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RECHARGING ADULT GUARDIANSHIP REFORM: SIX CURRENT PATHS FORWARD

ERICA WOOD*

INTRODUCTION

Guardianship reform: The phrase conjures up images in which courts and attorneys would rigorously screen for practical and legal less-restrictive options before considering the drastic intervention of judicial appointment. Determinations of capacity would be rooted in robust functional assessments focusing on supports needed, and fine-tuned to avoid an “all or nothing” result. No one who did not really need a guardian would have one. Anyone, who after careful screening had no other option, would have a guardian, with the scope of authority limited to the needs at hand. Judges and attorneys would be well trained in guardianship, aging and disability, and would focus on the particular values and needs of individuals. Mediation would be used when possible to sort out family dynamics instead of resorting to the hammer of a court order. Guardians would act under clear standards, would make effective use of community resources in care plans, and would seek to maximize self-determination. Restoration of rights would be a viable possibility. Family members serving as guardians would get the help they need. Reports and accountings would be submitted on time, scrutinized for any irregularities, entered into an electronic database, and pursued for action. There would be no unscrupulous draining of estates, no exploitation, no isolation, and no neglect by guardians.

It’s a compelling vision. It’s not a new vision.¹ The drive to protect yet empower vulnerable adults was sparked with the civil rights movement in the 1970s. When advocates first considered adult guardianship, they saw an antiquated process that had come from ancient Greece, Rome, and the fourteenth century English principle of *parens patriae* – a process that existed in the United States from colonial

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¹ See generally Sally Hurme & Erica Wood, *Introduction: Symposium Third National Guardianship Summit: Standards of Excellence*, 2012 UTAH L. REV. 1157; Erica Wood, *History of Guardianship*, in GUARDIANSHIP OF ADULTS: ACHIEVING JUSTICE, AUTONOMY AND SAFETY 17-48 (Mary Joy Quinn ed., 2005).

times and grew unexamined into state law.² While there were some early stirrings of reform, such as the promulgation of the Uniform Guardianship and Protective Proceedings Act³ in 1982, it was not until 1987 that changes began to speed up. In that year, a massive Associated Press (AP) report claimed on front pages all over the country that guardianship, “a crucial last line of protection for the ailing elderly, is failing many of those it is designed to protect.”⁴

The AP report denounced “a dangerously burdened and troubled system.”⁵ According to the report, “in thousands of courts around the nation every week, a few minutes of routine and the stroke of a judge’s pen are all that it takes to strip an old man or woman of basic rights.”⁶ The report found that in 44 percent of the cases examined, the alleged incapacitated person was not represented by a lawyer and in 49 percent of cases did not attend the hearing.⁷ Accountings were missing in 48 percent of the files.⁸ Three out of ten files included no medical evidence. One out of four files contained no indication that hearings had been held.⁹ Some 13 percent of the files were empty except for the opening of the guardianship.¹⁰

Over the close to three decades since the AP report, we have seen very substantial changes in state law. The backwater topic of guardianship gradually gained visibility in statehouses across the nation. Almost every state has made marked revisions in statutory provisions for procedural due process, the determination of capacity, the recognition of less restrictive alternatives and the potential for limited orders, the process of court oversight, and the development of public guardianship as a last resort.¹¹ There have been Congressional

² See SAMUEL JAN BRAKEL, JOHN PARRY & BARBARA A. WEINER, *THE MENTALLY DISABLED AND THE LAW* 24-25 & n. 17 (3d ed. 1985).

³ UNIF. GUARDIANSHIP & PROTECTIVE PROC. ACT § 1-101 et. seq. (superseded 1997), 8A U.L.A. 647 (2014).

⁴ Fred Bayles & Scott McCartney, *Guardianship of the Elderly: An Ailing System Part I: Declared “Legally Dead” by a Troubled System*, ASSOCIATED PRESS, Sept. 19, 1987, <http://www.apnewsarchive.com/1987/Guardians-of-the-Elderly-An-Ailing-System-Part-I-Declared-Legally-Dead-by-a-Troubled-System/id-1198f64bb05d9c1ec690035983c02f9f>.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ See Erica Wood, *State Adult Guardianship Legislation: Directions of Reform, Annual Update*, A.B.A. COMM’N ON LAW AND AGING (2014), http://www.americanbar.org/content/dam/aba/administrative/law_aging/2014_final_guardianship_legislative_update.authcheckdam.pdf; Sally Hurme, *Adult Guardianship Statutory Table of Authorities*, A.B.A. COMM’N ON LAW AND AGING (2014), http://www.americanbar.org/content/dam/aba/administrative/law_aging/2014_AdultGuardianshipStatutoryTableofAuthorities.authcheckdam.pdf.

hearings;¹² significant revisions in the Uniform Guardianship and Protective Proceedings Act in 1997; three national, multidisciplinary consensus conferences with recommendations;¹³ and a rush of guardian handbooks,¹⁴ training videos,¹⁵ and legal and judicial curricula.

But forging real change on the ground is difficult. Guardianship practice did not automatically and consistently follow changes in law and lofty recommendations. A 1994 ten-state study by The Center for Social Gerontology found disturbing deficits in legal representation, medical evidence, and hearing procedures.¹⁶ The study revealed that only about one-third of respondents were represented by a lawyer.¹⁷ Moreover, in most cases medical testimony was not presented at the hearing, the majority of hearings lasted no more than 15 minutes, and 25 percent of hearings lasted fewer than five minutes.¹⁸

Despite legislative advances through the 1990s and early 2000s, press stories claimed that “*Under Court, Vulnerable Became Vic-*

¹² See, e.g., *Guardianship over the Elderly: Security Provided or Freedoms Denied?: Hearing Before the S. Special Comm. on Aging*, 108th Cong. (2003) [hereinafter *Guardianship over the Elderly*]; *Exploitation of Seniors: American's Ailing Guardianship System: Hearing Before the S. Special Comm. on Aging*, 109th Cong. (2007).

¹³ The First National Guardianship Symposium, called “Wingspread,” was convened in 1988 by the American Bar Association Commission on Legal Problems of the Elderly (now the Commission on Law and Aging) and the Commission on the Mentally Disabled (now the Commission on Disability Rights). See A.B.A. Comm. on Legal Problems of the Elderly & Comm. on the Mentally Disabled, *Guardianship - An Agenda for Reform: Recommendations of the National Guardianship Symposium*, 13 MENTAL & PHYSICAL DISABILITY L. REP. 271 (1989) [hereinafter *Guardianship- An Agenda for Reform*]. The Second National Guardianship Symposium, called “Wingspan,” was convened in 2001. Primary sponsors were the National Academy of Elder Law Attorneys, Stetson University College of Law, and the Borchard Foundation Center on Law and Aging. See *Wingspan - The Second National Guardianship Conference, Recommendations*, 31 STETSON L. REV. 595 (2002) [hereinafter *Wingspan Recommendations*]. The Third National Guardianship Summit was convened in 2011 by the National Guardianship Network. See *Third National Guardianship Summit Standards and Recommendations*, 2012 UTAH L. REV. 1191 [hereinafter *Third National Guardianship Summit*].

¹⁴ See, e.g., *Adult Guardianship Handbooks by State*, A.B.A. COMMISSION ON LAW AND AGING (2012) http://www.americanbar.org/content/dam/aba/administrative/law_aging/2012_aging_gshp_adult_gship_hdbks_state_6_2012.authcheckdam.pdf (displaying a list of guardianship handbooks).

¹⁵ See *Guardianship Video Resources*, A.B.A. COMMISSION ON LAW AND AGING (2010), http://www.americanbar.org/content/dam/aba/administrative/law_aging/2011/2011_aging_gship_video_resourc_8_10.authcheckdam.pdf (displaying a list of guardianship training videos).

¹⁶ LAUREN BARRITT LISI, ANNE BURNS & KATHLEEN LUSSENDEN, NATIONAL STUDY OF GUARDIANSHIP SYSTEMS: FINDINGS AND RECOMMENDATIONS (1994); *Accord* LAUREN B. LISI ET AL., FINAL REPORT: NATIONAL STUDY OF GUARDIANSHIP SYSTEMS AND FEASIBILITY OF IMPLEMENTING EXPERT SYSTEMS (1992).

¹⁷ *Id.*

¹⁸ *Id.*

tims”¹⁹ and that “*Judges’ Inaction, Inattention Leave Many Seniors At Risk.*”²⁰ In 2004, the *New York Times* highlighted a Queens’ grand jury report that found guardians poorly trained and inadequately supervised.²¹

Meanwhile, a 2003 U.S. Senate hearing spotlighted the egregious District of Columbia *Orshansky* case concerning a blatant disregard for less restrictive alternatives.²² The U.S. Government Accountability Office studied guardianship three times (2004, 2010, and 2011) and found cases of malfeasance as well as gaps in court monitoring and screening.²³ In the 2010 report, the GAO said it “could not determine whether allegations of abuse by guardians are widespread; however, GAO identified hundreds of allegations of physical abuse, neglect and financial exploitation by guardians in 45 states and the District of Columbia between 1990 and 2010.”²⁴ At the same time, family members involved in guardianship cases raised their voices at hearings, in the press and on the web, telling heartbreaking stories of isolation and neglect.²⁵

While reform efforts lurched forward incrementally over the past decade, continuing problems have remained. Just within the last year, high profile investigative media stories in several states trumpeted serious flaws and sometimes abuse remaining in guardianship practice.

¹⁹ Carol D. Leonnig, Lena H. Sun & Sarah Cohen, *Under Court, Vulnerable Became Victims; Attorneys Who Ignored Clients or Misspent Funds Rarely Sanctioned*, WASH. POST, June 15, 2003, at A01; Sarah Cohen, Carol D. Leonnig and April Witt, *Rights and Funds Can Evaporate Quickly, Attorneys’ Powers Thwarted D.C. Residents Trying to Remain Independent*, WASH. POST, June 16, 2003, at A01.

²⁰ Jack Leonard, Robin Fields and Evelyn Larrubia, *Guardians for Profit; Judges’ Inaction, Inattention Leave Many Seniors at Risk*, L.A. TIMES, Nov. 14, 2005, at A1. See also Robin Fields, Evelyn Larrubia & Jack Leonard, *Guardians for Profit, When a Family Matter Turns into a Business*, L.A. TIMES, Nov. 13, 2005 at A1.

²¹ William Glaberson, *Grand Jury Urges Overhaul of Legal Guardianship System*, N.Y. TIMES, Mar. 3, 2004, at B1.

²² See *Guardianship over the Elderly*, *supra* note 12.

²³ See U.S. GOV’T ACCOUNTABILITY OFF., GAO-04-655, GUARDIANSHIPS: COLLABORATION NEEDED TO PROTECT INCAPACITATED ELDERLY PEOPLE (2004), <http://www.gao.gov/new.items/d04655.pdf> [hereinafter GAO-04-655]; U.S. GOV’T ACCOUNTABILITY OFF., GAO-10-1046, GUARDIANSHIPS: CASES OF FINANCIAL EXPLOITATION, NEGLECT, AND ABUSE OF SENIORS (2010), <http://www.gao.gov/assets/320/310741.pdf> [hereinafter GAO-10-1046]; U.S. GOV’T ACCOUNTABILITY OFF., GAO-11-678, INCAPACITATED ADULTS: OVERSIGHT OF FEDERAL FIDUCIARIES AND COURT-APPOINTED GUARDIANS NEEDS IMPROVEMENT (2011), <http://www.gao.gov/new.items/d11678.pdf> [hereinafter GAO-11-678].

²⁴ See GAO-10-1046, *supra* note 23 (quoting from “Highlights” page).

²⁵ See *Victim Profiles*, NAT’L ORG. TO STOP GUARDIANSHIP ABUSE, <http://stopguardianabuse.org/victims/> (last visited Oct. 28, 2015) (providing information on some victims of guardianship abuse).

In Ohio, a press series²⁶ — in an eerie echo of the AP report 27 years before — claimed “Thousands of Ohio’s most vulnerable residents are trapped in a system that was created to protect them but instead allows unscrupulous guardians to rob them of their freedom, dignity and money.”²⁷ The *Columbus Dispatch* series found no consistency in court oversight in the state’s 88 counties, and revealed that over 80 percent of the courts failed to conduct financial audits or in-home inspections.²⁸ It observed that “those needing the most help were treated mostly as names on a page and never seen by the court.”²⁹

According to a similar investigative news report in Florida,³⁰

In response to a pressing need, Florida has cobbled together an efficient way to identify and care for helpless elders, using the probate court system to place them under guardianship. But critics say this system — easily set in motion, but notoriously difficult to stop — often ignores basic individual rights. Most of it plays out in secret, with hearings and files typically closed from the public.³¹

In Las Vegas, Nevada, a news station aimed to “spotlight . . . a system that some say is tearing families apart and harming some of those it’s supposed to protect,”³² ultimately resulting in establishment of a state Supreme Court Guardianship Reform Commission.³³

How widespread are these guardianship problems illuminated by the press and by the Government Accountability Office? The answer is not known, as adult guardianship data³⁴ is sparse and empirical research next to nonexistent. Anecdotal evidence says guardianship practice ranges widely from quietly heroic to satisfactory to unknowingly deficient to malfeasant, but the proportions are not clear. In the

²⁶ Josh Jarman, Jill Riepenhoff, Lucas Sullivan & Mike Wagner, *Unguarded*, COLUMBUS TIMES DISPATCH, (May 18 – 22, 2014), <http://www.dispatch.com/unguarded.html> (The series spurred passage by the state Supreme Court of new adult guardianship rules in 2015). See *On Guard: Ohio Moves to Protect Vulnerable Adults*, COURT NEWS OHIO, April 2015, at 6.

²⁷ Josh Jarman, Jill Riepenhoff, Lucas Sullivan & Mike Wagner, *Unguarded: Elderly, Mentally Ill and Children Trapped in Broken Court System*, COLUMBUS TIMES DISPATCH, May 18, 2014 at 10A.

²⁸ *Id.*

²⁹ *Id.*

³⁰ Barbara Peters Smith, *The Kindness of Strangers*, SARASOTA HERALD TRIB. (Dec. 7 – 9, 2014), <http://guardianship.heraldtribune.com/>.

³¹ Barbara Peters Smith, *The Kindness of Strangers: A Well-Oiled Machine* SARASOTA HERALD TRIB., Dec. 7, 2014 at A01.

³² Kean Bauman, *Family Speaks Out About Guardianship System*, CONTACT 13 (Feb. 2, 2015), <http://www.scrippsmedia.com/ktnv/news/contact-13/contact-13-investigates/Family-speaks-out-about-guardianship-system-290598431.html>.

³³ See generally *Supreme Court Creates Guardianship Commission*, SUP. CT. NEV., (June 8, 2015, 4:05 PM), http://nvcourts.gov/Supreme/News/Supreme_Court_Creates_Guardianship_Commission/.

³⁴ See *infra* pp. 24-29.

United States, we have not one guardianship system but 51 and more – varying hugely from state to state, court to court, judge to judge, and guardian to guardian.

