Meeting Materials

4/8/2013

WASHINGTON
COURTS

ADMINISTRATIVE OFFICE OF THE COURTS
Callie Dietz
Interim State Court Administrator

April 8, 2013

TO: Certified Professional Guardian Board

FROM: Regulations Committee

RE: Proposed SOP 404.3 Meaningful Visit

Issue:

Who is responsible for in-person visits with incapacitated persons served by individual or agency certified professional guardians?

Proposed Solution:

Proposed New SOP 404.3 A certified professional guardian or certified professional guardian agency may delegate the responsibility for in-person visits with a client to: (a) an employee of the certified professional guardian or agency, (b) an independent contractor or (c) any individual who has been specifically approved by the court.

In all cases, before the delegation, a certified professional guardian with final decision making authority on the case must document the suitability of the delegation, having considered: (a) the needs of the client, and (b) the education, training and experience of the delegate. The documentation shall be: (a) dated and signed by the certified professional guardian, (b) placed in the guardian's file for that client, and (c) available to the Certified Professional Guardian Board.

Background:

The Regulations Committee met and discussed this issue several times. In developing the proposed standard of practice above, the Committee considered the following information:

Information Considered:

NGA Standard 13 (V) - Guardianship of the Person: Initial and Ongoing Responsibilities (Guardian Standard)

V. The guardian shall visit the ward no less than monthly.

A. The guardian shall assess the ward's physical appearance, 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, 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 23 - Management of Multiple Guardianship Cases (Guardian Standard)

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.

Note: "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." (p. 1)

NGA Agency Standard

III. Personnel Standards: The agency/program managers shall:

A. Employ competent staff with the training and experience to provide quality service to the individual.

B. Agency management shall recruit, train, and retain personnel who meet the identified needs of the individuals receiving service and contribute to the organization's mission.

1. Program Staff: The agency/program managers shall have written policy that assures there is sufficient qualified staff to provide services to each individual.

[Intent Statement]: The agency/program managers shall assure that adequate program staffing levels are identified and maintained. These staffing levels will be dependent upon the type of guardianship and other services provided. Adequate staff to client ratios must be established to assure that access to decision making is not impaired or delayed. The design of caseload assignments should include not only the guardian caseworker, but also the number of support staff required to fully support the case. Creative use of support staff such as bookkeepers, property managers, guardian assistants and volunteers can lessen the caseworkers' workload and enable them to spend more time with individual wards. The addition of an Information Specialist to help upgrade technology may be justified. The agency may also need to develop and document a process for caseload weighting to assure that complex cases do not overwhelm individual guardian caseworkers and that less active cases are not neglected.

Certification Requirements for Program Staff

1. At least one member of the management team shall hold certification from the Center for Guardianship Certification either as a Master Guardian, or be a Registered Guardian with a minimum of five years experience.

2. All professional guardianship staff having direct responsibility for individual wards shall hold current state and/or national certification at the Registered Guardian level or be required to attain it within two years of their employment.

[Intent Statement]: Because curricula in social services, medical and legal fields do not generally include guardianship, certification from the Center for Guardianship Certification is necessary. The CGC is a testing and certification entity separate from the NGA that understands the philosophy of NGA, and supports the effort to increase that understanding among practitioners. The program director should have certification at a minimum as a Registered Guardian, and must have at least five years experience working in guardianship. It is preferred that the top program manager be certified at the Master Guardian level.

DHHS v. Raven, Ct. of Appeals, Division II (3/27/12):

In case of neglect of a vulnerable adult under RCW 74.34.020, Guardian Raven's duty "did include making every reasonable effort to provide the care Ida needed." (p. 1)

DSHS Board of Appeals "concluded that Raven had a duty to have meaningful in-person contacts with Ida to observe her circumstances. Raven's log of her visits evidenced only six in 2004, two in 2005 (both when Ida was hospitalized), and five in 2006. The Board reasoned that more frequent visits would have allowed Raven to re-evaluate her decision not to place Ida in a full-time residential facility for rehabilitative care and Raven may have better appreciated the 'emergent need to remedy the shortfalls in the day-to-day care being provided for Ida.'" (pp. 10-11)

"The Board reasoned that if Raven lacked knowledge or experience, she had a duty to retain qualified persons who could supply the knowledge and experience." (p. 11)

"We do not discuss the Board's conclusions that Raven had specific 'duties,' including making frequent visits, procuring independent caregivers, and becoming knowledgeable about Ida's treatment. These are more appropriately considered as evidence of Raven's breach of her general duty to provide, to the extent possible, the care Ida needed." (p. 21, n. 7)

"[W]e hold that Raven's duty generally was to provide, to the extent reasonably possible, all the care Ida needed. We view the specific acts, such as infrequent visits, which the Board characterized as duties, to be evidence of Raven's failure to meet her general duty." (p. 23)

"I recognize that Raven had no duty to provide care for Ida herself and that Washington law did not require her to visit Ida any specific number of times per year. Yet here, the record shows that despite Ida's deteriorating condition, Raven neglected to make home visits necessary to assess personally the consequences of the caregivers' unwillingness or unavailability to reposition Ida as required. Raven's absence prevented her from building rapport with Ida and her family to better discern Ida's emergent needs and possibly obtain Ida's consent to residential treatment facility care. The facts of Ida's

growing urgent need for additional care demanded frequent meaningful home visits and Raven should have made such visits to satisfy her guardianship duties. Raven's inaction after May 2006, when Ida had no primary physician and received inadequate in-home care, was a blatant dereliction of her duties." (p. 26, concurring opinion)

WASHINGTON
COURTS

ADMINISTRATIVE OFFICE OF THE COURTS
Callie Dietz
Interim State Court Administrator

April 8, 2013

TO: Certified Professional Guardian Board

FROM: Regulations Committee

RE: Standby Guardians

Issue:

Who should serve as a Standby Guardian and what are the duties of a Standby Guardian?

Proposed Solution:

SOP 401.6 All certified professional guardians ~~and guardian agencies~~ have a duty by statute to appoint a standby guardian. ~~In appointing a standby guardian it is the best practice to appoint a certified professional guardian unless otherwise authorized by the local court with jurisdiction~~

> 401.6.1 All certified professional guardians shall appoint a standby guardian who is a certified professional guardian who accepts the appointment and has the skills, experience and availability to assume responsibility as court-appointed guardian per statutory requirements.
>
> 401.6.2 The standby guardian will serve when the guardian cannot be reached in an emergency, during planned absences and at the death or incapacity of the guardian.
>
> 401.6.3 The certified professional guardian will ensure that in his or her planned or unplanned absence the standby guardian shall have access to records and information needed to address the needs of the incapacitated person.

Background:

During the Board's January 14, 2013 meeting, Bill Jaback informed the Board of an issue that the Applications Committee discovered during the review of an application for

certification. The applicant used serving as a Standby Guardian for a Certified Professional Guardian as qualifying experience for certification. The Applications Committee discussed whether a lay person is an appropriate choice for a standby for a professional guardian. The Board's discussion of this issue raised the following additional questions:

- Should the Board limit the number of standby guardian appointments one individual can accept?
- Should the Board establish a standard of practice for professional guardians to develop contingency plans or provide guidance to help professional guardians plan for time off for vacations and illnesses?

Judge Swisher, who was chairing the meeting, asked the Regulations Committee to research the issue and submit a recommendation to the Board during its next meeting. The Regulations Committee met January 16, 2013 and asked staff to draft a proposed standard of practice.

Current Relevant SOP

401.6 All certified professional guardians and guardian agencies have a duty by statute to appoint a standby guardian. In appointing a standby guardian it is the best practice to appoint a certified professional guardian unless otherwise authorized by the local court with jurisdiction.

Current Relevant Statute

RCW.11.88.125
The person appointed by the court as either guardian or limited guardian of the person and/or estate of an incapacitated person shall file in writing with the court, within ninety days from the date of appointment, a notice designating a standby limited guardian or guardian to serve as limited guardian or guardian at the death or legal incapacity of the court-appointed guardian or limited guardian. The notice shall state the name, address, zip code, and telephone number of the designated standby or limited guardian. Notice of the guardian's designation of the standby guardian shall be given to the standby guardian, the incapacitated person and his or her spouse or domestic partner and adult children, any facility in which the incapacitated person resides, and any person entitled to special notice under RCW 11.92.150 or any person entitled to receive pleadings pursuant to RCW 11.88.095(2)(j). Such standby guardian or limited guardian shall have all the powers, duties, and obligations of the regularly appointed guardian or limited guardian and in addition shall, within a period of thirty days from the death or adjudication of incapacity of the regularly appointed guardian or limited guardian, file with the superior court in the county in which the guardianship or limited guardianship is then being administered, a petition for appointment of a substitute guardian or limited guardian. Upon the court's appointment of a new, substitute guardian or limited guardian, the standby guardian or limited guardian shall make an accounting and report to be approved by the court and upon approval of the court, the standby guardian or

limited guardian shall be released from all duties and obligations arising from or out of the guardianship or limited guardianship.

Proposed Statute Amendment

Senate Bill 5692 currently being considered by the Legislature modifies provisions relating to standby guardians and limited guardians (see Attachment A). The bill addresses several of the Board's concerns, but does not address the issue of a lay guardian serving as standby guardian for a certified professional guardian.

The Superior Court Judges' Association supported the bill and asked bill sponsors to revise the bill to give the court authority to approve or disapprove the person nominated to serve as standby guardian. The bill drafters agreed to the revision.

February 20, 2013, in a letter to bill sponsors, the Elder Law Section (ELS) supported portions of the bill, but did not support the whole bill (See Attachment B). March 20, 2012, in a letter to Representative Pedersen, the ELS opposed SB 5692 and submitted proposed edits (See Attachment C). March 13, 2013, the Washington Association of Professional Guardian opposed SB 5692 (See Attachment D).

SENATE BILL REPORT
SB 5692

As Passed Senate, February 28, 2013

Title: An act relating to standby guardians and limited guardians.

Brief Description: Concerning standby guardians and limited guardians.

Sponsors: Senators King, Harper, Conway, Eide and Tom.

Brief History:
Committee Activity: Law & Justice: 2/18/13, 2/21/13 [DP].
Passed Senate: 2/28/13, 48-0.

SENATE COMMITTEE ON LAW & JUSTICE

Majority Report: Do pass.
Signed by Senators Padden, Chair; Carrell, Vice Chair; Kline, Ranking Member; Darneille, Kohl-Welles, Pearson and Roach.

Staff: Jessica Stevenson (786-7465)

Background: A guardian is appointed by the court to make decisions on behalf of an incapacitated person. A guardian can be appointed to manage the affairs of the person, the estate, or both. The person can be appointed as a full guardian or a limited guardian. A limited guardianship is created when the court allows an incapacitated person to retain certain rights. A standby guardian is a person who acts as the guardian when the primary guardian is unavailable.

Within 90 days of appointment by the court, a guardian must file a notice designating a standby guardian to serve as guardian at the death or legal incapacity of the court-appointed guardian. Notice must be given to the standby guardian, the incapacitated person and incapacitated person's family, the facility where the incapacitated person resides – if applicable, and any person entitled to receive special notice or pleadings.

The standby guardian has the all the powers, duties, and obligations of the regularly appointed guardian. Within 30 days of the death or adjudication of the regularly appointed guardian, the standby guardian must file a petition for appointment of a substitute guardian in the superior court where the guardianship is being administered.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Upon the court's appointment of a new, substitute guardian, the standby guardian must make an accounting and report for approval by the court. Upon approval by the court, the standby guardian must be released from all duties and obligations arising from or out of the guardianship or limited guardianship.

Summary of Bill: The standby guardian may serve as the guardian during a planned absence of the court-appointed guardian. The regularly appointed guardian may delegate decision-making authority to the standby guardian in advance of a planned absence.

If the regularly appointed guardian dies, becomes incapacitated, is out of the state, or is otherwise unavailable to fulfill their duties, the standby guardian must have all the powers, duties, and obligations of the regularly appointed guardian.

The standby guardian must receive notice of all proceedings.

The regularly appointed guardian must report quarterly, or when there is a substantial change in circumstances, to the designated standby guardian to keep the standby guardian adequately informed about the needs of the incapacitated person. The report can be made by phone or other reasonable means.

If the standby guardian must act due to the death, incapacity, or absence of the regularly appointed guardian, the standby guardian may apply to the court to be paid for fees and costs.

Appropriation: None.

Fiscal Note: Not requested.

Committee/Commission/Task Force Created: No.

Effective Date: The bill takes effect on May 1, 2014.

Staff Summary of Public Testimony: PRO: A standby guardian needs to be more informed since the standby guardian may need to make a decision for the incapacitated person whenever the primary guardian is unavailable.

OTHER: The bill attempts to clarify communication with and duties of standby guardians, but the bill does not sufficiently address these issues.

Persons Testifying: PRO: Senator King, prime sponsor.

OTHER: Steve Lindstrom, WA Assn. of Professional Guardians.

S-1185.1

SENATE BILL 5692

State of Washington 63rd Legislature 2013 Regular Session

By Senators King, Harper, Conway, Eide, and Tom

Read first time 02/08/13. Referred to Committee on Law & Justice.

AN ACT Relating to standby guardians and limited guardians; amending RCW 11.88.125; and providing an effective date.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Sec. 1. RCW 11.88.125 and 2011 c 329 s 5 are each amended to read as follows:

(1)(a) The person appointed by the court as either guardian or limited guardian of the person and/or estate of an incapacitated person shall file in writing with the court, within ninety days from the date of appointment, a notice designating a standby limited guardian or guardian to serve as limited guardian or guardian at the death ((~~or~~)), legal incapacity, or planned absence of the court-appointed guardian or limited guardian.

(b) The notice shall state the name, address, zip code, and telephone number of the designated standby or limited guardian.

(c) Notice of the guardian's designation of the standby guardian shall be given to the standby guardian, the incapacitated person and his or her spouse or domestic partner and adult children, any facility in which the incapacitated person resides, and any person entitled to

1 special notice under RCW 11.92.150 or any person entitled to receive
2 pleadings pursuant to RCW 11.88.095(2)(j). ((~~Such~~))
3 (2)(a) If the regularly appointed guardian or limited guardian
4 dies, becomes incapacitated, is out of state, or is otherwise
5 unavailable to fulfill his or her duties, then the standby guardian or
6 limited guardian shall have all the powers, duties, and obligations of
7 the regularly appointed guardian or limited guardian ((~~and in addition~~
8 ~~shall,~~)).
9 (b) The regularly appointed guardian or limited guardian may
10 delegate decision-making authority to the standby guardian or limited
11 guardian in advance of a planned absence.
12 (c) Within a period of thirty days from the death or adjudication
13 of incapacity of the regularly appointed guardian or limited guardian,
14 the standby guardian or limited guardian must file with the superior
15 court in the county in which the guardianship or limited guardianship
16 is then being administered, a petition for appointment of a substitute
17 guardian or limited guardian. Upon the court's appointment of a new,
18 substitute guardian or limited guardian, the standby guardian or
19 limited guardian shall make an accounting and report to be approved by
20 the court, and upon approval of the court, the standby guardian or
21 limited guardian shall be released from all duties and obligations
22 arising from or out of the guardianship or limited guardianship.
23 ((~~(2)~~)) (d) The standby guardian or limited guardian must receive
24 notice of all proceedings.
25 (e) The regularly appointed guardian or limited guardian must
26 report quarterly to the designated standby guardian or limited
27 guardian, or when there is a substantial change in circumstances, to
28 keep the standby guardian or limited guardian adequately informed about
29 the needs of the incapacitated person. This report may be made by
30 phone or other reasonable means.
31 (f) If the standby guardian or limited guardian is required to act
32 due to the death, incapacity, or absence of the regularly appointed
33 guardian or limited guardian, then the standby guardian may apply to
34 the court to be paid for fees and costs.
35 (3) Letters of guardianship shall be issued to the standby guardian
36 or limited guardian upon filing an oath and posting a bond as required
37 by RCW 11.88.100 as now or hereafter amended. The oath may be filed
38 prior to the appointed guardian or limited guardian's death. Notice of

such appointment shall be provided to the standby guardian, the incapacitated person, and any facility in which the incapacitated person resides. The provisions of RCW 11.88.100 through 11.88.110 as now or hereafter amended shall apply to standby guardians and limited guardians.

((~~(3)~~)) (4) In addition to the powers of a standby limited guardian or guardian as noted in subsections (1) and (2) of this section, the standby limited guardian or guardian shall have the authority to provide timely, informed consent to necessary medical procedures, as authorized in RCW 11.92.040 as now or hereafter amended, if the guardian or limited guardian cannot be located within four hours after the need for such consent arises.

NEW SECTION. **Sec. 2.** This act takes effect May 1, 2014**-- END ---**

Elder Law Section

of the Washington State Bar Association

February 20, 2013

Senator Curtis King
Curtis.King@leg.wa.gov

Senator Nick Harper
Nick.Harper@leg.wa.gov

Senator Steve Conway
Steve.Conway@leg.wa.gov

Senator Tracey Eide
Tracey.Eide@leg.wa.gov

Senator Rodney Tom
Rodney.Tom@leg.wa.gov

Re: SB 5692 – Standby Guardian Bill

Dear Senators King, Harper, Conway, Eide, and Tom:

On behalf of the over 600 members of the Elder Law Section, I want to thank you for your interest in raising awareness of issues involving Standby Guardians through SB 5692.

We applaud and support the intent of SB 5692 to require Standby Guardians to be notified of their appointment, to receive copies of pleadings, and to receive regular updates from the Guardian or Limited Guardian. We are concerned about empowering a Standby Guardian to act in the event of a planned absence. We particularly question whether it is a good idea to give control of a guardianship proceeding, even temporarily, to someone who has not been vetted by the Court.

Under current law there are only two instances where a Standby Guardian can act. The first is in the event of the death or incapacity of the Guardian or Limited Guardian. RCW 11.881.25(1). Before a Standby Guardian can act, the Standby Guardian must comply with RCW 11.88.125(2) by filing an oath, posting any required bond, and having Letters of Guardianship issued. Also, in the event of death or incapacity of the Guardian or Limited

Re: SB 5692

Guardian, the Standby Guardian must petition the Court within 30 days for the appointment of a substitute (also known as successor) Guardian or Limited Guardian.

The other instance is when the Guardian or Limited Guardian is unavailable to give informed consent for necessary medical procedures. RCW 11.88.125(3).

Existing law already provides a mechanism for emergency medical making decisions if a treatment provider cannot obtain the consent of the Guardian or Limited Guardian, or the Standby Guardian, under RCW 11.88.125(3). The treatment provider, under RCW 7.70.065(c), can act if it is in the Incapacitated Person's best interest.

The duties of a Guardian or Limited Guardian are non-delegable. In the event of a "planned absence," we believe the better policy is for the Guardian or Limited Guardian to take appropriate steps to ensure the affairs of the Incapacitated Person are in order. In today's age of re-occurring/regular bills, it is not impossible to arrange for bill payment. If a Guardian or Limited Guardian is concerned that a medical decision will have to be made during a "planned absence," the Guardian or Limited Guardian should notify treatment providers of the planned absence, provide contact information, issue appropriate instructions, and alert the designated Standby Guardian of the possibility the Standby Guardian may be called upon to make a necessary medical decision.

In the limited time available to us, we have found no other statute from a sister state that authorizes a Guardian or Limited Guardian to delegate the responsibilities SB 5692 proposes in the event of a planned absence.[1] The Uniform Guardianship and Protective Proceedings Act, which few states have adopted, at Section 313 has a procedure to remove a guardian who is not effectively performing the guardian's duties and appoint a "temporary substitute guardian."[2] A copy of Section 313 is enclosed for your reference.

A copy of Georgia Statute 29-5-100 is also enclosed as an example of a process to appoint a "temporary substitute conservator."[3]

Unlike the Uniform Guardianship and Protective Proceedings Act and the Georgia Statute, SB 5692 contains no provision for court oversight of the Standby Guardian during a "planned absence."

---

[1] As time permits, we will continue to research the issue.

[2] RCW 11.88.120 is one statute that permits a Washington Court to remove a Guardian or Limited Guardian who is not effectively performing the duties of guardian. SB 5562 appears to have been tabled and will be worked on over the interim. SB 5562, in part, will amend RCW 11.88.120.

[3] Guardian of the Estate and conservator are functional equivalents.

Re: SB 5692

At best, RCW 11.88.125(2) (now (3) in SB 5692) requires the Standby Guardian to file an oath, post any required bond, and then obtain Letters of Guardianship. Because the Letters of Guardianship are proof of authority to act and because a Standby Guardian cannot act without valid Letters of Guardianship, how many Standby Guardians will actually follow through with filing an oath, posting a bond, and obtaining Letters of Guardianship for a "planned absence?" Also, what will Standby Guardian Letters of Guardianship look like? How long will they be valid? If the duration of the Letters of Guardianship will be limited, the Clerk of the Court will need an order from the Court so stating. Finally, what expense will the Incapacitated Person incur to have Standby Letters of Guardianship issued for a "planned absence?"

Also, there will be two sets of valid Letters of Guardianship in existence during the "planned absence." One set will empower the Guardian or Limited Guardian to act and the other set will empower the Standby Guardian to act. Will the Letters of Guardianship issued to the Guardian or Limited Guardian be temporarily suspended during the "planned absence?" If not, will two sets of Letters of Guardianship cause confusion with financial institutions, government entities, or treatment providers? Also, what will happen if the Guardian or Limited Guardian takes action during the "planned absence" contradicting the Standby Guardian or vice versa?

SB 5692, in several places, uses the phrase "standby guardian or limited guardian" and then uses the phrase "standby limited guardian or guardian." *See* Section (2)(c), (d), and (f), and then *see* Section (4). To remain consistent, we believe Section 4 should be changed to read "standby guardian or limited guardian." We also interpret the phrase "standby guardian or limited guardian" to identify the standby guardian or standby limited guardian nominated by the Guardian or Limited Guardian. If this is not the correct interpretation, then "standby" should be inserted before "limited guardian" to make it clear.

SB 5692 in Section (4) refers to RCW 11.92.040. RCW 11.92.040 was amended in part and replaced with RCW 11.92.043. The reference to RCW 11.92.040 in Section (4) should be changed to RCW 11.92.043 because the authority to consent to necessary medical procedures is now found in RCW 11.92.043.

In conclusion, we support the language in SB 5692 requiring a Guardian or Limited Guardian to keep the designated Standby Guardian better informed. We, at this time, do not support delegation of duties to a Standby Guardian in the event of a "planned absence." Finally, we recommend language be used to consistently identify the Standby Guardian and that the reference to RCW 11.92.040 be changed to RCW 11.93.043.

Re: SB 5692

Thank you for considering our comments.

Sincerely,

Michelle L. Graunke
Chair, Elder Law Section
Washington State Bar Association

Enclosures: Section 313 of the Uniform Guardianship and Protective Proceedings Act
Georgia Statute 29-5-100

cc: Senator Mike Padden, Chair, Senate Law & Justice Committee
Mike.Padden@leg.wa.gov

Jackson Maynard, Staff
Jackson.Maynard@leg.wa.gov

Sydney Forrester, Staff
Sydney.Forrester@leg.wa.gov

Kathryn Leathers

UNIFORM GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT (1998)

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-SIXTH YEAR
IN SACRAMENTO, CALIFORNIA
JULY 25 – AUGUST 1, 1997

WITH PREFATORY NOTE AND COMMENTS

COPYRIGHT © 1997
By
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

June 17, 1998

States enacting this Act should look at their requirements for an ex parte hearing and determine whether to adopt the time limit contained in this section or whether to impose different time limits. Five days seems to be the most common time period for a return hearing following an ex parte appointment. If the enacting state uses a different time period for a hearing following an ex parte appointment of a guardian, the time period used should be relatively short.

The NATIONAL PROBATE COURT STANDARDS, Standard 3.3.6 "Emergency Appointment of a Temporary Guardian" (1993), provides:

> (a) Ex parte appointment of a temporary guardian by the probate court should occur only:
>
> (1) upon the showing of an emergency;
> (2) in connection with the filing of a petition for a permanent guardianship;
> (3) where the petition is set for hearing on the proposed permanent guardianship on an expedited basis; and
> (4) when notice of the temporary appointment is promptly provided to the respondent.

This Act deviates from the above standard by permitting an emergency guardian to be appointed without the need of filing a petition for a permanent appointment. The drafting committee was concerned that requiring the filing of a petition for a permanent appointment would lend an air of inevitability that a permanent guardian should be appointed. Frequently, the need for an emergency guardian is temporary only and the respondent's long-term needs can be met by mechanisms other than guardianship. Consistent with this, subsection (c) provides that the appointment of an emergency guardian is in no way a finding of incapacity. For purposes of appointing a regular guardian, the same quantum of proof is required whether or not an emergency guardian has been appointed.

Unless stated to the contrary in this section, other sections of this Act apply to an emergency guardian appointed under this section, including the provisions relating to the duties of guardians.

SECTION 313. TEMPORARY SUBSTITUTE GUARDIAN.

(a) If the court finds that a guardian is not effectively performing the guardian's duties and that the welfare of the ward requires immediate action, it may appoint a temporary substitute guardian for the ward for a specified period not exceeding six months. Except as otherwise ordered by the court, a temporary substitute guardian so appointed has the powers set forth in the previous order of

appointment. The authority of any unlimited or limited guardian previously appointed by the court is suspended as long as a temporary substitute guardian has authority. If an appointment is made without previous notice to the ward or the affected guardian, the court, within five days after the appointment, shall inform the ward or guardian of the appointment.

(b) The court may remove a temporary substitute guardian at any time. A temporary substitute guardian shall make any report the court requires. In other respects, the provisions of this [Act] concerning guardians apply to a temporary substitute guardian.

Comment

This section differs from Section 312 since this section is used when there is a guardian, but the guardian is not discharging the functions of office. The role of the temporary substitute guardian, as the name implies, is to literally fill in for the regular guardian, whose powers are suspended for the duration of the appointment. This section also differs from Section 204(d). A temporary guardian for a minor is appointed under Section 204(d) in situations where there is no guardian, whereas under this section, the temporary substitute guardian is temporarily substituted for another non-performing guardian.

The standard for appointment under this section is that the ward's welfare requires immediate action and that the appointed guardian is not effectively performing the duties of office. This is not the same as the best interest standard applied in the selection of the original guardian. The standard instead invokes the sense of urgency usually involved in these cases, most of which involve possible abuse by the regularly-appointed guardian.

If, at the end of the six months, the ward still needs a guardian, the court should appoint a permanent guardian rather than granting an extension to the temporary substitute guardian. A temporary substitute guardian does not automatically have preference to be appointed as guardian in such cases.

In some cases, circumstances may dictate the appointment of the temporary substitute guardian without notice being given to the ward or current guardian. If that occurs, within five days of the appointment of the temporary substitute guardian, the court must inform either the ward or the guardian. Since the authority of the regularly-appointed guardian is suspended by the appointment of the

1 temporary substitute guardian, the court should make every effort to inform the
2 guardian of the appointment. In keeping with the concept of limited guardianship
3 and empowerment of the ward, the court should also notify the ward of the
4 appointment of the temporary substitute guardian if the ward has the ability to
5 understand.
6
7 States adopting this Act are free to enact a notice period of less than five days
8 but are encouraged to not enact a notice period of more than five days.
9
10 This section is based on Section 2-208(b) of the 1982 Act (U.P.C. Section 5-
11 308(b) (1982)).
12
13 **SECTION 314. DUTIES OF GUARDIAN.**

14 (a) Except as otherwise limited by the court, a guardian shall make decisions

15 regarding the ward's support, care, education, health, and welfare. A guardian shall

16 exercise authority only as necessitated by the ward's limitations and, to the extent

17 possible, shall encourage the ward to participate in decisions, act on the ward's own

18 behalf, and develop or regain the capacity to manage the ward's personal affairs. A

19 guardian, in making decisions, shall consider the expressed desires and personal

20 values of the ward to the extent known to the guardian. A guardian at all times shall

21 act in the ward's best interest and exercise reasonable care, diligence, and prudence.

22 (b) A guardian shall:

23 (1) become or remain personally acquainted with the ward and maintain

24 sufficient contact with the ward to know of the ward's capacities, limitations, needs,

25 opportunities, and physical and mental health;

26 (2) take reasonable care of the ward's personal effects and bring

27 protective proceedings if necessary to protect the property of the ward;

28 (3) expend money of the ward that has been received by the guardian for

29 the ward's current needs for support, care, education, health, and welfare;

Archive

Colorado Statutes

Title 15. PROBATE, TRUSTS, AND FIDUCIARIES

COLORADO PROBATE CODE

Article 14. Persons Under Disability - Protection

Part 3. GUARDIANSHIP OF INCAPACITATED PERSON

Current through 2012 First Extraordinary Session

§ 15-14-313. Temporary substitute guardian

(1) If the court finds that a guardian is not effectively performing the guardian's duties and that the welfare of the ward requires immediate action, it may appoint a temporary substitute guardian for the ward for a specified period not exceeding six months. Except as otherwise ordered by the court, a temporary substitute guardian so appointed has the powers set forth in the previous order of appointment. The authority of any unlimited or limited guardian previously appointed by the court is suspended as long as a temporary substitute guardian has authority. If an appointment is made without previous notice to the ward, the affected guardian, and other interested persons, the temporary substitute guardian, within five days after the appointment, shall inform them of the appointment.

(2) The court may remove a temporary substitute guardian or modify the powers granted at any time. A temporary substitute guardian shall make any report the court requires. In other respects, the provisions of parts 1 to 4 of this article concerning guardians apply to a temporary substitute guardian.

Cite as C.R.S § 15-14-313

History. L. 2000: Entire part R&RE, p. 1798, § 1, effective January 1, 2001 (see § 15-17-103).

Editor's Note:

This section is similar to former § 15-14-310 as it existed prior to 2001.

Archive

☐District Court ☐Denver Probate Court ______________ County, Colorado Court Address: ______________	
In the Interests of: ______________ Ward	▲ COURT USE ONLY ▲ Case Number: ______________ Division ______ Courtroom ______

ORDER APPOINTING TEMPORARY SUBSTITUTE GUARDIAN FOR ADULT PURSUANT TO §15-14-313, C.R.S.

Upon consideration of the Petition for Appointment of Temporary Substitute Guardian for the above Ward and/or hearing on ______________________ (date),

The Court finds:

1. Venue is proper and that the required notices have been given or waived
2. A qualified person seeks appointment.
3. That the current Guardian is not effectively performing his/her duties and that the welfare of the Ward requires immediate action pursuant to §15-14-313, C.R.S.
4. The temporary substitute guardianship can not exceed six months.

The Court appoints the following person as Temporary Substitute Guardian of the Ward:

Name: ____

Address: ____

City: ________________ State: _____ Zip Code: ________ Email Address: ____________________

Home Phone #: ____________________________ Work Phone #: ____________________________

The Court directs the issuance of Letters of Guardianship as follows:

This temporary substitute guardianship expires on ____________________ (date not to exceed six months from appointment).

The Temporary Substitute Guardian has the same powers as set forth in the previous Order Appointing Guardian, except as follows:

____

____

____

____

____

____

The Court orders the following:

1. The Temporary Substitute Guardian shall notify the Court within 30 days if his/her home address, email address, or phone number changes and/or any change of address for the Ward.

2. The authority and Letters of any Guardian previously appointed by this Court are hereby suspended.

3. The Temporary Substitute Guardian shall provide a copy of all future filings with the Court to the following identified as interested persons in this matter:

Name of Interested Person	Relationship to Ward
	Spouse
	Parent
	Adult Children

4. If an appointment is made without previous notice to the Ward, the affected Guardian and other interested persons, the Temporary Substitute Guardian, within five days after the appointment shall provide a copy of this of this Order Appointing a Temporary Substitute Guardian for Adult pursuant to §15-14-313(1), C.R.S.

5. **The Court further orders:**

____

____

____

____

____

Date: ______________________

____
☐Judge ☐Magistrate

STATE STATUTES & CODES

Alabama
Alaska
Arizona
Arkansas
California
Connecticut
Delaware
District of Columbia
Florida
Georgia
Hawaii
Idaho
Illinois
Indiana
Iowa
Kansas
Kentucky
Louisiana
Maine
Maryland
Massachusetts
Michigan
Minnesota
Mississippi
Missouri
Montana
Nebraska
Nevada
New Hampshire
New Jersey
New Mexico
New York
North Carolina
North Dakota
Ohio
Oklahoma
Oregon
Pennsylvania
Rhode Island
South Carolina
South Dakota
Tennessee

Google + 0 Like

14 - Day FREE Trial Targeted Lawyer Listing Targeted Lawyer Listing LAWS.com

§ 29-5-100 - Appointment of temporary substitute conservator; period of service; powers and authority; notice; removal

Washington Laws

Washington Legal Forms

Free Legal Advice

Legal Questions

Unclaimed Money Search

Legal Forms

Labor and Employment Law

Unclaimed Property

ads

O.C.G.A. 29-5-100 (2010)
29-5-100. Appointment of temporary substitute conservator; period of service; powers and authority; notice; removal

(a) Upon its own motion or upon the petition of any interested party, including the ward, the court may appoint a temporary substitute conservator for a ward if it appears to the court that the best interest of the ward requires immediate action.

(b) The temporary substitute conservator shall be appointed for a specified period not to exceed 120 days.

(c) The court shall appoint as temporary substitute conservator the county guardian or some other appropriate person who shall serve the best interest of the ward.

(d) Except as otherwise ordered by the court, a temporary substitute conservator has the powers set forth in the order of appointment. The authority of the previously appointed conservator is suspended for as long as the temporary substitute conservator has authority.

(e) Notice of the appointment of a temporary substitute conservator shall be served personally on the ward. Notice of the appointment shall be served personally on the previously appointed conservator at the last address provided by that conservator to the court. Notice of the appointment shall be mailed by first-class mail to the surety of the previously appointed conservator and to the ward's guardian, if any.

(f) The court may remove the temporary substitute conservator at any time. A temporary substitute conservator shall make any report and shall give any bond the court deems appropriate. In all other respects, the provisions of this chapter apply to the temporary substitute conservator.

Attachment B

Elder Law Section

of the Washington State Bar Association

March 20, 2013

Representative Jamie Pedersen | *Email: Jamie.Pedersen@leg.wa.gov*

Re: SB 5692 – Standby Guardian Bill

Dear Representative Pedersen:

I write in my capacity as Chair of the Washington State Bar Association Elder Law Section. The Elder Law Section appreciates your ongoing support for issues involving incapacitated persons.

The Elder Law Section is opposed to SB 5692 in its current form. For your convenience, I enclose a copy of my February 20, 2013 letter to the sponsoring senators of SB 5692, which I previously provided to you.

As you know from the testimony of Robert Nettleton on March 14, 2013, our section continues to have concerns about SB 5692. We believe it is unworkable in its current form, and we reiterate our earlier requests that this matter be tabled so that all issues can be addressed in a thoughtful manner during the interim. We acknowledge this may not happen and thus submit the attached suggested amendments to SB 5692. The Elder Law Section would take a neutral position on SB 5692 if it were amended as we have suggested.

Although our proposal puts a process in place for the court appointment of a standby guardian, there are still concerns to be worked through, including but not limited to, the costs to incapacitated persons, the costs to the courts, and whether or not a bonding company will issue a bond to a standby guardian during a planned absence. In addition, there may be better and/or different ways to deal with the appointment of the standby guardian, but they would involve amending other statutes. That is not feasible given the current time constraints.

Thank you again for your consideration of the Elder Law Section's concerns regarding SB 5692 and our suggested changes to RCW 11.88.125 and 11.92.043.

Sincerely,

Michelle L. Graunke
Chair, Elder Law Section of the
Washington State Bar Association.

Enclosures
cc: Kathryn M. Leathers

Attachment C

RCW 11.88.125 IS AMENDED AS FOLLOWS

~~(1) The person appointed by the court as either guardian or limited guardian of the person and/or estate of an incapacitated person shall file in writing with the court, within ninety days from the date of appointment, a notice designating a standby limited guardian or guardian to serve as limited guardian or guardian at the death or legal incapacity of the court-appointed guardian or limited guardian. The notice shall state the name, address, zip code, and telephone number of the designated standby or limited guardian. Notice of the guardian's designation of the standby guardian shall be given to the standby guardian, the incapacitated person and his or her spouse or domestic partner and adult children, any facility in which the incapacitated person resides, and any person entitled to special notice under RCW 11.92.150 or any person entitled to receive pleadings pursuant to RCW 11.88.095(2) (j). Such standby guardian or limited guardian shall have all the powers, duties, and obligations of the regularly appointed guardian or limited guardian and in addition shall, within a period of thirty days from the death or adjudication of incapacity of the regularly appointed guardian or limited guardian, file with the superior court in the county in which the guardianship or limited guardianship is then being administered, a petition for appointment of a substitute guardian or limited guardian. Upon the court's appointment of a new, substitute guardian or limited guardian, the standby guardian or limited guardian shall make an accounting and report to be approved by the court, and upon approval of the court, the standby guardian or limited guardian shall be released from all duties and obligations arising from or out of the guardianship or limited guardianship.~~

~~(2) Letters of guardianship shall be issued to the standby guardian or limited guardian upon filing an oath and posting a bond as required by RCW 11.88.100 as now or hereafter amended. The oath may be filed prior to the appointed guardian or limited guardian's death. Notice of such appointment shall be provided to the standby guardian, the incapacitated person, and any facility in which the incapacitated person resides. The provisions of RCW 11.88.100 through 11.88.110 as now or hereafter amended shall apply to standby guardians and limited guardians.~~

(1) The guardian or limited guardian shall file a petition in the superior court where the

guardianship or limited guardianship is being administered requesting the appointment of a standby guardian or standby limited guardian within ninety days from the date of appointment of the guardian or limited guardian. The petition shall include:

(a) The petitioner's name and address;
(b) The incapacitated person's name, age, and address;
(c) The name and address of the proposed standby guardian or standby limited guardian; and
(d) A request that the court appoint the proposed standby guardian or proposed standby limited guardian in the event of the death, legal incapacity, or planned absence of the guardian or limited guardian.

Notice of the petition to appoint the standby guardian or standby limited guardian shall be given to the proposed standby guardian or proposed standby limited guardian, the incapacitated person and his or her spouse or domestic partner and adult children, any facility in which the incapacitated person resides, and any person entitled to special notice under RCW 11.92.150 or any person entitled to receive pleadings pursuant to RCW 11.88.095(2)(j). Upon conclusion of the hearing to appoint a standby guardian or standby limited guardian, the court shall enter an order appointing the standby guardian or standby limited guardian, and the amount of bond as required by RCW 11.88.100 through 11.88.110 as now or hereafter amended upon the death or legal incapacity of the guardian or limited guardian.

(2) The person or entity appointed by the court as standby guardian or standby limited guardian shall meet the requirements of RCW 11.88.020 as now or hereafter amended. The order appointing standby guardian or standby limited guardian shall state the amount of bond, if any, to be posted by the standby guardian or standby limited guardian before letters of guardianship can be issued to the standby guardian or standby limited guardian. Any person or entity appointed by the court as standby guardian or standby limited guardian shall receive notice of all further guardianship proceedings, to include but not limited to the filing of any notice of substantial change in circumstance, petition for instruction, petition to sell property, accounting

under RCW 11.92.040, report under RCW 11.92.043, notice of death of guardian or limited guardian, notice of legal incapacity of guardian or limited guardian, and resignation of the guardian or limited guardian.

(3) A standby guardian or standby limited guardian shall have the authority to assume the duties, responsibilities, and powers of the guardian or limited guardian upon the filing of the notice of death or legal incapacity of the guardian or limited guardian pending the appointment of a successor guardian or successor limited guardian, upon the filing a notice of death or legal incapacity of the guardian or limited guardian, an oath, and the posting of any bond. Letters of guardianship issued to the standby guardian or standby limited guardian in the event of death or legal incapacity of the guardian or limited guardian shall expire within ninety days unless otherwise ordered by court order. Within ten days of the filing of the notice of death or legal incapacity of the guardian or limited guardian, the standby guardian or standby limited guardian shall file a petition for the appointment of a successor guardian or successor limited guardian in the superior court in which the guardianship or limited guardianship is being administered. Notice of the petition to appoint a successor guardian or successor limited guardian shall be given to the incapacitated person and his or her spouse or domestic partner and adult children, any facility in which the incapacitated person resides, and any person entitled to special notice under RCW 11.92.150 or any person entitled to receive pleadings pursuant to RCW 11.88.095(2)(j). Upon the court's appointment of a successor guardian or successor limited guardian, the standby guardian or standby limited guardian shall make an accounting and report to be approved by the court, and upon approval of the court, the standby guardian or standby limited guardian shall be released from all duties and obligations arising from or out of the guardianship or limited guardianship.

(4) A standby guardian or standby limited guardian may assume some or all of the duties, responsibilities, and powers of the guardian or limited guardian during the guardian or limited guardian's planned absence. Prior to the commencement of the guardian or limited guardian's planned absence and prior to the standby guardian or standby limited guardian assuming any duties, responsibilities, and powers of the guardian or limited guardian, the guardian or limited

guardian shall file a petition in the superior court where the guardianship or limited guardianship is being administered stating the dates of the planned absence and the duties, responsibilities, and powers the standby guardian or standby limited guardian should assume. Notice of the planned absence petition shall be given to standby guardian or standby limited guardian, the incapacitated person and his or her spouse or domestic partner and adult children, any facility in which the incapacitated person resides, and any person entitled to special notice under RCW 11.92.150 or any person entitled to receive pleadings pursuant to RCW 11.88.095(2) (j). Upon the conclusion of the hearing on the planned absence petition, the court shall specify the amount of bond as required by RCW 11.88.100 through 11.88.110 as now or hereafter amended to be filed by the standby guardian or standby limited guardian, the duties, responsibilities, and powers the standby guardian or standby limited guardian will assume during the planned absence, the duration the standby guardian or limited standby guardian will be acting, and the expiration date of the letters of guardianship to be issued to the standby guardian or standby limited guardian.

(~~3~~5) In addition to the powers of a standby limited guardian or standby limited guardian as noted in subsection (1) of this section, the standby limited guardian or standby limited guardian shall have the authority to provide timely, informed consent to necessary medical procedures, as authorized in ~~*RCW 11.92.040~~ RCW 11.92.043 as now or hereafter amended, if the guardian or limited guardian cannot be located within four hours after the need for such consent arises.

RCW 11.92.043(5) IS AMENDED AS FOLLOWS:

(5) Consistent with RCW 7.70.065, to provide timely, informed consent for health care of the incapacitated person, except in the case of a limited guardian where such power is not expressly provided for in the order of appointment or subsequent modifying order as provided in RCW 11.88.125 as now or hereafter amended, the standby guardian or standby limited guardian may provide timely, informed consent to necessary medical procedures if the guardian or limited guardian cannot be located within four hours after the need for such consent arises. No guardian, limited guardian, ~~or~~ standby guardian, or standby limited guardian may involuntarily commit for mental health treatment, observation, or evaluation an alleged incapacitated person who is unable or unwilling to give informed consent to such commitment unless the procedures for involuntary

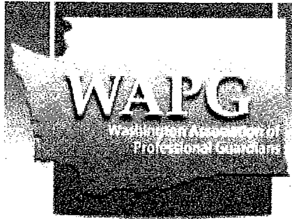
commitment set forth in chapter 71.05 or 72.23 RCW are followed. Nothing in this section shall be construed to allow a guardian, limited guardian, ~~or~~ standby guardian, or standby limited guardian to consent to:

(a) Therapy or other procedure which induces convulsion;

(b) Surgery solely for the purpose of psychosurgery;

(c) Other psychiatric or mental health procedures that restrict physical freedom of movement, or the rights set forth in RCW 71.05.217.

A guardian, limited guardian, ~~or~~ standby guardian, or standby limited gaurdian who believes these procedures are necessary for the proper care and maintenance of the incapacitated person shall petition the court for an order unless the court has previously approved the procedure within the past thirty days. The court may order the procedure only after an attorney is appointed in accordance with RCW 11.88.045 if no attorney has previously appeared, notice is given, and a hearing is held in accordance with RCW 11.88.040.



Washington Association of Professional Guardians

3/13/2013

Re: SB 5692 -Standby Guardian Bill

Dear Members of the House Committee on Judiciary:

On behalf of the over 90 members of the Washington Association of Professional Guardians (WAPG), I want to thank you for considering our views and concerns related to the proposed legislation affecting Standby Guardians, Senate Bill 5692.

While we support efforts to clarify and improve laws related to guardianship, we believe SB 5692 in its current form is: 1. unnecessary, (the goals of the sponsor can be achieved under current law); 2. confusing, the language of the bill has errors in language and content which would impede and not streamline guardianship practice; and, 3. possibly unconstitutional, (the proposed bill grants fiduciary authority to individuals who have not been vetted by the court--requiring no oath, no bond, and allowing unfettered access to the Incapacitated Person's income and assets without documentation of authority from the court). We particularly oppose the granting of fiduciary authority and control of an Incapacitated Person's assets, even temporarily, to someone who has not been vetted by the Court, which the bill does.

Moreover, SB 5692 fails to recognize the other stakeholders whose participation is essential for guardians to carry out their work: the financial institutions. If SB 5692 becomes law, it will significantly loosen requirements codified in statute for the protection of assets and it will eliminate provisions, currently in place. Current law requires evidence that a guardian is authorized to act, via Letters of Guardianship. This allows for the fluidity of essential financial transactions by providing financial institutions with the necessary evidence that the guardian or

standby guardian has the authority to transact business on behalf of the incapacitated person's estate.

Under current law, before a standby guardian can obtain Letters of Guardianship, they must sign an oath stating their fidelity to carrying out their duties in compliance with the law, obtain a bond, if required, and only then can they obtain Letters of Guardianship from the Clerk of the Superior Court. Absent the authority granted by the court and evidenced by the Letters of Guardianship, no prudent financial institution would consider releasing information or assets to any individual. The proposed bill eliminates the process for obtaining Letters of Guardianship. Without such letters, the standby guardian has no authority to act. We support the process as it stands under current law as we believe it protects the assets of the Incapacitated Person by requiring the court to evaluate the suitability of the guardian before granting fiduciary authority.

If the goal of SB 5692 is simply to insure that the Incapacitated Person's needs are met during a guardian's planned absence, it fails to recognize that this is already possible under existing law. The Washington State Bar Association has provided a letter which explains the two instances under current law where a Standby Guardian can act. Existing law already provides a mechanism for emergency medical making decisions if a treatment provider cannot obtain the consent of the Guardian or Limited Guardian, under RCW 11.88.125(3). The treatment provider, under RCW 7.70.065(c), can act if it is in the Incapacitated Person's best interest.

Thus, the current law already provides the standby guardian with the authority to act in a non-financial emergency situation and permits treatment providers to act in the Incapacitated Person's best interest if neither the guardian nor the standby guardian can be reached.

In the event of a "planned absence," there is nothing under current law to prevent a Guardian or Limited Guardian taking appropriate steps to ensure the affairs of the Incapacitated Person are in order. Routine bill paying can be automated, pre-paid, or arrangements can be made with vendors to accommodate necessary financial transactions. For medical decision during a "planned absence," the Guardian or Limited Guardian can notify treatment providers, provide contact information, issue appropriate instructions, and alert the designated Standby Guardian of the possibility that the Standby Guardian may be called upon to make a necessary medical decision and provide the Standby with information to allow them to make substituted judgment or best interest decisions.

Moreover, if the "planned absence" is extensive, say, for several months, or indeterminate amount of time because of medical reasons requiring recovery (e.g. a planned surgery); under current law the Guardian could facilitate the temporary resignation and petition to court to appoint their Standby in their place during such "planned absence".

We believe that "planned absences" can be addressed under current law. We believe that the duties of a Guardian or Limited Guardian are non-delegable, except as currently provided for under the law for medical emergencies. We believe the proposed bill places Incapacitated Person's assets at risk by proposing that Standby Guardians be given fiduciary authority without proper vetting by the court. We also believe the bill, as written, would be ineffective absent letters of guardianship, which we believe should not be granted without vetting from the court. Finally, if enacted, the legislation would add unnecessary and time-wasting reporting and notice requirements.

We support the concerns articulated by the Washington State Bar Association and the Superior Court Judges Association related to the practical negative effects that would result from the passage of this bill as well as some of the technical errors in the language. We have offered and will continue to offer our input and advice to the bill's supporters, if invited, and encourage their invitation of the other stakeholders to the table to craft a bill that would better serve the incapacitated citizens of Washington State.

Thank You.
Respectfully submitted,

Daniel Smerken
Vice President/ Legislative Committee Chair
Washington Association of Professional Guardians.

ADMINISTRATIVE OFFICE OF THE COURTS
Callie Dietz
Interim State Court Administrator

April 8, 2013

TO: Certified Professional Guardian Board

FROM: Regulations Committee

RE: Certified Professional Guardian Agency Ownership

Issue:

Should non-guardians be allowed to own professional guardian agencies?
If not, what should the Standard of Practice prohibiting ownership say? If yes, what mechanisms are needed to ensure adherence to guardian standards of practice?

Proposed Solution:

413 Responsibilities of Certified Professional Guardian Agencies

413.1 Responsibilities of Owners, Managers, and Supervisory Professional Guardians

413.1.1 An owner of a professional guardian agency, and a professional guardian who individually or together with other professional guardians possess comparable managerial authority in a professional guardian agency, shall make reasonable efforts to ensure that the agency has in effect measures giving reasonable assurance that all professional guardians in the agency conform to the Standards of Practice.

413.1.2 A professional guardian having direct supervisory authority over another professional guardian shall make reasonable efforts to ensure that the other professional guardian conforms to the Standards of Practice.

413.1.3 A professional guardian shall be responsible for another professional guardian's violation of the Standards of Practice if:

413.1.3.1 the professional guardian is an owner or has comparable managerial authority in the professional guardian agency in which the other professional guardian practices, or has direct supervisory authority over the other professional guardian, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

413.1.3.2 the professional guardian is an owner or has comparable managerial authority in the professional guardian agency in which the other professional guardian practices, or has direct supervisory authority over the other professional guardian and orders or, with knowledge of the specific conduct, ratifies the conduct involved.

413.1.3.3 the professional guardian is a designated certified professional guardian who has the final decision-making authority for an incapacitated person or their estate on behalf of the agency.

413.2 Responsibilities of a Subordinate Professional Guardian

413.2.1 A professional guardian is bound by the Standards of Practice notwithstanding that the professional guardian acted at the direction of another person.

413.2.2 A subordinate professional guardian does not violate the Standards of Practice if acting in accordance with a supervisory professional guardian's reasonable resolution of an arguable question of professional duty.

413.3 Responsibilities Regarding Non Guardian Employee Assistance

With respect to a non-guardian[1] employed or retained by or associated with a professional guardian:

413.3.1 an owner, and a professional guardian who individually or together with other professional guardians possess comparable managerial authority in a professional guardian agency shall make reasonable efforts to ensure that the agency has in effect measures giving reasonable assurance that the conduct of a non-guardian employee is compatible with the professional obligations of the professional guardian;

413.3.2 a professional guardian having direct supervisory authority over the non-guardian employee shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the professional guardian; and

413.3.3 a professional guardian shall be responsible for conduct of non-guardian employee that would be a violation of the Standards of Practice if engaged in by a professional guardian if:

413.3.3.1 the professional guardian orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

[1] A non-guardian is any individual not certified by the Certified Professional Guardian Board pursuant to its regulations and GR 23.

413.3.3.2 the professional guardian is an owner or has comparable managerial authority in the professional guardian agency in which the non-guardian is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

413.3.3.3 the professional guardian is a designated certified professional guardian who has the final decision-making authority for incapacitated persons or their estate on behalf of the agency.

413.4 Professional Independence of a Professional Guardian

413.4.1 A professional guardian or professional guardian agency shall not share guardian fees with a non-guardian, except that:

413.4.1.1 an agreement by a professional guardian with the professional guardian's agency, partner, or associate may provide for the payment of money, over a reasonable period of time after the professional guardian's death, to the professional guardian's estate or to one or more specified persons;

413.4.1.2. a professional guardian who purchases the practice of a deceased, disabled, or disappeared professional guardian may, pursuant to the provisions of 413.4.1.1 pay to the estate or other representative of that professional guardian the agreed-upon purchase price;

413.4.1.3 a professional guardian or professional guardian agency may include non-guardian employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

413.4.2 A professional guardian must hold a majority interest in a partnership with a non-guardian if any of the activities of the partnership consist of providing guardianship services.

413.4.3 A professional guardian shall not practice with or in the form of a professional corporation or association authorized to provide guardianship services for a profit, if:

413.4.3.1 a non-guardian owns a majority interest therein, except that a fiduciary representative of the estate of a professional guardian may hold the stock or interest of the professional guardian for a reasonable time during administration;

413.4.3.2 a non-guardian is a director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or

413.4.3.3 a non-guardian has the right to direct or control the professional judgment of a professional guardian.

413.5 Responsibilities Regarding Fiduciary Services

413.5.1 A professional guardian shall be subject to the Standards of Practice with respect to the provision of fiduciary services, as defined in 413.5.2, if fiduciary services are provided:

413.5.1.1 by the professional guardian in circumstances that are not distinct from the professional guardian's provision of guardianship services to clients; or

413.5.1.2 in other circumstances by an entity controlled by the professional guardian individually or with others if the professional guardian fails to take reasonable measures to assure that a person obtaining the fiduciary services knows that the services are not guardianship services and that the protections of the client-professional guardian relationship do not exist.

413.5.2 The term "fiduciary services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of guardianship services, including but not limited to Power or Attorney and Trustee.

Background:

For 21 years, except for the District of Columbia, the only jurisdiction in the United States that allows law firms to share fees and profits with non-lawyers, bar associations have prohibited ownership in a law firm by a non lawyer. The ABA Commission on Ethics has considered extending the D. C. rule to other states, but in 2012 declined to do so. Although not an exact comparison, the bar association ban on non lawyer ownership in law firms can inform the discussion before the Board regarding non-guardian ownership of professional guardian agencies (see Attachment A[2]).

Guardian conduct like attorney conduct is guided by standards of practice or rules of professional conduct and ethics which may not apply to non-guardians. Thus allowing non-guardians to own guardian agencies will allow individuals not bound by standards of practice to influence how guardians provide services to incapacitated persons. On the other hand, it is possible that bringing in non-guardian owners with business acumen could result in better run more efficient and effective guardianship agencies.

Although there is little hard evidence that guardians are incapable of practicing in conformance with standards of practice in organizations owned or run by non-guardians, the Board and Spokane Superior Court has experience with two agencies owned by non-guardians which illustrates the practical implications of allowing non-guardians to own and operate professional guardian agencies. A summary of the issues encountered with those agencies is provided below.

[2] April 16, 2012 the ABA decided not to propose changes to its ban on nonlawyer ownership of law firms. http://www.abanow.org/2012/04/aba-commission-on-ethics-2020-will-not-propose-changes-to-aba-policy-prohibiting-nonlawyer-ownership-of-law-firms/

April 2011, a non-guardian acquired two professional guardian agencies and decided to combine them into one agency. The new owner violated several Board regulations including, failing to notify the Board, the court and incapacitated persons of the change in circumstance, failure to have two designated guardians responsible for making decisions for incapacitated persons served by the agency, failure to obtain letters of guardianship in the agency name instead of the names of individual guardians and according to professional guardians working for the agency they failed to visit incapacitated persons and provide care as prescribed by standards of practice.

Unhappy with agency management two professional guardians decided to leave the agency, leaving the agency without a sufficient number of guardians to properly care for a caseload of 205 incapacitated persons. The court appointed a Special Master to oversee the transition.

To address the issue of who can own a professional guardian agency and who is responsible for the actions of the employees of a professional guardian agency, the Regulations Committee asks the Board to consider adoption of the proposed SOP provided above.

Defending Liberty
Pursuing Justice

AMERICAN BAR ASSOCIATION

ABA Commission on Ethics 20/20
321 N. Clark Street
Chicago, IL 60654-7598
Phone: (312) 988-5311
Fax: (312) 988-5280
Website: www.abanet.org/ethics2020

2010-2011

CO-CHAIR
Jamie S. Gorelick
WilmerHale
1875 Pennsylvania Ave., N.W.
Washington, DC 20006

CO-CHAIR
Michael Traynor
3131 Eton Ave.
Berkeley, CA 94705

MEMBERS
Professor Stephen Gillers
New York, NY

Jeffrey B. Golden
London, United Kingdom

George W. Jones, Jr.
Washington, DC

Hon. Elizabeth B. Lacy
Richmond, VA

Judith A. Miller
Washington, DC

Hon. Kathryn A. Oberly
Washington, DC

Roberta Cooper Ramo
Albuquerque, NM

Herman Joseph Russomanno
Miami, FL

Professor Theodore Schneyer
Tucson, AZ

Professor Carole Silver
Bloomington, IN

Kenneth W. Starr
Waco, TX

Frederic S. Ury
Fairfield, CT

Hon. Gerald W. VandeWalle
Bismarck, ND

LIAISONS
ABA Board of Governors
Carolyn B. Lamm
Washington, DC

Kenneth G. Standard
New York, NY

ABA Center for Professional Responsibility
Donald B. Hilliker
Chicago, IL

ABA Task Force on International Trade in Legal Services
Professor Robert E. Lutz, II
Los Angeles, CA

ABA Standing Committee on Ethics and Professional Responsibility
Philip H. Schaeffer
New York, NY

ABA Young Lawyers Division
Youshea A. Berry

COMMISSION REPORTERS
Andrew M. Perlman, Chief Reporter
Boston, MA

Paul D. Paton
Sacramento, CA

Anthony Sebok
New York, NY

W. Bradley Wendel
Ithaca, NY

CENTER FOR PROFESSIONAL RESPONSIBILITY
Jeanne P. Gray, Director

Ellyn S. Rosen, Commission Counsel
(312) 988-5311

Marcia Kladder, Policy & Program Director
(312) 988-5326

Natalia Vera, Senior Paralegal
(312) 988-5328

Kimley Grant, Regulation Paralegal
(312) 988-5319

To: **ABA Entities, Courts, Bar Associations (state, local, specialty and international), Law Schools, and Individuals**

From: **ABA Commission on Ethics 20/20 Working Group on Alternative Business Structures**[1]

Re: **For Comment: Issues Paper Concerning Alternative Business Structures**

Date: **April 5, 2011**

I. Introduction and Questions Concerning Alternative Business Structures

The American Bar Association Commission on Ethics 20/20 is examining the impact of globalization and technology on the legal profession. The principles guiding the Commission's work are protection of the public; preservation of core professional values; and maintenance of a strong, independent and self-regulated profession.

The Commission's November 2009 Preliminary Issues Outline invited consideration of how "core principles of client and public protection [can] be satisfied while simultaneously permitting U.S. lawyers and law firms to participate on a level playing field in a global legal services marketplace that includes the increased use of one or more forms of alternative business structures."[2] To address these challenges, the Commission formed a Working Group that has been studying the impact of domestic and international developments in this regard and is considering whether lawyers and law firms, in order to better serve their clients, should be able to structure themselves differently than is currently permitted under the Model Rules of Professional Conduct.

---

[1] The members of the Working Group are George W. Jones (Co-Chair and Commissioner), Professor Theodore J. Schneyer (Co-Chair and Commissioner), Jeffrey B. Golden (Commissioner), Roberta Cooper Ramo (Commissioner), Professor Carole Silver (Commissioner), Chief Justice Gerald W. VandeWalle (Commissioner), Donald B. Hilliker (ABA Center for Professional Responsibility, Kathleen J. Hopkins (ABA General Practice, Solo and Small Firm Division), George Ripplinger (ABA Standing Committee on Ethics and Professional Responsibility), and Gene Shipp (National Organization of Bar Counsel), and Robert D. Welden (ABA Standing Committee on Professional Discipline). Paul D. Paton serves as Reporter. Ellyn S. Rosen, Commission Counsel, and Arthur Garwin, Deputy Director of the ABA Center for Professional Responsibility provided counsel to the Working Group.

[2] *See* ABA Commission on Ethics 20/20, Preliminary Issues Outline at 6, *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_2020/preliminary_issues_outline.authcheckdam.pdf.

At present, only the District of Columbia permits nonlawyer ownership or management of law firms.[3] Except in very limited circumstances, there is a similar restriction on fee-sharing with nonlawyers. In March 2011, legislation to permit nonlawyer equity owners of incorporated law firms was introduced in North Carolina.[4]

The ABA has undertaken several previous efforts to examine alternative business structures (ABS), and the Working Group's efforts are necessarily informed by them. Since the House of Delegates last considered recommendations on multidisciplinary practice in July 2000, few jurisdictions within the United States have examined the issue of MDP or any other form of ABS. In the intervening period, however, other countries have implemented a wide range of approaches. Understanding how those models might be adapted or implemented domestically, as well as the challenges these approaches pose in the global legal services marketplace, is important given this Commission's charge. The economic challenges of the intervening period also invite reconsideration of whether ABS might serve to enhance access to legal services for those otherwise unable to afford them, and to provide new and varied opportunities for lawyers and firms domestically to better serve clients.

At its February 2011 meeting in Atlanta, the Commission decided that two options for alternative business structures -- passive equity investment in law firms and the public trading of shares in law firms -- would not be appropriate to recommend for implementation in the United States at this time, though both have been adopted elsewhere since July 2000. However, the Commission has invited the Working Group to continue analyzing previously unavailable data and information to determine whether and to what extent other structural reforms may now be desirable in the U.S. and, if so, how they might be implemented in our regulatory scheme in a manner consonant with the principles guiding the Commission's work.

