About the American Bar Association’s Commission on the Mentally Disabled,
David B. Wexler, Chairperson

Established in 1973, the Commission is a multidisciplinary group of lawyers, doctors, consumer advocates and mental health professionals. Its most important and longest running project is the Mental and Physical Disability Law Reporter and Legal Resource Center. Other projects include a computerized legal research service and brief bank, civil commitment training manual, evaluation of guardianship law and practices and a model statute for board and care homes.

About the American Bar Association’s Commission on Legal Problems of the Elderly,
John H. Pickering, Chairman

In 1978, the American Bar Association established the Commission on Legal Problems of the Elderly to examine law-related concerns of older persons. The Commission has encouraged legal services for the elderly, particularly through involvement of the private bar; and has explored legal issues surrounding long-term care, home care, guardianship, home equity conversion, surrogate decision-making, and Social Security due process.

About the American Bar Association’s Division of Public Services,
Elissa C. Lichtenstein, Director

The Public Services Division of the Governmental Affairs Office provides management oversight to the Commission on the Mentally Disabled and the Commission on Legal Problems of the Elderly. It helps promote the public welfare by applying the knowledge and experience of the legal profession to concerns facing all sectors of the general public. The division pursues this ABA goal through programs to improve the delivery of legal services to indigent and other needy individuals; protect the rights of disadvantaged persons (including the elderly and disabled); and address social issues of national importance such as housing and the environment.

About the American Bar Association’s Fund for Justice and Education

The FJE is the tax-exempt charitable fund within the ABA that supports the ABA’s public service and law-related education programs. Programs funded through the FJE help promote quality legal services, equal access to justice, better understanding of the law and improvements in the justice system.
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Preface

An increasing number of people are affected by guardianship, the judicial process that transfers the decision-making responsibility from a person declared to be incapable of handling his or her own affairs to another person. Demographic trends indicate a continuing rise in the number of vulnerable people who are most likely to need and benefit from guardianship and other less intrusive surrogate decision-making alternatives. With this increase comes the potential for abuses against the very wards the system is intended to serve.

In an extensive nationwide study in 1987, the Associated Press found guardianship to be a "troubled system." A year later, the American Bar Association's Commissioners on the Mentally Disabled and on Legal Problems of the Elderly convened a meeting of national experts at the Johnson Foundation's Wingspread conference facilities. These experts reviewed the current operations of the guardianship system and developed an agenda for reform. This monograph presents the recommendations and commentary from that meeting.

Background

By the year 2035, there will be nearly 71 million elderly persons, almost one quarter of the United States' population. According to estimates from the federal government's Administration on Developmental Disabilities, there are 3.9 million individuals with developmental disabilities. This figure will continue to grow due to improved survival rates of infants born with disabling conditions and further increases in life expectancy. Approximately 130,000 individuals currently reside in state mental hospitals and 344,000 persons are admitted to those hospitals in any given year. An unknown, although greater, number of people with chronic mental illness live outside of institutions, many of them on the street (rough estimates run from 25 to 40 percent of the street population) or in boarding homes. Most of these individuals with chronic mental illness need, or soon will need, surrogate decision-making for their personal and financial affairs.

In addition, it is estimated that already 1.5 million persons carry the AIDS virus, most of whom will develop the illness. That number should rise dramatically as we near the end of the century. Especially in the later stages of AIDS, many patients experience significant mental impairments. These individuals also will need temporary and indefinite surrogate decision-making resources.

Interest in guardianship matters was catalyzed by a series of Associated Press (AP) stories. In 1987, after numerous stories of abuses of the system began to appear in the press, the AP conducted a study of the nation's guardianship system, culminating in a report entitled, "Guardians of the Elderly: An Ailing System." In addition, many local newspapers ran AP stories on guardianship in their own jurisdictions.

The study involved 57 reporters who reviewed 220 probate court files from every state. The study revealed that many guardians are dedicated, caring people, and the process often meets the needs of frail and disabled persons. Yet guardianship has serious shortcomings: due process rights are often lacking; the standard used to determine incapacity is often unclear; guardians generally have little or no training, and often institutionalize their wards; many probate courts lack the resources to adequately monitor the activities of the guardian; and the public needs a greater awareness of alternatives to guardianship. "As America ages," observed the AP, "the system faces change. Medical advances have led to longer lives — and more cases of incompetence. As social services are pushed to the breaking point, many turn to guardianship."

Following the release of the AP report, the U.S. House Committee on Aging, Subcommittee on Health and Long Term Care, chaired by Congressman Claude Pepper, held hearings at which several former wards profiled in the AP series testified. John Pickerin, chairman of the ABA Commission on Legal Problems of the Elderly, also testified on recommended judicial practices. In March 1988, the television program 20/20 featured a story on guardianship, the plight of wards inappropriately caught in the system, and the courts' failure to adequately monitor the process.

The American Bar Association's Prior Guardianship Activities

Ten years of active involvement in guardianship issues provided the foundation for the American Bar Association's sponsorship of the July 1988 Wingspread National Guardianship Symposium. In 1979, the Commission on the Mentally Disabled examined limited guardianship, public guardianship and adult protective services in six states. This review was one of the first intensive inquiries into the implementation of what was then innovative guardianship legislation. A year later, the Commission completed an extensive model guardianship statute with commentary, as part of its Developmental Disabilities State Legislative Project (published as Chapter 7 of Disabled Persons and the Law, 1981). Even today, the statute provides useful guidance for state legislative efforts.

George Alexander and John Regan, two initial members of the Commission on Legal Problems of the Elderly, have been leading guardianship experts since the mid-1970s. They helped to focus the Commission's longstanding interest in guardianship which resulted in a 1986 National Conference of the Judiciary on Guardianship Proceedings for the Elderly, co-sponsored with the National Judicial College. The conference's 28 probate and general jurisdiction trial judges from across the country produced a Statement of Recommended Judicial Practices, endorsed in 1987 by the ABA House of Delegates.

Both Commissions also are active in related areas, including civil commitment, health care surrogate decision-
making, durable powers of attorney and life services planning.

The National Guardianship Symposium

On July 21-23, 1988, 38 guardianship experts from across the country assembled at the Johnson Foundation’s Wingspread Conference Center to participate in the National Guardianship Symposium. These experts included probate judges, attorneys, guardianship service providers, doctors, aging network representatives, mental health experts, governmental officials, law professors, a bioethicist, a state court administrator, a judicial educator, an anthropologist and American Bar Association staff. The symposium’s objective was to produce a set of recommendations for reform of the national guardianship system.

To build the framework for the symposium, ABA staff surveyed guardianship experts from around the country, many of whom later participated in the symposium. Using the results of both written and telephone surveys to prioritize an extensive list of issues, the Commissions designed an agenda and divided the symposium participants into six working groups to devise specific, practically oriented recommendations. The working groups focused on six major subject areas: an overview of the guardianship system, procedural due process, determination of incapacity, judicial practices, guardians’ accountability and guardianship agencies.

Each group had a leader, a reporter and an ABA staff member to provide support and direction. The members of each group were chosen for their particular expertise and to produce geographic and interdisciplinary diversity. Each participant helped to define the complex issues for his or her group and to outline ways in which these issues should be resolved. All participants felt a sense of excitement at the possibilities for improving existing law, policy and practice.

After an evening of keynote addresses and a full day of debate and discussion in the working groups, the participants met in a plenary session to consider the recommendations proposed by each working group. The 31 recommendations voted for by the participants are intended to better safeguard the rights of adult disabled wards and proposed wards. At the same time, these recommendations seek to provide for the wards’ needs while maximizing individual autonomy. The Wingspread conference urged the recommendations’ implementation at the state and local level, through appropriate legislation, legal and judicial rulemaking, changes in local practices and the funding of workable programs and educational sessions.

In February 1989, the American Bar Association House of Delegates adopted all but two of the recommendations as Association policy. The first recommendation that was not adopted addressed mandatory counsel; this recommendation already existed in ABA policy. The second recommendation, which addressed the role of counsel, was deferred for further discussion and analysis. The exact language approved by the House of Delegates appears on page 37.

These recommendations already have guided the Commissions’ activities in guardianship, and several projects to implement selected recommendations are being developed. It is the Commissions’ hope that these recommendations will spur the development and use of alternatives to guardianship, and will produce a guardianship system that is more fair, just and responsive to the needs of the wards.

Footnotes

Recommendations of the
National Guardianship Symposium
An Overview of the Guardianship Process

Recommendation I-A
Alternatives to Guardianship

To encourage alternatives to and more appropriate uses of guardianship, the costs and benefits of various guardianship alternatives should be explored and certain guardianship practices curtailed. Alternatives should include (1) health care consent statutes and living wills; (2) durable and health care powers of attorney; (3) representative payees; and (4) crisis intervention techniques such as mediation, counseling and respite support services. In addition, residential admission policies that establish guardianship as a criterion for admission should be withdrawn.

Commentary

While alternatives to guardianship certainly merit an entire symposium or set of recommendations themselves, the Wingspread Symposium had a different purpose. The intention was to focus on guardianship, not to closely examine every component of the continuum of surrogate decision-making and care. In this vein, the symposium attendees viewed alternatives as part of the movement to support independence in the home. It was agreed that these alternatives should be explored first, and guardianship and/or institutionalization should be relied on only as a last resort to provide needed services.

The conferees frequently stressed the importance of alternatives in addressing problems that are inappropriate for guardianship petitions. In particular, the attendees noted the motivations that trigger guardianship. Too often guardianships are initiated to meet the primary needs of parties other than the proposed ward, such as hospitals, nursing homes, service provider agencies, the families, commercial enterprises, group homes and the state. For example, the Associated Press study showed that in Michigan, guardianships were being filed routinely by social service agencies and other providers. In many cases, the guardianship petition may be a defensive response by an agency that needs to address a problem and fears liability if the situation is ignored and escalates. Thus, some adult protective services and other social service agencies seek to fulfill their responsibility to their clients and society by filing for guardianships. Yet the fear of liability can be addressed much more effectively in other ways, such as the enactment of statutes that provide immunity for good faith efforts in delivering services.

Families often use guardianship to address problems that might be solved in other ways. For example, many parents seek guardianship so they can place their disabled children in institutions when the demands of caring for them become too much to handle at home. Similarly, children may use guardianship to place their frail, elderly parents in nursing homes. In many instances, the root of both of these problems is inadequate support services to help relieve families of some of the burdens of home care. Similarly, families dealing with the abuse of a proposed ward, a desire to protect the ward's assets from dissolution, conflicts over custody, or marriage and sexual rights of their disabled children may use guardianship because they see no alternatives. These family members need specific solutions to specific problems, but instead are left to choose between an intrusive, generic solution known as guardianship and simply doing nothing.

Another principal justification for guardianship is the need for a responsible person to make decisions for persons who allegedly cannot make decisions on their own. Life-threatening surgeries, sterilization, the continuation or cessation of treatment and other special health care needs are primary examples, but third parties also seek guardianships to assign responsibility for payment or the validity of certain transactions.

There are alternatives for addressing these needs. Medical consent care statutes may resolve problems with clients who are later determined to be incompetent to make decisions. Powers of attorney can enable patients to designate in advance who should make decisions for them. Durable powers of attorney that remain in effect even when the patient becomes mentally incapacitated may help in a variety of situations. Representative payees can cash checks and deposit certain benefits for an individual without the panoply of lost rights normally associated with guardianship.

In order to resolve concerns about medical and financial decision-making, a number of facilities and institutions, including some nursing homes and group homes for mentally disabled persons, require that applicants be placed under guardianship as a condition for admission. This use of residential admission policies to compel guardianships is inappropriate. A need for residential care, even if it is based on an involuntary civil commitment order, does not necessarily imply a lack of capacity. Insisting upon or encouraging guardianships as an admission requirement flies in the face of recent legal developments that recognize the differences between commitment and incapacity. Such a blanket admissions policy also penalizes those who need residential care but who still have the capacity to make some or all of their decisions.

All of these inappropriate uses of guardianships are examples of the types of applications that should be curtailed. As a general guiding principle, guardianships should not be used in cases in which, but for the needs of the third party, there would be no reason for guardianship. Guardianship should be viewed as a measure of last resort. Thus, there should be sufficient available alternatives so that guardianship will be used only in those cases in which it clearly benefits the ward.

To achieve this ideal, the Wingspread attendees recommended a two-pronged solution. First, alternatives to guardianship should be explored and then assessed for their advantages and disadvantages. In particular, the
conferences noted the need to investigate new methods of dispute resolution. However, in designing alternatives to guardianship and in diverting cases out of guardianship, it is possible that the results of the diversion may be no better and possibly worse than guardianship itself. Thus, alternatives must be thoroughly and critically evaluated for their efficacy and their impact on proposed clients. Good alternative programs and dispositions must solve the problems presented in ways that not only are less restrictive of the client’s liberty, but more consistent with the client’s preferences.

The American Bar Association, through the two Commissions that sponsored the Wingspread Symposium, has been involved in providing alternatives to institutionalization and guardianship in a program known as Life Services Planning. The purpose of this effort is to encourage elderly and disabled persons to use advance planning techniques to minimize the possibility that changes in life circumstances will lead to drastic measures such as guardianship. Life services planning differs from other approaches in its integration of state, financial, health care and social service planning into one comprehensive document that is individualized for each client.

The second part of the Wingspread solution involves the education of agencies and professionals involved in guardianship about the appropriate uses of guardianship and each of the components of the community’s continuum of care that might provide workable alternatives. Service providers and the courts should be encouraged to look first at the motivations behind the filing of a petition to determine if the case is an appropriate one for guardianship. If a suitable alternative is available, the party seeking guardianship should be directed toward that alternative.

It is unethical for professionals to use guardianship inappropriately. Thus, professionals must be alert to their colleagues’ and others’ potential misuse of the system. Educating the courts, other agencies and professionals about alternatives may provide needed guidance for resolving difficult problems and ethical dilemmas, and will increase choices for everyone involved.

As a result, the various actors’ perceptions of the purpose and operations of the guardianship system and their roles differ considerably. Often these players do not know what they are supposed to do and how they are supposed to perform.

The first step in addressing this lack of communication and monitoring would build an understanding of the purposes of the guardianship system — the kinds of problems it is meant to address and the appropriate roles of all agencies and individuals in the system. Often these roles are undefined, overlap and, at times, even conflict. The roles of all professionals in the process — guardians, judges, other court personnel, examiners, attorneys and service providers — must be clearly defined and agreed upon by all involved in the system. Then, after the roles are clearly identified, minimal performance standards should be established for all of the professions involved.

Since there must be uniformity in basic assumptions about the national guardianship system and how the players should interrelate, the roles and standards should be established by one national, interdisciplinary group. Once developed, each state could implement the standards through statute or regulation and enforce their use.

Efforts to improve professional performance could be carried out by professional associations, state courts or other vehicles. However, it is important to emphasize that the responsibility for enforcing professional and ethical standards should not be left to the professions themselves. Professional organizations may not have the overall perspective needed for balanced enforcement. Also, the members responsible for enforcement often will be placed in situations in which personal and professional interests clash with enforcement. On the other hand, professional organizations are ideally suited to encourage compliance with, and educate their members about, minimally acceptable performance standards and ethical behavior.

Recommendation I-B
Roles and Standards for Performance

Roles and standards for performance should be clearly defined, communicated and monitored. A national interdisciplinary group should develop a conceptual framework for performance to be adopted by statute and/or implemented by state court administrators, interagency task forces, professional associations or other working groups concerned with performance standards.

Commentary

The guardianship system is a complex network of agencies and individuals who act independently with minimal supervision. Often the proposed ward is the only party who is involved in the process from the beginning to end.