SIX CURRENT PATHS FORWARD

Against the uncertain backdrop described above, six current paths of reform are bringing new energy for driving changes in practice that could affect individual lives. The changes provide needed safeguards to protect rights, better ways of assessing decisional abilities and ensuring supports, more attention to decisional options outside of guardianship, and stronger court monitoring. This article presents a snapshot of these six current strategies, the history on which they rest, the potential they bring for moving toward the vision of reform, the possible pitfalls of some, and the obstacles they face.

1. **STANDARDS OF PRACTICE.** The guardianship process can be said to have a “front end” and a “back end.” Issues on the front end prior to and through appointment concern the screening for less restrictive options, the petition to court, the form and service of notice, presence of the individual said to need a guardian, the right to counsel, rights at the hearing, determination of “incapacity,” and use of nuanced court orders transferring only limited authority to guardians. Issues on the “back end” come after appointment of a guardian. They include duties and powers of a guardian, education and training for guardians, court monitoring and case management procedures, guardian fees, and consideration of restoration of rights. A key “back end” concern is the need for well-recognized and widely used standards of guardian conduct and decision-making.

Serving as guardian is one of society’s most challenging roles. The guardian is a fiduciary with a high duty of care and accountability. The guardian constantly must negotiate the tension between protection and self-determination – “stepping into the person’s shoes” while at the same time recognizing safety concerns. The guardian has duties both to the individual and to court. The guardian needs ready access to answers on aging and disability resources, financial management, real estate, public benefits, exploitation and abuse, health care, housing, accessibility, long-term services and supports, and mental health. The answers needed are both practical and legal, vary by community, and are constantly changing. In short, it’s a job for a superhero. Yet family members come to it unprepared and without knowing what is expected. Even professional guardians often have little guidance.

State statutes set out the duties and powers of a guardian, but only in the most general terms. For example, a statute might direct a guardian to make decisions regarding the person's "support, care, education, health, and welfare" but offer no elucidation on weighing options, seeking services, developing care plans, or making the difficult decisions that arise in the real world of competing priorities and scarce resources. While some courts provide instructions and helpful materials, these vary in comprehensiveness and accessibility. There has been no widely recognized set of standards to guide guardian conduct and decision-making, fleshing out the broad brush mandates of law with day-to-day direction. Although state statutory provisions vary, there is enough similarity and enough breadth for adoption of recognized standards across jurisdictions, or with state adaptations where needed.

Early Standards. The National Guardianship Association (NGA) sought to address this gap. Early work by The Center for Social Gerontology resulted in preliminary guidelines for guardianship service programs in 1987 and model standards for guardianship and representative payee services, published by the U.S. House Committee on Aging in 1988.³⁵ After this initiative, NGA adopted a *Model Code of Ethics for Guardians* in 1991;³⁶ and built on the model code to develop a set of *Standards of Practice* in 2000, updated and expanded in 2003 and 2007, before its final revision in 2013.³⁷ Topics covered in the Standards include, for example, the guardian's relationship to the court, the individual, the family, and service providers; decision-making about medical treatment and financial matters; avoidance of conflict of interest; property management; and fees.³⁸ The Center for Guardianship Certification³⁹ operates a certification program for guardians based on the NGA Standards. Additionally, a small but growing number of states have adopted their own standards of prac-

³⁵ H. SELECT COMM. ON AGING, SUBCOMM. ON HOUSING AND CONSUMER INTERESTS, 100TH CONG. SURROGATE DECISION MAKING FOR ADULTS: MODEL STANDARDS TO ENSURE QUALITY GUARDIANSHIP AND REPRESENTATIVE PAYEESHIP SERVICES, (Comm. Print 1988).

³⁶ MICHAEL CASASANTO, MITCHELL SIMON & JUDITH ROMAN, NAT'L GUARDIANSHIP ASSOC., A MODEL CODE OF ETHICS FOR GUARDIANS (1988), http://www.guardianship.org/documents/Code_of_Ethics.pdf; See also NAT'L GUARDIANSHIP ASSOC., STANDARDS OF PRACTICE (2013), http://www.guardianship.org/documents/Standards_of_Practice.pdf [hereinafter STANDARDS OF PRACTICE] (adopting the model).

³⁷ See STANDARDS OF PRACTICE, *supra* note 36 (displaying the standards).

³⁸ See *id.* (providing a table of contents that highlights the standards).

³⁹ History, CENTER FOR GUARDIAN CERTIFICATION, http://www.guardianshipcert.org/about_history.cfm (last visited Aug. 3, 2015). As of October 15, 2014, CGC had over 1,550 National Certified Guardians, and 69 National "Master" Guardians.

tice or set out requirements for guardians to abide by the NGA Standards.⁴⁰

These efforts show good progress. But in 2011, there was a clear recognition that many guardians and courts remained unfamiliar with the NGA Standards – and that the 2007 version of those Standards required significant revisions. That was the challenge for which the National Guardianship Network (NGN) – a group of 11 national organizations dedicated to effective adult guardianship law and practice – in 2011 convened the *Third National Guardianship Summit: Standards of Excellence*. Unlike the prior two national guardianship conferences, the Summit was to focus exclusively on post-appointment standards for performance and decision-making.

Third National Guardianship Summit. The October 2011 Summit was held at the S.J. Quinney College of Law at the University of Utah.⁴¹ With 92 delegates, observers, authors, funders, and facilitators participating, as well as the production of ten law review background papers, the Summit was a consensus conference that resulted in 43 recommendations directly affecting guardian standards of practice, and 21 additional recommendations for action by courts, legislators, and others.⁴²

The Summit's recommended standards address several overarching issues of guardianship practice. Guardians must engage in "person centered planning," cooperate with other surrogates, and promptly report any abuse, neglect, or exploitation. The Summit standards for financial, medical, and residential decision-making direct the guardian to ascertain whether the person can direct the decision-making process and whether the person needs support to do so; and otherwise to make a substituted judgment decision based on the values, needs, and preferences of the person if possible.

The Summit standards include multiple mandates on how the guardian is to relate to and report to the court, and emphasize the need for ongoing, multifaceted guardian education. The Standards describe a role for the conservator (guardian of property) that emphasizes fiduciary management, as well as the need to value the well-being of the person. The conservator is to avoid conflicts of interest and appearances thereof, apply prudent investment practices, weigh a

⁴⁰ See *Find a Certified Guardian*, CENTER FOR GUARDIAN CERTIFICATION, http://www.guardianshipcert.org/find_a_certified_guardian.cfm (for information about state certification programs; lists 11 states).

⁴¹ *Third National Guardianship Summit*, *supra* note 13. The Summit was funded by the State Justice Institute and the Albert and Elaine Borchard Foundation Center on Law and Aging, as well as contributions from the NGN organizations and supporting cosponsors.

⁴² *Id.*

decision's costs and benefits to the estate and the person, and prepare a plan for management of income and assets. The standards also give guidance on guardian/conservator fees, specifically requiring disclosure of the basis of the fees and a projection of annual fees.

The Summit recommendations emphasize that every guardian, whether a professional or family/lay guardian, should be held to the same standards, but a guardian with a higher level of relevant skills should be held to the use of those skills.

Implementation of Summit Standards. The Summit's outcome represented a potential jump forward in guardian practice. Several organizations promptly endorsed the standards and recommendations, or incorporated them into existing policies and guidelines. The National Academy of Elder Law Attorneys incorporated aspects of the Summit outcome into its Public Policy Guidelines.⁴³ The National College of Probate Judges used the Summit standards in developing the 2012 revision of the *National Probate Court Standards*.⁴⁴ In July 2012, the Conference of Chief Justices and the Conference of State Court Administrators adopted a resolution urging state court systems to review and consider implementation of the Summit Standards and Recommendations.⁴⁵ The ABA House of Delegates passed a resolution adopting the Summit Standards and Recommendations as Association policy, urging implementation at all levels.⁴⁶ Perhaps most significantly, the National Guardianship Association in 2013 adopted nearly all of the Summit standards in its substantial revision of the *NGA Standards of Practice*⁴⁷ — making for a significantly more detailed and person-centered document.

Meanwhile, the 11-member NGN identified Summit provisions that were statutory in nature and could be incorporated into the Uniform Guardianship and Protective Proceedings Act. NGN approached the Uniform Law Commission about possible amendments to the Act. In 2014, the Commission approved a Drafting Com-

⁴³ *NAELA Public Policy Guidelines: Guardianship*, NAT'L ACAD. OF ELDER LAW ATTORNEYS (July 14, 2012), <http://www.naela.org/NAELADocs/PDF/Public%20Policy/GuidelinesJan2015/GuardianshipGuidelinesJan2015.pdf>.

⁴⁴ See Richard Van Duizend & Brenda K. Uekert, *Nat'l Probate Court Standards*, NAT'L COLLEGE OF PROBATE JUDGES (2013) <http://ncsc.contentdm.oclc.org/cdm/ref/collection/spcts/id/240>.

⁴⁵ *Resolution 6, Encouraging Consideration of the Standards and Recommendations from the Third National Guardianship Summit*, CONFERENCE OF CHIEF JUSTICES/CONFERENCE OF STATE COURT ADMINISTRATORS, (July 25, 2012), <http://ccj.ncsc.org/~media/Microsites/Files/CCJ/Resolutions/07252012-Encouraging-Consideration-of-the-Standards-and-Recommendations-from-the-Third.ashx>.

⁴⁶ *Guardianship Policy, August 2012, 106B*, A.B.A. COMM'N ON LAW AND AGING (Aug. 6-7, 2012), http://www.americanbar.org/groups/law_aging/policy.html.

⁴⁷ See STANDARDS OF PRACTICE, *supra* note 36.

mittee for revision of the Act, which began a two-year drafting process in 2015.⁴⁸

There is no doubt that these strides in the development and adoption of standards offer promise. Having widely-recognized, practical guidance can inform guardian behavior and serve as a measure of quality assurance. The challenge lies in achieving the wide recognition. Endorsement by national organizations may not translate to routine use by courts, attorneys, guardians and other stakeholders, especially in states without specialized probate courts⁴⁹ and active guardianship associations.⁵⁰ It will take consistent state advocacy and continuous education to make national and state standards more than words on paper.

2. A JURISDICTIONAL ROADMAP.⁵¹ In our increasingly mobile society, adult guardianships often involve more than one state, raising complex jurisdictional issues. Many older people own property in different states. Family members may be scattered across the country. Frail, at-risk individuals may need to move for medical or financial reasons. Thus, judges, guardians, and lawyers frequently are faced with problems about which state should have initial jurisdiction, how to transfer a guardianship to another state, and whether a guardianship in one state will be recognized in another. Such jurisdictional quandaries can consume vast amounts of time for courts and lawyers, cause cumbersome delays and financial burdens for family members, and exacerbate family conflict. Moreover, jurisdictional problems can aggravate sibling rivalry as each side must hire lawyers to battle over which state will hear a case and where a final order will be lodged. Finally, lack of clear jurisdictional guideposts can facilitate “granny snatching” and other abusive actions.

High profile jurisdictional cases have caught public attention. In *In re Lillian Glasser*,⁵² elderly Lillian Glasser, who was a life-long

⁴⁸ See *Committees, Guardianship and Protective Proceedings Act*, UNIF. LAW COMM’N, [http://uniformlaws.org/Committee.aspx?title=guardianship and Protective Proceedings Act](http://uniformlaws.org/Committee.aspx?title=guardianship%20and%20Protective%20Proceedings%20Act) (last visited Aug. 19, 2015) (illustrating the UGPPA’s upcoming revision).

⁴⁹ See *State Courts Having Probate Jurisdiction*, NAT’L COLLEGE OF PROBATE JUDGES (Apr. 2014), <http://ncpj.org/wp-content/uploads/2014/04/StateProbateJurisdictions.pdf> (also listing states without probate courts).

⁵⁰ See *NGA State Affiliates*, NAT’L GUARDIANSHIP ASSOC. (July 9, 2015), http://www.guardianship.org/state_affiliates.htm (listing state affiliates).

⁵¹ This section was drawn from Erica Wood, *State Adult Guardianship Legislation: Directions of Reform (annual summary)*, A.B.A. COMM. ON LAW AND AGING (2014), http://www.americanbar.org/content/dam/aba/administrative/law_aging/2014_final_guardianship_legislative_update.authcheckdam.pdf; Erica Wood, *Guardianship Jurisdiction: The Human Face Behind a New Uniform Law*, 22 VOICE EXPERIENCE no. 2, 2010, at 2.

⁵² *In re Glasser*, No. A-0500-08T3; A-0505-08T3; A-0509-08T3 2011 WL 2898956 (N.J. Super. Ct. App. Div. July 21, 2011).

New Jersey resident, visited her daughter in Texas. She became the subject of a highly contested proceeding when the daughter filed a guardianship petition in Texas based on her mother's presence in the state, keeping the mother from her home and piling up millions of dollars in legal fees as the battle was waged between the two states. In the tangled case of Loyce Juanita Parker,⁵³ a mother was caught between two feuding adult children as contests were waged in Texas and Oklahoma courts with multiple attorneys and experts over several years. Ms. Parker died in Texas and was never able to return to Oklahoma.

While the high profile cases have drawn public ire, everyday scenarios like the following are much more common, causing angst and expense for family caregivers:

Ms. X cares for her mother in Indiana. An Indiana court appointed her as guardian of her mother. Ms. X must move to Florida. She requests that her Indiana guardianship be transferred to Florida, but is told by the Florida court that she must refile for guardianship in Florida, starting all over with the presentation of evidence and determination of incapacity. She is staggered by the anticipated fees, delay, and time involved in terminating the Indiana guardianship and separately establishing a Florida guardianship.

Key Uniform Act Elements. To address these challenging problems, the Uniform Law Commission in 2007 approved the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA).⁵⁴ The UAGPPJA seeks to clarify jurisdiction and provide a procedural roadmap for addressing dilemmas where more than one state is involved, and to enhance communication between courts in different states. The Act targets three jurisdictional elements: initial jurisdiction, transfer, and enforceability of existing orders.⁵⁵

First, UAGPPJA addresses determination of initial jurisdiction⁵⁶ if two or more states are involved and there is a jurisdictional conflict concerning a guardianship or conservatorship petition. It provides procedures to resolve controversies concerning initial guardianship jurisdiction by designating one state – and one state only – as the proper forum. These provisions were based on the widely enacted and

⁵³ *In re Guardianship of Parker*, 275 S.W.3d 623 (Tex. App. 2008) *aff'd* 329 S.W.3d 97 (Tex. App. 2010), *petition for cert. denied* 2011 Tex. LEXIS 356 (Tex. Apr. 29, 2011); *In re Guardianship of Parker*, 2008 OK Civ. App. 62, 189 P.3d 730.

⁵⁴ See UNIF. ADULT GUARDIANSHIP & PROTECTIVE PROC. JURISDICTION ACT § 1-101 et. seq. (UNIF. LAW COMM'N 2007) http://www.uniformlaws.org/shared/docs/adult_guardianship/UAGPPJA_2011_Final%20Act_2015feb4.pdf [hereinafter UAGPPJA].

