Amending the Uniform Guardianship and Protective Proceedings Act to Implement the Standards and Recommendations of the Third National Guardianship Summit

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By David M. English, JD

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About the Author

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I. Introduction
The Third National Guardianship Summit, which was held in 2011, recommended the adoption of 70 standards and recommendations relating to guardianship law and practice. This article analyzes the standards and recommendations that might best be implemented by statutory change. The article focuses in particular on how the standards and recommendations might be applied in the current project to amend the Uniform Guardianship and Protective Proceedings Act (UGPPA), various versions of which have been enacted in numerous states.

II. Background
Guardianship law in the United States is one of many legal subjects controlled by state, not federal, law. All 50 states and the District of Columbia each have their own separate guardianship laws. To reduce the resulting inconsistencies among state laws, the Uniform Law Commission (ULC) was formed and held its first meeting in 1892. The ULC drafts model acts that states are free to enact or ignore. The hope is that if these model acts are widely enacted, the laws of the states will become more uniform over time. But even if uniform laws are not enacted by states in their entirety, states often borrow from them when revising or enacting particular provisions.

Article V of the ULC has long been involved in the drafting of guardianship laws. The ULC first addressed the subject of guardianship in 1969, when it approved the Uniform Probate Code (UPC), Article V of which is devoted to guardianship. Under the UPC, a “guardian” is appointed by the court to make decisions concerning personal care for a minor or incapacitated person and a “conservator” is appointed by the court to manage the person’s property. The appointment of a conservator is part of a broader category known as a “protective proceeding,” which may also include other court orders for the protection of property. But in many states, the court-appointed manager is referred to as either a “guardian of the person” or “guardian of the property.” This article generally uses the term “guardian” when referring to both roles, and “conservator” when referring to solely to property management.

Article V of the UPC was amended in 1982 to add the concept of limited guardianship. Concurrently, Article V was published separately from the UPC in the form of the UGPPA. The UGPPA and corresponding UPC provisions were further revised in 1997. The philosophy of the 1997 revision of the UGPPA has been described as follows:

The overriding theme of the 1997 UGPPA is that a guardian or conservator should be appointed only when necessary, only for so long as

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2 For an example of such influence, see Roger W. Andersen, The Influence of the Uniform Probate Code in Nonadapting States, 8 U. Puget Sound L. Rev. 599 (1985).
3 The text of this and all other uniform laws are available at the ULC website, http://www.uniformlaws.org (last visited Jan. 12, 2016).
4 See Unif. Guardianship & Protective Proceedings Act (UGPPA) prefatory note (1997). In this article, unless a citation is made to a specific section of a uniform act that was subsequently amended, uniform acts are cited by the date of their original approval, not by the date of the last section amended. If a particular section being cited has been amended, the date of the amendment is also shown.
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necessary, and only with such powers as are necessary. The Act views guardianship and conservatorship as a last resort, emphasizes that limited guardianships or conservatorships should be used whenever possible, and requires that the guardian or conservator consult with the ward or protected person, to the extent feasible, when making decisions. 5

Much of the energy for guardianship reform in the United States has been generated by national conferences on guardianship at which experts convene and issue recommendations. The first conference was held in 1988 and is known as Wingspread, the name of the conference center where it was held. The conference was convened in response to a series of articles published by the Associated Press critical of guardianship practice. 6 Among the principal goals of the recommendations approved at the Wingspread conference were the need to: 1) tighten appointment procedures; 2) emphasize limited guardianship; 3) appoint counsel for the respondent in all cases; 4) emphasize the ward’s choices and substituted judgment; and 5) train guardians. 7