This paper describes several issues and approaches that the Working Group has identified and is evaluating. The Working Group appreciates that, in many respects, the description of the current ABS landscape described below is very detailed. However, the Working Group believes that this level of detail will facilitate informed discussion and comments about these issues.

Apart from the February 2011 decisions about passive equity investment and the public trading of shares in law firms noted above, the Commission has taken no positions about the matters addressed in this paper. To assist the Commission in determining what, if any, other

[3] District of Columbia Rule of Professional Conduct 5.4 provides in relevant part that: (a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that: . . . . (4) Sharing of fees is permitted in a partnership or other form of organization which meets the requirements of paragraph (b) . . . (b) A lawyer may practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients, but only if: (1) The partnership or organization has as its sole purpose providing legal services to clients; (2) All persons having such managerial authority or holding a financial interest undertake to abide by these Rules of Professional Conduct; (3) The lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under Rule 5.1; (4) The foregoing conditions are set forth in writing. (c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

[4] *See* An Act to Allow Nonattorney Ownership of Professional Corporation Law Firms, Subject to Certain Requirements, *available at* http://www.ncleg.net/Sessions/2011/Bills/Senate/HTML/S254v0.html.

recommendations should be made regarding whether to permit U.S. law firms to structure themselves in a manner not currently permitted under the Model Rules of Professional Conduct, the Commission seeks input regarding the following questions by **June 1, 2011**:

1. Are there client services that U.S. lawyers and law firms should be permitted to offer, but that they currently are not permitted to offer due to restrictions set forth in Rule of Professional Conduct 5.4, including the prohibitions on sharing fees with nonlawyers?

2. Would maintaining the present restrictions contained in the Rules of Professional Conduct impede U.S. lawyers and law firms from participating on a level playing field in a global legal services marketplace that includes the increased use of one or more forms of alternative business structures (e.g., including but not limited, to the cost of services or the ability to recruit lawyers and nonalwyers)? If so, in what ways?

    a. What guidance is required for U.S. lawyers and law firms practicing in countries that currently permit forms of ABS?

3. What types of nonlawyer service providers (other than administrative assistants, paralegals, receptionists and other support staff) currently assist you in serving your clients?

    a. Are they employees of the firm, independent contractors, or do they have some other status?

    b. If you employ these nonlawyers directly, why do you choose to do so rather than through a separately organized business structure, such as a law-related business as defined under Rule 5.7 of the ABA Model Rules of Professional Conduct?

    c. If you were permitted to have nonlawyer partners in your firm would you do so?

4. The District of Columbia's version of Model Rule of Professional Conduct 5.4 permits (with certain restrictions set forth in footnote 3) a lawyer to practice law in a partnership or other form of organization in which nonlawyers hold a financial interest or have managerial authority.

    a. Do you believe that the District of Columbia Rule provides adequate protections to clients?

    b. If not, do you believe that District of Columbia Rule 5.4, along with limitations on the percentage of nonlawyer participation, would adequately protect clients?

II. A Brief History of the ABA's Consideration of ABS

As noted above, the ABA has previously studied ABS. In doing so, it has recognized that there is a relationship between those efforts, advances in technology, and increases in the globalization of legal practice. In 1999, a background paper made the following observation:

> The delivery of legal services in the United States faces unprecedented challenges. Revolutionary advances in technology and information sharing, the globalization of the capital and financial services markets, and more expansive government regulation of commercial and private activities have reshaped client demands for legal advice and advocacy. [5]

These same challenges are equally apparent today and are arguably even greater. As this Commission's Preliminary Issues Outline noted, "already the profession is encountering the competitive and ethical implications of U.S. lawyers and law firms seeking to represent American and foreign clients abroad and foreign lawyers seeking access to the U.S. legal market."[6]

A. Pre-Model Rules Treatment of ABS

Prior to 1969, Canon 33 of the ABA Canons of Professional Ethics provided that "[p]artnerships between lawyers and members of other professions or nonprofessional persons should not be formed or permitted where any part of the partnership's employment consists of the practice of law."

In 1969, this prohibition was carried forward in the ABA Model Code of Professional Responsibility. DR 3-103(A) prohibited a lawyer from forming "a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law." Moreover, under DR 3-102(A), lawyers could not "share legal fees with a non-lawyer" except under narrow circumstances.

B. The Kutak Commission – Model Rule 5.4

Between 1977 and 1983, the Commission on Evaluation of Professional Standards (Kutak Commission) developed the Model Rules of Professional Conduct. The Kutak Commission carefully considered the issue of lawyers partnering with nonlawyers and initially proposed that such partnerships should be permitted as long as certain safeguards were employed. The 1982 draft of Model Rule 5.4 provided as follows:

> *Professional Independence of a Firm*
>
> A lawyer may be employed by an organization in which a financial interest is held or managerial authority is exercised by a nonlawyer, or by a lawyer acting in a capacity other than that of representing clients, such as a business corporation, insurance company, legal services organization or government agency, but only if the terms of the relationship provide in writing that:

---

[5] Commission on Multidisciplinary Practice, *Background Paper on Multidisciplinary Practice: Issues and Development,* at 1 (January 1999), *available at* http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/multicomreport0199.html.

[6] Preliminary Issues Outline, *supra* note 2, at 1.

(a) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship;

(b) information relating to representation of a client is protected as required by Rule 1.6;

(c) the arrangement does not involve advertising or personal contract with prospective clients prohibited by Rules 7.2 and 7.3; and

(d) the arrangement does not result in charging a fee that violates Rule 1.5.

The House of Delegates rejected this proposed version of Model Rule 5.4. A revised version of Model Rule 5.4 was subsequently adopted in 1983 and has remained largely intact, except for relatively minor subsequent amendments that have not affected the basic prohibition on lawyer/nonlawyer partnerships and sharing of fees.

C. The Commission on Multidisciplinary Practice

In the late 1990s, the legal profession took note of the extent to which consulting firms had become associated with the then-"Big-5" accounting firms. In particular, these consulting firms had begun to engage in work that was similar to the work being performed by law firms.[7]

In August 1998, then-ABA President Philip S. Anderson appointed the Commission on Multidisciplinary Practice (MDP Commission) "to study and report on the extent to which and the manner in which professional service firms operated by accountants and others who are not lawyers are seeking to provide legal services to the public."[8] The Commission was asked to analyze:

•The experience of clients, foreign and domestic, who had received legal services from professional service firms, and report on international trade developments relevant to the issue;

•Existing state and federal legislative frameworks within which professional service firms were providing legal services, and recommend any modifications or additions to that framework that would be in the public interest;

•The impact of receiving legal services from professional service firms on a client's ability to protect privileged communications and to have the benefit of advice free from conflicts of interest; and

• The application of current ethical rules and principles to the provision of legal services by professional service firms, and to recommend any modifications or additions that would serve the public interest.[9]

Though large accounting firms were the impetus for the MDP Commission's work, it heard testimony and received written comments that suggested that the Model Rules should be revised to permit multidisciplinary practices and that such changes would benefit both lawyers

---

[7] *Supra* note 5, at 2.
[8] *See* The Commission on Multidisciplinary Practice, About The Commission, at http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice.html.
[9] *Id.*

and the public.[10] Accordingly, the MDP Commission's August 1999 Report to the House of Delegates contained a Recommendation that the Model Rules of Professional Conduct be amended to permit multidisciplinary practices, but with certain safeguards in place to ensure that the core values of the legal profession were maintained.[11] The recommendation was accompanied by illustrations of possible amendments to the Model Rules of Professional Conduct that would have been considered at a later time if the underlying recommendation were adopted.[12]

In response to the MDP Commission's recommendation, the House adopted the following resolution:

> That the American Bar Association make no change, addition or amendment to the Model Rules of Professional Conduct which permits a lawyer to offer legal services through a multidisciplinary practice unless and until additional study demonstrates that such changes will further the public interest without sacrificing or compromising lawyer independence and the legal profession's tradition of loyalty to clients.[13]

The MDP Commission proceeded to take more testimony and receive additional comments. It returned to the House of Delegates with a new Report in July 2000, which once again recommended changes to the Model Rules of Professional Conduct, but with less detail than in 1999 and in a manner that imposed more restrictions on proposed multidisciplinary practices.[14] The key change from the prior recommendation was that only lawyer-controlled MDPs would be permitted under the new recommendation. The House again rejected the Commission's recommendation, and this time adopted a recommendation that included the following language:

> The sharing of legal fees with nonlawyers and the ownership and control of the practice of law by nonlawyers are inconsistent with the core values of the legal profession.
>
> The law governing lawyers, that prohibits lawyers from sharing legal fees with nonlawyers and from directly or indirectly transferring to nonlawyers ownership or control over entities practicing law, should not be revised.
>
> * * * *
>
> FURTHER RESOLVED that the American Bar Association recommends that in jurisdictions that permit lawyers and law firms to own and operate nonlegal businesses, no nonlawyer or nonlegal entity involved in the provision of such services should own or control the practice of law by a lawyer or law firm or

---

[10] *See* Report to the House of Delegates 109 (August 1999) at C9-10, *available at* http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdpfinalreport.html.

[11] *Id*.

[12] *Id*.

[13] Report to the House of Delegates 10B (as revised) (August 1999).

[14] Report to the House of Delegates 117 (July 2000), *available at* http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdpfinalrep2000.html.

otherwise be permitted to direct or regulate the professional judgment of the lawyer or law firm in rendering legal services to any person.[15]

During the time that the MDP Commission was in existence, forty-four states and the District of Columbia formed committees to study the multidisciplinary practice issue.[16] A variety of recommendations followed.[17] When the Commission's work ended in July 2000, however, state initiatives in this area lost their impetus.

III. ABS Abroad

As noted in the Introduction, since July 2000, few jurisdictions within the United States have examined the issue of multidisciplinary practices or any other form of ABS. Other countries, however, have moved forward in this area, adopting a wide range of approaches. The competitive environment in which U.S. firms of all sizes now operate has changed, and at least one New York-based litigation firm with fewer than 40 lawyers converted its office in London, England to operate as a Legal Disciplinary Partnership (LDP), a form of ABS discussed below that permits up to 25% of a law firm's partnership to be formed by nonlawyers. Accordingly, while the regulatory environment elsewhere may not directly map the regulatory structures in place in the United States, U.S. firms and lawyers are already participating in ABS abroad. The discussion is no longer simply theoretical.

Further, the impact of the economic challenges of the intervening period also invites reconsideration of whether ABS might serve to enhance access to legal services for those otherwise unable to afford them, and to provide new and varied opportunities for lawyers and firms domestically to better serve the public. Though many of the issues and concerns present in the period leading up to the July 2000 resolution remain at the core of the assessment of ABS, the domestic and global context within which they are to be considered has changed.

A. Regulatory Reform in Australia

Australia has adopted an expansive approach to ABS. Australia is a Federation of six States, each with a plenary constitutional power to regulate the legal profession and the provision of legal services. Two self-governing Territories have primary regulatory power over the legal profession. In most jurisdictions it is a bifurcated profession (barristers and solicitors), with approximately 56,000 solicitors and 5,200 barristers as of December 2010. The profession is made up overwhelmingly of sole practitioners and small law firms, constituting approximately 80 percent of the total.[18]

---

[15] *See* Revised Recommendation 10F, *available at* http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdprecom10f.html.

[16] *See* charts at http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdpstats.html and http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdp_state_summ.html.

[17] *Id*.

[18] Murray Hawkins, Director, National Legal Profession Project, "Australian Models of Regulating the Legal Profession," Presentation to the Federation of Law Societies of Canada Semi-Annual Conference, 17-19 March 2011.

Australia's reforms began in 1994, when New South Wales became the first Australian jurisdiction (and the first of any common law jurisdiction) to permit multidisciplinary practices.[19] In that year, legislation authorized multidisciplinary partnerships, but required legal practitioners to retain at least 51% of the net partnership income in order to ensure that these firms retained the ethical practices of a law firm.[20] At that time, lawyers and firms did not express much interest in adopting these alternative business structures, in part because of prevailing attitudes that law should remain a profession and not be treated as a business.[21]

Subsequently, pressure from national competition authorities to reform regulatory structures to create greater accountability and enhance consumer interest and protection, and increased interest in innovation led to proposals to eliminate the 51% rule and to permit Incorporated Legal Practices [described below], including multidisciplinary practices and publicly traded law firms. These proposals raised concerns within the profession about conflicting duties and increased risks of unethical behavior. Regulators and the organized bar were able to overcome these reservations and to adopt these forms of alternative business structures.

As of December 2010, there were approximately 2,000 Incorporated Legal Practices in Australia, and this number is growing rapidly.[22] Most Incorporated Legal Practices are smaller firms, but mid-sized and large national firms also have incorporated. There are around 70 known multidisciplinary partnerships.[23] In New South Wales, the State with the largest number of firms and practitioners, as of August 2010, more than 20% of the legal profession was employed within non-traditional business structures (more than 1,000 of them operating as Incorporated Legal Practices).[24] Approximately 30 New South Wales firms operate as multidisciplinary practices. A primary reason for Australian lawyers taking advantage of these structures is the growing reality and perception that the traditional structure of law firms no longer meets the needs of many practitioners and clients.[25] A drive to promote competitiveness and participation in international markets for goods and services, the need to enhance consumer interests and protection, and the need for the national legal services market to complement and facilitate national competition have been consistent themes animating regulatory reform.[26]

1. Incorporated Legal Practices

Each Australian state or territory's Legal Profession Act sets forth the primary rules applicable to Incorporated Legal Practices (ILP).[27] Australian legal practitioners with valid

---

[19] Steve Mark, Tahlia Gordon, Marlene Le Brun, and Gary Tamsitt, *Preserving the Ethics and Integrity of the Legal Profession in an Evolving Market: A Comparative Regulatory Response*, (2010) (hereafter "Mark & Gordon").
[20] *Id.*
[21] *Id.*
[22] Hawkins, *supra* note 18.
[23] *Id.*
[24] Steve Mark, Regulating for Professionalism, the New South Wales Approach, August 5, 2010. This paper was presented as part of the Ethics 20/20 Commission's Showcase CLE Presentation at the 2010 Annual Meeting in San Francisco and is attached. (hereinafter "Mark")
[25] Mark & Gordon, *supra* note 19.
[26] Hawkins, *supra* note 18.
[27] For purposes of illustration, reference is made in this part to the legislation and regulations for New South Wales.

practice certificates can provide legal services either alone or alongside other service providers who may, or may not, be lawyers.[28] An ILP may provide legal and any other lawful service, except it may not operate a "managed investment scheme" or provide other services prohibited by applicable regulations.[29] The ILP itself is not required to have an Australian legal practice certificate.[30]

The law relating to attorney-client privilege or applicable legal professional privileges continues to apply to legal practitioners who are officers or employees of ILPs.[31] The ILP and each lawyer who is a legal practitioner director, employee or officer must have professional liability insurance and comply with all other rules and regulations governing the profession.[32]

ILPs may have external investors and be listed on the Australian Stock Exchange. They also must operate in compliance with the Australian Federal Corporations Act, including registration with the Australian Securities & Investment Commission. In Australia, a lawyer's professional duty is owed first to the court and then to the client, whereas a corporation's primary duty is to its shareholders. As a result, the New South Wales' Legal Services Commissioner worked closely with Slater & Gordon, the world's first publicly listed law firm, to ensure that its prospectus, constituent documents and shareholder agreements provided that its duty to the court remained primary, that duties to its clients followed, and that the firm's obligations to shareholders were last.

Upon incorporation an ILP must appoint at least one Legal Practitioner Director responsible for the management of the legal services provided by the entity. If the ILP operates in more than one jurisdiction, it is not required to have a Legal Practitioner Director in each jurisdiction in which it operates. The Legal Practitioner Director must implement and maintain appropriate management systems that allow the entity to provide legal services in accordance with the professional obligations of legal practitioners. A failure to do so may constitute misconduct.[33]

In addition to self-assessment and audit requirements, Legal Practitioner Directors must report to the regulator the conduct of any director of their ILP (whether or not the Legal Practitioner Director) that has resulted in, or is likely to result in a violation of that person's professional obligations or other obligations imposed by or under the Act.[34] The Legal Practitioner Director also must report to the appropriate regulator any professional misconduct of a solicitor employed by the practice and take all reasonable action to address any professional misconduct or unsatisfactory professional conduct by a solicitor employed by the ILP. Finally, a Legal Practitioner Director has an obligation to disclose to clients the services to be provided by

[28] Legal Profession Act 2004, http://www.austlii.edu.au/au/legis/nsw/consol_act/lpa2004179/; (hereinafter "LPA 2004") Legal Profession Regulation 2005, http://www.austlii.edu.au/au/legis/nsw/consol_reg/lpr2005270/.
[29] *Id.* at Section 112.
[30] *Id*. at Section 136.
[31] *Id.* at Section 112.
[32] *Id*. at Section 144.
[33] The New South Wales Office of the Legal Services Commissioner, the Law Society of New South Wales, the College of Law, and LawCover (the primary professional liability insurer in New South Wales) have developed key criteria designed to help the Legal Practitioner Director and ILPs demonstrate that they have developed and implemented these management systems. *See* Mark & Gordon *supra* note 19; Mark, *supra* note 24.
[34] *See* Mark & Gordon s*upra* note 19; Mark, *supra* note 24; LPA 2004 *supra* note 29.

the ILP, and whether or not the legal services to be provided will be provided by a legal practitioner.[35]

Sanctions for violations of the regulations governing ILPs can be taken against the entity as well as against the Legal Practitioner Director or other licensed legal practitioners for professional misconduct they commit.[36] Discipline can include canceling the practice certificate of the Legal Practitioner Director. Nonlawyers also may be prohibited from serving as officers or from acting as a manager of an ILP.[37] Upon application to the Supreme Court by the bar association or the Legal Services Commissioner, the Court can enter an order disqualifying the ILP from providing legal services; this means it must cease to be an ILP.[38]

Australia does not have a prerequisite "fit to own" test for nonlawyer managers/owners of alternative business structures like that described below for England, Wales, and Scotland. Also, the United Kingdom's "fit to own" test applies to all business structures permitted, not just incorporated practices.

2. Multidisciplinary Partnerships

Lawyers in Australia also may form multidisciplinary partnerships.[39] A multidisciplinary partnership is defined as "a partnership between one or more Australian legal practitioners and one or more other persons who are not Australian legal practitioners, where the business of the partnership includes the provision of legal services in this jurisdiction as well as other services."[40] Partnerships between Australian lawyers and Australian-registered foreign lawyers do not count as multidisciplinary partnerships.[41] Each lawyer partner is responsible for the management of the legal services provided by the partnership and must ensure that appropriate management systems are implemented and maintained as required by the rules and regulations governing the professional obligations of Australian legal practitioners.[42] Requirements for professional liability insurance apply and the Australian legal practitioner partners retain the attorney-client and other applicable legal professional privileges.

The legal practitioner partners of multidisciplinary partnerships may be found to have committed misconduct if any of the other legal practitioner partners commit professional misconduct, if the conduct of any nonlawyer partner adversely affects the provision of legal services by the partnership or if a nonlawyer partner is found to be unsuitable to serve in that capacity.[43] On application by the bar association or the Regulator, the Supreme Court can prohibit an Australian legal practitioner from being a partner with a nonlawyer in a firm that provides legal and other services if the Court finds that the nonlawyer is not a "fit and proper person" to be a partner or has committed conduct that, if committed by an Australian legal practitioner, would violate applicable professional conduct rules.[44]

---

[35] *See* Mark & Gordon, *supra* note 19.
[36] *See* LPA 2004 *supra* note 29 at Section 153.
[37] *Id*. at Section 154.
[38] *"Without Prejudice" supra*.
[39] *See* LPA 2004, *supra* note 29 at Section 165.
[40] *Id.*
[41] *Id.*
[42] *Id.* at Section 168
[43] *Id*. at Section 169.
[44] *Id*. at Section 179.

B. Multidisciplinary Practices in Canada

Multidisciplinary practices are permitted in two Canadian common-law provinces, Ontario and British Columbia, and in Quebec, which is a civil law jurisdiction. MDPs have been permitted in Ontario since 1999 and in British Columbia since 2010. The Ontario and British Columbia MDP regime is permissive but with significant restrictions: the lawyers involved in the partnership must have effective control over the legal services the partnership provides, and nonlawyer partners are not permitted to provide services to the public unless they "support or supplement the practice of law by the MDP."[45] For example, By-Law 7 of the Law Society of Upper Canada, which regulates lawyers in the Province of Ontario, permits a lawyer ("licensee") to form a partnership or other association (but not a corporation) with a nonlawyer professional "for the purpose of permitting the licensee to provide to clients the services of the professional" if application is made and a series of conditions are satisfied.[46] The conditions include a good character requirement for the nonlawyer professional, that the nonlawyer professional is "qualified to practise a profession, trade or occupation that supports or supplements the practice of law or provision of legal services," and that the lawyer "shall have effective control" over the nonlawyer's professional practice of his or her profession.[47]

In addition, the Law Society of Upper Canada has had rules in place since 2001 to regulate "affiliated" law firms. The Law Society's Multi-Disciplinary Practice Task Force had been tasked in 1998 and 1999 with examining a "captive law firm model," the provision of legal services to the public through law practices affiliated with professional-service or accounting firms.[48] As a result of the Task Force's deliberations, there are now provisions that impose a notification requirement on a lawyer member or firm that "affiliates with an affiliated entity" as well as various restrictions on such arrangements. For purposes of the By-Law, a lawyer "affiliates with an affiliated entity when the [lawyer] on a regular basis joins with the affiliated entity in the delivery or promotion and delivery of the services of the licensee and the services of the affiliated entity."[49] The Task Force acknowledged at the time that "the definition of affiliation captures more than law firms and non-law firms who by design operate under comprehensive arrangements for the joint delivery of legal and non-legal services."[50]

The section further requires that the lawyer member or firm in such an arrangement shall:

(a) own the professional business through which the [lawyer] practises law or provides legal services […]

(b) maintain control over the professional business through which the [lawyer] practises law or provides legal services; and

[45] Law Society of British Columbia, Law Society Rules, Multi-Disciplinary practice, Section 2-23.3(2)(a)(i), *available at* http://www.lawsociety.bc.ca/publications_forms/rules/rules_part02.html#2-23-3.
[46] Law Society of Upper Canada, By-Law 7, PART III, MULTI-DISCIPLINE PRACTICES (hereinafter By-Law 7), Section 18, *available at* http://www.lsuc.on.ca/media/bylaw7.pdf.
[47] *Id*.
[48] THE LAW SOC'Y OF UPPER CAN., MULTI-DISCIPLINARY PRACTICE TASK FORCE, IMPLEMENTATION PHASE: REPORT TO CONVOCATION 1 n.1 (Apr. 26, 2001) [hereinafter IMPLEMENTATION REPORT] (quoting The Law Society of Upper Canada Transcript of Convocation 218 (Sept. 25, 1998)), *available at* http://www.lsuc.on.ca/media/mdptaskforcereport.pdf.
[49] Law Society of Upper Canada, By-Law 7, PART IV, AFFILIATIONS, Section 31(2), *available at* http://www.lsuc.on.ca/media/bylaw7.pdf.
[50] IMPLEMENTATION REPORT, *supra* note 48 at 14.

(c) carry on the professional business through which the [lawyer] practises law or provides legal services, other than the practice of law or the provision of legal services that involves the delivery of the services of the [lawyer] jointly with the services of the affiliated entity, from premises that are not used by the affiliated entity for the delivery of its services, other than those that are delivered by the affiliated entity jointly with the delivery of the services of the [lawyer].[51]

The notification requirements include the following information:

1. The financial arrangements that exist between the [lawyer] and the affiliated entity.
2. The arrangements that exist between the [lawyer] and the affiliated entity with respect to
   i. the ownership, control and management of the professional business through which the licensee practises law or provides legal services,
   ii. the [lawyer's] compliance with the Society's rules, policies and guidelines on conflicts of interest in relation to clients of the licensee who are also clients of the affiliated entity, and
   iii. the [lawyer's] compliance with the Society's rules, policies and guidelines on confidentiality of information in relation to information provided to the [lawyer] by clients who are also clients of the affiliated entity.[52]

No fee-splitting or profit-sharing is permitted between the law firm and the affiliated entity, and the conflicts clearance requirements in essence treat the law firm and the affiliated entity "economically as if they were one firm."[53]

In contrast to the restrictive approach adopted in Ontario and British Columbia, amendments to regulations under the *Code des professions* (Professional Code) of Quebec in 2010 provide for a far more liberal multidisciplinary practice regime, requiring simple majority ownership by members of the Barreau du Quebec of the firm through which the professional services are provided.[54] Nonlawyer membership is restricted to those members of various other recognized professional bodies (including actuaries, patent agents, and members of the Chambre de l'assurance de dommages)[55] [damage insurance adjusters and brokers] or the Chambre de la securite financiere[56] [financial planners and insurance agents], but the regulation does not require that their activities "support or supplement the practice of law" in the manner of the Ontario and British Columbia MDP rules.

---

[51] By-Law 7, Part IV, at Section 32.
[52] *Id.*, at Section 33(2).
[53] IMPLEMENTATION REPORT, *supra* note 48 at 3.
[54] Quebec, Reglement sur l'exercice de la profession d'avocat en societe et en multidisciplinarite, Loi sur le Barreau (L.R.Q., c. B-1, a.4), Code des professions (L.R.Q., c C-26, a. 93 et 94), [hereafter Quebec Regulation] Sections 1 and 5, *available at* http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=%2F%2FC_26%2FC26R19_1_2.htm.
[55] *See* http://www.chad.ca/en/index.html.
[56] *See* http://www.chambresf.com/en/chamber/.

The firm is required to provide an undertaking to the Barreau du Quebec that in essence ensures that all members of the partnership comply with rules of law so as to permit the lawyer members to carry on their professional activities, particularly as regards the following:

a) professional secrecy, the confidentiality of information contained in client files and the preservation thereof;
b) professional independence;
c) the prevention of situations of conflict of interests;
d) activities reserved for advocates;
e) liability insurance;
f) professional inspections;
g) advertising;
h) billing and trust accounts; and
i) access by the syndic of the Barreau to this undertaking and, if applicable, to every contract or agreement regarding a [member of the Barreau][57]

C. England and Wales: The Legal Services Act 2007

The approach in England and Wales is the result of passage of the Legal Services Act of 2007 (LSA). The LSA sets forth the following "regulatory objectives":

(a) protecting and promoting the public interest;

(b) supporting the constitutional principle of the rule of law;

(c) improving access to justice;

(d) protecting and promoting the interests of consumers;

(e) promoting competition in the provision of services within subsection (2);

(f) encouraging an independent, strong, diverse and effective legal profession;

(g) increasing public understanding of the citizen's legal rights and duties;

(h) promoting and maintaining adherence to the professional principles.[58]

Under the LSA, alternative business structures are defined as entities that have lawyer and nonlawyer management and/or ownership and that provide only legal services or legal services in combination with non-legal services.[59] The Legal Services Board (the overarching regulator) has designated the Solicitors Regulation Authority (SRA) as an approved regulator for these entities. There also may be other approved regulators. All entities with a nonlawyer manager and/or owner must be licensed, and all individual participants also must be authorized. As noted above, unlike the current Australian regulatory regime, the LSA takes a front-end approach by requiring nonlawyer owners and managers to pass a "fit to own" test.[60] Disciplinary

[57] Quebec Regulation, at Schedule B (s.3) [in translation, French version official].
[58] *See* Legal Services Act 2007, Part I, The Regulatory Objectives, *available at* http://www.sra.org.uk/lsa.
[59] *See* http://www.sra.org.uk/sra/legal-services-act/faqs/ABS-faqs.page*; and* http://www.sra.org.uk/sra/legal-services-act/lsa-glossary.page.
[60] *See, e.g.,* Solicitors Regulation Authority Recognized Bodies Regulations, Regulation 3, at http://www.sra.org.uk/solicitors/change-tracker/code-of-conduct/recognised-bodies-regulations.page#r3.

sanctions can be imposed against the entity as well as lawyer and nonlawyer managers and employees.

1. Legal Disciplinary Practices

Since March 31, 2009, firms have been able to become licensed as a Legal Disciplinary Practice (LDP). An LDP can engage only in the provision of legal services, but may have managers who are different types of lawyers (barristers and solicitors) and up to 25% nonlawyer managers.[61] External owners are not permitted.[62] As noted above, nonlawyer managers are subject to a fitness review and approval by the SRA.[63] The SRA imposes an approval fee of £250 plus the cost of the criminal background check for nonlawyer managers.[64] The SRA can withdraw approval of a nonlawyer manager. The SRA may direct an LDP to appoint a person analogous to a Head of Legal Practice under Part 5 of the LSA to ensure compliance with the LDP's obligations and duties under the LSA, the Solicitors Code or Conduct, and other applicable rules and regulations, including the disciplinary rules and procedures. LDPs are required to maintain professional liability insurance.[65]

At the ABA Commission on Ethics 20/20's August 2010 meeting, the Chief Executive of the Law Society of England and Wales reported that, as of June 2010, there existed 254 LDPs; 184 of them were firms of 10 members or fewer. Types of nonlawyer partners include accountants, financial planners, barristers, and teachers. To date, no disciplinary problems with LDPs have been reported.

2. Full Alternative Business Structures

The SRA has reported that implementation of the full range of alternative business structures (ABS) permitted under the LSA will occur in October 2011.[66] At that time, existing LDPs will be able to "passport" into other permitted forms of ABS. The regulations under which the SRA will oversee full ABS are still under development. The SRA is developing a Handbook that will set forth the regulatory framework for solicitors and ABS that includes a new form of "outcome-focused" or "risk-based" regulation as opposed to primarily rule-based regulation. The Handbook is the subject of numerous consultations within the U.K. legal profession.[67]

As noted above, an ABS can have external investment by nonlawyers and may be a multidisciplinary practice. Potential external investors who will own a 10% or greater interest in an ABS must also pass the "fit to own" test. The SRA does not plan to prohibit any particular model under which an approved and licensed entity can operate. Rather, it would require an ABS

---

[61] *See* Legal Services Act: Legal disciplinary practices – practical issues *at* http://www.sra.org.uk/sra/legal-services-act/faqs/abs-faqs.page and Solicitors' Code of Conduct 2007, the Management and control requirement, para. 10-21, *available at* http://www.sra.org.uk/solicitors/code-of-conduct/rule14.page.
[62] *Id.*
[63] *See* SRA Recognised Bodies Regulations 2009 at 3.3, *available at* http://www.sra.org.uk/solicitors/change-tracker/code-of-conduct/recognised-bodies-regulations.page#r3.
[64] http://www.sra.org.uk/sra/legal-services-act/faqs/abs-faqs.page
[65] *See* Legal Services Act 2007, *supra* note 58.

[66] *See* Solicitors Regulation Authority Guidance, Preparing for Alternative Business Structures, November 2010, *http://www.sra.org.uk/solicitors/code-of-conduct/guidance/abs/preparing-for-alternative-business-structures-info.page.*
[67] *See* http://www.sra.org.uk/solicitors/freedom-in-practice/new-handbook/new-handbook-overview.page.

to meet minimum requirements such as having at least one active nonlawyer and lawyer owner/manager, and using a "suitable regulatory model" to ensure necessary client protection.[68]

Full ABSs will be accountable to the SRA through a nominated Head of Legal Practice and Head of Finance and Administration. These individuals must ensure the maintenance of appropriate ethical and financial accounting standards. Nonlawyer owners are obligated not to cause a lawyer to breach his or her professional duties. The SRA will have the power to ban a nonlawyer owner from future involvement in an ABS, to revoke the ABS's license or to fine the firm.

On the issue of confidentiality, an MDP ABS will be subject to the same requirements as other firms under the Solicitors' Code of Conduct and other applicable rules and regulations. It will not be able to disclose confidential client information to, for example, other companies within the same group.[69] The SRA also considers it inappropriate for any firm to exploit sensitive client information for marketing purposes. With regard to protecting client funds when an entity operates as an MDP ABS, the SRA has amended the trust accounting rules to ensure that monies coming from legal activities of the firm are segregated from other forms of client funds.[70]

The Law Society of England and Wales has urged the SRA to ensure that access to justice not receive short shrift as the implementation of ABSs moves forward. The Law Society has acknowledged that these new entities could improve access to justice by reducing costs and providing more services. However, it warns that regulators should take care to ensure that ABSs do not simply lead to expansion in the most profitable areas of practice while unacceptably reducing access in other areas like family or immigration law. To address these concerns, the SRA has engaged in an Equality Impact Assessment and ongoing consultation.

D. Scotland: Alternative Business Structures

On October 6, 2010, the Scottish Parliament approved the Legal Services (Scotland) Act, which permits ABS. The Act received Royal assent on November 9, 2010. Like the LSA in England and Wales, Part 1 of the Act sets forth regulatory objectives.[71] A recent consultation paper states that the "primary aim of the Act is to remove the current restrictions in the Solicitors (Scotland) Act 1980 on how solicitors can organize their businesses. It will allow solicitors to form partnerships with non-solicitors, and to seek investment from outside the profession. However, the Act is enabling rather than prescriptive, so solicitor firms that do not want to operate under the new business arrangements will be under no obligation to do so."[72] Scottish solicitors will be able to provide legal services in partnership with nonlawyers, as MDPs, and with external ownership. Solicitors can remain in traditionally structured practices. Unlike ABS

[68] *See* FAQs: Legal Services Act and ABSs, http://www.sra.org.uk/sra/legal-services-act/faqs/abs-faqs.page In a 2010 teleconference arranged by the State Bar of Georgia, the nonlawyer head of the SRA indicated that entities seeking to become a licensed ABS would likely be required to submit to the SRA for review and approval their business plans.
[69] Solicitors Regulation Authority, Consultations, The Architecture of Change Part 2 – the new SRA Handbook, para. 29, *available at* http://www.sra.org.uk/sra/consultations/OFR-handbook-October.page.
[70] *Id.* at para. 105.
[71] Legal Services (Scotland) Act (2010) at Part I, *available at* http://www.legislation.gov.uk/asp/2010/16/pdfs/asp 20100016 en.pdf [hereafter "Legal Services (Scotland) Act 2010"].
[72] The Scottish Government, "Ownership and control of firms providing legal services under the Legal Services (Scotland) Act 2010 – A consultation paper" (2011), *available at* http://www.scotland.gov.uk/Publications/2011/02/09105855/0.

in England and Wales, Scottish ABSs must have majority ownership by solicitors; nonlawyer external investors can only own up to a 49% percent stake in the entity.[73] As in England and Wales, nonlawyer investors must pass a "fitness for involvement" test.[74] The Scottish legislation does not create a Legal Services Board to oversee regulation like the LSA did in England and Wales. The Law Society of Scotland will retain its regulatory authority over solicitors and the Scottish Ministers in Parliament may approve other regulators.

A Scottish ABS must have a Head of Legal Services and also either a Head of Practice or a Practice Committee. The same licensed solicitor may serve as Head of Legal Services and Head of Practice. The Head of Legal Practice is required to see that licensed professionals in the entity adhere to their professional obligations.[75] The legal professional privilege applies to communications made to or by licensed providers in the course of providing legal services for any of their clients, as well as to or by others employed by the licensed entity who are acting in connection with the provision of legal services or who are working at the direction or under the supervision of a solicitor.[76]

E. Other Countries with ABS

MDPs also are permitted in Germany, the Netherlands (but not with accountants), and in Brussels (only with accountants but there must be separate billing). New Zealand permits incorporated law practices, but nonlawyers may only own non-voting shares. The definition of nonlawyer is restricted to relatives (spouse, civil union partner, de facto partner, parent, grandparent, child, brother or sister) of the actively involved lawyer. Only lawyers actively involved in providing the incorporated firm's regulated services can be directors.

F. Summary – Rationale for Regulatory Reform Abroad

Regulatory reforms in Australia and the U.K. were driven in large part by competition authorities and extreme consumer dissatisfaction with the lawyer disciplinary regime. In Australia, the 1998 Report by the New South Wales Attorney General's Department, entitled *National Competition Policy Review,* concluded that the partnership model for structuring and operating law firms was anticompetitive.[77] As noted above, this resulted in New South Wales passing legislation to permit Incorporated Legal Practices (ILP), including multidisciplinary practices.[78] Legislators believed these reforms would benefit consumers by enhancing competition and efficiency and lowering costs. Others believed that the changes would help Australia become a hub for the provision of legal services in the Asia-Pacific region.[79]

In the United Kingdom, the 2001 Report of the Office of Fair Trading, entitled *Competition in Professions,* concluded that certain rules governing the legal profession were unduly restrictive. In England and Wales, organized consumer groups voiced concerns that the

---

[73] Legal Services (Scotland) Act 2010. at Chapter 2, para. 49.
[74] *Id.,* at sections 62-67.
[75] *Id.* at Chapter 2, para. 52.

[76] *Id.* at Chapter 3, para. 75.
[77] National Competition Policy Review, *available at* http://www.lawlink.nsw.gov.au/.
[78] All Australian states and territories permit incorporation of law firms.
[79] *See, e.g., Legal Profession Amendment (Incorporated Legal Practices) Bill Second Reading¸* New South Wales Legislative Council, Hansard, October 12, 2000.

discipline system operated by the Law Society was confusing, inconsistent, protective of lawyers, and unresponsive. The government solicited a study by Sir David Clementi to address these issues. The Legal Services Act 2007 incorporated many of Clementi's recommendations from his 2004 Report entitled *Report of the Review of the Regulatory Framework for Legal Services in England and Wales,*[80] including alternative business structures.

The Council of the Law Society of Scotland determined that further discussion about alternative business structures was necessary because of the cross-border impact of the Legal Services Act 2007 and changes to the legal services market driven by technology and globalization.[81] The Office of Fair Trading also supported consumer claims that the restrictive nature of the legal services market in Scotland harmed consumer interests.[82] On April 4, 2008, the Council adopted a policy paper, entitled *The Public Interest: Delivering Scottish Legal Services, Policy Paper on Alternative Business Structures*.[83] The report, which endorsed alternative business structures, stated: "The business structures in which solicitors practice now reflect society, the profession and market conditions of the mid-twentieth century. They are not the conditions pertaining in Scotland now, much less in the decades to come."[84]

IV. Possible Approaches for Consideration

As the above discussion makes clear, alternative business structures can take many different forms. While there are various approaches possible, the Working Group is seeking feedback only with respect to the first three options enumerated below.

A. Limited Lawyer/Nonlawyer Partnerships with a Cap on Nonlawyer Ownership

Consistent with the Kutak Commission proposal, lawyers could be permitted to become partners with (and share fees with) nonlawyers, such as economists, social workers, architects, consultants, and financial advisors, under narrowly defined circumstances. The most modest such approach would require that: (1) the firm engage only in the practice of law, (2) the nonlawyers own no more than a certain percentage (e.g., 25%) of the firm,[85] and (3) the nonlawyers pass a "fit to own" test (such as the test that exists in the United Kingdom for all ABS, including LDPs).

B. Lawyer/Nonlawyer Partnerships with No Cap on Nonlawyers Ownership (The D.C. Approach)

The District of Columbia currently permits lawyers to engage in partnerships of the sort described in Option A, but without a cap on the nonlawyer ownership percentage. It also does not require nonlawyers to pass a "fit to own" test.

---

[80] Report of the Review of the Regulatory Framework for Legal Services in England and Wales*, available at* http://www.legal-services-review.org.uk/content/report/index.htm.

[81] *See* http://www.lawscot.org.uk/members/legal-reform-and-policy/law-reform/alternative-business-structures.

[82] *Id.*

[83] The Public Interest: Delivering Scottish Legal Services, Policy Paper on Alternative Business Structures, a*vailable at* http://www.lawscot.org.uk/members/legal-reform-and-policy/law-reform/alternative-business-structures/abs-news-archive.

[84] *Id.*at p.6.

[85] For example, LDPs in the United Kingdom have capped at 25% the ownership interest that nonlawyers can have in a law practice.

As noted above, Rule 5.4 of the District of Columbia Rules of Professional Conduct provides in relevant part that:

Rule 5.4—Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that: . . . .

(4) Sharing of fees is permitted in a partnership or other form of organization which meets the requirements of paragraph (b) . . .

(b) A lawyer may practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients, but only if:

(1) The partnership or organization has as its sole purpose providing legal services to clients;

(2) All persons having such managerial authority or holding a financial interest undertake to abide by these Rules of Professional Conduct;

(3) The lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under Rule 5.1;

(4) The foregoing conditions are set forth in writing.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

The Comment to this Rule elaborates as follows:

[4] This rule rejects an absolute prohibition against lawyers and nonlawyers joining together to provide collaborative services, but continues to impose traditional ethical requirements with respect to the organization thus created. Thus, a lawyer may practice law in an organization where nonlawyers hold a financial interest or exercise managerial authority, but only if the conditions set forth in subparagraphs (b)(1), (b)(2), and (b)(3) are satisfied, and pursuant to subparagraph (b)(4), satisfaction of these conditions is set forth in a written instrument. The requirement of a writing helps ensure that these important conditions are not overlooked in establishing the organizational structure of entities in which nonlawyers enjoy an ownership or managerial role equivalent to that of a partner in a traditional law firm.

[5] Nonlawyer participants under Rule 5.4 ought not be confused with nonlawyer assistants under Rule 5.3. Nonlawyer participants are persons having managerial authority or financial interests in organizations that provide legal services. Within such organizations, lawyers with financial interests or managerial authority are held responsible for ethical misconduct by nonlawyer participants about which the lawyers know or reasonably should know. This is the same standard of liability contemplated by Rule 5.1, regarding the responsibilities of lawyers with direct supervisory authority over other lawyers.

[6] Nonlawyer assistants under Rule 5.3 do not have managerial authority or financial interests in the organization. Lawyers having direct supervisory authority over nonlawyer assistants are held responsible only for ethical misconduct by assistants about which the lawyers actually know.

[7] As the introductory portion of paragraph (b) makes clear, the purpose of liberalizing the Rules regarding the possession of a financial interest or the exercise of management authority by

a nonlawyer is to permit nonlawyer professionals to work with lawyers in the delivery of legal services without being relegated to the role of an employee. For example, the rule permits economists to work in a firm with antitrust or public utility practitioners, psychologists or psychiatric social workers to work with family law practitioners to assist in counseling clients, nonlawyer lobbyists to work with lawyers who perform legislative services, certified public accountants to work in conjunction with tax lawyers or others who use accountants' services in performing legal services, and professional managers to serve as office managers, executive directors, or in similar positions. In all of these situations, the professionals may be given financial interests or managerial responsibility, so long as all of the requirements of paragraph (c) are met.

The Comment also makes clear that the Rule does not permit an individual or entity to acquire all or any part of the ownership of a law partnership or other form of law practice organization for investment or other purposes.

C. MDPs that Offer Non-Legal Services

A third option would be to permit firms of the sort described in option B and to allow those firms to offer both legal *and non-legal* services. In other words, this option would essentially be the D.C. Rule, but without the restriction contained in D.C. Rule 5.4(b)(1).

As noted above, the Commission has determined that the following two options are <u>not</u> appropriate to be recommended for the United States at this time. Both are in place in the global services marketplace in which U.S. lawyers and firms engage, however, so they may warrant additional monitoring and study.

D. Endorsing Outside Investment

The three options above assume that the nonlawyer is partnered with and is an active member of the firm. An alternative would be to permit nonlawyer passive investment in such entities, but to place caps on nonlawyer ownership in the context of passive investment.

E. The Australia Model

This approach would not only permit external passive investment and ownership in law firms, but also place no limits on the percentage of ownership that nonlawyers have in the entity.

V. Conclusion

In light of these issues and concerns, the Commission seeks input into whether amendments to the Model Rules of Professional Conduct or other action would be advisable. Any responses to the questions posed in this paper, as well as any comments on related issues, should be directed by **June 1, 2011** to:

Natalia Vera
Senior Research Paralegal, Commission on Ethics 20/20
ABA Center for Professional Responsibility
321 North Clark Street
15th Floor
Chicago, IL 60654-7598
Phone: 312/988-5328
Fax: 312/988-5280
Natalia.Vera@americanbar.org

Comments received may be posted to the Commission's website.

WASHINGTON
COURTS
ADMINISTRATIVE OFFICE OF THE COURTS

April 8, 2013

TO: Certified Professional Guardian Board

FROM: Shirley Bondon

Re: Increased Transparency in the Board's Disciplinary Process

Issue(s):

How can data from grievance, complaint and disciplinary records be used to inform public policy decisions regarding guardianships and help individuals needing guardianship services determine which certified professional guardians are the best fit for their individual needs?

Background:

The Supreme Court recently received public comments regarding proposed GR 31.1 (governing public access to the judiciary's administrative records). Several of the comments were written to support a proposal to amend proposed GR 31.1 so that public access to professional guardian records would be governed by standards that are set forth in the Uniform Disciplinary Act (UDA), Chapter 18.130 RCW, rather than by the standards and practices currently used by the Board. Generally, comments promote public disclosure provisions and processes similar to the UDA and the Department of Health to provide a means for the public to evaluate the performance of certified professional guardians, the quality assurance system for guardianship certification and discipline and to use aggregate data to inform public policy (see Attachment A).

Regulating Professional Guardians vs. Regulating Health Care Professionals:

Certified Professional Guardian Board

Since 2000, the CPG Board has been the regulatory body for professional guardians. The Board administers the application or credentialing process for guardian certification, including appeal of denials, annual recertification and the disciplinary process. Currently, there are 293 certified professional guardians, with approximately 5,000 appointments.

By 2014, the Board estimates fee-based revenue of approximately $108,000, up from $61,000 in previous years, and expenses of $137,000. Traditionally, the AOC has contributed approximately $86,000, the cost of staff, to the Board's budget. Given the

estimated increase in fee-based revenue in 2014, the AOC contribution may decrease. The Board is supported by one and one half FTEs.

Professional guardians are appointed officials of the court system, selected and supervised by the court and regulated by the Board. The court scrutinizes the actions of a professional guardian in each guardianship case and the Board scrutinizes a guardian's conduct in each case and across his or her caseload.

The Board developed rules and regulations to regulate the guardianship profession, including public disclosure provisions. The Board's public disclosure provisions are currently scheduled for inclusion in proposed GR 31.1, which governs public access to the judiciary's administrative records (See Attachment B).

Department of Health Licensing and Certification

Since 1986, the Department of Health or a board, such as the Medical Quality Assurance Commission has been the regulatory authority for health and health-related professionals and businesses. They grant and deny licenses/certifications and are responsible for enforcement of laws regarding licensure and the conduct of 80 regulated professions and businesses, approximately 380,000 licensees. The Medical Quality Assurance Commission alone has a staff of 39 FTEs and a biennial fee-based income of approximately $14.8 M which fully supports the program (See Attachment C)

Health care professionals are hired and supervised by individuals or entities for whom they work. All professions are subject to the Uniform Disciplinary Act (See Attachment B).

Comparison of Pertinent UDA Provisions to Board Public Disclosure Policy:

UDA Provision 1: Complaints filed after July 27, 1997, are exempt from public disclosure under chapter 42.56 RCW until the complaint has been initially assessed and determined to warrant an investigation by the disciplining authority.

Board: The Board's policy is currently consistent with UDA Provision 1. Grievances[1] which have not been assessed and determined to warrant an investigation are exempt from public disclosure.

---

[1] Terms used by the UDA and the Board are not consistent. The term "complaint" used by the UDA has the same meaning as the term "grievance" used by the Board.

A "grievance" is a written document filed by any person with the Board, or filed by the Board itself, for the purpose of commencing a review of the professional guardian's conduct under the rules and disciplinary regulations applicable to professional guardians. The grievance must include a description of the conduct of the professional guardian that the grievant alleges

UDA Provision 2: Complaints determined not to warrant an investigation by the disciplining authority are no longer considered complaints, but must remain in the records and tracking system of the department.

Board: The Board's policy is currently consistent with UDA Provision 2. Grievances which are determined not to warrant an investigation are dismissed, but remain in the Board's records and tracking system.

UDA Provision 3: Information about complaints that did not warrant an investigation, including the existence of the complaint, may be released only upon receipt of a written public disclosure request or pursuant to an interagency agreement as provided in (b) of this subsection.

UDA Provision 4: Complaints determined to warrant no cause for action after investigation are subject to public disclosure, must include an explanation of the determination to close the complaint, and must remain in the records and tracking system of the department.

Board: The Board's policy is not consistent with UDA Provisions 3 and 4. The Board treats grievances dismissed without investigation and those dismissed after an investigation similarly. Information about grievances that did not warrant an investigation and those investigated but did not warrant action are disclosed upon written request using established procedures for inspection, copying, and disclosure with identifying information about the grievant, incapacitated person, and professional guardian and/or agency redacted. A request for dismissed grievances must cover a specified time period of not less than 12 months.

The Board is attempting to create a mechanism to balance the conflict between privacy and access to public records. In the practice of guardianship, there are competing concerns. All stakeholders must act to appropriately protect incapacitated persons from potential abuse and exploitation, thus limiting access to certain information is necessary to protect persons subject to guardianship. At the same time, the public has the right to information that will assist them evaluate the guardianship system, and individual guardians and agencies have

---

violates a statute, fiduciary duty, standard of practice, rule, regulation, or other authority applicable to professional guardians, including the approximate date(s) of the conduct.

A "complaint" is the document filed by the Board during a disciplinary proceeding for the purpose of bringing the matter before a hearing officer for a factual hearing on the issue of whether or not the professional guardian's conduct provides grounds for the imposition of disciplinary sanctions by the Board. In a complaint, the Board describes how the professional guardian allegedly violated an applicable statute, fiduciary duty, standard of practice, rule, regulation, or other authority. The Board must approve the filing of a complaint.

the right to protect information which could harm their reputations unjustly. The Board has determined that releasing dismissed grievances with specific information redacted achieves the necessary balance of protecting incapacitated individuals, providing the information needed to assess the system while reducing potential harm to practitioners.

Comparison of DOH Public Disclosure Practice to Board Practice:

		DOH	CPGB
1.	The existence of complaint/grievance which has not been investigated is discloseable.	Yes	No
2.	The licensee's name is redacted from dismissed grievances before disclosure.	No	Yes
3.	All complaints/grievances for a particular licensee can be requested and disclosed.	Yes	No
4.	Complaints/grievances must be requested for a particular time period. i.e. last 12 months.	No	Yes

Current Guardian Board Data Collection

Approximately one year ago, AOC staff identified important guardian program data and began organizing the data from 2010, 2011 and 2012 (See Attachment D).

Tom Goldsmith

From: Tom Goldsmith <TTGsmith@TGandA.com>
Sent: Tuesday, November 27, 2012 5:58 PM
To: 'Denise.Foster@courts.wa.gov'
Subject: Proposed GR 31.1 and Professional Guardianships; Transparency or status quo

Honorable Chief Justice Madsen;

I fear the proposed GR 31.1 section (L)(12), as drafted, will not be helpful in achieving the transparency and mutual trust needed for guardians and their wards. My reasons and alternative suggestions are offered in this comment.

Many believe good policy requires that all parties bring the best and most complete information available to bear before decisions are made. It appears the Supreme Court is not being accorded that opportunity with regard to this proposed rule.

I suggest that complaints against guardians should not be handled differently from those for most other public-service professionals in Washington State. Yet the proposed GR31.1 creates a ***sui generis*** set of disciplinary rules for which no justification is offered as to why they require this unique treatment.

Washington's **Uniform Disciplinary Act**, RCW 18.130 (**UDA**) has been in place for over two decades. This time-tested law appears to be entirely appropriate as a model for handling public disclosure of complaints against guardians as well as for 80-some health care professionals, including dentists, medical doctors, nurses, pharmacists, psychologists, social workers and other highly respected professionals in sensitive positions.

The UDA (as defined in RCW 18.130.095) requires with respect to public disclosure and transparency:

a. Existence of all complaints be discoverable immediately upon submission.
b. The cited professional is invited to submit a written statement.
c. Complaint details are exempt from public disclosure until the complaint is initially assessed.
d. Complaints determined not to warrant investigation must:
    i. Remain in the records tracking system.
    ii. "Including" existence of the complaint.
    iii. Are subject to public disclosure.
e. Complaints determined to warrant no cause of action must:
    i. Include an explanation of the determination to close.
    ii. Remain in the records and tracking system.

f. Complaints resulting in discipline are posted and subject to public search, by the professional's name and license identification.

After more than two decades of history, the UDA system seems to be working well with respected professionals broadly exposed to public complaints. The proposed GR 31.1 is almost the polar opposite of the approach taken in the UDA. Yet I have not heard serious discussion by the Certified Professional Guardian Board (CPGB) that compares or evaluates their current "Administrative Regulation 003" rules or outcomes with RCW 18.130 —and I have attended or monitored telephonically all of its public meetings this year and last. Instead, it is proposed that guardians are to be treated like highly-visible and closely-observed judges and members of the Bar. For the latter, there is in place an extensive disciplinary structure and staff supported by a significant amount of financial resources. In contrast, professional guardians are overseen by a part-time, volunteer board whose budget always is limited and whose support comes from a small (albeit serious, energetic, and personally dedicated) AOC staff.

That is, I believe the UDA could be a fruitful source of practical experience, possibly a model of a new code, and surely a meaningful stimulant for discussion. Thus I suggest it behooves the Court to explore this option, perhaps even authorize a **Center for Court Research** study, before acting on the proposed new rule.

Allow me to step back for a moment to what has brought us to this point. I invite the Court's attention to my comments dated November 28, 2011 and February 2, 2012 as background for what follows. The concerns addressed in those comments have been addressed only to the extent that the new proposed GR 31.1 does not exempt the CPGB. While awkwardly, from my point of view, the small, core piece of current CPGB regulations incorporated in GR 31.1 as (L)(12) i, ii, and iii would continue the lack-of-transparency problems we see with professional guardians today.

Since writing you in February, I have learned three things.

1. The existence and apparent success of the UDA.
2. The great difficulty any member of the public has obtaining relevant disciplinary information about filed grievances against individual guardians through a public records request, compounded by the difficulty one has gleaning objective and relevant data from the few documents a request of my own has provided.
3. The CPGB has no plan or objective to undertake an overall analysis of the total body of complaints it receives. (The Board's budget and mandate are limited, and pursuit of serious complaints more than consumes resources at hand.) This means that overall trend or "barometer" policy information that might be mined from CPGB complaints data are unlikely to be provided to the Board to guide its decision-making.

The absence of data and its analysis are unfortunate, especially given the persistent flow of "bad actor" reports, in this state as well as nationally, and a general public concern about potential for "guardian abuse" which many find disturbing. Thus I continue to see professional guardianship as an area where transparency, and public trust can usefully be improved.

In the attached document, please find a list of observations and questions which have emerged as I have worked with the information provided as a result of my own public records request. It is my respectful hope that these thoughts will provide a seed from which to grow fruitful discussion and further analysis of the needs in this important area.

Above all, I believe it would be best if professional guardians were able to be seen through lenses similar to those of other respected and valued serving professionals. And if they are to be handled in ways ***exceptionally different***, that justifications, understandable and acceptable to the public, will be forthcoming.

Tom Goldsmith

==
TTGsmith@TGandA.com
Tel: +1-617-723-9494

Professional Guardian Complaint Handling

Can Washington State's Uniform Disciplinary Act (RCW 18-130) be a guide?

Following are observations and questions that have emerged while analyzing complaints (also known as "grievances") filed with the CPGB during calendar years 2010 and 2011.

Observations:

1. Historically, around 30% of complaints filed against guardians, and 9% of those against agencies, have resulted in disciplinary action.

Complaints Filed	
2007	27
2008	25
2009	19
2010	33
2011	49

   More than 70% escape public scrutiny.
2. Complaints often take over a year, possibly as long as two years r more, before a final decision is reached. Each complaint resulting in disciplinary action is posted as a summary line on an AOC web page, with a link to detailed text. Four web pages list more recent and archived information for individual guardians and for agencies. While a guardian or agency may appeal a CPGB finding (often time-consuming) the person filing a complaint may not.
3. Approximately 70% of cases are dismissed without action, with a notice letter mailed to the individual who filed the complaint. A listing of dismissed complaints has been included in the CPGB's Annual Reports through 2010.

   These annual report have listed an identifying number, county (but never the name of the guardian) nature of allegation, and disposition. In recent years, descriptions have been brief, with seldom more than a dozen words to describe allegations, and only a few words explain complaint disposition. While in years past, members of each complaint's review panel were listed, and the nature of allegations and/or disposition descriptions were more complete.
4. Complaints not yet posted are theoretically available via public records request, but all information which might possibly identify the incapacitated person or the guardian is redacted, making each filing difficult to identify and understand.
5. I can find no "interpretive" information, or introduction to what the complaint-list web pages might tell a reader.
6. In the case of my public records request, it surprised me that I did not find any grievance filing numbers or other identifying notation on any of the submittal documents I received. This raises the question of how staff assures the integrity of files kept for each complaint. From a requestor's point of view, it is difficult to uniquely identify complaints or confidently relate them to outcomes.

7. Many observers see the making of other people's personal-life and financial decisions by outsiders / ***strangers*** as difficult and risk-filled undertakings. Accordingly many see Court supervision as surely justified. It is not, however, equally clear to me that guardian tasks can be adequately executed without the public scrutiny other serving professions receive, which undoubtedly supplements any best-efforts the Courts themselves can provide.
8. The most vulnerable of our citizens are those subject to guardianships, but family, friends, and established network of support can be impacted almost as deeply. At the same time, it is virtually impossible for anyone impacted by a guardianship to "walk away" from a Court appointed guardian or attorney. At best, removal of a guardian will require a year-or-two-long, dollar-costly process, initiated and paid for by the incapacitated person, family, or friend(s), followed by limited prospects and little guidance in finding a more suitable individual.
9. As with any "service" the quality delivered is likely to be improved where "consumers" are enlightened, and have realistic expectations. Yet anything short of good transparency is unlikely to foster useful "customer" awareness. Family, friends, and other supporting persons need to be aware of the limits or pitfalls guardianships will, even in the best of circumstances, always face.
10. Needed guardianship reforms seem unlikely to occur in the darkness caused by blocked public disclosure. Further, increased funding to support guardian oversight is unlikely to materialize without public awareness and mined data in the hands of analysts and advocates.

Questions:

Based on the above, I offer the following questions that I respectfully suggest the Court should explore before determining that GR 31.1 should be approved, either as submitted or in a new form.

11. Does the **UDA** work as well as appears? My personal investigation suggests it might, but it would be important to determine if there are any unintended consequences. Has a pragmatic evaluation study of the UDA been undertaken, in an attempt to determine the success of this legislation and the resulting system?
12. What, if anything distinguishes guardians, from medical doctors, nurses, psychologists and numerous other professionals covered by the UDA that would justify a unique complaint process and disclosure rules for them?
13. Could the staff and systems now processing UDA complaints and materials also handle professional guardianship complaints? Alternatively, could details of current UDA processing inform as to how to better manage a comparable system for guardians, should one continue to be maintained at the AOC.

14. If clerical processing were placed elsewhere, could AOC staff continue to be the "knowledgeable" organ of investigation, guided by CPGB specialists? As I understand it, this process is used by the Medical Quality Assurance Commission, which learned how important staff experience was in working with its constituency of professionals.
15. Are complaints under UDA subject to appeal by complainant if rejected by investigators?
16. If there are cases of successful complainant appeals, are such decisions useful as a way to achieve "case law" like evolutions of applicable rules and regulations? If so, could there be an expectation of similar experience-based evolution of the CPGB's Standards of Practice?
17. What impact do frivolous or "retributive" complaints have on professionals subject to the UDA. How do or could professional groups, or these systems, accommodate /orcorrect for these problems.
18. How are UDA investigations and processing funded?
19. Why has the number of filed complaints reported by the CPGB doubled over the past five years? Is there any reason to believe that the current limited transparency has contributed to this increase?
20. How are complaints distributed among guardians? For example, do 20% of the guardians account for, say 80-90% of complaints or of the serious complaints? If so, what would this tell us about the value of increasing transparency and impact, if any, of adopting a UDA approach? Is there a geographic distribution of complaints that might be significant?
21. How would disclosure of professional guardianship complaints best be handed so they are least likely to lead to unexpected consequences for this important function, especially keeping in mind those many professional guardians who function well and appropriately and therefore are unnoticed and, normally unsung. Does the UDA effectively insulate and protect those who do not go outside the bounds of professional conduct?

Tom Goldsmith is a private person, who has been following Washington State's Certified Professional Guardianship Board since 2009, when his family became involved in a professional guardianship.

Foster, Denise

From: Sharon Denney [sdenney2000@gmail.com]
Sent: Thursday, December 20, 2012 12:54 PM
To: Foster, Denise
Subject: Proposed GR 31.1

From: Sharon Denney
To: Denise.Foster@courts.wa.gov
Date: December 17, 2012
Re.: Proposed GR 31.1 (L) (12)

Honorable Chief Justice Madsen:

I fear the suggested new rule, GR 31.1 (L) (12), Access to Administrative Records, will hinder the achievement of transparency and mutual trust needed between guardians and their clients as well as needed between the public and their courts.