⁵⁵ David English, *New Guidance on Guardianship Jurisdiction*, 24 PROB. & PROP. 10 (Feb. 2010).

⁵⁶ UAGPPJA, *supra* note 54, Art. 2.

highly successful Uniform Child Custody Jurisdiction and Enforcement Act.⁵⁷

Briefly, the Act sets out a schema for determining a person's "home state," which in most situations will be the state where the person was last physically present, including any period of temporary absence, for at least six months before the filing of a petition.⁵⁸ If there is no home state, or if the court of the home state declines, or in an uncontested case where no objection to jurisdiction is raised, the case can be heard by a court in a "significant connection state." A "significant connection state" is a state other than the home state in which the person has the most significant connection other than mere presence and in which substantial evidence of the respondent is available.⁵⁹ It is important to note that in emergency situations, a court in the state where the individual is physically present can appoint a guardian regardless of whether it is the home state.⁶⁰ Another exception is when an individual has real or tangible property located in a certain state, the court in that jurisdiction can appoint a conservator for that property.⁶¹

Second, UAGPPJA addresses cases in which there is a need to transfer an existing guardianship from one state (the transferring state) to another (the accepting state),⁶² as in the case scenario above when a person needs to move to a different state. The Act specifies a two-state procedure for transferring a guardianship or conservatorship to another state, helping to reduce expenses and save time while protecting persons and their property from potential abuse.

The two-state procedure avoids the need to re-litigate a case in which there are no controversies or objections, while preserving an opportunity to object. If both states have adopted the Act, filings are made in both courts, and when both have agreed that the case can be transferred, the first state terminates the guardianship or conservatorship and the second state accepts it.⁶³ If there are objections, they can be brought to the fore and dealt with expeditiously at the time of the filings, rather than festering at a later point. In the accepting state, not later than 90 days after issuance of a final order accepting the transfer, the court should determine whether the guardianship or conservator-

⁵⁷ See UNIF. CUSTODY JURISDICTION & ENFORCEMENT ACT § 207 CMT. (UNIF. LAW COMM'N 1997) ("It would be inappropriate to require parents to have custody proceedings in several States when one State could resolve the custody of all the children.").

⁵⁸ UAGPPJA, *supra* note 54, § 203.

⁵⁹ *Id.*

⁶⁰ *Id.* at § 204.

⁶¹ *Id.*

⁶² *Id.* at Art. 3.

⁶³ *Id.* at §§ 301-302.

ship needs to be modified to conform to the state's law.⁶⁴ For example, the existing guardian may have to undergo a background check or may not be qualified to serve, the scope of authority may be revised, a care plan may be required, or the reporting requirements altered.

Third, UAGPPJA provides for recognition and enforcement of a guardianship or protective proceedings order in another state.⁶⁵ It authorizes a guardian or conservator simply to register the order from the first state in the second state.⁶⁶ No new and expensive proceeding is required. Thus, for example, when a guardian needs to consent to medical treatment in a hospital across the state line but the hospital does not recognize the out-of-state guardian's authority, the guardian can register the order, allowing needed medical care to proceed without delay. Or, if a guardian needs to execute a contract in another state, registration would ensure the contract's enforceability. A safeguard is that the guardian must give notice to the appointing court of intent to register in another state, allowing the appointing court to object if there is evidence of problems.⁶⁷

Significantly, the Act permits communication between courts and parties of the states involved, providing that the court must make a record of the communication.⁶⁸ Indeed, if both states have adopted the Act, judges in the two states can talk with each other about the case and the best interests of the individual, preventing many tangled situations and unworkable outcomes. Thus, the Act opens the door to dialogue about the problems of vulnerable, at-risk individuals and their caregivers.

In addition to providing clarity and saving the time and expense of families and courts, the UAGPPJA procedures can help to reduce elder abuse.⁶⁹ Most importantly, prohibiting jurisdiction based on presence alone aims to halt the egregious "granny snatching" actions often borne of sibling feuds, in which a perpetrator stealthily takes an individual across state lines and immediately proceeds to obtain a guardianship order as a tool for abuse, isolation, and exploitation. Also, the Act enables a court to decline to exercise jurisdiction

⁶⁴ *Id.* at § 302(f).

⁶⁵ *Id.* at Art. 4.

⁶⁶ *Id.* at §§ 401-402.

⁶⁷ *Id.*

⁶⁸ *Id.* at § 104.

⁶⁹ See Lori Stiegel & Erica Wood, *Nine Ways to Reduce Elder Abuse Through Enactment of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act*, 30 BIFOCAL 35 (2009) http://www.americanbar.org/content/dam/aba/administrative/law_aging/2011/2011_aging_ea_nine_ways.authcheckdam.pdf.

because of — and to penalize — “unjustifiable conduct.”⁷⁰ Finally, the Act directs the court, determining whether it is an appropriate forum, to consider “whether abuse, neglect, or exploitation of the respondent has occurred or is likely to occur and which state could best protect the respondent.”⁷¹

Implementation of UAGPPJA. To make the Act work, both states involved must have adopted it. Because it is jurisdictional in nature – providing uniformity and reducing conflict – it cannot function as intended unless all states enact it. UAGPPJA is supported by the American Bar Association,⁷² the Conference of Chief Justices and Conference of State Court Administrators,⁷³ the National College of Probate Judges,⁷⁴ the National Academy of Elder Law Attorneys,⁷⁵ the National Guardianship Association,⁷⁶ the Alzheimer’s Association⁷⁷ and AARP.⁷⁸ Advocates in many states have worked for its passage, pointing out that it has no impact on state budgets, is bipartisan, is an important benefit for family caregivers, and makes no change in a state’s substantive guardianship law. As a result, the Act has had

⁷⁰ UAGPPJA, *supra* note 54, §207.

⁷¹ *Id.* at §206(c)(2).

⁷² The UAGPPJA was approved by the American Bar Association House of Delegates in February 2008. Report & Recommendation, American Bar Association House of Delegates, Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (Feb. 11, 2008), http://www.americanbar.org/content/dam/aba/directories/policy/2008_my_110c.authcheckdam.pdf.

⁷³ The UAGPPJA was adopted by the Conference of Chief Justices/Conference of State Court Administrators, Children and Families Committee on July 30, 2008. Resolution, Conference of Chief Justices, Conference of State Court Administrators, Resolution 5 In Support of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (Jul. 30, 2008), <http://ccj.ncsc.org/~media/microsites/files/ccj/resolutions/07302008-in-support-of-the-uniform-adult-guardianship-and-protective-proceedings.ashx>; *see also* Letter from Chief Justice Margaret H. Marshall, President, Conference of Chief Justices and Ms. Stephanie J. Cole, President, Conference of State Court Administrators to Hon. Martha Lee Walters, President, The National Conferences of Commissioners on Uniform State Laws (Sept. 29, 2008), <http://uniformlaws.org/Shared/Docs/CCJ%20Endorse.pdf>.

⁷⁴ National College of Probate Judges, Resolution In Support Of: The Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, <http://www.uniformlaws.org/Shared/Docs/NCPJ%20Endorse.pdf> (last visited Aug. 3, 2015).

⁷⁵ Letter from G. Mark Shalloway, President, National Academy of Elder Law Attorneys to David Nixon, National Conference of Commissioners on Uniform State Laws (Feb. 13, 2008), <http://www.uniformlaws.org/Shared/Docs/NAELA%20Endorse.pdf>.

⁷⁶ Letter from Denise R. Calabrese, Executive Director, National Guardianship Foundation to David G. Nixon, Chairman, National Conference of Commissioners on Uniform State Laws (May 7, 2007), <http://www.uniformlaws.org/Shared/Docs/NGA%20Endorse.pdf>.

⁷⁷ Alzheimer’s Association, Adult Guardianship Jurisdiction Case Statement, <http://www.uniformlaws.org/Shared/Docs/Alzheimers%20Assoc%20Support%20Letter.pdf> (last visited Aug. 3, 2015).

⁷⁸ Am. Ass’n Retired Persons, THE POLICY BOOK: AARP PUBLIC POLICIES 2015-2016 12-6 (2015), <http://policybook.aarp.org/the-policy-book/chapter-12/sub068-1.2034816>.

phenomenal success in state legislatures since its approval in 2007. As of May 2016, a total of 42 states plus the District of Columbia and Puerto Rico, have adopted the Act, with eight jurisdictions yet to pass it.⁷⁹

How is UAGPPJA working in practice? While it is still early and there is little documented information, attorneys and courts anecdotally have stated that the Act has functioned as intended to clarify cross-border issues. Indeed, if the Act is working, there should be very few reported cases in which there is a UAGPPJA controversy. In 2013, what appears to be the first reported UAGPPJA case, *Sears v. Hampton*, 143 So. 3d 151 (1983), was decided by the Supreme Court of Alabama. The case concerned transfer of a guardianship between Kentucky and Alabama.⁸⁰ Both states have enacted the Uniform Act.⁸¹ What should have been a straight-forward transfer according to the new procedure was complicated when an Alabama probate judge determined to use the procedure to inquire into the guardian's effectiveness, and appointed a new guardian.⁸² The Alabama Supreme Court reversed, emphasizing that in a transfer the accepting court should not make a determination about who should be guardian, essentially re-litigating the case, but instead should simply accept (or reject) the transfer.⁸³ The Act provides that once the transfer is com-

⁷⁹ In 2008, four states (Alaska, Colorado, Delaware, and Utah) and the District of Columbia adopted the Act. UNIF. ADULT GUARDIANSHIP & PROTECTIVE PROC. JURIS. ACT refs. & ann., 8A U.L.A. 3 (West 2015), [https://a.next.westlaw.com/Document/NC710DB906B1C11DD902AE572FA69DD76/View/FullText.html?originationContext=documenttoc&transitionType=categoryPageItem&contextData=\(sc.Default\)](https://a.next.westlaw.com/Document/NC710DB906B1C11DD902AE572FA69DD76/View/FullText.html?originationContext=documenttoc&transitionType=categoryPageItem&contextData=(sc.Default)).

In 2009, eight states adopted the act, namely Illinois, Minnesota, Montana, Nevada, North Dakota, Oregon, Washington, and West Virginia. *Id.* In 2010, seven states adopted the Act: Alabama, Arizona, Iowa, Maryland, Oklahoma, South Carolina, and Tennessee. *Id.* In 2011, another ten states enacted the Act: Arkansas, Idaho, Indiana, Kentucky, Missouri, Nebraska, New Mexico, South Dakota, Vermont and Virginia. *Id.* In 2012, Puerto Rico enacted the Act, 2012 P.R. LAWS 296, and six states passed the Act: Connecticut, Hawaii, Maine, New Jersey, Ohio, and Pennsylvania. *Id.* In 2013, Wyoming adopted the Act. *Id.* In 2014, Mississippi, Massachusetts and New York adopted the act. *Id.* In addition, California adopted a modified version of the act in 2014, known as the "California Conservatorship Jurisdiction Act" with an effective date of January 1, 2015 and an operative date of January 1, 2016. 2014 CAL. STAT. 553. In 2015, New Hampshire and Rhode Island adopted the Act. 2015 N.H. LAWS ch.79, 2015 R.I. PUB. LAWS CH.15-210 and in 2016 Georgia adopted it as GA. CODE ANN. §29-11, to be effective July 1, 2016. Jurisdictions that have not yet adopted the Act are: Florida, Kansas, Louisiana, Michigan, North Carolina, Texas, Virgin Islands, and Wisconsin.

⁸⁰ *Sears v. Hampton*, 143 So. 3d 151, 151 (Ala. 2013).

⁸¹ *Id.* at 155 (stating that Alabama enacted the Uniform Act in 2011); 8A U.L.A. 3, *supra* note 79 (listing Kentucky as having enacted the Uniform Act in 2011).

⁸² *Id.* at 153.

⁸³ *Id.* at 157.

pleted, the new court can then determine whether the guardianship needs to be modified to conform to the accepting state's law.

While the Act is perhaps a small sliver in the overall reform picture, it is an important one, smoothing rough edges between states and addressing problems before they mushroom into untold expense and barriers to care. Currently, the Act's key obstacle is the eight jurisdictions that have not yet passed it,⁸⁴ maintaining that it is not necessary and in some cases that they already have their own provisions to cover jurisdictional issues. As the Act grows into more widespread use, an additional challenge is the need for model pleadings and orders so attorneys and courts can more readily put its provisions into practice.⁸⁵ Finally, research will be required to document the Act's effectiveness, compiling and bringing to light unreported cases in which the provisions were used and how they worked.

3. COURT OVERSIGHT APPROACHES. Guardian accountability and monitoring has long been high on the list of needed reform. This section reviews the conceptual basis for court monitoring; traces research and recommendations on monitoring over the years; acknowledges the lack of guardianship data as a critical monitoring component; and spotlights some recent innovations.

Guardian as Agent and Fiduciary. The rationale for court monitoring derives from the ancient concept of *parens patriae* in which the king, and later the state, through the court, is responsible for the affairs of those who cannot take care of themselves or their property. The court delegates this responsibility to guardians, who serve as agents of the court. The court as principal thus has the responsibility for supervision and oversight of the guardian agent.

A number of state courts have confirmed this concept of guardian as agent – in particular a Maryland case that found “[i]n reality the court is the guardian; an individual who is given that title is merely an agent or arm of that tribunal in carrying out its sacred responsibility.”⁸⁶ A line of Ohio cases stemmed from state statutory language

⁸⁴ See Acts, Adult Guardianship and Protective Proceedings Jurisdiction Act, UNIF. LAW COMM'N <http://www.uniformlaws.org/Act.aspx?title=adult%20Guardianship%20and%20Protective%20Proceedings%20Jurisdiction%20Act> (The jurisdictions that have not adopted the Adult Guardianship and Protective Proceedings Act are Florida, Kansas, Louisiana, Michigan, North Carolina, Texas, Wisconsin, and the Virgin Islands).

⁸⁵ For an example of a court's repeated frustrations with UAGPPJA procedural errors and suggestions for appropriate forms, see *In re B.A.M.W.*, 44 Misc.3d 465, 988 N.Y.S.2d 456 (N.Y. Sup. Ct., 2014), *In re B.A.M.W.*, 45 Misc.3d 619, 989 N.Y.S.2d 603 (N.Y. Sup. Ct. 2014), *In re B.A.M.W.*, 48 Misc.3d 1209(A), 18 N.Y.S.3d 577 (Table), 2015 N.Y. Slip Op. 51017(U), No. 2198/14, (N.Y. Sup. Ct., July 10, 2015).