Only a portion of the Wingspread goals were incorporated into the 1997 revision of the UGPPA. Although appointment procedures were tightened 8 and a preference was created in favor of limited guardianship, 9 the other goals were not achieved. First, the 1997 revision does not mandate the appointment of counsel to represent the subject of the proceedings. The revision gives the enacting jurisdiction a choice on appointment of counsel. The enacting jurisdiction may select the optional paragraph requiring the appointment of counsel for the respondent in all cases or may select the optional paragraph leaving the appointment of counsel to the court’s discretion. 10 Second, the 1997 revision is ambiguous on the extent to which substituted judgment is recognized, used here in the sense that the guardian must make the same decision the person under guardianship would have made if the person was competent and not under guardianship. The UGPPA contains language suggesting that a substituted judgment standard applies. The guardian must encourage the person under guardianship to participate in decisions, 11 and in making decisions, must also consider the expressed desires and personal values of the person under guardianship. 12 But the UGPPA then retreats from a substi-

8 See generally English & Morgan, supra note 5, at 3.
9 “The court, whenever feasible, shall grant to a guardian only those powers necessitated by the ward’s limitations and demonstrated needs and make appointive and other orders that will encourage the development of the ward’s maximum self-reliance and independence.” UGPPA § 311(b) (1997).
10 Id. § 305(b) (amended 1998).
11 Id. § 314(a).
12 Id.
tuted judgment standard by stating, “A guardian at all times shall act in the ward’s best interests and exercise reasonable care, diligence, and prudence,” implying that best interests, not substituted judgment, is the predominant test. The final Wingspread goal, the better training of guardians, is more an issue of funding and court practice than of statutory enactment.

The Second National Guardianship Conference, held at the Stetson College of Law in 2001 and known as Wingspan, produced a series of recommendations largely reinforcing and refining the recommendations made in the Wingspread report. The Wingspread report had a major influence on guardianship reform, including the drafting of the 1997 UGPPA. The influence of the Wingspan recommendations has been more muted although Recommendation 1 did have a major impact. Recommendation 1 encourages the development of procedures to resolve interstate jurisdiction controversies over which state’s court has jurisdiction to appoint a guardian. The recommendation also encourages states to develop procedures to facilitate the transfer of existing guardianship cases between jurisdictions. Influenced by this recommendation, the ULC in 2005 appointed a committee to draft the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, which was approved in 2007. This Act has since been enacted in 40 states and the District of Columbia.

But the focus of this article is on the Third National Guardianship Summit and the extent to which the UGPPA should be revised in light of the 70 standards and recommendations approved by the Summit participants. The Summit was held at the University of Utah in October 2011. The Summit standards and recommendations and accompanying law review articles were published in the *Utah Law Review*.

The Third National Guardianship Summit was organized by the National Guardianship Network (NGN), a group of national organizations dedicated to effective adult guardianship law and practice. Also participating were an array

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15 For the text of Recommendation 1, see *Wingspan — The Second National Guardianship Conference, Recommendations*, supra note 14.


17 For the text of the standards and recommendations, see *Third National Guardianship Summit Standards and Recommendations*, 2012 Utah L. Rev. 1191. For an overview of the standards and recommendations, see Sally Hurme & Erica Wood, *Introduction*, 2012 Utah L. Rev. 1157. Several of the law review articles prepared as background papers for the various Summit working groups are cited later in this article. See infra notes 28, 39, 53, 73, 82, 95, 101, 134.

18 The NGN organizations at the time of the Summit were the AARP; ABA Commission
of other groups concerned with issues of aging, intellectual disability, and mental illness. Unlike the Wingspread and Wingspan conferences, the Third National Guardianship Summit focused primarily on issues that arise after a guardian or conservator is appointed. The Wingspread and Wingspan conferences focused more on issues concerning the appointment of guardians.

During the Summit, participants were divided into working groups. In addition to a standards overview group, working groups were created to focus on five substantive areas: guardian’s relationship with the court, health care decisions, residential decisions, financial decisions, and guardian fees. In addition, a state inter-disciplinary working group was charged with determining how the Summit results could best be implemented in the various states. Each working group produced a set of proposals that were debated in a final plenary session. After the conference, the Summit organizers were charged with harmonizing the final product. The 43 proposals directly affecting guardian standards of practice were classified as standards, and 21 proposals directed more at courts, legislators, and guardianship organizations were classified as recommendations. Finally, six recommendations address how to best implement the Summit results. Some of the proposals from different working groups overlap. For example, references to the importance of ascertaining the present and past wishes of a person under guardianship appeared in the reports of several working groups and made their way into many of the final standards and recommendations.