At a minimum, basic information including demographic characteristics (age, sex, financial status), decisions made by guardians and consequences of guardianship should be independently collected and reviewed; but the courts should fully cooperate in this process. The information should be used for quality assurance, monitoring, learning about system activities, needs assessments, program development and research.

Commentary

Little empirical information about the workings of the guardianship system is available to determine needed reform efforts and monitor activities on an ongoing basis. To some extent, diverse data collection efforts are taking place, but generally the data collection is not monitored and the data is not compiled, evaluated or compared. The Associated Press study revealed that many case files did not contain annual reports. In fact, 13% of
the files were completely empty except for the papers initiating the guardianship proceeding. In addition, there were serious questions about who read, checked or audited the reports. The Wingspread conferees expressed great concern about this problem and its effect on individual wards and the system as a whole.

Systematic data collection and evaluation is needed to understand the workings of the system, its shortcomings and the effectiveness of reform efforts. First, individual cases should be monitored to ensure that quality service is being provided. Second, feedback must be provided to those who are running the system. Continuing evaluation of the system and changes to the system is essential. Third, it is important to keep the bigger picture in mind. There must be data to project the needs of particular jurisdictions and program development to continually improve the system. Jurisdictions also should share information so that national trends and problem areas can be identified.

Efforts to improve data collection should focus on three levels of inquiry. First, does the state law require data collection, and if so, what information must be gathered? Second, does the court actually look at the records that are available, both for individual cases and for the court's caseload as a whole? Third, is there an auditor of the records to ensure quality maintenance?

The Wingspread conferees agreed that certain basic data collection elements are essential. Each case file should generate an annual report, and a compilation of the information in these reports should be presented to the chief judge in each jurisdiction. This data should be analyzed to ensure that individual cases are being handled appropriately and that the jurisdiction as a whole has a well-run guardianship system. In addition, all decisions made by guardians, particularly instances in which the ward is being relocated or funds are being spent, should be monitored. For courts with computers, these tasks should be relatively straightforward. Courts without computers will have to expend more energy on this task, but perhaps it is now time for these computerless courts to plan to obtain the technology they will need.

The Wingspread work group addressing information collection issues felt that the responsibility for such data collection and analysis lay with the courts. However, a majority of the plenary session contended that courts are seriously overburdened with other responsibilities. Thus, the court's role was narrowed to that of ensuring that some individual or unit is assigned to handle data collection, analysis and accessibility.

The conferees stressed that the need for data for program administration and policymaking should be balanced with the clients' rights to privacy. The tension between the need to know and privacy is exemplified by the Associated Press lawsuits to gain access to guardianship files in Delaware, New Mexico and New York. In general, the conferees agreed that once names and other confidential information have been deleted, documents should be made available to researchers and policymakers who are seeking to improve the system.

**Recommendation I-D**

**Screening to Divert Inappropriate Cases and the Cost of Guardianship Reform**

To maximize limited financial resources, screening should be used to divert inappropriate cases out of the guardianship system. Moreover, certain other potential funding resources should be explored: (1) insurance policies such as those provided for third parties, long-term care, legal services and disabilities; (2) pro bono contributions by all of the professions involved in the guardianship process; (3) increased fees to parties who can bear the cost; (4) general increases in probate court users' fees; (5) general revenues; and (6) interest on lawyers' trust accounts (IOLTA).

**Commentary**

The Wingspread conferees agreed that implementation of guardianship reforms will require additional resources. As a first step, the attendees stressed the need to divert inappropriate cases to maximize the efficient use of existing resources. While new screening and diversion mechanisms themselves will cost money, the conferees felt that these mechanisms, if properly established, would save considerably more money in the long run and would improve the overall quality of guardianship dispositions.

The conferees expressed concern that those who are placed under guardianship often are paying for a system that is primarily meeting the needs of other parties. Continuing this trend, jurisdictions may seek to place the burden of payment for screening and diversion services on the estates of the wards. The conferees rejected this approach, urging instead an alternative method of levying costs on those parties with the means to pay, particularly those parties seeking to obtain the guardianships. Thus, it was recommended that jurisdictions look first to general revenues and increased user fees for those proposing guardianship to defray reform costs.

To minimize the financial impact on the state and the parties paying for improved services, the conferees identified a number of alternative funding sources that deserve consideration. First, pro bono work on the part of all the professionals involved should be considered, although the potential decline in the quality of representation and service provided must be addressed and mitigated. The conferees were somewhat reluctant to support a reform effort that was based on a system supported by volunteers, since the wards ultimately would suffer in the event that the volunteers proved unable to meet professional performance standards consistently.

If guardianship is perceived as a case management function, third-party reimbursement schemes may be used to cover the costs of some of the services provided. However, the danger in using this approach is the potential conflict of interest between the monitoring role of the guardian and the service provision role of the case manager.

Another potential source of funds is "interest on lawyers' trust accounts." Because lawyers are involved
in the management of accounts that often are so small that banks and other financial institutions will not pay interest on them, it was suggested that these sums, with the consent of the clients, could be pooled into one account and the interest could be used to improve the administration of legal services and legal institutions. Although the competition for IOLTA funds already is significant, using the money for diversion and screening programs would be appropriate.

Finally, a guardianship insurance system also could be developed that would be similar to the insurance packages currently designed for legal services, disabilities and long-term care. Insurance holds the greatest potential for providing meaningful financial assistance because it does not involve a potential diminution in the quality of services, a conflict of interest or competition for limited funds.

**Recommendation I-E**

**Multidisciplinary Guardianship Committees (GACs)**

Each state should create a multidisciplinary guardianship and alternatives committee (GAC) to plan for the statewide implementation of these recommendations. In addition, an implementation manual should be created that would provide descriptions of successful guardianship programs, practices and model legal forms.

To deal with future issues on an ongoing basis, the GAC should serve as a planning, coordinating and problem-solving forum for the state’s guardianship system and should review the data being collected in that state (see recommendation I-C). Finally, to support the GACs’ efforts, a national guardianship resource center should be established to provide technical assistance to interested parties and to further reform efforts.

**Commentary**

Although guardianship reforms have been proposed in the past, too often good proposals have not been adopted or implemented. While there are many reasons for the gap between the recommended improvements and their implementation, the primary problem probably lies in the nature of the reforms that are needed.

First, it is essential that reform efforts focus on the practices that implement the states’ statutes and not seek statutory reform alone. Based on recent experiences in similar efforts by the National Center for State Courts and the American Bar Association’s Commission on the Mentally Disabled to improve the civil commitment process, as well as reports of the participants in the National Guardianship Symposium, it is reasonable to assume that guardianship practices in most states diverge significantly from the letter of the law. Thus, basic information should be collected about how the guardianship system in the state actually operates. This information should form the basis for efforts to improve the state’s approach to guardianship.

Second, it is important that information about good practices and successful model approaches be disseminated to facilitate emulation. Much good work already is being accomplished, and successful efforts should be replicated to avoid the needless duplication of efforts. Also, the ability to point to models and programs that work well will add to the credibility of reform efforts.

Third, most states lack the technical expertise to implement reform efforts. At the same time, there is a lack of coordination, communication and cooperation across agencies, institutions and organizations. In general, the guardianship system is composed of numerous agencies and individuals with their own concerns and agendas, who, in many situations, cannot or will not work together. Even if agreement can be reached on statutory reforms, implementation often lags far behind, and in some cases proves impossible.

Modeling their recommendation on recent efforts to improve the civil commitment process, the Wingspread conference urged the creation and nurturance of a problem-solving and implementation committee in each state that would be charged with developing and implementing proposed reforms. Specifically these committees would examine the linkages in the system to make sure that guardianship is an integrated and continuous process and not merely the haphazard operations of disconnected and isolated entities; determine the kinds of cases and individuals that are falling through the cracks and develop means to handle these situations; and assess the state’s service needs.

Members of this committee would represent most of the major participants in the guardianship process, thereby bringing to the group’s discussions the multitude of perspectives and experiences present in the whole system. In this way, the committee’s proposed solutions would be considered by all participants in the process and would stand a better chance of acceptance by the community at large. The committee also would be a valuable mechanism for exchanging basic information through regular meetings.

Finally, these committees could address the two other major barriers to implementation identified by the Wingspread attendees — stereotypes and prejudices against elderly and disabled citizens and naive assumptions about the guardianship system. The need to educate members of the community is great. Among the subjects of such an educational effort would be the role of guardianship and the types of problems it is meant to address, and the needs and abilities of elderly and disabled citizens.

The guardianship system is a tool for dealing with specific types of problems. However, until the public understands the limits of the system, abuses of wards and the system itself will continue. The GACs would spearhead a much needed educational reform effort.

**Footnotes for Recommendations I-A-E**


9. Id.

Procedural Due Process and Legal Representation of the Proposed Ward

Recommendation II-A

The Petition

Simplified But Specific Petition Form — A petition form should be widely available in each state to initiate guardianship proceedings. While this form should be as simple as possible to obtain, fill out and process, it should require at least the following information: (a) a description of the functional limitations and physical and mental condition of the ward; (b) the specific reasons why guardianship is being requested; (c) the steps taken to find less restrictive alternatives to guardianship; (d) the guardianship powers being requested; and (e) the qualifications of the individual proposed to serve as the guardian.

Preliminary Examination — A judicial officer should conduct a preliminary proceeding to examine the petition to ensure all the required information to initiate guardianship is completed and to promptly schedule any other necessary proceedings.

Commentary

Although the petition process varies somewhat across jurisdictions, usually “any interested person” may initiate guardianship proceedings, including, in most jurisdictions, the allegedly incompetent person. This “open” filing process can create problems. The mere filing of a guardianship petition may result in both personal and financial burdens to the parties involved, as well as costs to the public.

Traditionally, petitions often have lacked detail and specificity as to the necessity of guardianship and the qualifications of the proposed guardians. The guardianship process is abusive when individuals are compelled to undergo mental exams and contest guardianship proceedings on little more than an allegation of incompetency; the petition is filed by someone who could not possibly have a legitimate interest in the proceedings; or the residents of an institution or community facility are subjected to guardianships, en masse, without any distinctions regarding the wards’ individual needs. Controversies also arise when petitions are filed for improper motives such as harassing proposed wards or trying to gain control of property or assets.

Yet, elderly and disabled people are experiencing a growing need for a full range of assistance options, including guardianship. Thus, incapacitated persons and society are not served well by petitioning rules that are unnecessarily rigorous or difficult to understand. While it is important to ensure that the petition contains all the specific information necessary to determine whether the proceeding should go forward, there should be as few disincentives as possible in obtaining assistance for those who truly need a substitute decision-maker. Laws should recognize the serious implications for the proposed ward when guardianship petitions are filed, but cases should proceed without unnecessary obstacles and delays when the petition is justified.

The Wingspread conferees made a two-part recommendation to structure petitions in a way that will strike a balance between the individual’s rights and society’s needs. Part one recommends that each jurisdiction make widely available a simplified and standardized petition form. This form should require specific information that justifies the initiation of this serious legal proceeding against a vulnerable person who, at this point in the process, is presumed to be legally competent.

Five general categories of information to be included in the petition are noted in the recommendation — the functional and cognitive limitations of the proposed ward, the reasons for the guardianship, the less restrictive alternatives that have been explored, the guardianship powers sought, and the qualifications of the proposed guardian. The conferees recognized that the specific information within each category would have to be adapted to local and state situations. For example, adopting the approach generally used in civil commitment petitions, many jurisdictions may want to require that petitions specify examples of the proposed ward’s recent conduct that demonstrate incapacity, the dates of these occurrences and the names of witnesses to these occurrences. Making such information a prerequisite to filing a petition would not only provide a clear basis for proceeding with the guardianship process, but would make it easier for counsel on both sides to prepare their cases.

The second part of the recommendation — requiring early judicial review of petitions — addresses the need for an expeditious method for diverting inappropriate petitions, while at the same time ensuring that appropriate petitions proceed without delays.

Again, the specific criteria to be used in reviewing petitions should be determined by the localities. One sensible approach would require probable cause to believe that the proposed ward satisfies the jurisdiction’s guardianship standards. This method has worked well in the civil commitment system and is consistent with basic notions of due process.

Recommendation II-B

Minimum Due Process Safeguards, Generally

The following basic due process protections not only should be incorporated into the statutes of each state, but steps should be taken to ensure that these protections are carefully implemented in all guardianship proceedings:

Right to Notice — A court officer dressed in plain clothes and trained to communicate and interact with elderly and disabled persons should serve the respondent personally and present the information to the respondent in the mode of communication that the respondent is most likely to understand. The written notice should be in plain language and large type. It should indicate the
time and place of the hearing, the possible adverse consequences to the respondent of the proceedings and list the rights to which the respondent is entitled. A copy of the petition should be attached. Unless the court orders otherwise, at least fourteen (14) days' notice should be given before the hearing takes place.

**Mandatory Right to Counsel** — Counsel shall be appointed for each respondent who does not have counsel, regardless of the respondent’s ability to pay. If a respondent wishes to waive counsel and exercise the right of self-representation, the court shall ensure that the waiver is knowing and voluntary and otherwise complies with the laws of that jurisdiction.

**Hearing Rights** — The respondent shall receive a hearing before an impartial decision-maker in which he or she: (a) is present at the hearing and all other stages of the proceedings; (b) may compel the attendance of witnesses, present evidence and confront and cross-examine all witnesses; (c) is entitled to a clear and convincing standard of proof; and (d) may appeal any adverse orders or judgments.

**Commentary**

Agreeing that substantial due process should exist in the guardianship context, the Wingspread attendees discussed the proper balance between the individual's due process rights and interests and the societal need to ensure proper care for incapacitated individuals and proper management of their estates.

In a perfect world, due process and societal ideals would be the same. In modern society, where these interests diverge and are not always clearly defined or even implemented, finding the proper balance is not easy. This conflict of interests is exacerbated where funding and resources for all social services are limited. The Associated Press study found that while 75% of the 2,200 case files indicated that some kind of hearing was held, only 36% of the files indicated that the allegedly incapacitated person was represented by counsel. Moreover, 92% of the files noted the respondent’s absence at the hearing or failed to indicate whether the respondent had attended.

Regardless of the nature of the proposed guardianship, the conferees determined that substantial due process should be present to protect proposed wards from potentially serious restrictions of their constitutionally-protected freedoms. After guardianship is initiated through the petition process, and until a final determination is rendered after a hearing, a series of rules should be in place to govern the applicable proceedings. The most critical rules, according to the conferees, were those related to counsel, notice, and the hearing.

**Right to Notice**

Almost all states have at least some statutory requirement that the proposed ward be notified of the guardianship proceedings, and constitutional considerations seem to require some form of notice in the other states.

Regardless of the persons' mental condition, laws in 48 states mandate direct contact with the proposed wards. Statutes also commonly require that the nearest relative or an individual entrusted with the person’s care or custody be notified as well. If either the individual or the representative cannot understand the document and, consequently, does not attend the hearing, the notice is considered to be defective and the proceedings may be void or voidable. However, if notice is given, even if the statute is not followed correctly, the proceedings still may be valid.

The importance of proper notice is closely tied to the issue of waiver, since a decision to dispense with notice is, for all intents and purposes, a de facto decision to waive the respondent's due process rights. In fact, if notice is not completed, courts lack jurisdiction.

The notice provisions recommended by the participants of the Wingspread conference enjoyed a broad consensus of support and are reflected, almost point by point, in the *Recommended Judicial Practices* passed by the ABA's House of Delegates at its 1987 Annual Meeting.

In the guardianship resolution passed at the ABA's 1989 mid-year meeting, which made many of these Wingspread recommendations ABA policy, the two ABA Commissions included language that directs the court officer who serves notice on the proposed ward to “present the information to the respondent in the mode of communication that the respondent is most likely to understand,” as well as in writing. This language is the same as that used by the symposium attendees in another recommendation (II-C) regarding the role of counsel when communicating with a disabled or elderly client.