I agree with Mr. Goldsmith that the use of the Uniform Disciplinary Act RCW18.130 (UDA) would be appropriate and certainly, an improvement over the current quasi-exemption granted the CPGB. There are however, good reasons for handling complaints against guardians differently than those against most other public service providers in Washington State, provided that difference entails an increased level of scrutiny rather than a reduced level. For the following reasons, I believe **a heightened level of scrutiny** is required:

A. **The Obscurity of the CPGB:** The fact that there are Standards of Practice and a Guardianship Board to whom complaints can be addressed is virtually unknown by those who are unfortunately directed by the courts to utilize the service of guardians. The relatively few complaints that do reach the board are just the tip of the proverbial iceberg. The board operates now, as the probate courts have for many years, in obscurity. I direct you to the 2006 expose in The Seattle Times' newspaper, "Your Courts, Their Secrets," which exposed the probate courts' improper sealing of many guardianship cases. At great expense to the newspaper, largely due to King County Superior Court's refusal to voluntarily open the records, the records were legally unsealed and the public learned of the corrupt guardianship practices employed by guardians and approved by the court. Reports of those currently in the guardianship system indicate that while the improper sealing was discontinued for a while, it has recently begun again, particularly in King County Courthouse.

Additionally the GAO report of 2011 acknowledges the widespread difficulty in tracking guardianship cases and notes the corruption of the programs nationwide. Its report, titled, **Guardianships: Cases of Financial Exploitation, Neglect, and Abuse of Seniors,** is revelatory and descriptive of too many of guardianships in Washington State, which had the dubious honor of at least two mentions. The standard for inclusion of a case was incredibly high.

B. **Professionalism:** The level of "professionalism" of the guardian does not begin to compare with that of others considered "professional." Doctors, engineers, nurses, teachers, attorneys, etcetera, have achieved a level of "professionalism" by virtue of education, training, and practice that should not be compared to the fifty or so hours demanded of the Washington State guardians. The fact that guardians have full control over the human lives in their care mandates the **highest level of scrutiny possible.**

C. **Supervision:** There is an acute absence of any form of supervision, despite the claims of those to whom the responsibility of supervising falls. **The courts** realistically have inadequate time and resources to do anything more than rubberstamp what its colleagues, the guardians and their attorneys, have requested. To do otherwise

would be to demonstrate a level of integrity not yet achieved. The entire judiciary is discredited, if not shamed by the probate courts' pretence of supervising the guardians.

A quick glance at any probate court docket would reveal that the average amount of time given to a guardianship case is ten to fifteen minutes. Despite the fact that the estate may be worth millions, there is no forensic analysis of what are often hundreds of pages of billing for minutia. The judge has no training in complex or even simple estate management. Even if he or she did, time would not permit it. Rarely will there be expert testimony regarding the preference of one medical treatment over another. These guardian decisions regarding medical care will be rubberstamped by a too busy judge. This lack of real oversight has permitted the widespread use of isolation by the guardians, guaranteeing the last days, weeks, months of the client will be without the comfort only a family can offer.

The volunteer **Guardianship Board** also lacks the time and the resources to adequately supervise guardians. It has a convoluted history of avoiding grievances filed by guardianship clients and families. Initially it relied on Rule 23's admonition not to duplicate the work of the courts. The majority of complaints handled by the board dealt with dues and professional development. Then it claimed to deal with family complaints only when the presiding judge and the original justice agreed that the complaint had a basis in fact. Needless to say, that happened only rarely. Given the fact that the existence of standards, the board, and the grievance process is not freely shared with its client base nor with the public, one has to wonder whether the relative paucity of complaints that exist are truly reflective of the role played by guardians and attorneys in the lives of their clients.

Additionally, the "profession" is riddled with conflicts of interest so numerous that they can't be detailed here. Suffice it to say that the judge, the commissioner, the guardian, the guardian's attorney, and the guardian ad litem often have a long history of working together. The client and his or her attorney and family are often the "outsiders" to tightly knit group. The Guardianship Board has a long history of using convoluted excuses for not holding its membership accountable, to say nothing of the fact that the grievance committee is often comprised of only three persons, at least two of whom are in the guardianship industry. Additionally, rather than issue the Standards of Practice to the family and the client at the initiation of the guardianship, they are kept as secret as is the very existence of the board.

This lack of authentic supervision has resulted in the following:

1. When a small group met with provosts of the continuing education department of the University of Washington, to complain about the quality of guardian-instructors in the certification programs, the fact that the guardians involved had an "unblemished record" ended the discussion. Since the board, at that time, accepted no complaints from the public, all complaints were thrown out, and the guardian's record remains "unblemished" to this day – despite a long and continuing history of complaints. The board recommendation to the University trumped any examination of the guardian's own records that would have revealed a fifteen-year pattern of egregious theft and client abuse. The publically recorded acts of the guardians are appalling and shocking, but to get the university members to look for themselves was impossible. They preferred to take the word of the board.

2. The state laws requiring the guardians to "conserve, preserve, and protect" the estate are violated with regularity. Instead, the estate is quickly depleted of all assets for **activities that fail to offer even a minimum benefit to the IP**. Never have I heard of the court holding the guardian and its attorney to the standard of "protecting and conserving the estate" rather than squandering it.

3. Medical decisions are based on cost to the estate. Since, once the guardianship is initiated, the estate is considered a guardianship asset; it is small wonder that each IP expense is treated as though it is being personally paid by the guardian and its attorney. Less expensive medical alternatives are selected for the client. That might seem prudent until one looks at the billings of the guardianship and notes that the money

saved didn't buy anything for the client, but rather, added to the coffers of the guardian and the guardians 'attorney.

4. The guardian employs the standard technique of the abuser and isolates the client from friends and family, thus ensuring that the loved ones don't have first-hand knowledge of the IP's misery and can't include him or her in plans to terminate the guardianship. A variety of pretexts are used to "justify" this isolation – "adjustment period," in "the client's best interest," to "avoid family friction," etc. but families are the stuff of life and never more important than when that life is ending. Even prisons, nursing home and hospitals can't deny their clients the company of loved ones

5. The unrestricted use by a guardian of an attorney at legal wages, at the client's expense, is ubiquitous. This despite the fact that hospitals and nursing homes make life and death decisions daily without a high-priced attorney at hand. It is another way guardians and attorneys can quickly deplete the client's assets. The attorney gets full access to the IP's assets; in return, he or she does the minimal legal work required to permit the guardian to maintain nonprofit status. The guardian and the attorney can share in the rewards of bringing bogus charges and selfish decisions to be rubberstamped by the courts.

It is an ominous trend in WA State for guardianship attorneys to become guardians themselves. I have no doubt that this is not due to some altruistic concern for the IP, but rather because it offers the attorney a chance to put more of the IP's money into his or her pockets. Since the courts aren't looking, it's easy to blur the line between legal duties and guardianship duties

In twelve years of dealing with "the guardianship problem," at both the national and state level, I have never heard the program praised. (I am excluding family and lay guardians, and referring to only "professional guardians and their companies.) I have heard only rage and contempt aimed at these programs, dubbed "the biggest scam of the twenty-first century" by those in the know.

This unsupervised situation has not only brought needless suffering to the end of life of our most vulnerable citizens, but it has caused the judiciary as well as "the rule of law" to be viewed with suspicion, if not with contempt, by the families and friends of incapacitated persons. They have seen the incapacitated forced from their homes, denied the comfort of family and friends, and watched their assets squandered in ways that benefit the attorneys and guardians only. Only when the IP's are penniless, are they returned to the love and care of family members at great expense to the family and to Medicaid

Guardianship is an obscure legal field intended to protect the vulnerable. Secrecy helps keep the rampant conflicts of interest, the questionably billing practices, and the depletion of assets by court-appointed guardians and their ubiquitous attorneys from public eyes. The Washington State Constitution states "Justice in all cases shall be administered openly." Washington State law requires that court documents can be sealed only if a judge finds "compelling circumstances," a demanding legal standard. It provides a detailed explanation for secrecy that takes into account the public interest in open records. Despite the clear direction offered by the Constitution and the laws, the practice in guardianship has been to accept secrecy with little regard for legal restrictions. Exempting guardians from scrutiny has led to newspaper exposes, which have, in turn, led to public fear and contempt, not just for guardians and their attorneys, but for the judicial system and "rule of law" in general. The proposed GR 31.1 Section (L) (12) continues secrecy rather than offers new and fresh opportunities for transparency and mutual trust. I hope it will be rejected in favor of greater scrutiny.

Sharon Denney Sdenney2000@gmail.com
WSBA # 25256
Seattle, Washington

GR31.1 and Professional Guardians
12-18-2012

Honorable Chief Justice Madsen,

I am concerned that the Certified Professional Guardian Board's (CPGB) proposed disclosure rules, under GR31.1, section (L) (12), are not going to aid the public in distinguishing the good professional guardian from the bad. I think the CPGB needs to adopt the same rules as applies to other public service professionals as defined in the Uniform Disciplinary Act, RCW 18.130 (UDA).

My interest in this matter evolved from personal experience with a professional guardian. My father had dementia and was being exploited by a third party. Our family asked the court to appoint a professional guardian to protect him from abuse and safeguard family assets. We anticipated a cooperative relationship with the guardian. We got the opposite. I believe the guardian exploited our family financially and in the process allowed my dad to suffer mental and physical abuse. The guardian also caused my 90 year old mother considerable mental anguish. In three years, we paid the guardian $747,000. We spent an additional $94,000 on legal fees trying to ameliorate our grievances with the guardian. (I have a 12 page written summary with approximately 50 exhibits supporting the accuracy of the above claims.)

Well into the guardianship, I found out there were other people that had problems with our guardian. When I called the CPGB, there was no record of complaints having been made.

I have little confidence there would be a record of any complaint I might make regarding our guardian. Bias would be a factor because the guardian we had sits on the CPGB. Another factor is that guardians sit in a position where they can hide from the family, under the guise of confidentiality, information that might incriminate them. Only the most unsophisticated and dishonest of guardians will

be disciplined and exposed under the disclosure rules proposed by the CPGB. No information will be available to the public regarding professional guardians whose behavior pushes ethical limits and lacks common decency unless the guidelines in the UDA are adopted. The UDA has served the public interest with regard to other professionals and I think it would be appropriate for professional guardians as well.

Respectfully yours,

Stephen P. Bradley
810 17th St N.W.
Puyallup, WA 98371
sbradley801@yahoo.com

From: Michael/Claudia Donnelly <thedonnellys@oo.net>
Date: December 13, 2012 8:58:32 AM PST
To: denise.foster@courts.wa.gov
Subject: comment on GR 31.1.

101415 – 147th Avenue SE
Renton, WA 98059

December 9, 2012

The Honorable Chief Justice Barbara Madsen

Washington State Supreme Court

Olympia, WA 98504

RE: Comments on GR 31.1 – Transparency with Guardian Board

Dear Chief Justice Madsen:

When I need to hire a plumber, I go to the Better Business Bureau and see what problems the outfit I want to hire has had in the past. This will give me the opportunity to pick a better person to fix my problem. I can't do that with a professional guardian.

I see the purpose of the WA State Guardian Board as the protection of our most vulnerable adults from themselves or others who MAY want to harm them (i.e: embezzle their funds or force them into care facilities against their wishes). The Board licenses professional guardians and agencies. The Board is assigned to set standards of conduct for guardians. They are also charged with disciplining guardians who do not follow the Standards of Practice regulations set by the Board to protect the elderly wards under their care. This part of their purpose is not being done well and I am concerned it is not done within the view of the public. The public is being hurt by this lack of action and concern on the part of the Board. We are also being harmed by not being able to see how the Guardian Board disciplines these guardians. As I testified at the February 2012 hearing, I believe this is harmful, in the long run, to all residents of Washington State who will need a guardian for their loved ones.

In 2007, I filed a grievance against my mother's guardian for breaking state law and for presenting false testimony in court and/or being untruthful in communications with me/our family. The Guardian Board sent me a letter saying the "guardian did nothing wrong". At the time, I wanted to know how they "did nothing wrong". What criteria was used to make this

determination. I asked under the Public Disclosure Law for a copy of what her guardian sent to the Board in response to my grievance complaint. I got a letter back from the Board saying, "I could see what I provided to the Board, but I couldn't see what the guardian provided to Board." It was a private communication. I also was not given an opportunity to appeal the decision.

At the February 2012 hearing, the Allied Daily Newspapers representative mentioned the importance of "judicial review" in their testimony before the justices. To me, judicial review means being able to review the decision in a court of law or by other means. During the Guardianship Board meetings, the public is asked to leave the meeting when they discuss grievances or disciplining guardians. How can we – the public have judicial review or other discussions about grievance matters with the Board present if we are asked to leave the meeting and can't see/hear how the Board decides/discusses disciplining guardians or what the criteria is that the Board uses to determine if a grievance is a legitimate complaint? We also can't see what the Board provides to the committee hearing the grievance discussion. In addition, as we are aware, no minutes are taken of these discussions – we don't even know what documents/records are kept. There is no way that we can have confidence that appropriate discipline will even take place or if judicial review will be allowed because we aren't permitted to see/hear what the guardian gives to the committee rebutting our original complaint.

Thank you, in advance, for letting the public comment on GR 31.1. I hope that the Courts really provide some transparency for the public as it comes to grievances filed against professional guardians.

Sincerely,

Claudia Donnelly

December 30, 2012

Honorable Chief Justice Madsen;

I am concerned about the proposed GR 31.1 which has been offered by the Supreme Court for public comment. I learned through personal experience that the Certified Professional Guardianship Board's (CPGB) policies for handling complaints regarding guardian conduct doesn't work at least not for my family. Now, I see that the proposed rule will not change this unfortunate situation.

Let me give you some background on my family, my aging parents are now both living in separate Adult Family Homes. After already being separated for 13months due to a fall and broken hip suffered by mom, she was placed in a nursing home, than in an AFH miles away from family and her husband of 50+ years. Dad, who suffers from increasing dementia and walks with a walker, was later placed in a separate AFH also far away from family in separate towns from his wife, 5 miles apart, ten minutes by car and MUCH longer by public transportation. Mom was just diagnosed with Parkinson's disease and struggles with getting up from her wheelchair and walking while dad is struggling to make sense of why he's not in his house. Given the multiple illnesses each of them struggle with these months of separation have been very, very difficult for them both. In addition, their guardianship has been difficult in many other respects. Sibling disagreements, water damage to their formerly beautiful home in Juanita, my observation of visible black-mold accumulations in both of the AFHs, and other inevitable complexities have raised challenges my whole family has had to face.

What I'd like to impress upon you, is the introduction of a professional guardian into our family (at my request) has been a most difficult process; one I believe could have been made much easier. Most importantly, as I came to realize that a guardianship might be helpful, I had a hard time learning what a guardianship can be about. Searching the web did not explain to me that no matter the quantity of assets, it would all be "spent down" and not shared with family members during their time of duress. And, everything mom and dad worked for their entire life would be on the "spend down" program when they had acquired so much. Had I been able to see more complete information, review the guardians available, view their credentials, review complaints (or see if there were no complaints, serious complaints; against an individual or agency etc…) we might have been able to avoid certain pitfalls, or even know more of what to expect as we worked to come together and support two loving parents who had given so much of themselves raising us.

Thus, I strongly believe that a continuation of the so very limited disclosure policies, currently established by the CPGB, and apparently still supported by your Supreme Court, simply is a terrible idea. As "consumers" our family should be able, even encouraged, to learn a great deal about professional guardians, the way they work, the labor and integrity they must apply, and the numerous challenges they face as they perform those responsibilities they take on, as they assume the responsibilities for the

lives of aging vulnerable adults. Anything that blocks, or even delays, access to information a "diligent" family member might need in order to help a parent or parents as they approach end of life, should be removed.

As I understand it protection of persons like those in our family was at the core of the spirit of the Public Records Initiative of 1972 and then the now widely accepted Public Records Act, just as for GR 31, and as I have hoped would be the intention of the GR 31.1 you are working to produce. But I am disappointed to see that there seems to be an oversight. The work overseen by the CPGB, and thus the professional guardians who hopefully will in the future be helping the increasing numbers of vulnerable elderly who will be needing their services, needs public insight and understanding. But with the proposed GR 31.1 text, insight will be too limited, there needs to be more transparency.

I can only observe the fact that if I need to better understand, or examine the records of health care professionals (physicians, nurses, dentists, pharmacists, psychologists, social workers, and many others) I am able to find useful information. All I have to do is to telephone Health Systems Quality Assurance (who state that their "...top priority is to protect and improve the health of people in Washington State."). Their Customer Service Center at 360-236-4700, will tell me if I give the name of a Doctor, Nurse, or another professional, much of what I need to know. First they will quickly tell me of any disciplinary decision against the professional. Then further inquiry will give me (without any waiting time, even for a complaint filed this month) if other complaints have been filed against this professional. Including, how many complaints, the dates, and whether the complaint was dismissed or not. If I wish to know more, I have been told that I can make a public records request, which would provide more complete information, and that while this will take some time, it need not be costly in dollar terms. Also, I understand that the file on a complaint against a professional will contain details of the complaint, and if dismissed, will provide the reasoning behind the dismissal.

Such a process is simply not available for professional guardians, and I don't understand why. But I feel quite certain that if this kind of information were available, both my parents and my family would have suffered a lot less pain in learning to work with the guardians who now have a deep responsibility for two elderly and frail persons we all love very much. So your Court's help for us, and for those who come after us, could be very much appreciated.

Thank you for your consideration of my point of view.

Cynthia M. Jackson
Bellevue, WA

DISABILITY RIGHTS WASHINGTON

Formerly known as Washington Protection & Advocacy System

315 - 5th Avenue South, Suite 850
Seattle, WA 98104
T: 206-324-1521 800-562-2702
TTY: 206-957-0728 800-905-0209
F: 206-957-0729
www.DisabilityRightsWA.org

December 31, 2012

Honorable Chief Justice Barbara Madsen
Washington State Supreme Court
P.O. Box 40929, Olympia, WA 98504-0929
By e-mail:denise.foster@courts.wa.gov

Re: Proposed Rule 31.1 – Access to Administrative Records

Dear Chief Justice Madsen,

I am commenting on behalf of Disability Rights Washington (DRW) on proposed GR 31.1. DRW sees a compelling need for greater transparency in the complaint process for certified professional guardians (CPGs). People with disabilities who are subject to guardianship, their families, and others need information about the professional guardians who are proposed or appointed to serve them. We recommend that the Court amend proposed GR 31.1 to allow more access to information about the complaint experience of professional guardians.

Proposed GR 31.1, at subsection (l)(12)(iii), contains significant restrictions on the availability of the records of dismissed complaints. The draft rule requires redaction of "identifying information about the grievant, incapacitated person, and professional guardian and/or agency". The proposed rule also provides that requests for "dismissed grievances shall cover a specified time period of not less than 12 months."

DRW recognizes the interest in protecting the privacy of individuals who file grievances and persons who have been found incapacitated, and we support redaction of identifying information with respect to the identity of grievants and persons who are alleged or are found to be incapacitated.

On the other hand, professional guardians are engaged in a regulated trade, and as such we don't see a similar privacy interest with respect to complaints. That said, professional guardians do have a legitimate concern that unfounded grievances might be given credence by unsophisticated individuals who read them, and this may have an unjustified damaging effect on reputations. This concern must be balanced against the interest of people subject to guardianship and their families who are seeking information upon which to judge CPGs who may provide them with guardianship services. Multiple complaints from several different complainants, or a concerning pattern in the nature of allegations or fact patterns can raise valid concerns. The fact that a complaint has been dismissed does not mean the allegation was meritless. Technicalities and problems of proof can result in dismissal. Those who are evaluating potential guardians have very limited information upon which to form judgments, and denying them the ability to

review these complaints limits the available information still further. Where there are many dismissed grievances, a person who is the subject of a guardianship petition or his or her family may want to advocate that another CPG be appointed.

While we recognize there are conflicting interests, DRW favors disclosure of the identity of the guardian who is the subject of a dismissed grievance. The effect of unfounded or malicious complaints on a guardian's reputation can be mitigated by measures like including a statement from the guardian regarding the dismissed complaint when it is disclosed (as is done with complaints under the Uniform Disciplinary Act – see below).

Others who have commented on this proposed rule have suggested that the handling of complaints against guardians should be made consistent with the Uniform Disciplinary Act (UDA). I do not have experience with how the UDA works in practice, and cannot comment on the effectiveness of the act as applied to the wide range of professionals who are subject to its provisions. However, in reading RCW 18.130.095, I see that the Act provides greater access to complaint information than is available under GR 31.1. The UDA allows access to dismissed complaints, and ensures that complaints - dismissed or not – are tracked:

> RCW 18.130.095(1)(a) The secretary, in consultation with the disciplining authorities, shall develop uniform procedural rules to respond to public inquiries concerning complaints and their disposition, active investigations, statement of charges, findings of fact, and final orders involving a license holder, applicant, or unlicensed person...
>
> At the earliest point of time the license holder must be allowed to submit a written statement about that complaint, which statement must be included in the file. Complaints filed after July 27, 1997, are exempt from public disclosure under chapter 42.56 RCW until the complaint has been initially assessed and determined to warrant an investigation by the disciplining authority. Complaints determined not to warrant an investigation by the disciplining authority are no longer considered complaints, but must remain in the records and tracking system of the department. Information about complaints that did not warrant an investigation, including the existence of the complaint, may be released only upon receipt of a written public disclosure request or pursuant to an interagency agreement as provided in (b) of this subsection. Complaints determined to warrant no cause for action after investigation are subject to public disclosure, must include an explanation of the determination to close the complaint, and must remain in the records and tracking system of the department. (emphasis by underlining added)

Clients and patients of medical professionals subject to the UDA have access dismissed complaints. The nature and frequency of prior complaints – including dismissed

complaints – is obviously useful for patients and clients of medical professionals, and for the quality assurance system for the professions. This information can assist a client in deciding whether or not to hire the professional, or whether to continue to employ him or her. We believe that the nature and frequency of past complaints would be just as useful to those involved in making decisions about whether a particular professional guardian is an appropriate choice.

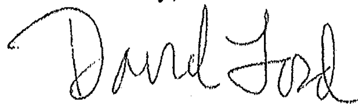
Of course, selection of a professional guardian is different in an important way from hiring a doctor, or other professional, because the decision to appoint the guardian is made by a court, not by a client. However, this difference just makes it *more important* that information about the prospective guardian be available. The person who receives the service is by definition "incapacitated" and therefore less able to assert his or her interests and preferences, in contrast to a patient who hires a medical professional. In addition, once appointed, the professional guardian cannot be "fired" by the incapacitated person, or anyone else, other than the court. An alleged incapacitated person, his family and friends, the Court, and the *guardian ad litem* should have access to at least as much information about the professional guardian who is nominated to serve as a patient or client has about a medical professional who will provide treatment. It is very important to make the right decision about who will be the guardian. It will be much more difficult for the person subject to the guardianship to change guardians than it is for a patient to switch doctors.

DRW strongly supports enhanced quality assurance for certified professional guardians The UDA provides that dismissed complaints must remain in the records and be tracked, and that there must be an explanation as to why a complaint is dismissed. The Court and the Certified Professional Guardianship Board could improve their quality assurance for CPGs by tracking and analyzing grievances and dismissed grievances, and ensuring that there is documentation of the reasons for dismissing all grievances.

Disability Rights Washington respectfully recommends that the Supreme Court allow access to the information about past complaint experience of certified professional guardians.

Thank you for this opportunity to comment on this proposed rule.

Sincerely,



David Lord
Disability Rights Washington

Guardian Board Public Disclosure Provisions

003 Public Records

003.1 Disclosure. Existing records that are prepared, owned, used, or retained by the Board shall be disclosed upon request using established procedures for inspection, copying, and disclosure except as otherwise provided in rules, regulations of the Board, or other authority.

003.2 Exemptions from Disclosure. The following records are exempt from public inspection, copying, and disclosure:

003.2.1 Test questions, scoring keys, test results, test answers test scores and other examination data used to administer a certification or license examination.

003.2.2 Investigative records compiled by the Board as a result of an investigation conducted by the Board as part of the application process, while a disciplinary investigation is in process under the Board's rules and regulations, or as a result of any other investigation conducted by the Board while an investigation is in process.

003.2.3 Investigative records compiled by the Board, the nondisclosure of which is essential to effective law enforcement.

003.2.4 Deliberative records compiled by the Board or a panel or committee of the Board as part of a disciplinary process.

003.2.5 Deliberative records of the Board, a hearing officer or hearing panel, review panel, or board committee made confidential by a court order.

003.2.6 Personal information, including, but not limited to, home address, home telephone number, financial information, health information, Social Security number, and date of birth.

003.2.7 Certain personal and other records of an individual such that disclosure would be highly offensive to a reasonable person and is not of legitimate concern to the public.

003.2.8 Other records related to the Certified Professional Guardian Board that are required by law, rule, regulation, court order, or other authority to be confidential.

003.3 Other Records.

003.3.1 Dismissed grievances shall be disclosed upon written request using established procedures for inspection, copying, and disclosure with identifying information about the grievant, incapacitated person, and professional guardian and/or agency redacted. A request for dismissed grievances shall cover a specified time period of not less than 12 months. (Amended 6/14/10)

003.3.2 The identity of a person requesting an ethics advisory opinion is confidential and not subject to public disclosure.

003.4 Records Retention. Records related to the Certified Professional Guardian Board shall be retained in accordance with records retention schedules for the judicial branch and the Washington State Administrative Office of the Courts (AOC).

003.5 Posting of Disciplinary Actions. Disciplinary sanctions involving admonitions or reprimands will be archived twelve months after the disciplinary action is completed. Disciplinary actions will remain permanently linked to an individual certified professional guardian's listing on the web site. (Adopted 1-9-12)

RCW 18.130.095(1)(a) (UDA in pertinent part):

The secretary, in consultation with the disciplining authorities, shall develop uniform procedural rules to respond to public inquiries concerning complaints and their disposition, active investigations, statement of charges, findings of fact, and final orders involving a license holder, applicant, or unlicensed person. The uniform procedural rules adopted under this subsection apply to all adjudicative proceedings conducted under this chapter and shall include provisions for establishing time periods for initial assessment, investigation, charging, discovery, settlement, and adjudication of complaints, and shall include enforcement provisions for violations of the specific time periods by the department, the disciplining authority, and the respondent. A license holder must be notified upon receipt of a complaint, except when the notification would impede an effective investigation. At the earliest point of time the license holder must be allowed to submit a written statement about that complaint, which statement must be included in the file. Complaints filed after July 27, 1997, are exempt from public disclosure under chapter 42.56 RCW until the complaint has been initially assessed and determined to warrant an investigation by the disciplining authority. Complaints determined not to warrant an investigation by the disciplining authority are no longer considered complaints, but must remain in the records and tracking system of the department. Information about complaints that did not warrant an investigation, including the existence of the complaint, may be released only upon receipt of a written public disclosure request or pursuant to an interagency agreement as provided in (b) of this subsection. Complaints determined to warrant no cause for action after

investigation are subject to public disclosure, must include an explanation of the determination to close the complaint, and must remain in the records and tracking system of the department.

State of Washington

Medical Quality Assurance Commission

Commission Leadership

Mimi Pattison, MD
Commission Chair
Marilyn.Pattison@doh.wa.gov

Richard Brantner, MD
1st Vice Chair
Richard.Brantner@doh.wa.gov

William Gotthold, MD
2nd Vice Chair
William.Gotthold@doh.wa.gov

Maryella Jansen
Executive Director
Maryella.Jansen@doh.wa.gov

George Heye, MD
Medical Consultant
George.Heye@doh.wa.gov

Julie Kitten
Operations Manager
Julie.Kitten@doh.wa.gov

Dani Newman
Program Manager
Dani.Newman@doh.wa.gov

Melissa McEachron
Projects Manager
Melissa.McEachron@doh.wa.gov

Micah Matthews
Performance & Outreach Manager
Micah.Matthews@doh.wa.gov

James Smith
Chief Investigator
Jim.Smith@doh.wa.gov

Michael Farrell
Legal Unit Manager
Michael.Farrell@doh.wa.gov

Betty Elliott
Licensing Manager
Betty.Elliott@doh.wa.gov

Medical Commission
Washington State Dept of Health
P.O. Box 47866
Olympia, Washington 98504-7866
T: 360.236.2750 F: 360.236.2795

2012 Best of Boards Award Recipient -Administrators in Medicine

Promoting patient safety and enhancing the integrity of the profession through licensing, discipline, rule-making, and education.

Overview

- The Commission is currently participating in a 5-year pilot project to measure performance and efficiency
- 21 members: 13 MDs, 2 PAs, 6 public members
- 39 staff, $14.8M biannual budget
- The Commission licenses 29,098 physicians and physician assistants

Significant Accomplishments during Pilot Project

- Adopted chronic noncancer pain management rules
- Established rule regulating office-based surgery
- Established rule regulating non-surgical medical cosmetic procedures
- Decision Package Approval by Legislature in 2012 for education efforts
- 92% of investigations and legal processes completed on time in 2012
- Reduced investigative aged-case backlog by 99%
- Reduced legal aged-case backlog by 74%
- 99% of disciplinary orders in compliance with sanction guidelines
- Created legal orders that are more clear, consistent, and transparent

Actions in Fiscal 2012

- Issued 2221 new licenses
- Received 1400 complaints/reports
- Investigated 1008 complaints/reports
- Completed legal process on 1099 complaints/reports
- Issued 93 disciplinary orders
- Summarily suspended or restricted 11 licenses
- Actively monitoring 181 practitioners
- 48 practitioners successfully completed compliance programs

Current Issues

- Implementing of pain management rules education package
- Implementing wrong site surgery project
- Monitoring national licensure legislation
- Developing social media and medical professionalism guideline
- Working with State Hospital Association to reduce medical errors
- Building demographic database of Washington practitioners
- Exploring requirements to ensure continuing competency
- Increasing educational outreach to profession and public
- Evolving Telehealth/Telemedicine/Telementoring
- Studying disciplinary recidivism among practitioners

DOH 658-005 February 28, 2013

E-mail: Medical.Commission@doh.wa.gov

Web: www.doh.wa.gov/hsqa/mqac

	GRIEVANCE DATA	
1.	Grievance Number	(4 digit year + three digit) 2013-001
2.	Guardian's Name	
3.	Guardian Agency's Name	
4.	Grievant's Name	
5.	Grievant's Relationship to IP	See list A
6.	Incapacitated Person's (IP) Name	
7.	IP Demographics	See list B
8.	Active Guardianship	Yes, No
9.	County	
10.	Guardianship Court Case No.	
11.	Allegations	See list C
12.	Grievance Summary	
13.	Interim Actions and Notes	
14.	SOPs and Reg Breached	See list C
15.	Resolution	See list D
16.	Date Grievance Received	
17.	Date Grievance Closed	
18.	Resolution Time	Grievance Closed Date (16) – Grievance Received Date (15)
19.	Costs Retrieved	
20.	Follow Up Required	Yes, No

	LIST A GRIEVANTS RELATIONSHIP TO IP
1.	Family
2.	Friend
3.	Social Worker
4.	Caregiver
5.	Adult Protective Services
6.	Developmental Disabilities
7.	Court
8.	Facility
9.	Title 11 GAL
10.	IP
11.	Other

	LIST B IP DEMOGRAPHICS			
	Gender	**Age**	**Disability**	**Living Arrangement**
1.	Female	18-29	Mental Illness	Western/Eastern State
2.	Male	30-39	Dementia	Medical Hospital
3.		40-49	Developmental Disability	Nursing Facility
4.		50-59	Chemical Dependency	Boarding Home
5.		60-69	TBI	AFH
6.		70-79	Other	Fircrest School
7.		80 & over		Frances Hadden
8.				Lakeland Village
9.				Rainier Village
10.				Yakima Valley
11.				ICF/MR
12.				Private Res W SL
13.				Private Res WO SL
14.				

	LIST C ALLEGATIONS
1.	401 Guardian’s Duty to Court
2.	402 Guardian’s Relationship to Family and Friends of Incapacitated Person and to Other Professionals
3.	403 Self-Determination of Incapacitated Person
4.	404 Contact with the Incapacitated Person
5.	405 General Decision Standards
6.	406 Conflicts of Interest
7.	407 Residential Decisions
8.	408 Medical Decisions
9.	409 Financial Management
10.	410 Guardian Fees and Expenses
11.	411 Changes of Circumstances/Limitation/Termination
12.	412 Sale or Purchase of Guardianship Practice
13.	Reg 200 Continuing Education
14.	Reg 700 Recertification
15.	

	LIST D RESOLUTION
1.	Dismissal - Administrative
2.	Ordered Dismissal – Hearing Officer
3.	Dismissal – SOPC – No Actionable Conduct
4.	Dismissal - No Jurisdiction
5.	ARD – Sanctions - SOPC
6.	ARD – Monitoring - SOPC
7.	ARD – Admonishment - SOPC
8.	ARD – Reprimand -SOPC
9.	ARD – Decertify - SOPC
10.	Ordered Sanctions – Hearing Officer
11.	Ordered Probation – Hearing Officer
12.	Ordered Suspension – Hearing Officer
13.	Ordered Decertification – Hearing Officer
14.	Noncompliance - Fees, CE, E & O, Disclosure
15.	Other

WASHINGTON
COURTS

ADMINISTRATIVE OFFICE OF THE COURTS
Callie T. Dietz
State Court Administrator

April 8, 2013

TO: Certified Professional Guardian Board (Board)

FROM: Shirley Bondon

RE: CPG Financial Standards

Issue:

What standards should be used to evaluate the financial fitness of candidates seeking certification as professional guardians and professional guardians seeking recertification?

Background:

In 2012, the Board adopted a new regulation requiring all applicants to submit a credit report and score. This information is used to determine the financial fitness of applicants. After reviewing credit reports for several months, it seems the credit score may not provide all the information needed, thus sometimes additional information may be needed, such as, the reason for poor credit history. In addition, because financial solvency may change over time, should the Board periodically examine the financial solvency of existing guardians? (See Attachment A – Current Recertification Packet).

Relevant Rules, Regulations and Statutes:

GR 23 in pertinent part;

(d)(4) Insurance Coverage. In addition to the bonding requirements of Chapter 11.88 RCW, applicants must be insured or bonded at all times in such amount as may be determined by the Board and shall notify the Board immediately of cancellation of required coverage.

(d)(5) Financial Responsibility. Applicants must provide proof of ability to respond to damages resulting from acts or omissions in the performance of services as a guardian. Proof of financial responsibility shall be in such form and in such amount as the Board may prescribe by regulation.

(d)(9) Denial of Certification. The Board may deny certification of an individual or agency based on any of the following criteria:

(vii) A Board determination based on specific findings that the applicant's financial responsibility background is unsatisfactory.

Characteristics of Financial Solvency/Insolvency:

Generally speaking, financial solvency means being able to pay all financial obligations in a timely manner and still have spending capital remaining. Financially solvent individuals are not burdened by financial debt and generally have a good credit rating. Several credit bureaus define a good credit rating as a credit score of 700 or above.

Financial insolvency usually is evident with bankruptcy and reliance on government assistance. Insolvency occurs when liabilities, or debts, exceed assets and cash flow.

Determining Financial Solvency:

Viability and Liquidity: *(excerpted from Investopedia)*

Liquidity is the term used to describe how easy it is to convert assets to cash. The most liquid asset, and what everything else is compared to, is cash. This is because it can always be used easily and immediately.

Certificates of deposit are slightly less liquid, because there is usually a penalty for converting them to cash before their maturity date. Savings bonds are also quite liquid, since they can be sold at a bank fairly easily. Finally, shares of stocks, bonds, options and commodities are considered fairly liquid because they can usually be sold readily and you can receive the cash within a few days. Each of the above can be considered as cash or cash equivalents because they can be converted into cash with little effort, although sometimes with a slight penalty.

Credit History: *(excerpted from Getting in Good Financial Health, by Dr. Bernice Wilson)*

The five factors that determine credit health are:

1. *Payment history* - accounting for 35 percent of FICO score;
2. *Dollar amount* - accounting for 30 percent of FICO score;
3. *Length of credit history* - accounting for 15 percent of FICO score;
4. *New credit accounts* - making up 10 percent of FICO score; and
5. *Mix of credit account types* - making up another 10 percent of FICO score.

You are considered to be in good financial health if your FICO is 700 or above. A FICO score below 600 is considered to be high risk and you run the chance of having your

credit application turned down. Eighty-five percent of Americans score higher than 600 according to Glasner (2006); Singletary (2006).

The VantageScore system is used by credit bureaus and is considered to be a relatively new credit scoring type that ranges from 501 to 990. Every 100 points corresponds with a letter grade in ascending order: 901 to 990 = A, 802 to 900 = B, 701 to 800 a C, 601 to 700 a D, and 501 to 600 an F. More than two-thirds of all consumers qualify for a grade of "C" or higher.

There are several types of credit scores developed by credit reporting agencies, independent companies, and other lenders. Therefore, a credit score may differ from lender to lender because credit history may differ from lender to lender.

Specialty credit reports also determine your financial health. The Fair and Accurate Credit Transaction Act of 2003 has permitted consumers to obtain a free copy of specialty reports annually since December 1, 2004. The Federal Trade Commission ensures that organizations carry out this mandate. Specialty reports relate to medical records or payments, check writing history, residential or tenant history, and insurance claims. Consumers are advised to call toll-free numbers, a specific agency or company to obtain a copy of their free specialty credit report (See Attachment B).

Things to Consider When Reviewing Negative Credit History:

Bankruptcy *(excerpted from Debt.org)*

Bankruptcy is the legal status of someone or some company that is unable to pay off debt. It is a status that can only be given by a court, either a state or federal court.

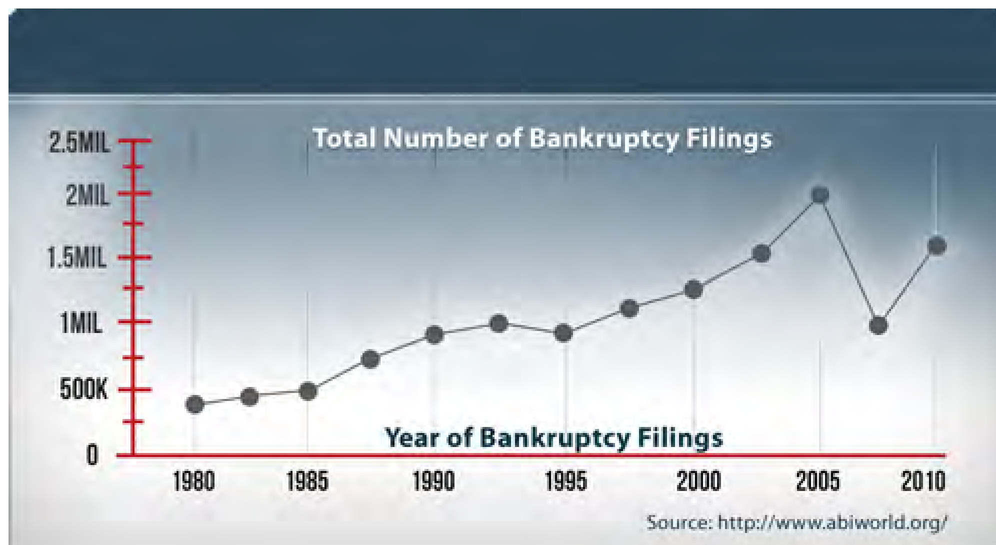
Generally, personal bankruptcy is considered a last resort for people inundated with loans or bills. Although going bankrupt is an effective way to wipe out most or all fiscal obligations, the process leaves long-lasting consequences.

Bankruptcy will negatively affect your credit and future ability to use money. It may prevent or delay foreclosure on a home and repossession of a car. It can also stop wage garnishment and other legal actions of creditors attempting to collect debts.

In addition, filing for bankruptcy can be a complex and costly process. Experts recommend anyone considering bankruptcy to seriously consider other options first. Despite the experts' warnings, the number of people in the United States filing for bankruptcy annually is on the rise.

Bankruptcy in the United States

In 2011, there were 1,410,653 bankruptcy filings; nearly four times the number filed 30 years prior.



The percentage of bankruptcies filed by consumers has also risen. In the early 1980s, consumer filings made up about 82 to 87 percent of all bankruptcy filings.

By 2011, this number had risen to 97 percent, meaning businesses made up only 3 percent of the total bankruptcy filings.

Consequences of Bankruptcy

The overriding principle of bankruptcy is that it wipes away debt. Sometimes all debt, oftentimes only a portion of it. The overall consequences of filing for bankruptcy carry a negative impact.

A bankruptcy filing remains on your credit report for 10 years. During this time, it may prevent you from obtaining new lines of credit and may even cause problems when you apply for jobs.

If you are considering bankruptcy, your credit report and credit score are probably already considerably damaged. Because of this your credit report may not endure further injury, especially if you consistently pay your bills after declaring bankruptcy.

Still, because of the long-term effects of bankruptcy some experts believe it may be beneficial only if you have more than $15,000 in debts.

Bankruptcy does not necessarily erase all financial responsibilities. It typically does not discharge the following types of debts and obligations:

- Alimony
- Child Support
- Debts that arise after bankruptcy is filed
- Loans obtained fraudulently
- Some debts incurred in the six months prior to filing bankruptcy
- Some student loans
- Some taxes

There are several types of bankruptcy for which individuals or married couples can file, the most common being Chapter 7 and Chapter 13.

Chapter 7 bankruptcy filings make up about 70 percent of non-business bankruptcy cases, and under this your debts are discharged and you are no longer responsible for repaying them. Some of your assets may be sold by a court-appointed bankruptcy trustee. The proceeds go towards paying the trustee, covering administrative fees and, if funds allow, repaying your creditors as much as possible.

You are allowed to keep key assets, but property exemptions vary from state to state. You may choose to follow either state law or federal law, which may allow you to keep more possessions.

Under federal law, you are typically entitled to $16,500 in equity in your home and $2,575 in equity in your car, as well as certain less valuable items like household items and job-related tools. If you jointly file as a married couple, these amounts double.

You also retain your right to receive pension, Social Security, unemployment, veteran benefits and welfare.

Chapter 13 bankruptcies make up for about 30 percent of non-business bankruptcy filings. A Chapter 13 bankruptcy involves repaying some of your debts to have the rest absolved. This is an option for people who do not want to give up their property or do not qualify for the Chapter 7 filing because their income is too high.

People can only file for bankruptcy under Chapter 13 if their debts do not exceed a certain amount. The specific cutoff is reevaluated periodically. Under Chapter 13, you must design a three-to-five year repayment plan for your creditors. Once you successfully complete the plan, the remaining debts are erased.

Understanding a Federal Tax Lien: *(excerpted from IRS.gov)*

A federal tax lien is the government's legal claim against your property when you neglect or fail to pay a tax debt. The lien protects the government's interest in all your property including real estate, personal property and financial assets. A federal tax lien exists after the IRS:

- Assesses your liability;
- Sends you a bill that explains how much you owe (Notice and Demand for Payment); and
- You neglect or refuse to fully pay the debt in time.

The IRS files a public document, the **Notice of Federal Tax Lien**, to alert creditors that the government has a legal right to your property.

How to Get Rid of a Lien

Paying your tax debt ***in full*** is the best way to get rid of a federal tax lien. The IRS releases your lien within 30 days after you have paid your tax debt.

Options: When conditions are in the best interest of both the government and the taxpayer, other options for reducing the impact of a lien exist:

- **Discharge of property** — Allows property to be sold free of the lien. The seller or buyer can submit Publication 783, Instructions on How to Apply for Certificate of Discharge From Federal Tax Lien (PDF).
- **Subordination** — Does not remove the lien, but allows other creditors to move ahead of the IRS, which may make it easier to get a loan or mortgage. For more information review Publication 784, Instructions on How to Apply for a Certificate of Subordination of Federal Tax Lien (PDF).
- **Withdrawal** — Removes the public notice and assures that the IRS is not competing with other creditors for your property. If applying for a withdrawal, use Form 12277, Application for the Withdrawal of Filed Form 668(Y), Notice of Federal Tax Lien (PDF).

How a Lien Affects You

- **Assets** — A lien attaches to all of your assets (such as property, securities, and vehicles) including future assets acquired during the duration of the lien.
- **Credit** — Once the IRS files a Notice of Federal Tax Lien, it may limit your ability to get credit.
- **Business** — The lien attaches to all business property and to all rights to business property, including accounts receivable.
- **Bankruptcy** — If you file for bankruptcy your tax debt, lien, and Notice of Federal Tax Lien may continue after the bankruptcy.

Avoid a Lien

You can avoid a federal tax lien by simply filing and paying all your taxes in full and on time. If you can't file or pay on time, don't ignore the letters or correspondence you get

from the IRS. If you can't pay the full amount you owe, payment options are available to help you settle your tax debt over time.

Lien vs. Levy

A lien is not a levy. A lien secures the government's interest in your property when you don't pay your tax debt. A levy actually takes the property to pay the tax debt. If you don't pay or make arrangements to settle your tax debt the IRS can levy, seize and sell any type of real or personal property that you own or have an interest in.

Other Considerations

- Foreclosure
- Medical Bills
- Repossession of Property
- Collection Agency Referral
- Late Payment

Ability to be Bonded:

Surety bonds, while issued by an insurance company, are not insurance. A bond is a third party contractual obligation between the surety, the principal, and the obligee. It is an obligation by the surety to provide financial benefit to the obligee (the entity to whom the bond is issued) on behalf of the principal (the party responsible for completion of the obligation established by the bond). The bond ensures that the conditions or award of money damages will be fulfilled.

Bond cost varies greatly; it is dependent on bond type, the applicant's credit history/ financial performance and the location where the bond is needed. The bond company requires information about credit and financial history as part of the bond application process. An applicant's credit history tells the bonding company whether the applicant can be considered financially reliable. A good credit score means a lower bond fee, but even those with terrible credit may be able to get a bond at a higher premium. These are called "high risk" applicants. The fee for "high risk" applicants can be between 5 and 20 percent or more of the total amount of the bond.

Different states charge different fees, as do different surety companies. For an applicant with good credit history the cost is usually between 1 and 4 percent of the total bond amount needed. The best way to find a cost for a particular bond is to submit an application to the surety company and get a quote.

Certified Professional Guardian Annual Recertification Form

GENERAL INSTRUCTIONS

1. **Please type.** If you must hand write, please print clearly with blue or black ink.
2. Read each question carefully. Please read the instructions for each section.
3. Mail complete packets to: **Certified Professional Guardian Board**
   PO Box 41170
   Olympia, WA 98504-1170

Only forms that are completed correctly will be accepted.
Forms that are illegible, incomplete or completed incorrectly will be rejected.

It is important that you keep your contact information up-to-date so the Guardian Program can contact you with important information and questions. Please update your contact information online at the link below.
Update Contact Information Online

Space reserved for online payment information.

**If you choose to pay by check, please make it payable to the Administrative Office of the Courts.

Section 1 - General Information. *Completed by only Certified Professional Guardian (CPG)*

1. This section should be completed by individual CPGs, ***not*** CPG Agencies.
2. If you fill out this section, ***do not*** fill out Section 2.
3. An annual recertification fee of $150 must be paid ***for each*** individual CPG.

First Name ______ Last Name ______ CPG Number ______

Section 2 - General Information. *Completed by only Certified Professional Guardian Agency (CPGA)*

1. This section should be completed by CPG Agencies, ***not*** individual CPGs.
2. If you fill out this section, ***do not*** fill out Section 1.
3. An annual recertification fee of $150 must be paid ***for each*** CPG Agency.

Name of Certified Professional Guardian Agency: ______ CPGA Number: ______

*****Note to agencies regarding recertification*****

You are encouraged to identify one of the designated guardians for the agency who will:

- Complete and sign the agency recertification form.
- Collect a completed and signed recertification form from every CPG working for the agency.
- Submit together, in one packet all of the items listed in the box to the right.

1. All recertification forms and fees.
2. A copy of the declaration page from your E&O insurance.
3. Properly identified official documents explaining any "Yes" answers from Section 3.

Attachment A

Section 2 Continued. *Completed by only Certified Professional Guardian Agency (CPGA)*

Designated Guardians: *Each CPG Agency is required to assign at least two designated guardians with final decision-making authority for incapacitated persons served by that agency. Please list two designated guardians below and confirm that they are covered by the agency's insurance.*

Please note: Each of these guardians must also submit a separate individual guardian recertification form.

Each Designated Guardian must have an Acceptance of Designated CPG form on file with the AOC.

For a copy of the form, click here.

Designated Guardian 1:		CPG Number	
Designated Guardian 2:		CPG Number	

List the names and CPG numbers of all certified professional guardians working at your agency. Submit an additional sheet if needed. Please indicate whether each guardian is covered by the agency's insurance, and if they are designated guardians (in addition to the names listed above).

Please note: Each of these guardians must also submit a separate individual guardian recertification form.

	Guardian Name	CPG #	Insurance?	Designated?
1.			☐	☐
2.			☐	☐
3.			☐	☐
4.			☐	☐
5.			☐	☐
6.			☐	☐

List the names and CPG numbers of all certified professional guardians who have left your agency since August 1, 2011, and explain why they left. Submit an additional sheet if needed.

	Guardian Name	CPG #	Reason for leaving
1.			
2.			
3.			

Section 3 - Disclosure (GR 23E). *Completed by both CPG and Agency*

If you answer "yes" to any of the following questions, please provide official documentation.

Since you last reported:	**Yes**	**No**
1. Has there been a finding by a court that you, an individual guardian or agency, violated your fiduciary duties, or committed a felony or any crime involving moral turpitude?	☐	☐
2. Have you, an individual guardian or agency, been removed as a guardian by a court order?	☐	☐
3. Has a judgment been entered against you, an individual guardian or agency, arising from your performance of services as a fiduciary?	☐	☐
4. Have you, an individual guardian or agency, been involved in any type of adjudication specified in RCW 43.43.830 and RCW 43.43.842?	☐	☐
5. Has the Department of Social and Health Services or a judge determined (substantiated) that you, an individual guardian or agency, or any employee, officer or certified professional guardian associated with you, abused a vulnerable adult, including abandonment, neglect, abuse or financial exploitation under RCW 74.34 (RCW 73.34.020 and WAC 388-71-01275)?	☐	☐
6. Has the Department of Social and Health Services or a judge determined (substantiated) that you, an individual guardian or agency, or any employee, officer or certified professional guardian associated with you, abused or neglected a child under RCW 26.44 (RCW 26.44.125 and WAC 388-15-061 through WAC 388-15-141)?	☐	☐
7. Are there any pending licensing or disciplinary actions related to fiduciary responsibilities or final licensing or disciplinary actions resulting in findings of violations?	☐	☐

Section 4a - Errors & Omissions (E&O) Insurance Declaration. *Completed by both CPG and Agency*

If the answer to EITHER OF the following two questions is "no," you **are required** to have Errors & Omissions (E&O) insurance.

	Yes	**No**
1. Do you, an individual certified professional guardian or agency, have 25 or fewer guardianship case appointments?	☐	☐
2. Do you, an individual certified professional guardian or agency, have less than $500,000 total countable guardianship assets under management?	☐	☐

If you answered yes to BOTH questions above, you are exempt from having E&O insurance. In accordance with Regulation 117.8, you may request a waiver if you are not exempt.

Will you, an individual certified professional guardian or agency, submit a request to waive the requirement to have E&O insurance?	☐	☐

Section 4b - Errors & Omissions Insurance Information. *Completed by both CPG and Agency*

Only those CPGs and CPGAs that are REQUIRED to carry E&O insurance must complete this section. A copy of the declaration page from your E&O policy **must be included** with this recertification packet.

Errors & Omissions Insurance Carrier [ ]

Insurance Policy # [ ]

Coverage Dates: From [ ] To [ ]

Limit of Insurance Liability [ ]

Name of Insurance Agent [ ]

Agent's Phone Number [ ]

Section 5. *Completed by Certified Professional Guardian OR Agency*

I declare as a Certified Professional Guardian, under penalty of perjury under the laws of the state of Washington, that the following is correct (select one that applies):

- ☐ I am covered by the E&O insurance held by a Certified Professional Guardian Agency.

  Name of Agency: [ ]

- ☐ I maintain a policy of E&O insurance of at least $500,000 as required by Regulation 117.2.
- ☐ I qualify for exemption from the requirement to have E&O insurance as set forth in Regulation 117.3.
- ☐ I do not qualify for exemption from the requirement to have E&O insurance as set forth in Regulation 117.3, but I do intend to submit a request to waive the E&O requirement.

-OR-

I declare on behalf of the Agency under penalty of perjury under the laws of the state of Washington that the following is correct (select one that applies):

- ☐ The Agency maintains a policy of E&O insurance of at least $500,000 as required by Regulation 117.2.
- ☐ The Agency qualifies for exemption from the requirement to have E&O insurance as set forth in Regulation 117.3.
- ☐ The Agency does not qualify for exemption from the requirement to have E&O insurance as set forth in Regulation 117.3, but does intend to submit a request to waive the E&O requirement.

I declare, under penalty of perjury, that all of the information provided in this form is accurate.

By typing your name below, you agree that this is valid as your signature and you have read and agree to the statements above and certify the information on this application is complete and truthful.

Date Signed: [ ] Place Signed (city, state): [ ] **Print Form**

Signature: [ ] **Submit**

IMPORTANT: *The due date for this packet is August 1, 2012. If any part of the packet (form, fee, E&O declaration page or supporting documents) is received after August 1, 2012 the submission is considered late. Packets received between August 2 and August 31 incur a **$50 late fee**; between September 1 and September 31 incur a **$100 late fee**; and after September 31, or not at all will result in **decertification**.*

Privacy Rights Clearinghouse
Empowering Consumers. Protecting Privacy.

Published on *Privacy Rights Clearinghouse* (https://www.privacyrights.org)
Today's Date: Mar 27, 2013

Fact Sheet 6b: "Other" Consumer Reports: What You Should Know about "Specialty" Reports

Copyright © 2004 - 2013
Privacy Rights Clearinghouse
Posted December 2004
Revised January 2013

1. Introduction
2. Specialty Consumer Reports – the Players
3. Your Right to Free Annual Reports from Specialty Consumer Reporting Agencies
4. Insurance Claims Reports
5. Medical and Prescription Drug History Reports
6. Residential and Tenant Reports
7. Check Writing History Reports
8. Employment Background Screening Reports
9. The Work Number Employment Data Reports
10. LexisNexis Accurint Person Reports
11. LexisNexis Full File Disclosure
12. When to Order a Specialty Report
13. References

1. Introduction

Will you be a good employee?
Are you likely to wreck your car?
Is your checking account frequently overdrawn?
Are you in poor health?
Will you default on your mortgage?
Does your home have water damage?
Will you trash the apartment or vacate with rent unpaid?

These are some of the unspoken questions asked by employers, landlords, creditors, insurers and banks as you – the consumer – make your way through the normal affairs of adult life. To the company that may give you a job, write an insurance policy, or rent you an apartment, you represent a risk – the unknown – and companies feel a need to assess their "risk" in dealing with you. Of course, you won't be asked these questions outright, but those who want to rate your "risk level" are turning more than ever to specialized "consumer reports" to find out more about you.

Attachment B

The federal Fair Credit Reporting Act (FCRA) covers reports about your overall financial health. Credit reports allow a lender to see whether you pay your bills on time, have filed for bankruptcy, or have an outstanding court judgment or collection action against you.

However, despite its name, the Fair Credit Reporting Act covers a lot more than simply credit reports. Credit reports are just one of a broader category of consumer reports covered by the FCRA. To learn more about your credit reporting rights, see PRC Fact Sheet 6, *How Private Is My Credit Report?*, www.privacyrights.org/fs/fs6-crdt.htm [1].

Consumer reports can also include reports about you made to employers, insurance companies, banks, and landlords. In recent years, many new companies have sprouted, compiling reports specifically targeted at employers, insurers, and landlords. The companies that compile reports for targeted users are "consumer reporting agencies" under the FCRA, just like the three national credit bureaus: Experian, TransUnion, and Equifax.

Companies that compile reports on consumers for other than credit have been designated by Congress as "nationwide specialty consumer reporting agencies." These agencies compile reports about much more than just your credit history. Here are a few examples of the types of reports that they compile:

- Medical conditions (for example, the Medical Information Bureau (MIB) report)
- Residential or tenant history and evictions (for example, RentBureau)
- Check writing history (for example, ChexSystems)
- Employment background checks (for example, LexisNexis Screening Solutions)
- Homeowner and auto insurance claims (for example, CLUE reports)

The "specialty" subcategory of consumer reporting agencies was specifically identified in amendments to the FCRA made by the Fair and Accurate Credit Transaction Act (FACTA) (FCRA sec. 612 (a)(1)(C)).

To learn more about FACTA see PRC Fact Sheet 6a, *FACTA, the Fair and Accurate Credit Transactions Act: Consumers Win Some, Lose Some*, www.privacyrights.org/fs/fs6a-facta.htm [2].

FACTA gives consumers the right to a free credit report each year from the three national credit bureaus: Experian, TransUnion and Equifax. For more on your right to free credit reports, see:

- Federal Trade Commission publication, *Your Access to Free Credit Reports* www.ftc.gov/bcp/edu/pubs/consumer/credit/cre34.shtm [3]
- The shared Web site of the three credit bureaus, www.annualcreditreport.com [4].

FACTA also gives consumers the right to a free report from a "nationwide specialty consumer reporting agency" once a year.

This fact sheet includes information about nationwide specialty consumer reporting agencies and other companies that offer consumers free access to their reports.

2. Specialty Consumer Reports – the Players

What information goes into a "specialty" report?

Specialty consumer reporting agencies operate much like the credit bureaus. The agencies collect information about you from a variety of sources, including:

- Public records of criminal or civil cases
- Your credit history
- Bankruptcy filings
- Companies with which you have an existing or prior business relationship, such as insurance companies or banks
- Your medical information
- Driving records

Attachment B

From this information, the specialty reporting agency compiles reports based on the requirements of targeted users such as insurance companies, employers, and landlords.

How do I know if there's a specialty report on me?

Unfortunately, most consumers are in the dark about the very existence of specialty consumer reports. Usually people learn about specialty reports only after having been denied a job, insurance, or an apartment rental.

What's involved in making a specialty report?

Like credit reports, the FCRA imposes certain obligations on the specialty reporting companies, users of such reports, and those that furnish information that goes into compiling the reports. The FCRA also gives you, the subject of the report, certain rights.

In addition, just like the credit bureaus, specialty reporting agencies do not make decisions about whether to rent you an apartment, give you a job, or write an insurance policy. Those decisions are left up to the landlord, employer or insurance company.

Following is a brief summary of how the FCRA treats each of the "players" involved:

- **Furnishers**, that is, those that feed information to a consumer reporting agency, have an obligation to furnish only accurate information. This holds true whether the furnisher provides information to a credit bureau, tenant screening agency, medical information service, or other entities that meet the definition of "consumer reporting agency".

Providers of information also have an obligation to update and correct inaccurate information. For more on the obligations of furnishers under the FCRA, see the Federal Trade Commission (FTC) publication, *What Information Providers Need to Know*, www.ftc.gov/bcp/edu/pubs/business/credit/bus33.shtm [5].

- **Users** of specialty consumer reports include landlords, insurers, and employers. Just like a lender who turns down your loan application, users of specialty consumer reports must give you what's called an "adverse action notice" along with a copy of your report. So, if you've been turned down for an apartment rental based on a report, or if you are denied an insurance policy due to information on a report, you are entitled to a copy of that report. For more on the obligations of these users, see these FTC publications:
    - *Consumer Reports: What Insurers Need to Know*, www.ftc.gov/bcp/edu/pubs/business/credit/bus07.shtm [6]
    - *Using Consumer Reports: What Employers Need to Know*, www.ftc.gov/bcp/edu/pubs/business/credit/bus08.shtm [7]
    - *Using Consumer Reports: What Landlords Need to Know*, www.ftc.gov/bcp/edu/pubs/business/credit/bus49.shtm [8]
- **Nationwide specialty consumer reporting agencies**, like the credit bureaus, have certain obligations when making reports about you. For example, reports can only be issued for purposes allowed by the FCRA. There are time limits on how long negative information can be reported. When you dispute information, the reporting agency has an obligation to investigate and correct any inaccurate or outdated information. A reporting agency that compiles public record information for employment purposes has an additional obligation under the FCRA when that information is likely to have an adverse effect on your ability to get a job.
- **You** have the right to a free copy of your consumer report when an adverse action is taken against you based on something in the report. An adverse action would be if you are turned down for employment, are denied insurance or are charged a higher premium, are denied a rental, or are not permitted to open a checking account based on some negative information in your check writing history report. You have the right to dispute inaccurate information in any consumer report prepared about you.

Attachment B

In addition to the free report you are entitled to get if you are turned down for employment, a rental, insurance, or a checking account, you can order a free copy of your specialty report directly from the nationwide specialty consumer reporting agency. *You are entitled to one free report from each specialty agency once a year. This fact sheet also includes information about other companies that offer consumers free access to their reports or file.*

3. Your Right to Free Annual Reports from Specialty Consumer Reporting Agencies

There is no centralized source for obtaining free specialty reports. Requests must be made directly to each specialty reporting agency. FTC regulations do not require nationwide specialty consumer reporting agencies to establish a Web site or allow mail-in requests. *The only requirement is that specialty agencies establish a toll-free number*, published anywhere the company does business. Requests processed otherwise such as through a Web site or by mail are optional, although many nationwide specialty agencies have posted information on their Web sites.

The Consumer Financial Protection Bureau has issued CFPB Bulletin 2012-09 [9] reminding nationwide specialty consumer reporting companies that they must give consumers an easy way to get a free copy of their specialty reports.

Specialty reporting agencies also:

- May collect only as much information as necessary to identity you, generally the same information necessary for a free credit report (name, address, Social Security number).
- Must give you, if you ask, an update on the status of your request. However, there is no time limit on when your request must be processed.
- Must provide a "help" or "frequently asked questions" screen if requests are processed online.