After the Summit, NGN appointed an implementation committee, on which this author served. One of the charges to the NGN Implementation Committee was to group the 70 standards and recommendations into four categories: statutory, practice, educational, and other. The 26 standards and 10 recommendations the committee deemed relevant to the revision of the UGPPA appear at the end of this article in Appendix A. Based on the report of the implementation committee, NGN recommended to the ULC that a drafting committee be appointed to revise the UGPPA. The ULC agreed, and a drafting committee was appointed in 2014, with this author serving as chair and Nina Kohn of Syracuse University as the reporter. The committee is charged with revising “selected portions of the UGPPA in order to implement some of the recommendations of the Third National Guardianship Summit and otherwise update the act.”

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19 Among these groups were the ABA Commission on Disability Rights, The Arc, and the Center for Social Gerontology; National Adult Protective Services Association; National Association of State Long-Term Care Ombudsman Programs; National Association of State Mental Health Program Directors, National Committee for the Prevention of Elder Abuse, National Disability Rights Network, and Bazelon Center for Mental Health Law. Hurme & Wood, supra note 17, at 1166 n.61. The National Disability Rights Network has subsequently joined NGN.

20 The process by which the Summit was conducted is more fully described in Hurme & Wood, supra note 17, at 1166–68.
The significance of the Summit is not limited to the current project to amend the UGPPA.\textsuperscript{23} The National Guardianship Association (NGA) incorporated the Summit standards into the NGA Standards of Practice for Guardians.\textsuperscript{24} The National Academy of Elder Law Attorneys incorporated the standards and recommendations into its public policy guidelines.\textsuperscript{25} The Conference of Chief Justices adopted a resolution urging state courts to review and consider the standards and recommendations.\textsuperscript{26} The American Bar Association House of Delegates approved a resolution adopting the standards and recommendations as association policy.\textsuperscript{27} Perhaps more significantly, to implement the standards and recommendations, six states formed Working Interdisciplinary Networks of Guardianship Stakeholders (WINGS).\textsuperscript{28} These multidisciplinary task forces will continually evaluate guardian practice in their individual states.\textsuperscript{29}

The remainder of this article analyzes the 36 National Guardianship Summit standards and recommendations relevant to amending the UGPPA. The standards and recommendations are grouped into the following categories:

A. Preference for People-First Language
B. Guardian's Relationship to the Court
C. Standards for Guardian Decisions
D. Health Care Decisions
E. Residential Decisions
F. Financial Decisions
G. Guardian Fees

III. Analysis of Standards and Recommendations

A. Preference for People-First Language

An adult under guardianship was traditionally referred to as an “incompetent.” A prominent example of this is the definition of “incompetent” in the 1946 Model Probate Code, which provides that a person may be determined incompetent due to conditions such as “imbecility, idiocy, senility, [and] habitual drunkenness.”\textsuperscript{30} Terms such as “incapacitated person” and “disabled person” are more modern substitutes. “Incapacitated person” was the term

\begin{itemize}
  \item \textsuperscript{23} For a summary of the developments described in this paragraph, see Erica F. Wood, \textit{Taking WING: Next Steps in Guardianship Reform}, 23(2) Experience 4 (2013).
  \item \textsuperscript{27} Resolution 106B, which was approved by the House of Delegates at the 2012 ABA Annual Meeting, may be accessed by linking to http://americanbar.org/directories/policy and searching “2012 AM 106B” (last visited Jan. 12, 2016).
  \item \textsuperscript{28} The six states are Missouri, New York, Ohio, Oregon, Texas, and Utah. Wood, \textit{supra} note 23, at 6. For the experience of the Ohio WINGS, which was the first, see Julia R. Nick, Carolyn L. Dessin & Thomas Scott, \textit{Creating and Sustaining Interdisciplinary Guardianship Committees}, 2012 Utah L. Rev. 1667.
  \item \textsuperscript{29} For further discussion of the role of WINGS, see Wood, \textit{supra} note 23, at 4, 5–6.
  \item \textsuperscript{30} Model Probate Code § 196(c) (1946), in Lewis M. Simes & Paul E. Bayse, \textit{Problems in Probate Law} 41, 190 (1946).
\end{itemize}
used in the 1969 UPC and the successor UGPPA. The term “disabled person” was the term adopted in the competing but far less successful 1979 ABA Model Guardianship and Conservatorship Act.