⁸⁶ *Kicherer v. Kicherer*, 285 Md. 114, 118, 400 A.2d 1097, 1100 (1979) (citations omitted).

stating that “[a]t all times, the probate court is the superior guardian of wards who are subject to its jurisdiction, and all guardians who are subject to the jurisdiction of the court shall obey all orders of the court that concern their wards or guardianships.”⁸⁷

At the same time, the guardian also acts as a fiduciary, exercising authority for the benefit of the individual, and is bound to perform this duty with the greatest trust, confidence, and good faith, even when not directly supervised or monitored. There is a potential conflict between the two concepts of “guardian as agent” and “guardian as fiduciary” as they relate to guardian liability and accountability. In the first, the guardian is an extension of the court, and immune from liability; whereas in the second, the guardian is held accountable under fiduciary standards.

A 2012 Supreme Court of Connecticut case addressed the question of whether court-appointed guardians as court agents are subject to quasi-judicial immunity, or whether the “guardian as fiduciary” role would supersede any such immunity.⁸⁸ The court found that quasi-judicial immunity extends to guardians (called conservators in Connecticut) only “when the Probate Court has expressly authorized or approved specific conduct by the conservator, [and thus] the conservator is not acting on behalf of the conservatee [as a fiduciary] but as an agent of the Probate Court.”⁸⁹ Otherwise, the conservator can be held personally liable. This holding significantly bolsters the accountability of guardians since most of the actions a guardian takes are not specifically authorized by the court but fall under the guardian’s broad statutory and fiduciary duties.

Calls for Monitoring Policy and Practice Improvements. Calls for better court oversight of guardians have spanned more than 25 years. The 1988 Wingspread National Guardianship Symposium made recommendations on accountability of guardians, addressing the need for review of guardian reports, training for guardians and judges, and use of guardianship care plans.⁹⁰ In 1991, two American Bar Association Commissions produced a landmark study, *Steps to Enhance Guardian-*

⁸⁷ *In re Guardianship of Spangler*, Nos. 2007-G-2800, 2007-G-2802, 2011 Ohio App. LEXIS 5511, at para. 29, 2011 WL 6880781, at *6 (Oh. Ct. App. Dec. 27, 2011); see *In re Guardianship of Elliott*, No. CA91-01-002, 1991 Ohio App. LEXIS 6048, at *5, 1991 WL 268238, at *2 (Ohio Ct. App. Dec. 16, 1991) (stating “[t]his supervisory authority of the probate court is considered necessary to ensure the proper and appropriate exercise of the guardian’s fiduciary duties.”).

⁸⁸ *Gross v. Rell*, 40 A.3d 240, 304 Conn. 234 (2012).

⁸⁹ *Id.* at 252-253.

⁹⁰ See *Guardianship- An Agenda for Reform*, *supra* note 13, at 296-300 (displaying *Recommendations VA-VF*).

ship Monitoring.⁹¹ The study outlined an active role for courts concerning personal and financial guardian reports, guardianship plans, enforcement and review of reports, investigation, sanctions, and case management. That same year, AARP began piloting an innovative model for volunteer guardianship monitoring.⁹² The 1993 *National Probate Court Standards* set out specific monitoring procedures including training and outreach, reports by guardians, review of reports, re-evaluation of the need for guardianship, enforcement of court orders, and final reports before discharge of the guardian.⁹³ In 1997, the Uniform Guardianship and Protective Proceedings Act required that courts “establish a system for monitoring guardianships, including the filing and review of annual reports.”⁹⁴

In 2001, the Wingspan Second National Guardianship Symposium recommendations reinforced the compelling need for stronger court oversight, acknowledging that “courts have the primary responsibility for monitoring” and suggesting strategies for accomplishing it.⁹⁵ In 2004, the U.S. Government Accountability Office found that “[a]ll states have laws requiring courts to oversee guardianships, but court implementation of these laws varies.”⁹⁶ A 2006 AARP Public Policy Institute survey and a 2007 report on court monitoring sought to raise the visibility of the issue and highlight practical court monitoring tools.⁹⁷ Also in 2007, a U.S. Senate Special Committee on Aging paper on adult guardianship reform recognized the need for improved court oversight as a key issue. These sources all targeted the urgent need for accurate guardian reports and accountings, timely

⁹¹ Sally Balch Hurme, *STEPS TO ENHANCE GUARDIANSHIP MONITORING* (1991). The American Bar Association Commission on the Mentally Disabled (now the Commission on Disability Law) and Commission on Legal Problems of the Elderly (now the Commission on Law and Aging) commissioned this publication. The study was funded through a grant from the State Justice Institute.

⁹² Susan Miler, Mary Twomey & Shirley Pledger, *AARP HANDBOOK ON VOLUNTEER GUARDIANSHIP MONITORING AND ASSISTANCE* (1992) (including a Program Coordinator’s Manual, a Trainer’s Manual, and a Trainee’s Manual).

⁹³ Comm’n on Nat’l Probate Ct. Standards, *NATIONAL PROBATE COURT STANDARDS* (1st ed. 1993).

⁹⁴ UNIF. GUARDIANSHIP & PROTECTIVE PROC. ACT § 317(c) (1997), 8A U.L.A. 566 (2014).

⁹⁵ *Wingspan Recommendations*, *supra* note 13, at 605-606 (sets forth recommendations fifty-one through fifty-six).

⁹⁶ GAO-04-655, *supra* note 23 (quoting from “Highlights” page).

⁹⁷ Naomi Karp & Erica Wood, AARP Public Policy Institute, *GUARDIANSHIP MONITORING: A NATIONAL SURVEY OF COURT PRACTICES* (2006), http://assets.aarp.org/rgcenter/consume/2006_14_guardianship.pdf [hereinafter *GUARDIANSHIP MONITORING*]; Naomi Karp & Erica Wood, AARP Public Policy Institute, *GUARDING THE GUARDIANS: PROMISING PRACTICES FOR COURT MONITORING* (2007), http://assets.aarp.org/rgcenter/il/2007_21_guardians.pdf [hereinafter *GUARDING THE GUARDIANS*].

filing of the reports, a court system for tracking the reports, court review of the reports, and follow-up investigation.

A 2010 national survey of courts by the National Center for State Courts, the Conference of Chief Justices, and the Conference of State Court Administrators concluded that “[g]uardianship monitoring efforts by the courts are generally inadequate,” and stated that a “number of courts are unable to adequately monitor guardianships as a result of insufficient staffing and resources.”⁹⁸ As noted above, the 2010 Government Accountability Office report on *Guardianships: Cases of Financial Exploitation, Neglect, and Abuse of Seniors* identified substantial allegations of abuse, neglect, and financial exploitation by guardians.⁹⁹

Finally, a 2014 survey commissioned by the Social Security Administration and conducted by the U.S. Administrative Conference of the United States analyzed responses by over 850 state court judges and staff, as well as over 140 guardians.¹⁰⁰ According to the study: (1) three-fourths of respondents said “inventory filings are required at or near the time of appointment . . . in all cases”; (2) two-thirds of the respondents said “annual financial accountings for Guardianships of the Estate are required in all cases”; and (3) three-fourths of respondents said that “at least some of the financial accounting forms are subject to audits or a similar type of evaluation,” generally by court staff and judges.¹⁰¹ Query what happens in the remaining instances.

Even as the need for court oversight increases, the funds for court oversight often have been slashed in state judicial budget reductions.¹⁰² At the same time, there has been a rise in professional guardians and guardianship agencies, meaning that more “stranger guardians” are making key decisions about the lives of others whom they do not know. Moreover, there has been an increase in cases of financial exploitation of elders generally,¹⁰³ with guardians both

⁹⁸ Brenda K. Uekert, Nat’l Center for State Courts, ADULT GUARDIANSHIP COURT DATA AND ISSUES: RESULTS FROM AN ONLINE SURVEY 5 (2010), http://www.eldersandcourts.org/~media/Microsites/Files/cec/GuardianshipSurveyReport_FINAL.ashx.

⁹⁹ GAO-10-1046, *supra* note 23.

¹⁰⁰ Admin. Conference of the U.S., SSA REPRESENTATIVE PAYEE: SURVEY OF STATE GUARDIANSHIP LAWS AND COURT PRACTICES 3 (2014), <http://www.acus.gov/research-projects/ssa-representative-payee-program> [hereinafter SURVEY OF STATE GUARDIANSHIP LAWS AND COURT PRACTICES].

¹⁰¹ *Id.* at 4.

¹⁰² In the 2010 fiscal year, 40 state court budgets were cut. Audrey Wall, *State Courts and the Budget Crisis: Rethinking Court Services*, THE COUNCIL OF STATE GOV’TS KNOWLEDGE CENTER (June 1, 2010, 12:00 AM), <http://knowledgecenter.csg.org/kc/content/state-courts-and-budget-crisis-rethinking-court-services>.

¹⁰³ MetLife Mature Market Inst. et al., BROKEN TRUST: ELDERS, FAMILY, AND FINANCES: A STUDY ON ELDER FINANCIAL ABUSE PREVENTION 16 (2009), <https://>

seeking recovery from exploitation by others, and committing exploitation themselves. Finally, irate family members have called for greater accountability for third party professional guardians.¹⁰⁴ In essence, we have a “perfect storm” demonstrating the need for greater guardian accountability.

Show Me the Numbers. While these trends have come to the fore, tackling guardianship oversight remains problematic without adequate data. Indeed, the total number of adults under guardianship in the nation – and the number in many states – is not known. In 1987, the Associated Press estimated 400,000 adults.¹⁰⁵ In 2010, experts from the National Center for State Courts made an informed “guestimate” of about 1.5 million adults under guardianship, with the caveat that it could be as low as less than a million or as high as three million.¹⁰⁶

In 2006, a white paper on adult guardianship data for the National Center on Elder Abuse found that many states did not collect or compile state-level data on adult guardianship.¹⁰⁷ The 2007 U.S. Senate Committee on Aging paper lamented the lack of data and recommended that Congress should mandate collection of data on guardianship cases by the states, and the federal government should encourage development of local data systems.¹⁰⁸ The GAO noted in 2004 that most courts it surveyed “did not track the number of active guardianships, and few indicated the number of incapacitated elderly people under guardianship.”¹⁰⁹ A resolution by the Conference of Chief Justices confirmed the compelling need for solid statistics and urged that “[e]ach state court system should collect and report the

www.metlife.com/assets/cao/mmi/publications/studies/mmi-study-broken-trust-elders-family-finances.pdf; see also Jilene Gunther, *THE 2010 UTAH COST OF FINANCIAL EXPLOITATION* (2011), http://www.nlrc.aoa.gov/NLRC/Docs/2010_Cost_of_FE_5_24_LE.pdf (examining 57 cases of substantiated financial abuse; produced by the Utah Div. of Aging and Adult Services); Lifespan of Greater Rochester, Inc. et al., *UNDER THE RADAR: NEW YORK STATE ELDER ABUSE PREVALENCE STUDY* (2011), <http://www.ocfs.state.ny.us/main/reports/Under%20the%20Radar%2005%2012%2011%20final%20report.pdf> (finding that financial exploitation was self-reported at a rate of 41 per 1,000 surveyed).

¹⁰⁴ See *Victim Profiles*, *supra* note 25.

¹⁰⁵ Bayles & McCartney, *supra* note 4.

¹⁰⁶ 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: SPECIAL FOCUS ON ACCESS TO JUSTICE* 107, 109 (2011), http://www.guardianship.org/reports/Uekert_Van_Duizend_Adult_Guardianships.pdf.

¹⁰⁷ Erica Wood et al., *STATE-LEVEL GUARDIANSHIP DATA: AN EXPLORATORY SURVEY* 7 (2006), <http://www.ncea.aoa.gov/Resources/Publication/docs/GuardianshipData.pdf>.

¹⁰⁸ Sen. Gordon H. Smith & Sen. Herb Kohl, *GUARDIANSHIP FOR THE ELDERLY: PROTECTING THE RIGHTS AND WELFARE OF SENIORS WITH REDUCED CAPACITY* 41-42 (2007), http://www.guardianship.org/reports/Guardianship_Report.pdf.

¹⁰⁹ GAO-04-655, *supra* note 23 (quoting from “Highlights” page).

number of guardianship, conservatorship, and elder abuse cases that are filed, pending, and concluding each year.”¹¹⁰

Indeed, knowing how many adults are under the court’s aegis would give a solid basis for monitoring. It also would help to highlight judicial funding needs. Additionally, knowing more about the demographics of the individuals and the guardians would help to guide policymakers and planners. For instance, important questions might include:

- What is the age range of individuals under guardianship? An increase in younger individuals would argue for enhanced training for guardians in the kinds of employment, housing, and mental health treatment resources that might benefit this population. An increase in very old individuals might warrant additional training in dementia.
- What percent of individuals are in long-term care residences? A high number could support the need for guardian training in resident rights and long-term care advocacy – or could lead to an inquiry as to whether guardians have sufficiently examined community-based options.
- Is there a rise in professional guardians? If so, this could support the need for certification programs.
- What is the size range of the estates? Large and small estates might require different “red flags” and monitoring approaches.
- How many cases are contested? Analysis could examine why cases are contested, and what court actions should result.
- How long does it take for a guardian to be appointed? In some instances, individuals languish without needed care while courts process papers.
- In what percent of cases do individuals alleged to need guardians have counsel? Pro bono attorneys could be called in to fill gaps.
- What percent of reports and accountings are timely filed? If many are late or simply not filed, automatic reminders could be instituted, followed by orders to show cause or other sanctions.
- How frequently is there a termination with restoration of rights? A very low number might indicate a lack of awareness of the right to restoration, a lack of counsel, or a need to better examine reports for changes in condition.

¹¹⁰ Uekert, *supra* note 98, at 1.

Without data, we are working in the dark in trying to “fix” the guardianship system. Limited court file studies, including a recent study in New York City,¹¹¹ have begun to shed light on the picture in a few localities. Overall, however, it remains hard to describe the needs and deficiencies without supporting statistics. Hopefully, as court case management technology changes, searchable guardianship databases will begin to offer a better information base.

Promising Practices. The 2007 AARP report on *Guarding the Guardians* gave a snapshot of “promising practices” in the works at the time — concerning reporting, protection of assets, court review of reports, investigation, and guardian training.¹¹² Developments since then suggest additional possibilities on which to build.

One such possibility is background checks for guardians. The 2010 GAO report found that “some states” conduct background checks of prospective guardians using fingerprints.¹¹³ However, the report also indicated that state courts in some instances “failed to adequately review the criminal and financial backgrounds of prospective guardians, leading to the appointment of individuals or organizations whose past should have raised questions about their suitability to care for vulnerable seniors.”¹¹⁴ As of 2013, at least 20 states had enacted statutory language requiring some type of background checks for guardians.¹¹⁵ Additionally, a U.S. Senate bill on guardian accountability includes background checks as an example of possible state improvements that might benefit from federal funding.¹¹⁶

While background checks might weed out some of the most egregious cases of potential fiduciary malfeasance, the court really needs “eyes and ears” in the community once a guardian is appointed. An imaginative AARP project in the 1990s assisted over 50 courts in developing court-based volunteer guardianship monitoring programs, using a cadre of trained volunteers to either visit individuals under guardianship and report back to court, or to assist in auditing

¹¹¹ Jean Callahan & Raquel Romanick, Brookdale Center for Healthy Aging, ARTICLE 81 GUARDIANSHIP FILE REVIEW PROJECT (2014), <http://www.jasa.org/events/docs/10.%20Guardianship-Benefits%20%26%20Limitations/slides%20for%20NY%20elder%20abuse%20presentation%20%20draft%20%205-21-15.pdf> (slides on file with author).