Where mental or physical incapacities are involved, and in those communities with a high number of adults who do not speak English, it makes good sense and requires little additional time and effort for the court officer to communicate the information in the notice in a way the respondent is most likely to understand. Moreover, the U.S Constitution probably requires an effort to ensure that the respondent understands the information being provided.

**Mandatory Right to Counsel**

There remains no substantial opposition to a general notion of a right to counsel in guardianship proceedings. Two-thirds of the states' statutes require such counsel, and representation for indigent respondents may be constitutionally required in all jurisdictions. This right already is supported by policy resolutions of the American Bar Association, and the Uniform Guardianship and Protective Proceedings Act (UGPPA) published in 1982 by the National Conference of Commissioners on Uniform State Laws.

Given the serious rights at stake in guardianship proceedings, the proposed ward’s questioned capacity and the complexities of the proceedings, the idea of holding a hearing at which the respondent is not represented by counsel would strike most people as unfair. Yet, in the Associated Press study, only 36 percent of the cases contained evidence that suggested that the respondent was represented by counsel. Moreover, even in cases in which counsel is provided, difficulties arise in determining at
what point in the case appointed counsel should be provided, who should pay for counsel, and what should be done if the proposed ward wishes to waive counsel.

In the context of judicial practices pertaining to guardianship, the ABA’s House of Delegates, at its 1987 Annual Meeting, resolved that “[c]ounsel as advocate for the respondent should be appointed in every case, to be supplanted by respondent’s private counsel if the respondent prefers.” The recommendation made by the Wingspread conference is very similar, although it also provides the opportunity for the proposed ward to waive the right to counsel in appropriate circumstances.

A mandatory right to counsel recognizes the serious rights involved in any guardianship proceeding. The primary purpose of providing counsel is to ensure that all significant points of view are aired in a hearing at which both sides are represented. Counsel for both sides should be prepared to frame the issues properly and address any and all disputes or differences between the parties. This adversarial approach assumes that even if the matter of incapacity were clear-cut, other important matters regarding the ward’s interests may not be so easily resolved, particularly issues such as who will serve as guardian and what standards should be used in making substitute decisions for the ward.

Despite the strong support this adversarial approach enjoys within the legal profession and in the Model Rules of Professional Conduct, a significant minority of the symposium attendees felt that a mandatory right to an attorney went too far and in certain circumstances might not be in the proposed ward’s best interests. The minority proposed that counsel should be appointed whenever the respondent requests representation. However, where no such request is made, the court should be able to utilize screening or investigative devices to determine whether appointment of counsel is appropriate. This minority position emphasized that in a number of cases, the appointment of counsel would add a layer of cost that might turn an otherwise cooperative family approach to guardianship into an adversarial proceeding.

In the Wingspread working group on procedural due process, the majority and minority positions about the right to counsel were discussed thoroughly. Most of the six experts in the group agreed that before a full adversarial proceeding takes place, there should be an interim step or preliminary hearing at which a type of legal triage occurs. Cases in which the proposed ward’s incapacity is clear beyond dispute would proceed on a fast track, bypassing a formal hearing and obviating the need for counsel after the preliminary proceedings. However, this proposal was defeated at the plenary session on the grounds that such an interim proceeding, without more protections, might deprive the proposed ward of too much due process. Furthermore, even if it could be structured to provide enough due process, a preliminary proceeding with sufficient safeguards would be overly cumbersome. Thus, the Wingspread recommendation, consistent with pre-existing ABA policy, requires counsel, along with a full hearing, in all guardianship cases. Because ABA policy on this issue already existed, the ABA House of Delegates did not consider this recommendation explicitly at its 1989 mid-year meeting.

Due to a concern that the cost of counsel might place an undue burden on the proposed ward’s estate, the conference recommended that counsel be appointed regardless of the respondent’s ability to pay. The conference felt that since the state, or a petitioner acting through the state, usually decides to intrude upon the respondent’s constitutionally protected rights, it would be unfair to require respondents to hire their own lawyers. Proposed wards petition for guardianship themselves in only a minority of cases. Thus, for administrative ease, it would be better to make counsel available to everyone, in all guardianship cases.

The symposium attendees recognized that in most cases, counsel will be needed to prepare the case and to look after the proposed ward’s interests during the pre-hearing phase. Yet, it was very difficult to specify exactly when counsel should be appointed. A large part of the problem was the variety of pre-hearing procedures in the different jurisdictions. These differences made it difficult, if not impossible, to recommend any one time as the most appropriate or best time in the process for the appointment of counsel. Thus, no recommendation on the timing of the appointment was issued.

Instead, in the recommendation discussed above on the petitioning process, the conference suggested that a designated judicial officer make a preliminary examination of the “petition to ensure its completeness, as well as the prompt scheduling of any other necessary proceedings,” such as the need for counsel. If the petition is defective in any way, the judicial officer should dismiss the petition without prejudice. If it is complete, the officer should ensure that counsel is appointed or should refer the issue to the court, consistent with the laws of that jurisdiction.

Cases in which the proposed ward wants the guardianship proceedings to go forward have special considerations. In these cases, there may be no need for counsel with its costs to the state. Yet, there is concern about the proposed ward’s right to waive counsel and other procedural rights. The conference recommended that in those relatively few instances in which an incapacitated person both wishes and is able to express the wish that guardianship proceedings go forward without an attorney, there should be a means by which the ward can waive counsel.

A prime concern, however, was the situation in which the proposed ward’s ability to make rational decisions was in doubt. In most states, there is a presumption of competency that must be overcome before the individual’s wishes can be countermanded. Thus, the conference recommended that a respondent be able to dispense with an attorney and represent him or herself following a knowing and voluntary waiver of counsel that is consistent with the laws of that jurisdiction.

**Hearing Rights**

Traditionally, one of the most significant disagreements about guardianship has concerned the nature of the hearing. Should the hearing involve a medical determination
made by clinicians, or should it be a regular civil judicial determination made in an adversarial hearing? Both points of view have legitimate support.\textsuperscript{21} The proposed ward’s medical or social best interests that would be advanced by prompt diagnosis and treatment support the use of a medical determination. Slow and contentious court proceedings are antithetical to the medical mission. On the other hand, a finding of incapacity and subsequent appointment of a guardian involve fundamental personal and property rights, including a potentially extreme, or even complete, diminution of the right to make one’s own decisions. Thus, it is argued that a full adversarial hearing is needed.

On balance, agreeing with most legislatures and courts, the conferees concluded that the medical considerations are outweighed by the even more serious legal concerns. Thus, an adversarial hearing best reflects the proper balance between the need for care and treatment and the potential loss of rights. At the same time, the conferees did not call for the most due process possible, but identified certain essential elements of due process that should be included.

First, while the attendees called for an “adversary hearing,” such a hearing would not have to be held before a judge. An “impartial decision-maker,” preferably with legal training, would suffice as long as other due process protections were provided. Second, respondents normally should be “present at the hearing and all other stages of the proceedings.” Only in limited circumstances, when it would be demonstrably harmful, should they be allowed to waive their presence. Similarly, the respondent should be allowed to compel the attendance of witnesses, present evidence, confront and cross-examine witnesses, have their alleged incapacity measured under a “clear and convincing standard of proof” and exercise the right to appeal. The ABA Statement of Recommended Judicial Practices has addressed and endorsed two of these hearing rights — the respondent’s presence in court and compelling the attendance of witnesses.

Like the person facing civil commitment, the rights at stake for the proposed ward are important. Thus, the set of due process procedures required for those facing guardianship is considerably more than those found in the typical civil case, although somewhat less than the due process guarantees required in criminal matters.

\textbf{Recommendation II-C}

\textbf{Role of Counsel Defined}

\textit{Zealous Advocacy} — In order to assume the proper advocacy role, counsel for the respondent and the petitioner shall: (a) advise the client of all the options as well as the practical and legal consequences of those options and the probability of success in pursuing any one of those options; (b) give that advice in the language, mode of communication and terms that the client is likely to understand; and (c) zealously advocate the course of actions chosen by the client or, for certain client respondents, actions chosen by their guardian ad litem.

\textbf{Role of Guardian Ad Litem Distinguished} — A respondent’s attorney in a guardianship proceeding should not act as a guardian ad litem.

\textbf{Commentary}

Once the issue of representation is settled, questions regarding how that representation should be carried out become paramount. The conferees addressed the special role of counsel in such proceedings.

The role of counsel may be divided into two primary concerns: counsel’s posture with regard to the client-attorney relationship; and the basic skills needed to communicate with a client who has special needs.

Over the years, attorneys have played two types of roles in representing allegedly incapacitated persons. In the traditional role, the attorney protected the client’s “best interests,” while in the more modern approach the attorney zealously advocated the client’s expressed or implied desires, regardless of what the attorney perceived as the client’s best interests.\textsuperscript{22}

Consistent with the ABA’s Model Rules of Professional Conduct, the best interests vs. zealous advocacy debate is resolved largely in favor of zealous advocacy, both within the legal profession and in the recommendations of the symposium participants. Yet, it should be understood that in a legal sense, being a zealous advocate is not equivalent to being a zealot.

As stated in the ABA Model Rules, the overriding professional obligation in representing an allegedly incapacitated person is “as far as reasonably possible, [to] maintain a normal client-lawyer relationship with the client.” It is assumed that most clients, even those who are mentally disabled, when “properly advised and assisted,” are able to make decisions regarding important legal matters such as their representation. Moreover, even a legally incapacitated client “often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client’s own well-being.”\textsuperscript{23}

If counsel believes that his or her client is severely impaired, the Model Rules of Professional Conduct advise that “a lawyer may seek the appointment of a guardian or take other protective action with respect to a client.”\textsuperscript{24} In this context, since a guardian has not yet been appointed, the lawyer may ask for the appointment of a guardian ad litem who should choose a course of action on the proposed ward’s behalf, if possible, based on what the ward would prefer. Otherwise, the lawyer should do what the client indicates, as long as those actions do not violate the law or legal ethics.

The conferees endorsed the approach recommended by the ABA’s Model Rules of Professional Conduct and added one further caution: in no case should the lawyer assume the role of guardian ad litem and make a decision for the respondent. It is the attorney’s role to carry out the client’s wishes as best as he or she can. In contrast, the guardian ad litem, employed only when the client cannot express his or her wishes, attempts to ascertain what the client would want or, if such a determination cannot be made, determines what is in the client’s
best interests. As the duly appointed surrogate, the guardian then tells the court what the respondent would prefer.

Not all of the Wingspread conference agreed with the conference’s recommendations on the role of counsel. This minority position manifested itself after Wingspread when the Section on Real Property, Probate and Trust indicated that it would not endorse these two recommendations. As a result, the two recommendations were withdrawn from the other recommendations submitted to the ABA House of Delegates at the 1989 mid-year meeting. The three sponsors of the resolution — the two Commissions and the Section on Real Property, Probate and Trust — agreed to postpone consideration of the role of counsel’s recommendations pending further study but to support all the other recommendations. This compromise was adopted by the ABA.

**Recommendation II-D**

**Education and Training**

*Training for Attorneys and Judges — Training should be:* (1) **made available to judges hearing guardianship cases;** (2) **required for attorneys who wish to be appointed as counsel in guardianship cases;** and (3) **required for attorneys who wish to be certified as legal specialists in guardianship, general disability or elder law.**

**Content of Training — The training for both judges and attorneys should include:** (1) **the rights and procedures applicable in guardianship proceedings;** (2) **the aging process and disability conditions, and the myths and stereotypes concerning older and disabled persons;** (3) **the skills required to effectively communicate with disabled and elderly persons;** (4) **the applicable medical and mental health terminology and the possible effects of various medications on the respondent;** and (5) **services and programs available in the community for elderly and/or disabled persons.**

*Model Curriculum — A model curriculum should be prepared to aid in the development and implementation of training programs for judges and attorneys. This curriculum should be prepared from a national perspective, but the materials should be adapted to state and local laws and situations.*

**Commentary**

The key to understanding the client’s desires is good communication between the attorney and the client. This maxim is true for all clients, but especially for clients with special needs. Allegedly incompetent clients may have mental illnesses, developmental or cognitive problems or side effects from their medications. Unfortunately, most lawyers are not equipped to communicate well with a client severely impaired by any of these problems.

The conferences made recommendations in two areas that would help improve communications between lawyers and their disabled clients. First, in his or her role as the zealous advocate, the lawyer should speak with and advise the client “in the language, mode of communication and terminology that the client is most likely to understand.” Second, the typical attorney handling a guardianship case needs education and training about severely impaired clients. Such training can be presented in two ways. The conference agreed that training should be required for attorneys wishing to represent persons in guardianship cases as court-appointed counsel. In addition, states and localities should consider certifying legal specialists in guardianship law, and use certification as a means for encouraging other attorneys to obtain the necessary training.

These training programs also would be made available to judges who preside over guardianship cases so that they too would be more familiar with the special needs of elderly and disabled persons.

As part of their training, lawyers and judges would not only be educated about the “rights and procedures applicable in guardianship proceedings,” but would be taught about “the aging process and disability conditions”; societal myths and stereotypes; effective communication skills; medical and mental health terminology and the possible side effects of various medications; and community services and programs.

**Footnotes for Recommendations II-A-D**


2. Supra note 1. As of the end of 1982, 29 states allowed allegedly incompetent persons to initiate proceedings.


7. The mere accusation that a person is mentally incapacitated can have a chilling effect on decision-making rights. See, J. Parry, "Decision-making Rights Over Persons and Property," S. Brakel, J. Parry, B. Weiner, The Mentally Disabled and the Law, supra note 1, at 435-36.


9. Supra note 1, at 380-81.

10. Supra note 1, Table 7.3, col. 17, at 408-415.

11. Supra note 1, Table 7.3, cols. 18, 19, at 408-415.

12. Supra note 1, at 381.


14. Supra note 1, at 381.

15. Supra note 1, at 381.

16. Supra note 1, Table 7.4, cols. 2-4, at 416-424.

18. See, Report to the House of Delegates from the ABA's Commission on Legal Problems of the Elderly, which was adopted at the ABA's 1988 Annual Meeting. Part C-1 states: "Counsel as advocate for the respondent should be appointed in every case, to be supplanted by respondent's private counsel if the respondent prefers."


20. Supra note 18.
21. Supra note 1.
24. Supra note 23.
Determination of Incapacity

Recommendation III-A
Definition of Incapacity

Elements of Definition — The definition of incapacity should focus upon but not be exclusively limited to the following elements: (a) incapacity may be partial or complete; (b) incapacity is a legal, not a medical, term; (c) a finding of incapacity should be supported by evidence of functional impairment over time; (d) the finding of incapacity should include a determination that the person is likely to suffer substantial harm by reason of an inability to provide adequate personal care or management of property or financial affairs; and (e) age, eccentricity, poverty or medical diagnosis alone should not be sufficient to justify a finding of incapacity.

Reconsideration by NCCUSL — The Joint Editorial Board of the Uniform Probate Code should request that the National Conference of Commissioners on Uniform State Laws reconsider the definition of "incapacity" as it is now contained in section 1-201 (7) of Chapter V of the Uniform Probate Code and the Uniform Guardianship and Protective Proceedings Act to recognize the need for a definition that stresses the individual’s level of functioning.

Commentary

The threshold determination in any guardianship hearing is incompetency or, as used in the recommendations of the symposium attendees, "incapacity." Traditionally, the problems surrounding this determination have been many, both practical and theoretical.