Recommendation 1.7 advises that, where possible, the term “person under guardianship” replace terms such as “incapacitated person,” “disabled person,” and “ward,” the other traditional term used in the UGPPA. This recommendation is consistent with the advocacy movement to use people-first language when referring to individuals with disabilities. The theory is that one should focus on the individual instead of the individual’s condition. Although the use of people-first language is a long-time priority of many advocacy groups, not all groups share this view.

Completely substituting people-first language for traditional language in the revision of the UGPPA will be difficult. To this author’s knowledge, no state has achieved such substitution across the board in its adult guardianship laws. The closest may be the 1993 South Dakota Guardianship and Conservatorship Act, a legislative drafting project for which this author served as committee chair and reporter. The South Dakota Act, which drew partially on the 1982 version of the UGPPA, avoids using the terms “incapacitated person” and “ward.” For “incapacitated person,” it substitutes “person alleged to need protection.” For “ward,” it substitutes “protected person,” which under the South Dakota Act refers to a person for whom either a guardian or conservator has been appointed. Considerably greater drafting difficulties would have been encountered had an attempt been made to use the terms “person under guardianship” and “person under conservatorship.” That effort, even if successful, might have resulted in a considerable loss of clarity.

B. Guardian’s Relationship to the Court

Several Third National Guardianship Summit standards and recommendations relate to the guardian’s required reporting to the court and to the court’s monitoring of the guardian’s performance.

Under Standard 2.2, a guardian or conservator must keep the court informed about the well-being of the person under guardianship or conservatorship and of the status of the person’s estate through personal and financial plans, inventories and appraisals, and annual reports and ac-
countings. Standard 2.2 is consistent with the UGPPA, except that Standard 2.2 requires a conservator to provide appraisals, an expensive and often unnecessary step. Under the UGPPA, the guardian must file a report within 30 days after appointment and annually thereafter. Among the required contents of the report is a statement on the guardian’s plans for future care. Cons ervators of the estate must file an inventory, a conservatorship plan, and an annual report. Finally, the UGPPA requires the court to establish a system for monitoring guardian and conservator compliance with the filing requirements. However, merely stating that a court must establish a monitoring system and actually having an effective monitoring system are two different things. Recommendation 2.3 describes in considerable detail the elements of an effective monitoring system.

The Third National Guardianship Summit standards and recommendations emphasize a philosophy of the least restrictive alternative. Some alternatives, such as the revocable trust or power of attorney, require advance planning. Others, such as the appointment of a representative payee under Social Security or better use of community supports, can be done currently. Recommendation 2.2 encourages the court to issue orders that implement the least restrictive alternative and maximize the person’s right to self-determination and autonomy. Steps the court might take to implement the recommendation are also listed. A least restrictive alternative philosophy is already an important element of the UGPPA. Before appointing a guardian for an adult, the court must determine whether any less-restrictive alternatives are available. Also, the court, whenever feasible, must grant the guardian or conservator only those powers necessitated by the limitations and demonstrated needs of the person under guardianship or conservatorship. Furthermore, the court must make appointive and other orders that will encourage the development of the person’s self-reliance and independence. The least restrictive alternative philosophy as applied to specific types of decisions is described later in this article.

Summit Standard 1.4 requires that the guardian promptly inform the court of any change in the capacity of the person under guardianship that warrants an expansion or restriction of the guardian’s powers. A 2015 Texas enactment includes a nonexclusive list of alternatives: 1) execution of a medical power of attorney; 2) appointment of an agent under a durable power of attorney; 3) execution of a declaration for mental health treatment; 4) appointment of a representative payee to manage public benefits; 5) establishment of a joint bank account; 6) creation of a management trust; 7) creation of a special needs trust; 8) designation of a guardian before the need arises; and 9) establishment of alternate forms of decision-making based on person-centered planning. 2015 Tex. Sess. Law Serv. ch. 214, enacting Tex. Est. Code § 1002.0015 (2015).

