of intent that clearly indicates the ward's wishes with respect to medical intervention, a guardian who has proper authority may not grant or deny authorization for medical intervention until he or she has given careful consideration to the criteria listed in Standard 6—Informed Consent and Standard 7—Standards for Decision-Making.
- V. In the event of an emergency, a guardian who has proper authority shall grant or deny authorization of emergency medical treatment based on a reasonable assessment of the criteria listed in Standards 6 and 7, within the time allotted by the emergency.

- VI. The guardian shall seek a second opinion for any medical treatment or intervention that would cause a reasonable person to do so or in circumstances where any medical intervention poses a significant risk to the ward. The guardian shall obtain a second opinion from an independent physician.
- VII. Under extraordinary medical circumstances, in addition to assessing the criteria and using the resources outlined in Standards 6 and 7, the guardian shall enlist ethical, legal, and medical advice, with particular attention to the advice of ethics committees in hospitals and elsewhere.
- VIII. The guardian may speak directly with the treating or attending physician before authorizing or denying any medical treatment.
- IX. The guardian shall not authorize extraordinary procedures without prior authorization from the court unless the ward has executed a living will or durable power of attorney that clearly indicates the ward's desire with respect to that action. Extraordinary procedures may include, but are not limited to, the following medical interventions:
  - A. Psychosurgery
  - B. Experimental treatment
  - C. Sterilization
  - D. Abortion
  - E. Electroshock therapy

*NGA Standard 15—Decision-Making About Withholding and Withdrawal of Medical Treatment*

- I. The NGA recognizes that there are circumstances in which, with the approval of the court if necessary, it is legally and ethically justifiable to consent to the withholding or withdrawal of medical treatment, including artificially provided nutrition and hydration, on behalf of the ward. In making this determination there shall in all cases be a presumption in favor of the continued treatment of the ward.
- II. If the ward had expressed or currently expresses a preference regarding the withholding or withdrawal of medical treatment, the guardian shall follow the wishes of the ward. If the ward's current wishes are in conflict with wishes previously expressed when competent, the guardian shall have this ethical dilemma reviewed by an ethics committee and if necessary, submit the issue to the court for direction.
- III. When making this decision on behalf of the ward, the guardian shall gather and document information as outlined in Standard 6—Informed Consent and shall follow the Standards for Decision Making, Standard 7.

*NGA Standard 16—Conflict of Interest: Ancillary and Support Services*

- I. 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 that can be perceived as self-serving or adverse to the position or best interest of the ward.
- II. Rules relating to specific ancillary and support service situations that might create an impropriety or conflict of interest include the following:
  - A. The guardian shall not directly provide housing, medical, legal, or other direct services to a ward. Some direct services may be approved by the court for family guardians.
    1. The guardian shall coordinate and assure the provision of all necessary services to the ward rather than providing those services directly.
    2. The guardian shall be independent from all service providers, thus ensuring that the guardian remains free to challenge inappropriate or poorly delivered services and to advocate on behalf of the ward.
    3. When a guardian can demonstrate unique circumstances indicating that no other entity is available to act as guardian, or to provide needed direct services, an exception can be made, provided that the exception is in the best interest of the ward. Reasons for the exception must be documented and the court notified.
  - B. A guardianship program must be a freestanding entity and must not be subject to undue influence.
  - C. When a guardianship program is a part of a larger organization or governmental entity, there must be an arm's-length relationship with the larger organization or governmental entity and it shall have independent decision-making ability.
  - D. The guardian shall not be in a position of representing both the ward and the service provider.
  - E. A guardian who is not a family guardian may act as petitioner only when no other entity is available to act, provided all alternatives have been exhausted.
  - F. The guardian shall consider all possible consequences of serving the dual roles of guardian and expert witness. Serving in both roles may present a conflict. The guardian's primary duty and responsibility is always to the ward.
  - G. The guardian may not employ his or her friends or family to provide services for a profit or fee unless no alternative is available and the guardian discloses this arrangement to the court.

- H. The guardian shall neither solicit nor accept incentives from service providers.
- I. The guardian shall consider various ancillary or support service providers and select the providers that best meet the needs of the individual ward.
- J. A guardian who is an attorney or employs attorneys may provide legal services to a ward only when doing so best meets the needs of the ward and is approved by the court following full disclosure of the conflict of interest. The guardian who is an attorney shall ensure that the services and fees are differentiated and are reasonable. The services and fees are subject to court approval.