Exactly what should be included under the term "incapacity" has been the subject of much debate. The most serious deficiency in the terminology has been its lack of precision. For example, for many years civil commitment orders and findings of incapacity were viewed as nearly synonymous and interchangeable. Thus, the legal system viewed a finding of the need for mental health hospitalization or a determination of incapacity as tantamount to losing all of one’s personal and property rights. At the same time, confusion about the legal and medical implications of incapacity, as well as the inappropriate use of incapacity in guardianship and civil commitment determinations, led to numerous abuses of power and sloppy bureaucratic decision-making for elderly and disabled persons who allegedly were impaired. In recent years, most jurisdictions have separated civil commitment from findings of incapacity.

The authority to find a person incompetent and to appoint a guardian has been based on multiple criteria that differ by state. Some jurisdictions focus on mental status and on particular mental conditions or categorical impairments; some focus on decision-making ability; some measure the ability to function in society and to care for self and property; and some include elements of all of these tests. Over the years, however, the definitions used to support guardianship appointments have moved away from mere labels and conclusory statements — insane, retarded, mentally deficient, senile, spendthrift, addict — and more toward functional assessments of skills and behavior related to one’s ability to make and execute decisions for oneself.

In defining a threshold for guardianship, the symposium attendees endorsed a move away from the traditional notions of incompetency and toward a focus that was more consistent with a functional emphasis — "incapacity."

Another major decision was the recommended reconsideration of the definition of “incapacitated person” used in the Uniform Probate Code and Uniform Guardianship and Protective Proceedings Act, which states:

[A]ny person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, or other cause (except minority) to the extent of lacking sufficient understanding or capacity to make or communicate responsible decisions. Sec. 1-201(7).

The conferees agreed that this definition does not account for the individual’s ability to function in society. They also questioned whether the definition should require that respondents make what society terms “responsible” decisions.

While the conferees did not articulate their own definition of an incapacitated person, they outlined five elements that should be included in any acceptable notion of incapacity. First, the definition should recognize that incapacity may be partial or complete. Thus, the notion of limited guardianship, aimed at addressing the individual’s particular needs, is supported here and in other recommendations.

Second, incapacity is a legal, not a medical, term. Thus, it is counterproductive to measure incapacity according to a medical diagnosis alone, without relating that diagnosis to a legal standard or the respondent’s ability to function.

Third, since incapacities often change, a finding of incapacity should be supported by evidence of functional impairment over time. Misleading results can and do result from viewing incapacity at only one or two points in time.

Fourth, any determination of incapacity should evaluate whether the respondents are likely to suffer substantial harm as a result of their specified abilities to manage their personal or financial affairs.

Fifth, mere labels that identify a person by age, eccentricities, poverty or medical diagnoses, i.e., advanced age, homelessness or schizophrenia, should not be used in the place of a finding of incapacity.
**Recommendation III-B**

**Evidence Required**

- *Expert Testimony* — Courts should hear expert testimony from any professionals whose training and experience aids in the assessment of functional impairment. These experts may include, but are not limited to, physicians, nurses, psychologists, social workers, developmental disability professionals, physical and occupational therapists, educators, habilitation workers and community health workers.
- *Assessment in Usual Environment* — Whenever possible, proposed wards should be assessed in their usual environment and with all due consideration given to their privacy and dignity.
- *Clear and Convincing Evidence* — Each finding should be based on a “clear and convincing evidence” standard of proof.

**Commentary**

Normally when judges and other triers of fact apply the definition of incapacity, certain proof is required. As a result, evidentiary rules and requirements are needed to ensure that due process is afforded and the best evidence is used to determine incapacity. Symposium attendees made three recommendations concerning evidentiary issues.

First, rules of evidence generally should be applied in guardianship hearings. The Wingspread conferees concluded that because guardianship implicates important civil rights, respondents should have an adversarial hearing that includes the use of evidentiary rules to avoid the informal transmission of information common in clinical settings.

Second, to obtain the best evidence, courts should allow and give credence to expert testimony from professionals whose training and experience aid in the assessment of functional impairment. The court should emphasize the quality of the evidence and the training and experience of those providing the testimony, rather than the professional identities of those who testify. Thus, the person who is testifying should be viewed as an individual, not merely as a member of a group that is permitted to, or restricted from, giving testimony.

Third, the conferees made it clear that functional assessments of respondents should be performed by clinicians in a setting that is as close as possible to the respondent’s familiar environment and over a time span that accounts for fluctuations in behavior. When people are placed in unfamiliar environments, they tend to be more anxious and to act differently than they would in their home or work environments. The best assessments are made in environments where the respondent feels most comfortable. When the respondent feels more comfortable, it is easier to preserve the respondent’s privacy and dignity — a prime consideration in any assessment.

**Recommendation III-C**

**Guidelines for Judges**

- *Authority Granted* — The authority granted to a guardian should be directly related to the functional impairment of the ward.
- *Functional Assessment* — Medical diagnosis alone should not be considered evidence of functional impairment. Courts should not be reluctant to seek independent expert evaluation to determine functional impairment in appropriate cases.
- *Behavior Fluctuation* — Behavior is a function of the person, the time and the environment. Changed environments may temporarily disrupt capacity. Functional capacity may be restored in time after return to a familiar setting or adaptation to a new setting.
- *Respondents’ Values* — Respondents’ values should be respected. Respondents have a right to choose risk-associated lifestyles. Assumption of a risk, or refusal of medical treatment or social and community services should not, without more, be determinative of functional impairment or incapacity.

**Commentary**

Judges, like lawyers, should be educated about the individuals who are respondents in incapacity hearings and should have some knowledge about determinations of incapacity. Although the Wingspread conferees mentioned many important considerations for judges, four stood out as primary concerns.

The conferees urged that judges delegate to guardians only that authority that is consistent with the ward’s functional impairments. In essence, no more authority should be granted than is necessary for the guardian to deal with the incapacities described during the hearing process. In such “limited guardianship,” the scope of authority is tailored to the respondent’s individual needs.

Consistent with existing American Bar Association policy on guardianship (derived from the 1986 National Conference of the Judiciary on Guardianship Proceedings for the Elderly), the Wingspread conferees reasserted the principle that the judge should look beyond medical diagnoses toward a more functional assessment in capacity determinations. In addition, the conferees noted that behavior may fluctuate with the time and setting in which an assessment is conducted. Not only can a change in environment temporarily disrupt capacity, but over time, functional capacity may be restored when the respondent is returned to a more familiar setting.

Perhaps most important, the symposium attendees urged judges to respect respondents’ values, particularly their “right to choose a risk-associated lifestyle.” In guardianship, the role of the judicial system is not to ensure that everyone acts appropriately as measured by what society favors or the values of the probate judges. Rather, the judiciary should assess whether the respondent is legally incapacitated.
Recommendation III-D
Scope of the Court’s Decision

Limited Guardianship — There should be a statutory presumption in favor of limited guardianship.

Temporary Guardianship — Courts should consider temporary guardianship where appropriate.

Modifications — Court orders should make it relatively easy for the court to extend, limit or dissolve guardianships.

Specificity of Order — The order should be as specific as possible with respect to the guardian’s powers and duties.

Commentary

In 1977, the ABA’s House of Delegates passed a resolution urging federal and state governments to support and swiftly and effectively implement laws and regulations codifying the rights of mentally disabled persons. An explicit right and underlying premise embodied in the Association’s statement was the doctrine of the “least restrictive alternative.” This doctrine states that mentally disabled persons cannot be deprived of basic rights in order to achieve state objectives that can be accomplished in less intrusive ways. The conferees made four recommendations to encourage the fashioning of guardianship decisions that maximize the ward’s autonomy consistent with the doctrine of the least restrictive alternative.

First, the Wingspread conference favored limited rather than plenary dispositions. While many jurisdictions have statutory language requiring courts to use limited guardianships, implementation of this requirement is spotty. The additional time and resources required to tailor a guardianship to the respondent’s specific needs and provide ongoing supervision, when combined with the reality of overcrowded dockets, results in substantial judicial resistance to this concept.

Second, the Wingspread conferees encouraged courts to make their orders as specific as possible with respect to the guardian’s powers and duties. If used, such specificity would help courts limit guardianships and tailor them to the circumstances presented.

Third, guardianships may be limited by using a temporary guardianship in which restoration occurs at a specified time unless further action is pursued. Thirty-four jurisdictions use this mechanism in medical emergencies or when the guardian dies or becomes incapacitated and no longer is able to carry out the guardian’s role.

Finally, the conferees recommended that a process be established that would make it relatively easy for the court to extend, limit or dissolve guardianships. In this way, courts can monitor changing conditions and make sure the guardianship order still represents the least restrictive alternative possible.

Recommendation III-E
Standards for the Orders

Ward’s Preferences — Courts should follow the ward’s previously expressed preferences regarding the choice of a guardian.

Substituted Judgment Standard — Whenever possible, “substituted judgment” should be the standard that guides the decision-making of the court or the guardian. The doctrine of “best interest of the ward” should be employed only in those instances where no evidence of the ward’s preference exists.

Current Choices of the Ward — The contemporaneous expressed wishes or spoken choice of the ward should be given due consideration.

Commentary

In the modern approach to substitute decision-making, after a finding of incapacity, the value and choices of the ward guide the court and the guardian to the greatest extent possible. Yet implementing this concept is not easy. The conferees made three recommendations addressing substitute decision-making.

First, the conferees agreed that the ward’s previously expressed preferences regarding the choice of a guardian should be followed. The “substituted judgment” standard, in which the ward’s past values and preferences shape the decision being made, should be the standard to guide the decision-making of the court or the guardian whenever possible. The other standard, “best interest of the ward,” should be employed only in those instances where no evidence of the ward’s preference exists. In such a case, the family’s interests should receive secondary consideration, and the ward’s interests should be controlling. In any case, the substitute decision-maker should be bound to give due consideration to the contemporaneous expressed wishes or spoken choice of the ward to the greatest extent possible.

These recommendations follow recent case law developments in the health care decision-making context that attempt to integrate the substituted judgment and best interest standards into a workable substitute decision-making system. Those decisions state that

If there is clear and convincing evidence — either through a living will, some other written document or verifiable oral statements or personal actions — indicating what the... [ward] would want done if he or she were competent, the... [ward’s] wishes should be followed using substituted judgment. If there is less than clear and convincing evidence of what the... [ward] would want done if he or she were competent, the... decision should be based on the... [ward’s] best interests: what a reasonable member of the patient’s community would do, taking into consideration the... [ward’s] family, friend, moral and religious values... Thus, the best interests test is not a narrow examination of medical concerns, but a broad

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examination of moral, medical, psychological and financial concerns expressed as much as possible from the... [ward's] point of view.10

Recommendation III-F
Standards for Restoration

Prompt Judicial Response — The court should respond promptly to a ward's requests for a redetermination of status and possible restoration to legal capacity.

Burden of Proof — Upon a showing of favorable change in circumstances, the burden of proof should be imposed upon those seeking to continue the guardianship.

Commentary

The final issue in incapacity determinations is that of restoration of competency. The conferees considered how the court's jurisdiction should be brought to an end to restore the individual's legal competence and end the guardianship.

Most states provide for restoration of capacity through a proceeding to terminate the guardianship. Commentators have observed, however, that such a proceeding is rare, and that "the law presumes that persons who are adjudicated incompetent remain so."11

The attendees made two recommendations in this area that relate to the issues of promptness and burden of proof. First, the court should respond promptly to a ward's requests for a redetermination of status and possible restoration to legal capacity. Such requests often are not taken seriously or become mired in legal bureaucracy. In addition, upon a showing of favorable change in circumstances, the burden of proof should be imposed upon those seeking to continue the guardianship. Thus, once the ward meets the initial burden of going forward with some evidence of changed circumstance, the burden of proof shifts to those who seek to maintain the guardianship.

The conferees also suggested that reviews automatically be conducted after a specified period of time, instead of relying solely on court or ward initiation. Such a change would help counterbalance the tendency to continue the status quo. Finally, in those jurisdictions that require regular reviews of guardianships with or without a documented change of circumstance, the burden of proof should be on the party favoring continued guardianship.

Footnotes for Recommendations III-A-F

2. Id.
4. See, Recommendations III-C, III-D(1) and IV-B(1).
6. The American Bar Association supported "a right to treatment in the least restrictive setting." Report with recommendations to the House of Delegates, 1978 Annual Meeting, Item 113A.
7. See, Commentary under "Judicial Practices" section, below.
8. Supra, note 1, at 388-389.
Judicial Practices

Recommendation IV-A
Removal of Barriers

Access — Judges should encourage access to the courts by elderly and disabled respondents.

Scheduling — Courts should take into account the needs of elderly and disabled respondents in scheduling guardianship hearings.

Conduct of Hearings — In conducting hearings, judges should seek to maximize communication with and participation of elderly and disabled respondents.

Public Information — Courts should assist in the preparation and dissemination of information to the public regarding guardianship and its alternatives.

Commentary

The Wingspread conference urged courts' active participation in translating the law's existing procedural and substantive protections into equitable, fair, effective and efficient programs and practices. Specifically, in planning and conducting guardianship proceedings, courts should seek to remove physical, economic and emotional barriers for respondents.

Access

Many elderly and disabled respondents may live alone, lack transportation, or may not know where the courthouse is or how to get there. Others may reside in nursing homes, board and care homes or housing facilities for seniors. The 1986 Statement of Recommended Judicial Practices on guardianship proceedings for the elderly thus provided that:

The court shall do everything possible to encourage access to the courts by the elderly, including making the court facilities accessible and training court staff as to available services and resources.

The Wingspread conference specifically stated that: (1) the courthouse should be safe and accessible for disabled respondents; (2) comfortable waiting areas should be available; (3) the court should determine that the respondent has transportation to and from the hearing; and (4) the court should consider the use of supportive volunteers to drive the respondent to court and accompany him to the courtroom. Cooperative efforts between the court and the area agency on aging (under the Older Americans Act) or the protection and advocacy agency would be useful in examining courtroom access by the elderly and disabled.

Many respondents are not mobile and simply are unable to participate in a court appearance. In such cases, a telephone interview might provide helpful information to the court and allow the respondent to voice his or her perspective. In addition, both the symposium attendees and the Recommended Judicial Practices advise that, where necessary, the judge should conduct hearings at the location of a respondent who is unable to be present in court.

Scheduling

Since many respondents in guardianship proceedings are frail and tire easily, the conference recommended that:

Hearings... be scheduled so that respondents do not have to wait unnecessarily for the disposition of other cases; and with sufficient time so that respondents will not feel pressured when presenting their views, and will perceive that their cases have received the full attention of the court.

Conduct of Hearings

The allegation of incapacity can be insulting and stigmatizing, and involvement in the judicial process can seem bewildering and intimidating. The conference urged that the court conduct the hearing in such a way that the respondent's full participation is encouraged and the proceedings are as understandable and meaningful as possible. They recommended that, where appropriate, judges should hold hearings in chambers rather than open court; dispense with formal robing; and sit close to disabled respondents to enhance communication.

Guardianship proceedings and consequences should be explained simply. The judge should seek to establish eye contact with respondent, and generally should show respect and interest. The judge should recognize that extra time and patience may be required to get the respondent's full response. "Paraphrasing provides an accuracy check, and at the same time gives the person a feeling of support from being understood."

In addition, both the Wingspread conference and the Recommended Judicial Practices urged that the court recognize and respond to sensory losses.

While hearing loss should not be assumed, it is frequently experienced by older people. Those with hearing impairments find it difficult to understand someone who talks quickly, indistinctly, or in a setting where there is excessive background noise. To compensate for hearing loss, the speaker should: eliminate background noise; enunciate clearly; announce especially important points or changes in the discussion; and sit so the individual can watch lip movements.

Many older people do not see as well as they used to. The lens of the eye changes with aging. The elderly are often more sensitive to glare, have trouble going from bright light to darkness, and do not function well in low light levels. To compensate for vision loss: assure that lighting is sufficiently bright, but diffuse; avoid having the individual face a source of glare, such as a window; double or triple space written materials or use large type; and assure that courtroom signs use large and well-spaced lettering.