40 UGPPA § 317(a) (1997).
41 Id. § 317(a)(6).
42 Id. § 419(a).
43 Id. § 418(c).
44 Id. § 420(a).
45 Id. §§ 317(c) (guardians), 420(d) (conservators).
46 See also Sally Balch Hurme & Erica Wood, Guardian Accountability Then and Now: Tracing Tenets for an Active Court Role, 31 Stetson L. Rev. 867 (2002).
47 For a discussion of alternatives, see David M. English, Financial Decision-Making for Adults Lacking the Capacity to Make Their Own, 36(2) Generations 66, 71 (2014).
authority. Although the UGPPA requires the guardian to include in the guardian's report a recommendation on the need for continued guardianship and any recommended changes in the guardianship's scope,\textsuperscript{51} the guardian is not required to report on changes in capacity. Requiring a prompt report on changes in capacity could place a burden on guardians, but such a statement could certainly be added as one of the required statements in the guardian's annual report.

Issues concerning the court's role in approving a guardian's or conservator's compensation, supervising the conservator's financial management of the estate, and approving the guardian's health care and residential care decisions are addressed in the sections of this article devoted to these topics.

C. Standards for Guardian Decisions

The most significant portion of the Third National Guardianship Summit report relates to the standards by which a guardian's decisions should be judged. At the heart of these standards is the adoption of "person-centered" planning,\textsuperscript{52} a concept that originated from experts working with individuals with intellectual disabilities.\textsuperscript{53} The theory here is that the plan of care will be directed by the person with a disability, with "support" or "assistance" from a network of family and professionals (the "supporters").\textsuperscript{54} Another model is "co-decision-making," under which the individual's decisions require the consent of another person.\textsuperscript{55}

Person-centered planning and the related concept of supported or co-decision-making are recognized in several European countries, Japan, and a number of Canadian provinces.\textsuperscript{56} The provision of adequate supports is also required under the United Nations Convention on the Rights of Persons With Disabilities.\textsuperscript{57} Person-centered planning is not without concerns, however. It assumes that supporters are available, which is sometimes not the case. There is also a concern that safeguards may be needed to minimize the risk of abuse.\textsuperscript{58}

Person-centered planning and supported decision-making are only beginning to

\textsuperscript{51} See UGPPA § 317(a)(7) (1997).
\textsuperscript{52} Standard 1.1 requires that the guardian develop and implement a plan emphasizing a "person-centered philosophy." Standard 6.4 requires that the guardian, when making residential decisions, "implement a person-centered plan." Standard 6.5 requires that the guardian, "wherever possible, seek to ensure that the person leads the residential planning process ...."


\textsuperscript{56} See id. at 148–54.


\textsuperscript{58} Possible safeguards are discussed in Then, supra note 55, at 160–62.
be recognized in U.S. guardianship statutes, the 2015 Texas statute being the first such enactment. The Texas statute recognizes person-centered planning and the availability of adequate supports as an alternative to guardianship or as the basis for limiting a guardian's powers. The statute also defines supported decision-making, specifies the requirements for a supported decision-making agreement, and specifies what a supporters may do.

Numerous Summit standards are relevant to person-centered planning and supported decision-making. Standard 1.1 requires that the guardian develop a plan emphasizing a "person-centered philosophy," and Standard 6.5 requires that the person under guardianship, whenever possible, lead the residential planning process. Several standards encourage the guardian to follow the person's decisions when feasible. Several other standards encourage the person under guardianship to participate in decisions, and others require that the person's current preferences at least be considered. The guardian or conservator must otherwise promote the self-determination of the person and exercise authority only as necessitated by the person's limitations. Also, when possible, the conservator must assist the person to develop or regain the capacity to manage the person's own financial affairs.