¹¹² GUARDING THE GUARDIANS, *supra* note 97.

¹¹³ GAO-10-1046, *supra* note 23, at 4.

¹¹⁴ *Id.* at 7-8.

¹¹⁵ Sally Hurme, *Guardian Felony Disqualification and Background Requirements*, ABA COMM’N ON LAW AND AGING (April 26, 2013), http://www.americanbar.org/content/dam/aba/administrative/law_aging/2013_04_CHARTFelonyandBackgroundcheck.authcheckdam.pdf (providing a state legislative chart on guardian felony disqualification and background requirements).

¹¹⁶ Court-Appointed Guardian Accountability and Senior Protection Act, S. 1614, 114th Congress § 2 (2015) (introduced by Sen. Amy Klobuchar on June 18, 2015).

accounts.¹¹⁷ By 2008, about half of these court programs were still operating, while the rest had withered under court funding cuts, insufficient staffing, or lack of court attention.¹¹⁸ Yet the model remains vibrant.

The ABA Commission on Law and Aging sought permission from AARP to modernize the volunteer monitoring handbook and make it available electronically. In 2011, the ABA Commission launched a set of three web-based handbooks for courts¹¹⁹ to develop court visitor/auditor programs; and to recruit, train and supervise volunteers – either from the community or from universities. Today, local courts in at least 12 states have some form of volunteer monitoring program.¹²⁰ Texas law provides that “[e]ach statutory probate court shall operate a court visitor program to assess the condition of wards and proposed wards” and further provides that a “court that operates a court visitor program shall use persons willing to serve as court visitors without compensation to the greatest extent possible.”¹²¹

Two jurisdictions have or are moving toward statewide volunteer monitoring programs. In Utah, the Administrative Office of the Courts operates a Court Visitor Volunteer Program in several districts.¹²² A trained court visitor “investigates, observes, and reports to the court, ensuring that the protected person’s needs are met, that their property is protected and being used for their benefit, and that

¹¹⁷ AARP Legal Counsel for the Elderly, NATIONAL GUARDIANSHIP MONITORING PROGRAM MANUALS (1992) (on file with author).

¹¹⁸ Ellen Klem, ABA Comm’n on Law and Aging, VOLUNTEER GUARDIANSHIP MONITORING PROGRAMS: A WIN-WIN SOLUTION 5 (2007) http://apps.americanbar.org/aging/publications/docs/Volunteer_Gdhip_rpt.pdf.

¹¹⁹ ABA Comm’n on Law and Aging, VOLUNTEER GUARDIANSHIP MONITORING AND ASSISTANCE: SERVING THE COURT AND THE COMMUNITY INTRODUCTION (2011) http://www.americanbar.org/content/dam/aba/administrative/law_aging/2011/vol_gship_intro_1026.authcheckdam.pdf; ABA Comm’n on Law and Aging, VOLUNTEER GUARDIANSHIP MONITORING AND ASSISTANCE: SERVING THE COURT AND THE COMMUNITY PROGRAM COORDINATOR’S HANDBOOK (2011) http://www.americanbar.org/content/dam/aba/administrative/law_aging/2011/vol_gship_coord_1026.authcheckdam.pdf; ABA Comm’n on Law and Aging, VOLUNTEER GUARDIANSHIP MONITORING AND ASSISTANCE: SERVING THE COURT AND THE COMMUNITY TRAINER’S HANDBOOK (2011), http://www.americanbar.org/content/dam/aba/administrative/law_aging/2011/vol_gship_trainr_1026.authcheckdam.pdf. The Handbook was funded by the State Justice Institute.

¹²⁰ Internal ABA Commission on Law and Aging table (on file with author).

¹²¹ Tex. Est. Code Ann. § 1054.102(a) (West 2014); Tex. Est. Code Ann. §1054.105(a) (West 2014).

¹²² UTAH COURTS COURT VISITOR VOLUNTEERS, <http://www.utcourts.gov/visitor> (last visited Sep. 30, 2015).

the court's orders are being followed.”¹²³ In New Jersey, the judiciary has initiated a volunteer guardianship monitoring program in which trained volunteers review and analyze guardian annual reports.¹²⁴ Additionally, the DC Superior Court recruits social work students from four local schools of social work, provides training and supervision by a court social worker employee, and assigns selected cases for visits; students are expected to contribute 16 hours per week, and are appointed by the court as visitors in cases selected by staff.¹²⁵

Meanwhile, the Minnesota Judicial Branch has pioneered a stellar system for tracking and monitoring conservator financial information. In 2011, the Minnesota courts implemented a statewide web-based program for conservators to enter their account information to the court online. The system — called CAMPER (Conservator Account Monitoring Preparation and Electronic Reporting) was used in all 87 counties in 10 judicial districts and is the first of its kind in the nation.¹²⁶

In 2014, Minnesota moved a step beyond the CAMPER program, in the implementation of MyMNConservator (MMC).¹²⁷ Under MMC, all conservators are required to file their accounts online. The system generates reminders of when the next accounting is due. Using income, expense and asset categories, the conservator enters the information, which is then automatically updated. Assets entered in the inventory carry over to the annual account, and each annual account thereafter. When the conservator submits an inventory or account, the filing is automatically entered into the case management system, which then sets out another filing date for the next year. Beyond these benefits, MMC includes steps for auditing the account and identifying “red flags” that might be of concern and require further court investigation. The system “evaluates the account that is filed for approximately 30 red flags. The line items in the account are flagged and those flags are visible in the court examination queue and the audit queue.”¹²⁸ The Minnesota Judicial Branch is willing to share the

¹²³ *Court Visitor Program Brochure*, UTAH COURTS COURT VISITOR VOLUNTEERS, http://www.utcourts.gov/visitor/docs/Court_Visitor_brochure.pdf (last visited Sep. 30, 2015).

¹²⁴ Press Release, New Jersey Courts, Judiciary Launches Volunteer Guardianship Monitoring Program — Attorneys, Accountants, Retired Professionals, Students and Others Called to Help (Jan. 30, 2013), <http://www.judiciary.state.nj.us/pressrel/2013/pr130130a.htm>.

¹²⁵ D.C. Superior Court, Probate Division, GUARDIANSHIP ASSISTANCE PROGRAM ANNUAL REPORT 2013-2014 6 (2014) (on file with court).

¹²⁶ E-mail from Cate Boyko, Manager, Conservator Account Auditing Program, Minnesota Courts, to author (April 6, 2015, 08:46 CST) (on file with author).

¹²⁷ *Id.* Funding for the development of MMC was from the State Justice Institute.

¹²⁸ *Id.*

“source code” for MMC with other states and to assist in the application.¹²⁹

Another example of progress in guardianship monitoring is in Palm Beach County, Florida.¹³⁰ Florida legislation provides that independently elected clerks of the Circuit Court must audit guardianship reports to determine if the reports were timely filed, if the reports were complete, and if the financial information is correctly calculated. As a result of the legislation, the majority of the 67 Florida Clerk’s offices have established audit procedures. However, these basic audits have not been comprehensive enough to prevent guardian malfeasance.

Thus, the Clerk & Comptroller’s office in Palm Beach County has established a Guardianship Fraud Unit within a Division of the Inspector General.¹³¹ The program is to conduct “enhanced audits” and advise the court of its findings.¹³² “Enhanced audits are comprehensive in scope, as third-party verification of income, disbursements, capital transactions and other assets are required and evaluated.”¹³³ The professional auditors in the Clerk’s office follow the assets back to their source, require independent verification, and compare their findings to the guardianship reports, identifying any discrepancies that may affect the individual. The auditors report their findings to the court, and if necessary to law enforcement, the State’s Attorney and/or the Florida Bar. In the first two years, the Program identified more than \$2.7 million in “questionable expenses and misreported assets” and made two arrests.¹³⁴

These are examples of practices that might be adapted by courts in different locales. It is interesting to note, however, that in other nations, monitoring is not always exclusively the province of the courts. For example, in Canada, provincial and territorial public guardian and trustee programs monitor private guardians appointed by the court. The programs review annual guardian financial reports, and may undertake investigations. The programs report annually to government agencies and are subject to independent audits.¹³⁵ In

¹²⁹ *Id.*

¹³⁰ Sharon Bock & Anthony Palmieri, *Palm Beach Guardianship Monitoring Program Offers Innovative Model*, 35 *Bifocal* 101 (April 2014), http://www.americanbar.org/publications/bifocal/vol_35/issue_4_april2014/palm_beach_monitoring.html.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 103.

¹³⁵ See Erica Wood, *Guardian Accountability: Key Questions and Promising Practices*, in *COMPARATIVE PERSPECTIVES ON ADULT GUARDIANSHIP* 326 n.50 (A. Kimberley Dayton ed., 2014).

England, the Court of Protection may require “deputies,” who are appointed to make decisions on behalf of another, to submit reports to the Public Guardian.¹³⁶ Pilots testing such non-judicial monitoring roles might prove useful for state courts in the United States.¹³⁷

All of these recent guardianship monitoring approaches bear further examination, assessment, and funding support. Court appointment and monitoring differentiates guardians from other fiduciaries such as agents under a power of attorney, and strong oversight is a hallmark of guardianship reform. Courts may be on the cusp of important changes in monitoring, as technology advances. But state and local dollars, court time and imagination, and political will are required — and these ingredients often have been lacking or inconsistent. Non-judicial oversight resources to supplement the court’s role appear worth further examination.

4. HOPE FOR HIGH CONFLICT CASES. Some of the toughest guardianship problems arise from family disputes over the care and the control of finances of elders. Long-standing sibling feuds may erupt again in antagonistic questions over who will be mom’s guardian, where will she live, who will visit her, how will her funds be protected, and how will the funds be spent.¹³⁸ Families are now more complex, with divorces and second marriages resulting in tension among adult children and stepchildren. Additionally, families are more spread out geographically. Often, one adult child may live nearby, assisting the parent, while another lives across the country and arrives in a crisis, angrily insisting on steps out of guilt rather than informed decisions about needed care. In aggravated situations, one sibling may prevent visitation by another, isolating and perhaps neglecting the elder — or perhaps misusing financial or health care powers of attorney — in a claimed attempt to protect the elder from abuse.

The Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act may address stark cases of multistate “granny snatching.” But the number of “custody feuds” is likely to spiral with increases in the aging population. One answer of course is advance planning. As people increasingly designate their decision-makers and directions about care and assets in advance, conflicts played out in

¹³⁶ Denzil Lush, *Guardianship in England and Wales*, in *COMPARATIVE PERSPECTIVES ON ADULT GUARDIANSHIP* 144 (A. Kimberley Dayton ed., 2014).

¹³⁷ See Margaret K.Dore, *The Time is Now: Guardian Should Be Licensed and Regulated Under the Executive Branch, Not the Courts*, WASHINGTON STATE BAR NEWS, Mar. 2007, at 27-29.

¹³⁸ Rachel E. Silverman, *Latest Custody Battle: Who Gets Mom*, WALL ST. J., Aug.17, 2006, at D1.

guardianship proceedings may decrease. On the other hand, forced or fraudulent directives may actually increase the need for a guardian's protection.

Elder Mediation and Guardianship Mediation. Another answer is mediation. Mediation brings parties together in a voluntary, confidential process in which parties with disputes communicate their concerns and agree upon a workable solution.¹³⁹ Court proceedings are adversarial and can exacerbate conflict, whereas mediation may help to bring parties together to better understand differing points of view. Mediation thus looks to “the shadow of the future” – the fact that families and other parties with ongoing relationships must continue communicating in the future, and would be better off doing this harmoniously rather than harmfully.¹⁴⁰

Mediation can pose powerful positives as well as important cautions in the guardianship context.¹⁴¹ It can be fast, “flexible, inexpensive, convenient, [and] humane.”¹⁴² It can be seen as an “empowering” approach giving voice to respondents or potential respondents in a guardianship proceeding and to family members.¹⁴³ “It allows the parties to talk to each other in a setting that is constructive and secure.”¹⁴⁴ The resulting solutions can be “more creative” and better tailored to individual needs than a court proceeding, and parties are likely to “adhere better to solutions they have designed themselves.”¹⁴⁵

On the other hand, mediation proceeds without structured due process, court supervision or public scrutiny (although the court may approve the agreement), and there may be a risk of an “uneven table” for parties who are old or have disabilities.¹⁴⁶ Rights may be bargained away without understanding, and an agreement may not actually be aligned with the person's goals and preferences.¹⁴⁷ These

¹³⁹ American Arbitration Association, et al., MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005), http://www.imis100us2.com/acr/ACR/Resources/Model_Standards/ACR/Resources/Model_Standards.aspx?hkey=315fc2bd-2cac-422b-82bf-b3160b6a1b08. See also JACQUELINE M. NOLAN-HALEY, ALTERNATIVE DISPUTE RESOLUTION IN A NUTSHELL (4th ed. 2013).

¹⁴⁰ Erica Wood, *Dispute Resolution and Dementia: Seeking Solutions*, 35 GA. L. REV. 785, 799 (2001).

¹⁴¹ *Id.* at 803-805.

¹⁴² *Id.* at 803.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 803.

¹⁴⁶ *Id.* at 803, 834.

¹⁴⁷ *Id.* at 804.

potential negatives can be addressed through effective mediator training in serving older adults and people with disabilities.¹⁴⁸

Mediation has long been recognized as a useful approach specifically for resolving issues of family dynamics surrounding a guardianship petition.¹⁴⁹ In guardianship mediation, the issue of incapacity itself is not mediated, as that is a legal issue for judicial determination. However, mediation might identify options less restrictive than guardianship or discuss who might serve as guardian, propose limits on the scope of the order, or suggest where the person might live and who might provide care.

In some instances, following a guardianship petition, courts may refer a case to mediation, and may then consider or adopt the mediated agreement in the guardianship order – or the mediation may moot the need for guardianship. At least three state guardianship codes reference or authorize the use of mediation in guardianship cases. Michigan specifies that a guardian ad litem must determine whether a disagreement related to the petition “might be resolved through court ordered mediation.”¹⁵⁰ North Carolina provides that the court may extend the time for a hearing if necessary for the completion of a mediation.¹⁵¹ Washington permits the court to require any party to participate in mediation, establish the terms of the mediation, and allocate the cost of the mediation if it appears that the alleged incapacitated person could benefit and that that mediation would likely result in overall reduced costs to the estate.¹⁵²

The Center for Social Gerontology led the way in the use of mediation in resolving adult guardianship and caregiver disputes. In the early 1990s, the Center pioneered the use of mediation as “a non-adversarial means of addressing the complex personal, financial and related issues that often precipitate the filing of petitions for guardianship by family members, friends or private guardianship organizations.”¹⁵³ It then expanded the potential use of mediation to caregivers who may experience conflicts more “upstream” in advance of considering guardianship. The Center’s *Adult Guardianship Media-*

¹⁴⁸ *Id.* at 821.