Recommendation IV-B
Use of Limited Guardianship and Other Less Restrictive Alternatives

Use of Limited Guardianship — In the absence of statute, judges should use their inherent or equity powers
to limit the scope of and tailor the guardianship order to the particular needs of the ward. The petition and order should include detailed statements of the respondent's functional capabilities and limitations. If practical, the court's order should require the guardian to attempt to maximize self-reliance, autonomy and independence. Finally, the guardian periodically should report these efforts to the court.

Social Service/Judicial Linkages — Courts should maximize coordination and cooperation with social service agencies in order to find alternatives to guardianship or support a limited guardianship.

Continuing Education — Continuing judicial education should be offered for judges and court personnel on programs concerning guardianship that address the aging process, the aging network under the Older Americans Act, the protection and advocacy network, the developmental disabilities process and the Developmental Disabilities Act, the least restrictive alternative doctrine and practical ways to tailor guardianship.

Commentary

The inherent and recurring conflict in guardianship law lies in the balance between the civil liberties of the ward or proposed ward and the state's parens patriae power. Legal scholars have argued that the constitutional doctrine of the "least restrictive alternative" should apply in guardianship cases, thereby limiting state paternalism to that necessary for the health and welfare of the individual. The Wingspread conference agreed, stating that since guardianship always involves a loss of autonomy, judges should attempt to minimize this loss through the effective use of limited guardianship and other less restrictive alternatives.

The "least restrictive alternative" doctrine was established by the U.S. Supreme Court in Shelton v. Tucker, 364 U.S. 479 (1960), in which the court declared unconstitutional an Arkansas statute that required teachers in state-supported schools to file affidavits listing all organizations to which they belonged or contributed. The court stated:

Even though the government purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same purpose. 364 U.S. at 488.

This doctrine was first applied to the area of civil commitment in Lake v. Cameron, 364 F.2d 657 (D.C. Cir. 1966), in which the court found that Mrs. Lake, an elderly woman, could not be committed indefinitely without a complete expiration of all possible alternatives for her care and treatment in the community. The court stated:

Deprivations of liberty solely because of dangers to the ill persons themselves should not go beyond what is necessary for their protection. 364 F.2d at 658.

Lake's holding that the least restrictive alternative doctrine applies to commitment cases has been followed by numerous courts. For instance, in Gary W. v. State of Louisiana, 437 F. Supp. 1209 (E.D. La. 1976), the court held that the doctrine requires that the state give thoughtful consideration to the needs of the individual, treating him constructively and in accordance with his own situation, rather than automatically placing [him] in institutions. 438 F. Supp., at 1217.

Since similar deprivations of rights and liberties are involved in guardianship proceedings, the Wingspread conference, as well as many guardianship experts, concluded that the doctrine of the least restrictive alternative should be applied in these cases as well.

The Uniform Probate Code reflects this idea well, providing that in guardianship proceedings, the court should encourage the development of maximum self-reliance and independence of the incapacitated person and make appointive and other orders only to the extent necessitated by the incapacitated person's mental and adaptive limitations or other conditions warranting the procedure. Sec. 5-306.

Similarly, the model statute drafted by the ABA Commission on the Mentally Disabled provides that the court "shall impose the least restrictive dispositional alternative which . . . will be sufficient" to meet the needs of the proposed ward."

Finally, the Statement of Recommended Judicial Practices states that "the court should find that no less restrictive alternative exists before the appointment of a guardian."

Allowing the allegedly incompetent person to retain as much autonomy as possible seems consistent with gerontological findings indicating that the maintenance of opportunity for choice and control are important to the mental health of the elderly. Scientific studies show that the loss of ability — or perceived loss — to control events can lead to physical and/or emotional illness. Indeed, complete loss of status as an adult member of society could act as a self-fulfilling prophecy and exacerbate any existing disability.

Legal Interventions

Several legal interventions can serve as an alternative to guardianship. If the respondent has the required legal capacity, he/she may execute a durable power of attorney, a health care power of attorney, a "living will" or an inter vivos (living) trust.

If the respondent does not have legal capacity, the court may ratify a single transaction such as the sale of real estate or make a single health care decision such as giving authority to proceed with an operation; the family may make a decision in accordance with a health care consent law; or an administrative agency such as the Social Security Administration may appoint a representative payee.

Another approach involves limiting the guardianship in accordance with the particular needs of the ward. A
"limited guardianship" has been defined as a relationship in which the guardian "is assigned only those duties and powers which the individual is incapable of exercising." The concept has been included in the Uniform Probate Code.

The Court, at the time of appointment or later, on its own motion or on the appropriate petition or motion of the incapacitated person or other interested person, may limit the powers of a guardian otherwise conferred by this [Act] and thereby create a limited guardianship." Sec. 5-306(c).

Sec. 5-408 provides for a limited conservatorship.

The concept of a limited guardianship also is included in the model statute drafted by the ABA Commission on the Mentally Disabled. Finally, the Statement of Recommended Judicial Practices provides that "a scheme for limited guardianship and limited conservatorship should be provided, preferably by statute." Over 40 state statutes now provide for limited guardianship.

The Wingspread conference recommended that in states that do not have statutory provisions for limited guardianships, judges should use their inherent equity powers to limit the scope of the guardianship order where appropriate. Historically, guardianship actions were under the jurisdiction of equity courts, which traditionally have tailored their remedies to fit the facts before them. Thus, where a proposed ward is only partially disabled, courts could choose to exercise less than the full authority they possess and grant only those powers necessary to protect the ward's health and safety and/or manage the ward's financial affairs. Some courts already have recognized the inherent equitable authority of probate courts to limit the powers of a guardian. See, e.g., Guardianship of Basset, 385 N.E.2d 1024 (1979); In re Quinlan, 355 A.2d 647 (1976); and Strunk v. Strunk, 445 S.W.2d 145 (1969).

It is unclear how often courts have used their statutory and/or equitable powers to limit guardianships. A recent study of guardianship practices in three Illinois counties found limited guardianships rarely used. The ABA Commission on the Mentally Disabled's 1979 study of limited guardianship in selected states also found that the approach was seldom used. A 1983 study of 369 petitions filed in Maine that year found only one petition that sought limited guardianship and five that sought single transaction arrangements. This study concluded that "generally, the most, rather than the least restrictive protective arrangement is employed."

One source offers the following explanation:

In part, plenary guardianship is favored because it is familiar. Practitioners and courts feel comfortable with what they know. Lacking an appreciation of the advantages to the ward of limited guardianship, they tend to automatically request the appointment of a plenary guardian. But the problem goes deeper. A judge, when faced with the choice of granting a limited or plenary guardian, is likely to select plenary power in the belief that such power will provide the guardian with sufficient authority to handle any circumstances that might arise. The appointment of a limited guardian, on the other hand, might result in a rehearing if the power granted to the guardian should prove inadequate to the changing needs of the ward. Moreover, the appointment of a plenary guardian eliminates the effort of tailoring the power of the guardian to fit the particular needs of the ward. In short, plenary guardianship is familiar, uncomplicated, and saves time and effort.

The Wingspread conference urged that judges and lawyers be educated about "the least restrictive alternative doctrine, and practical ways to tailor guardianship." This recommendation builds on the ABA study, referenced above, that suggested "an educational campaign, focused on the bench and bar," and concurs with the approach endorsed the Statement of Recommended Judicial Practices.

Social Services

The Wingspread conference recognized that legal intervention may not be required if sufficient social services are available to enable the respondent to remain independent and if he/she voluntarily accepts these services. Critical social services might include homemaker, health aide services, transportation, shopping, friendly visiting, telephone reassurance, congregate and home-delivered meals, senior centers, case management, daycare facilities, sheltered housing, board and care homes and programs for money management. By working closely with agencies established under the Older Americans Act and the Developmental Disabilities Act, courts can more easily identify relevant community services and/or propose joint solutions where service gaps exist.

Recommendation IV-C

Creative Use of Nonstatutory Judicial Authority

Development of Guardianship Rules of Practice — The court should participate in the development of written rules of practice and procedure that comport with due process and result in equitable outcomes.

Development of Standardized Forms — The court should devise standardized pleadings and other forms such as medical reports, investigator reports, accountings and reports of the ward's condition.

Appointment of Impartial Investigators — The court should exercise its inherent power to appoint impartial investigators and other experts.

Commentary

The Wingspread conference believed that effective guardianship depends upon the court's creative use of non-statutory authority. Historically, guardianship was administered through the chancery court — the "conscience of the king." Thus, courts retain inherent equitable powers to fashion a just procedure that will best safeguard the rights of individual wards while providing for their needs. The court need not be constricted by scant statutory provisions, but should supplement them through the development of rules, forms and practices to strengthen the guardianship system.
The conference recommended that courts take the initiative in devising rules that provide adequate due process protections for proposed wards and encourage sensitivity to the needs of the elderly and disabled. For example, court rules might require that the respondent have an opportunity to cross-examine the physician rather than admit the doctor’s statement as hearsay evidence. Rules might set out the steps court personnel should take to encourage the presence of the respondent, or ways in which the notice should be served so as to minimize its traumatic, frightening effect.

The symposium attendees advised that courts develop and require the use of standardized forms. The forms should provide the judge with all of the information needed to make a careful determination of capacity and to adequately monitor the guardianship. The forms should be clear, in large print and readily understandable, and should avoid the use of legal wording. Standardized forms should be developed for the petition, the notice, the physician’s report, the guardian ad litem or visitor’s report, the court order, the guardianship plan and the guardian’s annual report.

Finally, the conference suggested that the court ensure that it hears sufficient testimony from impartial professionals who could aid in the assessment of functional impairment. If the statute does not provide for an investigator’s participation, the court should, where appropriate and feasible, use its equitable powers to appoint such an expert.

**Recommendation IV-D**

**Judicial Role in Providing Effective Legal Representation**

**Attorney Instruction** — Courts should instruct respondents’ attorneys as to their roles and responsibilities.

**System for Legal Representation** — Courts should help develop an ongoing system that will ensure effective legal representation of respondents.

**Commentary**

This recommendation is directly related to several others made by the Wingspread conference. Recommendation II-B provides that counsel should be appointed for each respondent, II-C defines the role of counsel, and V-B calls for the development of rules of professional conduct for attorneys handling guardianship cases and continuing legal education sessions. The conference urged the court to take an active role in the implementation of each of these items, ensuring a system for effective legal representation of respondents. This responsibility would involve:

- Developing a list of qualified attorneys for court appointment as counsel for respondents, and setting standards for their performance.

- Working toward adequate compensation for court-appointed counsel.

- Working with the state and local bar associations to create a pro bono panel of attorneys to represent respondents.

- Instructing each attorney as to his or her role and how this role differs from that of a guardian ad litem. The Associated Press found that “when attorneys are appointed, sometimes picked from a courthouse list and paid a limited fee, they often serve only as rubber stamps.”

- Strong judicial instruction would encourage more vigorous and thoughtful representation.

- Encouraging and participating in guardianship continuing legal education sessions for attorneys.

**Footnotes for Recommendations IV-A-D**

1. The Wingspread working group on judicial practices presented six recommendations, all of which were passed in plenary session. Two of these — accountability and evaluation of evidence — were so similar to other recommendations that they have been incorporated therein.


4. Id.


6. Twelve such cases are listed in Dudovitz, supra note 5, at 80.

7. Supra note 5.


9. Supra note 2, Recommendation III(A).

10. Supra note 8, at 538.

11. Supra note 8, at 538 and 555.

12. Supra note 2, Recommendation II(B).


17. Frolik, supra note 5, at 634.

18. Frolik, supra note 5, at 648, note 15.

Accountability of Guardians

**Recommendation V-A**
Guardian Training and Orientation

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

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

*Ongoing Assistance — The court should develop programs for ongoing training and assistance of guardians.*

**Commentary**

According to one Florida social worker, "if you want to be a good guardian, you have to share some of the pain." While such a perspective cannot be taught, training can help to prepare a guardian for one of society's most serious and demanding roles — managing the personal and/or financial affairs of another person. A good guardian should be knowledgeable about housing and long-term care options, community resources, protection and preservation of the estate, accounting, medical and psychological treatment, public benefits and communication with elderly and disabled individuals. A guardian should develop advocacy skills; assume "case management" functions; monitor the ward's living situation; make decisions that are, to the greatest extent possible, in accord with the ward's values; avoid any conflict of interest; and regularly report to the court.

The Wingspread attendees agreed that guardians need to know what is expected of them and where to get help before they can be held accountable. Yet, in many instances, the training, orientation and ongoing support of guardians is lacking, quantitatively as well as qualitatively.

Although no national study has been conducted, it appears that training for guardians is rare. For example, of 28 probate court judges surveyed by the American Bar Association Commission on Legal Problems of the Elderly in 1986, 80% indicated that their jurisdictions offered no training for guardians, while 20% reported that guardians were provided with an instruction sheet or received brief instructions from the clerks. However, a few discrete efforts at training are underway, including a video by the Pima County Bar Association in Arizona, a video by the Probate Division of the Circuit Court of Dade County, Florida (with the Dade County Young Lawyers Section), a video and handbook by the San Francisco Probate Court Investigation Unit, a manual by the Broward County Social Services Division in Florida, a handbook for guardians in Pinellas County, Florida, a handbook by the Bureau of Aging and Adult Services in Washington and a conservatorship manual by Legal Counsel for the Elderly (AARP) in the District of Columbia.

Recent studies have begun to document the importance of providing training programs and materials for guardians. The 1986 *Statement of Recommended Judicial Practices* endorsed by the American Bar Association recommends that courts "encourage orientation, training and ongoing technical assistance for guardians, including an outline of a guardian's duties and information concerning the availability of community resources." The Wingspread attendees concurred, maintaining that model guardian training materials would significantly improve guardian performance and accountability by providing a framework for states and localities to use in developing their own curricula. Such materials could be developed at the national level and adapted for use by states and localities, or could be designed at the state level. A video might be especially effective in demonstrating to prospective guardians the level of commitment required and the kinds of real-life situations for which they must be prepared.

The conferees recommended that a minimum level of guardian training be mandated — that at a minimum, the guardian should be required to read prepared materials and see a video before a guardianship order is signed by the judge. This practice is currently in use in Dade County, Florida; Pima County, Arizona; and San Francisco, California.

Finally, the conferees addressed the need for ongoing technical assistance for guardians. Guardians must have somewhere to turn for answers to questions regarding social and community services. In some cases, the area agency on aging or the protection and advocacy office could fill this role. In Maryland, local interdisciplinary adult public guardianship review boards serve as ongoing resources for public guardians for the elderly. Guardians also might benefit from informal support groups or associations that meet regularly to exchange information and experiences.

Ideally, guardians also should have ready access to legal advice, perhaps through the bar association. For example, in Hennepin County, Minnesota, the bar association has agreed to assist volunteer guardians recommended through a local nonprofit organization. In Arlington, Virginia, the local bar is preparing to provide pro bono legal back-up to volunteers coordinated through the county Department of Human Services.

**Recommendation V-B**
Review of Guardian Reports

*A Standard Report Form — A standard annual report form should be developed and required for guardianship of the person as well as guardianship of the property.*

*Timely Filing — The court should vigorously enforce timely filing of all required reports.*

*Regular, Thorough Court Review — Courts should increase the frequency and quality of report reviews and*
should use supplemental means such as volunteers, review boards and investigators to verify the contents of the report and the circumstances of the ward.

Commentary

Most states statutorily provide for some type of continued court supervision after the appointment of a guardian. Laws in 44 states require guardians to file regular accountings of the ward’s money. Some states also require courts to regularly check on the ward’s personal status. However, the Uniform Probate Code only requires that conservators of property account to the court upon their resignation or removal (sec. 5-418), and does not require any review of a guardian of the person.