But in many situations, the person under guardianship is unable to participate in decision-making. The Summit working groups on health care decisions and residential decisions recommends that if the person under guardianship is unable to participate, the guardian follow a three-part test for decision-making that was derived originally from the case law on the withholding or withdrawal of health care treatment. The guardian must first act in accordance with the person's prior directions, expressed desires, and opinions; or to the extent these are unknown or uncertainable, must act in accordance with the person's prior general statements, actions, values, and preferences; or to the extent these are also unknown or uncertainable, must act in the person's best interests.

To effectuate this three-part test, the Summit recommended that state statutes and the UGPPA be amended to empha-

61 Id. § 1101.101(a)(1)(E).
62 Id. §§ 1101.103(b)(6-a), 1202.151.
63 Supported decision-making is defined as follows: "A process of supporting and accommodating an adult with a disability to enable the adult to make life decisions, including decisions related to where the adult wants to live, the services, supports, and medical care the adult wants to receive, whom the adult wants to live with, and where the adult wants to work, without impeding the self-determination of the adult." Id. § 1357.002(3).
64 Id. §§ 1357.051–1357.053, 1357.055–1357.057.
65 Id. at § 1357.051.
66 Standards 5.2, 5.3 (health care decisions); 6.1 (residential decisions).
67 Standards 4.4 (financial decisions); 5.1, 5.2 (health care decisions); 6.1 (residential decisions).
68 Standards 4.2, 4.8 (financial decisions); 6.8 (residential decisions).
69 Standards 4.1, 4.3 (financial decisions); 6.6 (residential decisions).
70 Standard 4.5 (financial decisions).
71 For a discussion of the case law on the withholding or withdrawal of health care treatment, see David M. English, Defining the Right to Die, 56 Law & Contemp. Probs. 255 (1993).
72 See also Standard 6.1 (residential decisions).
size a preference for self-determination and substituted judgment. However, the Summit working group on financial decisions was less definitive in its advocacy of substituted judgment, suggesting that more of a balancing test should be applied. While the conservator must give priority to the needs and preferences of the person, the conservator must also weigh the costs and benefits to the estate and apply state law regarding prudent investment practices.

The UGPPA only partially incorporates the Summit's decision-making standards. The UGPPA does not expressly mention either person-centered planning or supported decision-making, although there is language requiring guardians and conservators, to the extent possible, to encourage persons under guardianship or conservatorship to participate in decisions, act on their own behalf, and develop or regain capacity. The UGPPA could follow the lead of Texas and expressly recognize effective person-centered planning or supported decision-making as an alternative to guardianship or conservatorship. Person-centered planning or supported decision-making could also be integrated into the guardianship or conservatorship itself. The guardian or conservator could be required to arrange for the appropriate supports and either follow the person's decisions in appropriate situations or otherwise give these decisions great weight.

Language appears in the UGPPA that supports a substituted judgment standard. A guardian, when making decisions, must consider the person's prior expressed desires and personal values. However, the next sentence states that “[a] guardian at all times shall act in the ward's best interest and exercise reasonable care, diligence, and prudence,” implying that the predominant test is the person's best interests. At a minimum, the UGPPA should give increased weight to substituted judgment.

Addressing a different issue, the Summit standards require a guardian to make a good faith effort to cooperate with the person's other surrogate decision-makers, such as trustees or agents. When different persons who serve as guardians or conservators fail to work together, deadlock can result.

D. Health Care Decisions

In the UGPPA, the statutory language on the authority of a guardian to make health care decisions is limited to a brief reference in § 314, the section that specifies all guardian duties. The NGN Implementation Committee concluded that the subject of health care was important enough to be addressed in a separate statutory section. As mentioned previously in

73 Recommendation 1.5. For a comprehensive discussion of the doctrine of substituted judgment, see Linda S. Whitton & Lawrence A. Frolik, Surrogate Decision-Making Standards: Theory and Reality, 2012 Utah L. Rev. 1491, one of the articles prepared as a background paper for the Summit.