¹⁴⁹ *Id.* at 807; see also *Elder Mediation*, THE CTR. FOR SOCIAL GERONTOLOGY, <http://www.tcsg.org> (last visited June 6, 2015).

¹⁵⁰ Mich. Comp. Laws Ann. 700.5305(1)(g)(ii) (West 2015).

¹⁵¹ N.C. Gen. Stat. Ann. § 35A-1108(b) (West 2015).

¹⁵² Wash. Rev. Code Ann. § 11.88.090(2) (West 2015).

¹⁵³ *Elder Mediation*, THE CTR. FOR SOCIAL GERONTOLOGY, <http://www.tcsg.org> (last visited June 6, 2015); see The Ctr. for Social Gerontology, *Considering Guardianship for Someone You Care About? Consider Mediation*, http://www.tcsg.org/M1courtbrochure_01.pdf (last visited Aug. 4, 2015).

*tion Manual*¹⁵⁴ and its adult guardianship/caregiver mediation trainings have offered valuable guidance to mediators nationally. The Center's 2001 evaluation of guardianship mediation found the process "effective in helping disputing parties reach agreements in three-quarters of the cases in which it was used [and in] finding better or more satisfactory resolutions such as fewer guardianships, less restrictive orders, or limited rather than full guardianships."¹⁵⁵

Following this pioneering work by The Center for Social Gerontology, in 2012 the Association for Conflict Resolution (ACR) developed "Mediation Training Objectives for Adult Guardianship Cases" in conjunction with its broader elder mediation training objectives.¹⁵⁶ The ACR objectives recommend that training for mediators cover basics of the adult guardianship process and the range of less restrictive alternatives; ethical issues concerning adult guardianship; use of mediation during the pre-filing, adjudication and post adjudication phases of guardianship; review of local laws, courts rules and processes; and considerations in inclusion of parties.¹⁵⁷

Eldercaring Coordination. While there is no data on use of guardianship mediation, in practice it still appears minimal, and judges may not fully recognize its potential. Moreover, some embittered guardianship conflicts have gone beyond the ability of mediation to address. There may be allegations of abuse or exploitation, and some family members may be isolating an elder from others. "The fireworks become an ongoing spectacle as childhood and family conflicts are relived. At that point, the elder's safety, well-being, or financial resources may be at risk."¹⁵⁸

For similar high conflict cases involving children, courts have used "parenting coordination" to help parents work together in the best interest of their children, under court supervision and with a trained coordinator. Based on — but significantly differing from — this parenting model, the Association for Conflict Resolution in 2014

¹⁵⁴ Susan Hartman, *The Ctr. for Social Gerontology, ADULT GUARDIANSHIP MEDIATION MANUAL* (2002).

¹⁵⁵ Susan J. Butterwick, Penelope A. Hommel & Ingo Keilitz, *The Ctr. for Social Gerontology, EVALUATION OF MEDIATION AS A MEANS OF RESOLVING ADULT GUARDIANSHIP CASES 1* (2001), http://www.tcsg.org/mediation/SJI_01.pdf.

¹⁵⁶ Assoc. for Conflict Resolution, *Elder Decision-Making and Conflict Resolution Section, Additional Mediation Training Objectives for Adult Guardianship Cases, in ELDER CARE AND ELDER FAMILY DECISION-MAKING MEDIATION: TRAINING OBJECTIVES AND COMMENTARY 10-15* (2012), http://acrelldersection.weebly.com/uploads/3/0/1/0/30102619/eldercareobjectives_7_30_2012.pdf.

¹⁵⁷ *Id.*

¹⁵⁸ Sue Bronson & Linda Fieldstone, *From Friction to Fireworks to Focus: Eldercaring Coordination Sheds Light in High Conflict Cases*, *EXPERIENCE (A.B.A.)*, Fall/Winter 2015, at 30.

approved a new court-based dispute resolution process called “eldercaring coordination.”¹⁵⁹ It is an option “specifically designed for high-conflict cases involving issues related to the care and needs of elders in order to complement, not replace, other services such as provision of legal information or legal representation; individual and/or family therapy; and medical, psychological, or psychiatric evaluation or mediation.”¹⁶⁰

Eldercaring coordination is defined as “a dispute resolution process in which an eldercaring coordinator assists elders, legally authorized decision makers, and others who participate by court order or invitation, to resolve high-conflict disputes impacting the elder’s autonomy and safety.”¹⁶¹ The process aims to enhance problem-solving skills, offer education and resources, facilitate an eldercare plan, and make recommendations for the resolution of issues.¹⁶² It seeks to “help the elder and other . . . participants work collaboratively in a way that respects the autonomy of the elder so that the elder may live out his or her life free from the threat of being caught in the middle of disputes that jeopardize care, needs, and safety.”¹⁶³ The trained eldercaring coordinator may be authorized to make certain decisions within the scope of a court order or with the parties’ prior agreement.¹⁶⁴ The eldercaring coordinator may serve for a term of up to two years, to try to “break the cycle of ingrained conflict.”¹⁶⁵

ACR convened a broad-based national Task Force on Eldercaring Coordination that in 2014 developed a comprehensive set of *Guidelines for Eldercaring Coordination*.¹⁶⁶ The Guidelines outline the qualifications of an eldercaring coordinator, including family mediation training, elder mediation training, eldercaring coordination training, and extensive practical experience in a profession relating to high conflict within families. ACR held the first training for certified eldercaring coordinators in July 2015.

The Guidelines define “responsible practice” for coordinators, emphasizing that the coordinator’s primary responsibility is to the elder. The coordinator “supports the well-being and safety of elders

¹⁵⁹ Ass’n for Conflict Resolution, GUIDELINES FOR ELDERCARING COORDINATION (OCT. 2014), <http://www.eldersandcourts.org/~media/Microsites/Files/cec/ACR%20Guidelines%20for%20Elder%20Caring%20Coordination%202014.ashx> [hereinafter GUIDELINES FOR ELDERCARING COORDINATION].

¹⁶⁰ *Id.* at 3.

¹⁶¹ *Id.* at 7.

¹⁶² *Id.*

¹⁶³ Bronson & Fieldstone, *supra* note 158, at 33.

¹⁶⁴ GUIDELINES FOR ELDERCARING COORDINATION GUIDELINES, *supra* note 159, at 7.

¹⁶⁵ Bronson & Fieldstone, *supra* note 158, at 33.

¹⁶⁶ GUIDELINES FOR ELDERCARING COORDINATION, *supra* note 159.

within complex systems of public and private social services, legal services, and health care providers.”¹⁶⁷ The Guidelines set out nine “foundational ethical principles” to guide practice.¹⁶⁸ ACR is poised to pilot the process in selected courts in Florida, Ohio, and several other states; and will evaluate the results of these court-based pilots over a two-year period.

Family conflict has been a continuing and blatant quandary in adult guardianship. Tools such as mediation and eldercaring coordination can offer a welcome path of relief. Eldercaring coordination boldly targets exactly the cases that are most aggravating and abusive. If eldercaring coordination works, it will be a real boon to courts, families and elders. A downside is that there are costs involved — to be paid by families unless there is provision for indigent services. And there is a risk that eldercaring coordination could simply add another layer to an already cumbersome process without substantial results. Hopefully the soundly developed guidelines and the comprehensive training requirements and materials, as well as plans for a careful evaluation, will prevent that. The model is just beginning and the jury is out, but the outlook is positive.

5. SUPPORTED DECISION-MAKING. The essence of guardianship is that it is a means of surrogate decision-making. Pursuant to a court order, one person (or entity) is making decisions on behalf of another — effectively “unpersoning”¹⁶⁹ the individual by removing self-determination in the name of protection. Over the years, the concept of surrogate decision-making has changed to move away from a “best interests” model toward “substituted judgment” standards in which the guardian or other surrogate uses the person’s values and preferences in making choices¹⁷⁰ — stepping into the shoes of the other or “liv[ing] the decisional life”¹⁷¹ of the other. This trend is a notable move toward a more person-centered approach that places a premium on self-determination. But the decisions are still made *by* the surrogate, *for* the individual. The emergent concept of “supported decision-

¹⁶⁷ *Id.* at 7.

¹⁶⁸ *Id.* at 8-13 (stating that the nine principles are the following: autonomy, beneficence, collaboration, professional competence, fidelity, integrity, justice, nonmaleficence, and cultural competence. The Guidelines also include a recommended complaint procedure, extensive training guidelines and protocols, a pilot project proposal, a court rule template, and a project assessment tool).

¹⁶⁹ Bayles & McCartney, *supra* note 4 (stating that the 1987 Associated Press report said adult guardianship “unpersons” an individual).

¹⁷⁰ Linda Whitton & Lawrence Frolik, *Surrogate Decision-Making Standards for Guardians: Theory and Reality*, 2012 UTAH L. REV. 1491.

¹⁷¹ Pamela Teaster, *When the State Takes Over a Life: The Public Guardian as Public Administrator*, 63 PUB. ADMIN. REV. 396, 396 (2003).

making” challenges this notion of surrogate decision-making with a model in which people with disabilities “use friends, family members, and professionals to help them understand the situations and choices they face, so they may make their own decisions”¹⁷²

New Basis for Capacity. While concepts of self-determination have long been basic to disability advocacy and while the U.N. Universal Declaration of Human Rights¹⁷³ confers “the right to recognition everywhere as a person before the law,” the 2007 U.N. Convention on the Rights of Persons with Disabilities (CRPD)¹⁷⁴ presents a stark shift in the concept of capacity. The Convention’s Article 12 first reaffirms the right set out in the Declaration of Human Rights,¹⁷⁵ and bolsters this by providing that “persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.”¹⁷⁶ It is not that there is a “presumption” of capacity that can be overcome, but rather that all adults *have a right* to legal capacity. In guardianship law, many states allow for an initial presumption of capacity, but then set out a procedure by which lack of capacity may be determined based on medical, functional and cognitive evidence. Thus, a judge’s finding concerning a person’s legal status of capacity or incapacity depends on findings concerning his or her mental abilities. Article 12 breaks that link. Moreover, Article 12 requires that governments provide necessary supports to enable individuals to exercise their rights to make their own decisions.¹⁷⁷

Article 12 thus calls for a stunning switch in perception from a focus on disabilities to abilities, from surrogate decision-making to individual decision-making, and from protection to support. While guardianship requires governments to provide protection, Article 12 requires governments to enable decision-making through a range of supports and accommodations, thus turning *parens patriae* on its head – governmental sanction and action of a very different kind is needed. Instead of declaring Mr. X “an incapacitated person” and appointing a guardian, governments must inquire into what assistance would help Mr. X make his own decisions, such as a trusted supporter or circle of supporters, communications strategies so he can understand the deci-

¹⁷² Peter Blanck & Jonathan G. Martinis, “The Right to Make Choices”: The National Resource Center for Supported Decision-Making, 3 INCLUSION 24, 24-25 (2015).

¹⁷³ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217 (III) (Dec. 10, 1948).

¹⁷⁴ Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. Doc. A/RES/61/106 (Dec. 13, 2006).

¹⁷⁵ *Id.* at 12(1).

¹⁷⁶ *Id.* at 12(2).

¹⁷⁷ *Id.* at 12(3).

sions at hand, assistive technology, and practical community supports to help him live more independently as he chooses.

Implementation Steps. While the CRPD has not yet been ratified by the United States, its influence is potentially powerful.¹⁷⁸ The U.S. can look to other countries such as Canada, Ireland, Australia, and Bulgaria, where various forms of supported decision-making are in implementation or pilot phases.¹⁷⁹ For instance, British Columbia has enacted a Representation Agreement Act that allows adults to enter into a legally-recognized supported decision-making agreement.¹⁸⁰ In South Australia, a Supported Decision Making Project, aimed to assist people with disabilities, set up supported decision-making agreements in areas of health, accommodation, and lifestyle decisions.¹⁸¹ The Mental Disability Advocacy Center, headquartered in Budapest, aims to forge paths toward legal capacity in European countries.¹⁸² In 2014, the Third World Congress on Adult Guardianship¹⁸³ showcased supported decision-making approaches in many nations, triggering a high level of interest by U.S. participants.

In the United States, the concept of supported decision-making began to make headway in 2012. In that year, two American Bar Association commissions spearheaded a roundtable to engage stakeholders in discussion of ways to move supported decision-making forward.¹⁸⁴ In 2013, The Quality Trust for Individuals with Disabilities and other co-sponsors held a symposium resulting in recommendations in education, research, advocacy, policy and practice.¹⁸⁵ Symposium participants expressed consensus around the need for action on:

¹⁷⁸ See, e.g., *In re Guardianship of Dameris L.*, 38 Misc. 3d 570, 956 N.Y.S. 2d 848 (N.Y. Sur. Ct., 2012) (referencing the CRPD).

¹⁷⁹ Kristin Booth Glen, *Supported Decision-Making and the Human Right of Legal Capacity*, 3 INCLUSION 2, 7-9 (2015).

¹⁸⁰ Representation Agreement Act, R.S.B.C. 1996, c 405 (Can.). See also Can. Ctr. for Elder Law, Background, *Understanding the Lived Experience of Assisted and Supported Decision-making in Canada*, <http://www.bcli.org/project/understanding-lived-experience-supported-decision-making> (last visited Aug. 4, 2015).

¹⁸¹ *Supported Decision-Making*, S. Austl. Office of the Public Advocate, http://www.opa.sa.gov.au/resources/supported_decision_making (last visited Aug. 4, 2015).

¹⁸² Mental Disability Advocacy Ctr., *Legal Capacity In Europe: A Call to Action to Governments and to The EU* (2013), http://mdac.info/sites/mdac.info/files/legal_capacity_in_europe.pdf

¹⁸³ NATIONAL GUARDIANSHIP NETWORK INTERNATIONAL RESOURCE LIBRARY, <http://www.guardianship.org/IRL> (last visited June 8 2015).

¹⁸⁴ ABA Commission on Disability Rights, *Supported Decision Making*, <http://www.americanbar.org/groups/disabilityrights/resources/article12.html> (last visited June 8 2015) (providing an overview of the roundtable discussion entitled *Beyond Guardianship: Supported Decision-Making by Persons with Intellectual Disabilities*).