The Wingspread conferes found that in many instances, the content, submission and court review of guardian reports was lacking, quantitatively as well as qualitatively. They concluded that given the loss of liberties involved in guardianship and the vulnerability of elderly and disabled wards, it is essential that the court regularly receive and review basic information about the well-being of the ward, the ward’s funds and property and the actions the guardian has taken. The conferes recommended the development of a standard annual report form for both guardians of the person and guardians of the property. Such a form could be developed by each court, or could be developed at the state level, perhaps through the court administrator’s office and/or the state association of probate judges. The standardized form also could be incorporated into the guardianship code.

The model guardianship statute drafted by the ABA Commission on the Mentally Disabled sets out specific information to be included in guardianship reports: any significant changes in the capacity of the disabled person, the services being provided, actions taken by the guardian, problems relating to the guardianship, and reasons why the guardianship should not be terminated or why no less restrictive alternative would suffice. For conservators, the report also should include a complete financial accounting of resources under his/her control.

The Wingspread conferes urged that courts strictly enforce the timely filing of all required reports. The Associated Press found that in 48% of the 2200 probate court files examined, at least one annual accounting of money was missing; only 16% of the files had annual reports on the ward; and 13% contained no reports at all. Similarly, in Florida, a Dade County Grand Jury investigation found that of 200 random files selected, 87% were not up-to-date in annual reports, 75% were not timely in financial reports, and 91% did not have completed physical examination reports. The AP study observed that such files are critical to the court’s knowledge that wards are being cared for and that their money is being spent properly. Without the files, the door is open to abuse.

A tickler system could alert the court to delinquent reports, thereby enabling the court to direct the guardian to file the report promptly or suffer the consequences of removal.

Specific contents and timely filing of guardianship reports will be of little value, however, if the report is not thoroughly reviewed by the court for two purposes: (1) to assure the use of the least restrictive arrangement to protect the health, welfare and safety of the ward; and (2) to assure that guardians are not abusing the wards and/or the wards’ assets.

Finally, the court must conduct more than a paper review of the ward’s actual circumstances. It must investigate the validity of the report and determine whether the activities of the guardian reflect the purpose(s) of the guardianship. Discussions at the Wingspread Symposium recognized that while many guardians are dedicated, honest and caring people, the opportunities for financial or physical mistreatment or neglect are significant, particularly with the advent of professional guardianship agencies serving large numbers of wards.

The reality, though, is that most courts lack the resources to adequately review every guardianship on a regular basis. Budget restraints limit the oversight a court can provide. Thus, the Wingspread participants recognized the potential role for volunteers in aiding the courts’ monitoring of guardianships. For example, Legal Counsel for the Elderly of the American Association of Retired Persons (AARP) is piloting demonstration projects in Atlanta, Denver and Houston in which AARP volunteers review files, update the court on delinquent accountings, interview wards at their places of residence and report to the court. In Los Angeles, university students visit wards and report to the court through a Volunteer Visitation Alliance.

Reaching beyond these approaches, statutes could provide for — and adequately fund — review boards or investigators to monitor the status of the ward and the ward’s finances. Since 1977, California law has mandated a system in which approximately 115 court investigators in the state’s 58 counties conducted over 22,000 investigations in one recent year. In Maryland, statutory local Adult Public Guardianship Review Boards appointed by the court provide impartial oversight of public guardianship cases.

Recommendation V-C
Public Knowledge and Involvement

Public Information — State and local public and professional information campaigns should be waged to increase public knowledge of and involvement in the guardianship process.

Volunteers — Courts should consider using volunteer programs and resources.

Commentary

The Wingspread conferes concluded “inadequate public knowledge of and involvement in the guardianship process can hinder guardian accountability.” They concluded that improved public knowledge about the
guardianship process and its risks will make it more likely that guardians will recognize and honor their fiduciary duty to their wards and their responsibility to the court. Greater public knowledge also will increase the impetus for advance planning through the use of alternatives to guardianship such as durable powers of attorney, health care powers of attorney, living wills and discretionary trusts.

The conferees also concluded that the effective use of volunteers would increase public involvement in and scrutiny of the guardianship system. Volunteers could serve as guardians, consultants to guardians (for example, pro bono attorneys providing legal back-up), friendly visitors in a guardianship program or monitors of either the court records or the well-being of the wards.

Volunteers serve an important outreach and linkage function as they relay their experiences to friends and relatives who may be unfamiliar with guardianship. Use of volunteers in programs can contribute to: "(1) the development of a supportive constituency; [and] (2) a change in public attitudes and knowledge.""9 Volunteers also can provide a high degree of energy, caring and attention "that can mean more to individual wards than the squadron of lawyers, psychiatrists, and social workers who might otherwise be the ward's only source of direct contact.""9

Yet the conferees recognized that these benefits require considerable staff time in recruitment, training and supervision which may come at the expense of direct client service.

Public guardianship programs should maximize opportunities to utilize volunteer services. At the same time, care should be taken that the benefits of volunteer services remain greater than the costs to secure them. A volunteer is initially highly motivated, but may not be as continually motivated as someone who is paid to do a job that can be as depressing and frustrating as it can be emotionally and spiritually rewarding."10

Recommendation V-D
Guardian Standards and Plans

Guardian Performance Standards — Model guardian performance standards should be developed and distributed nationally and adapted for local use.

Guardianship Plan Forms — Guardianship plan forms should be developed locally and their use required by the courts.

Commentary

Guardians currently have little guidance in statute or court rule to help them define and carry out their fiduciary duties and enhance the quality of life for their wards. Also, most courts lack a comprehensive assessment tool for evaluating guardian performance. The Wingspread conferees concluded that the absence of guardian performance standards and written individual guardianship plans makes it difficult to measure guardian performance. They agreed that model guardian performance standards would be useful in setting out basic principles, duties and requirements. A national model then could be adapted at the state and local level to reflect the specifics of state law and local resources.

The U.S. House Committee on Aging has published a committee print presenting a set of proposed standards for guardians originally developed by the Center for Social Gerontology. These standards address: (1) basic statutory duties; (2) avoidance of conflict of interest; (3) rights of wards; (4) guardian's responsibilities and activities (including visitation requirements); (5) assessment and monitoring of the ward's living situation; (6) directions regarding medical services and treatment; (7) instructions regarding the disposition of property; and (8) responsibilities upon the death of a ward."11 The standards also set out additional requirements for guardianship agencies.

Applying any standards to the situation of individual wards requires a specific guardianship plan. Under the model guardianship statute drafted by the ABA Commission on the Mentally Disabled, each guardian must develop such a plan, with the participation of the ward "to the maximum extent possible," and submit it to the court. The plan must specify necessary services; the means for obtaining these services; the manner in which the guardian will exercise his/her decision-making authority; and the extent to which decision-making will be shared with the ward. Similarly, an "individual conservatorship plan" must specify the services necessary to manage the financial resources involved; the means of securing those services; the manner in which the conservator will exercise and share decision-making authority; and policies and procedures governing the expenditure of funds.

An updated plan must be submitted with each annual report. Such a plan is a useful evaluation and monitoring tool in that it "provides a reference against which the performance of the [guardian or conservator] and the delivery of assistance and services can be compared.""12

The Wingspread conferees recommended that courts develop plan forms and require guardians to complete the forms and update them periodically. The Guardianship Program of Dade County, Inc. and the Guardianship Program of Lutheran Ministries, both in Florida, have used a plan form that provides a workable example. Separate sheets cover seven possible areas of the ward's needs: (1) living situation; (2) activities; (3) functional status (daily skills); (4) nutritional status; (5) medical status; (6) intellectual functioning and behavior; and (7) services and social support. For each area of need, the plan requires statements on the following:"13

- the specific needs of the ward in particular functioning areas;
- the optional (least restrictive) arrangements to meet those needs;
- the available services that will be obtained to meet those needs within six months and on a longer term basis;
- the rationale for providing any non-optional service;
• the guardian or staff responsible for obtaining the service; and
• minimum conditions for limiting or terminating the guardianship.

Recommendation V-E
Role of Attorneys

Rules of Professional Conduct — State supreme courts and appropriate bar entities should develop and enforce rules of professional conduct regarding the performance of attorneys in holding guardians accountable — in their role as guardians themselves, in their representation of guardians and in their representation of wards.

Continuing Legal Education — Continuing legal education programs and bar publications should address the performance of attorneys in these roles.

Commentary

The Wingspread conferees concluded that most attorneys perform admirably while handling difficult guardianship cases. Yet they acknowledged that in many instances, the knowledge and performance of attorneys — as guardians, for guardians and for wards in holding guardians accountable is lacking, quantitatively as well as qualitatively. They observed that in some instances, attorneys may not understand the full extent of their duties regarding accountability or may be confused about their ethical obligations in an area fraught with complexity. Thus, they recommended that state supreme courts and bar entities provide further guidance through the development — and active enforcement — of rules of professional conduct in three related areas.

Attorneys representing guardians. The bar could benefit from more direction on the appropriate relationship of attorneys to client-guardians. For example, what is the extent of the attorney’s responsibility to educate the guardian about his/her duties; to remind the guardian of accountings due; and/or to monitor the performance of the guardian? What is the attorney’s obligation when the attorney has evidence that the guardian is not acting in the best interests of the ward and/or is violating his/her fiduciary duty? May the attorney take action without violating the confidentiality of the attorney-client relationship?

The ABA Model Rules of Professional Conduct and ABA Ethics Opinions provide some guidance on the last question. The comment to Rule 1.14 provides that if the attorney is aware that the guardian “is acting adversely to the ward’s interest, the lawyer may have an obligation to prevent or rectify the guardian’s misconduct.” The comment refers to Rule 1.2(d), which says that a lawyer shall not assist a client in conduct which the lawyer knows is criminal or fraudulent. But the rule gives no clue as to how the lawyers should “prevent or rectify” the misconduct.

ABA Ethics Opinion C1-805 (9/3/82) indicates that a lawyer representing a guardian who is acting against the ward’s interest must first make a reasonable attempt to have the client-guardian correct the situation. If the client does not do so, the lawyer should disclose the problem to the court regardless of confidentiality concerns.

Finally, another option not explored in the Rules or the Opinions is the attorney’s withdrawal from the case. By withdrawing, the attorney may cause the judge to order the guardian into court to explain why he or she did not cooperate with the lawyer.14

The conferees maintained that state bar rules of ethics should directly address these issues, and bar publications and continuing legal education sessions should emphasize their importance to practicing attorneys.

Attorneys representing wards. Recommendation II-C above discusses the role of counsel for the proposed ward before and during the guardianship hearing. It states that counsel should zealously advocate for the client’s expressed or implied wishes. However, what — if any — is the role of respondent’s counsel once a guardian has been appointed? Should the attorney represent the ward in an appeal; continue as advocate for the ward within the confines of the guardianship order; continue to communicate regularly with the ward; assess the possibilities for restoration; monitor the actions of the guardian; and/or ensure that accountings to the court are timely and reflect the true situation of the ward? The symposium attendees contended that these questions require careful scrutiny by state courts and bar associations.

Attorneys as guardians. Attorneys who act as guardians are accountable to the court in two respects — as a licensed member of the legal profession and as a judicially appointed fiduciary. As attorneys, they should abide by rules of professional conduct. As guardians, they should act in accord with state law and the judge’s order. Some of the Wingspread conferees questioned whether such dual-role attorneys have, or should have, a special duty. Should selected standards for guardians be incorporated into rules of professional conduct for lawyers? Should bar associations sponsor sessions instructing guardians on their duties? Again, these questions merit serious consideration and resolution by judicial and bar entities.

Recommendation V-F
Role of Judges

Continuing Judicial Education — Continuing judicial education should include information about the judge’s role in holding guardians accountable.

Encouragement and Recognition — Judges should be encouraged to fulfill their role in accountability efforts. Before disciplinary actions are taken against those who fail to meet their responsibilities, judges should be encouraged by all available means. Judges who excel in their performance in this area should receive political endorsement and peer, consumer and press recognition.

Commentary

The symposium’s working group on accountability contended that many judges — while admittedly overworked, swamped with cases and understaffed — none-
theless should be more sensitive to the need for accountability in guardianship. They maintained that some guardianship abuses could be averted by greater judicial awareness of the court’s role in monitoring the guardian’s performance.

A minority of Wingspread conferees, however, observed that most judges are carrying out their responsibilities well given limited resources. Nonetheless, the majority concluded that far too many judges have not fully recognized the need for regular and thorough guardian accountability and are not aware of the possible ways to achieve it.

The remedies are threefold: education, encouragement and, as a last resort, disciplinary action. First, presentations and materials on guardian accountability should be available to probate and other judges handling guardianship cases. These materials might include reporting forms, computerized tickler systems and suggestions for appropriate roles of court personnel and the creative use of volunteers and review boards.

Second, judges who consistently maintain a high level of guardian accountability should be commended and their techniques publicized to their peers. State/local judicial organizations could play a key role in molding judges’ attitudes about accountability and recognizing those who do well. Consumer groups, including organizations of elderly and disabled persons, also could show their appreciation of such judicial efforts.

Finally, judicial codes of conduct might address the responsibility for ensuring guardian accountability. Such provisions should be enforced through appropriate disciplinary action.

Footnotes for Recommendations V-A-F

3. Supra note 1, at 1.
6. Supra note 1, at 1.
7. Supra note 1, at 14.
9. Supra note 8, at 156.
10. Id.
12. Supra note 4, at 562-563 and 568.
13. Supra note 8, at 132.
Public and Private Guardianship Agencies

Recommendation VI-A
Proper Role of Guardianship Agencies

Public guardianship agencies should be used as a last resort when guardianship alternatives have been exhausted and other qualified guardians are unavailable or unwilling to serve.

Guardianship agencies should not directly provide services such as housing, medical care and social services.

Commentary

While family and friends comprise the largest segment of persons serving as guardians, the last two decades have witnessed a remarkable increase in the number of public guardians and private guardianship agencies. By the beginning of this decade, statutes in nearly 70 percent of the states specifically provided for a public guardian.¹ The growth in the number of public guardians has been paralleled by a “new industry...of professional guardians,”² comprised of private agencies — both for-profit and not-for-profit — whose sole, or primary, purpose is to serve as a guardian. The factors that presage increased use of guardianship in the future suggest that guardianship agencies may become the provider of choice as the use of guardianship services rises.

First, the numbers of persons needing assistance will grow. The nation’s elderly population will increase as elderly people survive illnesses that once were fatal. The aging process itself may produce health, social and financial problems that often require daily support services. In addition, medical advances have led to increased survival rates of infants born with disabling conditions and have contributed to increased life expectancies for persons with disabilities. Many people with disabilities live in the community as a result of deinstitutionalization. In this era of budget-trimming, where support services are becoming inadequate or unavailable, it is likely that many of these individuals will be placed under guardianship.

Second, as the traditional support networks of elderly and disabled persons — relatives and friends — decrease in numbers or are not able to help, government and private agencies will step into the breach to meet the long-term care needs of many of these individuals. Changes in family structure and demographics, including two-income households and geographic dispersion of family members, will continue, making reliance on the family unrealistic.

Third, even if relatives are present or available to help, they may be contributors to the need for guardianship, e.g., abuse and neglect, or be unable to meet their family member’s needs due to their own problems and infirmities or an inability to deal effectively with the vulnerable person.