74 Standard 4.8. The conservator must also consider current wishes, past practices, reliable evidence of likely choices, and best interests of the person. Standard 4.2.

75 UGPPA §§ 314(a) (guardians), 418(b) (conservators) (1997).

76 The alternative approaches are described in Kohn, Blumenthal & Campbell, supra note 54, at 1124–26.

77 UGPPA § 314(a) (1997).

78 Id.

79 See Frolik & Whitton, supra note 13.

80 Standard 1.3.

81 “Except as otherwise limited by the court, a guardian shall make decisions regarding the ward’s support, care, education, health, and welfare.” UGPPA § 314(a) (1997).
this article, the Third National Guardianship Summit recommended a multi-level test for decision-making by guardians. A similar formulation appears in the standards for health care decisions. First, the guardian is charged with maximizing the participation of the person under guardianship. This includes encouraging and supporting the person “in understanding the facts and directing a decision.” Second, if the person is unable to direct the decision, the Summit standard applies the three-part test described previously of expressed wishes, substituted judgment, and, finally, best interests. Best interests include “consideration of consequences for others that an individual in the person’s circumstances would consider.”

The Summit participants recommended that guardianship statutes be amended to provide that a health care power of attorney remain in effect unless the court determines that the agent is unable, unwilling, or unsuitable to perform the agent’s duties. This recommendation is consistent with the UGPPA, which already addresses this subject in considerable detail. Under the UGPPA, if the principal has not nominated anyone to be a guardian or conservator, the agent under the health care or financial power of attorney is given priority for appointment as guardian or conservator. To ensure that the agent is in a position to become guardian or conservator, the UGPPA requires that the agent receive notice of the proceeding. Furthermore, until the court revokes that authority, the UGPPA provides that the authority of the agent takes precedence over that of the guardian. “The agent is granted a preference on the theory that the agent is the person the respondent would most likely prefer to act. The nomination of the agent will also make it more difficult for someone to use a guardianship to thwart the authority of the agent.”

E. Residential Decisions

The UGPPA provisions relating to residential decisions are brief. The UGPPA empowers a guardian to take custody of the person under guardianship and determine the person’s place of physical residence. The guardian must notify the court of any change in the place of physical residence, but court approval of the change is necessary only if the guardian seeks to establish the physical residence in another state.

The Summit standards relating to residential decisions are more detailed. Several Summit standards on residential decisions duplicate the general standards for decisions discussed previously. Emphasis is placed on deferring to the individual’s wishes and otherwise 1) following the person’s prior express wishes if any; 2) making the decision the person would have wanted if that can be ascertained; or 3) making the decision that is in the person’s

82 See supra pt. III(C). For the article on health care decisions prepared as a background paper for the Summit, see Kim Dayton, Standards for Health Care Decision-Making: Legal and Practical Considerations, 2012 Utah L. Rev. 1329.
83 Standard 5.1.
84 Standard 5.2(c).
85 Standard 5.3.
86 Standard 5.3(b).
87 Recommendation 4.1.
89 Id. §§ 102(6), 304(b)(4), 309(b) (guardians); 102(6), 403(b)(6), 404(b) (conservators).
90 Id. §§ 316(c) (guardians); 411(d) (conservators).
91 Id. § 310 cmt.
92 Id. § 315(a)(2).
93 Id. § 314(b)(6).
94 Id. § 315(a)(2).
best interests. The Summit standards also include a requirement that the guardian implement a person-centered plan. At a minimum, the guardian must ensure that the person participate in the planning process.

The Summit standards prioritize placement in home or other community-based settings and require the guardian to seek approval by the court or court-designated third party before moving the person under guardianship to a more restrictive setting. A guardian must also monitor the residential setting on an ongoing basis. The NGA Implementation Committee concluded that these particular standards require further discussion before a recommendation can be made on whether to incorporate them into the UGPPA and, if so, how.