¹⁸⁵ Quality Trust for Individuals with Disabilities, *Supported Decision-Making: An Agenda for Action* (2014), www.supporteddecisionmaking.org/news/supported-decision-making-agenda-action

research and a compilation of existing information on supported decision-making in the U.S.; identification of barriers to guardianship reform; implementation of less restrictive alternatives; and the importance of sharing decision-making stories.¹⁸⁶

In 2014, the federal government put its stamp on the supported decision-making concept and the need for implementation. The U.S. Department of Health and Human Services, through its Administration on Community Living, funded a National Resource Center on Supported Decision-Making to conduct research, create educational resources, develop best practices, and foster state/local demonstration programs.¹⁸⁷

At the same time, efforts toward supported decision-making were percolating in other venues. Small pilot programs in Massachusetts and in Texas were seeking to test the use of supported decision-making as an alternative to guardianship by providing individuals with supporters and recognizing the supporters' role.¹⁸⁸ The Autism Self Advocacy Network drafted a model act creating a supported health care decision-making agreement, with accompanying materials.¹⁸⁹ Selected state legislatures have begun to address supported decision-making as well.¹⁹⁰

Supported Decision-Making as an Alternative to Guardianship. In 2013, Kohn and colleagues recommended that "policymakers should explore how supported decision-making could reduce the use of guardianship as well as how supported decision-making approaches could be integrated into guardianship systems."¹⁹¹ That is, Kohn outlined two approaches. The first focuses on how supported decision-making models could become a workable less restrictive option that might obviate the need for guardianship.¹⁹² The second addresses how

¹⁸⁶ *Id.* at 11.

¹⁸⁷ National Resource Center for Supported Decision Making, <http://www.supporteddecisionmaking.org/> (last visited Jun. 8 2015).

¹⁸⁸ See Glen, *supra* note 179.

¹⁸⁹ Autistic Self Advocacy Network, *An Act Relating to the Recognition of a Supported Health Care Decision-Making Agreement for Adult with Disabilities*, <http://autisticadvocacy.org/wp-content/uploads/2014/07/ASAN-Supported-Decisionmaking-Model-Legislature.pdf> (last visited Aug. 4, 2015).

¹⁹⁰ See, e.g., Texas S.B. 1881, Supported Decision-Making Agreement Act (2015). See also V.A. H.J. 190 (2014) (commissioning a study on supported decision-making, as per the decision of the Virginia General Assembly).

¹⁹¹ Nina A. Kohn, Jeremy A. Blumenthal & Amy T. Campbell, *Supported Decision-Making: A Viable Alternative to Guardianship?*, 117 PENN ST. LAW REV. 1111, 1154 (2013).

¹⁹² *Id.* at 1120-1124.

the self-determination principles of supported decision-making can be used to guide the actions of guardians in enhancing autonomy.¹⁹³

In 2011, Salzman maintained that both the Americans with Disabilities Act and the CRPD provide the legal basis for recognizing a right to decision-making support “as a less restrictive alternative to the substituted decision-making that characterizes guardianship.”¹⁹⁴ Examination of this strategy is underway. The Uniform Guardianship and Protective Proceedings Act requires that a court may appoint a guardian only if “the respondent’s identified needs cannot be met by less restrictive means”¹⁹⁵ In 2015, at the first meeting of the Uniform Law Commission drafting committee to revise the Act, committee members began discussion of possible inclusion of supported decision-making approaches as such a “less restrictive means.”

Additionally, four American Bar Association entities¹⁹⁶ are sponsoring a joint project to create a supported decision-making tool for lawyers. The nine-step tool — tentatively named “The PRACTICAL Guide”¹⁹⁷ — will help lawyers to “hit pause” before moving ahead with a petition, and will walk them through a checklist of elements to consider first, including practical community supports that might boost abilities. The tool will encourage lawyers to ask “what would it take”¹⁹⁸ in practical terms to have this person make the decisions at hand so that guardianship is not needed. The challenge is to operationalize the least restrictive alternative principle and the supported decision-making concept, and build them into the practice of law routinely — an ambitious goal, considering that ingrained practices are hard to change — and moreover there may be financial incentives to petitioning rather than identifying other routes.

¹⁹³ *Id.* at 1126-1128.

¹⁹⁴ Leslie Salzman, *Guardianship for Persons with Mental Illness – A Legal and Appropriate Alternative?*, 4 ST. LOUIS U. J. HEALTH L. & POL’Y 279, 280 (2011).

¹⁹⁵ UNIF. GUARDIANSHIP & PROTECTIVE PROC. ACT § 311(a)(1)(B) (UNIF. LAW COMM’N 1997) http://www.uniformlaws.org/shared/docs/guardianship%20and%20protective%20proceedings/UGPPA_2011_Final%20Act_2014sep9.pdf.

¹⁹⁶ Namely, the ABA Commission on Law and Aging, the ABA Commission on Disability Rights, the ABA Section on Individual Rights and Responsibilities, and the ABA Section on Real Property, Trust and Estate Law.

¹⁹⁷ ABA Commission on Law and Aging et al., *THE PRACTICAL GUIDE* (forthcoming 2016) (PRACTICAL is an acronym for the nine steps, tentatively including: (1) Presume that guardianship is not needed; (2) Identify Reasons for concern; (3) Ask if concerns may be caused by temporary or reversible conditions; (4) Connect to family or community resources; (5) Identify any current Team to help make decisions; (6) Identify abilities; (7) Screen for any Challenges with identified supports; (8) Appoint trusted supporters; and (9) Limit any guardianship order needed as a last resort).

¹⁹⁸ Telephone Communications with Hon. Kristin Booth Glen (Ret.), Dean Emerita, CUNY School of Law (2014).

Use of Supported Decision-Making Principles in Guardianship. Aside from serving as an alternative to guardianship, supported decision-making has principles that can guide guardians in how they relate to individuals for whom they care – giving individuals a voice in decisions that affect them. While the idea of incorporating self-determination into a guardian’s role is not new, it was highlighted at the 2011 Third National Guardianship Summit.¹⁹⁹ The Summit resulted in proposed guardian standards with a hallmark of person-centered planning and self-determination.

Under the Summit standards, for example, the guardian must have a plan with a “person-centered philosophy.”²⁰⁰ A guardian of property must “manage the financial affairs in a way that maximizes the dignity, autonomy, and self-determination of the person”²⁰¹ and must “consider current wishes, past practices, reliable evidence of likely choices”²⁰² as well as best interests of the person. In health care decision-making, a guardian must “maximize the participation of the person” and “encourage and support the individual in understanding the facts and directing a decision.”²⁰³ A guardian making residential decisions must “whenever possible, seek to ensure that the person leads the residential planning process, and at a minimum to ensure that the person participates in the process.”²⁰⁴ As noted above, the Summit’s proposed standards have been incorporated into the NGA 2013 *Standards of Practice*, and endorsed by leading national judicial and legal organizations — and additionally are serving as a basis for the upcoming revisions to the UGPPA. All of this puts a spotlight on supported decision-making principles.

There is also another route through which supported decision-making could affect a guardian’s performance. Guardians must promote and maintain the health and well-being of the individual. Numerous findings show that being able to make choices about one’s life can enhance overall health and well-being.²⁰⁵ People deprived of the opportunity to make decisions, to be “causal agents” in their own lives, often experience “low self-esteem, passivity, and feelings of inadequacy” that detract from their ability to function in society.²⁰⁶ Therefore, a guardian’s duty to promote the individual’s health and

¹⁹⁹ *Third National Guardianship Summit Standards and Recommendations*, 2012 UTAH L. REV. 1191

²⁰⁰ *Id.* at 1192, (Std. 1.1).

²⁰¹ *Id.* at 1194, (Std. 4.1).

²⁰² *Id.* at 1194, (Std. 4.2).

²⁰³ *Id.* at 1196, (Std. 5.1 & 5.2).

²⁰⁴ *Id.* at 1197, (Std. 6.5).

²⁰⁵ Blanck & Martinis, *supra* note 172, at 26-27.

²⁰⁶ *Id.* at 25.

well-being should include means by which the person can lead or at least participate in decision-making where possible.

Restoration of Rights. On the “front end” of guardianship, before appointment, supported decision-making approaches could reduce the need for guardianship; and on the “back end,” after appointment, people who have adequate support may have the guardianship terminated and have their rights restored. Two recent court cases demonstrate supported decision-making as a basis for restoration of rights. In the New York case, *In re Guardianship of Dameris L.*, 38 Misc. 2d 570, 956 N.Y.S.2d 848, (Surr. Ct. NY County 2012), a woman with intellectual disabilities had built up a system of supports through relatives, neighbors and social services staff that enabled the court to terminate the guardianship. The court found “guardianship is no longer warranted because there is now a system of supported decision-making in place that constitutes a less restrictive alternative to [plenary guardianship].”²⁰⁷

In *Ross and Ross v. Hatch*, No. CWF120000426P-03, slip. op. (Va. Cir. Ct. Aug. 2, 2013), Jenny Hatch, a young woman with Down’s Syndrome, had been placed under a restrictive guardianship. After lengthy litigation, the court first made a change in guardians to those she preferred, and specified a one-year temporary guardianship during which time the guardians were to use supported decision-making to help her learn to handle her own affairs. With help from her guardians, Jenny returned to her job at a thrift store, went out with friends, used her computer, and made daily choices. She reported that her guardians “help me and support me. They help me make good decisions.”²⁰⁸ The court then restored Jenny’s right to make her own decisions, allowing her to live and work where she wants, and see who she chooses — and her guardians became long-term supporters who continue to assist her.

Restoration of rights for those under guardianship increasingly is recognized as a key component of supported decision-making, since people with adequate supports may not need a guardian and could have their rights restored. Also, being able to make one’s own decisions over time could build decisional ability, laying groundwork for restoration. In Florida, the Developmental Disabilities Council has conducted a restoration project. The Council researched court files in three Florida counties to identify instances of restoration, and found

²⁰⁷ *In re Guardianship of Dameris L.*, 38 Misc. at 576, 956 N.Y.S. 2d at 853.

²⁰⁸ Jenny Hatch, *My Story*, 3 INCLUSION 1, 34 (2015).

that “restoration activity is rare at best.”²⁰⁹ It also concluded “that guardians and people under guardianship are not specifically aware of their rights to continuing review of the need of guardianship and the legal process to obtain guardianship restoration.”²¹⁰ The project is creating a manual on restoration for legal professionals.²¹¹

The ABA Commission on Law and Aging has compiled state statutory provisions on restoration, collected reported case decisions, and conducted preliminary queries of judges and attorneys.²¹² Key issues included: the required evidentiary standard; the individual’s access to counsel; procedures for requesting restoration; the role of the guardian when an individual files for restoration; and need for ongoing review concerning the person’s condition, as well as supports that might warrant a restoration of rights.²¹³ Raising the visibility of these restoration issues will promote examination of restoration as a supported decision-making tool.

Challenges Going Forward. Supported decision-making and its impact on guardianship is still at an early stage. Supported decision-making can be an alternative to guardianship, and its self-determination principles can offer a pioneering approach in the practice of guardianship. Critical challenges remain, and there is a compelling need for individual stories, pilot projects, research and evaluation. Questions that merit intensive scrutiny²¹⁴ are:

- Supported decision-making has been explored primarily in the context of younger individuals with disabilities. How can it best be translated to elders who need help? What happens in cases of extreme cognitive impairment, such as very advanced dementia, when an individual seems simply unable to make decisions? What happens in cases of “unbefriended patients” who appear non-responsive and about whom little or nothing is known of their history, values and preferences?
- How can third parties with whom an individual interacts – such as banks, housing agencies, or hospitals – recognize the

²⁰⁹ Florida Developmental Disabilities Council, RESTORATION OF CAPACITY STUDY AND WORK GROUP REPORT 31 (2014), http://www.guardianship.org/IRL/Resources/Handouts/Charting%20a%20New%20Course_Restoration%20Report.pdf.

²¹⁰ *Id.* at 6.

²¹¹ *Id.* at 36.

²¹² See A.B.A. Comm’n on Law and Aging, RESTORATION IN ADULT GUARDIANSHIPS (STATUTES) (June 2013), http://www.americanbar.org/content/dam/aba/administrative/law_aging/2013_CassidyRestorationofRightsChart7-13.authcheckdam.pdf. See also Jenica Cassidy, *Restoration of Rights in the Termination of Adult Guardianship*, 23 THE ELDER LAW JOURNAL 83 (2015) (summarizing ABA report findings).

²¹³ *Id.*

²¹⁴ See Glen, *supra* note 179, at 11-13.

person's legal right to capacity? Our system currently requires a legal surrogate such as a guardian or agent to provide consent or approval. In British Columbia, third parties can rely on "representation agreements" between the individual and a supportive "representative" whom the person selects, giving the representative authority to make health and personal care decisions, obtain legal services, and engage in routine management of financial affairs on the person's behalf.²¹⁵ Tremendous changes in infrastructure would be needed in the U.S. for such recognition to occur.

- What should be the safeguards against abuse, particularly subtle undue influence, by supporters? While the CRPD Article 12 requires that governments ensure measures for "appropriate and effective safeguards to prevent abuse,"²¹⁶ how in practice can we ensure that the relationship between the individual and the supporter is not coercive? Undue influence is often difficult to identify and address,²¹⁷ and supporters would be perfectly placed to exert subtle pressure on choices. Indeed, where is the line between what the person says he or she wants, based on interactions with the supporter, and what the supporter wants? How could such interactions be regulated?
- Finally, what research is needed about how supported decision-making works and what the outcomes are? Kohn argues that while supported decision-making could empower individuals, "it is too early to rule out the possibility that it may . . . allow largely unaccountable third parties to improperly influence the decisions of persons with disabilities . . ."²¹⁸ She outlines five primary areas for empirical research on the process and its outcomes.²¹⁹

While examination of these formidable questions is ongoing,²²⁰ it is clear that supported decision-making is already leaving its mark on adult guardianship and will continue to do so.

6. WINGS: COURT-COMMUNITY STAKEHOLDER PARTNERSHIPS. None of the above five current paths to reform – nor any other reform

²¹⁵ Representation Agreement Act, *supra* note 180.

²¹⁶ Convention on the Rights of Persons with Disabilities, *supra* note 174, at 12(4).

²¹⁷ Lisa Nurenberg, *Undue Influence: An Insidious Form of Elder Abuse*, <http://nyceac.com/undue-influence-an-insidious-form-of-elder-abuse> (2013) last visited (Aug. 9, 2015).

²¹⁸ Kohn et al., *supra* note 191, at 1157.

²¹⁹ Kohn et al., *supra* note 191, at 1156-1157.

²²⁰ See NATIONAL RESOURCE CENTER ON SUPPORTED DECISION-MAKING, <http://www.supporteddecisionmaking.org> (last visited Aug. 9, 2015).

efforts — will work effectively without communication among guardianship stakeholders. To make real change, states need an ongoing forum in which stakeholders can bring problems, engage in informed discussion, prioritize issues, trigger solutions, identify resources, and conduct education and outreach.

While over the past three decades states have convened task forces, bar committees, working groups, and judicial commissions to assess adult guardianship problems and make recommendations for change, most such groups have dissolved after accomplishing an immediate goal — such as passage of legislation or provision of educational sessions. In addition, many such groups have been somewhat narrow in scope, failing to include the full range of court, bar, aging, disability and mental health representatives. Some have lacked buy-in from the state's highest court. Viewing the landscape from afar and over time, guardianship reform groups seem to arise, sometimes in response to negative press reports, exist for a time, accomplish selected objectives, experience turnovers in members, and disappear — often leaving ingrained problems.