Many state legislatures have responded to these trends by authorizing the creation of a public guardian. Yet evidence reveals that many of these public guardian agencies, due to staff shortages, poor management and insufficient budgets, have been unable to respond to those who need their services or to do so in a timely fashion; failed to properly supervise their wards’ care; prematurely institutionalized their wards; inadequately responded to complaints; and been slow to act when improvements in their wards’ physical or mental condition might warrant termination of the guardianship.³

Public guardianship agencies appear to be suffering from a lack of clarity with regard to their role. Some existing agencies inherited their roles without carefully evaluating their responsibilities and determining the most effective means for meeting them. Other agencies have provided less than adequate services by trying to be all things to all people. This confusion has resulted in inappropriate referrals and an inefficient provision of services.⁴

In states without public guardians, inexperienced attorneys often are appointed as guardians. Bank managers and trust officers, accountants, nurses and insurance agents often recognize their clients’ needs and serve as “de facto” guardians where family members are unavailable. In many communities in these states, the formation of private guardianship agencies has, to some degree, provided an alternative to these informal arrangements.

Yet the attendees who focused on guardianship agencies were concerned that “creaming” — private agencies trying to limit their services to wards with substantial assets — would make the public guardian a “dumping ground” for only the most hopeless individuals. At the same time, private guardianship agencies do not exist in all communities and services must be made available to individuals who do not have or cannot afford alternatives to public guardianship.

The symposium conferees adopted a two-part approach to defining the appropriate role of a guardianship agency. First, public guardianships, even more so than other guardian arrangements, should be used as a last resort. Therefore, it should be demonstrated to the court that guardianship alternatives have been investigated and found to be unavailable or inappropriate and other qualified guardians are unavailable or unwilling to serve.

The conferees recommended that, unless and until public guardians’ offices receive increased funding, all guardianship agencies should target their services to those who truly have no alternatives. Public agencies’ limited resources could then be directed to the tasks of acting as guardian, exploring alternatives to guardianship and actively monitoring changes and improvements in their wards’ condition for those who are most needy. (See recommendation VI-D).

There was a clear consensus that guardianship agencies that function as both guardian and direct service provider face serious potential conflicts of interest. The guardian’s direct provision of services is of particular concern when public guardianship agencies are housed within
social service agencies, an arrangement often referred to appropriately as the "conflict of interest" model. The social service agency's main purpose is likely to be the efficient distribution of various forms of financial and social assistance. This goal often interferes with a guardian's proper role — to challenge service provider agencies that are not providing proper services.

Consequently, the conferees recommended that public guardians be independent. Such an arrangement would make these public agencies as free as their private counterparts to independently evaluate and advocate for their wards' needs and, if necessary, challenge inadequate or inappropriate services.

**Recommendation VI-B**

Standards for Guardianship Agencies

Guardianship agencies and professional guardians should comply with national standards that are adapted and monitored by the states.

These standards should address basic requirements for staff training and qualifications, minimum service levels and basic reporting requirements.

Compliance with these standards should be enforced by the judiciary.

**Commentary**

The number of guardianship agencies will continue to grow for many years. Experience with enterprises offering related support services such as home health care and daily money management has shown that this growth is likely to proceed on a continuum ranging from large, sophisticated agencies to small one or two-person operations.

A great deal of variation already can be seen among existing agencies with respect to staff size, services provided, use and roles of volunteers, caseload, fees, funding sources and budgets. Uniformity also is missing in the powers granted to the agencies over wards' persons and/or property as well as agency accountability. In large part, this lack of uniformity is due to the absence of standards for measuring the quality of guardianship programs.

While some variability is inevitable, and probably necessary, a more coherent approach is warranted. Standards are needed to ensure that individuals entering the "business" of serving as guardians clearly understand their responsibilities and are held accountable for their performance. Policymakers and funding sources need a clear sense of the guardianship agencies' mission and the operating standards for evaluating performance. Publicly-funded agencies should be required to comply with these standards as a condition of continued funding.

As fiduciaries, guardians are held to the highest standard of care allowed by law. They are required to be reasonable and prudent, and to treat each of their wards as though he or she is the only ward. This standard should apply regardless of how many wards are represented. In addition, individuals who profess to have special knowledge or skills are required to use them in the performance of their duties, and are held to a higher standard of care commensurate with that specialized knowledge and skill. Because professional guardians — public and private — hold themselves out as experts, they should be held to this more onerous standard.

There is little evidence that courts, county boards of supervisors or other oversight bodies monitor or enforce guardianship agencies' adherence to the requisite standard of care. Most courts do not have the budget or staff to monitor guardianship agencies, and have no standards by which to measure performance. Even where performance standards have been established, either by local law, court rule or individual judges, they are not uniform, creating a great deal of variation in the manner and quality of services delivered.

Standards should be developed at the national level for adaptation on a statewide basis. The standards should be devised by a broad-based coalition of service providers and representatives of the bench and bar. At a minimum, the standards should address staffing levels, staff training and qualifications, minimum levels of service to be provided to wards and basic reporting requirements. Particular attention should be paid to the guardian's role and the avoidance of conflicts of interest. Ongoing education and training should be required for guardians employed by agencies, as well as for the staff of agencies that create, fund and monitor guardianship programs.

Since each ward requires different types and amounts of services, the conferees felt that it was unrealistic to recommend or require a particular staff-to-ward ratio or minimum hours of service or visitation of wards. Instead, they urged that the standards focus on the total number of wards served by a guardianship agency or a single guardian as a function of the time needed to fulfill each ward's individualized needs. For example, wards residing in non-institutional settings such as personal residences or group homes will require more attention than wards living in institutions. Limiting a guardianship agency's caseload in this way will help ensure that the agency fulfills its obligation to explore alternatives to guardianship and encourage maximum self-reliance and restoration of capacity for every ward in its care. (See recommendation VI-D).

While enforcement of standards statewide will promote uniformity, the local judiciary should have the predominant role in enforcing any standards, since the appointing court ultimately is responsible for monitoring each guardianship. The judges who appoint guardians have the authority and duty to remove and/or sanction a professional guardian whose performance does not meet the required standards.

**Recommendation VI-C**

Funding of Guardianship Agencies

States should assure adequate funding for their public guardianship agencies as well as for other organizations that receive public funds to provide guardianship services. Publicly funded guardianship agencies should charge
fees when clients are able to pay. However, the agency's budget should not be contingent upon the collection of fees.

Guardianship services should be reimbursable under federal and state public benefit programs.

Commentary

Many statutes creating public guardianship agencies do not specifically provide funding, and states often do not have specific budget allocations for these agencies. As a result, public guardian agencies often receive funds from other governmental agencies such as social services departments.

Similar to the problems faced by agencies that serve as both guardian and service provider (see recommendation VI-A), conflicts of interest may arise if an agency that funds the public guardian also provides services to wards. This dual role may inhibit the guardianship agency from making the proper decision regarding services for its wards and challenging its parent agency's decisions. In addition, the guardianship agency may encounter difficulties in serving wards who do not meet the funder's eligibility criteria if and when it becomes necessary to use the funder's other services or to seek additional funds from other sources.

Furthermore, public funding sources should not have the power to direct an agency's programmatic operations. Rather, a publicly-funded guardianship agency should design its programs to meet the needs of its wards, and should retain sufficient independence to raise legitimate challenges to the hand that feeds it without fearing a loss of funds.

The symposium attendees agreed that states that mandate the creation of a public guardian, and those that fund private agencies to provide guardianship services, are obliged to ensure adequate funding for the programs. One of the premises underlying public guardianship is that many individuals who need guardianship will be unable to pay for these services. Unless states appropriate adequate funds, the existence of public guardians will hold out an empty promise for individuals who have nowhere else to turn. States, not counties, should be responsible for funding in order to ensure some degree of quality control on a statewide basis.

While adequate state funding is crucial to the provision of quality services, the conference agreed that publicly-funded guardianship agencies should collect reasonable fees from wards who are able to pay. Such payments would help to defray program costs and support the provision of services to wards who are unable to pay and otherwise could not receive program services. Nevertheless, the agency's budget should not depend upon the collection of fees.

Guardianship agencies that receive public funds may be pressured to collect inappropriate fees to offset costs to the state or county. While such pressure may not be overt, even subtle pressures can affect the provision of services. Such pressure may even cause agencies to seek out or accept only cases that are able to pay for services and to terminate the cases, regardless of the ongoing need for services, when the wards no longer are able to pay. All agencies, particularly public guardians, must be kept free from pressure to cover operating costs with fees.

Finally, federal and state public benefit programs that are targeted to clients who are likely to be wards of public agencies, e.g., Title XX and medical assistance programs, should recognize their responsibility to support guardianship services. Where appropriate, these public benefit programs should treat private guardianship agencies' services as reimbursable expenses. Such coverage would further relieve the public guardian's burden and also would allow individuals to choose among guardianship service providers.

Recommendation VI-D

Agencies' Role Beyond Providing Guardians

Those entities that mandate or fund guardianship programs should recognize their larger responsibility to provide a continuum of support services that address the many human needs related to guardianship.

Guardianship agencies should investigate and explore alternatives to guardianship before the appointment of a guardian (or filing of a petition), and should educate the community on the appropriate uses of guardianship and the development and use of alternatives to guardianship.

Guardianship agencies should work to limit or terminate guardianships by exploring alternative services and encouraging the ward to develop maximum self-reliance and independence.

Commentary

The appropriate role of a guardianship agency is an extensive one that begins as soon as a referral to the agency is made or a guardianship petition is filed, depending upon the particular jurisdiction's procedures, and continues through the termination of an individual guardianship into the areas of community education and the development of less restrictive alternatives. Entities that mandate or fund guardianship agencies should recognize these investigative and community education roles and budget for these time-consuming activities.

A primary part of the agency's early role is an investigative function — to ensure that alternatives both to guardianship and to the agency have been explored and appropriately rejected. Many persons referred to the public guardian by a court's guardianship order have not yet had any contact with the agency. After the public guardian's appointment as guardian, interviews and assessments often reveal that the provision of various social services would have solved the person's problem and obviated the need for guardianship. For example, one study found that the majority of cases referred to the Los Angeles County Public Guardian were "solved," and consequently rejected for service, by the public guardian's investigation. Thus, investigations prior to guardianship orders can divert inappropriate cases, preserving the
agency's resources for those who truly need guardianship services and have no alternative to the public guardian. In order to perform this screening role effectively, public guardian agencies need to maintain links to providers of social and other support services. While some staff time must be devoted to developing and maintaining these links, such a referral network can reduce the amount of resources needed for guardianships over the long term.

The agencies' obligation to explore guardianship alternatives extends beyond the time a petition is filed or a guardianship established. (See recommendation VI-D.) The Wingspread conference noted that guardianship agencies should seek to limit their role by constantly working toward restoring the ward's capacity and terminating the guardianship. The agencies should work to maximize their wards' autonomy and independence by encouraging them to function to the full extent of their capacity. Consequently, guardianship agencies always should be investigating, developing and implementing less restrictive alternatives to guardianship.

The conference recognized that working to restore capacity and terminate guardianships may be abhorrent to agencies with fee-generating cases. However, these agencies also should recognize this goal as their ultimate one. They can enhance their credibility with the courts by showing that their assistance enabled someone to manage his or her own affairs again, and that they now stand ready to serve someone else.

The public guardian's role also encompasses educating the community about steps that should be taken to help avoid the need for guardianship; encouraging the development of alternative services in the community; and training social service providers, and other common referral sources, in how to determine potential wards' appropriateness for agency guardianship. Community education will enable the agency, the funder and the client to more fully understand the limits of the agency's role as guardian and will help ensure that referrals to the agency are more appropriate, again preserving the agency's resources for those who truly need its services.

**Recommendation VI-E**

**Serving Poor and Low-Income Clients**

Publicly-funded guardianship programs should provide guardianship services regardless of the proposed ward's ability to pay. Moreover, private guardianship agencies also should be encouraged to provide guardianship services to proposed wards who are indigent.

**Commentary**

Guardianship agencies should be concerned about the needs of low-income, poor and indigent clients. The numbers of these needy individuals supported the birth of the public guardian concept and demonstrate the continuing need for its existence. Yet, some public guardians are required or have discretion to refuse cases according to the size of the estate involved. In Chicago, for example, the Cook County Public Guardian has legal authority to reject cases where the estate's value is less than $25,000. Some California counties set a limit of $7,500 per estate, either through formal or informal means. These limits raise obvious concerns in a system designed as the "last resort" for low-income and indigent clients. The conference also raised other more general concerns about policies that continually relegate non-paying clients to public programs and the wisdom of requiring those programs to bear the entire burden of serving low-income and indigent clients.

The conference believed that any publicly-funded, non-governmental guardianship agency (e.g., agencies funded by Title XX and area agencies on aging) has the responsibility to serve some clients regardless of their ability to pay. For example, Support Services for Elders in San Francisco, which is supported by fees, has a mix of 70 percent paying and 30 percent non-paying clients.

In addition, the conference indicated that private agencies should be encouraged to serve some low-income and indigent wards to relieve some of the burden currently placed on publicly-funded programs. Similar to "pro bono" services, such an approach would help stem the tide of cases in which certain private agencies seek only those clients who can pay; imprudently deplete their wards' assets; and refer these wards to the public guardian when their funds have been exhausted.

**Recommendation VI-F**

**Agency Autonomy, Risk Management and Liability**

To the greatest extent possible, the guardianship agency's professional autonomy should be preserved.

To limit their risk of liability, guardianship agencies should develop and implement operating policies in accordance with their fiduciary duties.

Guardianship agencies should limit the impact of liability through insurance, as it becomes available.

States should be encouraged to facilitate the development of insurance coverage for guardianship agencies.

**Commentary**

As discussed earlier in this section, agency autonomy is of paramount concern. Guardianship programs should be free to serve their wards without pressures from parent or funding agencies, and should only be required to demonstrate to these agencies that they are complying with performance standards. Furthermore, public agencies should be able to challenge other governmental divisions concerning both funding levels and the provision of inadequate or inappropriate services.

Guardianship agencies are affected by the risk of liability and the widespread unavailability of liability insurance, a problem common to public fiduciaries. In order to reduce the risk of exposure, the symposium attendees recommended that guardianship programs, funding sources and potential regulators explore "risk management" techniques.

At a minimum, guardianship programs should develop
and follow operating policies and procedures tied to industry standards that conform to their fiduciary obligations. The conference recognized the tendency of social services providers to venture into the guardianship arena with an unclear understanding of the risks or responsibilities involved. The requirement of clear operating policies can generate a higher level of responsibility and diligence in program design.

Risk management should be pursued independent of the question of insurance coverage. If guardianship programs are relying merely on a liability insurance policy, they will not be providing quality services; closely managing their staffs; or adequately protecting their wards.

The importance of minimizing the risk of liability exposure is heightened by the difficulties encountered in trying to obtain professional liability insurance, particularly for private programs. It is clear that the willingness of private entrepreneurs to provide guardianship services is closely tied to the availability of insurance. While public programs generally do not have to be concerned about liability insurance, since they usually are covered by the insurance held by the “parent” governmental entity, it still is in their interest to have good liability insurance available. Unless private agencies can obtain coverage, they will not be able to serve clients who, in turn, will add to the public agencies’ caseloads.

The insurance industry is reluctant to develop insurance products for programs that need relatively small coverage and present potentially high or uncertain risks. Efforts should be made on the state level, and among service providers, to overcome this resistance and pursue self-insurance. As states begin to regulate guardianship agencies, they should be encouraged to recognize that they have a responsibility to ensure the availability of liability coverage. States and guardianship programs should explore creative ways of financing liability coverage such as a risk pool funded through wards’ assets that pass through intestate succession or fees paid to probate wards’ estates.