*NGA Standard 17—Duties of the Guardian of the Estate*

- I. The guardian shall act in a manner above reproach, and his or her actions will be open to scrutiny at all times.
- II. The guardian shall provide competent management of the ward's property and shall supervise all income and disbursements of the estate.
- III. The guardian shall manage the estate only for the benefit of the ward.
- IV. The guardian shall keep estate assets safe by keeping accurate records of all transactions and be able to fully account for all the assets in the estate.
- V. The guardian shall keep estate money separate from the guardian's personal money; the guardian shall keep the money of individual estates separate unless accurate separate accounting exists within the combined accounts.
- VI. The guardian shall make claims against others on behalf of the estate as deemed in the best interest of the ward and shall defend against actions that would result in a loss of estate assets.
- VII. The guardian shall employ prudent accounting procedures when managing the estate.
- VIII. The guardian shall determine if a will exists and obtain a copy to determine how to manage estate assets and property.
- IX. The guardian shall apply the Prudent Person Rule and the Prudent Investor Rule when managing the estate.

*NGA Standard 18—Guardian of the Estate: Initial and Ongoing Responsibilities*

- I. With the proper authority, the initial steps after appointment as guardian are as follows:
  - A. The guardian shall address all issues of the estate that require immediate action, which include, but are not limited to, securing all real and personal property, insuring it at current market value, and taking the steps necessary to protect it from damage, destruction, or loss.
  - B. The guardian shall meet with the ward as soon after the appointment as feasible. At the first meeting the guardian shall:
    1. Communicate to the ward the role of the guardian;
    2. Outline the rights retained by the ward and the grievance procedures available;
    3. Assess the previously and currently expressed wishes of the ward and evaluate them based on current acuity; and
    4. Attempt to gather from the ward any necessary information regarding the estate.
- II. The guardian shall prepare a financial plan and budget that correspond with the care plan for the ward. The guardian of the estate and the guardian of the person (if one exists) or other health care decision-maker shall communicate regularly and coordinate efforts with regard to the care and financial plans, as well as other events that might affect the ward.
- III. The guardian shall post and maintain a bond with surety sufficient for the protection of the estate.
- IV. The guardian shall obtain all public and insurance benefits for which the ward is eligible.
- V. The guardian may allow the ward the opportunity to manage funds to his or her ability.
- VI. The guardian must thoroughly document the management of the estate and the carrying out of any and all duties required by statute or regulation.
- VII. The guardian must prepare an inventory of all property for which he or she is responsible. The inventory must list all the assets owned by the ward with their values on the date the guardian was appointed and must be independently verified.

- VIII. All accountings must contain sufficient information to clearly describe all significant transactions affecting administration during the accounting period. All accountings must be complete, accurate, and understandable.
- IX. The guardian shall oversee the disposition of the ward's assets to qualify the ward for any public benefits program.
- X. On the termination of the guardianship or the death of the ward, the guardian shall facilitate the appropriate closing of the estate and submit a final accounting to the court.
- XI. The guardian may monitor or manage the personal allowance of the institution-based ward.
- XII. The guardian shall, when appropriate, open a burial trust account and make funeral arrangements for the ward.

*NGA Standard 19—Property Management*

- I. The guardian may not dispose of real or personal property of the ward without judicial, administrative, or other independent review.
- II. In the absence of reliable evidence of the ward's views before the appointment of a guardian, the guardian, having the proper authority, may not sell, encumber, convey, or otherwise transfer property of the ward, or an interest in that property, unless doing so is in the best interest of the ward.
- III. In considering whether it is in the best interest of the ward to dispose of the ward's property, the guardian shall consider the following:
- A. Whether disposing of the property will benefit or improve the life of the ward.
  - B. The likelihood that the ward will need or benefit from the property in the future.
  - C. The previously expressed or current desires of the ward with regard to the property.
  - D. The provisions of the ward's estate plan as it relates to the property, if any.
  - E. The tax consequences of the transaction.
  - F. The impact of the transaction on the ward's entitlement to public benefits.
  - G. The condition of the entire estate.
  - H. The ability of the ward to maintain the property.