Origin of WINGS. Over the past 25 years, national adult guardianship reform recommendations have repeatedly urged the creation of ongoing court-community partnerships. The 1988 multidisciplinary “Wingspread” Symposium sponsored by American Bar Association commissions proposed the development of “multidisciplinary guardianship and alternatives committees.”²²¹ The broad-based 2001 Second National “Wingspan” Guardianship Conference suggested an “interdisciplinary entity focused on guardianship implementation, evaluation, data collection, pilot projects, and funding.”²²² A 2004 Wingspan follow-up conference of judges, attorneys and guardians emphasized that such interdisciplinary entities are at the very core of adult guardianship practice improvement.²²³ A 2010 Conference of State Court Administrators report recommended establishment of statewide guardianship task forces to resolve guardianship issues.²²⁴

But it was not until the 2011 Third National Guardianship Summit that the idea really gained force. The Summit called for state Working Interdisciplinary Networks of Guardianship Stakeholders –

²²¹ *Guardianship: An Agenda for Reform*, *supra* note 13, at 280-281 (Recommendation I-E).

²²² *Wingspan Recommendations*, *supra* note 13, at 596 (Recommendation No. 6).

²²³ Nat'l Guardianship Network, *National Wingspan Implementation Session – Action Steps on Adult Guardianship Progress* (2004), http://www.naela.org/NGN/Summits_on_Guardianship/History/NGN/Summits_on_Guardianship/History.aspx?hkey=ed8f7a49-dc08-44b0-b9be-b4313011f515 (last visited Aug. 9, 2015).

²²⁴ Uekert, *supra* note 98, at 2.

or WINGS, a play on words harking back to the names (Wingspread and Wingspan) of the earlier national guardianship conferences.

Collective Impact of WINGS. The WINGS model is based on a theory of “collective impact.” In a 2011 article on social change entitled “Collective Impact,” Kania and Kramer stated, “[l]arge-scale social change comes from better cross-sector coordination rather than from the isolated intervention of individual organizations.”²²⁵ In a following article, they stated that “collective impact” is not just the collaboration of public and private entities toward a common goal, but a “highly structured collaboration” that requires: (1) a shared vision for change; (2) data collection and measurement of results; (3) different stakeholder activities coordinated through a “mutually reinforcing plan;” (4) consistent communication among stakeholders; and (5) a coordinating “backbone” entity.²²⁶ Applied to adult guardianship reform, “collective impact” brings important actors from different sectors – courts, adult protective services, aging and disability agencies for example – to the table to develop and confirm a common vision, and coordinate stakeholder action in response.

Based on the collective impact theory, the National Guardianship Network has articulated ten hallmarks of WINGS, described in a state WINGS replication guide:²²⁷ (1) “WINGS groups are ongoing and sustainable.”²²⁸ WINGS is concerned with constant, measurable change over the long term that gradually improves guardianship procedures and practice.²²⁹ (2) “WINGS groups are broad-based and interdisciplinary, including non-professionals.”²³⁰ (3) WINGS groups are “problem-solving in nature.”²³¹ “Since each stakeholder brings a unique perspective . . . structured consensus building” may “produce

²²⁵ John Kania & Mark Kramer, *Collective Impact*, STAN. SOC. INNOV. REV., Winter 2011, at http://ssir.org/articles/entry/collective_impact.

²²⁶ Fay Hanleybrown, John Kania & Mark Kramer, *Channeling Change: Making Collective Impact Work*, STAN. SOC. INNOV. REV., 2012, at 1, http://ssir.org/pdf/Channeling_Change_PDF.pdf.

²²⁷ National Guardianship Network, *WINGS Tips: State Replication Guide for Working Interdisciplinary Networks of Guardianship Stakeholders* 6-10 (2014), <http://www.naela.org/NAELADocs/PDF/NGN/Wings%20Implementation%20Guide.pdf> [hereinafter *WINGS State Replication Guide*]. See also *Court –Community Reform Through WINGS*, NAT’L GUARDIANSHIP NETWORK, http://www.naela.org/NGN/WINGS/Court-Community_Reform_Through_WINGS/NGN/WINGS/Court-Community_Reform.aspx?hkey=7d32011f-2ac5-461a-9b4a-5636722c4914 (last visited Oct. 22, 2015) (providing additional resources including a five-minute introductory video to the WINGS Replication Guide by District of Columbia Chief Judge Eric Washington).

²²⁸ *WINGS State Replication Guide*, *supra* note 224, at 6.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.* at 7.

imaginative solutions.”²³² (4) WINGS looks “primarily to changes in practice” and is not dependent on legislation.²³³ “WINGS targets on-the-ground performance by each . . . stakeholder group.”²³⁴ While legislation can be one element of change, WINGS is not dependent on a legislative body, and looks beyond codifying change to implementing change. (5) “WINGS groups start with solutions that are short-term ‘low-hanging fruit’ to generate momentum.”²³⁵ WINGS looks to incremental changes adding up to a large-scale and ongoing difference.²³⁶ Accomplishing realistic, short-term objectives first helps to build confidence for future success.²³⁷ (6) WINGS promotes “mutually reinforcing activities” among stakeholders.²³⁸ With proper coordination, stakeholders can work around a common theme, with each using its particular skills and communication channels toward the common vision.²³⁹ (7) “WINGS . . . focus[es] on rights and person-centered planning.”²⁴⁰ While judicial needs and processes are critical, WINGS focuses equally on self-determination of individuals who are or may be in the adult guardianship system.²⁴¹ “Individual rights and person-centered planning” – building blocks toward supported decision-making – were prominent 2011 Summit themes.²⁴² (8) “WINGS groups welcome public input, and are transparent to the public” – for example through public comment periods and public hearings.²⁴³ (9) WINGS groups collect data, evaluate and adapt.²⁴⁴ They continuously evaluate their priorities, and as changes occur, may alter course.²⁴⁵ (10) “WINGS groups see themselves as part of a national network.”²⁴⁶ As more states develop WINGS, they can each benefit from the experiences of others.²⁴⁷

State WINGS in Action. To encourage the implementation of WINGS, the National Guardianship Network sought and received

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.* at 8.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.* at 9.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.* at 10.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

funds²⁴⁸ to help states initiate WINGS pilots. The aim was for the state's highest court to partner with community agencies and groups in establishing and maintaining a WINGS entity. In 2013, NGN named four WINGS pilot states: the New York State Unified Court System; the Oregon State Unit on Aging, with leadership from the Oregon Judicial Department; the Texas Office of Court Administration; and the Utah Administrative Office of the Courts.²⁴⁹

In 2013-2014, each state launched WINGS with a full-day summit prioritizing issues, and developed workgroups to focus on key areas such as less-restrictive decision-making options, education and training, support for family guardians, and court monitoring. The state WINGS groups thus far have constructed websites, prepared articles and flyers, created tools for guardians, and participated in legislative drives.²⁵⁰ The Utah WINGS has created a set of Organizational By-Laws.²⁵¹ The Texas WINGS played a key role in passage of landmark guardianship and supported decision-making bills in 2015. In Oregon, WINGS is credited with the momentum that made possible passage in 2014 of a long-sought public guardianship program. "Without WINGS," the coordinator stated, "[the Senator] may not have made the public guardian bill one of his two bills this session . . . [and] when the bill died last year, it could have stayed on that heap, but the momentum was here to make it a priority"²⁵² But perhaps the real force for change in WINGS has been that "[c]onnections were established between agencies that sometimes serve the same population but do not communicate with each other or provide referrals."²⁵³

In 2015, the National Guardianship Network named six additional state WINGS – in the District of Columbia, Indiana, Mississippi, Minnesota, Washington, and Wisconsin.²⁵⁴ These new groups are beginning to meet and set priorities. In addition, three other

²⁴⁸ NGN funding for WINGS was from the State Justice Institute and the Albert and Elaine Borchard Foundation Center on Law and Aging. *State WINGS Groups in Action*, NAT'L GUARDIANSHIP NETWORK, http://www.naela.org/NGN/WINGS/State_WINGS_Groups_in_Action/NGN/WINGS/State_WINGS.aspx?hkey=93abb2c0-e16c-4cf0-b6a0-37ddc10ad498 (last visited Oct. 22, 2015).

²⁴⁹ *See Id.*

²⁵⁰ *Id.*

²⁵¹ Utah Wings Organizational Bylaws, UTCOURTS http://www.utcourts.gov/utc/wings/wp-content/uploads/sites/33/2016/01/Bylaws_Utah-WINGS.pdf.

²⁵² *WINGS State Replication Guide*, *supra* note 227, at 20.

²⁵³ *Id.* at 15.

²⁵⁴ *See* Press Release, National Guardianship Network, National Guardianship Network Names State Courts for Guardianship Improvement WINGS Awards (Mar. 18, 2015), <http://www.naela.org/NGN> (noting that the Wisconsin WINGS developed independently but in response to the NGN request for proposal for state WINGS, and works closely with NGN).

states – Ohio,²⁵⁵ Missouri and West Virginia – have similar problem-solving consensus stakeholder groups.

Federal Government Stakeholders. One objective of WINGS is to promote communication and coordination between state courts that administer adult guardianship cases and federal representative payee programs including the Social Security program and the VA Fiduciary program.²⁵⁶ The Social Security Commissioner's Office has designated SSA regional representatives for state WINGS groups and has convened them in information exchange calls.²⁵⁷ More recently, the Department of Veterans Affairs Fiduciary Office has designated VA "points of contact" for state WINGS groups.²⁵⁸ These new links created between WINGS and federal agencies are directly in line with objectives of the Elder Justice Coordinating Council on preventing and detecting financial exploitation.²⁵⁹

WINGS Evaluation. In 2015, the National Center for State Courts completed an evaluation of the four 2013 WINGS pilots and the three independently initiated state groups similar to WINGS.²⁶⁰ The evaluation featured a survey of WINGS leaders based 20 assessment criteria drawn from the WINGS Replication Guide, as well as telephone interviews with WINGS coordinators. The findings showed that thus far, despite obstacles such as turnover in members and leadership, all but one WINGS groups "have engaged in wide-ranging efforts to improve guardianship in their state."²⁶¹

²⁵⁵ See Julia Nack, Carolyn Dessin & Judge Thomas Swift, *Creating and Sustaining Interdisciplinary Guardianship Committees*, 2012 UTAH L. REV. 1667.

²⁵⁶ SURVEY OF STATE GUARDIANSHIP LAWS AND COURT PRACTICES, *supra* note 100, at 6 (highlighting the need for such coordination and the extent of court communication).

²⁵⁷ See e.g., e-mail from Martha J. Lambie, Regional Commissioner, Social Security Administration, to author (Sept. 17, 2013, 12:03 EST), providing the names of several representatives (on file with author).

²⁵⁸ E-mail from Kathleen McManaman, Asst. Director of Pension and Fiduciary Services, Veteran Affairs Government, to author (June 27, 2015, 19:10 EST) (on file with author).

²⁵⁹ Elder Justice Coordinating Council, *Eight Recommendations for Increased Federal Involvement in Addressing Elder Abuse, Neglect and Exploitation*, http://www.aoa.gov/AoA_programs/Elder_Rights/EJCC/index.aspx (focusing on Recommendation #7 – Combat Elder Financial Exploitation, Including Abuse by Fiduciaries).

²⁶⁰ Richard Van Duizend and Brenda k. Uekert, ASSESSMENT OF THE IMPACT AND EFFICACY OF WORKING INTERDISCIPLINARY NETWORKS OF GUARDIANSHIP STAKEHOLDERS (WINGS), FINAL REPORT (July 2015), <http://www.naela.org/NAELADocs/PDF/NGN/WINGS%20Assessment%20Final%20Report%207-23-15.pdf> (At the initiation of the evaluation, the three independent groups were in Ohio, Missouri and Indiana. Subsequently, NGN named Indiana as an official WINGS entity, and West Virginia developed a WINGS Roundtable. The evaluation included New York, Oregon, Texas, Utah, Indiana, Missouri, and Ohio).

²⁶¹ *Id.* at iii. The New York WINGS met only once as a full group, but a WINGS working group is continuing to meet on action strategies.

The evaluation noted three factors key to the WINGS' effectiveness: (1) perceived need for coordination; (2) strong and effective leadership; and (3) strong and effective staff support. WINGS dedicated staff time has been largely from state court administrative offices, with staff resources from a state unit on aging in one case and a state developmental disabilities council in another case. Oregon and Texas "estimated that their highly productive WINGS had been supported by between 0.1 and 0.2 FTE, although both would like to have more staff hours available."²⁶²

The evaluation concluded that at this still relatively early point, WINGS "is proving to be a feasible and effective means for addressing the current shortcomings of the guardianship system and process. Most of the WINGS studied have weathered the formative stage and generated meaningful recommendations, significant initial improvements, and new informational resources."²⁶³ However, the report urged the WINGS groups to take additional steps to prepare for the needed long-term effort. These steps include: (1) developing an agreed-upon vision of the system and process sought; (2) developing a set of agreed-upon measures of performance and impact; (3) periodically encouraging WINGS stakeholder members to support and coordinate with the group's objective; (4) continuing and expanding efforts to ensure regular communication among stakeholders; and (5) periodically determining the staffing support needed and the most feasible way of securing staff.²⁶⁴

CONCLUSION

This article has profiled six current paths toward improving adult guardianship practices. First, the 2011 Third National Guardianship Summit significantly boosted a movement toward development of standards of practice for guardians, to guide their performance beyond the broad outlines of state law.

Second, the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act and its widespread adoption by states offers measures for addressing multi-state guardianship jurisdiction issues — which can save time and expense for families and courts, and reduce elder abuse where more than one jurisdiction is involved.

Third, while better court oversight ultimately requires court resources often not available, there are recent examples of workable approaches. The current lack of adult guardianship data is a barrier to

²⁶² *Id.* at 8.

²⁶³ *Id.* at 16.

²⁶⁴ *Id.* at 11-16.

efficient guardianship monitoring. Future changes in court technology, including guardianship databases and case management systems, could spur improved oversight.

Fourth, mediation, and the newer process of eldercaring coordination for high conflict cases, hold hope for addressing the complicated family dynamics and related disputes that often surround or prompt guardianship.

Fifth, supported decision-making already is calling into question basic premises about capacity and surrogates, and, if widely practiced, could reduce use of guardianship. Moreover, its principles could change the way guardians relate to individuals they serve, markedly enhancing self-determination. Questions about implementation remain, and there is a need for safeguards and for empirical research.

Sixth, ongoing WINGS court-community partnerships in a growing number of states are beginning to open doorways of communication and enable stakeholders collectively to seek a meaningful impact on state guardianship practice. WINGS can bolster the first five reform strategies through its “collective impact” approach.

Taken together, these paths of reform have significant potential to improve the lives of people affected by adult guardianship. Real change, however, will have to come from the ground up through enlightened practice and through changing “hearts and minds” — court by court, judge by judge, lawyer by lawyer, and guardian by guardian.