Footnotes for Recommendations VI-A-F

3. J. Regan, Protective Services for the Elderly — A Working Paper, prepared for the U.S. Senate Special Committee on Aging, July 1977, Appendix 5 at 125.
4. Steinberg, R., “Alternative Approaches to Conservatorship and Protection of Older Adults Referred to Public Guardian,” Final Report, Institute for Policy and Program Development, Andrus Gerontology Center, University of Southern California, Los Angeles, CA 90089. Funded by U.S. Dept. of Health and Human Services, grant no. 85ASPE154A, Sept. 1985. Eighty percent of all cases referred to the Los Angeles County Public Guardian during the first quarter of 1985 were inappropriate for public conservatorship.
5. Supra note 1, at 60. See also “Final Report of the Public Guardianship Pilot Program,” Office of the State Courts Administrator, Florida Supreme Court (1984), at 44.
6. Supra note 1, at 75-76.
8. Supra note 7, at §7-302.
9. Supra note 1, at 169.
10. Supra note 4, at 2.
11. Supra note 4, at 61-64.
National Guardianship Symposium

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Policy of the American Bar Association
Policy of the American Bar Association

Be It Resolved, that the American Bar Association supports the following recommendations of the National Guardianship Symposium, which aim to safeguard the rights and maximize the autonomy of adult disabled wards and proposed wards, while providing for their needs.

Be It Further Resolved, that the American Bar Association urges the implementation of the recommendations at the state and local level through appropriate legislation, legal and judicial rules and practices, workable programs, and educational sessions.

Recommendations of the National Guardianship Symposium

Overview of Guardianship

Recommendation I-A
Alternatives to Guardianship

To encourage alternatives to and more appropriate uses of guardianship, the costs and benefits of various guardianship alternatives should be explored and certain guardianship practices curtailed. Alternatives should include (1) health care consent statutes and living; (2) durable and health care powers of attorney; (3) representative payees; and (4) crisis intervention techniques such as mediation, counseling, and respite support services. In addition, residential admission policies which establish guardianship as a criterion for admission should be withdrawn.

Recommendation I-B
Roles and Standards for Performance

Roles and standards for performance should be clearly defined, communicated and monitored. A national interdisciplinary group should develop a conceptual framework for performance to be adopted by statute and/or implemented by state court administrators, interagency task forces, professional associations or other working groups concerned with performance standards.

Recommendation I-C
Systematic Data Collection and Evaluation

At a minimum, basic information including demographic characteristics (age, sex, financial status), decisions made by guardians and consequences of guardianships should be independently collected and reviewed; but the courts should fully cooperate in this process. The information should be used for quality assurance, monitoring, learning about system activities, needs assessments, program development and research.

Recommendation I-D
Screening to Divert Inappropriate Cases/
Costs of Guardianship Reform

To maximize limited financial resources, screening should be used to divert inappropriate cases out of the guardianship system. Moreover, certain other potential funding resources should be explored: (1) insurance policies such as those provided for third parties, long-term care, legal services and disabilities; (2) pro bono contributions by all of the professions involved in the guardianship process; (3) increased fees to parties who can bear the cost; (4) general increases in probate court users' fees; (5) general revenues; and (6) interest on lawyers' trust accounts (IOLTA).

Recommendation I-E
Multidisciplinary Guardianship Committees

Each state should create a multidisciplinary guardianship and alternatives committee (GAC) to plan for the statewide implementation of these recommendations. In addition, an implementation manual should be created, which will provide descriptions of successful guardianship programs, practices and model legal forms.

To deal with future issues on an ongoing basis, the GAC should serve as a planning, coordinating and problem-solving forum for the state's guardianship system and should review the data being collected in that state (see Recommendation I-C). Finally, to support the GACs' efforts, a national guardianship resource center should be established to provide technical assistance to interested parties and to further reform efforts.

Approved by the ABA House of Delegates on February 7, 1989
**Procedural Due Process and Legal Representation of the Proposed Ward**

**Recommendation II-A**

**The Petition**

_Simplified But Specific Petition Form_ — A petition form should be widely available in each state to initiate guardianship proceedings. While this form should be as simple as possible to obtain, fill out, and process, it should require at least the following information: (a) a description of the functional limitations and physical and mental condition of the ward; (b) the specific reasons why guardianship is being requested; (c) the steps taken to find less restrictive alternatives to guardianship; (d) the guardianship powers being requested; and (e) the qualifications of the individual proposed to serve as the guardian.

_Preliminary Examination_ — A judicial officer should conduct a preliminary proceeding to examine the petition to ensure all the required information to initiate guardianship is completed, and to promptly schedule any other necessary proceedings.

**Recommendation II-B**

**Minimum Due Process Safeguards**

The following basic due process protections not only should be incorporated into the statutes of each state, but steps should be taken to ensure that these protections are carefully implemented in all guardianship proceedings:

_Right to Notice_ — A court officer dressed in plain clothes and trained to communicate and interact with elderly and disabled persons should serve the respondent personally and present the information to the respondent in the mode of communication that the respondent is most likely to understand. The written notice should be in plain language and large type. It should indicate the time and place of the hearing, the possible adverse consequences to the respondent of the proceedings and list the rights to which the respondent is entitled. A copy of the petition should be attached. Unless the court orders otherwise, at least fourteen (14) days notice should be given before the hearing takes place.

_Hearing Rights_ — The respondent shall receive a hearing before an impartial decision-maker in which he or she: (a) is present at the hearing and all other stages of the proceedings; (b) may compel the attendance of witnesses, present evidence and confront and cross-examine all witnesses; (c) is entitled to a clear and convincing standard of proof; and (d) may appeal any adverse orders or judgments.

**Recommendation II-C**

**Education and Training**

_Training for Attorneys and Judges_ — Training should be (a) made available to judges hearing guardianship cases, (b) required for attorneys who wish to be appointed as counsel in guardianship cases, and (c) required for attorneys who wish to be certified as legal-specialists in guardianship, or in the disability or elder law area.

_Content of Training_ — The training for both judges and attorneys should include: (a) the rights and procedures applicable in guardianship proceedings; (b) the aging process and disability conditions, and the myths and stereotypes concerning older and disabled persons; (c) the skills required to effectively communicate with disabled and elderly persons; (d) the applicable medical and mental health terminology and the possible effects of various medications on the respondent; and (e) services and programs available in the community for elderly and/or disabled persons.

_Model Curriculum_ — A model curriculum should be prepared to aid in the development and implementation of training programs for judges and attorneys. This curriculum should be prepared from a national perspective, but the materials should be adaptable to state and local laws and situations.
Determination of Incapacity

Recommendation III-A
Definition of Incapacity

Incapacity Redefined — The definition of incapacity should focus upon but not be exclusively limited to the following elements: (a) incapacity may be partial or complete; (b) incapacity is a legal, not a medical term; (c) a finding of incapacity should be supported by evidence of functional impairment over time; (d) the finding of incapacity should include a determination that the person is likely to suffer substantial harm by reason of an inability to provide adequate personal care or management of property or financial affairs; and (e) age, eccentricity, poverty, or medical diagnosis alone should not be sufficient to justify a finding of incapacity.

NCCUSL’s Definition — The Joint Editorial Board of the Uniform Probate Code should request that the National Conference of Commissioners on Uniform State Laws reconsider the definition of “incapacity” as it is now contained in section 1-201 (7) of Chapter V of the Uniform Probate Code and the Uniform Guardianship and Protective Proceedings Act to recognize the need for a definition that stresses the individual’s level of functioning.

Recommendation III-B
Evidence Required

Rules of Evidence — Rules should apply in guardianship hearings.
Expert Testimony — Courts should hear expert testimony from any professionals whose training and experience aid in the assessment of functional impairment. These experts may include, but are not limited to, physicians, nurses, psychologists, social workers, developmental disability professionals, physical and occupational therapists, educators, habilitation workers, and community health workers.
Questioning of Witnesses — Judges should participate in the questioning of witnesses where appropriate.
Assessment in a Familiar Environment — Whenever possible, proposed wards should be assessed in their usual environment and with all due consideration given to their privacy and dignity.
Findings — Each finding should be based on clear and convincing evidence.

Recommendation III-C
Guidelines for Judges

Authority Granted — The authority granted to a guardian should be directly related to the functional impairment of the ward.

Functional Assessment — Medical diagnosis alone should not be considered evidence of functional impairment.
Behavior Fluctuation — Behavior is a function of the person, the time and the environment. Changed environments may temporarily disrupt capacity. Functional capacity may be restored in time after return to a familiar setting or adaption to a new setting.
Respondents’ Values — Respondents have a right to be respected. Respondents have a right to choose risk-associated lifestyles. Assumption of a risk, or refusal of medical treatment or social and community services should not, without more, be determinative of functional impairment or incapacity.

Recommendation III-D
Scope of the Court’s Decision

Limited guardianship — There should be a statutory presumption in favor of limited guardianship.
Temporary Guardianship — Courts should consider temporary guardianship where appropriate.
Modifications — Court orders should make it relatively easy for the court to extend, limit or dissolve guardianships.
Specificity of Order — The order should be as specific as possible with respect to powers and duties of the guardian.

Recommendation III-E
Standards for the Orders

The Ward’s Preferences — The ward’s previously expressed preferences regarding choice of a guardian should be followed.
Substituted Judgment Standard — “Substituted judgment” should be the standard to guide the decision-making of the court or the guardian whenever possible. The doctrine of “best interest of the ward” should be employed only in those instances where no evidence of the ward’s preference exists.
Choices of the Ward — The contemporaneous expressed wishes or spoken choice of the ward should be given due consideration.

Recommendation III-F
Standards for Restoration

Prompt Judicial Response — The court should respond promptly to requests from the ward for a redetermination of status and possible restoration to legal capacity.
Burden of Proof — Upon a showing of favorable change in circumstances, the burden of proof should be imposed upon those seeking to continue the guardianship.
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Recommen dation IV-A
Removal of Barriers

Access — Judges should encourage access to the courts by elderly and disabled respondents.

Scheduling — Courts should take into account the needs of elderly and disabled respondents in scheduling guardianship hearings.

Conduct of Hearings — In the conduct of hearings, judges should seek to maximize communication with and participation of elderly and disabled respondents.

Public Information — Courts should assist in the preparation and dissemination of information to the public regarding guardianship and its alternatives.

Recommen dation IV-B
Use of Limited Guardianship and Other Less Restrictive Alternatives

Use of Limited Guardianship — In the absence of statute, judges should use their inherent or equity powers to limit the scope of and tailor the guardianship order to the particular needs of the ward. The petition and order should include detailed statements of the respondent’s functional capabilities and limitations. The court’s order should require the guardian to attempt to maximize self-reliance, autonomy and independence; and, periodically, the guardian should report these efforts to the court.

Social Service/Judicial Linkages — Courts should maximize coordination and cooperation with support and social service agencies in order to find alternatives to guardianship or support a limited guardianship.

Continuing Education — Continuing judicial education should be offered for judges and court personnel on programs concerning guardianship, including: the aging process, the aging network and the Older Americans Act, the protection and advocacy network, the developmental disabilities process and the Developmental Disabilities Act, the least restrictive alternative doctrine, and practical ways to tailor guardianship.

Recommen dation IV-C
Creative Use of Non-Statutory Judicial Authority

Development of Guardianship Rules — The court should participate in the development of written rules of practice and procedure that comport with due process and result in equitable outcomes.

Development of Standardized Forms — The court should devise standardized pleadings and other forms such as medical reports, investigator reports, accountings and reports of the ward’s condition.

Appointment of Impartial Investigators — The court should exercise its inherent power to appoint impartial investigators, independent medical experts and other professionals.

Recommen dation IV-D
Judicial Role in Providing Effective Legal Representation

Attorney Instruction — Courts should instruct respondents’ attorneys as to their roles and responsibilities.

System for Legal Representation — Courts should help develop an ongoing system that will ensure effective legal representation of respondents.
Accountability of Guardians

Recommendation V-A
Guardian Training and Orientation

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

Mandatory Guardian Training — Before permanent letters of guardianship are issued, the judge should require that at a minimum the guardian see the video and read the handbook.

Ongoing Assistance — The court should develop systems for ongoing training and assistance of guardians.

Recommendation V-B
Review of Guardian Reports

A Standard Report Form — A standard annual report form should be developed and required for guardianship of the person as well as guardianship of the property.

Timely Filing — The court should vigorously enforce timely filing of all required reports.

Regular, Thorough Court Review — Courts should increase the frequency and quality of report reviews; and should use such supplemental means as volunteers, review boards and investigators to verify the contents of the report and the circumstances of the ward.

Recommendation V-C
Public Knowledge and Involvement

Public Information — State and local public and professional information campaigns should be waged to increase public knowledge of and involvement in the guardianship process.

Volunteers — Courts should consider using volunteer programs and resources.

Recommendation V-D
Guardianship Standards and Plans

Guardian Performance Standards — Model guardian performance standards should be developed and distributed nationally and adapted for local use.

Guardianship Plan Forms — Guardianship plan forms should be developed locally and their use required by the courts.

Recommendation V-E
Role of Attorneys

Rules of Professional Conduct — State Supreme Courts and appropriate bar entities should develop and enforce rules of professional conduct regarding the performance of attorneys — in their roles as guardians, for guardians and for wards — in holding guardians accountable.

Continuing Legal Education — Continuing legal education systems and bar publications should address the performance of attorneys in the above roles in holding guardians accountable.

Recommendation V-F
Role of Judges

Continuing Judicial Education — Continuing judicial education should include information about the judge’s role in guardian accountability.

Encouragement and Recognition — Judges should be encouraged in their role of holding guardians accountable. Before disciplinary actions are taken against judges who fail to meet their responsibilities, judges should be encouraged by all available means. Outstanding judges should receive political endorsement, and peer, consumer and press recognition.
Recommendation VI-A
Proper Role of Guardianship Agencies

Last Resort — Public guardianship agencies should be used as a last resort when guardianship alternatives have been exhausted and other qualified guardians are unavailable or unwilling to serve.

Non-Provision of Services — Guardianship agencies should not directly provide services such as housing, medical care and social services.

Recommendation VI-B
Standards for Guardianship Agencies

Development of Standards — Guardianship agencies and professional guardians should comply with standards developed at the national level to be adapted and monitored in the states.

Coverage of Standards — Such standards should address basic requirements for staff training and qualifications, minimum service levels and basic reporting requirements.

Enforcement of Standards — Compliance with such standards should be enforced by the judiciary.

Recommendation VI-C
Funding of Guardianship Agencies

Adequate State Funding — States should assure adequate funding for their public guardianship agencies and other organizations that receive public funds to provide guardianship services.

Fees — Publicly funded guardianship agencies should charge fees when clients are able to pay. However, the agency’s budget should not be contingent upon the collection of fees.

Reimbursement — Guardianship services should be reimbursable under federal and state public benefit programs.

Recommendation VI-D
Agencies’ Role Beyond Providing Guardians

Support Services — Those entities that mandate or fund guardianship programs should recognize their larger responsibility to ensure a continuum of support services that address the many human needs related to guardianship.

Exploration of/Education About Alternatives — Guardianship agencies should investigate and explore alternatives to guardianship before the appointment of a guardian (or filing of a petition); and should educate the community on the appropriate uses of guardianship and the development and use of alternatives to guardianship.

Encouragement of Ward’s Independence — Guardianship agencies should work to limit or terminate guardianships by exploring alternative services and encouraging the ward to develop maximum self-reliance and independence.

Recommendation VI-E
Serving Poor and Low-Income Clients

Public-funded guardianship programs should provide guardianship services regardless of the proposed ward’s ability to pay. Moreover, private guardianship agencies also should be encouraged to provide guardianship services to proposed wards who are indigent.

Recommendation VI-F
Agency Autonomy, Risk Management and Liability

Agency Autonomy — To the greatest extent possible, the guardianship agency’s professional autonomy should be preserved.

Operating Policies — To limit their risk of liability, guardianship agencies should develop and implement operating policies in accordance with their fiduciary duties.

Use of Insurance — Guardianship agencies should limit the impact of liability through insurance, as it becomes available.

Development of Insurance Coverage — States should be encouraged to facilitate the development of insurance coverage for guardianship agencies.