- I. The availability and appropriateness of alternatives to the disposition of the property.
  - J. The likelihood that property may deteriorate or be subject to waste.
  - K. The benefits versus the liability and costs of maintaining the property.
- IV. The guardian shall consider the necessity for an independent appraisal of real and personal property.
- V. The guardian must provide for insurance coverage, as appropriate, for property in the estate.

*NGA Standard 20—Conflict of Interest:  
Estate, Financial, and Business Services*

- I. The guardian shall avoid 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 that might be perceived as self-serving or adverse to the position or best interest of the ward.
- A. Rules relating to specific situations that might create an impropriety or conflict of interest include the following:
  - 1. The guardian shall not commingle personal or program funds with the funds of the ward, except as follows:
    - 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 also be 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 individual wards' funds in a single account. In this manner, banking fees and costs are distributed among the individual wards, rather than being borne by each separately.
    - d. If the court allows the use of combined accounts, they should be permitted only where the guardian or conservator has available resources to keep accurate records of the exact amount of funds in the account, including allocation of interest and charges, attributable to each individual ward based on the asset level of the ward.
  - 2. The guardian may not sell, encumber, convey, or otherwise transfer the ward's real or personal property or any interest in

that property to himself or herself, a spouse, a coworker, an employee, a member of the board of the agency or corporate guardian, an agent, or an attorney, or any corporation or trust in which the guardian has a substantial beneficial interest.

3. The guardian may not sell or otherwise convey to the ward property from any of the parties noted above.
4. The guardian may not loan or give money or objects of worth from the ward's estate unless specific prior approval is obtained.
5. The guardian may not use the ward's income and assets to support or benefit other individuals directly or indirectly unless specific prior approval is obtained and a reasonable showing is made that such support is not detrimental to the best interests of the ward.
6. The guardian may not borrow funds from, 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 administering the ward's benefits, and the transaction is approved by the court.
7. The guardian may not profit from any transactions made on behalf of the ward's estate at the expense of the estate, nor may the guardian compete with the estate, unless prior approval is obtained from the court.

*NGA Standard 21—Termination and Limitation of the  
Guardianship/Conservatorship*

- I. Limited guardianship of the person and estate is preferred over a plenary guardianship.
- II. The guardian shall seek termination or limitation of the guardianship in the following circumstances:
  - A. When the ward has developed or regained capacity in areas in which he or she was found incapacitated by the court.
  - B. When less restrictive alternatives exist.
  - C. When the ward expresses the desire to challenge the necessity of all or part of the guardianship.
  - D. When the ward has died.
  - E. When the guardianship no longer benefits the ward.

*NGA Standard 22—Guardianship Service Fees*

- I. Guardians are entitled to reasonable compensation for their services.
- II. The guardian shall bear in mind at all times the responsibility to conserve the ward's estate when making decisions regarding providing guardianship services and charging a fee for those services.
- III. All fees related to the duties of the guardianship must be reviewed and approved by the court. Fees must be reasonable and be related only to guardianship duties.
- IV. Factors to be considered in determining reasonableness of the guardian's fees include:
  - A. Powers and responsibilities under the court appointment;
  - B. Necessity of the services;
  - C. Time required;
  - D. Degree of difficulty;
  - E. Skill and experience required to carry out the duty;
  - F. Needs of the ward; and
  - G. Costs of alternatives.
- V. Fees or expenses charged by the guardian shall be documented through billings maintained by the guardian. If time records are maintained, they shall clearly and accurately state:
  - A. Date and time spent on a task;
  - B. Duty performed;
  - C. Expenses incurred;
  - D. Collateral contacts involved; and
  - E. Identification of individual who performed the duty (e.g., guardian, staff, volunteer).

*NGA Standard 23—Management of Multiple Guardianship Cases*

- I. The guardian shall limit each caseload to a size that allows the guardian to accurately and adequately support and protect the ward, that allows a minimum of one visit per month with each ward, and that allows regular contact with all service providers.
- II. The size of any caseload must be based on an objective evaluation of the activities expected, the time that may be involved in each case, other demands made on the guardian, and ancillary support available to the guardian.