The FTC's web site gives further information about your rights to get free credit and specialty reports, www.ftc.gov/bcp/edu/pubs/consumer/credit/cre34.shtm [3].

The following sections of this guide include information we have gathered to date about access to specialty consumer reports and other similar products. For some specialty reports, one or two companies dominate the market. This means it will be easier for you to find out where to direct your request. For other areas, such as employment and rental history, specialty reports may be prepared by many different companies.

One company, LexisNexis, maintains a wide variety of information on consumers, including insurance claims, employment, and tenant history. The company has information on its Web site about how to obtain these three types of free specialty reports individually (https://personalreports.lexisnexis.com/ [10]).

Will I get the same information the insurer, landlord, employer, or other business gets?

Although this guide and other publications generally refer to free "reports," the FCRA technically gives you the right to a free "file disclosure." There is a difference under the FCRA between your "report" and your "file."

Under the FCRA, a "consumer report" is:

> ...any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living ....(FCRA §609(d)(1))

Your "file" is:

> ...all of the information on [you] recorded and retained by a consumer reporting agency regardless of how the information is stored. (FCRA §609(g))

Attachment B

In other words, the report is the document provided to the employer, landlord, insurer or creditor. The report reflects information collected and compiled at any given time. Your "file" on the other hand is the information the consumer reporting agency maintains about you. Your right to a free disclosure is to your "file," not your "report."

4. Insurance Claims Reports

Specialty reports that tell insurers about claims you have made against your homeowner's or automobile insurance polices are prepared by two companies: LexisNexis and ISO Insurance Services. For more on insurance claims reports, see PRC Fact Sheet 26, *CLUE and You: How Insurers Size You Up*, www.privacyrights.org/fs/fs26-CLUE.htm [11].

To request a free A-PLUS loss-history report, call the A-PLUS Consumer Report Request Line at 800-627-3487. For additional information on how to order your free A-Plus Report from ISO, see http://www.iso.com/Products/A-PLUS/Consumers-Order-Your-Free-A-PLUS-Loss-History-Report.html [12].

To order your automobile or homeowner's CLUE report, call the LexisNexis toll-free number, (866) 312-8076, or visit the LexisNexis web site at [10] https://personalreports.lexisnexis.com/fact_act_claims_bundle/landing.jsp [13].

5. Medical and Prescription Drug History Reports

MIB Group Inc. (formerly The Medical Information Bureau) is a nationwide specialty consumer reporting agency that compiles and maintains records concerning *individual* life, health, long-term care, and disability insurance. Generally, you will have an MIB file *only* if you have applied for one of these insurance products within the last seven years, and only if you've applied as an individual rather than as a member of a group.

If you have no significant medical condition and have not applied for insurance as an individual, you are not likely to have an MIB report. The report includes information that you have reported on an insurance application or that the insurance company has obtained from your healthcare provider indicating a medical condition that insurance companies consider significant. In all, MIB assigns from among 230 codes that indicate medical conditions such as asthma, diabetes, high blood pressure, depression, and so on.

MIB's toll-free number for disclosure is (866) 692-6901 (TTY (866) 346-3642 for hearing impaired) For more on free reports from MIB, see the company's web site, http://www.mib.com/request_your_record.html [14].

IntelliScript and **MedPoint** are databases that report prescription drug purchase histories to insurance companies. Like the MIB reports, IntelliScript and MedPoint reports are used primarily when consumers are seeking private health, life or disability insurance. Prescription drug databases can go back as far as five years, detailing drugs used as well as dosage and refills.

With a history of prescription drugs in hand, insurers may make assumptions about medical conditions and assess the risk of writing an insurance policy. Information in an IntelliScript or MedPoint report may prompt an insurer to deny coverage for certain conditions, increase insurance premiums, or deny coverage altogether. Such adverse actions by insurance companies trigger a sequence of consumer rights under the FCRA.

Until recently, use of prescription drug databases was unknown to consumers. Insurers' use of these databases first came to light in 2007 when the FTC sued Milliman, the owner of the IntelliScript database, and Ingenix, Inc., owner of the MedPoint database. www.ftc.gov/opa/2007/09/ingenixmilliman.shtm [15]

The FTC claimed that the companies are consumer reporting agencies subject to the FCRA. Both

Attachment B

cases were settled without the data brokers paying a monetary penalty, but Milliman and Ingenix agreed to follow the FCRA. This means, among other things, that consumers who apply for private insurance and are turned down because of something in an IntelliScript or MedPoint report are entitled to a copy of the report from their insurance company and an opportunity to dispute the accuracy of information in the report.

Individuals who have applied for individual health, life, or disability insurance may also request a copy of any prescription report directly from MedPoint or IntelliScript. Reports are available once a year whether or not there has been an adverse decision by an insurance company.

You can request a copy of your MedPoint report by calling (888) 206-0335 and leaving a message.

IntelliScript reports are available by calling the toll-free request line at (877) 211-4816. Consumers will have to provide their full name, date of birth, last four digits of their Social Security number and current zip code. Milliman will provide a copy of any information the company has on an individual as well as the names of insurance companies that have requested a prescription history. The company's Web site includes information about the product as well as additional contact information. http://www.rxhistories.com/contact_us.html [16]

For more about medical information and your privacy, see PRC Fact Sheet 8, *How Private Is My Medical Information?*, www.privacyrights.org/fs/fs8-med.htm [17], and PRC Fact Sheet 8a, *HIPAA Basics: Medical Privacy in the Electronic Age*, www.privacyrights.org/fs/fs8a-hipaa.htm [18].

6. Residential and Tenant Reports

A number of companies prepare reports for landlords concerning individuals who have applied to rent housing. LexisNexis Screening Solutions Resident History Report contains information related to your tenant history as well as other information regarding your background. Call toll-free (877) 448-5732 or visit https://personalreports.lexisnexis.com/resident_history_report.jsp [19] to obtain a copy of your report.

Experian RentBureau receives rental payment data from its national network of property management companies. This data is accessed by resident screening companies for use during the application process for prospective residents. Consumers may order their Rental History Report by using the form at http://www.experian.com/assets/rentbureau/brochures/request_form.pdf [20]

Another agency that provides tenant screening information is Core Logic Safe Rent. A SafeRent file may include criminal and/or landlord-tenant records as well as rental performance history. Consumers may obtain a copy of their consumer file by calling (800) 815-8664. For more information go to http://www.corelogic.com/landing-pages/rental-screening-analytics.aspx#container-Consumers [21].

Consumers may have a particularly difficult time exercising their right to a free specialty report when the "specialty" market is saturated with agencies. This may prove to be the case for tenants who want to check their file. If you learn you will be subject to a tenant screen, you may save yourself a lot of time and trouble by simply asking the landlord the name and contact information for the screening company.

7. Check Writing History Reports

There are three major specialty companies that report on check writing history.

- **ChexSystems** is a nationwide specialty consumer reporting agency that collects and maintains information from member financial institutions such as banks and credit unions. If a bank closes your checking account because of insufficient funds, for example, it will make a report to ChexSystems that other banks will check when you apply for new accounts. You can read more about how ChexSystems tracks your banking history at http://money.cnn.com/2012/08/16/pf/bank-account-history/index.html [22].
- Toll-free number: (800) 428-9623
- Web: www.consumerdebit.com/consumerinfo/us/en/chexsystems/report/index.htm [23]

Attachment B

- **Shared Check Authorization Network (SCAN)** maintains a database of returned checks and instances of fraud. It provides check authorization and verification to member retailers.
- Toll-free number: (800) 262-7771
- Web: [24]http://www.nobouncedchecks.com/SCAN-check.html [25]

- **TeleCheck** also maintains a database of returned checks and instances of fraud. It provides check authorization and verification to member retailers.
- Toll-free number: (800) 835-3243.
- Web: [26]http://www.firstdata.com/telecheck/telecheck-request-file-report.htm [27].

8. Employment Background Screening Reports

Obtaining a free copy of your employment report may be a frustrating exercise – unless you know the name the company that performs the background screening. Employees and job applicants do have some additional rights under the FCRA regarding access to background check reports. For example, the employer must give you notice that a background screening may be conducted, and the employer must get your permission. Notice and permission must be given on a separate document, not buried in an application or another form.

Unfortunately, under the FCRA an employer need not tell you the name of the company that will screen you. This appears to us to be a significant loophole in the law. Under California law, on the other hand, an employer must give you this information up front, when you are given the notice and permission documents to sign.(California Civil Code §1786.12(2)(B)(iv)) In addition, California laws allows you to get a copy of your report for two years. (California Civil Code 1786.11))

For more on employment background checks in California, see PRC Fact Sheet 16a, *Employment Background Checks in California: New Focus on Accuracy*, www.privacyrights.org/fs/fs16a-califbck.htm [28].

The national standard, set by the FCRA, does not require an employer to tell you the name of the screening company or tell you how to get a copy of your report. The employer need only give you a copy of the report if he or she decides *not* to hire you or denies you a promotion if you are a current employee. But it's important that you keep in mind -- your right to a free employment report does not hinge on the employer's action.

To say you have the right to a free specialty employment report means little if you don't know where to look. That's because hundreds of companies are now engaged in employment background screening. The National Association of Professional Background Screeners lists over 300 member background check companies. www.napbs.com/ [29]

If you are given notice by an employer that a background check will be conducted, we strongly suggest you ask for the name of the screening company at that time. Even when you know the name of the screening company, this may be a "hollow" right. You can only get free disclosure if the company *maintains* a file on you. Some employment screeners may simply evaluate you and then issue a one-time report without maintaining a file. For this reason, we suggest you make your request for a free disclosure to the screening agency soon after you get notice that a report may be prepared.

The LexisNexis Screening Solutions Employment History Report contains information related to your employment history as well as other information regarding your background. You can get your free file disclosure by contacting the company at:

- Toll-free number: (866) 312-8075
- Web: https://personalreports.lexisnexis.com/employment_history_report.jsp [30]

9. The Work Number Employment Data Reports

The Work Number provides employment data reports, which are entirely different from the employment background screening reports discussed in the previous section. Employment Data Reports are limited to basic employment information (such as name of employer, dates of employment, salary, and job

Attachment B

title) obtained from participating employers. The Work Number is an employment and income verification service. It is not a background screening service.

Essentially, the Work Number permits companies to outsource certain payroll and human resource functions. Thus, it operates somewhat differently than a typical consumer reporting agency in that it only collects information from the employers with which it has contracts. The Work Number maintains information on at least 30% of the U.S. working population. It is operated by TALX Corporation, which is owned by the credit reporting agency Equifax.

In a January 2013 investigative report, MSNBC journalist Bob Sullivan revealed that Equifax sells employees' employment information to debt collectors and other financial services companies. http://redtape.nbcnews.com/_news/2013/01/30/16762661-exclusive-your-employer-may-share-your-salary-and-equifax-might-sell-that-data?lite [31].

The Work Number will provide you with one free Employment Data Report every 12 months. You can obtain a free annual disclosure by calling TALX directly at (866) 604-6570 or by going to https://www.theworknumber.com/Employees/DataReport/ [32]. You can download the Employment Data Report Request form and follow the instructions to complete and return the form to TALX Corporation. Once your request is received, your Employment Data Report will be mailed to you within 15 days.

If you believe information in your Employment Data Report is inaccurate, you may contact the Work Number's Client Service Center at (800) 996-7566 to have your dispute investigated. Your information will be blocked from verifiers during the reinvestigation. Results of the reinvestigation will be provided within 30 days of receipt of a dispute.

10. LexisNexis Accurint Person Reports

LexisNexis provides a broad range of information to both businesses and government for numerous purposes including identity authentication, employment screening, fraud prevention, claims management, and debt collection. Information provided by LexisNexis includes public records, other publicly available information, and some non-public information.

Public records include records created and maintained by government agencies that are open for public inspection. This includes information such as real estate title records, liens, death records, and motor vehicle registrations.

Publicly available information is information about an individual that is available to the general public from non-governmental sources such as newspapers, magazine articles and telephone directories.

Some LexisNexis products contain non-public information, which may not be readily available to the general public. Non-public information is information about an individual obtained from a source that is privately owned and that is not available to the general public including commercial directories or databases compiled by other publishers. Non-public information may include the following information: current and previous addresses; Social Security Number; previous names used, such as alias names, maiden names or previous married names; birth date information; and/or telephone numbers.

According to LexisNexis, some of its products are considered to be subject to the FCRA, while others are not. Likewise, not all of the LexisNexis reports are necessarily considered consumer specialty reports. However, LexisNexis will provide individuals with a copy of the information about themselves contained in the so-called "Person Report" products distributed through its Accurint information services division. These reports tend to be much more comprehensive than the other reports discussed in this fact sheet, and go well beyond typical specialty reports in terms of types of information provided. You can see a sample LexisNexis Accurint Comprehensive Report here: https://w3.lexis.com/consumeraccess2.0/sample/person_report.htm [33]

Consumers can request a copy of their Person Report found in the Accurint services by using the form at www.lexisnexis.com/privacy/for-consumers/request-personal-information.aspx [34]. Consumers also will need to mail or fax copies of 2 forms of identification. One must be a government-issued ID. A utility

Attachment B

bill showing your name and your current address may serve as the other form of ID.

Consumers can also order a copy of their Person Report by mailing a printable form available from the same link. Again, two forms of identification are required, and one must be a government-issued ID.

Person Reports will be returned by U.S. mail approximately 30 to 60 days after LexisNexis receives proof of identification. Consumers with questions about the LexisNexis Consumer Access Program can call (888) 332-8244, select Option 1, and dial extension 999-4498.

11. LexisNexis Full File Disclosure

A LexisNexis Full File Disclosure includes both the consumer's file and a public records search. You can see what information about you is maintained in LexisNexis files. This is the information that is used by LexisNexis to create consumer reports. These consumer reports may be sold to businesses with a legitimate business need for that information. The public records search will contain information available in county, state or federal public records such as real estate transaction and ownership data, lien, judgment and bankruptcy records, professional license information, and historical addresses.

The LexisNexis Full File Disclosure will include data from its specialty reports as well as additional information. The disclosure includes your CLUE reports (described in Section 4 above), current insurance carrier reports, a pre-employment background check (only if one has been previously ordered by an employer), criminal records information, and additional information that may be available in LexisNexis files. For a more complete description of the information included see https://personalreports.lexisnexis.com/access_your_personal_information_faq.jsp

[35]

LexisNexis offers consumers their Full File Disclosure free of charge once per year. A Full File Disclosure is available only to a consumer that requests their own file, when the request is submitted with proper identity authentication. Businesses and government agencies cannot order your LexisNexis Full File Disclosure, but they are entitled, with legitimate business purposes, to order some of the reports that comprise your LexisNexis Full File Disclosure for the business-related activities they conduct.

To order your Full File Disclosure, read the instructions and download the forms at [36] https://personalreports.lexisnexis.com/access_your_personal_information.jsp [37] The form must be mailed with the required identity authentication docments. Once LexisNexis has verified your identity, all information will be mailed to the address you provide on the request form.

12. When to Order a Specialty Report

We encourage consumers to find out about the information that is stored with consumer reporting agencies. Doing so enables you to detect inaccuracies that might result in the denial of financial or other benefits, or that might indicate the presence of fraud or other misuse of your information. However, ordering all of your reports will be time-consuming. Even though it's free, there is probably no need to expend the time and effort to get every report available to you.

You have the right to choose the reports that you want to see based on your individual needs. Here are our recommendations for situations in which you probably will want to order one or more of your specialty reports:

1. If you are shopping for new *homeowner's* or *automobile insurance*, order a copy of your CLUE or A-Plus claims report. And if you have *filed claims on existing policies*, it's a good idea to check the report to make sure the information is accurate. Sometimes, simply calling an insurance agent with a question can result in a "black mark" to your CLUE or A-Plus report. You will want to make sure that such inquiries are removed.
2. If someone has *fraudulently cashed checks* against your account or you have for some reason had problems with your checking or savings account, order your checkwriting history reports.

Attachment B

3. If a potential or existing employer asks your permission to run a *background check*, ask for the name of the screening company. Contact the company as soon as the report has been issued because screening companies may not maintain permanent files.
4. If you have been a *victim of identity theft*, we recommend you order all available reports. Remember, insurers, landlords, employers, and banks have permissible purposes for accessing your credit report. Information in your specialty report may overlap information in your credit report. It is important to correct inaccuracies no matter where they appear.
5. If you want to *rent an apartment or home*, ask the landlord for the name of the tenant screening company he or she uses, if any. There are many companies involved in this market and you will need to know where to look to exercise your right to a free report.
6. If you are *applying for private health, life, long-term care, or disability insurance*, order your MIB report. If your reports contain erroneous information, you will want to make sure it is corrected before you apply for insurance.
7. If you are *applying for a new job*, you will want to obtain your Employment Data Report from the Work Number *if* you have ever worked for a company that uses their service. You will also want to obtain a LexisNexis Full File Disclosure.
8. For a *good overall "check-up,"* you may wish to order your LexisNexis Full File Disclosure and your Lexis-Nexis Accurint Person Report.

13. References

Laws and Regulations

- Fair Credit Reporting Act, as amended by FACTA, www.ftc.gov/os/statutes/031224fcra.pdf [38]
- FTC's final regulations about free credit and specialty consumer reports, www.ftc.gov/os/2004/06/040624factafreeannualfrn.pdf [39]
- California Investigative Consumer Reporting Agencies Act, CA Civil Code 1786 et seq. www.leginfo.ca.gov [40]

Federal Trade Commission Publications

- *Obligations of Furnishers of Information under the FCRA* www.ftc.gov/os/2004/11/041119factaappg.pdf [41]
- *Obligations of Users of Information under the FCRA* www.ftc.gov/os/2004/11/041119factaapph.pdf [42]
- *Consumer Reports: What Insurers Need to Know* www.ftc.gov/bcp/edu/pubs/business/credit/bus07.shtm [6]
- *Credit Reports: What Information Providers Need to Know* www.ftc.gov/bcp/edu/pubs/business/credit/bus33.shtm [5]
- *Using Consumer Reports: What Employers Need to Know* www.ftc.gov/bcp/edu/pubs/business/credit/bus08.shtm [7]
- *Using Consumer Reports: What Landlords Need to Know* www.ftc.gov/bcp/edu/pubs/business/credit/bus49.shtm [8]

Privacy Rights Clearinghouse Publications

- Fact Sheet 6. How *Private Is My Credit Report?* www.privacyrights.org/fs/fs6-crdt.htm [1]
- Fact Sheet 6a. *FACTA, the Fair and Accurate Credit Transactions Act: Consumers Win Some, Lose Some* www.privacyrights.org/fs/fs6a-facta.htm [2]
- Fact Sheet 8. *How Private Is My Medical Information?* www.privacyrights.org/fs/fs8-med.htm [17]
- Fact Sheet 16. *Employment Background Checks: A Jobseeker's Guide* www.privacyrights.org/fs/fs16-bck.htm [43]
- Fact Sheet 16a. *Employment Background Checks in California: New Focus on Accuracy* www.privacyrights.org/fs/fs16a-califbck.htm [28]

Attachment B

- Fact Sheet 26. *CLUE and You: How Insurers Size You Up* www.privacyrights.org/fs/fs26-CLUE.htm [11]

Consumer Finance Protection Board (CFPB) Publications

- List of consumer reporting companies: http://files.consumerfinance.gov/f/201207_cfpb_list_consumer-reporting-agencies.pdf [44]
- CFPB Bulletin 2012-09, The FCRA's "streamlined process" requirement for consumers to obtain free annual reports from nationwide specialty consumer reporting agencies:http://files.consumerfinance.gov/f/201211_cfpb_NSCRA_Bulletin.pdf [9]

Tags: Background Checks & Workplace [45] Credit & Credit Reports [46] Insurance [47] Public Records & Info Brokers [48] Fact Sheet [49] background checks [50] consumer reports [51] credit report [52] FACTA [53] insurance [54] insurance claims [55] MIB [56] telephone [57]

Copyright © Privacy Rights Clearinghouse. This copyrighted document may be copied and distributed for nonprofit, educational purposes only. For distribution, see our copyright and reprint guidelines. The text of this document may not be altered without express authorization of the Privacy Rights Clearinghouse.

Links:
[1] https://www.privacyrights.org/fs/fs6-crdt.htm
[2] https://www.privacyrights.org/fs/fs6a-facta.htm
[3] http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre34.shtm
[4] http://www.annualcreditreport.com
[5] http://business.ftc.gov/documents/bus33-credit-reports-what-information-providers-need-know
[6] http://business.ftc.gov/documents/bus07-consumer-reports-what-insurers-need-know
[7] http://business.ftc.gov/documents/bus08-using-consumer-reports-what-employers-need-know
[8] http://business.ftc.gov/documents/bus49-using-consumer-reports-what-landlords-need-know
[9] http://files.consumerfinance.gov/f/201211_cfpb_NSCRA_Bulletin.pdf
[10] https://personalreports.lexisnexis.com/
[11] https://www.privacyrights.org/fs/fs26-CLUE.htm
[12] http://www.iso.com/Products/A-PLUS/Consumers-Order-Your-Free-A-PLUS-Loss-History-Report.html
[13] https://personalreports.lexisnexis.com/fact_act_claims_bundle/landing.jsp
[14] http://www.mib.com/request_your_record.html
[15] http://www.ftc.gov/opa/2007/09/ingenixmilliman.shtm
[16] http://www.rxhistories.com/contact_us.html
[17] https://www.privacyrights.org/fs/fs8-med.htm
[18] https://www.privacyrights.org/fs/fs8a-hipaa.htm
[19] https://personalreports.lexisnexis.com/resident_history_report.jsp
[20] http://www.experian.com/assets/rentbureau/brochures/request_form.pdf
[21] http://www.corelogic.com/landing-pages/rental-screening-analytics.aspx#container-Consumers
[22] http://money.cnn.com/2012/08/16/pf/bank-account-history/index.html
[23] http://www.consumerdebit.com/consumerinfo/us/en/chexsystems/report/index.htm
[24] http://www.consumerdebit.com/consumerinfo/us/en/consumerreports/index.htm#TopOfPage
[25] http://www.nobouncedchecks.com/SCAN-check.html
[26] http://www.telecheck.com
[27] http://www.firstdata.com/telecheck/telecheck-request-file-report.htm
[28] https://www.privacyrights.org/fs/fs16a-califbck.htm
[29] http://www.napbs.com/
[30] https://personalreports.lexisnexis.com/employment_history_report.jsp
[31] http://redtape.nbcnews.com/_news/2013/01/30/16762661-exclusive-your-employer-may-share-your-salary-and-equifax-might-sell-that-data?lite
[32] https://www.theworknumber.com/Employees/DataReport/
[33] https://w3.lexis.com/consumeraccess2.0/sample/person_report.htm
[34] http://www.lexisnexis.com/privacy/for-consumers/request-personal-information.aspx
[35] https://personalreports.lexisnexis.com/access_your_personal_information_faq.jsp
[36] https://personalreports.lexisnexis.com/pdfs/CD107_CP-File-Disclosure-Request-Form_pg-1.pdf
[37] https://personalreports.lexisnexis.com/access_your_personal_information.jsp
[38] http://www.ftc.gov/os/statutes/031224fcra.pdf
[39] http://www.ftc.gov/os/2004/06/040624factafreeannualfrm.pdf
[40] http://www.leginfo.ca.gov
[41] http://www.ftc.gov/os/2004/11/041119factaappg.pdf
[42] http://www.ftc.gov/os/2004/11/041119factaapph.pdf

Attachment B

[43] https://www.privacyrights.org/fs/fs16-bck.htm
[44] http://files.consumerfinance.gov/f/201207_cfpb_list_consumer-reporting-agencies.pdf
[45] https://www.privacyrights.org/category/topics/background-checks-workplace
[46] https://www.privacyrights.org/category/topics/credit-credit-reports
[47] https://www.privacyrights.org/taxonomy/term/121
[48] https://www.privacyrights.org/category/topics/public-records-info-brokers
[49] https://www.privacyrights.org/taxonomy/term/129
[50] https://www.privacyrights.org/category/tags/background-checks
[51] https://www.privacyrights.org/category/tags/consumer-reports
[52] https://www.privacyrights.org/category/tags/credit-report
[53] https://www.privacyrights.org/category/tags/facta
[54] https://www.privacyrights.org/category/tags/insurance
[55] https://www.privacyrights.org/category/tags/insurance-claims
[56] https://www.privacyrights.org/category/tags/mib
[57] https://www.privacyrights.org/category/tags/telephone

Attachment B

CONFERENCE OF CHIEF JUSTICES

Resolution

Encouraging Consideration of the Revised National Probate Court Standards

WHEREAS, the number of Americans age 65 or older will increase by 50 percent, from nearly 40 million to about 60 million within the next decade; and

WHEREAS, this demographic trend is likely to result in a substantial increase in the number of cases filed in courts with probate jurisdiction; and

WHEREAS, in order to handle this caseload efficiently and address these sensitive cases fairly, it is essential that courts with probate jurisdiction utilize the most effective and up-to-date approaches possible; and

WHEREAS, on November 16, 2012, the National College of Probate Judges unanimously adopted a revised set of National Probate Court Standards following a two-year development effort; and

WHEREAS, the revised National Probate Court Standards reflect the many changes in probate law and practice since the original standards were adopted in 1993 including:

- the widespread use of automated case management systems that enable courts to exercise greater control over their dockets;
- The growing availability of electronic filing systems and the resulting greater use of electronic records, that provide courts with not only the capability of operating more efficiently, but also of more easily analyzing the information contained in those records to identify patterns and anomalies that may indicate abuses;
- The promulgation of new and revised uniform acts;
- The issuance of additional national recommendations regarding guardianship and conservatorship including those of the 2011 Third National Guardianship Summit and the 2010 Conference of State Court Administrators White Paper;
- The expanded services being provided directly to court users by probate courts;
- The increased use of volunteer programs to monitor guardianships and conservatorships and the development of collaborative programs to improve the quality, delivery, and coordination of services to persons under the jurisdiction of probate courts;
- The advent of State Supreme Court Commissions on elders and the courts, and, more negatively;
- The increasing instances of financial abuse in conservatorships/ guardianships, in decedent's estates, in trusts under court supervision, and in guardianships of minors; and

WHEREAS, the revised National Probate Court Standards set forth aspirational goals for both specialized probate courts and general jurisdiction courts with probate jurisdiction that are intended to promote uniformity, consistency, and continued improvement in the operations of probate courts; and

WHEREAS the revised National Probate Court Standards provide many references to promising practices developed by specific courts to bridge gaps of information, provide organization and direction; and

WHEREAS these Standards may be used by individual probate courts and by state court systems as:

- A source of ideas for improving the quality of justice, the effectiveness of operations, and efficient use of resources;
- A basis for requests for needed budgetary support in those instances in which implementation of Standards-based improvements require additional resources;
- A tool for charting the path toward greater excellence and measuring the progress;
- A template for state standards reflecting state statutory requirements, rules of procedures, and demographic, geographic, organizational, and fiscal factors.

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices encourages each state court system and the courts with probate jurisdiction in each state to review and consider implementation of the revised National Probate Court Standards.

Endorsed by the CCJ/COSCA Joint Committee on Elders and the Courts at the COSCA Midyear Meeting on November 29, 2012.

NATIONAL PROBATE COURT STANDARDS

NATIONAL COLLEGE OF PROBATE COURT JUDGES

Borchard Center logo

This document has been prepared under an agreement between the National College of Probate Judges through the National Center for State Courts supported through Grant No. SJI-10-T-180 from the State Justice Institute and grants from the Borchard Foundation Center on Law and Aging and the ACTEC Foundation. The points of view and opinions offered in this report are those of the Task Force on Revision of the National Probate Court Standards and do not necessarily represent the official policies or position of the State Justice Institute, the Borchard Foundation Center on Law and Aging, ACTEC Foundation, or the National Center for State Courts.

Online legal research provided by LexisNexis.

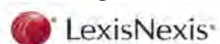


TABLE OF CONTENTS

ACKNOWLEDGMENTS i
INTRODUCTION 1
SECTION 1: PRINCIPLES FOR PROBATE COURT PERFORMANCE 11
1.1 ACCESS TO JUSTICE 11
1.2 EXPEDITION AND TIMELINESS 14
1.3 EQUALITY, FAIRNESS, AND INTEGRITY 16
1.4 INDEPENDENCE AND ACCOUNTABILITY 19
SECTION 2: ADMINISTRATIVE POLICIES AND PROCEDURES OF THE PROBATE COURT 22
2.1 JURISDICTION AND RULEMAKING 22
STANDARD 2.1.1 JURISDICTION 22
STANDARD 2.1.2 RULEMAKING 23
2.2 CASEFLOW MANAGEMENT 25
STANDARD 2.2.1 COURT CONTROL 25
STANDARD 2.2.2 TIME STANDARDS GOVERNING DISPOSITION 27
STANDARD 2.2.3 SCHEDULING TRIAL AND HEARING DATES 27
2.3 JUDICIAL LEADERSHIP 28
STANDARD 2.3.1 HUMAN RESOURCES MANAGEMENT 29
STANDARD 2.3.2 FINANCIAL MANAGEMENT 29
STANDARD 2.3.3 PERFORMANCE GOALS AND STRATEGIC PLAN 31
STANDARD 2.3.4 CONTINUING PROFESSIONAL EDUCATION 32
COMMENTARY 32
2.4 INFORMATION AND TECHNOLOGY 33
STANDARD 2.4.1 MANAGEMENT INFORMATION SYSTEM 33
STANDARD 2.4.2 COLLECTION OF CASELOAD INFORMATION 35
STANDARD 2.4.3 CONFIDENTIALITY OF SENSITIVE INFORMATION 36
2.5 ALTERNATIVE DISPUTE RESOLUTION 36
STANDARD 2.5.1 REFERRAL TO ALTERNATIVE DISPUTE RESOLUTION 36
SECTION 3: PROBATE PRACTICES AND PROCEEDINGS 38
3.1 COMMON PRACTICES AND PROCEEDINGS 38

STANDARD 3.1.1 NOTICE 38
STANDARD 3.1.2 FIDUCIARIES 40
STANDARD 3.1.3 REPRESENTATION BY A PERSON HAVING SUBSTANTIALLY IDENTICAL INTEREST 42
STANDARD 3.1.4 ATTORNEYS' AND FIDUCIARIES' COMPENSATION 43
STANDARD 3.1.5 ACCOUNTINGS 45
STANDARD 3.1.6 SEALING COURT RECORDS 46
STANDARD 3.1.7 SETTLEMENT AGREEMENTS 46
3.2 DECEDENT'S ESTATES 47
STANDARD 3.2.1 UNSUPERVISED ADMINISTRATION 47
STANDARD 3.2.2 DETERMINATION OF HEIRSHIP 48
STANDARD 3.2.3 TIMELY ADMINISTRATION 48
STANDARD 3.2.4 SMALL ESTATES 49
3.3 PROCEEDINGS REGARDING GUARDIANSHIP AND CONSERVATORSHIP FOR ADULTS 51
STANDARD 3.3.1 PETITION 52
STANDARD 3.3.2 INITIAL SCREENING 54
STANDARD 3.3.3 EARLY CONTROL AND EXPEDITIOUS PROCESSING 56
STANDARD 3.3.4 COURT VISITOR 58
STANDARD 3.3.5 APPOINTMENT OF COUNSEL 60
STANDARD 3.3.6 EMERGENCY APPOINTMENT OF A TEMPORARY GUARDIAN/CONSERVATOR 61
STANDARD 3.3.7 NOTICE 64
STANDARD 3.3.8 HEARING 65
STANDARD 3.3.9 DETERMINATION OF INCAPACITY 67
STANDARD 3.3.10 LESS INTRUSIVE ALTERNATIVES 69
STANDARD 3.3.11 QUALIFICATIONS AND APPOINTMENTS OF GUARDIANS AND CONSERVATORS 72
STANDARD 3.3.12 BACKGROUND CHECKS 74
STANDARD 3.3.13 ORDER 75
STANDARD 3.3.14 ORIENTATION, EDUCATION, AND ASSISTANCE 78
STANDARD 3.3.15 BONDS FOR CONSERVATORS 80
STANDARD 3.3.16 REPORTS 81
STANDARD 3.3.17 MONITORING 83

STANDARD 3.3.18 COMPLAINT PROCESS 87
STANDARD 3.3.19 ENFORCEMENT OF ORDERS; REMOVAL OF GUARDIANS AND CONSERVATORS 88
STANDARD 3.3.20 FINAL REPORT, ACCOUNTING, AND DISCHARGE 89
3.4 INTERSTATE GUARDIANSHIPS AND CONSERVATORSHIPS 91
STANDARD 3.4.1 COMMUNICATION AND COOPERATION BETWEEN COURTS 92
STANDARD 3.4.2 SCREENING, REVIEW, AND EXERCISE OF JURISDICTION 92
STANDARD 3.4.3 TRANSFER OF GUARDIANSHIP OR CONSERVATORSHIP 93
STANDARD 3.4.4 RECEIPT AND ACCEPTANCE OF A TRANSFERRED GUARDIANSHIP 94
STANDARD 3.4.5 INITIAL HEARING IN THE COURT ACCEPTING THE TRANSFERRED GUARDIANSHIP 95
3.5 PROCEEDINGS REGARDING GUARDIANSHIP AND CONSERVATORSHIP FOR MINORS 97
STANDARD 3.5.1 PETITION 97
STANDARD 3.5.2 NOTICE 100
STANDARD 3.5.3 EMERGENCY APPOINTMENT OF A TEMPORARY GUARDIAN/CONSERVATOR FOR A MINOR 102
STANDARD 3.5.4 Representation for the Minor 103
STANDARD 3.5.5 PARTICIPATION OF THE MINOR IN THE PROCEEDINGS 104
STANDARD 3.5.6 BACKGROUND CHECKS 105
STANDARD 3.5.7 ORDER 106
STANDARD 3.5.8 ORIENTATION, EDUCATION, AND ASSISTANCE 108
STANDARD 3.5.9 BONDS FOR CONSERVATORS OF MINORS 108
STANDARD 3.5.10 REPORTS 109
STANDARD 3.5.11 MONITORING, MODIFYING, TERMINATING A GUARDIANSHIP OR CONSERVATORSHIP OF A MINOR 111
STANDARD 3.5.12 COMPLAINT PROCESS 113
STANDARD 3.5.13 COORDINATION WITH OTHER COURTS 114

ACKNOWLEDGMENTS

This volume is the result of a long-term collaborative effort involving many individuals and organizations. The Reporter and Research Director would like to extend their deep appreciation to:

- The Board of the Directors of the National College of Probate Judges for their vision and commitment to excellence when agreeing to undertake this revision effort and the members of NCPJ for their consideration and support
- The State Justice Institute, the Borchard Foundation Center on Law and Aging, and the ACTEC Foundation for their generous funding support and their patience and encouragement during the lengthy revision process
- The members of the Task Force on Revision of the National Probate Court Standards representing the National College of Probate Judges; the National Association for Court Management; the American Bar Association Section on Real Property, Trust, and Estate Law, and the American College of Trust and Estate Counsel, for their dedication, thoughtfulness, openness, and kindness throughout the drafting process
- The "Observers", particularly Professor David English, for giving so generously of their time and expertise to enable us to "get it right"
- The members of the Commission on National Probate Court Standards and its staff that produced the original National Probate Court Standards which provided such a solid base on which to build
- The many individuals and organizations that painstakingly read through the Review Draft and suggested enhancements, clarifications, suggestions, and corrections that have greatly improved these standards including but not limited to the American Bar Association Section on Real Property, Trust, and Estate Law; Frederick D. Floreth, President of the Center for Guardianship Certification; Cherstin Hamel, Assistant Director, Judicial Programs Department, of the Administrative Office of Pennsylvania Courts; Sally Hurme; the National Council of Juvenile and Family Court Judges; and Professor Winsor Schmidt; Erica Wood, Assistant Director of the American Bar Association Commission on Law and Aging; NCJFCJ, and
- Our colleagues at the National Center for State Courts, including our many law student assistants, for their hard work and unstinting support.

Richard Van Duizend *Brenda K. Uekert*

TASK FORCE ON REVISION OF THE NATIONAL PROBATE COURT STANDARDS

MARY JOY QUINN, President, National College of Probate Judges (2010-2011),
Director (ret.), Probate, Superior Court, San Francisco, CA

HON. TAMARA CURRY, Executive Committee, National College of Probate Judges (2010-2012), Associate Judge, Probate Court, Charleston, SC

ANNE MEISTER, Register of Wills, Probate Division, Superior Court, Washington, DC

HON. WILLIAM SELF, President, National College of Probate Judges (2011-2012),
Judge, Probate Court, Macon, GA

HON. JEAN STEWART, Secretary-Treasurer, National College of Probate Judges (2010-2012) Judge (ret.), Probate Court, Denver, CO

HON. MIKE WOOD, President, National College of Probate Judges (2012-2013),
Judge, Probate Court No. 2, Houston, TX

KEVIN BOWLING, President, National Association for Court Management (2011-2012)
Court Administrator, 20th Judicial Circuit Court, Ottawa County, MI

JUDE DEL PREORE, President, National Association for Court Management (2010-2011),
Trial Court Administrator, Superior Court, Mount Holly, NJ

PROF. MARY RADFORD, President, American College of Trust and Estate Counsel (2011-2012),
Georgia State University College of Law, Atlanta, GA; and

ROBERT SACKS, Esq., American Bar Association Section on Real Property, Trust and Estate Law,
Los Angeles, CA,

RICHARD VAN DUIZEND, Standards Report, National Center for State Courts

BRENDA K. UEKERT, Ph.D., Standards Research Director, National Center for State Courts

INTRODUCTION

Evolution of Probate Courts: Although individual cases involving traditional probate matters such as wills, decedents' estates, trusts, guardianships, and conservatorships have garnered considerable public and professional attention, relatively little attention has been focused until recently on the courts exercising jurisdiction over these cases. Unlike other types of courts (*e.g.,* criminal courts), the evolution of probate courts has differed considerably from state to state.

In England, probate court jurisdiction began in the separate ecclesiastical courts and the courts of chancery. The early probate courts in America exercised equity jurisdiction. Modern counterparts of these equity courts are chancery, surrogate, and orphan's courts. In other American jurisdictions, a judge within a court of broader jurisdiction would typically be given responsibility for probate cases (usually in addition to other duties) because of that judge's expertise or interest in the area or to expedite the handling of this group of cases. Over time, this caseload became sufficiently large to necessitate the assignment of full-time probate judges or the establishment of a separate probate court in some jurisdictions.

This evolution, however, occurred differently in every state, and even within different jurisdictions within a given state. As a result, there is considerable variation between (and often within) the various states in the way in which the state courts handle probate matters.

Need for National Probate Court Standards: This evolution has provided little opportunity for the development of uniform practices by courts exercising probate jurisdiction. Meanwhile, a call for the study of probate court procedures has come from both within and outside the probate courts, including judicial leaders and organizations, bar associations, academicians, and the public. The administration, operation, and performance of courts exercising probate jurisdiction have been identified as areas in need of attention.

In 1987, after numerous stories of abuses, the Associated Press (AP) conducted a study of the nation's guardianship/conservatorship system, resulting in a report, "Guardians of the Elderly: An Ailing System." The report described a "dangerously burdened and troubled system that regularly puts elderly lives in the hands of others with little or no evidence of necessity, and then fails to guard against abuse, theft, and neglect." Specifically identified problems were lack of resources to adequately monitor the activities of guardians/conservators and the financial and personal status of their wards; guardians/conservators who have little or no training; lack of awareness of alternatives to guardianship/conservatorship; and the lack of due process.[1]

Active involvement in guardianship/conservatorship issues provided the foundation

---

[1] ASSOCIATED PRESS, GUARDIANS OF THE ELDERLY: AN AILING SYSTEM (Special Report, September 1987). *See also* Fred Bayles & Scott McCartney, *Declared "Legally Dead": Guardian System is Failing the Ailing Elderly,* THE RECORD (September 20, 1987); AMERICAN BAR ASSOCIATION, GUARDIANSHIP: AN AGENDA FOR REFORM (1989).

for the sponsorship by the American Bar Association (ABA) of the 1988 Wingspread National Guardianship Symposium. Experts from across the country attended the meeting, including probate judges, attorneys, guardianship and conservatorship service providers, doctors, aging network representatives, mental health experts, government officials, law professors, a bioethicist, a state court administrator, a judicial educator, an anthropologist, and ABA staff. The symposium produced recommendations for reform of the national guardianship/conservatorship system, which were largely adopted by the ABA's House of Delegates in February 1989. The recommendations, especially those pertaining to judicial practices, reflected the need for improvement of practices and procedures related to guardianship/conservatorship in probate courts.[2] These initial examinations of the exploitation, neglect, and/or abuse of persons under guardianship or conservatorship have been followed by additional articles in the press,[3] government and private studies,[4] state task forces,[5] and sets of national recommendations.[6]

---

[2] Recommendations for improved judicial practices include removal of barriers, use of limited guardianship/conservatorship and other less intrusive alternatives, creative use of non-statutory judicial authority, and enhanced judicial role in providing effective legal representation. AMERICAN BAR ASSOCIATION, *supra,* note 1, at 19-22

[3] *See e.g.,* Paul Rubin, *Checks & Imbalances: How the State's Leading Private Fiduciary Helped Herself to the Funds of the Helpless*, PHOENIX NEW TIMES (June 15, 2000); Carol D. Leonnig *et al*., *Misplaced Trust/Guardians in the District: Under Court, Vulnerable Become Victims*, THE WASHINGTON POST, (June 15-16, 2003); S. Cohen et al., *Misplaced Trust: Guardians in Control*, THE WASHINGTON POST, (June 16, 2003); Kim Horner, Lee Hancock, *Holes in the Safety Net,* DALLAS MORNING NEWS (January 12, 2005); S.F. Kovalski, *Mrs. Astor's Son to Give Up Control of Her Estate*, THE NEW YORK TIMES, (October 14, 2006); Robin Fields, Evelyn Larrubia, Jack Leonard, *"Justice Sleeps While Seniors Suffer,"* LOS ANGELES TIMES (November 14, 2005); Kristin Stewart, *Some Adults' 'Guardians' Are No Angels,* THE SALT LAKE TRIBUNE, (May 14, 2006); Cheryl Phillips, Maureen O'Hagan and Justin Mayo, *Secrecy Hides Cozy Ties in Guardianship Cases*, SEATTLE TIMES (December 4, 2006); P. Kossan and R. Anglen, *Task Force to Probe Arizona Probate Court*, THE ARIZONA REPUBLIC (May. 4, 2010); Todd Cooper, *Ward's Assets Vulnerable,* OMAHA WORLD HERALD (August 16, 2010).

[4] *See e.g*., SEN. GORDON.H. SMITH & SEN. HERBERT. KOHL, GUARDIANSHIP FOR THE ELDERLY: PROTECTING THE RIGHTS AND WELFARE OF SENIORS WITH REDUCED CAPACITY (US Senate Special Committee on Aging, December 2007); GOVERNMENT ACCOUNTABILITY OFFICE, GUARDIANSHIPS: CASES OF FINANCIAL EXPLOITATION, NEGLECT, AND ABUSE OF SENIORS (GAO-10-1046, 2010); DAVID. C. STEELMAN, ALICIA. K. DAVIS, DANIEL. J. HALL, IMPROVING PROTECTIVE PROBATE PROCESSES: AN ASSESSMENT OF GUARDIANSHIP AND CONSERVATORSHIP PROCEDURES IN THE PROBATE AND MENTAL HEALTH DEPARTMENT OF THE MARICOPA COUNTY SUPREIOR COURT (NCSC, July 2011); PAMELA B. TEASTER, ERICA F. WOOD, NAOMI KARP, SUSAN A. LAWRENCE, WINSOR.C. SCHMIDT, JR., MARTA S. MENDIONDO, WARDS OF THE STATE: A NATIONAL STUDY OF PUBLIC GUARDIANSHIP (2005); OVERSIGHT OF PROBATE CASES: COLORADO JUDICIAL BRANCH PERFORMANCE AUDIT, (Colorado Legislative Audit Committee, 2006); NAOMI KARP & ERICA WOOD, GUARDIANSHIP MONITORING; A NATIONAL SURVEY OF COURT PRACTICES (AARP 2006); ELLEN M. KLEM, VOLUNTEER GUARDIANSHIP MONITORING PROGRAMS: A WIN-WIN SOLUTION (ABA Commission on Law and Aging 2007); PAMELA B. TEASTER, WINSOR C. SCHMIDT, JR., ERICA. F. WOOD, SUSAN A, LAWRENCE, & MARTA MENDIONDO, PUBLIC GUARDIANSHIP: IN THE BEST INTEREST OF INCAPACITATED PEOPLE? (Praeger Publishers, 2007); JUDICIAL DETERMINATION OF CAPACITY OF OLDER ADULTS IN GUARDIANSHIP PROCEEDINGS (ABA Commission on Law and Aging, American Psychological Association, National College of Probate Judges 2006); NAOMI KARP AND ERICA WOOD, GUARDING THE GUARDIANS: PROMISING PRACTICES FOR COURT MONITORING (AARP 2007); BRENDA.UEKERT, ADULT GUARDIANSHIP COURT DATA AND ISSUES: RESULTS FROM AN ONLINE SURVEY (NCSC 2010).

[5] *See e.g.,* AD HOC COMMITTEE ON PROBATE LAW AND PROCEDURE, FINAL REPORT TO THE UTAH JUDICIAL COUNCIL (February 23, 2009); JOINT REVIEW COMMITTEE ON THE STATUS OF ADULT GUARDIANSHIPS AND CONSERVATORSHIPS IN THE NEBRASKA COURT SYSTEM, REPORT OF FINAL RECOMMENDATIONS (2010); COMMITTEE ON IMPROVING JUDICIAL OVERSIGHT AND PROCESSING OF PROBATE COURT MATTERS, FINAL REPORT TO THE ARIZONA JUDICIAL COUNCIL (2011).

[6] THIRD NATIONAL GUARDIANSHIP SUMMIT: STANDARDS OF EXCELLENCE, GUARDIAN STANDARDS AND

Efforts to reform the administration of decedents' estates predate guardianship reform. A Model Probate Code was promulgated in 1946 and provided the basis for reform in the 1950s and 1960s. In 1969, the National Conference of Commissioners on Uniform State Laws and the ABA approved the Uniform Probate Code (UPC), which was drafted by which was jointly drafted by the Commissioners and by the ABA Section of Real Property, Probate and Trust Law. The UPC has been adopted by 18 jurisdictions, and has been adopted in part or has influenced reform in still others.[7] It has been revised numerous times since 1969, most recently in 2008, and has been followed by related uniform legislation such as the Uniform Guardianship and Protective Proceedings Act, the Uniform Guardianship and Protective Proceedings Jurisdiction Act, and the Uniform Trust Code.[8]

The need for reform of courts exercising probate jurisdiction has been expressed not only by those outside of the courts but also by the court leadership itself. In 1990, in order to determine the need for national probate court standards and to assess the support for a project to develop such standards, the National College of Probate Judges (NCPJ) and the National Center for State Courts (NCSC) polled 42 state representatives of the NCPJ. Responses were received from 30 of these representatives and four state court administrators in states that do not have separate probate courts or probate divisions of general or limited jurisdiction courts. The overwhelming number of respondents stated that current standards, including those of the ABA, did not sufficiently address the concerns of probate courts. Twenty-seven (79%) of the 34 respondents cited the need for separate probate court standards. Even those who did not advocate special probate court standards believed that guidance in some areas, such as automated case processing, would be helpful to probate courts. Most respondents believed that national probate standards were needed in the areas of fees and commissions, court automation, judicial education, judicial officer and support staff, and financial and fund management, and to address the performance of courts exercising probate jurisdiction.

In sum, the need for reform and improvement of the administration, operations, and performance of courts exercising probate jurisdiction has been clearly expressed by groups and individuals both inside and outside of these courts.

Accordingly, the NCPJ, in cooperation with the NCSC, undertook a two-year project in 1991 to develop, refine, disseminate, and promulgate national standards for courts

---

RECOMMENDATIONS FOR ACTION, 2012 UTAH L. REV. NO. 3, 1191 (2013); CONFERENCE OF STATE COURT ADMINISTRATORS (COSCA), THE DEMOGRAPHIC IMPERATIVE: GUARDIANSHIPS AND CONSERVATORSHIPS, 8 (December 2010). *Recommendations, Wingspan – The Second National Guardianship Conference* 31 STETSON LAW REVIEW 595 (2002); NATIONAL GUARDIANSHIP NETWORK, NATIONAL WINGSPAN IMPLEMENTATON SESSION: ACTION STEPS ON ADULT GUARDIANSHIP PROGRESS (2004); JEANNE. DOOLEY, NAOMI. KARP, ERICA. WOOD, OPENING THE COURTHOUSE DOOR: AN ADA ACCESS GUIDE FOR STATE COURTS (1992); COURT-RELATED NEEDS OF THE ELDERLY AND PERSONS WITH DISABILITIES: A BLUEPRINT FOR THE FUTURE (American Bar Association and National Judicial College, 1991).

[7] http://www.uniformlaws.org/Act.aspx?title=Probate Code.

[8] http://www.uniformlaws.org/Act.aspx?title=Guardianship and Protective Proceedings Act; http://www.uniformlaws.org/Act.aspx?title=Adult Guardianship and Protective Proceedings Jurisdiction Act; http://www.uniformlaws.org/Act.aspx?title=Trust Code.

exercising probate jurisdiction—the National Probate Court Standards Project. Support was provided by a grant from the State Justice Institute, with a supplemental grant provided by the American College of Trust and Estate Counsel Foundation. The standards were intended to provide a common language to facilitate description, classification, and communication of probate court activities; and, most importantly, a management and planning tool for self-assessment and self-improvement of courts throughout the country exercising probate jurisdiction.

The National Probate Court Standards were prepared by a 15-member Commission on National Probate Court Standards (Commission) chaired by Hon. Evans V. Brewster of New York, then President of NCPJ,[9] assisted by NCSC staff led by Dr. Thomas Hafemeister.[10] Comments on the Standards were solicited and received from a number of individuals with expertise and interest in the operation of the probate courts, who served collectively as a Review Panel.

The National Probate Court Standards were published in 1993 and widely disseminated. In 1999, a chapter was added to address interstate guardianship matters. By 2010, it was recognized that much had changed in the court's world generally, and probate law specifically. Significant technological, legal, policy, procedural, and demographic developments that affect the way probate courts can and should operate include:

- The widespread use of automated case management systems that enable courts to exercise greater control over their dockets.
- The growing availability of electronic filing systems and the resulting greater use of electronic records, that provide courts with not only the capability of operating more efficiently, but also of more easily analyzing the information contained in those records to identify patterns and anomalies that may indicate abuses (*e.g.,* unwarranted expenditures by conservators, exorbitant fiduciary fees, and relationships between service providers and guardians that may constitute conflicts of interest).[11]
- The promulgation of new and revised uniform acts such as those cited earlier.
- The issuance of additional national recommendations regarding guardianship and conservatorship as a result of the 2001 "Wingspan" Second National

---

[9] Other Commission members were: Hon. Arthur J. Simpson, Jr., retired judge, NJ Superior Court, Appellate Division (Vice-Chair); Hon. Freddie G. Burton, Chief Judge, Wayne County Probate Court, Detroit, MI; Hon. Ann P. Conti, Union County Surrogate's Court, Elizabeth, NJ; Hon. George J. Demis, Tuscarawas County Probate/Juvenile Court, New Philadelphia, OH; Hon. Nikki DeShazo, Probate Court, Dallas, TX; Hon. John Monaghan, St. Clair County Probate Court, Port Huron, MI; Hon. Frederick S. Moss, Probate Court, Woodbridge, CT; Hon. Mary W. Sheffield, Associate Circuit Judge, 25th Circuit Court, Division 1/Probate Division, Rolla, MO; and Hon. Patsy Stone, Florence County Probate Court, Florence, SC.; Emilia DiSanto, Vice President of Operations, Legal Services Corporation Washington, DC; Hugh Gallagher, Deputy Court Administrator, Superior Court of Maricopa County, Phoenix, AZ; Prof. William McGovern, University of California-Los Angeles Law School, Los Angeles, CA; James R. Wade, Esq., Denver, CO; and Raymond M. Young, Esq., Boston, MA

[10] Other members of the staff were Dr. Ingo Keilitz, Dr. Pamela Casey, Shelley Rockwell, Hillery Efkeman, Brenda Jones, Thomas Diggs, and Paula Hannaford-Agor.

[11] *See* Winsor C. Schmidt, Fevzi Akinci, & Sarah A. Wagner, *The Relationship Between Guardian Certification Requirements and Guardian Sanctioning: A Research Issue in Elder Lay and Policy,* 25(5) BEHAVIORAL SCIENCES AND THE LAW 641-653 (September/October 2007);

Guardianship Conference, the 2004 Wingspan Implementation conference, the 2011 Third National Guardianship Summit, the reports by the US Government Accountability Office, the American Bar Association Commission on Law and Aging, the AARP, the Conference of Chief Justices/Conference of State Court Administrators Joint Task Force on Elders and the Courts, the Conference of State Court Administrators, and the National Center for State Courts' Center on Elders and the Courts.

- Expanded services being provided directly to court users by probate courts including court staff serving as visitors/investigators in guardianship and conservatorship cases
- Increased use of volunteer programs to monitor guardianships and conservatorships and the development of collaborative programs to improve the quality, delivery, and coordination of services to persons under the jurisdiction of probate courts
- Implementation of initiatives by probate courts around the nation to address problematic areas, especially in guardianship and conservatorship, such as assigning employees to screen all the filings and accountings and to perform both routine and spot investigations including interviewing the incapacitated person,
- The advent of State Supreme Court Commissions on elders and the courts, and, more negatively,
- The increasing instances of financial abuse in conservatorships/ guardianships, in decedent's estates, in trusts under court supervision, and in guardianships of minors.

Adding urgency to the need generated by these developments is the impact that the "Baby Boom" population bulge will have on the probate courts. Within the next decade, the number of Americans age 65 or older will increase by 50 percent, from nearly 40 million to about 60 million. This demographic bulge has had significant impact on various sets of courts at each stage of its life. In the 1960s and 1970s, teenage baby boomers strained the capacity, procedures, and resources of the juvenile courts. In the 1970s and 1980s, when this generation was in its most criminogenic years, the resulting "War on Crime" required sweeping changes in the way the criminal courts operated. In the 1990s and first decade of the 21st century, family cases including divorce, child custody, domestic violence, and neglect and abuse have dominated the court-reform landscape. The probate courts will be the next segment of the judicial system to be spotlighted by this demographic surge.[12]

Accordingly, with generous support from the State Justice Institute, the Borchard Foundation Center on Law and Aging, and the ACTEC Foundation, a new Task Force was formed including members of the leadership of NCPJ and representatives from the American Bar Association Section on Real Property, Trust and Estate Law, the American College of Trust and Estate Counsel, and the National Association for Court Management (NACM).[13] Staff support

---

[12] Richard Van Duizend, *The Implications of an Aging Population for the State Courts*, FUTURE TRENDS IN STATE COURTS–2008 (Williamsburg, VA: NCSC, 2008), http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/famct&CISOPTR=208.

[13] Task Force members include: Mary Joy Quinn, President, National College of Probate Judges, Director, Probate, Superior Court, San Francisco, CA; Hon. Tamara Curry, Associate Judge, Probate Court, Charleston, SC; Anne

was again provided by NCSC.[14]

After defining the issues, staff conducted a web-based survey of members of NCPJ and NACM. The survey requested examples of effective practices and programs being used by probate courts to address the issues on the issues list and other key standards. Based on the issues list, the results of the survey, each section of the standards was revised with the drafts reviewed and modified by the Task Force. The revisions sought to update the standards in light of the developments, reports, and recommendations cited above, add examples of how courts have been able to implement the concepts and approaches contained in the standards, and decrease repetition of material (*e.g.,* by combining the original separate sections on guardianship and conservatorship of adults.). In addition, a new set of standards on guardianship and conservatorship of minors was prepared. This was an iterative process stretching over 18 months.

Following completion of a full review draft, the Revised National Probate Court Standards were sent, for comment, to each member of NCPJ, members of the Conference of Chief Justices and the Conference of State Court Administrators, the Boards or Executive Committees of the National Association for Court Management, the American Bar Association Section of Real Property Trust and Estate Law, and the American College of Trust and Estate Counsel. Copies were also sent for comment to the American Bar Association Commission on Law and Aging, the National Council of Juvenile and Family Court Judges, the participants in the Third National Summit on Guardianship, and others. The Task Force reviewed the comments received and made necessary changes. The final draft was submitted for adoption to the membership of NCPJ at its November 2012 meeting.

Structure, Organization, and Caseloads of Probate Courts and Divisions of Courts in the United States: Seventeen states have specialized probate courts in all or a few counties. In the remaining 33 states, the District of Columbia and the Territories, jurisdiction over probate and related issues lies within courts of general jurisdiction, with assignment or designation periodically rotating among the several judges in circuits or districts having more than one judge. The following table based on data collected by NCPJ shows which approach states have taken.[15]

Meister, Register of Wills, Probate Division, Superior Court, Washington, DC; Hon. William Self, President-Elect, National College of Probate Judges, Judge, Probate Court, Macon, Georgia; Hon. Jean Stewart, Judge, Probate Court, Denver, CO; Hon. Mike Wood, Secretary-Treasurer, National College of Probate Judges, Judge, Probate Court No. 2, Houston, TX; Kevin Bowling Court Administrator, 20th Judicial Circuit Court, Ottawa County, MI (2011-2012)/Jude del Preore, Trial Court Administrator, Superior Court, Mount Holly, NJ (200-2011), President, National Association for Court Management; Prof. Mary Radford, President, American College of Trust and Estate Counsel, Georgia State University College of Law, Atlanta, GA; and Robert Sacks, Esq., Los Angeles, CA; Observers, Edward Spurgeon Executive Director of the Borchard Foundation Center on Law and Aging; Prof. David English, Executive Director, Joint Editorial Board for Uniform Trust and Estate Acts.

[14] Richard Van Duizend, Standards Reporter, Dr. Brenda K. Uekert, Research Director.

[15] http://www.ncpj.org/images/stories/StateProbateJurisdictions.pdf.

PROBATE JURISDICTION IN:	STATES	AUTHORITY
A SPECIALIZED PROBATE COURT	AL	Code of Ala. §12-13-1
	CT	Conn.Gen.Stat. §45a-98
	GA	O.C.G.A. §15-9-30
	ME	4 M.R.S. §251
	MD	MD. Estates & Trusts Code Ann. §2-101
	MA	A.L.M. G.L .ch. 215 §3
	MI	M.C.L. §205.210
	NH	R.S.A. §547.3
	NM	N,M. Stat. Ann. §45-1-302
	NY	NY CLS SCPA §§201 & 205
	OH	O.R.C. §2101.01
	RI	R.I. Gen. Laws §§8-9-9
	SC	S.C. Code Ann. §§62-1-301 & 302
	TX (urban areas only)	Tex. Prob. Code §4A
	VT	4 V.S.A. §272
A GENERAL JURISDICTION TRIAL COURT	AK	Alaska Stat. § 22.10.020
	AZ	A.R.S. §14-1302
	AR	A.C.A. §28-1-104
	CA	Cal. Prob. Code §§800, 7050
	CO (except the Denver Probate Court)	C.R.S. §§13-6-103 & .13-9-105
	DE	10 Del.C. §341
	DC	D.C. Code §11-921
	FL	Fla. Stat. §26-012
	HI	H.R.S. §603-21.6
	ID	Idaho Code §1-2208
	IL	Illinois Const., Art.VI §9
	IN (except in St. Joseph County)	Burns Ind. Code Ann. §§33-28-1-2 & 33—31-1-10
	IA	Iowa Code §633
	KS	K.S.A. §20-301
	KY	K.R.S. §24A-120
	LA	LA. Constitution Art. V, §16
	MN	Minn. Stat §484.011
	MS	Miss. Code. Ann §9-5-83
	MO (Except in Greene, Jackson, & St. Louis Counties and St. Louis City)	§§478.070 & 461.076 R.S. MO
	MT	Mont Code Anno. §3-4-302
	NE	R.R.S. Neb §30-2211
	NV	Nev. Rev. Stat. Ann §132.116§
	NJ	NJ Stat. §3B:2-2
	NC	N.C. Gen. Stat. §47-1
	ND	N.D. Cent. Code §30.1-02-02
	OK	58 Okl. Stat. §1
	OR	O.R.S. §111.075
	PA	42 Pa. C. S. §§912 & 3131
	SD	S.D. Codified Laws §§6-6-8 & 29-1-301
	TN	Tenn. Code Ann. §§30-1-301, 32-2-101
	UT	Utah Code Ann. §§75-1-302
	VA	Va. Code Ann. §64-1-75
	WA	Rev. Code Wash. 11.96A-040
	WV	W.Va. Code §41-5-4
	WI	Wis. Stat. §§753.03 & §856.01
	WY	Wyo. Stat. §2-2-101

Caseload Volume and Composition: The level of public debate and directions in public policy tend to shift dramatically as the nation's media highlight particularly heinous or unfortunate cases (*e.g.,* neglected or abused wards in guardianship, estates depleted by unscrupulous executors). The rush to reform often leads to proposed solutions based more on ideology and doctrinal analysis than on fact. The absence of a national database on the volume and composition of cases handled by probate courts hinders attempts to answer critical broad-based questions about the scope and nature of the problem, or its possible solutions.[16]

The pragmatic justification for caseload statistics on wills, decedents' estates, trusts, conservatorships, and guardianships is compelling. Caseload statistics are the single best way to describe the courts' current activities as well as to predict what they will likely face in the future. Caseload statistics are analogous to the financial information used by the private sector to organize their operations. Well-documented caseload statistics provide powerful evidence for claims for needed resources.

