Standards for Guardian Decision-Making

Input for the Third National Guardianship Summit

June 3, 2011 Meeting of NCLCF

I. Background

a. For the past 25 years, guardianship reform has centered largely on improving due process protections for the alleged incapacitated person, particularly with respect to capacity assessment and adjudication.

b. These issues remain critically important. However, post-appointment guardian performance and decision-making requires additional study and consideration, especially given the growth of professional and public guardianship programs.

c. The Third National Guardianship Summit: Standards of Excellence, to be convened by the National Guardianship Network in October 2011, will focus on a spectrum of issues involving guardianship standards for performance and decision-making.

d. ABA RPTE will be sending four delegates to the Summit. In addition, input from NCLCF is encouraged and will be conveyed to Summit authors and attendees. Especially helpful would be the insights of NCLCF members who represent financial institutions that serve as corporate guardians or that interface with the guardians of their clients or customers.

e. Focus of Input: Members of NCLCF are encouraged to consider the general policy questions associated with guardian standards (see Section II & III of this memo) as well as those directed to the discrete subject areas of residential placement, financial, and medical decisions (see Sections IV-VI). While all input in whatever form is welcome, it would be particularly helpful for suggestions to be organized according to the following three categories:

1. Law Reform
2. Non-Statutory Standards Reform
3. Best Practices (i.e., lawyer, professional association, court, guardian)
II. Setting the Stage: Overview of Guardian Standards

b. Recommendation 45 from the 2001 Wingspan conference urges states to adopt minimum standards for guardians, using the National Guardianship Association Standards of Practice and Code of Ethics as a model.

c. Some states by statute, rule or certification program have adopted all or parts of the NGA Standards or similar standards.

d. Standards could be mandatory minimum requirements for guardians or could be more aspirational, educational statements of best practices. What are the pros and cons of these models?

e. To which guardians should standards apply? All guardians? All professional guardians? Some states exempt certain groups from certification and/or compliance with standards – i.e., attorneys, family members, banks.

III. Standards for Guardian Decision-Making: Substituted Judgment vs Best Interest

a. State laws and guardianship literature generally refer to two guardian standards of decision-making:

1. “Substituted judgment” – the guardian steps into the individual’s shoes and aims to make the decision the person would have made if the person still had capacity.

2. “Best interest” – the guardian makes a more objective decision of what would be best for the person, after being fully informed of all options.

b. Uniform Guardianship and Protective Proceedings Act
(http://www.nccusl.org/update/ActSearchResults.aspx)

1. – “A guardian, in making decisions, shall consider the expressed desires and personal values of the ward to the extent known to the guardian. A guardian at all times shall act in the ward’s best interest and exercise reasonable care, diligence, and prudence.” Sec. 314(a).

2. A guardian must “encourage the ward to participate in decisions, act on the ward’s own behalf, and develop or retain the capacity to manage the ward’s personal affairs.” Sec. 314(a).
c. *National Guardianship Association Standards (NGA Standards of Practice, www.guardianship.org)* -- NGA Standard #7 provides that the guardian should use substituted judgment, which promotes self determination and well being, except when following the person’s wishes would cause substantial harm to the person, or when the guardian cannot establish the person’s prior wishes. In those instances, the best interest standard should be used. The best interest standard requires the guardian to consider “the least intrusive, most normalizing and least restrictive course of action possible.”

d. *NGA Standard #6* sets out elements of informed consent for making a decision based on a full disclosure of facts. It provides that “the guardian stands in place of the ward . . .” in information needed to make an informed decision. It sets out factors for evaluating a decision.

e. Recent thinking as exemplified by the article, “Substituted Interests and Best Judgments: An Integrated Model of Surrogate Decision-Making,” by Sulmasy & Snyder, suggests the two decision-making standards are in reality more of an integrated continuum.

f. The use of and trade-offs between the standards of substituted judgment and best interest – or a more integrated model -- infuse the following specific areas of guardian decision-making.

**IV. Standards for Making Residential Placement Decisions**

a. The AARP Public Policy Institute and ABA Commission on Law and Aging conducted a study of how guardians make residential placement decisions and the policy levers for enhancing home and community-based placement when appropriate. The Survey considered the following factors:

1. Least restrictive environment
2. Selecting an institution
3. Identifying and using community-based services
4. Choice between institution and home/community-based care
5. Preferences of person & family
6. State law; court order
7. Risk/safety analysis
8. Medicaid waivers and other community-based options

b. *NGA Standard #12* requires the guardian to “see that the ward is living in the most appropriate environment that addresses the ward’s needs.” The guardian should
authorize moving the individual to a more restrictive environment only after evaluating all other options and determining that the move is the least restrictive alternative that fills the need. Placement in an institution should be only “to minimize the risk of substantial harm” and “secure the best treatment.”


V. Standards for Making Financial Decisions

a. Factors/issues to consider:
   1. Fiduciary standards and responsibilities—making financial decisions on behalf of someone else
   2. Prudent investor rules—what they are, how to comply
   3. Exploitation recovery—when to, when not to, how to decide
   4. Selling the home/moving to institution—whether to sell, how to decide
   5. Other financial decisions—credit issues, etc.
   6. When there is little money—representative payee, applying for benefits, use of Medicaid
   7. When the money runs out—strategies to address; pro bono.

b. NGA Standard #17 sets out duties of the guardian of the estate; Standard #18 details ongoing responsibilities of the guardian of the estate; and Standard #19 addresses property management, including considerations for sale of property.

VI. Standards for Making Medical Decisions

a. Factors to consider:
   1. Guardian and health care agent relationship
   2. Informed consent for treatment—what guardian needs to know before giving consent
   3. Applying substituted judgment vs best interest standard
   4. How to be a proxy; informed consent; steps to take before a decision; questions to ask doctor (see ABA Commission on Law and Aging, Making Medical Decisions for Someone Else: A How To Guide for Proxies, http://www.abanet.org/aging/pdfs/genlproxyguide2009.pdf)
   5. Involving incapacitated person in decisions, identifying values, quality of life
   6. Navigating the health care system
   7. When is it an emergency, when is it not?
   8. Making decisions about pain, hospice
9. Differences between medical decision-making for different populations

b. *NGA Standard* #14 concerns decision-making about medical treatment. It requires the guardian to determine whether the individual executed any advance directives, and to consider the person’s wishes in the decision-making process. *NGA Standard* #6 requires the guardian to make decisions, including medical treatment decisions, based on the principle of informed consent.