- A. The guardian may institute a system to evaluate the level of difficulty of each guardianship case to which the guardian is assigned or appointed.
- B. The outcome of the evaluation must clearly indicate the complexity of the decisions to be made, the complexity of the estate to be managed, and the time spent. The guardian must use the evaluation as a guide for determining how many cases the individual guardian may manage.

*NGA Standard 24—Quality Assurance*

- I. Guardians shall actively pursue and facilitate periodic independent review of their provision of guardianship services.
- II. The independent review shall occur periodically, but no less often than every two years, and must include a review of a representative sample of cases.
- III. The independent review must include, but is not limited to, a review of agency policies and procedures, a review of records, and a visit with the ward and with the individual providing direct service to the ward.
- IV. An independent review may be obtained from:
  - A. A court monitoring system;
  - B. An independent peer; or
  - C. An CGC national master guardian.
- V. The quality assurance review does not replace other monitoring requirements established by the court.

*NGA Standard 25—Sale or Purchase of a Guardianship Practice*

- I. Guardianship is a fiduciary relationship and as such is bound by the fiduciary obligations recognized by the community and the law.
- II. A guardianship practice is defined as private, professional guardianship services provided to two or more individuals found by a court to be incapacitated and in need of a guardian.
- III. A professional guardian may choose to sell all or substantially all of a guardianship practice, including goodwill, subject to the following guidelines:
  - A. A professional guardian considering the sale of a guardianship practice shall ensure that the wards are considered in the sale

- process and that guardianship responsibilities continue to be met during the transition.
- B. The professional guardian shall require documentation of the purchaser's references pertaining to qualifications to serve as guardian, as defined by state statutes.
  - C. Sale of a guardianship practice to a purchaser engaged in serving or representing any interest adverse to the interest of the wards is not appropriate.
  - D. The sale price for the guardianship practice must not be the sole consideration in selecting the purchaser.
  - E. The professional guardian shall provide formal written notice of the proposed sale to the court, to the wards, and to other interested parties, even if not required by state statutes.
  - F. Consideration should be given to requesting that the court appoint a guardian ad litem, or another third party reviewer, to protect the interests of the wards.
  - G. All parties to the sale of the guardianship practice shall take steps to ensure the continuity of care and protection for the wards during the period of the sale and transfer of ownership.
  - H. The professional guardian shall not disclose confidential information regarding a ward for the purpose of inducing a sale of a guardianship practice.
  - I. The fees charged to existing wards shall not be increased by the purchaser of a guardianship practice solely for the purpose of financing the purchase.
- IV. Admission to, employment by, or retirement from a guardianship practice, retirement plans or similar arrangements, or sale of tangible assets of a guardianship practice shall not be considered a sale or purchase under this standard.

#### DEFINITIONS

*Advance Directive*—A written instruction, such as a living will or durable power of attorney for health care that guides care when an individual is terminally ill or incapacitated and unable to communicate his or her desires.

*Advocate*—To assist, defend, or plead in favor of another.

*Arm's-Length Relationship*—A relationship between two agencies or organizations, or two divisions or departments within one agency, that ensures independent decision-making on the part of both.

*Best Interest*—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.

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

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

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

*Court Order*—A legal document issued by the court and signed by a judge. Examples include a letter of guardianship spelling out directions for the care of the ward and the estate and an authorization or denial of a request for action.

*Court-Required Report*—A report that the guardian is required by statute or court order to submit to the court relative to the guardianship.

*Designation of Guardian*—A formal means of nominating a guardian before a guardian is needed.

*Direct Services*—These include medical and nursing care, care/case management and case coordination, speech therapy, occupational therapy, physical therapy, psychological therapy, counseling, residential services, legal representation, job training, and other similar services.

*Estate*—Both real and personal property, tangible and intangible, and includes anything that may be the subject of ownership.

*Extraordinary Medical Circumstance*—Includes abortion, removal of life support, sterilization, experimental treatment, and other controversial medical issues.

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

*Freestanding Entity*—An agency or organization that is independent from all other agencies or organizations

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

*Guardian*—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 an individual. The term includes conservators and certified private or public fiduciaries. All guardians are accountable to the court.

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

*Foreign Guardian* is a guardian appointed in another state or jurisdiction.

*Guardian of the Estate* is a guardian who possesses any or all powers and rights with regard to the property of the individual.