Comprehensive and reliable caseload statistics can increase understanding of the functioning of courts with probate jurisdiction and direct efforts to enhance and improve their performance.

Scope and Purpose of the Standards: The Revised National Probate Court Standards are intended to promote uniformity, consistency, and continued improvement in the operations of probate courts. The Standards and associated commentary, footnotes, and references to specific courts using promising practices bridge gaps of information, provide organization and direction, and set forth aspirational goals for both specialized probate courts and general jurisdiction courts with probate jurisdiction. Although the Standards include both concrete recommendations and the rationale behind them, they are not intended to serve as statements of what the law is or should be, nor otherwise infringe on the decision-making authority of probate court judges or state legislatures. They do not address every aspect of the nation's probate courts, but, rather, set forth some guiding principles to assist the evolution of these courts. They seek to capture the philosophy and spirit of an effective probate court and encourage effective use of limited resources.

These Standards may be used by individual probate courts and by state court systems in a number of ways, including as:

- A source of ideas for improving the quality of justice, the effectiveness of operations, and efficient use of resources;
- A basis for requests for needed budgetary support in those instances in which implementation of Standards-based improvements require additional resources;
- A tool for charting the path toward greater excellence and measuring the progress;

[16] CCJ/COSCA JOINT TASK FORCE ON ELDERS AND THE COURTS, ADULT GUARDIANSHIP COURT DATA AND ISSUES: RESULTS FROM AN ON-LINE SURVEY (Williamsburg, VA: NCSC, 2010) http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/famct&CISOPTR=266; Brenda K. Uekert & Richard Van Duizend, *Adult Guardianships: A "Best Guess" National Estimate and the Momentum for Reform*, FUTURE TRENDS IN STATE COURTS – 2011 (NCSC, 2011), http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctadmin&CISOPTR=1846.

- A template for state standards reflecting state statutory requirements, rules of procedures, and demographic, geographic, organizational, and fiscal factors.

The Standards are divided into three major sections. Section 1 sets forth a set of guiding principles in four major areas: (1) access to justice, (2) expedition and timeliness, (3) equality, fairness and integrity, and (4) independence and accountability. Although tailored specifically for probate courts, this section draws upon the standards and commentary of the Trial Court Performance Standards applicable to all trial courts.[17]

Section 2 includes standards for administrative policies and procedures for courts exercising probate jurisdiction regarding: (1) jurisdiction and rule making, (2) caseflow management, (3) judicial leadership, (4) information and technology, and (5) referral to alternative dispute resolution.

Section 3 covers probate practices and proceedings relating to (1) common practices and proceedings, (2) decedents' estates, and (3) guardianship, and conservatorship of adults and minors. Other types of "probate" proceedings are considered only indirectly within the general areas of performance, administrative policies and procedures, and the common practices and proceedings category within the probate practices and proceedings section. These include adoptions, elder abuse and neglect, name change applications, marriages, divorces, assessment and collection of inheritance and estate taxes, hearings of petitions from minors whose parents refuse to consent to abortions, and involuntary civil commitment.

The standards and accompanying commentaries are presented in a common format. Each standard is presented in a succinct statement—the "blackletter." Commentary follows each standard to explain and clarify its underlying rationale. When there are “Promising Practices” that illustrate how jurisdictions have implemented the standard, they are presented in a highlighted box with appropriate references and links to further information. Footnotes accompany the commentary to illustrate examples of the issues discussed. Although the commentaries and notes may be extensive, they are explanatory and do not incorporate all available materials on the various points addressed. For example, when cases or statutes are cited as examples, one should not assume that they exhaust all available legal precedent. Rather, they are exemplary of the issue being discussed. Similarly, the Standards frequently refer to the Uniform Probate Code (UPC), the Uniform Guardianship and Protective Proceedings Act (UGPPA) the Uniform Guardianship and Protective Proceedings Jurisdiction Act (UGGPJA) and other Uniform Acts. The Standards do not endorse or adopt these Uniform Acts in their entirety, but they have influenced the content of portions of this report and serve as an important source for possible reform. Although the Standards cover a wide range of issues, they do not and could not address all potential issues. Given the diversity of probate courts, this would have been an impossible task.

The purpose of these Standards is not to supplant state laws or court rules. Rather,

[17] COMMISSION ON TRIAL COURT PERFORMANCE STANDARDS, TRIAL COURT PERFORMANCE STANDARDS WITH COMMENTARY (NCSC, 1990).

they seek to fill gaps left unaddressed by the various states and to provide goals and standards for judges regarding issues not directly covered by state laws or court rules. Judges exercising probate jurisdiction and the parties appearing before them must comply with applicable state law and state or local court rules. These Standards, based on a national perspective, suggest ways to improve the handling of probate matters that often lie with the inherent powers and duties of probate court judges. However, all the Standards need to be read in light of the applicable law of each particular state and it is recognized that all states may not be able to incorporate all of the Standards because of the requirements of their own state laws.

Because they are aspirational in nature, some Standards may assume the existence of resources that a particular probate court does not have. In general, however, the goals set by the Standards should be obtainable by probate courts that are provided with reasonable levels of resources.

Although these Standards focus on the probate court, they are also generally applicable to any judge responsible for a probate matter. Furthermore, the operation of an effective and efficient court is necessarily dependent upon the cooperation and assistance of all persons appearing before the court or otherwise employing the court's services. As a result, these Standards encompass and address such persons as well.

SECTION 1: PRINCIPLES FOR PROBATE COURT PERFORMANCE

The Trial Court Performance Standards (TCPS)[18] were the first in a series of efforts to create a framework for assessing the performance of trial courts in four key areas – Access; Timeliness; Equality, Fairness and Integrity; and Independence and Accountability. This section draws upon the TCPS provisions to establish the principles from which flow the more detailed standards contained in Sections 2 and 3 concerning the operation and performance of courts exercising probate jurisdiction (hereinafter referred to as probate courts). Adherence to these principles and the resulting standards will enhance greater public trust and confidence in probate courts.

1.1 ACCESS TO JUSTICE

A. Proceedings and other public business of the probate court should be conducted openly, except in those cases and proceedings that require confidentiality pursuant to statute or rule.

B. Probate court facilities should be safe, accessible, and convenient to use.

C. All interested persons who appear before the probate court should be given the opportunity to participate without undue hardship or inconvenience.

D. Judges and other probate court personnel should be courteous and responsive to the public and should treat with respect all who come before the court.

E. Access to the probate court's proceedings and records—measured in terms of money, time, or the procedures that must be followed—should be reasonable, fair, and affordable.

COMMENTARY

Probate courts should be open and accessible. Because location, physical structure, procedures, and the responsiveness of its personnel affect accessibility, the four principles grouped under Access to Justice urge probate courts to eliminate unnecessary barriers. Barriers to access can be physical, geographic, economic, linguistic, informational or procedural. Additionally, psychological barriers can be created by unduly complicated and intimidating court procedures. These principles should not be limited only to those who are represented by an attorney but should apply to all litigants, witnesses, jurors, beneficiaries of decedents in probate matters, parents of children before the court, guardians and other court

[18] COMMISSION ON TRIAL COURT PERFORMANCE STANDARDS, TRIAL COURT PERFORMANCE STANDARDS WITH COMMENTARY (National Center for State Courts (NCSC), 1997), *available at* www.ncjrs.gov/pdffiles1/161570.pdf; *see also* NCSC, COURTOOLS, (NCSC, 2005), *available at* www.courtools.org; BRIAN OSTROM & ROGER HANSON, ACHIEVING HIGH PERFORMANCE: A FRAMEWORK FOR COURTS (NCSC, Apr., 2010), *available at* http://ncsc.contentdm.oclc.org/cgi-bin/showfile.exe?CISOROOT=/ctadmin&CISOPTR=1874; *High Performance Courts*, NCSC (2011), http://www.ncsc.org/information-and-resources/high-performance-courts.aspx.

appointees, persons seeking information from court-held public records, employees of agencies that regularly do business with the courts, and the public.[19]

Probate courts should conduct openly all proceedings, contested or uncontested, that are public by law. There may be occasions when the court will properly hold proceedings in chambers or outside the courthouse (*e.g.,* in a nursing home or hospital), albeit open to the public. Because of the vulnerability of some of the parties in probate proceedings and the sensitivity of the matters in those proceedings (*e.g.,* guardianship/conservator proceedings) there are circumstances in which it is appropriate to deny access by the public. In order to ensure that such closures are carried out so as to protect both the interests of the litigants and those of the public, the standard recommends that the authority to close probate proceedings be defined by statute or rule.

Further, probate courts should ensure that proceedings are accessible and understandable to all participants, including litigants, court personnel, and other persons in the courtroom as well as attorneys, with special attention given to responding to the needs of persons with disabilities. Plain language should be used in these proceedings to the greatest extent possible. Language difficulties, mental impairments, or physical disabilities should not be permitted to stand in the way of complete participation or representation. Accommodations made by probate courts for individuals with a disability should include the provision of interpreters for hearing or speech-impaired persons and special courtroom arrangements or equipment for court participants who are visually or speech impaired.[20] Probate courts should be sensitive to the needs of persons who may benefit from dimmed or enhanced lighting, microphones, or special seating.

Probate courts should attend to the security of persons and property within the courthouse and its facilities, and the reasonable convenience and accommodation of those unfamiliar with the court's facilities and proceedings. They should be concerned about such things as:

- The centrality of their location in the community they serve
- The adequacy of parking, the availability of public transportation
- The degree to which the design of the court provides a secure setting
- The ease with which persons unfamiliar with the facility can find and enter the office or courtroom they need
- The availability of elevators and convenient, accessible restrooms

---

[19] Probate courts are using a variety of approaches to facilitate access: e.g., the establishment of an access center to provide information and assist pro se litigants in filling out forms (San Francisco, CA, Denver, CO); monthly clinics with volunteer lawyers (Los Angeles, CA), videos (Washington, DC); electronic access to information regarding probate matters (California, Washington, DC, Fort Worth, TX, GA Council of Probate Judges, Ottawa County, MI) electronic access to basic forms (California, Ottawa County, MI, Philadelphia, PA, Phoenix, AZ, SC); and access to public records through the internet and at kiosks (Phoenix, AZ). *See also Self-Representation Resource Guide*, NCSC, http://www.ncsc.org/Topics/Access-and-Fairness/Self-Representation/Resource-Guide.aspx (July 10, 2012).

[20] For example, ADA-compliant facilities, use of court or commercial interpreter services in various languages including sign language, audio-assist devices. Stetson University College of Law maintains a model courtroom designed to facilitate participation by elderly and disabled litigants. For a description, see *Eleazer Courtroom*, Stetson University College of Law, http://www.law.stetson.edu/academics/elder/home/eleazer-courtroom.php (July 11, 2012).

- Seating areas outside the courtroom
- The availability of electronic access to information about the court and the procedures for initiating, responding to, and participating in probate matters

Probate courts should also endeavor to adjust their calendaring procedures to permit effective participation by elderly or disabled litigants. Long calendar calls at which parties must be present should be avoided and hearings should be set for specific times to the greatest extent possible. Judges should exercise flexibility in taking breaks in hearings to accommodate litigant needs and try not to set matters involving elderly litigants early or late in the court day. Probate courts should also tailor their procedures (and those of others under their influence or control) to the reasonable requirements of the matter before the court. Means to achieve this include simplification of procedures and reduction of paperwork in uncontested matters, simplified pretrial procedures, fair control of pretrial discovery, and establishment of appropriate alternative methods for resolving disputes (*e.g.,* referral services for cases that might be resolved by mediation, court-annexed arbitration, early neutral evaluation, tentative ruling procedures, or special settlement conferences).

A responsive court ensures that judicial officers and other court employees are available to meet both routine and exceptional needs of those they serve. Court personnel should assist those unfamiliar with the court and its procedures by providing standard procedural information, though not legal advice.[21] In keeping with the public trust embodied in their positions, judges and other court employees should reflect, by their conduct, the law's respect for the dignity and value of all persons who come before or request information and assistance from the court. No court employee should by words or conduct demonstrate bias or prejudice of any kind. This should also extend to the manner in which court employees treat each other.

To facilitate access and participation in its proceedings, court fees should be reasonable. Fees and costs should be related to the time and work expended by the court. In addition, probate courts may consider either waiving fees for individuals who are economically disadvantaged or taking other steps to enable such individuals to participate in its proceedings.[22]

Probate courts should maintain records of their own public proceedings as well as important documents generated by others. These records must be readily available to those who are authorized to receive them in either physical or electronic form, or both. Probate courts should maintain a reasonable balance between their actual cost in providing

[21] For a discussion of the distinction between legal information and legal advice, see J.M. Greacen, *"No Legal Advice from Court Personnel": What Does That Mean?*, 34 Judges J. 10, (Winter 1995); IOWA JUDICIAL BRANCH CUSTOMER SERVICE ADVISORY COMMITTEE, GUIDELINES AND INSTRUCTIONS FOR CLERKS WHO ASSIST PRO SE LITIGANTS IN IOWA'S COURTS 7 (July 2000), *available at* http://www.ajs.org/prose/pdfs/Iowa_Guidelines.pdf; *but see* Wash. St. Bar Assoc. v.Great Westerm Federal Savings & Loan Ass'n*.,* 91 Wash. 2d. 49, 54-55 586 P.2d 870 (1999) – the practice of law includes selection and completion of forms.

[22] The amount and structure of the filing fees assessed in probate matters varies considerably. In some jurisdictions, the amount of the fee is based on the size of the estate (e.g., CT, DC, and SC); in others it depends on the number of hearings and other proceedings (e.g., CA); in a few there is a flat filing fee for all cases or no fee for certain types of cases such as guardianship (DC) or involuntary commitment (FL). Most jurisdictions have some provision to waive or defer fees in probate matters.

documents or information and what they charge users.

Related Standards	
2.1.2	Rulemaking
2.2.2	Time Standards Governing Disposition
2.2.3	Scheduling Trial and Hearing Dates
2.4.1	Management Information System
2.5.1	Alternative Dispute Resolution
3.1.1	Notice
3.1.4	Attorney and Fiduciary Compensation
3.1.6	Sealing Court Records
3.2.1	Unsupervised Administration (of Estates)
3.2.4	Small Estates
3.3.1	Petition
3.3.4	Court Visitor
3.3.5	Appointment of Counsel
3.3.7	Notice
3.3.8	Hearing
3.3.11	Qualifications and Appointment of Guardians and Conservators
3.4.3	Transfer of Guardianship or Conservatorship
3.4.4	Receipt and Acceptance of a Transferred Guardianship/Conservatorship
3.5.1	Petition
3.5.2	Notice
3.5.3	Representation for the Minor
3.5.4	Participation of the Minor in the Proceedings

1.2 EXPEDITION AND TIMELINESS

A. Probate courts should establish and maintain guidelines for timely case processing.

B. Probate courts should promptly implement changes in law and procedure affecting court operations.

COMMENTARY

Unnecessary delay may have serious consequences for the persons directly concerned and cause injustice, hardship, and diminished public trust and confidence in the court. Timely disposition is defined in terms of the elapsed time a case requires for consideration by a court, including the time reasonably required for pleadings, discovery, trial, and other court events.[23] Any time beyond that necessary to prepare and to conclude a case constitutes delay.

Probate courts should control the time from case filing to trial or other final disposition.[24] Early and continuous control establishes judicial responsibility for timely disposition, identifies cases that can be settled, eliminates delay, and assures that matters

[23] *See* RICHARD VAN DUIZEND, DAVID C. STEELMAN & LEE SUSKIN, MODEL TIME STANDARDS FOR STATE TRIAL COURTS, 32 (NCSC, 2011).
[24] *Id.* at 31-34; . STEELMAN & DAVIS, *supra,* note 4.

will be heard when scheduled. During and following a trial or hearing, probate courts should make decisions in a timely manner. Judges should attempt to rule from the bench while the parties are present whenever possible, particularly where questions of status are involved (*e.g.,* when considering the establishment of a guardianship or conservatorship). When it is necessary for a probate court to take a relatively complex matter under advisement, the court should, nevertheless, issue its decision promptly. Ancillary and post-judgment or post-decree proceedings also need to be handled expeditiously to minimize uncertainty and inconvenience.

Probate courts should also manage their caseload to avoid backlog. For example, the court should consider the use of caseload management systems and periodic status reports.

If probate courts hold funds for others, timely and proper disbursement of those funds following a determination of who is entitled and the amount to be disbursed is particularly important. For some recipients, delayed receipt of funds may be an accounting inconvenience; for others, it may create personal hardships. Regardless of who is the recipient, when a court is responsible for the disbursement of funds, performance should be expeditious and timely.

Tradition and formality can obscure the reality that both the law and the procedures affecting court operations are subject to change.[25] Changes in statutes, case law, and court rules affect what is done in probate courts, how it is done, and who conducts business in the court. Probate courts should implement mandated changes promptly. Whether a probate court can anticipate and plan for change, or must react to change quickly, the court should make its own personnel aware of the changes, and notify court users of such changes to the extent practicable. This is particularly true when the court is the body that has implemented the change by court rule or other means. It is imperative that changes mandated by statute, case law, or court rules be integrated into court operations as they become effective.

Related Standards:

2.1.2 Rulemaking
2.2.1 Court Control
2.2.2 Time Standards Governing Disposition
2.2.3 Schedule Trial and Hearing Dates
2.4.2 Collection of Caseload Information
3.1.1 Notice
3.3.7 Notice
3.2.3 Timely Administration
3.3.3 Early Control and Expeditious Processing
3.4.5 Initial Hearing in the Court Accepting a Transferred Guardianship or Conservatorship
3.5.1 Notice

[25] The National College of Probate Judges posts links to the laws and rules governing probate matters as well as links to other organizations' publications on its website. National College of Probate Judges, http://www.ncpj.org/ (July 11, 2012).

1.3 EQUALITY, FAIRNESS, AND INTEGRITY

A. The practices of the probate court should faithfully adhere to relevant laws, procedural rules, and established policies.

B. The probate court should give individual attention to cases, deciding them without undue disparity among like proceedings and upon legally relevant evidence.

C. Decisions of the probate court should address the issues presented with clarity and specify how compliance can be achieved.

D. The probate court should be responsible for the enforcement of its orders.

E. Records of all relevant probate court decisions and proceedings should be accurately maintained and securely preserved.

COMMENTARY

Probate courts should provide due process and equal protection of the law to all persons involved with matters and proceedings before it, as guaranteed by the federal and state constitutions. Integrity should characterize the nature and substance of probate courts procedures, decisions, and the consequences of those decisions. Integrity refers not only to the lawfulness of a court's actions (*e.g.,* compliance with constitutional rights to legal representation, a record of legal proceedings), but also to the results or consequences of its orders. A court's performance is diminished when, for example, its mechanisms and procedures for enforcing court orders are ineffective or nonexistent, or when the orders themselves are issued slowly. The court's authority and its orders should guide the actions of those under its jurisdiction both before and after a case is resolved.

Fairness should characterize all probate courts processes. This principle is derived from the concept of due process, which includes provision for notice and a fair opportunity to be informed and heard at all stages of the judicial process. Probate courts should respect the right to legal counsel and the rights of confrontation, cross-examination, impartial hearings, and, where applicable, jury trials. They should afford fair judicial processes through adherence to constitutional and statutory law, case precedent, court rules, and other authoritative guidelines, including policies and administrative regulations. Adherence to established law and court procedures contributes to achieving predictability, reliability, and integrity.

Litigants should receive individual attention without variation due to judge assignment or to legally irrelevant characteristics of the parties such as race, religion, ethnicity, gender, sexual orientation, color, age, disability, or political affiliation. Persons similarly situated should receive similar treatment. The outcome of the case should depend

solely upon legally relevant factors. This standard refers to all judicial decisions, including court appointments.[26]

An order or decision that sets forth consequences or articulates rights but fails to connect the actual consequences resulting from the decision to the antecedent issues breaks the connection required for reliable review and enforcement. A decision that is not clearly communicated poses problems both for the parties and for judges who may be called upon to interpret or apply it. In order to facilitate clarity and comprehension of decisions and orders by those who must apply or comply with them, plain language should be used to the greatest extent possible, and the excessive use of formal legal terms and Latin phrases should be avoided.

How compliance with court orders and judgments is to be achieved should be clear. An order that requires compliance within a stated time period, for example, is clearer and easier to enforce than one that establishes an obligation but sets no time frame for completion.

It is common and proper in some matters for courts to remain passive with respect to judgment satisfaction until called on to enforce the judgment. Nevertheless, probate courts should ensure that their orders are enforced. The integrity of the judicial process is reflected in the degree to which parties adhere to awards, settlements, and decisions arising out of this process. Noncompliance may indicate miscommunication, misunderstanding, misrepresentation, or lack of respect toward or confidence in probate courts.

Probate court responsibility for enforcement and compliance varies from jurisdiction to jurisdiction, program to program, case to case, and event to event. In some matters, particularly when affected individuals may be unlikely to voice their concerns (*e.g.,* in guardianship/conservatorship proceedings), probate courts may need to actively monitor compliance and enforce their orders. If a probate court becomes aware that an order is not being carried out by a party in a timely fashion, and the party is not represented by an attorney, direct notice should be given to the party as soon as possible.. If an attorney represents the party, both the attorney and the party should be put on notice of the failure to carry out the court's order. Monitoring and enforcement of proper procedures and interim orders while cases are pending are within the scope of this principle.

Probate courts should preserve an accurate record of all proceedings, decisions, orders, and judgments. Relevant court records include original wills, indexes, dockets, and various registers of court actions maintained to assist inquiry into the existence, nature, and history of actions at law. Documents associated with particular cases that make up official case files and the verbatim records of proceedings should be included as well. Preservation

---

[26] KEVIN BURKE & STEVE LEBEN, PROCEDURAL FAIRNESS: A KEY INGREDIENT IN PUBLIC SATISFACTION: A WHITE PAPER OF THE AMERICAN JUDGES ASSOCIATION, (American Judges Association, 2007), http://aja.ncsc.dni.us/pdfs/AJAWhitePaper9-26-07.pdf; E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (Plenum Press, 1988); E. Allen Lind, Bonnie E. Erickson, Nehemia Freidland, & Michael Dickenberger, *Reactions to Procedural Models for Adjudicative Conflict Resolution,* 22 CONFLICT RES.. 318 (1978); Jonathan D. Casper, Tom Tyler, & Bonnie Fisher, *Procedural Justice in Felony Cases,* 22 LAW & SOC. REV. 483 (1988).

of the case record, whether in paper or digital form, entails the full range of records management systems. Because records may affect the rights and duties of individuals for generations, their protection and preservation over time are vital. Record systems must ensure that the location of case records is always known and whether the case is active and in frequent circulation, inactive, or in archive status. Inaccuracy, obscurity, loss of court records, or untimely availability of such records seriously compromises the court's integrity and subverts the judicial process.

At the same time, an effective records management program does not necessitate the retention of all records for all time. Most states have statutes addressing the creation, retention, and disposition of public records that apply to all branches of government. Although the public records law may dictate the basic parameters for retaining, maintaining, and storing probate records, probate courts retain considerable discretion in determining which records should be kept, how long they should be kept, what medium they should be stored in, and how they should be maintained. Failure to purge unneeded court records can exhaust available storage space and require probate courts to expend funds for the retention and maintenance of these records.

Related Standards:

2.2.1 Court Control
2.2.2 Time Standards Governing Disposition
2.4.1 Management Information Systems
2.4.2 Collection of Caseload Information
2.4.3 Confidentiality of Sensitive Information
2.5.1 Alternative Dispute Resolution
3.1.2 Fiduciaries
3.1.3 Representation by Persons Having Substantially Identical Interest
3.1.5 Accountings
3.2.2 Determination of Heirship
3.3.2 Initial Screening
3.3.4 Court Visitor
3.3.6 Emergency Appointment of a Temporary Guardian or Conservator
3.3.8 Hearing
3.3.9 Determination of Incapacity
3.3.10 Less Intrusive Alternative
3.3.11 Qualifications and Appointment of Guardians and Conservators
3.3.12 Background Checks
3.3.13 Order
3.3.14 Orientation, Education, and Assistance
3.3.15 Bonds for Conservators
3.3.16 Reports
3.3.17 Monitoring
3.3.18 Complaint Process
3.3.19 Enforcement of Orders; Removal of Guardians and Conservators
3.3.20 Final Report, Accounting, and Discharge
3.4.1 Communication and Cooperation Between Courts
3.4.2 Screening, Review, and Exercise of Jurisdiction
3.5.5 Background Checks
3.5.6 Order

3.5.7 Orientation, Education, and Assistance
3.5.8 Bonds for Conservators
3.5.9 Reports
3.5.10 Monitoring
3.5.11 Complaint Process

1.4 INDEPENDENCE AND ACCOUNTABILITY

A. Probate courts should maintain their institutional integrity as part of the third branch of government and observe the principle of comity in its governmental relations.

B. Probate courts should make efficient, effective, and economic use of their resources.

C. Probate courts should use fair employment and appointment practices.

D. Probate courts should develop procedures to inform the community of their proceedings.

E. Probate courts should seek to adapt to changing conditions or emerging issues.

COMMENTARY

Independence and accountability engender public trust and confidence as they permit government by law, access to justice, and timely resolution of disputes with equality, fairness, and integrity. Because judicial independence protects individuals from the arbitrary use of government power and ensures the rule of law, it defines court management and legitimates the judiciary's claim for respect as the third branch of government. Courts possessing institutional independence and accountability protect judges from unwarranted pressures. They operate in accordance with their assigned responsibilities and jurisdiction within the state judicial system.

Independence is not likely to be achieved if a court is unwilling or unable to manage itself. Accordingly, probate courts should establish and support effective leadership, operate effectively within the state court system, develop plans of action, obtain resources necessary to implement those plans, measure their performance accurately, and account publicly for their performance.

An effective court resists being absorbed or managed by the other branches of government. A court compromises its independence when it serves primarily as a revenue-producing arm of government, or perfunctorily places its imprimatur on decisions made by others.[27] Effective court management enhances independent decision making by judges exercising probate jurisdiction.

[27] For example, in Michigan, probate courts are charged with the responsibility of determining inheritance taxes,

The court's independent status, however, should be achieved without avoidable damage to the reciprocal relationships that must be maintained with others. Probate courts are necessarily dependent upon the cooperation of other components of the justice system over which they have little or no direct authority. For example, elected clerks of court are components of the justice system, but may function independently of the court. Sheriffs and process servers perform both a court-related function and a law enforcement function. If a court is to attain institutional independence, it must clarify, promote, and institutionalize effective working relationships with all the other components of the justice system. The boundaries and the effective relationships between the court and other segments of the justice system must, therefore, be apparent in both form and practice.

To appropriately carry out their responsibilities, probate courts should have sufficient financial resources and personnel. They should seek the resources required to meet their judicial responsibilities, use available resources prudently, and account for their use. If the legislative (or funding) branch of government does not provide the necessary funding, the court may, if necessary, need to resort to legal proceedings to acquire funding to accomplish its purposes.

Probate courts should use available resources efficiently to address multiple and often conflicting demands. Information collected by probate courts should be used in the courts' planning, monitoring, research, and assessment activities. Resource allocation to cases, categories of cases, and case processing is at the heart of court management. Assignment of personnel and allocation of other resources must be responsive to established case processing goals and priorities, implemented effectively, and evaluated continuously. Monitoring of staff and resources will provide information to evaluate whether needs are being met adequately and whether reallocation of resources is necessary.

Because equal treatment of all persons before the law is essential to the concept of justice, probate courts should operate free from bias on the basis of race, religion, ethnicity, gender, sexual orientation, marital status, color, age, disability, or political affiliation in their personnel practices and decisions. Fairness in the recruitment, appointment, compensation, supervision, and development of court personnel helps ensure judicial independence, accountability, and organizational competence. A court's personnel practices and decisions should establish the highest standards of personal integrity and competence among its employees. Continuing competence can be enhanced through court-sponsored training programs.

Most members of the public have little direct contact with or knowledge of probate courts. Information about the court is filtered through, among others, the media, lawyers, litigants, jurors, political officeholders, and employees of other components of the justice system. Probate courts, either independently or in conjunction with the state court system, other local trial courts, the bar and other interested groups, should take steps to inform and educate the public. Descriptive informational brochures and annual reports help the public to understand and appreciate the administration of justice. Participation by court personnel

---

with those taxes collected upon the order of the probate court. MICH. COMP. LAWS ANN.. § 205.213 (West 2012).

on public affairs commissions, advisory committees, study groups, and boards should be encouraged.

An effective court recognizes and responds appropriately to emergent public issues such as the rapidly increasing proportion of persons over age 65 in the US population, the even more rapid increase in the proportion of persons over age 85, and the advances in medical care that enable persons with developmental disabilities as well as victims of catastrophic illnesses and accident to live longer.[28] A court that moves deliberately in response to emergent issues is a stabilizing force in society and acts consistent with its role of maintaining the rule of law. Responsiveness may also include informing responsible individuals, groups, or entities about the effects of emerging issues on the judiciary and about possible solutions. The creation of a task force consisting of, among others, bench and bar members can help to identify new problems and keep probate courts informed about new issues. Court-sponsored training for judges, probate court staff, attorneys, and appointees of probate courts can also help probate courts to adjust its operations to address new conditions or events.

Related Standards:	
2.1.2	Rulemaking
2.2.1	Court Control
2.2.2	Time Standards Governing Dispositions
2.2.3	Scheduling Trial and Hearing Dates
2.3.1	Human Resources Management
2.3.2	Financial Management
2.3.3	Performance Goals and Strategic Plan
2.3.4	Continuing Professional Education
2.4.2	Collection of Caseload Information
3.3.2	Initial Screening
3.3.3	Early Control and Expeditious Processing
3.4.1	Communication and Cooperation Between Courts
3.4.2	Screening, Review, and Exercise of Jurisdiction
3.4.3	Transfer of Guardianship or Conservatorship
3.4.4	Receipt and Acceptance of a Transferred Guardianship or Conservatorship
3.5.12	Coordination with Other Courts

[28] R. VAN DUIZEND, THE IMPLICATIONS OF AN AGING POPULATION FOR THE STATE COURTS, 76 (NCSC, 2008), *available at* http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/famct&CISOPTR=208.

SECTION 2: ADMINISTRATIVE POLICIES AND PROCEDURES OF THE PROBATE COURT

In contrast to the standards provided in Section 1 (Probate Court Performance), the standards in this section emphasize the processes, the structures, and the means used by probate courts to accomplish their assigned duties. It is important that probate courts not overlook these aspects of their function. In addition, probate courts often are able to exercise direct control over the administrative policies and procedures they employ, and thus promptly effect needed change and reform.

The standards related to administrative policies and procedures are divided into five categories. JURISDICTION AND RULE MAKING, the first category, recommends that probate courts exert control over matters set before them by ensuring that the appropriate jurisdictional requirements are met, that their judgments are carried out in other jurisdictions, and that they have shaped, to the extent permitted, the rules that govern their functions. CASEFLOW MANAGEMENT, the second category, recommends that probate courts exert control by actively managing its caseload, by actively supervising the progress of their cases, by establishing timelines that govern the disposition of their cases, and by scheduling trial and hearing dates that ensure that cases move forward without unnecessary delay.

JUDICIAL LEADERSHIP, the third category, recommends that probate courts assume leadership in implementing an appropriate human resources management program; in obtaining, allocating, and managing their financial resources; and in instituting performance goals and a strategic plan that will allow them to determine whether they are meeting their responsibilities. INFORMATION AND TECHNOLOGY, the fourth category, recommends that probate courts take active steps to ensure that they carry out their duties in an efficient and responsible manner by instituting a management information system for the court's records, regularly monitoring and evaluating this system, implementing appropriate new technologies, collecting and reviewing caseload data, and establishing procedures to assure the confidentiality of information where needed. ALTERNATIVE DISPUTE RESOLUTION, the final category, recommends that probate courts encourage the use of non-litigation processes as a means to resolve cases.

2.1 JURISDICTION AND RULEMAKING

The standards in this category recognize the special nature of probate courts and the importance of probate courts being able to exert control over the cases brought before them, to hear those matters that fall within their expertise, and to ensure that their judgments are properly carried out.

STANDARD 2.1.1 JURISDICTION

A. **Probate courts should fully exercise their jurisdiction over cases within their statutory, common law, or constitutional authorization, which commonly includes trusts, decedents' estates, guardianships, and conservatorships of adults**

and may also include guardianship and/or conservatorship of minors, and other matters. In jurisdictions in which general jurisdiction courts exercise probate jurisdiction, all probate matters should be assigned to a specialized probate division.

B. When a probate court in one jurisdiction properly issues a final judgment, that judgment should be afforded comity and respect in other jurisdictions, subject to each state's principles for resolving conflicts of laws.

COMMENTARY

Probate-related cases involve unique and complex issues and require specialized expertise by the judge. For example, the judge may be requested to resolve the validity of a will, rights of survival and wrongful death distributions, disputed property and creditors' claims, tax regulations, determination of death, disposition of last remains, the need for a protective order, guardianship, or conservatorship for a disabled adult or for a minor, or an individual's mental health status. Because of their accumulated experience in dealing with these cases, probate judges develop a specialized knowledge particularly well-suited for these cases. In addition, it may be more efficient to consolidate all matters related to such proceedings before probate courts.

Because of the mobility of today's society, interstate cooperation among courts is vital. Such cooperation promotes consistency, confidence in the judicial system, and the efficient use of judicial resources. As a result, comity and respect should be accorded a final order or judgment issued by a probate court when the parties subject to that order or judgment move to a different jurisdiction. The court issuing the order or judgment should also be sensitive to the possibility that the order or judgment may be applied in another jurisdiction and craft its language appropriately. At the same time, the court's jurisdiction may be subject to traditional choice of law provisions where a state as a matter of its own policy may decline to apply the law of other states. In general, however, it is preferable that there be good working relationships among the courts of the country, and, where no direct conflict of laws exists, the court exercising probate jurisdiction should respect the final order or judgment of a court from another jurisdiction. [See Standards 3.4.1 – 3.4.5.]

STANDARD 2.1.2 RULEMAKING

Probate courts should recommend changes to the state rules pertaining to probate courts consistent with these standards. Local rules may be utilized for special needs and circumstances provided they are not inconsistent with the statewide rules.

COMMENTARY

The procedural and administrative rules applicable to probate courts may suffer from various basic deficiencies. First, if each court institutes its own set of unique rules, the practice of law within that state may become unnecessarily complex and unwieldy as parties and their attorneys attempt to adhere to the various rules of each individual court. On the

other hand, if all trial courts within a state are governed by one universal set of rules, those rules may fail to take into account the unique nature and responsibilities of probate courts in general and fail to allow sufficient flexibility for them to meet their needs. This is particularly likely to occur when those rules have been established by entities that are relatively unfamiliar with probate courts. In addition, each individual court may need to be afforded sufficient discretion to modify these rules in responding to its own needs and responsibilities. When properly considered, such local rules can be accomplished without imposing substantial variations from the rules of other similarly situated courts within that jurisdiction.

Generally, a state's supreme court or, if applicable, the state legislature is responsible for articulating the general procedural and administrative rules applicable to probate courts.[29] Such an approach promotes uniformity in the rules governing the various probate courts. Where possible, a separate section of these general rules should be devoted to probate courts of that state and their special needs and responsibilities, based upon recommendations provided by the probate courts.[30] When permitted and where appropriate, however, a probate court may also find it necessary to take advantage of the opportunity to adapt these rules to meet its specific needs and circumstances by instituting local procedural and administrative rules that are not inconsistent with the state's general rules. By so doing, the probate court can increase its efficiency and ability to fulfill its duties, ensure itself of sufficient flexibility to meet emerging needs, and ensure that persons requiring access to its services encounter no unnecessary barriers. In making or proposing adaptations to the court's rules, the probate judge may wish to establish a task force consisting of court administrators, clerks, members of the local legal community, and other persons with special knowledge and experience in practice and procedure in the probate court. This will ensure that a wide range of perspectives is considered in drafting these changes and that their likely effect has been taken into consideration. Throughout this process, attention should be given to ensuring that the probate court's local rules are consistent with the state's general court rules. In addition, attempts should be made to encourage uniformity in the rules of all the probate courts of the state.

Rule revision should be completed as expeditiously as possible and resulting changes promptly published. Revision may be necessitated by changes effected by the state's supreme court or the legislature, which may require an immediate response by the probate court to bring its own rules into compliance. Where revisions are made, relevant forms (mandatory or instructive) should be produced and made available.

[29] The general rules of the court may address such matters as what is needed to prove a will, what is needed procedurally to determine intestacy, what medical information is needed with a guardianship or conservatorship petition, or what is needed for a minor's personal injury settlement.
[30] *See, e.g.*, MICH. COMP. LAWS SERV. § 700.1302 (LexisNexis 2000).

2.2 CASEFLOW MANAGEMENT

The standards in this category suggest several steps that probate courts may take to ensure that their heavy caseload is processed in a fair and expeditious manner.

STANDARD 2.2.1 COURT CONTROL

The probate courts should actively manage their cases.

COMMENTARY

To ensure prompt and fair justice to the parties appearing before them, probate courts should recognize the importance of controlling the progress of the cases over which they preside. To this end, the court should have in place written policies and procedures establishing and governing an appropriate caseflow management system. Scheduling of cases should, in general, reflect a realistic balance of the competing demands for a timely resolution of the matters placed before the court, the opportunity for relevant persons to participate in the proceedings, and careful consideration and exploration of the issues raised.

> The court should monitor and control case progress from initiation, establish time expectations for completion of discovery and progress toward initial disposition, make an early appointment of counsel for a respondent when appropriate, use pretrial conferences and ADR to promote early resolution, and set an early date for trial or hearing. Although trials occur in only a small percentage of probate cases, they can consume a great deal of a judge's time. A trial management conference shortly before the scheduled trial date can help ensure effective use of trial time. [31]

Special considerations should be taken into account when implementing a caseflow management system. While the processing of normal, routine cases may proceed without particular attention by the court, certain parties or cases may require special handling or scheduling. The caseflow system should provide for the early identification of these parties and cases, and the court should be prepared to give them appropriate attention and accommodation. Instances where special attention may be needed include cases in which the issues raised are particularly complex; parties or witnesses have a physical or mental disability; parties or witnesses require an interpreter; or parties or witnesses are ill, elderly, or near death. The court should regularly review its caseflow management system to ensure that it addresses the needs of those parties and cases that come before the court, as well as the court's own needs and requirements. [See Commentary to Principle 1.1.]

The court's case management system should have adequate procedures to manage the motions docket and those cases requiring expeditious processing, such as authorizing or withholding life-sustaining medical treatment. In general, the system should be designed to

---

[31] DAVID C. STEELMAN, JOHN.A. GOERDT, & JAMES.E. MCMILLAN, CASEFLOW MANAGEMENT: THE HEART OF COURT MANAGEMENT IN THE NEW MILLENNIUM, 45 (NCSC, 2004).

permit resolution of most contested issues expeditiously.[32]

Ordinarily, a continuance should be granted only when the probate court finds that there is good cause and takes into consideration the interests of all parties. This case supervision, however, should not replace or supplant the attorneys' responsibility to move cases forward. Rather, it should create a joint responsibility between the bench and bar that will build upon their different perspectives in establishing appropriate case-processing timelines. Probate courts in many states now actively monitor and exercise control over caseflow [*e.g.,* Maricopa County (AZ) Superior Court, San Francisco County (CA) Superior Court, DC, FL, Franklin County (OH) Probate Court, PA, TX].

The use of standardized timelines to manage the flow of cases should be generally applicable to most cases. For special or complex cases, however, the court should adopt distinct or flexible timetables to meet the special needs and demands of such cases, subject to modification following periodic conferences with the relevant parties. A number of probate courts are beginning to apply differentiated case management to probate cases.

> Differentiated case management is an attempt to define case-specific features that distinguish among cases as to the level of case management required. Thus, the essence of differential case management is reorganization of the caseflow system to recognize explicitly that the speed and method of case disposition should depend on cases' actual resource and management requirements (both court and attorney), *not* on the order in which they have been filed.[33]

In contested cases, an initial conference should ordinarily be held between the judge and the attorneys to establish appropriate deadlines, such as for pre-trial discovery and to identify special or complex cases. For example, many courts have established rules with respect to pretrial conferences and discovery timetables, that are strictly enforced. Adopting this approach in contested matters could greatly reduce the delays between the filing of a petition and the ultimate trial and disposition. This initial conference will help the court monitor the progress of each case and anticipate and respond to special difficulties the case may pose. If the case is especially complex, or if circumstances change, additional conferences may be necessary. If the parties are unable to agree upon appropriate deadlines, the court should impose a default schedule. Should a party fail to meet an established deadline, the court should issue sanctions, compel parties to appear, or dismiss the action.

---

[32] Some probate cases, such as those involving the appointment of a guardian or conservator or a decedents' large estate where the estate cannot be closed until the federal estate tax liability is settled (with the return not even due until nine months after the date of death), by their nature are going to be open ended and will extend over relatively long periods of time. Other cases, such as those involving decedents' estates where an extended period of time for the filing of claims by creditors is required, may have an initial determination subject to subsequent modification. In such cases, goals for resolving probate cases within a given time frame may need to focus on specific events or procedures associated with these cases (e.g., the issuing of the initial order on the need for a guardianship or conservatorship).

[33] STEELMAN & DAVIS, *supra,* note 4, at 14-15.

PROMISING PRACTICES

The **Maricopa County, AZ, Superior Court** issued a list of 11 enhancements to the probate courts system. The first enhancement concerned differentiated case management and the need for separate tracks for cases with a high-conflict potential.[34]

STANDARD 2.2.2 TIME STANDARDS GOVERNING DISPOSITION

Probate courts in each state, in collaboration with the Administrative Office of the Courts and the bar, should establish overall time standards governing case disposition of each major kind of case and intermediate standards governing elapsed time between major case events.

COMMENTARY

An initial step in developing a functional caseflow management system is the creation of time standards governing case disposition. Ideally, these should be statewide standards applicable to all courts with probate jurisdiction in the state. The *Model Time Standards for State Trial Courts,*[35] adopted by the Conference of Chief Justices, the Conference of State Court Administrators, the American Bar Association, and the National Association for Court Management, provide a basis for discussion with the Administrative Office of the Courts, the bar, and other stakeholders regarding the appropriate time standards in light of state procedures, statutory time periods, jurisdictional conditions, demographic and geographic factors, and resources.[36]

In addition to overall time standards, it is useful, for case management purposes, to include timelines governing each significant intermediate event from filing to disposition, including status conferences, arbitration hearings, or issue conferences. Intermediate timelines should be integrated with the overall standard for case disposition to create a consistent and functional organizational plan for caseflow management. Status reports should be periodically generated to maintain a record of what has occurred and to determine whether prescribed deadlines have been met. Each intermediate step should be monitored to assure compliance with the timelines, thereby ensuring orderly case development and prompt disposition.[37]

STANDARD 2.2.3 SCHEDULING TRIAL AND HEARING DATES

The probate court should establish realistic trial and hearing dates based on the schedules established during the pretrial conferences.

---

[34] *Id.* at 9.
[35] VAN DUIZEND, STEELMAN, & SUSKIN, *supra,* note 23, at 31 – 34 (NCSC, 2011).
[36] *Id.* at 2.
[37] *Id.* at 35-51.

COMMENTARY

The court should give careful attention to the scheduling of trials, hearings, conferences and all other appearances before the court. This will ensure the efficient use of judicial resources, and promote trial date certainty, one of the key factors in reducing delay.[38] To achieve accurate scheduling, among the factors the court should consider are:

- Any statutory requirements for hearings
- the likelihood that a case will proceed to trial
- the needs and disabilities of the parties[39]
- the anticipated length of the trial, including the number of court days that will be required
- the number of court days available for scheduling
- the expected judicial complement available (i.e., the number of judges assigned to the court minus anticipated and predicted judicial absences)
- the number of judge days available (i.e., the expected judicial complement multiplied by the number of court days in the period)
- the judicial capacity (i.e., the percentage of scheduled cases tried and settled with judicial participation within the court)
- fallout (i.e., the percentage of cases scheduled for trial that are continued, settled, or dismissed without judicial intervention); and
- priorities or time limits imposed by statute.[40]

The likelihood and expected length of a trial or hearing should be determined by the court after consultation with the attorneys or pro se parties in the case. The other factors can be computed as needed by the court administrator. An additional factor that may be appropriate to take into consideration when scheduling trial and hearing dates is the court's case backlog and delays likely to result from this backlog.

Accurate scheduling requires the court to adopt firm policies on the issuance of trial and hearing dates and to restrict the availability of continuances.[41] Counsel should be expected to prepare for trial or hearing properly and adequately with the anticipation that the trial or hearing will be held as scheduled. Continuances should not be granted without a showing of good cause and never solely on the stipulation of the attorneys to a continuance.

2.3 JUDICIAL LEADERSHIP

The standards in this category discuss the responsibility of probate courts to ensure that they, like any other organization, are managed in a responsible and appropriate manner.

---

[38] COURTOOLS, *supra, note 18, at* Measure 5, *available at* http://www.ncsconline.org/D_Research/CourTools/Images/courtools_measure5.pdf.

[39] LORI STIEGEL, RECOMMENDED GUIDELINES FOR STATE COURTS HANDLING CASES INVOLVING ELDER ABUSE, Recommendations 4 & 5 (American Bar Association (ABA), 1996).

[40] *See generally* MAUREEN SOLOMON & DOUGLAS SOMERLOT, CASEFLOW MANAGEMENT IN THE TRIAL COURT: NOW AND FOR THE FUTURE, 18 (ABA, (1987).

[41] STEELMAN, GOERDT, & MCMILLAN, *supra,* note 31, at 9-10.

Probate judges should assume a leadership role in helping probate courts meet this responsibility.

STANDARD 2.3.1 HUMAN RESOURCES MANAGEMENT

Probate courts should be responsible for implementing an effective human resources management program.

COMMENTARY

Probate courts should be administered so that their employees are treated with dignity and respect. (See Principle 1.4) To meet this goal, probate courts should implement a human resources management program. A clear chain of command should exist to prevent confusion and ensure accountability. Court employees should have clear and accurate written job descriptions, adequate training and supervision,[42] regularly conducted performance evaluations, and written policies and guidelines to follow. [See Standard 2.3.4]

Probate courts should actively support and improve the quality of the work of their personnel. Surveys of court employees should be administered periodically to identify problems and assess the level of employee satisfaction.[43] Annual development of goals should be established for each supervisor and court unit, as well as for all staff members. Training programs should be used to maintain and improve the capabilities and skills of all staff members. An employee recognition program should acknowledge the strengths and achievements of the court employees.

An effective human resource plan cannot be implemented successfully without the leadership of the court. The judge and court administrator, if there is one, must demonstrate their complete support of and commitment to the plan through active involvement in court training programs and model behavior on and off the bench.

STANDARD 2.3.2 FINANCIAL MANAGEMENT

A. Probate courts should seek financial support sufficient to enable them to perform their responsibilities effectively.

B. Probate courts should inform state and local funding sources on a regular basis about the importance, breadth, and impact on the community and individuals of probate courts and their decisions, as well as about the demographic trends affecting probate court caseloads.

C. The court should institute standardized procedures for monitoring fiscal expenditures.

---

[42] The Probate Division of the District of Columbia Superior Court records, and has supervisors review, the responses that Division staff provide to telephonic information inquiries from the public in order to identify areas in which additional training may be needed and make certain that accurate information is provided in a timely and courteous manner.

[43] COURTOOLS, *supra,* note 18, at: MEASURE 9, *available at* http://www.ncsconline.org/D_Research/CourTools/Images/courtools_measure9.pdf.

COMMENTARY

To carry out their duties adequately and effectively, probate courts must receive sufficient funding. Considerable variation in the sources of funding exists from jurisdiction to jurisdiction. In many jurisdictions, the state rather than local government has assumed financial responsibility for the probate courts, which may avoid fragmented and disparate levels of financial support among courts. Whatever the source of funds, adequate funding is needed for probate courts to attract and retain competent judges and court personnel; to provide adequate supplies, equipment, and library materials; to purchase specialized services such as those provided by court visitors, physicians, psychologists, expert witnesses, examiners, interpreters, and consultants; and to obtain, renovate, and replace, when needed, capital items and physical facilities.

In generating a budget for a probate court, it is necessary that the court's special functions and responsibilities be taken into account. Imposition of a standardized court budget derived from other courts generally provides an inadequate representation of the budgetary needs of a probate court. Probate courts should have the opportunity to present their resource needs as part of the budget preparation process whether that takes place at the general jurisdiction court level, the administrative office of the court level, the county board level, or the state legislature level. In order to do so, it is helpful to be able to present statistical analyses of the number of cases of each type and the staff and judicial time required to dispose of each type of case. [See Standards 2.4.1 and 2.4.2] During the budget process and at other times of the year, probate judges also should take the opportunity to better inform their funding bodies about the nature of probate court work and how it affects individual litigants and the community as a whole. Information should also be presented on how demographic trends are and will affect probate caseloads.[44]

The overall level of financial support required by probate courts is likely to vary from year to year, as may the specific levels of support needed for the various activities of the courts. Probate courts should regularly review and evaluate their funding requirements and requests. Within the funds provided, probate courts should allocate expenditures according to the needs and priorities established by the courts themselves.

In addition to generating requests for financial resources for the upcoming fiscal year, the long-term needs of a probate court should be emphasized in each annual operating budget. This should include projections of court operations and corresponding financial requirements for future years. Procedures should be in place for the review and revision of these projections in light of later events. Special attention should be given to the projection of anticipated major capital expenditures. By developing projections of their future needs, probate courts will be able to better anticipate those needs and build them into their annual budgetary request. In addition, certain budgetary requests, such as major capital expenditures, may require a special request, more extensive justification, and lobbying with the funding source. Such requests may necessitate a long-term budgetary strategy. At the same time, unanticipated events may invalidate prior forecasts. Sufficient flexibility should

---

[44] See Richard Van Duizend, *The Implications of an Aging Population for the State Courts*, *in* FUTURE TRENDS IN STATE COURTS 2008 76 (NCSC, 2008).

be built into a court's budget to allow the court to respond appropriately to unanticipated events. The establishment of an advisory committee on court finance may provide helpful advice on the court's budget and on obtaining the support of the funding agency.

Because of their role as a guardian of the public trust, probate courts must carefully account for their resources. They should institute procedures that will ensure that their fiscal expenditures are adequately monitored.[45] Monthly reviews of expenditures should be conducted and probate courts should be subject to regular audits of its accounts following close of each fiscal year by an independent auditing agency. Use of generally accepted accounting principles and an independent auditing agency ensures the proper use of public funds and enhances public confidence in the probate court. In general, the fees charged in the court should be reasonably related to the time and work expended by the court. (See Principle 1.1.)

STANDARD 2.3.3 PERFORMANCE GOALS AND STRATEGIC PLAN

Probates courts should:

- **A. Adopt quantifiable performance goals.**
- **B. Establish multi-year strategic plans to meet its goals.**
- **C. Continuously measure their progress in meeting those performance goals.**
- **D. Disseminate information regarding their performance and progress.**

COMMENTARY

Probate courts should adopt performance goals to fulfill their responsibilities and to achieve efficiency in their operations and in meeting these Standards. Over the past two decades, strategic planning -- a systematic, interactive process for thinking through and creating an organization's best possible future"[46] -- has become a fundamental management approach in individual courts and judicial systems throughout the United States and around the world. It is particularly helpful when the courts, like probate courts, are working closely with other governmental as well as community partners.

Adopting goals and establishing a plan in themselves are not sufficient. It is essential for probate courts to assess their performance by collecting and analyzing data to determine the extent to which they are achieving their goals, the progress in implementing the changes and strategies identified in the plan, the impact of those changes, and any unintended consequences.[47]

[45] *See, e.g.,* AMERICAN BAR ASSOCIATION COMMITTEE ON STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO COURT ORGANIZATION §1.52 (ABA, 1990) (recommended procedures for fiscal administration "should include uniform systems for payroll accounting and disbursement; billing and presentation and pre-audit of vouchers for purchased equipment and services; receipt, deposit, and account for money paid into court; internal audits and regular, at least monthly, recapitulations of current financial operations").

[46] BRENDA WAGENKNECHT-IVEY, AN APPROACH TO LONG RANGE STRATEGIC PLANNING FOR THE COURTS, 2-19 (Center for Public Policy Studies, 1992).

[47] INTERNATIONAL CONSORTIUM FOR COURT EXCELLENCE, INTERNATIONAL FRAMEWORK FOR COURT EXCELLENCE

There are many sets of performance measurement tools that courts can use, most notably *CourTools,* which provide a balanced approach to assessing performance and progress.[48] By simultaneously establishing a strategic plan and updating it in conjunction with periodic evaluations, probate courts can engage in a continuous cycle of improvement.

Probate courts should share their goals, plan, and reports on progress internally and with external stakeholders including the state administrative office of the courts, funding sources, the bar, and the public.

> Open communication about court performance — be it stellar, good, mediocre, or poor — builds public trust and confidence. This is particularly true if a report includes a court's strategy for improving performance.[49]

STANDARD 2.3.4 CONTINUING PROFESSIONAL EDUCATION

A. Probate courts should work with their state judicial branch education program and national providers of continuing education for judges and court staff to ensure that specialized continuing education programs are available on probate court procedures, improving probate court operations, and issues and developments in probate law.

B. Probate courts should encourage and facilitate participation of their judges, managers, and staff in relevant continuing professional education programs at least annually.

COMMENTARY

Probate law and procedures and probate court operations are distinct from those of other trial court jurisdictional areas. It is also one of the dynamic jurisdictional areas that must adjust to frequent changes in federal tax law and benefit programs, a swelling caseload due to demographic trends, and increased scrutiny of the probate court's responsibility to oversee the trans-generational transfer of property and the well-being and assets of disabled adults. Updates on legal changes and new approaches, as well as professional development on the skills required to operate a probate court effective are needed,[50] but in many states, are not readily available due to limited resources and the relatively small number of judges and staff engaged in probate work.

It is recommended that the staff training program should prepare all probate court employees for all elements of their work.[51] Training also should include components on aging and the causes and effects of dementia, the Americans with Disabilities Act; communication with disabled persons and elders, civil rights laws; employment policies

---

(2009), *available at* http://www.courtexcellence.com/pdf/IFCE-Framework-v12.pdf.

[48] COURTOOLS, *supra,* note 18; for other sets of court measures, see INTERNATIONAL CONSORTIUM FOR COURT EXCELLENCE, *supra,* note 47, at 18-22.

[49] INTERNATIONAL CONSORTIUM FOR COURT EXCELLENCE, *supra,* note 47, at 35.

[50] THIRD NATIONAL GUARDIANSHIP SUMMIT, *supra,* note 6, at Recommendation 2.1, 2012 UTAH L.REV., at 1200.

[51] *See* CORE CURRICULUM, NATIONAL ASSOCIATION FOR COURT MANAGEMENT, http://www.nacmnet.org/CCCG/index.html (July 12, 2012).

including those pertaining to advancement, promotions, and grievances; courtesy and responsiveness to their fellow employees and the public; tolerance for different viewpoints; and ways to eliminate gender, racial, ethnic bias and sexual harassment.

In addition to the continuing education on probate matters offered by state judicial branch education programs and state probate judges associations, educational conferences, courses, and webinars relevant to probate court judges, registrars, clerks, and staff are offered by the National College of Probate Judges, the National Judicial College, the National Association for Court Management, and the Institute for Court Management among others.

Promising Practices

The **State Justice Institute** has for many years provided scholarships to judges, court managers, and court staff to assist them in attending continuing professional education programs -- http://www.sji.gov/grant-esp.php.

2.4 INFORMATION AND TECHNOLOGY

The courts, like all of society, have undergone a technological revolution driven in part by the need to process and store increasing amounts of information, including the records associated with the greater number of cases over which they preside. At the same time, increased attention is being given to the importance of accountability and efficient caseflow within the courts. The standards in this category recognize the importance of the court with probate jurisdiction (hereinafter the court) remaining abreast of and joining in these developments.

STANDARD 2.4.1 MANAGEMENT INFORMATION SYSTEM

A. **Probate courts should use a record system that is easily accessible and understandable for all persons who are entitled to the information within those records, and that effectively protects the confidentiality of sensitive information The records should be comprehensive, indexed, and cross-referenced.**
B. **Probate courts should regularly monitor and evaluate their management information system, and acquire and utilize new technologies and equipment when needed to assist the court in performing its work effectively, efficiently, and economically.**

COMMENTARY

The records and files of probate courts should be accurate, reliable, and accessible to ensure efficient court operation. Access to these records and files is needed by a range of persons, including court personnel as they perform their duties, litigants as they develop and present their cases, and non-litigants as they conduct various research permitted under public records laws. (*But see*, Standard 2.4.3 regarding protection of sensitive personal

information and information entitled to confidentiality under state law.) Probate court information systems should provide for integration of printed and digitized records and be updated regularly to allow complete and easy access to all needed information. The systems should be sufficiently flexible to permit probate courts to use new technology as it becomes available. Probate court information systems should be designed to produce all information and records in a timely manner and understandable formats, and to make them available for both case-processing and management purposes.

At least after the initial filing, probate courts should enable counsel and *pro se* litigants to file pleadings and supporting materials electronically except for those documents such as wills for which the original is required. The e-filing system should be tied directly into the probate court's case management system to permit case tracking and management without additional data entry.[52] Probate courts should ensure that digitized information is managed in a way that provides access to authorized persons, maintains the security of the data from inappropriate release and unauthorized alterations, and permits the use of improved versions of the operating software. Access to probate courts records should be user-friendly both through on-site public access terminals and through a probate court website. Websites should provide information on what case file information is available, what is confidential, how to access it along with general information on the court's jurisdiction, and how to file and respond to pleadings. Probate court staff and volunteers should be trained to explain information access and answer questions about it. Beyond this routine assistance, the Americans with Disabilities Act requires court personnel to provide additional assistance to individuals with a disability seeking access to court records.

Probate courts should periodically determine whether its management information system, including its system of filing and record keeping, is fulfilling the needs of the court. This should include an evaluation of the overall system and the system's individual components. The monitoring system should only be as complex as required to provide necessary and useful information. In addition to routine self-assessment, periodic review by a third party, who is not a member or a current employee of the court, may provide an objective and independent assessment of the court's performance.

The first and most important step in deciding whether to implement a technological innovation is to consider the needs of the probate court and its constituents, including an analysis of court operations and processes that might benefit from the introduction of new technology. The second step should be to assess the usefulness of the technological innovation with a cost-benefit analysis. Where appropriate, probate courts should rely on their own employees for the evaluation. If necessary, outside consultants with technical expertise should be used. If the adoption of the technology is advantageous, a specific plan should be developed to implement the necessary changes. With the introduction of any new technology, probate courts, when necessary, may wish to maintain a dual recordkeeping system, simultaneously recording information via both the old and new systems, but only long enough to establish the reliability of the new system.

---

[52] *See Court Specific Standards*, NCSC, http://www.ncsc.org/Services and Experts/Technology tools/Court specific standards.aspx (July 12, 2012).

STANDARD 2.4.2 COLLECTION OF CASELOAD INFORMATION

Probate courts should collect and review meaningful caseload statistics including the volume, nature, and disposition of proceedings, the time to disposition including a comparison to the time standards adopted for probate courts, the certainty of hearing dates, and the number of guardianships and conservatorships being monitored.

COMMENTARY:

The functioning of probate courts can be enhanced by accumulating basic information regarding their court's caseload and dispositions. These data can be useful to probate courts or the court administrator's office in managing probate court operations and measuring court performance as well as assessing job performance of court appointees and conducting needs assessments. "Excellent courts use a set of key-performance indicators to measure the quality, efficiency, and effectiveness of their services."[53] The measures suggested in the standard reflect the case management related performance measures contained in *CourTools 2-5.*[54] In addition, to helping gauge probate court performance, this information may assist in identifying trends in system use and allow the court to divert and apply its resources to meet these trends. The information may also bolster arguments for increased resources for the court. [See Standard 2.3.3]

While many courts collect and closely monitor caseload data, others do not, often because they lack the resources to do so. Such statistical data will inform the court about the number of proceedings it processes, how judicial and staff resources are allocated. Identification of statistical categories of court proceedings and activities should be consistent throughout the state. When a data collection system involving the probate court is designed, the unique nature of the court and its procedures should be taken into account, thereby ensuring that the data gathered will accurately reflect the operations and goals of the court and definitions adhering as closely as possible to those set forth in *The State Court Guide to Statistical Reporting*.[55]

At a national level, neither the justice system nor the social service system—both of which have long-standing programs for the development and reporting of "case" statistics—possess a meaningful statistical portrait of the volume and composition of probate court cases in the United States. Without such information, questions fundamental to reform and improvement of the state probate systems are difficult to answer.[56]

---

[53] INTERNATIONAL CONSORTIUM FOR COURT EXCELLENCE, *supra,* note 7, at 33.
[54] COURTOOLS, *supra,* note 18.
[55] COURT STATISTICS PROJECT, STATE COURT GUIDE TO STATISTICAL REPORTING 10 (NCSC, 2009) *available at* http://www.courtstatistics.org/~/media/Microsites/Files/CSP/DATA%20PDF/CSP%20StatisticsGuide%20v1%203.ashx.
[56] *See* Brenda K. Uekert & Richard Van Duizend, *Adult Guardianships: A 'Best Guess' National Estimate and the Momentum for Reform*, *in* FUTURE TRENDS IN STATE COURTS 2011 107 (NCSC, 2011); COSCA, *supra,* note 6; B.K. UEKERT, ADULT GUARDIANSHIP COURT DATA AND ISSUES: RESULTS FROM AN ONLINE SURVEY, (NCSC, 2009), *available at* http://eldesandcourts.org/docs/GuardianshipSurveyReport.pdf.

STANDARD 2.4.3 CONFIDENTIALITY OF SENSITIVE INFORMATION

Probate courts should establish procedures to maintain the confidentiality of sensitive personal information and information required to be kept confidential as a matter of law.

COMMENTARY

Probate courts should remain cognizant that sensitive and private matters may be contained both in automated case management systems and in physical casefiles. Probate courts should take special precautions, in accordance with state law, to ensure the confidentiality of Social Security and financial account numbers, medical, mental health, financial, and other personal information.[57]

2.5 ALTERNATIVE DISPUTE RESOLUTION

The use of alternative dispute resolution techniques to resolve disputes in probate matters is often preferable to litigation. Mediation, family group conferencing, and settlement conferences can better accommodate all interests and maintain long-term familial relations than litigation. The standard in this category recognizes the increased use and proposed use of ADR for probate matters.

STANDARD 2.5.1 REFERRAL TO ALTERNATIVE DISPUTE RESOLUTION

Probate courts should refer appropriate cases to appropriate alternative dispute resolution services including mediation, family group conferencing, settlement conferences and arbitration.

COMMENTARY

In many situations, mediation may be a highly desirable method of dispute resolution. In addition to providing relief from crowded court dockets and dispensing justice in a timely manner, participants may find the opportunity to discuss all issues fully and to craft their own solutions to be particularly satisfying. In addition, the cost of mediation may be much lower than trial, particularly when volunteer mediators are used.[58] Thus, at a minimum, probate judges should strongly encourage the parties and their families to participate in mediation, family group conferencing, or other alternative dispute resolution (ADR) processes, and consider ordering participation in appropriate cases. A number of states currently offer or require mediation in guardianship, conservatorship, and/or contested

---

[57] *See* MARTHA W. STEKETEE & ALAN CARLSON, DEVELOPING CCJ/COSCA GUIDELINES FOR PUBLIC ACCESS TO COURT RECORDS (NCSC, 2002).

[58] *See* S.J. BUTTERWICK, P.A. HOMMEL, & I. KEILITZ, EVALUATING MEDIATION AS A MEANS OF RESOLVING ADULT GUARDIANSHIP CASES, (The Center for Social Gerontology, 2001); S.N. Gary, *Mediating Probate Disputes* 1 GP/SOLO LAW TRENDS AND NEWS, No. 3 (May 2005), *available at* http://www.americanbar.org/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/0506_estate_probate.html.

will cases (*e.g.,* CA, CT, DC, OH, OR, PA, SD, TX, WA). Others, such as AZ offer settlement conferences with trained volunteer attorneys. Family group conferencing, an ADR technique widely used in child protection cases,[59] may be useful as well in cases in which the welfare and protection of an older person or disabled person is at issue.[60]

The court should be open to ADR in all situations, but especially when the parties have requested outside help in settling their dispute. It may be beneficial for resolving disputes such as will contests and contested creditor claims. ADR may also often work well for disputes involving individual treatment or habilitation plans for respondents in guardianship or civil commitment proceedings and may be appropriate to determine the extent of the guardian's or conservator's powers in a limited guardianship or conservatorship or to determine which family member(s) will be given fiduciary responsibility.

ADR, however, should not be used for the threshold determination of incapacity in guardianship/conservatorship proceedings. Similarly, it may not be a viable alternative when one of the parties is at a significant disadvantage. Examples include disputes involving persons with severe depression; who are on a medication that affects their reasoning; who have difficulty asserting themselves; who have been physically or emotionally abused by another party; or who perceive themselves as significantly less powerful than the opposing party. In any of these instances as well as in proceedings related to guardianships/conservatorships, the disadvantaged party should be represented and probate court judges should exercise special care before accepting any agreement reached.[61]

In addition, probate courts should ensure that the ADR professionals and volunteers in court-connected alternative dispute resolution have received training on the nature of and key issues in probate matters. This training should include methods for effectively communicating with elders and persons with mental health and developmental disabilities.

[59] *See* S.M. Chandler & M. Giovannucci, *Transforming Traditional Child Welfare Policy and Practice*, 42 FAM. CT. REV. 216 (2004).
[60] *See e.g.,* JULIA HONDS, FAMILY GROUP CONFERENCING AS A MEANS OF DECISION-MAKING IN MATTERS OF ADULT GUARDIANSHIP, (University of Wellington, 2006); L. MIRSKY, FAMILY GROUP CONFERENCING WORLDWIDE (International Institute for Restorative Practices, 2003).
[61] *See* Mary F.. Radford, *Is the Use of Mediation Appropriate in Adult Guardianship Cases?* 31 STETSON L. REV. 611 (2002).

SECTION 3: PROBATE PRACTICES AND PROCEEDINGS

Unlike the standards in the first two sections, the standards in this section focus on the practices and proceedings used by probate courts to resolve the issues placed before them. Because many of the issues faced by probate courts are relatively unique, specialized practices and proceedings have evolved. This section identifies and discusses these practices and proceedings.

The standards related to probate practices and proceedings are divided into four categories. COMMON PRACTICES AND PROCEEDINGS addresses procedural aspects that most probate matters have in common. The last three categories, DECEDENTS' ESTATES, ADULT GUARDIANSHIPS AND CONSERVATORSHIPS, and GUARDIANSHIPS OF MINORS, are areas of the law that almost all courts with probate jurisdiction must address. Each poses its own special issues.[62]

The standards in this category recognize the importance of probate courts adopting procedures that respond to the special needs of the parties appearing before them and the unique nature of the issues that probate courts are asked to resolve.

3.1 COMMON PRACTICES AND PROCEEDINGS

STANDARD 3.1.1 NOTICE

A. Probate courts should ensure that timely and reasonable notice is given to all persons interested in court proceedings. The elements of notice (content, delivery, timing, and recipients) should be tailored to the situation.

B. The initial notice should be non-digital and formally served. If permitted by statute or court rule, subsequent notices and pleadings may be served through electronic means to all parties, counsel, and interested persons who provide their e-mail addresses, and to the probate court if it has e-filing capabilities.

<u>COMMENTARY</u>

Notice and due process are important concepts in any area of the law, but particularly in probate. Persons whose interests may be affected may be unaware that an action has been filed. Although notice requirements vary from state to state, proper notice must be given, and certain levels of notice may even be constitutionally required.[63] When there is a failure to provide proper notice, any orders previously made can be vacated. Due process standards do not depend on whether an action is characterized as one *in rem* or *in personam*.[64]

[62] Although not specifically listed, the Standards in this section also apply to the other types of cases within probate court jurisdiction including, but not limited to, testamentary and *inter vivos* trust cases.
[63] Tulsa Prof'l Collection Servs. v. Pope, 485 U.S. 478, 485 (1988) (notice by publication insufficient to bar reasonably ascertainable creditors of an estate).
[64] Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950).

The need for notice varies in different contexts. Many states allow informal probate of wills without notice, but such probate can be superseded by a formal proceeding. To have *res judicata* effect, a decree in a formal proceeding must be preceded by notice. Where notice of a hearing is required, it should indicate the time, place, and purpose of the hearing in a manner likely to be understood by the recipient. Notice should be given in a language in addition to English if appropriate to the circumstances. It should be served a reasonable time before the hearing, by mail or personal delivery where possible. Notice by publication is acceptable only as to persons whose address or identity cannot be ascertained with reasonable diligence.[65]

The "interested persons" to whom notice should be given in the context of decedents' estates includes persons with a potential property interest in the estate. When a will is offered for probate, this includes trustees, charities, and/or the state Attorney General in some circumstances, as well as the testator's heirs who would take if no will existed. If the testator executed several wills, devisees under earlier wills filed with the court that are adversely affected by the later will also have an interest because they may take if the later will is found to be invalid. However, it is not reasonable to require notice to the devisees of every will ever executed by the testator, particularly those that have not been probated or offered for probate. But if notice, even though not required by statute, is not given to known devisees under the decedent's last prior will, the probate order may not be *res judicata* as to such devisees.

When interested persons are under a legal disability, they may be represented by another. For example, virtual representation may be applicable. [See Standard 3.1.4] Similarly, provided no conflict of interest exists, a trustee of a trust that is a beneficiary under a will may represent trust beneficiaries in connection with a personal representative's accounting. However, it may be appropriate to give notice in such cases also to the persons represented by others (*e.g.,* the trust beneficiaries) so they will be kept informed and be assured that their interests are being considered.

Notice is not limited to hearings before the court. In some instances, lack of court supervision of a decedent's estate is acceptable only where the affected persons receive notice that the court is not going to supervise the matter and that the affected persons will be responsible for protecting their own interests. [See Standard 3.2.1] For example, some states allow a will to be probated without a judicial hearing, but require the personal representative to notify the heirs and devisees promptly. The notice must inform them that the estate is being administered without court supervision but that they can petition the court on any matter relating to the estate.[66] Similarly, some states allow an estate to be closed without a court proceeding by operation of law or on the basis of a closing statement executed by the personal representative, which must be sent to the court and to distributees advising them that administration of the estate has been completed.[67]

[65] *See id.* at 317.
[66] *See, e.g.,* CAL. PROB. CODE § 10451 (West 1991); UNIF. PROB. CODE § 3-705 (2008).
[67] *See* DC STAT §20-1301(c) (2012); UNIF. PROB. CODE § 3-1003 (2008) ;

The notice requirements in proceedings for guardianship and conservatorship raise some special problems. In such proceedings, "interested persons" is a flexible concept and its meaning may change depending on the circumstances. [See Standards 3.3.7 and 3.5.2]

To ensure that all parties and interested persons have knowledge of a probate proceeding, the initial notice should be a formal written paper document served in the traditional manner. However, to expedite the process and reduce costs, subsequent notices and pleadings may be served electronically.[68] Parties and interested persons who provide their e-mail address should be deemed to have consented to electronic service. A number of states currently permit electronic notice, at least in some instances [*e.g.,* CA, OR, and PA]. Any process for providing notice electronically should require delivery of an electronic receipt to document that notice has been served.

STANDARD 3.1.2 FIDUCIARIES

A. Probate courts should appoint as fiduciaries only those persons who are:

(1) Competent to serve.

(2) Aware of and understand the duties of the office.

(3) Capable of performing effectively. A fiduciary nominated by a decedent should be appointed by the court absent disqualifying circumstances.

B. When issuing orders appointing or directing a fiduciary, probate courts should make those orders as clear and understandable as possible and should specify the fiduciary's duties and powers, the limits on those duties and powers, and the duration of the appointment.

C. Probate courts should require a surety bond or other asset protection arrangement of a fiduciary when (1) an interested person makes a meritorious demand, (2) there is an express requirement for a bond in the will or trust, or (3) the court determines that a bond is necessary. The court should ensure that the amount is reasonably related to the otherwise unprotected assets of the estate.

D. Probate courts are encouraged to develop and implement programs for the orientation and education of unrepresented fiduciaries, to enable them to understand their responsibilities, how to perform them effectively, and how to access resources in the community.

COMMENTARY

Probate courts should appoint qualified fiduciaries. A *fiduciary* is "one who must exercise a high standard of care in managing another's money or property."[69] The term generally includes personal representatives, guardians, conservators, and trustees. *Persons*

[68] Original documents such as wills should be filed with the probate court.
[69] BLACK'S LAW DICTIONARY 625 (9th ed. 2009).

as it is used here includes natural persons, corporations, and other entities authorized to serve as a fiduciary.

Because trust and confidence are needed between the fiduciary and the beneficiaries, probate courts should examine the credentials of potential fiduciaries with care. Experience, honesty, the absence of a conflict of interest, reputation and ability, and any prior service as a fiduciary are some of the factors that probate courts may consider in reviewing a person's ability to perform the duties of the office. Probate courts should determine if anything would disqualify the person being considered (*e.g.,* statutory disqualifications) or make the appointment unsuitable.[70] [See Standard 3.3.12.]

Issuing an order that is clear and understandable to a non-lawyer fiduciary is essential for ensuring that the terms of that order are properly carried out. Specifying the responsibilities and authority of a fiduciary provides a blueprint, not only for the fiduciary, but also for beneficiaries, their families, and third parties engaged in financial and other transactions with the estate or trust.

Another means of protecting the estate is requiring fiduciaries to post a surety bond in an amount not less than the estimated value of the personal property of the estate and the income expected from the real and personal property during the next year, less any amounts that can be otherwise protected.[71] [See Standards 3.3.15 and 3.4.8] When a testator or settlor of a trust has provided for appointment without bond, his or her wishes should be respected unless an interested person is able to show a necessity for imposing the bond. In such instances, there may be alternatives that protect assets without adding to the cost of administration of estates such as restricted bank accounts, safekeeping agreements, insurance,[72] and collateral for performance (*e.g.,* a mortgage of land).

Some states have enacted mandatory statutory preference lists, thereby limiting the discretion of probate courts in selecting the most qualified person. Other states have a statutory priority list but allow probate courts to disregard the list if in the best interest of the estate or respondent. If a statutory preference is granted to certain persons, probate courts should have authority to deny that appointment if the person is unsuitable under the evidence presented. In all situations, the court should limit appointments as required by statute, assuming the statute does not require unconstitutional distinctions.[73]

Inherent in the process of appointment is the probate court's responsibility to ensure that the fiduciary understands his or her duties under controlling state law. [See Standard 3.3.14] Probate courts should develop or use available materials and programs to assure that

---

[70] Currently, 13 states require that guardians undergo independent criminal background checks before being appointed. U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-11-878, INCAPACITATED ADULTS: OVERSIGHT OF FEDERAL FIDUCIARIES AND COURT-APPOINTED GUARDIANS NEEDS IMPROVEMENT, 7 (July 2011), http://www.gao.gov/new.items/d11678.pdf; *See, e.g.,* TEX. PROB. CODE ANN. § 78 (Vernon 1995).

[71] *See* U.P.C. §3-604; regarding bonds for conservators *see* THIRD NATIONAL GUARDIANSHIP SUMMIT, *supra,* note 6, at Standard 4.9, 2012 UTAH L.REV., at 1195; M.J. Quinn & H. Krooks, *The Relationship Between the Guardian and the Court*, 2012 UTAH L. REV. 1611 (2013).

[72] *See e.g.,* WASH. CT. GEN. R. 23(d)(4) &(5).

[73] *See* Reed v. Reed, 404 U.S. 71, 74 (1971) (statute preferring males to females in selecting administrators

those appointed know what they must do to properly discharge their responsibilities. Several states offer an orientation or instructional materials to fiduciaries such as personal representatives and executors as well as to guardians and conservators [*e.g.,* AZ, DC, and VA].

PROMISING PRACTICES

District of Columbia: *AFTER DEATH A GUIDE TO PROBATE IN THE DISTRICT OF COLUMBIA*[74]

Tarrant County, TX Probate Court No. 2 requires all decedents' administrators, guardians, and conservators to attend a mandatory training immediately after appointment conducted by the staff member who will be reviewing their documents and to sign an acknowledgment of understanding following the training.

STANDARD 3.1.3 REPRESENTATION BY A PERSON HAVING SUBSTANTIALLY IDENTICAL INTEREST

Probate courts should allow representation by a person having substantially identical interest, where appropriate.

COMMENTARY

Often, in probate proceedings, interested persons are minors or incapacitated adults, unborn, unascertained, or persons whose addresses are unknown. In order for probate courts to have jurisdiction to enter a fully binding order, their interests must be represented by others – for example, "a trust providing for distribution to the settlor's children as a class with an adult child being able to represent the interests of children who are either minors or unborn."[75] Both the Uniform Probate Code and the Uniform Trust Code embrace this concept of virtual representation[76] as well as in some state statutes,[77] but it has also been recognized without explicit statutory support.[78]

Before allowing someone to represent others in this manner, probate courts should conduct a careful examination to ensure that the interests are truly identical, and when the trustee of a testamentary trust and the personal representative are the same person, a potential conflict of interest exists, and the beneficiaries, if incapacitated, should be represented by an independent person. The question of virtual representation may also arise in connection when an earlier judgment is challenged by someone who was not formally

---

[74] PROBATE DIV. OF THE SUPERIOR COURT OF D.C., AFTER DEATH – A GUIDE TO PROBATE IN THE DISTRICT OF COLUMBIA, (Jan. 2010), http://www.dccourts.gov/internet/documents/AfterDeathAGuideToProbateInTheDistrictOfColumbia.pdf.

[75] UNIF. TR. CODE comment to §304 (2010).

[76] UNIF. TR. CODE §304 (2010); UNIF. PROB. CODE §1-403(2)(iii) (2008).

[77] *See, e.g.,* NY SURR. CT. PROC. ACT § 315 (McKinney 1981); UNIF. PROB. CODE § 1-403 (2008).

[78] *See* WILLIAM M. MCGOVERN *ET AL.*, *WILLS, TRUSTS AND ESTATES* 703 (1988).

represented. In the latter situation, the probate court may decide that the challenge is barred because the challenger was virtually represented by another at the time of the prior decree.

STANDARD 3.1.4 ATTORNEYS' AND FIDUCIARIES' COMPENSATION

A. Attorneys and fiduciaries should receive reasonable compensation for the services performed.

B. In order to enhance consistency in compensation and reduce the burden on probate courts of determining compensation in each case, probate courts or the state Administrative Office of the Courts should consider establishing fee guidelines or schedules.

C. When a dispute arises that cannot be settled by the parties directly or by means of alternative dispute resolution, probate courts should determine the reasonableness of fees.

COMMENTARY

Attorneys and fiduciaries are entitled to receive fair compensation for the time, effort and expertise they are providing.[79] However, defining what is reasonable compensations for the services rendered can be a complex, thorny determination. One way of limiting the need for probate courts to engage in the review of fees on a case-by-case basis is through the use of fee schedules or guidelines set either by statute or court rule. Ohio, for example, has established a fee schedule by statute.[80] Such schedules help to ensure fairness and consistency. In establishing a fee schedule or guideline, it is essential that the fees set are reasonable and reflect or relate to customary time involvement so as not to discourage well qualified individuals from serving as fiduciaries or counsel in probate matters.

When there is no guideline, in reviewing a request for a fee in excess of the scheduled amount due to the provision of extraordinary services, or when a dispute arises that requires court intervention, the factors that a probate court may consider include:

- The usual and customary fees charged within that community
- Responsibilities and risks (including exposure to liability) associated with the services provided
- The size of the estate or the character of the services required including the complexity of the matters involved
- The amount of time required to perform the services provided
- The skill and expertise required to perform the services
- The exclusivity of the service provided
- The experience, reputation and ability of the person providing the services

[79] UNIF. PROB. CODE 3-179 (2008); UNIF. TR. CODE §708 (2010).
[80] Probate Court of Montgomery Cty., Ohio, *Computation of Fiduciary Fees in Estate Cases*, http://www.mcohio.org/government/probate/docs/estate/APPENDIX D_Computation_of_Fiduciary_Fees.pdf (Jun. 25, 2012).

- The benefit of the services provided.[81].

Time expended should not be the exclusive criterion for determining fees. Probate courts should consider approving fees in excess of time expended where the fee is justified by the responsibility undertaken, the results achieved, the difficulty of the task, and the size of the matter. Conversely, a mere record of time expended should not warrant an award of fees in excess of the worth of the services performed.

In many cases, it may be helpful for probate courts to require a fiduciary, at the time of appointment or first appearance in a matter, to disclose the basis for fees (e.g., a rate schedule). Probate courts may also direct that a fiduciary submit a projection of the annual fees within 90 days of appointment, disclose changes in the fee schedule and estimate, seek authorization for fee-generating actions not included in the appointment order, and provide a detailed explanation for any fees claimed.[82]

The services should be rendered in the most efficient and cost-effective manner feasible. For example, the proper delegation of work to paralegals, acting under the supervision of an attorney, reduces the cost of services, and a requested allowance for such services should be approved.[83] Probate courts should not penalize firms that reduce expenses by prudently employing paralegals or using other appropriate methods by disallowing these expenses.

In most estates, the fiduciary will retain an attorney to perform necessary legal services. The dual appointment of one person as both fiduciary and attorney may result in significant savings for the estate and should not be discouraged by denial of compensation, though the fees requested as fiduciary and as attorney should be differentiated and must still be reasonable. In most estates, the fiduciary will retain an attorney to perform necessary legal services. The dual appointment of one person as both fiduciary and attorney may result in significant savings for the estate and should not be discouraged by denial of compensation, though the fees requested as fiduciary and as attorney should be differentiated and must still be reasonable. When a person acts both as fiduciary and attorney, probate courts should be alert for the possibility that there may be a conflict of interest and that having the fiduciary serve in a dual capacity will best meet the needs of the person, trust, or estate.[84]

When requesting fees in excess of a schedule or guideline, the attorney or fiduciary has the burden of proving the reasonableness of the fees requested. Probate courts may consider factors that made the provision of services more complicated, including the threat or initiation of litigation; the operation of a business; or extensive reporting and monitoring requirements. Improper actions by a fiduciary or a lawyer may justify a reduction or denial of compensation.[85]

---

[81] *See generally* MODEL CODE OF PROF'L CONDUCT R. 1.5(a) (2007).

[82] THIRD NATIONAL GUARDIANSHIP SUMMIT, *supra,* note 6, at Standard 3.1, 2012 UTAH L.Rev., at 1193-1194.

[83] *See, e.g.,* CAL. PROB. CODE § 10811(b) (West 1993).

[84] *See* NATIONAL GUARDIANSHIP ASSOCIATION, STANDARDS OF PRACTICE, Standard 16(2)(J). www.guardianship.org/guardianship_standards.htm.

[85] *See* MCGOVERN, *supra,* note 78, at 626-27.

Generally, probate courts are not involved in reviewing fees in unsupervised estates unless the matter is appropriately brought before the court. In extreme cases, however, even though the administration is unsupervised, a probate court may review compensation on its own motion where the personal representative is the drafting attorney or the will contains an unusually generous fee provision. Similarly, probate courts may review fees if the court observes a pattern of fee abuse.

In supervised administration of estates, unless all affected parties consent, attorneys and fiduciaries seeking payment of fees from an estate should submit to the probate court sufficient evidence to allow it to make a determination concerning compensation. [See Standard 3.2.1 for a discussion of the distinction between these two types of estate administration.]

Fee disputes can be particularly acrimonious and can involve litigation costs eventually borne by the estate or the parties far in excess of the amount in controversy. Probate courts should identify, encourage and provide opportunities for early settlement or disposition of these disputes through settlement conferences and alternative dispute resolution procedures.

STANDARD 3.1.5 ACCOUNTINGS

A. As required, probate courts should direct fiduciaries to provide detailed accountings that are complete, accurate and understandable.

B. Probate courts should have the ability to review fiduciary accountings as required.

COMMENTARY

Unless specified by statute, the format for accountings should be established by statute, the probate court or the state Administrative Office of the Courts. An accounting should include all assets, the distribution of those assets, the payments of debts and taxes, and all transactions by the fiduciary during the administration of the estate. Categorical reporting of expenditures should not be permitted in order to lessen opportunities for theft or fraud. Receipts for all expenditures and documentation of all revenue should be provided upon request. While requiring detailed information, the schedules and text of the accountings (including the formats used) should be readily accessible and understandable to all interested persons, particularly those persons with limited experience with and knowledge of estates and trusts. Although the court reviews many accountings, others are prepared for beneficiary use and review in unsupervised estates and trusts. Several jurisdictions have developed forms for fiduciaries to use in providing accountings including DC, FL, ID, OH, and PA.[86]

---

[86] See e.g., D.C. Courts, *Search Court Forms*, http://www.dccourts.gov/internet/formlocator.jsf (Jun. 25, 2012); Fla. Courts, *E-Filling Forms*, http://www.17th.flcourts.org/index.php/component/content/article/34-17th-fl-courts/166-e-filling-forms (Jun. 25, 2012); The Philadelphia. Courts, Forms Center, http://www.courts.phila.gov/forms (Jun. 25, 2012). *See also* Standard 3.3.16.

Unless waived, the fiduciary should distribute copies of status reports and accountings to all persons interested in the estate. The accounting entity, not the probate court, should have the responsibility for distributing the accountings to interested persons, and should incur the cost as an expense of administration. Probate court staff should review accountings individually or through an automated review process if the accounting is submitted electronically. [See Standard 3.3.17]

If all interested persons agree, the court may waive a review of accountings. Many estates have expenditures that are relatively straightforward, and court review of the accountings may unnecessarily deplete the estate's resources. A waiver of an accounting should be executed by all potential distributees and beneficiaries or their representatives.

STANDARD 3.1.6 SEALING COURT RECORDS

Probate courts should not order probate records, or any parts thereof, to be sealed without a full explanation of the reasons for doing so.

COMMENTARY

Public access to governmental records has been increasingly required as a matter of policy to promote transparency and accountability.[87] The general trend in the courts has been to allow public access to court records except under specifically delineated circumstances, and, accordingly, to restrict the sealing of court records.[88]

Probate courts should not seal a record without providing a reason for their action, unless the records associated with these proceedings are sealed routinely pursuant to statute or court rule.[89] For example, confidentiality and restricted access to records may ordinarily attach to adoption records, records associated with guardianship or conservatorship proceedings, and other records containing sensitive information. Except for these routine sealings, when the court seals the record in a given case without providing in its order a reason for the ruling, public confidence in and access to the court may be impaired. When a probate court concludes that sealing a record is appropriate, it should consider whether to limit the length of time that access to the record is restricted, where this is permitted by state law.

STANDARD 3.1.7 SETTLEMENT AGREEMENTS

When required, probate courts should carefully review settlement agreements before authorizing a personal representative or conservator to bind the estate.

In some jurisdictions, state law or practice requires a personal representative or

[87] STEKETEE & CARLSON , *supra,* note 57.
[88] *See, e.g.,* In re Estate of Hearst, 67 Cal.App.3d 777, 782-83 (1977.
[89] *See e.g.,* NBC Subsidiary v. Superior Court, 20 Cal. 4th 1178, 980 P.2d 337, 86 Cal. Rptr. 2d 778 (1999) that holds that before a trial court seals a record it must hold a hearing and find expressly that there exists "an overriding interest supporting . . .sealing; . . .a substantial probability that the interest will be prejudiced absent closure or sealing; . . . [that] the proposed . . . sealing is narrowly tailored to serve the overriding interest; and . . . [that] there is no less restrictive means of achieving the overriding interest."

conservator to obtain court authority to enter into an agreement to settle a lawsuit or claim. For example, probate courts may be called upon to allocate the proceeds of the settlement between pre-death pain and suffering and wrongful death. In reviewing such settlements, probate courts should be alert to potential conflicts of interest, premature settlements, improper attorneys' fee arrangements, or inappropriate allocation of the award between injured parties.[90] All interested parties should be provided notice and represented in the settlement discussions. The allocation of the settlement proceeds should be closely reviewed, and, if necessary, the court should appoint a guardian *ad litem* to represent minors or incapacitated parties.[91] [*See* Standard 3.1.3]

3.2 DECEDENT'S ESTATES

The standards in this category attempt to facilitate the ability of probate courts to process decedent's estates using simple, inexpensive methods. Much property already transfers without court supervision by mechanisms such as joint tenancy and funded living trusts. Without simplifying and reducing the expense of estate administration, the current trend to avoid probate to transfer property at death will accelerate. These standards generally apply equally whether the decedent died testate or intestate, although special recommendations for an intestate decedent are included.

STANDARD 3.2.1 UNSUPERVISED ADMINISTRATION

Absent a need for probate court supervision, the interested persons should be free to administer an estate without court intervention.

COMMENTARY

State law varies with respect to the requirements for continued court supervision of estate administration after a fiduciary has been appointed. For example, some states do not permit independent administration of an estate if the will prohibits it,[92] or if "it would not be in the best interest of the estate to do so."[93] Other states allow it if the will so directs, or if the distributees agree and the court, in its discretion, allows it.[94] The Uniform Probate Code permits both informal administration of estates and succession without administration.[95] Unless mandated by state law or the court finds there is good cause (*e.g.,* a significant conflict within the family or a delayed opening of the estate), probate courts should not require supervised estate administration. Even if the will calls for supervision of estate administration, probate courts should waive this provision if "circumstances bearing on the

[90] *See* C. Jean Stewart, *Court Approval of the Settlement of Claims of Persons Under Disability,* 35 COLORADO LAWYER no. 8,97 (Aug. 2006).
[91] UNIF. PROB. CODE §1-403 (2008).
[92] *See, e.g.,* CAL. PROB. CODE § 10404 (West 1991).
[93] TEX. PROB. CODE ANN. § 145 (Vernon 1995). *See also* CAL. PROB. CODE § 10452 (West 1991) (no independent administration where objector shows good cause).
[94] *See, e.g.,* TEX. PROB. CODE ANN. § 145 (Vernon 1995).
[95] UNIF. PROB. CODE §§301-322 (2008).

need for supervised administration have changed since the execution of the will."[96]

Unsupervised or independent administration means different things in different states. In some states an unsupervised estate may be finally distributed without any probate court review of an accounting,[97] whereas in other states, court review of the accounts is required even in an independent administration.[98] This standard adopts the general view that court approval of every step in estate administration is not cost-effective and should be abandoned.

Whenever administration of an estate is unsupervised, all interested persons should be advised that the probate court is available to hear and resolve complaints about the administration. Court intervention should be available at the request of any interested person, including the fiduciary. Probate courts, on their own motion, may intervene when the circumstances warrant. The need for probate court determination of a particular issue, however, does not require court supervision of the rest of the administration.

This standard differs from Standard 3.3.17, which calls for the court monitoring of conservatorships. Conservatorships involve persons who are unable to protect their own interests, whereas the beneficiaries of estates are often competent adults, or are represented by competent adults, and thus are able to assert their own interests.

STANDARD 3.2.2 DETERMINATION OF HEIRSHIP

Probate courts should determine heirship only after proper notice has been given to all potential heirs and reliable evidence has been presented.

COMMENTARY

Although probate courts are most frequently called upon to determine heirship when the decedent died intestate, the issue can arise when there is a will as well. Probate courts should require the personal representative or applicant to provide personal notice to all heirs, including purported heirs and/or persons who may claim or hold a right of inheritance, whose addresses can be found after a good faith effort which may include electronic searches..[99] [See Standard 3.1.1] Notice by publication may be required for unlocated and unascertained beneficiaries as well as the appointment of a guardian *ad litem* to represent them. In determining heirship in an intestate estate, probate courts should require reliable evidence, including testimony by persons who do not inherit and documentary evidence, because the testimony of interested persons may be suspect.

STANDARD 3.2.3 TIMELY ADMINISTRATION

All estates should be administered in a timely fashion and closed at the earliest possible

---

[96] UNIF. PROB. CODE § 3-502 (amended 2008).
[97] *See, e.g.,* UNIF. PROB. CODE § 3-704 (2008).
[98] *See, e.g.,* CAL. PROB. CODE § 10501 (West 1992).
[99] *See* UNIF. PROB. CODE §3-705 (2008).

opportunity.

COMMENTARY

The *Model Time Standards for State Trial Courts* recommend that administration of 75 percent of all estates should be completed within 360 days, 90 percent within 540 days, and 98 percent within 720 days.[100] Twelve jurisdictions have time standards governing administration of estates, though they vary considerably.[101] In order to facilitate the timely administration of estates, probate courts should establish rules setting forth a schedule as to when certain filings and actions associated with supervised estates should occur. This schedule may set different time frames based on the size and complexity of an estate or whether or not the matter is contested. Probate courts should ensure that the filings are completed on a timely basis or require those responsible for the filings to show cause for their failure to be so filed. The court may consider providing 30 calendar days advance notice of all filing deadlines to encourage prompt filings. Failure without cause to comply with the filing rules should result in sanction, removal, or denial of fees.[102]

Although no set formula exists to determine when an estate should be closed, probate courts should establish a system to monitor the progress of estates in probate. In supervised estates, probate courts should require brief periodic reports on the progress that the personal representative has made, and should take action when there has been little or no progress. Once the final report is filed, probate courts should review it promptly and move to close the estate as soon as possible.

The court should be aware of tax responsibilities that may require the continued existence of an estate. For example, the forms for filing the decedent's final income tax return will not be available to the personal representative until early in the calendar year following death. A federal estate tax return is not due until nine months after the date of death, and another year may pass before the return is approved or even selected for audit. Nevertheless, the personal representative may still make interim partial distributions to facilitate the processing of the estate.

Unsupervised administration of an estate generally permits closing without a formal accounting to the probate court, but, a probate court should ensure that even unsupervised estates are closed in a timely manner in accordance with state law (*e.g.,* by the filing of an affidavit or a release and discharge).[103]

STANDARD 3.2.4 SMALL ESTATES

Probate courts should encourage the simplified administration of small estates.

[100] VAN DUIZEND, STEELMAN & SUSKIN, *supra,* note 23, at 31 (NCSC, 2011).
[101] *Id.,* at 31.
[102] *See, e.g.,* CAL. PROB. CODE §§ 12200-12205 (West 1991).
[103] *See, e.g.,* NY. SURR. CT. PROC. ACT § 2203 (McKinney 1997); UNIF. PROB. CODE § 3-1003 (2008).

COMMENTARY

Many states have provisions for the expedited processing of "small estates."[104] Generally, one of two approaches are used – either a summary administrative procedure in which court approval is require before the personal representative can gather and distribute assets, or an affidavit procedure through which an appropriate person can use an affidavit to directly collect and distribute the decedent's property. States are almost evenly divided on which approach they use.[105]

These approaches seek to eliminate or minimize the need for full probate proceedings when the size of the estate and type of assets fit within statutory guidelines. It is important that processes be available for persons expeditiously to collect the assets of small estates and to enable them to represent themselves. Such summary procedures may also include distributions of family allowances and exempt property to surviving spouses or unmarried minors, distribution to creditors, and distribution to heirs or devisees of decedent by affidavit. Sometimes cases are opened where, upon further examination of the matter before the court, a small estate proceeding might have been more appropriate for the disposition of the matter (*e.g.,* by the filing of an affidavit to close out the estate or by using a summary proceeding). In these cases, such alternative proceedings should remain available and be considered in lieu of more formal proceedings.

---

[104]The definition of a small estate is generally established as a matter of state law. *See, e.g.,* CAL. PROB. CODE §13100 (West 1996) (estates may undergo summary administration where the gross value of the decedents' real and personal property in California, subject to certain statutory exceptions, does not exceed $150,000); COLO. REV. STAT. § 15-12-1201 (2011) (no more than $60,000); MICH. COMP. LAWS ANN. 700.3982 (West 2000) (Michigan has a small estate statute that deals with estates of $15,000 or less and also applies to estates where the size of the estate is not more than the sum equal to the statutory exemptions and allowances for a surviving spouse and minor children, if any).

[105] "A total of 27 states have an Affidavit Procedure allowing a person to directly deliver an affidavit to the holder of the property to collect that property, without a court order. These 27 states can be further divided, as follows: (1) Eight of these states ... allow a person to collect those assets and never come to court, i.e., they do not need to file for a summary proceeding to close the estate (IL, CA, LA, MS, SD., WA, WI, DE) (note, however, that California still requires a "probate referee" to perform an inventory and appraisal of assets); (2) The other 19 affidavit states allow collection by affidavit but still require summary court procedure to close the estate. This means that a person could create his own affidavit and collect property without court approval and later close the estate in court. (…AK, AZ, CO, GA, HI, ID, KS, KY, ME, MN, MT, NE, NV, ND., NY., N.M., PA, UT, VA). . . . The other 23 states and the District of Columbia require a person to go to court for Summary Administration before receiving the assets in question . . . .[AL, AR, CT, FL, IN, IA, MA, MD, MI, MO, NH., NJ., NC., OH, OK, OR, RI., SC., TN, TX, VT, WV, WY & DC]." SMALL ESTATE PROCEDURES IN 50 STATES & RECOMMENDED MISSOURI REVISIONS*,* paper prepared by JOSEPH N. BLUMBERG, University of Missouri College of Law (2012).

3.3 PROCEEDINGS REGARDING GUARDIANSHIP AND CONSERVATORSHIP FOR ADULTS

The standards in this chapter address guardianships and conservatorships of incapacitated adults. They are intended to serve as a basis for review and amendment, where necessary, of state law and rules. Although the terminology varies considerably across the country, this report will use the definitions of ***conservator*** and ***guardian*** found in the Uniform Probate Code:

> A ***conservator*** means a person appointed by a probate court to manage the estate of the respondent on a temporary and permanent basis.[106]
>
> A ***guardian*** is a court-appointed person responsible for the care, custody, and control of the respondent on a temporary and permanent basis
>
> A ***respondent*** is the subject of a guardianship/conservatorship proceeding.[107]

The inclusion of guardianship and conservatorship into a single section is not meant to imply that guardianships and conservatorships should be filed together. Many times a joint petition seeking both a guardianship and a conservatorship and combining both matters into a single proceeding can bring about an effective and efficient result. Indeed, it may not be necessary to file separate petitions for the two. Furthermore, it may be more efficient and effective to appoint the same person to serve as both guardian and conservator. Regardless, guardianship and conservatorship are separate matters that must be considered individually.[108]

The standards in this category recognize the important liberty interests at stake in a guardianship/conservatorship proceeding and the due process protections appropriately afforded a respondent in conjunction with such a proceeding. These standards also recognize, however, that the great majority of these cases are not contested and that they are initiated by people of goodwill who are in good faith seeking to assist and protect the respondent. Indeed, the initiating petition may have been filed at the behest of or even by the respondent. Furthermore, in the great majority of guardianship/conservatorship proceedings, the outcome serves the best interests of the respondent and an appointed guardian/conservator acts in the respondent's best interests.[109] Nevertheless, the procedural protections described here and generally in place in the various states are needed to protect the significant liberty interests at stake in these proceedings, and attempt to minimize, to the greatest extent possible, the potential for error and to maximize the completeness and accuracy of the information provided to probate courts.

Because it is the respondent's property rather than the respondent's personal liberty

---

[106] UNIF. PROB. CODE § 5-102(1) (2008). UGPPA §102(2) (1997).

[107] The term respondent is used rather than ward or interdict, protected person, etc., because it is not indicative of the final outcome of the proceeding.

[108] For example, §409(d) of the Uniform Guardianship and Protective Proceedings Act (UGPPA) (1997) specifies that appointment of a conservator is not a determination of incapacity of the protected person." [*emphasis added*]

[109] *But see,* Winsor C. Schmidt, *Medicalization of Aging: The Upside and the Downside,* 13(1) MARQUETTE ELDER'S ADVISOR 55, 75-77 (Fall 2011).

that is the subject of a conservatorship proceeding, the importance of this proceeding to the respondent is sometimes overlooked. Nevertheless, because diminished access to his or her property may dramatically affect the way in which the respondent lives, a conservatorship proceeding may have critical implications for the respondent. The standards in this category are intended to ensure that the respondent's interests receive appropriate protection from probate courts while responding appropriately to the needs of the parties appearing before the court.

STANDARD 3.3.1 PETITION

A. Probate courts should adopt a clear, easy to complete petition form written in plain language for initiating guardianship/conservatorship proceedings.

B. The petition form together with instructions, an explanation of guardianship and conservatorship, and the process for obtaining one should be readily available at the court, in the community, and on-line.

C. A petition to establish a guardianship or conservatorship should be verified and require at least the following information:

(1) The name, age, address, and nationality of the respondent.

(2) The address of the respondent's spouse, children, parents, siblings, or other close kin, if any, or an adult with whom the respondent has resided for at least the six months prior to the filing of the petition.

(3) The name and address of any person responsible for the care or custody of the respondent.

(4) The name and address of any legal representative of or representative payee for the respondent.

(5) The name and address of the person(s) designated under any powers of attorney or health care directives executed by the respondent.

(6) The name, address, and interest of the petitioner.

(7) The reasons why a guardianship and/or conservatorship is being sought.

(8) A description of the nature and extent of the limitations in the respondent's ability to care for herself/himself or to manage her or his financial affairs.

(9) Representations that less intrusive alternatives to guardianship or conservatorship have been examined.

(10) The guardianship/conservatorship powers being requested and the limits and duration of those powers.

(11) In conservatorship cases, the nature and estimated value of assets, the real and personal property included in the estate, and the estimated annual income.

D. The petition should be accompanied by a written statement from a physician or licensed mental health services provider regarding the respondent's physical,

mental, and/or emotional conditions that limit the respondent's ability to care for herself/himself or to manage her or his financial affairs.

E. **The petition should be reviewed by the probate court or its designee to ensure that all of the information required to initiate the guardianship/conservatorship proceeding is complete.**

COMMENTARY

The standard lists the minimum information that probate courts and all parties to a guardianship or conservatorship proceeding need in order to proceed. It attempts to strike a balance between making guardianship/conservator proceedings available to a person concerned about the well-being of another, and protecting against frivolous or harassing filings. On the one hand it urges courts to use forms that minimize "legalese" and are as easy to complete as possible. On the other, it requires that petitioners verify the statements made and include a written statement from an appropriate medical or mental health professional regarding the conditions that are affecting the respondent's capacity to care for herself/himself or manage her/his financial affairs.[110] The standard calls for specifying the respondent's nationality because of the provision in the Vienna Convention on Consular Relations that requires notification of the local consulate whenever a guardian may be appointed for a foreign national.[111]

While the standard sets forth the minimum information that should be required, good practice suggests that the following information will often be needed and should be included as part of the petition itself or as attachments to it, including:

- Whether other related proceedings are pending in this or other jurisdictions.
- Specific examples of behavior that demonstrate the need for the appointment of a guardian or conservator.
- Known nominations by the respondent of persons to be appointed if a guardian/conservator is needed.
- The proposed guardian's/conservator's qualifications.
- The relationship between the proposed guardian/ conservator and the respondent. known and potential conflicts of interest.
- The name, address, and relationship of those persons required to be given notice and those persons closely related to the respondent.[112]

A petition for conservatorship should also include information on the respondent's assets, property, and income.

[110] *See*, *e.g.*, Probate Court of Tarrant Cty, TX, *Physician's Certificate of Medical Exam,* http://www.tarrantcounty.com/eprobatecourts/lib/eprobatecourts/PhysiciansCertificateofMedicalExam.pdf (July 6, 2012); Jennifer Moye *et al., A Conceptual Model and Assessment Template for Capacity Evaluation in Adult Guardianship,* 47 GERONTOLOGIST 591 (2007); *but see* Jennifer Moye, *Clinical Evidence in Guardianship of Older Adults is Inadequate: Findings from a Tri-State Study,* 47 GERONTOLOGIST 604, 608, 610 (2007).

[111] Vienna Convention on Consular Relations, Art. 37 21 U.S.T. 77 (1963) http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf

[112] See UGPPA § 304 (1997).

Probate courts should develop and distribute forms that will assist the petitioner to meet these requirements. Whenever possible, petitions, instructions, and explanations of guardianship, conservatorship, and the process for seeking them should be available on the court website as well as at libraries, and providers of services to disabled persons and elderly persons. Probate courts should be able to provide sources of free or low-cost legal services, such as bar referral services, legal aid offices, and law school clinics. To the extent possible, petitioners should be able to complete and submit petitions electronically. Informational brochures should be available on the court website and distributed to all persons upon request or to those who file guardianship/conservatorship petitions.

When a petitioner seeks a guardianship or conservatorship for two or more respondents, separate petitions should be filed for each respondent.

Promising Practices

Several court systems and individual courts provide information regarding guardianship/conservatorship proceedings on their websites including the forms necessary to initiate a conservatorship or guardianship. For example:

California Judicial Branch http://www.courts.ca.gov/documents/gc310.pdf

Colorado State Judicial Branch
http://www.courts.state.co.us/Forms/SubCategory.cfm?Category=Probate

The Georgia Council of Probate Judges http://www.gaprobate.org/

District of Columbia Superior Court
http://www.dccourts.gov/internet/legal/aud_probate/int-iddlegal.jsf

Maricopa County, AZ Superior Court
http://www.superiorcourt.maricopa.gov/SuperiorCourt/Self-ServiceCenter/Forms/ProbateCases/prob_group_1.asp

Philadelphia County, PA Court of Common Pleas
http://www.courts.phila.gov/forms/

Tarrant County, TX
http://www.tarrantcounty.com/eprobatecourts/cwp/view.asp?A=766&Q=430951

STANDARD 3.3.2 INITIAL SCREENING

Probate courts should encourage the appropriate use of less intrusive alternatives to formal guardianship and conservatorship proceedings.

COMMENTARY

Guardianship/conservatorship is often used to address problems that could be solved by less intrusive means. Concerned individuals may seek guardianships to provide respondents with a wide variety of needed services. However, a screening process may identify and can encourage other ways to address the respondent's needs that are less intrusive, expensive, and burdensome.

- Possible alternatives to a full guardianship include, but are not limited to: advance health care directives including living wills; voluntary or limited guardianships; health care consent statutes; instructional health care powers of attorney; designation of a representative payee; and intervention techniques including adult protective services, respite support services, counseling, and mediation.

- Possible alternatives to a full conservatorship include, but are not limited to: establishment of trusts; voluntary or limited conservatorships; representative payees; revocable living trusts; durable powers of attorney; and custodial trust arrangements.

In addition to protecting the interests of the respondent, such alternative arrangements avoid court action, delay, and expense. Additionally, petitioners may be able to use social service agencies and volunteer organizations to help persons requiring assistance, or the court may ratify individual transactions rather than impose a conservatorship.

Probate courts should consider establishing a procedure for screening potential guardianship/conservatorship cases if consistent with state law and court rules. Screening may occur at various points, but at least some initial screening should occur as early as possible in the process. The screening procedure may be no more complex than instructing the court official who routinely receives petitions to initiate a guardianship/conservatorship to discuss possible alternatives with the petitioner. Where resources permit, a more formal, separate screening unit may be appropriate. In either instance, the probate court should provide training for those members of its staff who initially review petitions for guardianships and conservatorships so that they can properly screen and divert inappropriate petitions, when consistent with state law and court rule.

By providing an early screening of petitions, probate courts can minimize the expense, inconvenience, and possible indignity incurred by respondents for whom a guardianship/conservatorship is inappropriate, or for whom less intrusive alternatives exist, and conserve court resources. In addition, in most jurisdictions many petitions for a guardianship or conservatorship are filed by persons who are not represented by attorneys and who will need instruction regarding the responsibilities of a guardian or conservator, when a guardianship/conservatorship is appropriate and assistance in meeting the initial requirements for filing a petition. Such screening may be provided in several ways: by probate court staff when appropriate, by use of volunteers, or by providing access to *pro bono* legal advice.

As part of this screening, the petition should initially be reviewed for compliance with filing requirements, the completeness of the information supplied, and consideration of less intrusive alternatives. Screening also should be used to identify available services in the community that may adequately assist and protect the respondent, divert inappropriate cases, and promote consideration of less intrusive legal alternatives.[113] In addition, screening should be used to determine whether undue influence was used to gain the respondent's participation in the process.[114] In establishing the screening process and criteria, care should be taken to ensure that they do not result in an insurmountable barrier-to-entry that leaves vulnerable persons unprotected.

Preferably this initial screening will be renewed after the court visitor has had an opportunity to make an investigation and report. [See Standard 3.3.4, Court Visitor]

PROMISING PRACTICES

In **Colorado,** a pro se facilitator interviews unrepresented persons seeking to file a guardianship or conservatorship petition to help them understand the process and ascertain whether other services or resources may suffice.

The Probate Division of the **District of Columbia** Superior Court houses a Public Resources Center staffed by volunteer attorneys who offer information and brief legal services to unrepresented parties or potential parties. http://www.dccourts.gov/internet/documents/Public_Resources_for_Probate.pdf

In at least one **Pennsylvania county,** all petitions are first reviewed by guardianship staff who make a report and recommendation to the court. The petition is then reviewed by the judge's law clerk.

In **South Dakota,** pro se parties are interviewed prior to filing the petition.

STANDARD 3.3.3 EARLY CONTROL AND EXPEDITIOUS PROCESSING

The probate court should establish and adhere to procedures designed to:

A. Identify guardianship and conservatorship cases immediately upon their filing with the court.

B. Supervise and control the flow of guardianship and conservatorship cases on the docket from filing through final disposition.

[113] In conducting this screening, non-lawyer court staff should remain mindful of the distinction between providing legal information and offering legal advice. *See* J.M. Greacen, *Legal Information vs. Legal Advice—Developments During the Last Five Years*, 84 JUDICATURE 198 (January-February 2001), www.ajs.org/prose/pro_greacen.asp; IOWA JUDICIAL BRANCH CUSTOMER SERVICE ADVISORY COMMITTEE, GUIDELINES AND INSTRUCTIONS FOR CLERKS WHO ASSIST PRO SE LITIGANTS IN IOWA'S COURTS (2000); *but see*. Wash. St. Bar Assoc. v. Great Western Federal Savings & Loan Ass'n., 91 Wash. 2d. 49, 54-55 586 P.2d 870 (1999) – the practice of law includes selection and completion of forms

[114] COSCA, *supra,* note 6, at 8.

C. **When appropriate, make available pre-hearing procedures to narrow the issues and facilitate their prompt and fair resolution.**

COMMENTARY

Unnecessary delay engenders injustice and hardship and may injure the reputation of the court in the community it serves. Probate courts should meet their responsibilities to everyone affected by its activities in a timely and expeditious manner.[115] [See Standards 2.2.1 – 2.2.3] Delay in court action may be devastating, for example, to a respondent who is experiencing considerable pain and suffering and needs authorization for a medical procedure. Once a guardianship or conservatorship case is presented, probate courts should be prepared to respond quickly by having procedures in place that allow for an expedited resolution of the case.

Guardianship/conservatorship proceedings should receive special treatment and priority as part of the court's docket, ensuring that a prompt hearing is provided where appropriate. Probate courts, not the attorneys, should control the case from the filing of the petition to final disposition.[116] Probate courts should always ensure that necessary parties are given an opportunity to be heard and that their decisions are based on careful consideration of all matters before them.

Expeditious processing must be balanced with the need for a thorough investigation and consideration of the issues. Procedures should result in the identification of petitions that need more or less attention.[117] Differentiated case management, in which some cases receive additional investigation based on information in the petition, should be considered. As part of their pre-hearing procedures, probate courts should consider establishing investigatory services to facilitate expeditious, efficient, and effective performance of their adjudicative, supervisory, and administrative duties in guardianship/conservatorship cases. Where such services are unavailable, probate courts should attempt to obtain such services by contract, recruitment, and training of volunteers, or similar options. [See Standards 3.3.4 and 3.3.17] The results of these services should be presented promptly to the court and made available to all parties. In particularly difficult or contentious cases, probate courts may schedule a hearing or status conference in advance of the hearing on the petition to resolve issues disclosed during the investigation.

PROMISING PRACTICES

The Probate and Mental Health Department of the **Maricopa County, AZ** Superior Court has established a comprehensive caseflow management protocol.

[115] VAN DUIZEND, STEELMAN & SUSKIN, *SUPRA,* NOTE 23, AT 32 (NCSC, 2011); *SEE ALSO* COURT-RELATED NEEDS OF THE ELDERLY AND PERSONS WITH DISABILITIES: A BLUEPRINT FOR THE FUTURE (ABA 1991) http://www.americanbar.org/content/dam/aba/migrated/aging/docs/aug_1991.authcheckdam.pdf .

[116] STEELMAN, GOERDT, & MCMILLAN, *supra* note 31, at 55.

[117] Principles 8 and 9 of the *Principles for Judicial Administration* provide that while "Judicial officers should give individual attention to each case that comes before them[,] the attention judicial officers give to each case should be appropriate to the needs of that case." NCSC, PRINCIPLES FOR JUDICIAL ADMINISTRATION: THE LENS OF CHANGE 153 (NCSC, Jan., 2011).

At the time when guardianship and conservatorship cases are filed, Court staff triage and establish separate tracks for high-conflict cases involving large dollar estates, multiple issues in controversy and those that may be susceptible to protracted litigation. Additional judicial and support resources are directed to these matters to ensure fair and timely consideration and disposition. The Court has established Probate Alternative Dispute Resolution, conducting early settlement conferences to resolve disagreements and abbreviate litigation. The Court also may set a telephonic comprehensive pre-hearing conference ("CPTC") to identify issues that have been settled, issues that still need to be resolved and a trial date.[118]

STANDARD 3.3.4 COURT VISITOR

A. Probate courts should require a court appointee to visit with the respondent upon the filing of a petition to initiate a guardianship/conservatorship proceeding to:

(1) Explain the rights of the respondent and the procedures and potential consequences of a guardianship/conservatorship proceeding.

(2) Investigate the facts of the petition.

(3) Determine whether there may be a need for appointment of counsel for the respondent and additional court appointments.

B. The visitor should file a written report with the court promptly after the visit.

COMMENTARY

Persons placed under a guardianship or conservatorship may incur a significant reduction in their personal activities and liberties. When a guardianship/conservatorship is proposed, probate courts should ensure that respondents are provided with information on the procedures that will follow. Respondents also need to be informed of the possible consequences of the probate court's action.

Probate courts should appoint a person to provide the respondent with this information when counsel has not been retained or appointed to represent the respondent. Several different designations have been used to identify this appointee, including court visitor,[119] court investigator,[120] court evaluator,[121] and guardian *ad litem*[122] (collectively referred to as a court visitor in these standards).

The visitor's role is generally addressed by this standard, although their duties will

[118] STEELMAN & DAVIS, NCSC, *supra,* note 4, at 17-18.
[119] *See* UNIF. PROB. CODE § 5-305 (2008) cmt. ("The visitor can be a physician, psychologist, or other individual qualified to evaluate the alleged impairment, such as a nurse, social worker, or individual with pertinent expertise.").
[120] *See, e.g.,* CAL. PROB. CODE §§ 1454, 1513.
[121] *See, e.g.,* NY. MENTAL HYG. LAW § 81.09 (McKinney through 2011 legislation).
[122] *See, e.g.,* MISS. CODE ANN. § 93-15-107 (West).

also be typically established by statute.[123] In general, their role stands in contrast to that of court-appointed counsel [see Standard 3.3.5], although in some states, counsel (or guardian *ad litem*) may be assigned some of the duties delineated here. A court visitor may be better equipped to address the psychological, social, medical, and financial problems raised in guardianship and conservatorship proceedings than court-appointed counsel. Although a visitor may be a lawyer by training, it is not necessary that the visitor be a lawyer. Indeed, in many instances, other professional training such as medicine, psychology, nursing, social work, or counseling may be more appropriate. Regardless of their professional background, court visitors should have the requisite language and communication skills to adequately provide necessary information to the respondent.

Court visitors serve as the eyes and ears of probate courts, making an independent assessment of the need for a guardianship/conservatorship. Under the standard, they have additional specific responsibilities. The first is to inform the respondent about the proceedings being conducted in the manner in which the respondent is most likely to understand. Even though the respondent may not fully understand the proceedings because of a lack of capacity, this information should still be provided. When talking with a respondent, a visitor should also seek to ascertain the respondent's views about the proposed guardian, the proposed guardian's powers and duties, and the scope and duration of the guardianship/conservatorship; inform the respondent of the right to consult with an attorney at the respondent's expense or request court-appointed counsel; advise the respondent of the likely costs and expenses of the proceeding and that they will be paid from the respondent's resources;[124] as well as determining whether the respondent desires and is able to attend the hearing. Visitors should also interview the petitioner and the proposed guardian/conservator; visit the current or proposed residence/placement of the respondent; and consult, where appropriate, with professionals who have treated, advised, or prepared an evaluation of the respondent.

The visitor's report should state the respondent's views; provide an assessment of the capacity of the respondent; evaluate the fitness of the proposed guardian/conservator; contain recommendations regarding (a) whether counsel should be appointed to represent the respondent if one has not already been retained or appointed, (b) the appropriateness of a guardianship/conservatorship, including whether less intrusive alternatives are available; and (c) the need for the specific powers requested in the petition.[125] The report should be provided promptly to the petitioner and the respondent so that they can review its contents in advance of the hearing.

The court visitor may be a part of the initial screening process or independent of it.

[123] *See, e.g.,* N.Y. MENTAL HYG. LAW § 81.09; UNIF. PROB. CODE § 5-305 (2008). In some jurisdictions, the assigned duties of a guardian *ad litem* (GAL) may be slightly different from those of a court visitor or court investigator. They may be given the additional responsibility of representing or speaking on behalf of the respondent during a guardianship proceeding. This role may overlap with that of court-appointed counsel. More typically, however, the GAL's duties are limited to those described here and, as a result, the designation court visitor is used here to subsume that of GAL.

[124] UGGPA, §305(c).

[125] *See* CAL. PROB. CODE §1513; THIRD NATIONAL GUARDIANSHIP SUMMIT, *supra,* note 6, at Recommendation 2.2, 2012 UTAH L. REV., at 1200.

[See Standard 3.3.2] The expenses incurred by probate courts visitors should be charged to the respondent's estate where such funds are available.

Jurisdictions have adopted various approaches to performing the visitor function. Some states utilize court staff to conduct the visits (*e.g.,* Maricopa County, AZ, CA, OH, TX). Others appoint professionals in the community (*e.g.,* CO, ID, SD). Individual jurisdictions rely on community volunteers (*e.g.,* Rockingham County, NH). At least two states, (FL, KY), appoint a multi-disciplinary team to assess the respondent and perform other visitor functions.[126]Regardless of the source, visitors should be required to adhere to strict standards of confidentiality.

PROMISING PRACTICES

In **Maricopa County, AZ, Los Angeles County, CA, and Harris County, TX,** court investigators are responsible for visiting respondents and reporting to the court on their findings.

STANDARD 3.3.5 APPOINTMENT OF COUNSEL

A. Probate courts should appoint a lawyer to represent the respondent in a guardianship/conservatorship proceeding if:

(1) Requested by the respondent; or
(2) Recommended by the visitor; or
(3) The court determines that the respondent needs representation; or
(4) Otherwise required by law.

B. The role of counsel should be that of an advocate for the respondent.

COMMENTARY

This standard follows the first alternative offered by the Uniform Guardianship and Protective Proceedings Act.[127] Respondents in guardianship and conservatorship proceedings are often vulnerable. They may have an incomplete or inadequate understanding of proceedings that may have a significant effect upon their lives and fundamental. The assistance of counsel provides a valuable safeguard of their rights and interests. Although there may be occasions when respondents can speak on their own behalf or where family and friends of respondents can be relied upon to fill this role, counsel is typically better equipped to provide this function.[128] Over 25 states require appointment of an attorney. When there are sufficient assets in the respondent's estate, the cost of

[127] UGPPA §305, Alt. 1 (1997). (UGGPA Alternative 2 provides that the court shall appoint a lawyer unless the respondent is represented by counsel.)
[128] Wingspan – The Second National Guardianship Conference, *Wingspan – The Second National Guardianship Conference, Recommendations*, 31 STETSON LAW REVIEW 595, 601 (2002); *see also* UGPPA §305(b), Alt. 2 (1997); Application of Rodriquez, 169 Misc. 2d 929, 607 N.Y.S.2d 567 (Sup. Ct. 1992).

appointed counsel may be charged to the estate. When the respondent is unable to the cost of an attorney, the appointment should be at state expense.[129]

Respondents should have the right to secure their own counsel in these proceedings. Because of a respondent's prior experience with a given attorney, the respondent may prefer to obtain the attorney's continued services in these proceedings. In such cases, it is unnecessary for the court to appoint additional counsel to represent the respondent. Respondents may also seek to waive their right to counsel, but this raises the question of whether an allegedly incompetent individual has the capacity or should be allowed to exercise this waiver. Such waivers should not be impermissible *per se*, but probate courts should have independent information confirming the competency of the respondent to make such a waiver (*e.g.,* a report from the court visitor). A visitor may also notify the court, when appropriate, that there is a need for court-appointed counsel. [See Standard 3.3.4]

In general, the role of counsel should be that of an advocate for the respondent.[130] In cases where the respondent is unable to assist counsel (*e.g.,* where the respondent is comatose or otherwise unable to communicate or indicate her/his preferences), counsel should consider the respondent's prior directions, expressed desires, and opinions, or, if unknown, consider the respondent's prior general statements, actions, values and preferences to the extent ascertainable.[131] Where the position of the respondent is not known or ascertainable, counsel should request the probate court to consider appointment of a guardian *ad litem* to represent the respondent's best interest.

Appointment of counsel will incur additional expense, but because of the valuable services provided, it is typically a necessary expense.[132] If the petition was not brought in good faith, these fees may be charged to the petitioner.[133] Good faith should be determined based on the circumstances prevailing at the time the petition was filed.

STANDARD 3.3.6 EMERGENCY APPOINTMENT OF A TEMPORARY GUARDIAN/CONSERVATOR

A. When permitted, probate courts should only appoint a temporary guardian or conservator e*x parte*:

(1) Upon the showing of an emergency.

(2) In connection with the filing of a petition for a permanent guardianship or conservatorship.