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

*Limited Guardian* is a guardian appointed by the court to exercise the rights and powers specifically designated by a court order entered after the court finds that the 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 petitions for appointment of a limited guardian. A limited guardian may possess fewer than all of the legal rights and powers of a plenary guardian.

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

*Pre-Need Guardian* is a guardian who is formally nominated before a guardian is needed.

*Standby Guardian* is a person, agency, or organization whose appointment as guardian becomes effective without further proceedings immediately upon the death, incapacity, resignation, or temporary absence or unavailability of the initially appointed guardian.

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

*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, i.e., knowledge of risks involved, alternatives, etc.

*Least Restrictive Alternative*—A mechanism, course of action, or environment that allows the ward to live, learn, and work in a setting that places as few limits as possible on the ward's rights and personal freedoms as 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 make that investment.

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

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

*Social Services*—These services are provided to meet social needs, including provisions for public benefits, case management, money management services, adult protective services, companion services, and other similar services.

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

*Ward*—A person for whom a guardian has been appointed. Synonyms include Conservatee, Disabled Person, Protected Person, and Incapacitated Person.

## NGA AND CGC QUALIFICATIONS FOR COURT-APPOINTED GUARDIANS

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

### Guidelines:

A corporate guardian:

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

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

### Guidelines:

A family guardian:

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

*Individual Professional Guardian*—An individual professional guardian is an individual who is not related to the 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 the Model Code of Ethics for Guardians.
2. Shall follow the NGA Standards of Practice.
3. Should strive to become a national certified guardian and national master guardian, if applicable.

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

**Guidelines:**

Master guardian qualifications as established by the Center for Guardianship Certification:

1. Must be a national certified guardian in good standing when submitting an application.
2. Must have:
  - a. a graduate degree from an accredited college or university, with three years of full-time professional guardianship experience; or
  - b. a bachelor's degree from an accredited college or university (to include a registered nurse) with five years of full-time professional guardianship experience; or
  - c. 12 years of full-time professional guardianship experience.
3. A completed application must include:
  - a. an application form;
  - b. four professional references;
  - c. proof of employment and education; and
  - d. a signed affidavit stating the number of years of guardianship and number of wards served.
4. "Professional guardianship experience" is defined to include:
  - a. serving in a position of making decisions serving as court-appointed guardian or as agent for a court-appointed guardian providing guardianship service directly to or on behalf of two or more unrelated wards; and
  - b. spending an average of at least 16 hours per week practicing guardianship during at least three of the last five years, including the most recent year.
5. A national master guardian must have a high degree of competence in managing complex issues and must demonstrate experience in at least five of the following:
  - a. Manage significant financial estates.
  - b. Conduct or arrange for comprehensive assessment of ward's needs.
  - c. Provide consultation on a wide range of guardianship issues.
  - d. Provide supervision to staff in a guardianship program.
  - e. Plan, implement, control, direct, and fund a professional guardianship program.
  - f. Provide case oversight for less experienced guardians.

- g. Have experience with more than one disability group.
  - h. Provide training and supervision and mentoring to less experienced guardians.
  - i. Be a professional education presenter on guardianship-related topics.
  - j. Provide consultation regarding medical procedures, use of psychotropic medications, and evaluation of behavioral programs.
  - k. Advance the profession through policy development, legislative advocacy, or community outreach.
  - l. Provide consultation or make decisions on end-of-life issues and other complex or controversial issues.
  - m. Actively advocate for limited guardianship, alternatives to guardianship, and restoration of wards' rights.
- 6. Must successfully complete the national master guardian examination administered by the Center for Guardianship Certification.
  - 7. Shall follow the Model Code of Ethics for Guardians.
  - 8. Shall follow the NGA Standards of Practice.

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

Guidelines:

A public guardian:

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

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

Guidelines:

National certified guardian qualifications as established by the Center for Guardianship Certification:

- 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 must satisfy the following education or training requirements:
  - a. a degree from an accredited college; the degree must be in a field related to guardianship; 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 a 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 Center for Guardianship Certification
10. Shall follow the Model Code of Ethics for Guardians.
11. Shall follow the NGA Standards of Practice.
12. Should strive to become a national master guardian.

*Volunteer Guardian*—A volunteer guardian is a person 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:**

A volunteer guardian:

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