(3) Where the petition is set for hearing on the proposed permanent

---

[129] TEASTER, SCHMIDT, WOOD, LAWRENCE, & MENDIONDO*, supra,* note 5, at 20.
[130] *Id., See e.g.,* Joan L. O'Sullivan, *Role of the Attorney for the Alleged Incapacitated Person,* 31 STETSON LAW REVIEW 686-734 (2002); Winsor C. Schmidt, *Accountability of Lawyers in Serving Vulnerable Elderly Elderly Clients,* 5 JOURNAL OF ELDER ABUSE AND NEGLECT 39-50 (1003).
[131] *Cf.* THIRD NATIONAL GUARDIANSHIP SUMMIT, *supra,* note 6, at Standard 5.3 (regarding responsibilities of guardians), 2012 UTAH L.REV., at 1196.
[132] COSCA, *supra,* note 6, at 9.
[133] *See, e.g.,* NY. MENTAL HYG. LAW § 81.10(f) ("If the petition is dismissed, the court may in its discretion direct that petitioner pay such compensation for the person alleged to be incapacitated.").

guardianship or conservatorship on an expedited basis.

(4) When notice of the temporary appointment is promptly provided to the respondent.

B. The respondent should be entitled to an expeditious hearing upon a motion by the respondent seeking to revoke the temporary guardianship or conservatorship.

C. Where appropriate, probate court should consider issuing a protective order (or orders) in lieu of appointing a temporary guardian or conservator.

D. The powers of a temporary guardian or conservator should be carefully limited and delineated in the order of appointment.

E. Appointments of temporary guardians or conservators should be of limited and finite duration.

COMMENTARY

Emergency petitions seeking a temporary guardianship/conservatorship require the court's immediate attention. Such appointments have the virtue of addressing an urgent need either to provide needed assistance to a respondent that cannot wait until the hearing on appointment of a permanent guardian/conservator or to supplant a previously appointed guardian or conservator who is no longer able to fulfill the duties of office. However, where abused, they have the potential to produce significant or irreparable harm to the interests of the respondent. When continued indefinitely, they bypass procedural protections to which the respondent would be otherwise entitled. Because probate courts must always protect the respondent's due process rights, emergencies, and the expedited procedures they may invoke, require probate courts to remain closely vigilant for any potential due process violation. In such cases, while providing for an immediate hearing, probate courts should also require immediate service of written notice on the respondent, appoint counsel for the respondent, and allow the respondent an appropriate opportunity to be heard.[134] Because other individuals including family, friends, and caregivers may also have an interest in the proceedings, probate courts, when appropriate, may require that they be served notice and allow them an opportunity to be heard as well.

Emergency appointment of a guardian/conservator should be the exception, not the rule. Before making an emergency appointment prior to a full guardianship/ conservatorship hearing, probate courts should require a showing of actual risk to the respondent of an immediate and substantial risk of death or serious physical injury, illness, or disease, or an immediate and substantial risk of irreparable waste or dissipation of property. Following appointment of a guardian or conservator, an emergency appointment may be required if the guardian or conservator dies, becomes incapacitated, resigns, or is removed.

[134] *See* UGGPA §312(a).

By requiring the showing of an emergency and the simultaneous filing of a petition for a permanent guardianship/conservatorship, probate courts will confirm the necessity for the temporary guardianship/conservatorship and ensure that it will not extend indefinitely. When the temporary guardianship or conservatorship is established, the date for the hearing on the proposed permanent guardianship/conservatorship should be scheduled. The order establishing the temporary guardianship/conservatorship should limit the powers of the temporary guardian or conservatorship to only those required by the emergency at hand and provide that it will lapse automatically upon that hearing date. Full bonding of liquid assets should be required in temporary conservatorship cases. Temporary guardianships/ conservatorships should not extend for more than 30 days.[135]

Because the imposition of a temporary guardianship/conservatorship has the potential to infringe significantly upon the interests of the respondent with minimal due process protections, probate courts should also consider whether issuing a protective order might adequately meet the needs of the situation. [See Standard 3.3.2] For example, in a guardianship case the court might issue a protective order that allows for a surgical procedure, but that defers a decision on the appointment of a temporary or permanent guardian pending further proceedings. In a conservatorship case, the court might issue a protective order that allows for the payment of medical bills, but defers a decision on the appointment of a temporary or permanent conservator pending further proceedings. The use of a protective order may be particularly appropriate in the case of a respondent who has suffered a physical injury that leaves him or her unable to make decisions for a short period of time, but who is expected to soon regain full decision-making capacity.

In some jurisdictions, *ex parte* temporary guardianships have been used to bypass the normal procedural requirements for involuntary civil commitment to a psychiatric facility. Temporary guardians may have the authority under state law to "voluntarily" admit the respondent for psychiatric care even though the respondent objects to this admission. Alternatively, a temporary guardianship may be used to supplement adult or children's protective services, again bypassing usual procedural protections. A although a temporary guardian should not be prevented from making necessary health care and placement decisions, the court should ensure that the temporary guardianship is not used for improper purposes or to bypass the normal procedural protections.

When establishing the powers of the temporary guardian or conservator, the court should be cognizant of the fact that certain decisions by a temporary guardian or conservator may be irreversible or result in irreparable damage or harm (*e.g.,* the liquidation of the respondent's estate). Therefore, it may be appropriate for the court to limit the ability of the temporary guardian or conservator to make certain decisions without prior court approval (*e.g.,* sensitive personal or medical decisions such as abortion, organ donation, sterilization, civil commitment, withdrawal of life-sustaining medical treatment, termination of parental rights).

[135] *Cf.* UGPPA § 313(a) (1997) (suggesting that a temporary guardianship should not exceed six months). *See* Grant v. Johnson, 757 F. Supp. 1127 (D. Or. 1991) (Oregon temporary guardianship provisions unconstitutional for lack of minimum due process protections). In addition, UGPPA §316 (d) imposes limits on the authority of a temporary guardian, such as a prohibition against initiating civil commitment proceedings.

While the appointment of a temporary guardian or conservator provides a useful mechanism for making needed decisions for a respondent during an emergency, it also can offer an option to a probate court that receives information that a currently appointed guardian or conservator is not effectively performing his or her duties and the welfare of the respondent requires that a substitute decision maker be immediately appointed. Under such circumstances, the authority of the permanent guardian or conservator can be suspended and a temporary guardian appointed for the respondent with the powers of the permanent guardian or conservator. The court should, however, ensure that this temporary guardianship/conservatorship also does not extend indefinitely by including a maximum duration for it in its order.

STANDARD 3.3.7 NOTICE

A. The respondent should receive timely written notice of the guardianship or conservatorship proceedings before a scheduled hearing. Any written notice should be in plain language and in easily readable type. At the minimum, it should indicate the time and place of judicial hearings, the nature and possible consequences of the proceedings, and set forth the respondent's rights. A copy of the petition should be attached to the written notice.

B. Notice of guardianship and conservatorship proceedings also should be given to family members, individuals having care and custody of the respondent, agents under financial and health care powers of attorney, representative payees if known, and others entitled to notice regarding the proceedings. However, notice may be waived, as appropriate, when there are allegations of abuse.

C. Probate courts should implement a procedure whereby any interested person can file a request for notice.

COMMENTARY

Almost all states have a specific statutory notice requirement that the respondent in a guardianship/conservatorship proceeding receive notice within a stated number of days before a hearing (*e.g.,* 14 days).[136] This standard underscores the general notice requirements of Standard 3.1.1 (Notice) by requiring specific timely notice of guardianship and conservatorship proceedings to the respondent and others entitled to notice.[137] The notice should be written and personally delivered. When the officers serving the notice are under court control, it may be appropriate to provide them with special training to facilitate interactions with persons who may have diminished capacity and/or have hearing, sight, or other physical disabilities that may impede communications. The notice and petition should be subsequently explained to the respondent by a court visitor. Care should be taken to ensure that the visitor has the requisite language and communication skills to adequately provide this explanation to the respondent. [See Standard 3.1.1]

---

[136] AMERICAN BAR ASSOCIATION COMMISSION ON LAW AND AGING/SALLY HURME, TABLE ON NOTICE IN GUARDIANSHIP PROCEEDINGS (2011), www.americanbar.org/content/dam/aba/uncategorized/2012_aging_gship_chrt_notice_06_12.authcheckdam.pdf

[137] *See, e.g.,* NY MENTAL HYG. LAW § 81.07(d) (Consol. Supp. 1992); UNIF. PROB. CODE §§ 1-401, 5-304 (2008).

If the respondent is unable to understand or receive notice, provision may be made for substitute or supplemental service. The respondent may still benefit, however, from receiving notice even though he or she may not fully understand it. The use of substitute or supplemental service should not relieve the court visitor or counsel of the responsibility to communicate to the respondent the nature of the proceedings in the manner most likely to be understood by the respondent.

Failure to serve requisite notice upon the respondent will ordinarily establish a right in the respondent for de novo consideration of the matter and independent grounds for setting aside a prior order establishing a guardianship or conservatorship.

In addition to providing notice to the respondent, notice should ordinarily also be given to the respondent's spouse, or if none, to the respondent's adult children, or if none, to the respondent's parents, or if none, to at least one of the respondent's nearest adult relatives if any can be found.[138] In guardianship cases, notice should also be given to any persons having responsibility for the management of the estate of the respondent, including any previously appointed conservator. In conservatorship cases, notice should also be given to any individuals having care and custody of the respondent, including any previously appointed guardian. It may also be appropriate to provide notice to an individual nominated by the respondent to serve as his or her guardian, agents appointed by the respondent under a durable health care power of attorney, a close friend providing routine care to the respondent, and the administrator of a facility where the respondent currently resides. Whenever possible, notice should be provided to at least two persons in addition to the respondent or to adult protective services if there are not contact persons.

Probate courts should establish a procedure permitting interested persons who desire notification before an order is made in a guardianship/conservatorship proceeding to file a request for notice with the court.[139] This procedure allows persons interested in the establishment or monitoring of a guardianship or conservatorship to remain abreast of developments and to bring relevant information to the court's attention. The request for notice should contain a statement showing the interest of the person making the request. Intervention in the proceedings by an interested party, including the nomination of someone else as guardian or conservator, should be permitted. A fee may be attached to the filing of the request and a copy of the request should be provided to the respondent's guardian/conservator (if any). Unless the probate court makes a contrary finding, notice should be provided to any person who has properly filed this request.[140]

STANDARD 3.3.8 HEARING

A. Probate courts should promptly set a hearing for the earliest date possible.

B. Respondents should be present at the hearing and all other stages of the proceeding unless waived.

---

[138] *See e.g.,* N.Y. ML HYG. LAW § 81.07(e); UNIF. PROB. CODE §§ 1-401, 5-309 (2008).
[139] *See e.g.,* N.Y. MENTAL HYG. LAW § 8 1.07(g)(ii); UNIF. PROB. CODE §§ 5-304(a), 5-309(b) (2008).
[140] *See e.g,* UGPPA § 116 (1997); UNIF. PROB. CODE § 5-116 (2008).

C. Probate courts should make reasonable accommodations to enable the respondent's attendance and participation at the hearing and all other stages of the proceeding.

D. A waiver of a respondent's right to be present should be accepted only upon a showing of good cause.

E. The hearing should be conducted in a manner that respects and preserves all of the respondent's rights.

F. Probate courts may require the court visitor who prepared a report regarding the respondent to attend the hearing.

G. Probate courts should require the proposed guardian or conservator to attend the hearing.

H. Probate courts should make a complete record of the hearing.

COMMENTARY

It is critical that probate courts promptly hear a petition for guardianship or conservatorship. After the filing of the petition, probate courts should promptly set a hearing date and ensure that the hearing is held expeditiously. This permits either a prompt dismissal of the petition where warranted or a timely decision ordering the establishment of a guardianship/conservatorship or the imposition of a less intrusive alternative. With a prompt dismissal, the respondent will not have to endure unnecessary emotional stress. With a prompt order establishing a guardianship/conservatorship or a less intrusive alternative, the respondent will receive needed supervision or services in a timely fashion.

A guardianship or conservatorship hearing can have significant consequences for the respondent, and the rights and privileges of the respondent should, accordingly, be respected and preserved. The respondent should be given time and opportunity to prepare for the hearing, with the assistance of counsel. The respondent's presence at the hearing and at all other stages of the proceeding should be waived only for good cause. The standard urges probate courts to make reasonable accommodations to enable the respondent's attendance and participation (*e.g.,* mobility accommodations, hearing devices, medical appliances, setting the hearing at a time at which the respondent is generally the most alert, frequent breaks, telephonic or video conferencing).[141] This may necessitate the moving of the hearing to a location readily accessible to the respondent (*e.g.,* a hospital conference room).

The Standard, following the practice in most states, does not recommend that the person appointed to perform the responsibilities of a court visitor [see Standard 3.3.4] be present at the hearing in each case to provide testimony based on her or his report and respond to questions from the parties. The parties should advise the probate court if they

[141] *See* AMERICANS WITH DISABILITIES ACT, 42 U.S.C. §§ 12101-12213 (Supp. 1993); CIVIL RIGHTS ACT OF 1991, 42 U.S.C. §§ 1981-2000 (Supp. 1993).

wish the visitor to testify.

The proposed guardian or conservator should attend the hearing in order to become more fully acquainted with the respondent, the respondent's identified needs and wishes, and the intended purposes of the guardianship/conservatorship. The proposed guardian/conservator should also be available at the hearing to answer relevant questions posed by the respondent, other interested parties, or the court.

The hearing should ordinarily be open to the public unless the respondent or counsel for the respondent requests otherwise. In general, any person who so desires should be able to attend these proceedings. With the court's permission, any interested person should be able to participate in these proceedings provided that the best interests of the respondent will be served thereby.[142] A stenographic, audio, or video recording should be made of the hearing and maintained for a reasonable period of time.

The respondent's due process rights should be afforded full recognition in the course of the hearing. For example, a complete record will protect the respondent should an appeal be necessary. Similarly, the respondent should be able to obtain an independent evaluation prior to the hearing, present evidence, call witnesses, cross-examine witnesses including any court-appointed examiner or visitor, and have the right to be represented by counsel.[143] [See Standard 3.3.5] In at least 24 states the respondent is entitled to or may request a jury trial.[144]

STANDARD 3.3.9 DETERMINATION OF INCAPACITY

A. The imposition of a guardianship or conservatorship by the probate court should be based on clear and convincing evidence of the incapacity of the respondent and that a guardianship or conservatorship is necessary to protect the respondent's well-being or property.

B. The court may require evidence from professionals or experts whose training and expertise may assist in the assessment of the physical and mental condition of the respondent.

COMMENTARY

The appointment of a guardian or conservator should be based on clear and convincing evidence. This is the standard of proof prescribed in at least three-quarters of the states.[145] Evidentiary rules and requirements are needed to ensure that due process is

---

[142] *See* UGPPA § 308(b) (1997).
[143] *Id.*, at §§ 305 & 308.
[144] AMERICAN BAR ASSOCIATION COMMISSION ON LAW AND AGING/SALLY HURME, TABLE ON CONDUCT AND FINDINGS OF GUARDIANSHIP PROCEEDINGS, (2011) http://www.americanbar.org/content/dam/aba/uncategorized/2012_aging_gship_chrt_conduct_06_12.authcheckdam.pdf .
[145] AMERICAN BAR ASSOCIATION COMMISSION ON LAW AND AGING/SALLY HURME, ADULT GUARDIANSHIP LEGISLATIVE CHARTS (2011) http://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice.html/

afforded and that competent evidence is used to determine incapacity. To obtain competent evidence, probate courts should allow evidence from professionals and experts whose training qualifies them to assess the physical and mental condition of the respondent.

Although it may not be necessary to receive evidence from a professional or expert in every case (*e.g.,* where the evidence regarding incapacity is relatively clear), probate courts should seek the assistance of professionals and experts when their knowledge will assist the court in making a decision on whether a plenary guardianship/conservatorship is necessary or whether a less intrusive alternative may adequately protect and assist the respondent. [See Standard 3.3.10] These professionals and experts include, but are not limited to, physicians, psychiatrists, nurses, psychologists, social workers, developmental disability professionals, physical and occupational therapists, educators, and community mental health workers with skill and experience in capacity assessments. The determination of the need for the appointment of a guardian or conservator is frequently made by a physician after conducting an examination of the respondent.[146] Although a physician may provide valuable information regarding the capacity of the respondent, incapacity is a multifaceted issue and the court may consider using other professionals whose expertise and training may give them greater insight into representations of incapacity.

> Even medical diagnoses of common mental illnesses do not dictate whether an individual has legal capacity. … "Establishing that a patient lacks decisional capacity requires more than making a psychiatric diagnosis; it also requires demonstrating that the specific symptoms of that disorder interfere with making or communicating responsible decisions about the matter at hand." [147]

The use of other professionals and experts may ensure that when a physician is appointed, his or her skills are fully utilized and, in turn, ensure that the physician is a willing and responsive participant in the proceeding. Evaluation by an interdisciplinary team can provide probate courts with a fuller and more accurate understanding of the alleged incapacity of the respondent that includes cognition, everyday functioning, values and preferences, risk and level of supervision, and the means to enhance capacity as well as the respondent's medical condition.[148] In at least some jurisdictions, however, the cost of using an interdisciplinary team may preclude its use in every case.

The written reports of professionals should be presented promptly and should be

---

[146] *See* UNIF. PROB. CODE § 5-306 (2008) ("[T]he respondent must be examined by a physician, psychologist, or other individual appointed by the court who is qualified to evaluate the respondent's alleged impairment.").

[147] Robert P. Roca, *Determining Decisional Capacity: A Medical Perspective*, 62 FORDHAM L. REV. 1177, 1187 (1994); *see also* Mary F. Radford, *Is the Use of Mediation Appropriate in Adult Guardianship Cases?*, 31 STETSON L. REV. 611, 628 n.85 (2002).

[148] AMERICAN BAR ASSOCIATION COMMISSION ON LAW AND AGING, AMERICAN PSYCHOLOGICAL ASSOCIATION, NATIONAL COLLEGE OF PROBATE JUDGES, DETERMINATION OF CAPACITY OF OLDER ADULTS IN GUARDIANSHIP PROCEEDINGS: A HANDBOOK FOR JUDGES (2006) http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011_aging_bk_judges_capacity.authcheckdam.pdf; *See* FL. STAT. ANN. § 744.331(3) (2011); T.L. Hafemeister & B.D. Sales, *Interdisciplinary Evaluations for Guardianships and Conservatorships,* 8 LAW & HUMAN BEHAV. 335 (1985); *see also,* Moye, *supra,* note 110.

made available to all interested persons. Probate courts need not base their findings and order on the oral testimony of such professionals and experts in every case. However, where a party objects to submitted documents that contain the opinion of a professional or expert (*e.g.,* the written medical report of an examining physician), that professional or expert should appear and be available for cross-examination. Where the professional or expert is unavailable for cross-examination, the traditional rules of evidence may limit the ability of the judge to rely on the written report. Probate courts should be able to obtain as much helpful information as they need and can properly acquire.

The prescribed content of the written report should be in the discretion of the court. In general, most of the developing law in this area indicates that an evaluation of incapacity should be based upon an appraisal of the functional limitations of the respondent.[149] Among the factors to be addressed in the report are: the respondent's diagnosis; the respondent's limitations and prognoses, current condition, and level of functioning; recommendations regarding the degree of personal care the respondent can manage alone or manage alone with some assistance and decisions requiring supervision of a guardian or conservator; the respondent's current incapacity and how it affects his or her ability to provide for personal needs; and whether current medication affects the respondent's demeanor or ability to participate in proceedings. Prescribing such content avoids the unfortunate practice of professionals and expert examiners providing cursory, conclusory evaluations to the court.

Oral testimony from family and friends of the respondent is often helpful to round out the picture presented by the written reports and oral testimony of professionals. These lay witnesses may be more familiar with the functional adaptations not evident in clinical environments that enable respondents to meet their needs at home.

The Uniform Guardianship and Protective Proceedings Act specifies that appointment of a conservator is not a determination of the respondent's incapacity for other purposes.[150] However, the basis for initiating a conservatorship proceeding under UGPPA is that "the individual is unable to manage property and business affairs because of an impairment in the ability to receive and evaluate information or make decisions, even with appropriate technological assistance … and the property will be wasted or dissipated unless management is provided …." [151] The Standards take the position that the distinction between incapacity and impairment can more clearly be made by clear definition of the powers of a conservator in the order. [See Standard 3.3.12]

STANDARD 3.3.10 LESS INTRUSIVE ALTERNATIVES

A. Probate courts should find that no less intrusive appropriate alternatives exist before the appointment of a guardian or conservator.

B. Probate courts should always consider, and utilize, where appropriate, limited guardianships and conservatorships, or protective orders.

---

[149] COSCA, *supra,* note 6, at 8.
[150] UGPPA §409(d) (1997). *See also,* UNIF. PROB. CODE §4-409(d) (2008).
[151] UGPPA §401(2) (1997); UNIF. PROB. CODE § 5-401(2) (2008).

C. In the absence of governing statutes, probate courts, taking into account the wishes of the respondent, should use their inherent or equity powers to limit the scope of and tailor the guardianship or conservatorship order to the particular needs, functional capabilities, and limitations of the respondent.

COMMENTARY

Scientific studies show that the loss—or perceived loss—of a person's ability to control events can lead to physical or emotional illness. Indeed, complete loss of status as an adult member of society can act as a self-fulfilling prophecy and exacerbate any existing disability.[152] Allowing persons potentially subject to guardianships or conservatorships to retain as much autonomy as possible may be vital for their mental health. Therefore, probate courts should encourage the exploration and appropriate use of suitable alternatives to guardianship/conservatorship.[153] [See Standard 3.3.2] Such alternatives may avoid unwanted intrusion, divisiveness, and expense, while meeting the needs of the respondent before establishing a guardianship/conservatorship. Alternatives include but are not limited to:

Alternatives for financial decision-making

- Use of a representative payee appointed by the Social Security Administration or other federal agency or a fiduciary appointed by the Department of Veterans Affairs to handle government benefits
- Use of a single transaction protective order[154]
- Use of a properly drawn trust
- Use of a properly drawn durable power of attorney
- Establishment of a joint bank account with a trusted person
- Electronic bill-paying and deposits

Alternatives for health care decision-making

- Use of properly drawn advance health care directives
- Use of a properly drawn power of attorney for medical decisions

Alternatives for crisis intervention and daily needs

- Use of mediation, counseling, and respite support services
- Engagement of community-based services[155]

When attempting to determine what constitutes a less intrusive appropriate

---

[152] AMERICAN BAR ASSOCIATION COMMISSION ON THE MENTALLY DISABLED & AMERICAN BAR ASSOCIATION COMMISSION ON LEGAL PROBLEMS OF THE ELDERLY, GUARDIANSHIP: AN AGENDA FOR REFORM, 20 (American Bar Association, 1989).

[153] Wingspread Conference, *Recommendations III-D & IV-B*, 13 MENTAL & PHYSICAL DISABILITY L. REP. 271, 290 & 292 (1989); Wingspan Conference, *Recommendations 38 and 39*, 31 STETSON L. REV. 595, 602-603. (2002); THIRD NATIONAL GUARDIANSHIP SUMMIT, *supra,* note 6, Recommendation 2.2, 2012 UTAH L.REV., at 1200; AMERICAN BAR ASSOCIATION COMMISSION ON LAW AND AGING & AMERICAN PSYCHOLOGICAL ASSOCIATION, JUDICIAL DETERMINATION OF CAPACITY OF OLDER ADULTS IN GUARDIANSHIP PROCEEDINGS, 2 (American Bar Association, 2006); UTAH *AD HOC* COMMITTEE ON PROBATE LAW AND PROCEDURE, *supra,* note 5.

[154] UGPPA § 412 (1997).

[155] UTAH *AD HOC* COMMITTEE ON PROBATE LAW AND PROCEDURE, *supra* note 5, at 24-25

alternative, probate courts should defer to any alternatives previously established or proposed by the respondent (*e.g.,* a durable power of attorney). In general, probate courts should be guided by the express wishes of the respondent where available, and, where not available, by past practices, reliable evidence of likely choices, and best interests of the person.[156] Even if a respondent lacks current capacity to make decisions regarding his or her personal care, probate courts should solicit the respondent's opinions and preferences and obtain information about the respondent's needs and available services and alternatives. The use of an initial screening process can facilitate the consideration of less intrusive alternatives. [See Standard 3.3.2]

On the other hand, probate courts should also be mindful that there may be downsides to less intrusive alternatives as well, especially because of the absence of judicial oversight, bonding, and other safeguards.

> Although, principals may revoke … [a durable power of attorney (DPA)] as long as they have capacity, the lack of formality and oversight means there is no standard method for ascertaining if and when a DPA has been revoked.... Because the DPA remains in force if the principal becomes incapacitated, a lawsuit may only be filed if someone else notices a misuse of the fiduciary duty (Rhein 2009). Often it is too late to recover lost assets at this point . . . . Similarly, because they are an owner, a joint account holder cannot usually be charged with stealing funds unless there was some kind of deception or the elder was mentally incapacitated at the time the joint tenant was added. (Gailly 2007 POA Abuse pp. 7-5 - 7-19). . . . Living trusts, while avoiding probate, are vulnerable to the same abuses as other guardianship alternatives due to a lack of supervision or oversight of the trustee.[157]

If probate courts determine that a guardianship or conservatorship is necessary, the respondent's self-reliance, autonomy, and independence should be promoted by restricting the authority of the guardian or conservator to the minimum required for the situation, rather than routinely granting full powers of guardianship/conservatorship in every case. For example, where a respondent has only a limited disability, the court should grant only those powers needed to protect the respondent's health or safety. Probate courts also should require the guardian or conservator to attempt to maximize the respondent's self-reliance and independence (*e.g.,* by including the respondent in decisions to the fullest extent possible) and to report periodically on these efforts to the court.

Although many states do not have statutory provisions for limited guardianship or conservatorship, probate courts, in at least some states, have the power to create such

---

[156] THIRD NATIONAL GUARDIANSHIP SUMMIT, *supra,* note 6, at Standard 4.2, 2012 UTAH L.REV., at 1194; see also Linda S Whitton & Lawrence A. Frolik, *Surrogate Decision-Making Standards for Guardians—Theory and Reality,* 2012 UTAH L. REV., at 1491 (2013).

[157] D. SAUNDERS, ISSUE PAPER ON ABUSES TO ALTERNATIVES TO GUARDIANSHIP, 1-2, (NCSC, 2011); Jennifer L. Rhein, *No One in Charge: Durable Powers of Attorney and the Failure to Protect Incapacitated Principals*, 17 UNIVERSITY OF ILLINOIS ELDER LAW JOURNAL 165 (2009); LORI STIEGEL & ELLEN M. KLEM, POWER OF ATTORNEY ABUSE: WHAT STATES CAN DO ABOUT IT (AARP Public Policy Institute, 2008); ROSE MARY BAILLY ET AL., FINANCIAL EXPLOITATION OF THE ELDERLY, (Civic Research Institute, 2007).

limited guardianships/conservatorships because of their equitable nature. Similarly they can invoke (either with or without further court supervision) other less intrusive alternatives.[158] [See Standard 3.3.2]

STANDARD 3.3.11 QUALIFICATIONS AND APPOINTMENTS OF GUARDIANS AND CONSERVATORS

Probate courts should appoint a guardian or conservator suitable and willing to serve as a guardian/conservator. Where appropriate, probate courts should appoint a person requested by the respondent or related to or known by the respondent.

COMMENTARY

Different degrees of expertise will be required in guardianships and conservatorships. Probate courts should consider the training, education, and experience of a potential guardian or conservator to determine if that person can perform the necessary tasks on behalf of the respondent competently. If the court anticipates that the scope of the guardianship/conservatorship may later increase, the person appointed should be competent to handle these possible future responsibilities as well. In determining the competence of a potential guardian, probate courts should consider such factors as familiarity with health care decision making, residential placements, and social service benefits. In determining the competence of a potential conservator, probate courts should consider such factors as the size of the estate, the complexity of the estate, and the availability of financial planning experts who can give the conservator advice. Further, the guardian or conservator should act only within the bounds of the court order and should not expand the scope of the guardianship/conservatorship, except when authorized to do so by the court.

Probate courts should attempt, when appropriate, to appoint as guardian or conservator a person who has been designated for this role by the respondent, or who is related to or known by the respondent. This enhances the likelihood that the guardian/conservator will obtain the trust and cooperation of the respondent and be familiar with the respondent's values and preferences. When considering appointing a person known to the respondent, probate court judges should enquire about the length, depth and nature of the relationship in order to guard against empowering individuals who may be seeking to take advantage of the respondent.

It may also be appropriate to appoint as guardian or conservator a public administrator, a public guardian, a professional guardianship/ conservatorship firm, a person or corporation having special qualifications, certification, or expertise that will be beneficial to the respondent, an attorney or other professional. Eleven states require a level of certification for some non-family guardians/conservators either through the Center for Guardianship Certification,[159] or a state run program.[160] Although probate courts should not appoint any agency, public or private, that financially benefits from directly providing housing, medical, or social services as a guardian, they should use the services of such organizations, where appropriate.

---

[158] UGPPA and the Uniform Probate Code require that the court find that a "respondent's needs cannot be met by less restrictive means." UGPPA §311(a)(1)(B) (1997); UNIF. PROB. CODE § 5-311(a)(1)(B) (2008).

[159] AK, CA, FL, IL, NV, NH, OR, WA.

[160] By the Supreme Court in AZ, and TX, or the state guardianship association in NC.

Probate courts also should consider the geographical proximity of any prospective nominee and the nominee's ability to respond in a timely and appropriate fashion to the needs of the respondent. Particular care may be required in making a reappointment where a guardian or conservator has left the jurisdiction where the original order of guardianship/conservatorship was issued. If the guardian or conservator has failed to carry out the original order and is subject to a contempt charge, that person should not be reappointed as a guardian/conservator for the original respondent or appointed as a guardian/conservator for any other respondent.

In selecting the guardian or conservator, preference should be given to any written designation of a prospective guardian/conservator made by the respondent while competent (*e.g.,* as provided in a durable power of attorney) unless there are compelling reasons to appoint another.[161] In many situations, the respondent has had ample opportunity to anticipate the need for a guardian or conservator and to identify a nominee with whom he or she is comfortable. In such cases, probate courts should give great weight to the expressed desires of the respondent (although care should be taken to ensure that the respondent has not changed his or her mind about the nominee since the nomination was made, particularly when a considerable period of time has passed since the nomination). Alternatively, the respondent may have indicated in a non-guardianship or non-conservatorship context a preference for a given person in an advance written directive executed while the respondent was competent (*e.g.,* the executor in a will). Ordinarily, such preferences should also be respected. If a preference for a guardian/conservator is not stipulated, or a person designated is not suitable or willing to serve, probate courts should appoint a guardian or conservator who is capable and willing to develop a rapport with the respondent.

Generally, state law will provide a list of categories of persons who must be considered, although ultimate discretion in making this appointment remains with the court.[162] In general, probate courts should seek a guardian or conservator with the least potential for a conflict of interest with the respondent. In many cases this may disqualify individuals such as the respondent's physician, attorney, landlord, current caregiver (particularly where there is a pecuniary interest), or creditor from serving as the respondent's guardian or conservator. Probate courts should not decline to appoint the respondent's parent, spouse, or child, however, when the appointment would be the most beneficial to the respondent. As noted above, such persons are likely to be familiar with the respondent's values and residential, health care, and other preferences. [See Standard 3.3.14 Training and Orientation]

Similarly, state law may provide a list of categories of potential nominees who are qualified for or disqualified from serving as a conservator (*e.g.,* a convicted felon may not be eligible to act as a conservator).[163] To the extent permitted, probate courts should

[161] *See, e.g.,* NY MENTAL HYG. LAW §§ 81.17 & 81.19(b) (McKinney through 2011 legislation); UNIF. PROB. CODE § 5-310 (2008).
[162] *See, e.g.,* NY MENTAL HYG. LAW § 81.19 ; UNIF. PROB. CODE § 5-310(a) (2008).
[163] *See, e.g.,* NY MENTAL HYG. LAW §§ 81.20, 81.22, 81.29(a); UNIF. PROB. CODE § 5- 206(b) (2008), cmt. background.

supplement this list by making their own determination regarding the qualifications of individuals being considered for appointment as a conservator. For example, a nonfamily care provider or any person associated with a facility where the respondent is a resident should not be appointed in most instances, nor should persons of questionable honesty or integrity or any person who may have a material conflict of interest in handling the respondent's estate.

A relationship to the respondent does not, in and of itself, constitute a potential conflict of interest, and should not preclude appointment. The adult child of the respondent may stand to inherit from the respondent's estate and may technically be subject to a potential conflict of interest, yet he or she will often be particularly well suited to serve as the respondent's conservator because of the close emotional bond between the offspring and the respondent.

Probate courts should require attorneys who file guardianship/conservatorship proceedings to exercise due diligence by informing proposed guardians or conservators of the qualifications for appointment and the obligations if appointed, and inquiring whether they are willing to serve, are eligible for an appropriate surety bond and to open a bank account,, have not been convicted of a potentially disqualifying offense [see Standard 3.3.12], and do not have a bankruptcy history.

STANDARD 3.3.12 BACKGROUND CHECKS

A. Probate courts should request a national background check on all prospective guardians and conservators, other than those specified in paragraph (b), before an appointment is made, to determine whether the individual has been convicted of a relevant crime; determined to have committed abuse, abandonment, neglect, or financial or sexual exploitation of a child, spouse, or other adult; has been suspended or disbarred from law, accounting, or other professional licensing for misconduct involving financial or other fiduciary matters; or has a poor credit history.

B. Background checks should not be conducted for prospective guardians and conservators who have been the subject of such a check as part of a certification or licensing procedure, or banks, trust companies, credit unions, savings and loan associations, or other financial institution duly licensed or authorized to conduct business under applicable state or federal laws.

COMMENTARY

Currently, criminal conduct disqualifies or may disqualify a person from serving as a guardian or conservator in half the states. Only 13 states require that guardians undergo independent criminal background checks before being appointed.[164] There is little empirical

[164] U.S. Gov't Accountability Office, GAO-11-678, INCAPACITATED ADULTS: OVERSIGHT OF FEDERAL FIDUCIARIES AND COURT- APPOINTED GUARDIANS NEEDS IMPROVEMENT, 7 (July 2011), *available at*

data demonstrating the effectiveness of background checks in reducing instances of abuse and exploitation.[165] However, given the authority of guardians and conservators, the opportunities for misuse of that authority, and the occurrence of abuse and exploitation of vulnerable adults around the country, requiring prospective guardians and conservators to undergo a thorough criminal history and credit check is an appropriate safeguard. The background information is intended to provide probate courts with information on which to base a decision whether the nominee should be appointed. Upon receiving such potentially disqualifying information, probate courts should weigh the seriousness of the offense or misconduct, its relevance to the responsibilities of a guardian or conservator, how recently the offense or misconduct occurred, the nominee's record since the offense or misconduct occurred, and the vulnerability of the respondent. If there is some concern but not enough to disqualify a potential guardian or conservator, probate courts may require periodic post-appointment criminal history and/or credit checks of a guardian or conservator.[166]

STANDARD 3.3.13 ORDER

A. Probate courts should tailor the order appointing a guardian or conservator to the facts and circumstances of the specific case. Each order should specify the duties and powers of the guardian or conservator, including limitations to the duties and powers, the rights retained by the respondent, and if the order is for a temporary or limited guardianship or conservatorship, the duration of the order.

B. Probate courts should inform newly appointed guardians regarding their responsibilities to the respondent, the requirements to be applied in making decisions and caring for the respondent, and their responsibilities to the court including the filing of plans and reports.

C. Probate courts should inform newly appointed conservators regarding their responsibilities to the respondent, the requirements to be applied in managing the respondent's estate, and their responsibilities to the court including the filing of inventories and accountings.

D. Following appointment, probate courts should require a guardian or conservator to:

(1) Provide a copy of and explain to the respondent the terms of the order of appointment including the rights retained.

(2) Serve a copy of the order to the persons who received notice of the petition initiating the guardianship/conservatorship proceeding, and file proof of service with the court.

---

http://www.gao.gov/new.items/d11678.pdf; *see also* NATIONAL GUARDIANSHIP ASSOCIATION, STANDARDS OF PRACTICE, (3d ed. 2007), *available at* http://guardianship.org/documents/Standards_of_Practice.pdf.

[165] SARA GALANTOWICZ ET AL., SAFE AT HOME? DEVELOPING EFFECTIVE CRIMINAL BACKGROUND CHECKS AND OTHER SCREENING POLICIES FOR HOME CARE WORKERS, 25 (AARP Policy Institute, 2010).

[166] In light of the abuses that have occurred, some probate courts may wish to require periodic updates of background checks in all cases in order to ensure that the person appointed continues to be fit to serve.

(3) Record the order.

(4) Establish such restricted accounts as may be necessary to protect the respondent's estate.

E. Probate courts should set the due date for the initial report or accounting and periodically consider the necessity for continuing a guardianship or conservatorship.

COMMENTARY

Most individuals appointed as a guardian or conservator know little about what is expected of them and the scope of their responsibilities and authority. Thus, including a clear, complete statement of duties and powers in the appointment order is an important first step in ensuring that the respondent will receive the protection and services needed and that the respondent's rights and autonomy will be respected.[167] Specifically enumerated duties and powers serve as a guide for the appointing court and other interested parties in evaluating and monitoring the guardian or conservator. Because the preferred practice is to limit the powers and duties of the guardian/conservator to those necessary to meet the needs of the respondent [see Standard 3.3.10], a probate court should specifically enumerate in its order the assigned duties and powers of the guardian/conservator, as well as limitations on them, with all other rights reserved to the respondent.[168] By listing the powers and duties of the guardian/conservator, the court's order can serve as an educational roadmap to which the guardian/conservator can refer to help answer questions about what the guardian/conservator can or cannot do in carrying out the assigned responsibilities. [See Standards 3.3.16 and 3.3.17]

When a guardianship/conservatorship is for a limited period of time (*e.g.,* when the respondent has suffered a traumatic brain injury and may recover some or all of his/her faculties), specifying the duration of a guardianship/conservatorship is particularly important so as not to unnecessarily impede the respondent's ability to return to normalcy.

When establishing the powers of the guardian/conservator, probate courts should be aware that certain decisions by a guardian or conservator may be irreversible or result in irreparable damage or harm. As a result, unless otherwise provided by statute, probate courts may specifically limit the ability of the guardian/conservator to make certain decisions without prior court approval (*e.g.,* sensitive personal or medical decisions such as abortion, organ donation, sterilization, civil commitment, termination of parental rights, change of residence, sale of residence or other major assets, or limits on visitation and contact). The ability of the guardian to make routine medical decisions should not ordinarily be curtailed, but where extraordinary decisions of an irreversible or irreparable nature are involved, authorization for those decisions should be included in the initial court order or the guardian should be required to return to the court for specific authorization before proceeding.

---

[167] M.J. Quinn & H. Krooks, *supra,* note 71, at 1635; *see also* THIRD NATIONAL GUARDIANSHIP SUMMIT, *supra,* note 6, at Recommendation 1.3, 2012 UTAH L.REV., at 1199.

[168] *See, e.g.,* NY MENTAL HYG. LAW §§ 81.20, 81.22, 81.29(a); UNIF. PROB. CODE § 5- 206(b) (2008), cmt. Background assigned responsibilities. *See also,* Standard 3.3.14, Reports by the Guardian; Standard 3.3.15, Monitoring of the Guardian.

Generally, guardians should also be required to obtain prior court approval before a respondent is permanently removed from the court's jurisdiction. Prior court approval, however, should not be required where the removal is temporary in nature (*e.g.,* when the respondent is being taken on a vacation).

In general, the court's order should only be as intrusive of the respondent's liberties as necessary. [See Standard 3.3.10] The court's order should also include a statement of the need for the guardian/conservator to involve the respondent to the maximum extent possible in all decisions affecting the respondent. The guardian should consider the preference and values of the respondent in making decisions and attempt to help the respondent regain legal capacity.[169]

Requiring the guardian/conservator to serve a copy of the order of appointment to those persons who received notice of the petition for guardianship or conservatorship will promote their continued involvement in monitoring the respondent's situation. Explaining the order of appointment to the respondent demonstrates respect for the person, facilitates the respondent's awareness of the implementation of the guardianship/conservatorship, encourages communication between the respondent and the guardian/conservator, and provides an initial opportunity to involve the respondent in decision-making as much as is appropriate. Recording a guardianship/conservatorship order provides notice to others regarding who has the authority to engage in significant financial transactions including the sale of real property.

The guardian or conservator, when accepting appointment, should acknowledge that he or she consents to the court's jurisdiction in any subsequent proceedings concerning the respondent.[170]

In order to facilitate greater use of limited guardianships and other less intrusive alternatives [see Standard 3.3.10], it is critical that probate courts implement procedures for conducting periodic reviews of the guardianship or conservatorship. The initial review should ordinarily take place no more than one year after appointment. These periodic reviews should examine compliance with the order and the well-being of the respondent and the estate, and determine whether the conditions still exist that underlay the original appointment of a guardian or conservator, whether the duties and authority of the guardian or conservator should be expanded or reduced, or particularly in instances in which the injury, illness, or condition that resulted in the guardianship may be temporary, whether the guardianship or conservatorship can be abolished.

The reviews may be triggered by a review date set as part of the terms of the original guardianship order, the review of the guardian's/conservator's/court visitor's report (see Standard 3.3.17), the request of the respondent or the guardian/conservator, or at the urging of a family member or other concerned person.[171] Probate courts should establish flexible written guidelines for the submission of a *pro se* petition or other request for review of the

[169] *See* THIRD NATIONAL GUARDIANSHIP SUMMIT, *supra,* note 6, at Standards 4.1 – 6.11, 2012 UTAH L.REV., at 1194-1198.
[170] *See* UNIF. PROB. CODE § 3-602 (2008).
[171] *Cf.* UGPPA §§ 318(b) & 421(b) (1997).

continuing need for a guardianship or conservatorship. So as not to dissipate the court's time and resources with frequent, unnecessary reviews, however, probate courts may wish to set a limit on the frequency with which the need for a guardianship or conservatorship may be re-adjudicated, absent special circumstances.

There is a divergence of views as to whether, in connection with a petition or request for reevaluation, the burden of proof should be on the respondent to reverse or modify the court's prior order or on the guardian/conservator to reestablish the basic grounds for the guardianship/conservatorship. There are also different opinions as to whether a trial *de novo* is required or whether the court may consider evidence received in prior hearings.

Promising Practices

The **District of Columbia Superior Court** provides newly-appointed guardians and conservators with a list of mandatory filing deadlines in addition to the order itself.

STANDARD 3.3.14 ORIENTATION, EDUCATION, AND ASSISTANCE

Probate courts should develop and implement programs for the orientation, education, and assistance of guardians and conservators.

A key recommendation of the Third National Guardianship Summit is that "the court or responsible entity shall ensure that guardians [and conservators] . . . receive sufficient ongoing, multi-faceted education to achieve the highest quality of guardianship possible."[172] As noted previously, most newly appointed guardians and conservators are not fully aware of their responsibilities and how to meet them. While only eight states statutorily require that all guardians and conservators receive training,[173] courts throughout the country are addressing the need to inform and assist lay guardians and conservators in a variety of ways including printed manuals and information materials (*e.g.,* AK, CA, NJ, OH); videos (AK, DC, MI, TX); on-line training and information (*e.g.,* ID, NC, OH, PA, UT, WI); and in-person briefings and educational sessions by court staff (*e.g.,* DC, FL, NY, TX) or professional or public guardians (*e.g.,* CA).[174] Where appropriate, the materials should be in a language other than English to supplement the English version (*e.g.,* AZ).

[172] THIRD NATIONAL GUARDIANSHIP SUMMIT, *supra, note* 6, at Recommendation 2.4, 2012 UTAH L.REV., at 1200; Quinn & Krooks, *supra,* note 71, at 1659-1661; *See also* NATIONAL CONFERENCE OF THE JUDICIARY ON GUARDIANSHIP PROCEEDINGS FOR THE ELDERLY, RECOMMENDED JUDICIAL PRACTICES, recommendation IV(b) (Jun. 1986) (endorsed by the American Bar Association, House of Delegates, Aug. 1987).

[173] Quinn & Krooks, *supra,* note 71, at 1659; In addition, the 11 states that require a level of certification for some non-family guardians/conservators require initial training sufficient to enable the individual to pass a certification examination, in most instances, continuing professional education.

[174] *Id.*; KARP AND WOOD, *supra,* note 4, at 61-62 (AARP, 2007). For a list of video and on-line informational resources for guardians and conservators, *see* Guardianship Video Resources, American Bar Association Commission on Law and Aging http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011_aging_gship_video_resourc_8_10.authcheckdam.pdf; American Bar Association, Adult Guardianship Handbooks by State, http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011_aging_gship_st_hbks_2011.authcheckdam.

Even when the appointment order clearly sets forth the duties and authority of a guardian and conservator and effective initial orientation and education has been provided, there will be instances in which guardians or conservators will be uncertain about how best to meet their responsibilities or whether they have the authority to take the actions necessary.[175] Again, there are a variety of approaches to addressing this need short of formally petitioning the court for guidance. Some probate courts have authorized staff to provide guidance short of legal advice to guardians and conservators on an on-going basis (*e.g.,* San Francisco, CA, Houston, TX, and UT).[176] In Florida, lay guardians are required to be represented by an attorney following appointment.[177] The District of Columbia offers annual conferences for guardians and conservators. Probate courts in Colorado employ facilitators whose duties include assisting guardians/conservators. The court in Suffolk County, NY employs a resource coordinator to assist in linking guardians to community resources, and the courts in Maricopa County, AZ and elsewhere utilize volunteer visitors whose duties include providing assistance to guardians and conservators as well as ensuring the well-being of the protected person. Maricopa County also has training programs on its website such as on basic accounting for non-professional conservators.[178]

Promising Practices

The **District of Columbia Superior Court** offers annual conferences for guardians and for fiduciaries managing funds such as conservators, personal representatives and trustees. It also sets training requirements for attorneys who wish to be eligible for appointment to represent respondents.

Florida requires that every guardian complete an educational course within four months of appointment. The course covers reporting requirements, duties, and responsibilities. Professional guardians are required to complete a 40-hour course.

Idaho and **Ohio** require guardians and conservators to complete an on-line training course before a court can hold any final hearing or issue a final order.

The **San Francisco CA Superior Court** requires all lay appointees to purchase a handbook published by the Administrative Office of the Courts and offers an orientation program.

Tarrant County, TX Probate Court No. 2 requires all decedents' administrators,

---

pdf. Initial and continuing education requirements for professional guardians and conservators are set forth in licensing and certification requirements. *See, e.g.,* FL .STAT. ANN. §744.1085(3) (2006); NATIONAL GUARDIANSHIP ASSOCIATION, STANDARDS OF PRACTICE, 23-24 (3d ed. 2007).

[175] Quinn & Krooks, *supra,* note 71, at 1637-1640.

[176] For a definition of the distinction between legal information and legal advice, *see* IOWA JUDICIAL BRANCH CUSTOMER SERVICE ADVISORY COMMITTEE, GUIDELINES AND INSTRUCTIONS FOR CLERKS WHO ASSIST PRO SE LITIGANTS IN IOWA'S COURTS 7 (July 2000), *available at* http://www.ajs.org/prose/pdfs/Iowa_Guidelines.pdf; *but see* Wash. St. Bar Assoc. v. Great Western Federal Savings & Loan Ass'n*.,* 91 Wash. 2d. 49, 54-55 586 P.2d 870 (1999).

[177] FL. PROB. R. 5.030(a) (West 2012) (except when the personal representative remains the sole interested person).

[178] Establishing a mentoring program through which experienced guardians and conservators can serve as mentors of less experienced guardians and conservators is yet another approach.

guardians, and conservators to attend a mandatory training immediately after appointment conducted by the staff member who will be reviewing their documents and to sign an acknowledgment of understanding following the training.

STANDARD 3.3.15 BONDS FOR CONSERVATORS

Except in unusual circumstances, probate courts should require for all conservators to post a surety bond in an amount equal to the liquid assets and annual income of the estate.

COMMENTARY

Among the measures probate courts may use to protect respondents is to require newly appointed conservators to furnish a surety bond[179] conditioned upon the faithful discharge by the conservator of all assigned duties.[180] The requirement of bond should not be considered as an unnecessary expense or as punitive. It is insurance against any loss being suffered by the minor. Bonding or some equally protective alternative (*e.g.*, accounts that require a court order for all withdrawals, court-maintained accounts, etc.) protect the court from public criticism for having failed in its duty and responsibility to protect the respondent's estate from loss, misappropriation, or malfeasance on the part of the conservator.

In determining the amount of the bond, or whether the case is the unusual situation in which an alternative measure will provide sufficient protection, probate courts should consider such factors as:

- The value of the estate and annual gross income and other receipts.
- The extent to which the estate has been deposited under an effective arrangement requiring a court order for its removal.
- Whether a court order is required for the sale of real estate.
- Whether a restricted account has been established and proof provided to the court that the restrictions will be enforced by the bank.
- The frequency of the conservator's required reporting.
- The extent to which the income or receipts are payable to a facility responsible for the ward's care and custody.
- Whether the conservator was appointed pursuant to a nomination that requested that bond be waived.

---

[179] This standard addresses surety bonds, that is, bonds with corporate surety or otherwise secured by the individual assets of the personal representative.

[180] *See* UNIF. PROB. CODE § 5-415 (2008) (unless otherwise directed, the size of the bond should equal the aggregate capital value of the estate under the conservator's control, plus one year's estimated income, minus the value of securities and land requiring a court order for their removal, sale, or conveyance); see also THIRD NATIONAL GUARDIANSHIP, *supra,* note 6, at Standard 4.9, 2012 UTAH L.REV., at 1195; M.J. Quinn & H. Krooks, *supra,* note 71, at 1649-1653.

.

- The information received through the background check.
- The financial responsibility of the proposed guardian/conservator.

STANDARD 3.3.16 REPORTS

A. Probate courts should require guardians to file at the hearing or within 60 days:

(1) A guardianship plan and a report on the respondent's condition, with annual updates thereafter.

(2) Advance notice of any intended absence of the respondent from the court's jurisdiction in excess of 30 calendar days.

(3) Advance notice of any major anticipated change in the respondent's physical location (*e.g.,* a change of abode).

B. Probate courts should require conservators to file within 60 days, an inventory and appraisal of the respondent's assets and an asset management plan to meet the respondent's needs and allocate resources for those needs, with annual accountings and updates thereafter. Probate courts should require conservators to submit, for approval, an amended asset management plan whenever there is any significant deviation from the approved plan or a significant change from the approved plan is anticipated.

COMMENTARY

The standard urges that guardians be required to provide a report to the court at the hearing or within two months of appointment.[181] Similarly, conservators must immediately commence making an inventory of the respondent's assets and submit the inventory and a plan within a two-month period.

- The guardian's report should contain descriptive information on the respondent's condition, the services and care being provided to the respondent, significant actions taken by the guardian, and the expenses incurred by the guardian.
- The conservator's report should include a statement of all available assets, the anticipated financial needs and expenses of the respondent, and the investment strategy and asset allocation to be pursued (if applicable). As part of this process, the conservator should consider the purposes for which these funds are to be managed, specify the services and care provided to the respondent and their costs, describe significant actions taken, and the expenses to date.

[181] Each state's respective statutory provisions may establish somewhat different time frames. *See, e.g.,*REV. CODE WASH. ANN. § 11.92.043(1) (West, Westlaw through 2011 legislation) ("It shall be the duty of the guardian . . . to file within three months after appointment a personal care plan for the incapacitated person."); WYO. STAT. § 3-2-109 (West, Westlaw through 2012 Budget Session) ("The guardian shall present to the court and file in the guardianship proceedings a signed, written, report on the physical condition, including level of disability or functional incapacity, principal residence, treatment, care and activities of the ward, as well as providing a description of those actions the guardian has taken on behalf of the ward."); OR. REV. STAT. § 125.470 (West 2012) (inventory of the estate must be filed within 90 days of conservator's appointment); S.C. CODE ANN. § 62-5-418 (West 2012) (inventory of the estate must be filed within 30 days of conservator's appointment); W. VA. CODE § 44-4-2 (2010) (inventory of the estate must be filed within 1 year of conservator's appointment).

These reporting requirements ensure that probate courts quickly receive information to enable them to better determine the condition of the respondent, the amount of assets and income available, and the initial performance of the guardian or conservator. Probate courts should also consider requiring additional information to assist in monitoring the guardianship or conservatorship such as an estimate of the fees that the guardian/conservator will charge and the basis for those charges.[182] [See Standard 3.1.4]

Probate courts should provide explicit instructions regarding the information to be contained in initial and subsequent reports. This can be accomplished either through clear forms with detailed instructions,[183] or through an on-line program such as that developed by Minnesota that poses a series of questions for the guardian or conservator to respond to and calculates totals automatically.[184] Where there is considerable overlap or interdependence, probate courts may authorize the joint preparation and filing of the plans and reports of the guardian and conservator.

In addition, the standard calls for submission of an initial plan that will help guardians and conservators perform their duties more effectively. The plans should specify goals over the next 12-24 months and how the guardian or conservator will meet those goals.[185] Development of a care or financial management plan not only offers a guide to the guardian and conservator, but also provides probate courts with a benchmark for measuring performance and assessing the appropriateness of the decisions and actions by the guardian/conservator.

The plans should be neither rote nor immutable. They should reflect the condition and situation of each individual respondent rather than provide general statements applicable to anyone. For example, the investment strategy and management objectives may be different for a relatively young respondent than for one who is older, may vary depending on the source or purpose of the assets,[186] or may be different where there is a greater need to replenish the funds for long-term support.[187] Minor changes to a guardianship plan (*e.g.,* changing doctors, replacing one social activity with another, etc.) and prudent changes in a conservatorship's investments may be implemented without consulting the court. However,

[182] Third National Guardianship Summit, *supra,* note 6, at Standard 3.1, UTAH L.REV., at 1193-1194.

[183] *See, e.g.*, Alaska Courts, *Guardianship and Conservatorship Forms, Instructions & Publications*, www.courts.alaska.gov/forms-subj.htm#guardian (last updated May 8, 2012); California Courts, *Probate Forms*, www.courts.ca.gov/forms.htm?filter=GC (July 9, 2012); D.C. Courts, *Form Locator*, http://www.dccourts.gov/internet/formlocator.jsf (July 9, 2012); 17th Judicial Circuit Court of Florida, *Probate and Guardianship Smart Forms,* http://www.17th.flcourts.org/index.php/judges/probate/probate-and-guardianship-smart-forms (July 9, 2012); KARP & WOOD, *supra,* note 4, at 37-41 & Appendix B.

[184] Minnesota Judicial Branch, *Conservator Account Monitoring Preparation and Electronic Reporting (CAMPER)*, www.mncourts.gov/conservators (July 9, 2012).

[185] *See e.g.,* NATIONAL GUARDIANSHIP ASSOCIATION, STANDARDS OF PRACTICE, Standards 13 and 18 (3d ed. 2007); For a model plan *see* KARP & WOOD, *supra,* note 4, at 87-88.

[186] For example, the management objectives may be different where funds come from a wrongful death settlement designed to replace the support capacity of a deceased parent as opposed to funds that come from a personal injury settlement designed to provide medical support for the respondent.

[187] *See generally* Edward C. Halbach Jr., *Trust Investment Law in the Third Restatement*, 27 REAL PROP., PROB. & TRUST J. 407 (1992) (discussing the background and applications of principles of fiduciary prudence as formulated in the Third Restatement of the Law of Trusts).

probate courts should advise guardians and conservators that except in emergencies, there should be no substantial deviation from the court-approved plan without prior approval. For example, any absence of the guardian or respondent from the jurisdiction of the court that will exceed 30 calendar days should be reported as should any anticipated move of the respondent within or outside the jurisdiction so that the court can readily locate the respondent at all times.

The standard provides for annual updates of the initial guardianship and conservatorship reports and plans to enable probate courts to ensure that the guardian is providing the respondent with proper care and services and respecting the respondent's autonomy, and that the estate is being managed with the proper balance of prudence and attention to the current needs and preferences of the respondent. The Uniform Guardianship and Protective Proceedings Act, and all but one state statutorily require reports of some type.[188] Along with the periodic reporting on what has been done during the reporting period including information on expenditures and projected future expenditures, guardians or conservators should notify the probate court about significant changes in the respondent's condition, either for the better or for the worse, and suggest what changes may be needed in the scope of the guardianship order.[189]

Additionally, guardians/conservators should immediately report if the respondent has been abused (e.g., by staff at their place of residence)..[190] Upon receiving a report of abuse, probate courts may take any of a number of appropriate actions including ordering an investigating by court staff, notifying the appropriate law enforcement or adult protective services agency, setting a hearing, or ordering an immediate change in placement.[191]

PROMISING PRACTICES

In **Minnesota**, after inserting a user name and password, conservators can log into a special webpage on the Judicial Branch website to complete annual financial reports by inserting requested information in response to prompts. The program automatically ensures that the report balances. It will also interface with common non-technical accounting programs to permit data to be uploaded. Supporting information can be attached such as bank statements and cancelled checks.[192]

STANDARD 3.3.17 MONITORING

Probate courts should monitor the well-being of the respondent and the status of the estate on an on-going basis, including, but not limited to:

- **Determining whether a less intrusive alternative may suffice.**

[188] UGPPA §§ 317 & 420 (1997).
[189] *See* THIRD NATIONAL GUARDIANSHIP SUMMIT, *supra,* note 6, at Standard 1.4, UTAH L.REV., at 1193.
[190] *Id.* at Standard 1.5. In some jurisdictions, guardians and conservators are mandatory reporters.
[191] *See* Quinn and Krooks, *supra*, note 71, at 1658-1659 for additional examples of actions probate courts might take .
[192] Minnesota Judicial Branch, *Conservator Account Monitoring Preparation and Electronic Reporting (CAMPER)*, www.mncourts.gov/conservators (July 9, 2012); *see also* THIRD NATIONAL GUARDIANSHIP SUMMIT, *supra,* note 6, at Standard 2.4 UTAH L.REV., at 1194.

- **Ensuring that plans, reports, inventories, and accountings are filed on time;**
- **Reviewing promptly the contents of all plans, reports, inventories, and accountings.**
- **Independently investigating the well-being of the respondent and the status of the estate, as needed.**
- **Assuring the well-being of the respondent and the proper management of the estate, improving the performance of the guardian/conservator, and enforcing the terms of the guardianship/conservatorship order.**

Investigations by the Government Accountability Office (GAO) and articles in newspapers around the country have documented failures by some probate courts to properly monitor guardianships and conservatorships they have established, resulting in harm to respondents and dissipation of their estates.[193] This standard adopts the recommendation of the Third National Guardianship Summit.[194] Following appointment of a guardian or conservator, probate courts have an on-going responsibility to make certain that the respondent is receiving the services and care required, the estate is being managed appropriately, and the terms of the order remain consistent with the respondent's needs and condition. The review, evaluation, and auditing of the initial plans, inventories, and report and the annual reports and accountings filed by a guardian or conservator is the initial step in fulfilling this duty. Making certain that those documents are filed is a necessary precondition. An automated case management system that tracks when reports and accounting are due and sends out reminders in advance and notices when required material is overdue can be helpful in fulfilling this responsibility. [See Standard 2.4.2] Probate courts should also have the capacity to investigate those situations in which guardian/conservators may be failing to meet their responsibilities under the order or exceeding the scope of their authority.

A principal component of the review is to ensure that the guardian/conservator included all of the information required by the court in these reports. Probate courts should not permit conservators to file accountings that group expenses into broad categories, and should require that all vouchers, invoices, receipts, and statements be attached to the

---

[193] *See e.g.,* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-655, COLLABORATION NEEDED TO PROTECT INCAPACITATED ELDERLY PEOPLE, (JULY 13, 2004); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-1086T, LITTLE PROGRESS IN ENSURING PROTECTION FOR INCAPACITATED ELDERLY PEOPLE, (Sept. 7, 2006); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-1046, GUARDIANSHIPS: CASES OF FINANCIAL EXPLOITATION, NEGLECT, AND ABUSE OF SENIORS, (Sept., 2010); Associated Press, *Guardians of the Elderly: An Ailing System*, Sept., 1987; Carol D. Leonnig et al., *Misplaced Trust/Guardians in the District: Under Court, Vulnerable Become Victims*, THE WASHINGTON POST, June 15-16, 2003; S. Cohen et al., *Misplaced Trust: Guardians in Control*, THE WASHINGTON POST, June 16, 2003; L. Hancock & K. Horner, THE DALLAS MORNING NEWS, Dec. 19-21, 2004; S.F. Kovalski, *Mrs. Astor's Son to Give Up Control of Her Estate*, THE NEW YORK TIMES, Oct.14, 2006; Robin Fields, Evelyn Larrubia, Jack Leonard, *"Justice Sleeps While Seniors Suffer,"* LOS ANGELES TIMES (November 14, 2005); Kristin Stewart, *Some Adults' 'Guardians' Are No Angels,* THE SALT LAKE TRIBUNE, (May 14, 2006); Cheryl Phillips, Maureen O'Hagan and Justin Mayo, *Secrecy Hides Cozy Ties in Guardianship Cases*, SEATTLE TIMES (December 4, 2006); Todd Cooper, *Ward's Assets Vulnerable,* OMAHA WORLD HERALD (August 16, 2010).

[194] Third National Guardianship Summit, *supra,* note 6, at Recommendation 2.3, 2012 UTAH L.REV., at 1200; WASHINGTON STATE BAR ASSOCIATION ELDER LAW SECTION GUARDIANSHIP TASK FORCE, REPORT TO THE WSBA ELDER LAW SECTION EXECUTIVE COMMITTEE, 9 (August 2009) www.wsba.org/Legal-Community/Sections/Elder-Law-Section/Guardianship-Committee.

accounting to enable comparison. Prompt review of the guardian's or conservator's reports enables probate courts to take early action to correct abuses and issue a show cause order if the guardian/conservator has violated a provision of the original order.

Various approaches have been developed to facilitate monitoring of guardianships and conservatorships. Some jurisdictions such as Spokane County, WA and 11th Judicial Circuit of FL (Miami-Dade) employ court staff to review reports and accountings and visit respondents. Others such as Tarrant County, TX and Trumbull County, OH rely on volunteers such as nursing or social work students. Maricopa County, AZ and Ada County, ID use a mix of staff and volunteers. Maricopa County has also implemented a "compliance calendar" process to enforce guardianship/conservatorship orders. The 17th Judicial Circuit of Florida (Broward County) has developed electronic systems to analyze expenditures and flag anomalies and possible problems. These systems also notify guardians and conservators of upcoming due dates and alert the court when reports are submitted or overdue.[195]

Some jurisdictions also require guardians and/or conservators to distribute reports and accountings to family members and other interested persons. This provides probate courts with additional informed reviews. On the other hand, given the personal information contained in reports and the financial disclosures in accountings, it may also compromise a respondent's privacy or generate family disagreements regarding the allocation of assets that have little to do with the performance of the conservator.

A number of probate courts have identified lists of actions or factors that may warrant provision of additional services or training for the guardian or conservator or further examination of a particular guardianship or conservatorship through a visitor, guardian *ad litem*, adult protective services, or more frequent reviews and hearings. These include:

Concerns

- The person under guardianship/conservatorship has no relatives or active friendships. There is no one to ask questions or provide oversight.
- The guardian/conservator talks about being exhausted and overwhelmed.
- The estate is large and complicated with significant amounts of cash and securities.
- The guardian/conservator keeps changing attorneys or attorneys try to withdraw from representing the guardian/conservator.
- The guardian/conservator has little knowledge about caring for dependent adults or has minimal experience with financial matters or.
- The guardian/conservator excessively controls all access to the person in guardianship/conservatorship and insists on being the sole provider of information to friends and family.
- The guardian/conservator does not permit the person in guardianship/conservatorship to be interviewed alone.
- The guardian/conservator wants to resign.
- The guardian/conservator changes the person's providers such as physicians, dentist, accountants and bankers to his own personal providers.

[195] THIRD NATIONAL GUARDIANSHIP SUMMIT, *supra,* note 6, at Recommendation 2.5, UTAH L.REV., at 1201.

- The guardian/conservator has financial problems such as tax problems, bankruptcy, or personal problems such as illness, divorce, a family member who has a disabling accident or illness.

Possible Red Flags

- The bills are not being paid or are being paid late or irregularly.
- The person in guardianship/conservatorship lives in a nursing home or assisted living and the guardian/conservator does not furnish/pay for clothing.
- The guardian/conservator does not arrange for application for Medicaid when needed for skilled nursing home payment.
    - The guardian/conservator does not cooperate with health or social service providers and is reluctant to spend money on the person in guardianship.
    - The guardian/conservator is not forthcoming about the services the person in guardianship/conservator can afford or says the person cannot afford services when that is not true.
    - The court has been alerted that the guardian's/conservator's lifestyle seems more affluent than before the guardianship/conservatorship.
    - Court documents, including accountings are not filed on time.
    - Accountings have questionable entries such as:
        - There are charges for utilities when the person is not living in the home or the home is standing empty.
        - Television sets or other items appear in the accounting but the person does not have them.
        - Numerous checks are written for cash.
        - The guardian reimburses herself repeatedly without explanation as to why.
        - An automobile is purchased but the person in guardianship cannot drive or use the car.
        - Use of an ATM without court authorization.
        - Gaps and missing entries for expected income such as pensions, Social Security, rental income.
        - No entries for expected expenses such as insurance for health or real property.
    - There are concerns about the quality of care the person is receiving.
    - There are repeated complaints from family members, neighbors, friends, or the person in guardianship.
    - A different living situation is needed, either more protected or less protected.
    - Revocation or failure to renew fiduciary bonds.
    - Large expenditures in the accounting not appropriate to the person's lifestyle or setting.
    - The guardian is not visiting or actively overseeing the care the person in guardianship is receiving or not receiving.[196]

---

[196] Quinn & Krooks, *supra, note* 71, at 1663-1666 (citing Tarrant County Probate Court Number Two *A Systems Approach to Guardianship Management* (2002) (paper presented at the National College of Probate Judges Fall Conference, Tucson, AZ)); R. T. Vanderheiden, *How to Spot a Guardianship or Conservatorship Going Bad: Effective Damage Control and Useful Remedies* (2002) (Paper presented at the National College of Probate Judges Fall Conference, Tucson, AZ); MARY JOY QUINN, GUARDIANSHIPS OF ADULTS: ACHIEVING JUSTICE, AUTONOMY, AND SAFETY, 213 (Springer Publ'g Co., 2005).

PROMISING PRACTICES

The Probate Division of **Florida's 17th Judicial Circuit** (Broward County) uses electronic filing and XML-based forms to create a database that enables the court to run a variety of reports such as a list of the guardianships in which expenses increased by more than specified percentage; the respondents for whom a particular guardian or conservator has been appointed; and the fees above a particular level.[197]

Maricopa County, AZ is developing a risk assessment tool to enable court staff to calibrate the level of oversight required, whether monitoring should be conducted by volunteers or full-time employees, and the frequency of reviews.[198]

Tarrant County, TX Probate Court #2 has established a program under which MSW under the supervision of a staff social worker visit respondents on behalf of the Court and report on the condition of the respondent, and the needs of the respondent and the guardian.[199]

American Bar Association Commission on Law and Aging, Volunteer Guardianship Monitoring and Assistance: Serving the Court and the Community includes handbooks for program coordinators and volunteers and a trainer's manual to help courts establish volunteer programs. It is based on the extensive experience of AARP, as well as existing court volunteer guardianship review programs.[200]

STANDARD 3.3.18 COMPLAINT PROCESS

Probate courts should establish a clear and easy-to-use process for communicating concerns about guardianships and conservatorships and the performance of guardians/conservators. The process should outline circumstances under which a court can receive *ex parte* communications. Following the appointment of a guardian or conservator, probate courts should provide a description of the process to the respondent, the guardian/conservator, and to all persons notified of the original petition.

COMMENTARY

The standard urges probate courts to establish a process for respondents, members of the respondent's family, or other interested persons to question whether the respondent is receiving appropriate care and services, the respondent's estate is being managed prudently for the benefit of the respondent, or whether the guardianship/conservatorship should be modified or terminated.[201] In designing the process, care should be taken to ensure that that

[197] KARP & WOOD, *supra,* note 4, at 55.
[198] STEELMAN & DAVIS, *supra, note 4*.
[199] KARP & WOOD, *supra,* note 4, at 51.
[200] http://www.americanbar.org/content/dam/aba/uncategorized/2011/vol_gship_intro_1026.authcheckdam.pdf
[201] Quinn & Krooks, *supra,* note 71, at 1659-1659.

an unrepresented person is able to use it, that the court receives the necessary information, and that the process is flexible enough to accommodate emergency or urgent circumstances. The process could include designation of a specific member of the staff to receive and review complaints, a designated e-mail address, and/or an on-line form. Requiring that the request be written (whether electronically or on paper) can discourage frivolous or repetitious requests that can drain the estate as well as waste the court's time.[202]

When a complaint is received, it should be reviewed to determine how it should be addressed. Approaches include a referral to services, sending a court visitor to investigate; requesting the guardian or conservator to address the issue(s) raised; referring the matter for mediation, particularly when the complaint appears to be the result of a family dispute; conducting an evaluation of the person under guardianship or conservatorship; or setting a hearing on the matter.

STANDARD 3.3.19 ENFORCEMENT OF ORDERS; REMOVAL OF GUARDIANS AND CONSERVATORS

A. Probate courts should enforce their orders by appropriate means, including the imposition of sanctions. These may include suspension, contempt, removal, and appointment of a successor.

B. When probate courts learn of a missing, neglected, or abused respondent or that a respondent's assets are endangered, they should take timely action to ensure the safety and welfare of that respondent and/or the respondent's assets.

C. When a guardian or conservator is unable or fails to perform duties set forth in the appointment order, and the safety and welfare of that respondent and/or the respondent's assets are endangered, probate courts should remove the guardian or conservator and appoint a successor as required.

COMMENTARY

Although probate courts cannot be expected to provide daily supervision of the guardian's or conservator's actions, they should not assume a passive role, responding only upon the filing of a complaint. The safety and well-being of the respondent and the respondent's estate remain the responsibility of the court following appointment. When a guardian or conservator abandons the respondent, or fails to submit a complete and accurate report or accounting in a timely manner, or based on a review of such reports or accountings, the report of a visitor, or complaints received there is reason to believe that a respondent and/or the respondent's assets are endangered, probate courts should conduct a prompt hearing and take necessary actions. [See Standards 3.3.15 – 3.3.19]

For example, orders to show cause or contempt citations may be issued against guardians and conservators who fail to file required reports on time after receiving notice and appropriate training and assistance. [See Standard 3.3.14] If there is a question of theft

---

[202] Arizona has adopted a rule providing probate courts with remedies to limit "vexatious conduct" such as frivolous filings. ARIZ. RULES OF PROB. PROC. 10(G) (2012).

or mismanagement of assets, the court may enter an order freezing the assets and suspending the powers of the conservator. If the guardian or conservator has left the court's jurisdiction, notice of a show cause hearing should be sent to the probate court in the new jurisdiction. [See Standard 3.4.1] If the guardian or conservator is an attorney, probate courts should advise the appropriate disciplinary authority that the attorney may have violated his or her fiduciary duties to the respondent. Probate courts may consider suspending the guardian or conservator and appointing a temporary guardian/conservator to immediately take responsibility for the welfare and care of the respondent. (See Standard 3.3.6, Emergency Appointment of a Temporary Guardian or Conservator.)

If a guardian or conservator becomes unable to fulfill his/her responsibilities or abandons a respondent, probate courts should make an emergency appointment of a temporary guardian/conservator and remove the original guardian/conservator. The emphasis should be on protecting the respondent's safety, welfare, and assets. After assigning a temporary guardian or conservator, probate courts should order an investigation to locate the guardian/conservator and to examine the conduct of the guardian/conservator. Probate courts should impose appropriate sanctions against a guardian or conservator who failed to fulfill his or her duties, and when the whereabouts of a guardian or conservator are unknown, check the records of state and local agencies when sharing of information is authorized by state law.

When the whereabouts of a respondent are unknown to the probate court or the guardian/conservator, an immediate investigation should be ordered to locate the respondent including checking the records of state and local agencies when state law permits the sharing of information. If the guardian or conservator has been diligent in his or her duties, and the absence of the respondent is not the fault of the guardian/conservator, the guardian/conservator should retain the appointment. If the guardian or conservator has not been diligent in his or her duties, the probate court may remove the guardian/conservator and make an emergency appointment of a temporary guardian/conservator.

In imposing sanctions such as contempt upon a guardian or conservator, the due process rights of the guardian/conservator should be protected. At a minimum, the guardian/conservator should be entitled to notice and a hearing prior to the imposition of sanctions. However, these proceedings should not preclude probate courts from taking interim steps to protect the interests of the respondent and the estate. In addition, where needed, probate courts should be able unilaterally to suspend or remove the guardian/conservator and appoint a temporary successor to provide for the welfare of the respondent with the guardian/conservator entitled to object to the action at a later date. [See Standard 3.3.6]

STANDARD 3.3.20 FINAL REPORT, ACCOUNTING, AND DISCHARGE

A. Probate courts should require guardians to file a final report regarding the respondent's status and conservators to file a final accounting of the respondent's assets.

B. Probate courts should review and approve final reports and accountings before discharging the guardian or conservator unless the filing of a final

report or accounting has been waived for cause.

COMMENTARY

The authority and responsibility of a guardian or conservator terminates upon the death, resignation, or removal of the guardian/conservator, or upon the respondent's death or restoration of competency.[203] The respondent, guardian, conservator, or any interested person may petition the court for a termination of the guardianship or conservatorship. A respondent seeking termination should be afforded the same rights and procedures as in the original proceeding establishing the guardianship/conservatorship. [See Standards 3.3.8 and 3.3.16] Where the guardian or conservator stands to benefit financially from the termination of the conservatorship, the court should carefully scrutinize this proposal.

When the request for termination of the guardianship or conservatorship is contested, probate courts should direct that notice be provided to all interested persons, conduct a hearing, and issue a determination regarding the need for continuation of the guardianship or conservatorship. [See Standards 3.1.1 and 3.3.8] Before terminating a guardianship or conservatorship, probate courts should require submission of a final report regarding the respondent's status and actions taken on behalf of the respondent and or a final accounting of the estate access, review these submissions, and if all is in order, approve them. Following approval the court order should provide for the guardian's/conservator's reasonable expenses associated with the termination and cancel any applicable bond.

Circumstances may exist, however, where a formal closing of the guardianship or conservatorship, including notice, hearing, a final report, or accounting, may be waived. For example, where the status of a now-deceased respondent is virtually unchanged except for the fact of death since the previous status report (*e.g.,* the respondent suffered from a long-term disabling illness), the guardianship may be closed, the guardian discharged, and a final report forgone, if the guardian shows a waiver and consent by the respondent's successors or other interested parties. Similarly, where a relatively small amount of funds remains in the respondent's account at the time of the respondent's death, the conservator may be directed to apply those funds to the respondent's funeral and burial expenses. If the conservator shows a waiver and consent by the respondent's successors, as well as a receipt from the funeral home for expenses depleting the balance of the respondent's assets, the conservatorship should be closed without a final accounting and full hearing.[204] If the respondent approves of the actions taken previously on his or her behalf by the conservator, the balance of funds on hand may be restored or delivered to the respondent without a final accounting and discharge.

[203] *See* UGPPA §§ 318 & 431 (1997).

[204] The procedure of *waiver and consent* is alternatively known as *release and discharge* or *release and approval* in various other jurisdictions.

3.4 INTERSTATE GUARDIANSHIPS AND CONSERVATORSHIPS

Properly administering a guardianship/conservatorship system is difficult enough when the parties— the respondent, the guardian, the family and friends—stay in one place. Today, a respondent (or alleged incapacitated person) often has ties to more than one state. Numerous factors contribute to the increase of such interstate guardianships/conservatorships.[205] The respondent, his or her guardian, family or assets may be located outside of the jurisdiction of the court that originally established the guardianship. Some incapacitated adults desire to be closer to family or may need to be placed in a different, more suitable health care or living arrangements. Family caregivers that relocate for employment reasons reasonably may wish to bring the respondent with them. The respondent's real or personal property may remain in the existing jurisdiction, however, even after the respondent has moved. interfamily conflict or attempts simply to thwart jurisdiction may occur less frequently, but still cause significant problems for probate courts. Guardians and family members, for example, may engage in forum shopping for Medicaid purposes or for state laws governing death and dying that are compatible with their views or the views of the respondent.

The frustration of courts in their attempts to monitor and enforce guardianship orders outside their jurisdiction led the Uniform Law Commission to draft the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UGAPPJA) now enacted in 31 states.[206] UGAPPJA defines what state has primary jurisdiction to determine the need for and scope of a guardianship or conservatorship and lessens the legal impediments to transferring guardianships from one state to another.

The five standards in this section make provisions for guardianships that cross state lines. Central to the provisions is the concept of "portability" – that is, that a guardianship established in one state should be able to be "exported" or "imported" from one state to another absent a showing of abuse of the guardianship. The intent of the provisions, consistent with the concept of portability, is to facilitate, and not to impede unnecessarily, the movement of a guardianship across state lines, and to speed decisions and case processing by the court while protecting, even furthering, the interests of the respondent and other interested persons.

The standards in this section are extensions to interstate guardianships of the provisions in Principle 1.1 and Standard 3.3.10. They require probate courts to be accommodating and responsive to the wishes of the respondent as well as convenient and accessible. A guardianship is not intended to restrict freedom unreasonably or to limit the flexibility, choices and convenience available to the respondent. It should not unnecessarily limit choices and preferences. Standards of access to justice and the principle of comity require courts to remove those barriers that impede litigants' participation in the legal system

[205] *See generally* A. Frank Johns et al., *Guardianship Jurisdiction Revisited: A Proposal for a Uniform Act*, 26 CLEARINGHOUSE REV. 647 (1992).

[206] Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA), (2007). Some states that have not adopted the uniform act provide probate courts with the authority to transfer guardianships and conservatorships. *See e.g.,* O.C.G.A. §29-2-73 (2010); TEX.PROB.CODE §891 (2007).

even when that participation requires the engagement

STANDARD 3.4.1 COMMUNICATION AND COOPERATION BETWEEN COURTS

Probate courts in different jurisdictions and states should communicate and cooperate to resolve guardianship and conservatorship disputes and related matters.

COMMENTARY

This standard extends the requirement of independence and comity in Principle 1.1 to a probate court's relationship with courts in other jurisdictions and recognizes that the ends of justice are more likely to be met when courts communicate and cooperate to resolve guardianship matters that cross state lines.[207] In matters pertaining to specific guardianship or conservatorship cases in which two or more probate courts have jurisdiction, the courts should communicate among themselves to resolve any problems or disputes.

When an alleged incapacitated person temporarily resides or is located in another state, for example, the court in which the petition is filed should notify the foreign jurisdiction of the respondent's presence and the relevant allegations in the petition. This notification is intended to trigger proper actions in that jurisdiction including "courtesy checks" and other investigations of the proposed respondent, and, if necessary, protective or other services.

STANDARD 3.4.2 SCREENING, REVIEW, AND EXERCISE OF JURISDICTION

A. As part of its review and screening of a petition for guardianship or conservatorship, probate courts should determine that the proposed guardianship or conservatorship is not a collateral attack on an existing or proposed guardianship in another jurisdiction or state.

B. When multiple states may have jurisdiction, a probate court should determine:

(1) The respondent's home state.

(2) If the respondent does not have a home state or if the respondent's home state has declined jurisdiction, whether the respondent has a significant connection to the state in which the probate court is located and whether it is an appropriate jurisdiction.

C. In determining whether it is an appropriate jurisdiction, a probate court should consider such factors as:

(1) The expressed preference of the respondent.;

(2) Whether abuse, neglect, or exploitation of the respondent has occurred or is

[207] *See* UAGPPJA, §§ 104- & 105 (2007).

likely to occur and which state could best protect the respondent.

(3) The length of time the respondent was physically present in or was a legal resident of the probate court's state or another state.

(4) The distance of the respondent from the court in each state.

(5) The financial circumstances of the respondent's estate.

(6) The nature and location of the evidence.

(7) The ability of the probate court of each state to decide the issue expeditiously and the procedures necessary to present evidence.

(8) The familiarity of the court of each state with the facts and issues in the proceeding.

(9) If an appointment were made, the probate court's ability to monitor the conduct of the guardian or conservator.

D. In an emergency, a probate court that is not in the respondent's home state or a state with which the respondent has a significant connection may appoint a temporary guardian or conservator or issue a protective order unless requested to dismiss the proceeding by the probate court of the respondent's home state.

COMMENTARY

This standard is based on Sections 201-209 of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act. Its intent is to stop the "race to the courthouse" as determinative of jurisdiction and venue and to promote communication and cooperation between probate courts. Paragraphs (a) – (c) set out three tiers of review. Paragraph (d) addresses the authority of probate courts in an emergency situation. When there is any question regarding the appropriate venue for submission of a guardianship/conservatorship petition, probate courts should require the parties to submit information bearing on the factors listed in paragraph (c) in order to determine which state is the appropriate jurisdiction to hear the matter. In addition, when the petition is not brought in a respondent's home state, probate courts should order the petitioner to provide notice to those persons who would be entitled to notice of the petition if the proceeding had been brought in the respondent's home state.[208]

STANDARD 3.4.3 TRANSFER OF GUARDIANSHIP OR CONSERVATORSHIP

A. Probate courts may grant a petition to transfer a guardianship or conservatorship when:

[208] UAGPPJA § 208 (2007).

(1) The respondent is physically present or is reasonably expected to move permanently to the other state or has a significant connection to the other state.

(2) An objection to the transfer has not been made or has been denied.

(3) Plans for the care of and services for the respondent and/or management of the respondent's property in the other state are reasonable and sufficient.

(4) The probate is satisfied that the guardianship/conservatorship will be accepted by the probate court in the other state.

B. The respondent and all interested persons should receive proper notice of the intended transfer and be informed of their right to file objections and to request a hearing on the petition.

COMMENTARY

This standard is consistent with Section 301 of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act. Its intent is to facilitate the transfer of a guardianship and/or conservatorship to another state in cases in which the probate court is satisfied that the guardianship/conservatorship is valid and that the guardian/conservator has performed his or her duties properly in the interests of the respondent for the duration of his or her appointment. It is based on the assumption that most guardians/conservators are acting in the interest of the respondent and that the notice and reporting requirements, and the opportunity to bring objections to the transfer to the attention of the court, are sufficient checks on the appropriateness of the transfer of the guardianship.

A guardian or conservator should always provide the court, the respondent, and all interested persons advance notice of an intended transfer of the guardianship/conservatorship or movement of the respondent or property from the court's jurisdiction. The guardian/conservator should be familiar with the laws and requirements of the new jurisdiction.

Any bond or other security requirements imposed by the exporting court should be discharged only after a new bond, if required, has been imposed by the receiving court. Debtor issues may need to be dealt with in accordance with existing state laws.

STANDARD 3.4.4 RECEIPT AND ACCEPTANCE OF A TRANSFERRED GUARDIANSHIP

Probate courts should accept a guardianship or conservatorship transferred in accordance with Standard 3.4.3 unless an objection establishes that the transfer would be contrary to the interests of the respondent or the guardian/conservator is ineligible for appointment in the receiving state. Acceptance of the transferred guardianship/conservatorship can be made without a formal hearing unless one is requested by the court *sua sponte* or by motion of the respondent or by any interested

person named in the transfer documents. Upon accepting a transferred guardianship/conservatorship, probate courts should notify the transferring probate court.

COMMENTARY

This standard is consistent with Section 302 of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act. Probate courts should recognize and accept the terms of a foreign guardianship or conservatorship that has been transferred with the approval of the transferring court. The receiving court should notify the transferring court and acknowledge that it has formally accepted the guardianship. Receipt of this notice can serve as the basis for the original court's termination of its guardianship.

Consistent with Standard 3.4.1, probate courts should cooperate with the foreign court to facilitate the orderly transfer of the guardianship. To coordinate the transfer, it may delay the effective date of its acceptance of the transfer, make its acceptance contingent upon the discharge of the guardian/conservator by the transferring court, recognize concurrent jurisdiction over the guardianship/conservatorship, or make other arrangements in the interests of the parties and the ends of justice.

STANDARD 3.4.5 INITIAL HEARING IN THE COURT ACCEPTING THE TRANSFERRED GUARDIANSHIP

A. No later than ninety (90) days after accepting a transfer of guardianship/conservatorship, probate courts should conduct a review hearing during which they may modify the administrative procedures or requirements of the guardianship/conservatorship in accordance with state law and procedure.

B. Probate courts should:

(1) Give effect to the determination of incapacity unless a change in the respondent's circumstances warrants otherwise.

(2) Recognize the appointment of the guardian/conservator unless the person or entity appointed does not meet the qualifications set by state law.

(3) Ratify the powers and responsibilities specified in the transferred guardianship/conservatorship except where inconsistent with state law or required by changed circumstances

COMMENTARY

Probate courts should schedule a review hearing within 90 days of receipt of a foreign guardianship. The review hearing permits the court to inform the respondent and guardian/conservator of any administrative changes in the guardianship/conservatorship (*e.g.,* bond requirements or reporting procedures) that are necessary to bring the transferred guardianship/conservatorship into compliance with state law. Unless specifically requested to do otherwise by the respondent, the guardian/conservator, or an interested person because of a change of circumstances, probate courts should give full faith and credit to the

terms of the existing guardianship/conservatorship concerning the rights, powers and responsibilities of the guardian/conservator except when they are inconsistent with statutes governing guardianship and/or conservatorship in the receiving state.

3.5 PROCEEDINGS REGARDING GUARDIANSHIP AND CONSERVATORSHIP FOR MINORS

The standards in this section address non-testamentary guardianships and conservatorships of minors, i.e. persons under age 18.[209] They set forth the practices that probate courts should follow when adjudicating these cases but do not cover the complex interpretational issues that can arise, for example, in interstate cases where the Uniform Child Custody Jurisdiction Act[210] and the federal Parental Kidnapping Prevention Act[211] may apply, or when determining when the conditions have occurred to trigger a standby guardianship or terminate a temporary guardianship. The standards cover both guardianships of a minor's person and conservatorships of a minor's estate. In some states, both types of proceedings are within the jurisdiction of probate courts. In many other states, probate court jurisdiction is limited to protecting the property and financial interests of a minor with jurisdiction over custody matters vested in the family or juvenile court. Standard 3.5.12 specifically addresses the latter situation, urging that the courts communicate and coordinate with each other to ensure that the best interests of the minor are served. In most instances, the standards in this section urge probate courts to follow practices similar to those recommended in Section 3.3 for guardianships/conservatorships of adults.

STANDARD 3.5.1 PETITION

A. Probate courts should adopt a clear, easy to complete form petition written in plain language for initiating proceedings regarding the non-testamentary appointment of a guardian/conservator for a minor.

B. The petition form, together with instructions, a description of the jurisdiction of the probate court and, if applicable, the jurisdiction of the juvenile or family court regarding guardianships/conservatorships of minors, and an explanation of guardianship and conservatorship and the process for obtaining one, should be readily available at the court, in the community, and on-line.

C. A petition to establish a guardianship or conservatorship should be verified and require at least the following information:

(1) The full name, physical and mailing address of the petitioner(s)

(2) The relationship, if any, between the petitioner(s) and the minor

(3) The full name, age, and physical address or location of the minor

---

[209] Testamentary appointment of a guardian or conservatorship for a minor is effective automatically subject to later challenge; non-testamentary appointments require court approval. *See* UNIF. PROB. CODE 5-201, 5-202 (2008); UGPPA §§ 201 and 202 (1997).

[210] UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT (1997) http://www.law.upenn.edu/bll/archives/ulc/uccjea/final1997act.htm

[211] 28 U.S.C. §1738A

(4) Whether the minor may be a member of a federally recognized tribe or a citizen of another country

(5) If the petitioner(s) is/are not the parent(s) or sole legal guardian(s) of the minor, the full name, physical and mailing address of each parent of the child whose parental rights have not been legally terminated by a court of proper jurisdiction

(6) The reasons why a guardianship and/or conservatorship is being sought

(7) The guardianship/conservatorship powers being requested and the duration of those powers

(8) Whether other related proceedings are pending

(9) In conservatorship cases:

(a) The nature and estimated value of assets

(b) The real and personal property included in the estate

(c) The estimated annual income and annual estimated living expenses for the minor during the ensuing twelve (12) months

(d) That the petitioner(s) is/are qualified for and capable of posting a surety bond in the total of the present value of all real property assets included in the estate plus the annual income expected during the ensuing twelve (12) months

D. If the petition is for appointment of a standby guardian or conservator it should be accompanied by documentation of the parent's debilitating illness or lack of capacity.[212]

E. The petition should be reviewed by the probate court or its designee to ensure that all of the information required to initiate the guardianship/conservatorship proceeding is complete.

COMMENTARY

The standard lists the minimum information that probate courts and all parties to a guardianship or conservatorship proceeding for a minor need in order to proceed. It attempts to strike a balance between making guardianship/conservator proceedings available to parents or others concerned about the well-being of a child, while providing the court with the fundamental information necessary to proceed. Paragraph C(4) of the standard is included to enable probate courts to comply more easily with the requirements of the Indian

[212] At least 24 states and the District of Columbia permit parents with a degenerative, incurable disease to seek appointment of a person who will serve as guardian/conservator of their children upon their death or incapacity. *See* J.S. Rubenstein, *Standby Guardianship Legislation: At the Midway Point*, 2 ACTEC JOURNAL 33 (2007); UGPPA §202 (1997).

Child Welfare Act[213] and the Vienna Convention on Consular Relations.[214] The standard urges courts to use forms that minimize "legalese" and are as easy to complete as possible but requires that petitioners verify the statements made in order to protect against frivolous filings.

While the standard sets forth the minimum information that should be required, good practice suggests that the following information will often be needed and should be included as part of the petition itself or as attachments to it, including:

- The name and address of any person responsible for the care or custody of the minor including an existing guardian/conservator.
- The name and address of any current guardian, conservator, legal representative or representative payee for the minor.
- Existing powers of attorney applicable to the minor.
- The name, address, and interest of the petitioner.[215]

In addition, if the petition is for appointment of a stand-by guardian or conservator, a doctor's certificate or other documentation that the parent is suffering from a progressively chronic or irreversible illness that is fatal or will result in the parent's inability to protect the well-being and property of the minor.

Probate courts should develop and distribute forms that will assist the petitioner to meet these requirements. Whenever possible, petitions, instructions, and explanations of guardianship/conservatorship for minors, and the process for seeking them should be available on the court website as well as at libraries. Probate courts should be able to provide a list of community resources for free or low-cost legal services, such as bar referral services, legal aid offices, and law school clinics. To the extent permissible under state law and court rules, petitioners should be able to complete and submit petitions electronically. Informational brochures should be available on the court website and distributed to all persons upon request or to those who file guardianship/conservatorship petitions.

Promising Practices

Several court systems and individual courts provide information regarding guardianship/conservatorship for minors proceedings on their websites including the forms necessary to initiate a conservatorship or guardianship. For example:

---

[213] 25 USC §§1901 *et seq.*

Vienna Convention on Consular Relations, Art. 37 21 U.S.T. 77 (1963) http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf, which requires notification of the local consulate whenever a guardian may be appointed for a foreign national.

[215] *See Model Statute on Guardianship and Conservatorship*, §19(b) in BRUCE D. SALES, D.MATTHEW POWELL, & RICHARD VAN DUIZEND, DISABLED PERSONS AND THE LAW, 573-574 (Plenum Press, 1982).

California Judicial Branch
http://www.courts.ca.gov/documents/gc210.pdf

District of Columbia Superior Court
http://www.dccourts.gov/internet/legal/aud_probate/gdnlegal.jsf

Maricopa County, AZ Superior Court
http://www.superiorcourt.maricopa.gov/SuperiorCourt/Self-ServiceCenter/Forms/ProbateCases/prob_group_4.asp

Philadelphia County, PA Court of Common Pleas
http://www.pacourts.us/NR/rdonlyres/11E9588C-4158-4962-8ACA-BC95A7EA1B1E/0/OCRFormOC04.%20target=

In addition, the Denver, CO Probate Court employs *pro se* facilitators to assist persons seeking to file a petition for guardianship.
http://www.denverprobatecourt.org/

STANDARD 3.5.2 NOTICE

A. Probate courts should ensure that timely notice of the guardianship/conservator proceedings is provided to:

(1) The minor if the minor has attained a sufficient age to understand the nature of the proceeding.

(2) Any person who has had primary care and custody of the minor during the 60 days prior to the filing of the petition.

(3) The minor's parents, step-parents, siblings, and other close kin.

(4) Any person nominated as guardian/conservator.

(5) Any current guardian, conservator, legal representative or representative payee for the minor.

(6) Notice to a representative of the minor's tribe if the minor is Native American.

B. Any written notice should be in plain language and in easily readable type. At the minimum, it should set forth the time and place of judicial hearings, the nature and possible consequences of the proceedings, and the rights of the minors and of persons entitled to object to the appointment of a

guardian/conservator of the minor. A copy of the petition should be attached to the written notice.

C. **Probate courts should implement a procedure whereby any interested person can file a request for notice and/or a request to intervene in the proceedings.**

D. **Probate courts should require that proof that all required notices be filed.**

COMMENTARY

This standard underscores the general notice requirements of Standard 3.1.1 (Notice) by requiring specific timely notice of guardianship and conservatorship proceedings to the minor and others entitled to notice. It generally follows the notice provision in the Uniform Guardianship and Protective Proceedings Act.[216] Consistent with the trend in other types of proceedings involving minors, it does not specify a minimum age at which the minor is entitled to receive notice and participate in the hearing.[217] The notice should be written and personally delivered. When the officers serving the notice are under court control, it may be appropriate to provide them with special training to facilitate interactions with minors. In addition to providing notice to the minor, notice should ordinarily also be given to those who are most likely to have interest in the minor's well-being and safety, as well as the proposed guardian/conservator and any previously appointed legal representatives. This may include a tribal representative if the minor may be a member of a recognized Indian tribe.[218]

Probate courts should establish a procedure permitting interested persons who desire notification before a final decision is made in a guardianship/conservatorship proceeding to file a request with the court for notice or to intervene in the proceedings.[219] This procedure allows persons interested in the establishment or monitoring of a guardianship or conservatorship to remain abreast of developments and to bring relevant information to the court's attention. The request for notice should contain a statement showing the interest of the person making the request. Intervention in the proceedings by an interested party, including the nomination of someone else as guardian or conservator, should be permitted. A fee may be attached to the filing of the request and a copy of the request should be provided to the minor's guardian/conservator (if any). Unless the probate court makes a contrary finding, notice should be provided to any person who has properly filed this request.

[216] UGPPA §205(a) (1997).
[217] *See e.g.,* AZ JUV. CT. R. PRO., RULE 41 (2010); 42 U.S.C.A. § 675(5)(c) (2010).
[199] INDIAN CHILD WELFARE ACT, 25 USC §§1901 *et seq.*
[200] *See, e.g,* UGPPA § 116 (1997); UNIF. PROB. CODE § 5-116 (2008).
[201] FOSTERING CONNECTIONS TO SUCCESS AND INCREASING ADOPTIONS ACT, 42 U.S.C. 671(a) (2008).

STANDARD 3.5.3 EMERGENCY APPOINTMENT OF A TEMPORARY GUARDIAN/CONSERVATOR FOR A MINOR

A. When permitted, probate courts should only appoint a temporary guardian or conservator for a minor e*x parte*:

(1) Upon the showing that unless granted temporary appointment is made, the minor will suffer immediate or irreparable harm and there is no one with authority or who is willing to act.

(2) In connection with the filing of a petition for a permanent guardianship or conservatorship for the minor.

(3) Where the petition is set for hearing on the proposed permanent guardianship or conservatorship on an expedited basis.

(4) When notice of the temporary appointment is promptly provided in accordance with Standard 3.5.2.

B. The minor or the person with custody of the minor should be entitled to an expeditious hearing upon a motion seeking to revoke the temporary guardianship or conservatorship.

C. Where appropriate, probate courts should consider issuing a protective order (or orders) in lieu of appointing a temporary guardian or conservator for a minor.

D. The powers of a temporary guardian or conservator should be carefully limited and delineated in the order of appointment.

E. Appointments of temporary guardians or conservators should be of limited and finite duration.

COMMENTARY

Emergency petitions seeking a temporary guardianship/conservatorship for a minor require the court's immediate attention. Ordinarily such petitions would arise when both parents are deceased, or when there is written consent from the custodial parent, but there is not time to serve the non-custodial parent before significant decisions must be made for the minor such as enrollment in school or medical treatment), or when for some other reason the safety of the minor is threatened and there is no one including the relevant child protection agency willing or authorized to act.

Because not only the minor's safety but also parental and other important rights are involved, emergencies, and the expedited procedures they may invoke require probate courts to remain closely vigilant for any potential due process violation and any attempt to use the emergency proceedings to interfere with an investigation or proceeding initiated by the relevant child protection agency. Thus, the standard calls for the request for an emergency petition to submitted in conjunction with a petition for appointment of a permanent guardian/conservator for the minor [See Standard 3.5.1], notice to all parties or potential

parties listed in Standard 3.5.2, an expedited hearing[220], and use of protective orders as a substitute for appointment of a guardian or conservator when appropriate. By requiring the showing of an emergency and the simultaneous filing of a petition for a permanent guardianship/conservatorship for the minor, probate courts will confirm the necessity for the temporary guardianship/conservatorship and ensure that it will not extend indefinitely. When the temporary guardianship or conservatorship is established for the minor, the date for the hearing on the proposed permanent guardianship/conservatorship should be scheduled. The order establishing the temporary guardianship/conservatorship should limit the powers of the temporary guardian or conservatorship to only those required by the emergency at hand and provide that it will lapse automatically upon that hearing date. The temporary guardianship/conservatorship order may be accompanied by support, visitation, restraining, or other relevant orders when appropriate.[221] Full bonding of liquid assets should be required in temporary conservatorship cases. The length of temporary guardianships/conservatorships for minors should be in accord with state law, but should not extend for more than 30 days.[222]

When establishing the powers of the temporary guardian or conservator, the court should be cognizant of the fact that certain decisions by a temporary guardian or conservator may be irreversible or result in irreparable damage or harm (*e.g.,* the liquidation of the respondent's estate). Therefore, it may be appropriate for the court to limit the ability of the temporary guardian or conservator or a minor to make certain decisions without prior court approval (*e.g.,* sensitive personal or medical decisions such as abortion, organ donation, sterilization, civil commitment, withdrawal of life-sustaining medical treatment, termination of parental rights).

While the appointment of a temporary guardian or conservator for a minor provides a useful mechanism for making needed decisions during an emergency, it also can offer an option to a probate court that receives information that a currently appointed guardian or conservator is not effectively performing his or her duties and the welfare of the minor requires that a substitute decision maker be immediately appointed. Under such circumstances, the authority of the permanent guardian or conservator can be suspended and a temporary guardian appointed for the minor with the powers of the permanent guardian or conservator. The probate court should, however, ensure that this temporary guardianship/conservatorship also does not extend indefinitely by including a maximum duration for it in its order.

STANDARD 3.5.4 Representation for the Minor

A. Probate courts should appoint a guardian *ad litem* for the minor if the guardianship results from a child neglect or abuse proceeding, there are grounds to believe that a conflict of interest may exist between the petitioner or proposed guardian and the minor, or if the minor is not able to comprehend the nature of the proceedings.

---

[220] See e.g., NH REV. STAT. ANN. §463:7 (2011); UGGPA §204(e).
[221] NH REV. STAT. ANN. §463:7 (II) (2011).
[222] NH REV. STAT. ANN. §463:7 (2011); UGGPA §204(e).

B. **Probate courts should appoint an attorney to represent a minor if the court determines legal representation is needed or if otherwise required by law.**

COMMENTARY

Most proceedings for appointment of a guardian/conservator for a minor are uncontested and the best interests of the minor will be served by the appointment of the proposed guardian/conservator. However, with greater use of other kinship guardianship as a means for providing a permanent placement for children who have been abused or neglected,[223] there will be greater need for probate courts to obtain more in-depth information regarding a minor's best interests when making determinations whether to appoint a guardian or conservator for a minor and whom to appoint.[224]

Guardians *ad litem* are persons appointed to represent the best interests of a minor. They are responsible for conducting an independent investigation in order to provide the court with information and recommendations regarding what outcome will best serve the child's needs.[225] Some courts use CASAs (Court Appointed Special Advocates) who are specially screened and trained volunteer(s) to serve in this role in cases involving child abuse and neglect.[226] Both guardians *ad litem* and CASAs take the views and wishes of the minor into account but make their own determination of what are the child's or youth's best interests. Attorneys appointed to serve as legal counsel, on the other hand, must advocate for the outcome sought by their client. When appointing a guardian *ad litem*, CASA, or attorney for a minor, it is good practice for probate court judges to state their duties on the record and the reasons for the appointment.[227] Especially in jurisdictions with a significant Native American population, guardians *ad litem,* CASAs, and attorneys appointed for a minor should be familiar with the requirements of and reasons underlying ICWA.

STANDARD 3.5.5 PARTICIPATION OF THE MINOR IN THE PROCEEDINGS

Probate courts should encourage participation of minors who have sufficient capacity to understand and express a reasoned preference in guardianship/conservatorship proceedings and to consider their views in determining whether to appoint a guardian/conservator and whom to appoint.

---

[224] THE PEW COMMISSION ON CHILDREN IN FOSTER CARE, FOSTERING THE FUTURE: SAFETY, PERMANENCE AND WELL-BEING FOR CHILDREN IN FOSTER CARE, 43 (2004), http://pewfostercare.org/research/docs/FinalReport.pdf.
[225] *See* NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES (NCJFCJ), ADOPTION AND PERMANENCY GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES, 83-84 (NCJFCJ, 2000).
[226] *See* www.casaforchildren.org
[227] UGGPA, §115 (2007).

COMMENTARY

From the time of the Romans, children age 14 or older had a voice in selecting a guardian.[228] This legal tradition is reflected in the Uniform Guardianship and Protective Proceedings Act and many state statutes.[229] There is growing recognition that presence and participation of a child in a proceeding determining residence and custody is important for both the child and the court both in the literature regarding dependency proceedings and in both family court and probate court statutes.[230] This has led some states to provide that minors of any age may not just formally object to a guardian but may also nominate a guardian if they are "of sufficient maturity to form an intelligent preference."[231] While a judge is not required to follow the preferences of a minor regarding the appointment of a guardian or conservator, it is good practice to at least ask the children or youth for their views.

Promising Practices

Resources to assist judges in meaningfully and appropriately involving minors in court proceedings are available from the American Bar Association Center on Children and the Law.
http://www.americanbar.org/groups/child_law/what_we_do/projects/empowerment/youthincourt.html

STANDARD 3.5.6 BACKGROUND CHECKS

A. Probate courts should request a national background check on all prospective guardians and conservators of minors, other than those specified in paragraph B., before an appointment is made to determine whether the individual has been: convicted of a relevant crime; determined to have committed abuse, abandonment, neglect, or financial or sexual exploitation of a child, or a spouse or other adult; has been suspended or disbarred from law, accounting, or other professional license for misconduct involving financial or other fiduciary matters; or has a poor credit history.

B. Background checks should not be conducted for prospective guardians and conservators who have been the subject of such a check as part of a certification or licensing procedure, , or banks, trust companies, credit unions, savings and loan

[228] David M. English, *Minor's Guardianship in an Age of Multiple Marriage*, 1995 INSTITUTE ON ESTATE PLANNING, 5-15 (1995).
[229] *Id.* at 5-16 – 5-18; UGPPA §203 (1997).
[230] NCJFCJ, *supra,* note 225, at 20; Andrea. Khoury, *With Me, Not Without Me: How to Involve Children in Court,* 26 CHILD L. PRAC. 129 (2007); Miriam A. Krinsky, *The Effect of Youth Presence in Dependency Court Proceedings*, JUV. & FAM. JUST. TODAY, Fall 2006, at 16; PEW COMMISSION, *supra,* note 224, at 41; FLA. STAT. ANN. §39.701(6)(a) (2012); NH REV. STAT. ANN. §463-8 (II) (2012).
[231] E.g., CAL. PROB.CODE §1514(e)(2) (2012); CONN. GEN. STAT. ANN. §45a-617 (2012); NH REV. STAT. ANN. §463.8 (IV) (2012).

associations, or other financial institutions duly licensed or authorized to conduct business under applicable state or federal laws.

COMMENTARY

Given the vulnerability of children who have lost their parents through death, illness, or through action of a court, the authority of guardians and conservators, the opportunities for misuse of that authority, and the incidence of abuse and exploitation around the country, requiring prospective guardians and conservators to undergo a thorough criminal history and credit check is an appropriate safeguard. Currently the federal Fostering Connections to Success and Increasing Adoption Act requires at least a criminal records check,[232] and many states require both a criminal records check and a check of child abuse registries.[233]

The background information is intended to provide probate courts with information on which to base a decision whether the nominee should be appointed. Upon receiving such potentially disqualifying information, probate courts should weigh the seriousness of the offense or misconduct, its relevance to the responsibilities of a guardian or conservator, how recently the offense or misconduct occurred, the nominee's record since the offense or misconduct occurred, and the vulnerability of the minor. If there is some concern but not enough to disqualify a potential guardian or conservator, probate courts may require periodic post-appointment criminal history and/or credit checks of a guardian or conservator, a larger bond, more frequent reports or accountings, and/or more intensive monitoring.[234] [See Standards 3.5.9 through 3.5.11].

STANDARD 3.5.7 ORDER

A. Probate courts should tailor the order appointing a guardian or conservator for a minor to the facts and circumstances of the specific case.

B. In an order appointing a conservator or limited guardian for a minor, probate courts should specify the duties and powers of the conservator or limited guardian, including limitations to the duties and powers, requirements to establish restrictive accounts or follow other protective measures, and any rights retained by the minor.

C. If the order is for a temporary, limited, or emergency guardianship or conservatorship for a minor, probate courts should specify the duration of the order.

D. Probate courts should inform newly appointed guardians about their responsibilities to the minor, the requirements to be applied in making decisions and caring for the minor, and their responsibilities to the court including the filing of plans and reports.

---

[232] 42 U.S.C. §471(a)(2)(D); *see e.g.*, NH REV. STAT. ANN. §463.5(V)

[233] *See e.g.*, NH REV. STAT. ANN. §463.5(V).

[234] In light of the abuses that have occurred, some probate courts may wish to require periodic updates of background checks in all cases in order to ensure that the person appointed continues to be fit to serve.

E. Probate courts should inform newly appointed conservators of minors about their responsibilities to the minor, the requirements to be applied in managing the minor's estate, and their responsibilities to the court including the filing of inventories, asset management plans, and accountings.

F. Following appointment, probate courts should require a guardian, or conservator for a minor to:

G. Provide a copy of and explain to the minor the terms of the order of appointment including the rights retained; and

H. Serve a copy of the order to the persons who received notice of the petition initiating the guardianship/conservatorship proceeding and those persons whose request for notice and/or to intervene has been granted by the court and file proof of service with the court;

I. Record the order in the appropriate property record if the minor's estate includes real estate;

COMMENTARY

Most individuals appointed as a guardian or conservator know little about what is expected of them and the scope of their responsibilities and authority. Thus, including a clear, complete statement of duties and powers in the appointment order (and/or the letters of authority) is an important first step in ensuring that minors will receive the protection and services needed. Generally, a guardian of a minor has the powers and responsibilities of a parent regarding the minor's well-being, care, education, and support.[235] Conservators of minors should have duties and authorities similar to those of a conservator of an incapacitated adult. By listing the powers and duties of the guardian/conservator, the probate court's order can serve as an educational roadmap to which the guardian/conservator can refer to help answer questions about what the guardian/conservator can or cannot do in carrying out the assigned responsibilities. This will also as serve as notice to third parties with whom the guardian/conservator may have dealings regarding the limitations on the powers and authority.

The Uniform Guardianship and Protective Proceedings Act provides that a probate court may establish a temporary, emergency, or limited guardianship for a minor in certain circumstances.[236] [See Standard 3.5.3] When such a guardianship or conservatorship is established, it is all the more important for probate courts to specify the guardian's/conservator's duties and authority, limitations on that authority, the responsibilities and rights retained by the minor or the minor's parents, and the duration of the appointment, in order to limit uncertainty within the family and by health providers, school officials, and creditors. Probate courts may also require use of protective measures

[235] UGPPA, §§207 – 208 (1997).
[236] UGPPA, §§204(d) & (e), and 206(b) (1997).

such as establishment of restricted accounts, deposit of funds with the court, or transfers of property pursuant to the Uniform Transfer to Minors Act if applicable.[237]

Guardians of minors should also be required to obtain prior court approval before a minor is permanently removed from the court's jurisdiction. Prior court approval, however, should not be required where the removal is temporary in nature (*e.g.,* when the minor is being taken on a vacation or is sent to a school out of state).

Requiring the guardian/conservator to serve a copy of the order of appointment to those persons who received notice of the petition for guardianship or conservatorship and those persons whose request for notice and/or to intervene have been granted by the court will promote their continued involvement in monitoring the minor's situation. Explaining the order of appointment to minors in terms they can understand facilitates the minor's awareness of what is happening and encourages communication between the minor and the guardian/conservator. Recording a guardianship/conservatorship order provides notice to others regarding who has the authority to engage in significant financial transactions including the sale of real property.

STANDARD 3.5.8 ORIENTATION, EDUCATION, AND ASSISTANCE

Probate courts should develop and implement programs for the orientation, education, and assistance of guardians and conservators for minors.

As noted previously, most newly appointed guardians and conservators are not fully aware of their responsibilities and how to meet them. A number of states currently provide at least some materials that explain the duties of guardians and conservators for minors (*e.g.,* printed guidelines CT; a video, GA; on-line instructions, AZ).[238] Where appropriate, the materials should be in a language other than English to supplement the English version (*e.g.,* GA). In addition, as with guardians and conservators for disabled adults, probate courts should have some program or process for assisting guardians or conservators for minors who are uncertain about how best to meet their responsibilities or whether they have the authority to take the actions necessary. [See Standard 3.3.14]

STANDARD 3.5.9 BONDS FOR CONSERVATORS OF MINORS

Except in unusual circumstances, probate courts should require all conservators to post a surety bond in an amount equal to the value of the liquid assets and annual income of the estate.

---

[237] UNIFORM TRANSFERS TO MINORS ACT (1986), http://www.law.upenn.edu/bll/archives/ulc/fnact99/1980s/utma86.htm.

[238] http://www.jud.state.ct.us/probate/Guardian-KID.pdf; http://www.gaprobate.org/guardianship.php; https://www.azcourts.gov/Portals/34/Forms/Probate/gardinst.pdf.

COMMENTARY

Among the measures probate courts may use to protect minors is to require newly appointed conservators to furnish a surety bond[239] conditioned upon the faithful discharge by the conservator of all assigned duties.[240] The requirement of bond should not be considered as an unnecessary expense or as punitive. It is insurance against any loss being suffered by the minor. Bonding or some equally protective alternative (*e.g.,* accounts that require a court order for all withdrawals, court-maintained accounts, etc.) protect the court from public criticism for having failed in its duty and responsibility to protect the minor's estate from loss, misappropriation, or malfeasance on the part of the conservator.

In determining the amount of the bond, or whether the case is one in which an alternative measure will provide sufficient protection, probate court should consider such factors as:

- The value of the estate and annual gross income and other receipts.
- The extent to which the estate has been deposited under an effective arrangement requiring a court order for its removal.
- Whether a court order is required for the sale of real estate.
- Whether a restricted account has been establish and proof provided to the court that the restrictions will be enforced by the bank.
- The frequency of the conservator's required reporting.
- The extent to which the income or receipts are payable to a facility responsible for the minor's care and custody.
- Whether the conservator was appointed pursuant to a nomination that requested that bond be waived.
- The information received through the background check.
- The financial responsibility of the proposed conservator.

STANDARD 3.5.10 REPORTS

A. Probate courts should require guardians of minors to file at the hearing or within 60 days:

(1) A guardianship plan, with annual updates thereafter.

(2) Advance notice of any intended absence of the minor from the court's jurisdiction in excess of 30 calendar days.

[239] As noted in Standard 3.1.2 (Fiduciaries), a personal bond adds little to a personal representative's oath or acceptance of appointment. This standard addresses surety bonds, that is, bonds with corporate surety or otherwise secured by the individual assets of the personal representative.
[240] *See* UNIF. PROB. CODE § 5-415 (2008) (unless otherwise directed, the size of the bond should equal the aggregate capital value of the estate under the conservator's control, plus one year's estimated income, minus the value of securities and land requiring a court order for their removal, sale, or conveyance).

(3) Advance notice of any major anticipated change in the minor's physical location (e.g., a change of abode).

B. Probate courts should require conservators for minors to file within 60 days, an inventory of the minor's assets and an asset management plan to meet the minor's needs and allocate resources for those needs, with annual accountings and updates thereafter. Probate courts should require conservators to submit, for approval, an amended asset management plan whenever there is any significant deviation from the approved plan or a significant change from the approved plan is anticipated.

COMMENTARY

The standard urges that guardians for minors be required to provide a report to the probate court at the hearing or within 60 days of appointment and annually thereafter until discharged. Similarly, conservators for minors must immediately commence making an inventory of the minor's assets and submit the inventory and an asset management plan for the first twelve (12) months within 60 days of appointment.

- The guardian's report should contain descriptive information on the services and care being provided to the minor, significant actions taken by the guardian, and the expenses incurred by the guardian.
- The conservator's report should include a statement of all available assets, the anticipated income for the ensuing twelve (12) months, the anticipated financial needs and expenses of the minor, and the investment strategy and asset allocation to be pursued (if applicable). As part of this process, the conservator should consider the purposes for which these funds are to be managed, specify the services and care to be provided to the minor and their costs, describe significant actions taken, and the expenses to date.

These reporting requirements ensure that probate courts quickly receive information to enable them to better determine the condition of the minor, the amount of assets and income available, and the initial performance of the guardian or conservator. The Uniform Guardianship and Protective Proceedings Act authorizes courts to require guardians and conservators of minors to "report on the condition of the ward and account for money and other assets in the guardian's possession or subject to the guardian's control" as required by rule or at the request of an interested person.[241] Several states require guardians and conservators of minors to file reports periodically as well.[242]

Probate courts should provide explicit instructions regarding the information to be contained in initial and subsequent reports. This can be accomplished either through clear forms with detailed instructions or through an on-line program such as that developed by Minnesota for conservators of incapacitated adults.[243] Where there is considerable overlap

[241] UGPPA, §207(b)(5) (1997).
[242] *See e.g.,* FLA. STAT. ANN. §744.367 (2012); N.H. STAT. REV. §463.17 (2012).
[243] www.mncourts.gov/conservators.

or interdependence, probate courts may authorize the joint preparation and filing of the plans and reports of the guardian and conservator.

The plans should be neither rote nor immutable. They should reflect the condition and situation of each individual minor rather than provide general statements applicable to anyone. For example, the investment strategy and management objectives may be different for a relatively young minor than for one who is older, may vary depending on the source or purpose of the assets, or may be different where there is a greater need to replenish the funds for long-term support.[244] Minor changes to a guardianship plan (*e.g.,* changing doctors, replacing one social activity with another, etc.) and prudent changes in a conservatorship's investments may be implemented without consulting the court. However, probate courts should advise guardians and conservators that except in emergencies, there should be no substantial deviation from the court-approved plan without prior approval. For example, any absence of the guardian or minor from the jurisdiction of the court that will exceed 30 calendar days should be reported as should any anticipated move of the minor within or outside the jurisdiction so that the court can readily locate the minor at all times. In addition, if at any time there is any change in circumstances that might give rise to a conflict of interest or the appearance of such a conflict, it should be reported to the probate court as quickly as possible.

Finally, the standard provides for annual updates of the initial guardianship plan and conservatorship asset management plan to enable probate courts to ensure that the guardian is providing the minor with proper care and services and respecting the minor's autonomy, and that the estate is being managed with the proper balance of prudence and attention to the current needs and preferences of the minor. Along with reporting on what has been done during the reporting period, it is essential that the guardian inform the court about changes in the minor's condition, either for the better or for the worse, and suggest what changes may be needed in the scope of the guardianship order. [See Standard 3.3.16]

STANDARD 3.5.11 MONITORING, MODIFYING, TERMINATING A GUARDIANSHIP OR CONSERVATORSHIP OF A MINOR

A. Probate courts should monitor the well-being of the minor and the status of the minor's estate on an on-going basis, including, but not limited to:

(1) Ensuring that plans, reports, inventories, and accountings are filed on time.

(2) Reviewing promptly the contents of all plans, reports, inventories, and accountings.

(3) Ascertaining the well-being of the minor and the status of the estate, as needed.

(4) Assuring the well-being of the minor and the proper management of the

[244] *See generally* Edward C. Halbach Jr., *Trust Investment Law in the Third Restatement*, 27 REAL PROP., PROB & TRUST J. 407 (1992) (discussing the background and applications of principles of fiduciary prudence as formulated in the Third Restatement of the Law of Trusts).

estate, improving the performance of the guardian/conservator, and enforcing the terms of the guardianship/conservatorship order.

B. When required for the well-being of the minor or the minor's estate, probate courts should modify the guardianship/conservatorship order, impose appropriate sanctions, or remove and replace the guardian/conservator, or take other actions that are necessary and appropriate.

C. Before terminating a guardianship or conservatorship of a minor, probate courts should require that notice of the proposed termination be provided to all interested parties.

COMMENTARY

This standard parallels that regarding monitoring of guardianships and conservatorships for incapacitated adults. [See Standard 3.3.17] As in the case of minors found to have been neglected or abused, probate courts have an on-going responsibility to make certain that the minor for whom they have appointed a guardian or conservator is receiving the services and care required, the estate is being managed appropriately, and the terms of the order remain consistent with the minor's needs and condition. The review, evaluation, and auditing of the initial and annual_plans, inventories, and reports and accountings by a guardian or conservator are essential steps in fulfilling this duty. Making certain that those documents are filed is a necessary precondition. Probate courts should also have the capacity to investigate those situations in which guardian/conservators may be failing to meet their responsibilities under the order or exceeding the scope of their authority.

A principal component of the review is to ensure that the guardian/conservator included all of the information required by the court in these reports. Probate courts should not permit conservators to file accountings that group expenses into broad categories, absent inclusion of all vouchers, invoices, receipts, and statements to permit comparison against the returns. Prompt review of the guardian's or conservator's reports enables probate courts to take early action to correct abuses and issue a show cause order if the guardian/conservator has or appears to have violated a provision of the original order. Many of the red flags and concerns listed in the commentary to Standard 3.3.17 apply to guardianships/conservatorships of minors as well as those for incapacitated adults.

Some jurisdictions also require guardians and/or conservators to distribute reports and accountings to family members and other interested persons. This provides probate courts with additional opportunities for independent reviews by others having an interest in the welfare of the minor. On the other hand, given the personal information contained in reports and the financial disclosures in accountings, it may also compromise a minor's privacy or generate family disagreements regarding the allocation of assets that have little to do with the performance of the conservator.

If a probate court finds that a guardian/conservator for a minor is not performing the required duties or is performing them so inadequately that the well-being of the minor and/or the minor's is being threatened, it should take all necessary remedial actions including removing and the guardian/conservator and appointing a temporary or full replacement. If the minor has been abused or neglected or possible criminal conduct has occurred regarding the minor or the minor's state, the probate court should report the matter to local child protection or law enforcement agency.

A guardianship of a minor generally may be terminated upon the minor's adoption, attainment of majority, emancipation, or death, or upon a determination that termination will be in the best interest of the minor (e.g., at the request of a parent who has recovered from a debilitating illness or addiction).[245] Some states, reflecting the provisions of the federal Fostering Connections to Success and Increasing Adoption Act,[246] permit courts to delay termination until age 21 in certain circumstances.[247] Because family members, care givers, educational institutions, and creditors may have an interest in the termination, notice of the proposed termination and an opportunity to be heard should be provided before issuance of the termination order.

STANDARD 3.5.12 COMPLAINT PROCESS

Probate courts should establish a clear and easy-to-use process for communicating concerns about guardianships and conservatorships for minors and the performance of guardians/conservators. The process should outline circumstances under which a court can receive *ex parte* communications. Following the appointment of a guardian or conservator, probate courts should provide a description of the process to the minor, the guardian/conservator, and to all persons notified of the original petition.

COMMENTARY

The standard urges probate courts to establish a process for minors, members of the minor's family, or other interested persons to question whether the minor is receiving appropriate care and services, the minor's estate is being managed prudently for the benefit of the minor, or whether the guardianship/conservatorship should be modified or terminated. In designing the process, care should be taken to ensure that that an unrepresented person is able to use it, that the court receives the necessary information, and that the process is flexible enough to accommodate emergency or urgent circumstances. The process could include designation of a specific member of the staff to receive and review complaints, a designated e-mail address, and/or an on-line form. Requiring that the request be written (whether electronically or on paper) can discourage frivolous or repetitious requests.

When a complaint is received, it should be reviewed to determine how it should be addressed. Approaches include a referral to services, sending a court visitor to investigate,

[245] *See e.g.*, UGPPA §210(b).

[246] 42 USC §§ 673(a)(4)(A)(i) & 675 (8)(B)(iii).

[247] *See e.g.,* NH REV. STAT. ANN. §463:15 (II) (2011).

requesting the guardian or conservator to address the issue(s) raised, conducting an evaluation of the minor under guardianship or conservatorship, or setting a hearing on the matter.

STANDARD 3.5.13 COORDINATION WITH OTHER COURTS

When there is concurrent or divided jurisdiction over a minor or a minor's estate, probate courts should communicate and coordinate with the other court or courts having jurisdiction to ensure that the best interests of the minor are served and that orders are as consistent as possible.

COMMENTARY

In many states, guardianships of minors are matters within the jurisdiction of the juvenile or family court, and conservatorships of the estate of a minor are within the jurisdiction of the probate court.

> Guardianship of the person and the awarding of custody are essentially equivalent. . . . Family courts have the authority to decide custody between competing parents, but they may also have the authority to award custody to third persons. Family courts also frequently appoint guardians as a prelude to adoption. Finally, guardians may be appointed by the juvenile courts for children who have been abused, neglected, or adjudicated delinquent. . . . Unless otherwise ordered by the court, a guardian of a minor's person has custody of the child and the authority of a parent, *but without the financial responsibility.*[248] [emphasis added]

Protection of the minor's best interests and well-being are best served when the judges of the respective courts talk and cooperate with each other in making appointments, fashioning orders, and mitigating attempts to use the procedures of one court to undercut the process in another.[249]

[248] English, *supra,* note 228, at 5-4.
[249] *Id.* at 5-5.