F. Financial Decisions

Similar to the Summit standards for guardians, the standards for conservators require a conservator to manage the financial affairs of the person under conservatorship in a way that maximizes the person’s dignity, autonomy, and self-determination. In addition, a conservator must promote the self-determination of the person and exercise authority only as necessitated by the person’s limitations. The conservator must encourage and assist the person to act on his or her own behalf and to participate in decision-making. When possible, the conservator must assist the person to develop or regain the capacity to manage the person’s own financial affairs. The UGPPA already contains similar language.

But there are limits to this emphasis on self-determination. The Summit standards require that the conservator, when making decisions, consider the costs and benefits to the estate and the law regarding prudent investment practices. The decision-making standards for health care and residential decisions and the recommendation for decision-making by guardians in general give greater weight to the person’s current and past preferences.

The UGPPA provisions on conservators appear in Article 4. Although some of these provisions were updated in the 1997 revision of the Act, many date back to the original UPC, which was approved in 1969. Since then, the ULC has approved several major fiduciary acts, including the Uniform Prudent Investor Act of 1994, Uniform Trust Code of 2000, and Uniform Guardianship, Conservatorship, and Protective Proceedings Act 45

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96 Standard 6.4. This standard is similar to Standard 1.1.
97 Standard 6.5.
98 Standard 6.3.
99 Standard 6.7.
100 Standard 6.8.
102 Standard 4.3.
103 Standard 4.4.
104 Standard 4.5.
105 See UGPPA § 418(b) (1997).
106 Standard 4.8.
107 Standards 5.1–5.3.
109 Recommendation 1.5.
111 For background on this Act, see David M. English, The Uniform Trust Code (2000): Sig-
form Power of Attorney Act of 2006. The more modern acts should be consulted during the current project to revise the UGPPA.

The Third National Guardianship Summit recommended that state guardianship statutes specify the mandatory duties of the guardian and do so with greater clarity. With regard to conservators, the UGPPA already specifies a number of duties, including the duty to file conservatorship plans, inventories, and annual reports. It also specifies in detail the duties of the conservator with respect to distributions. But the UGPPA is otherwise brief in describing the conservator’s fiduciary duties. Under the UGPPA, the overriding obligation of the conservator is to observe the standards of care applicable to trustees. This seems to imply, at a minimum, that the conservator has a general obligation to act with prudence. However, it is uncertain to what extent the obligation to observe the standards of care applicable to trustees subjects the conservator to the specific provisions of the Uniform Prudent Investor Act and the many other trustee duties, such as the many duties codified in the Uniform Trust Code.

The Uniform Power of Attorney Act, which was approved in 2006, may offer a path forward. The predecessor Uniform Durable Power of Attorney Act was very short, largely leaving the duties of the agent to the common law of agency. Under the 2006 Act, the duties of the agent are specified in detail. While other acts, such as the Uniform Trust Code, served as a model for the Uniform Power of Attorney Act, the latter modifies these duties in a way that is appropriate for agents. It is suggested that the UGPPA drafting committee follow the same process in making the stated duties of the conservator more complete as was used in drafting the Power of Attorney Act. Although the other uniform acts can serve as models, provisions borrowed from these acts should be modified in a way that is appropriate for conservators.

The Third National Guardianship Summit approved a number of other standards relating to financial decisions. The Summit recommended that a conservator be required to delegate responsibilities, as appropriate, to people with appropriate expertise. The UGPPA already contains a delegation provision, which was copied from the Uniform Prudent Investor Act. The Summit report contains a standard for determining whether a conservator may enter into a transaction that involves a conflict of interest or self-distribut

112 For background on this Act, see Linda S. Whitton, Navigating the Uniform Power of Attorney Act, 3 NAEA J. 1 (2007).
113 Recommendations 1.1, 1.3.
114 UGPPA § 418(c) (1997).
115 Id. § 419(a).
116 Id. § 420.
117 Id. § 427.
118 Id. § 418(a).
119 For the obligation of a trustee to act with prudence, see Unif. Trust Code § 804 (2000).
123 Standard 4.12.
124 UGPPA § 426 (1997).
dealing. The UPGGA already contains a provision specifying when transactions with close family and other affiliated parties are presumed to be a violation, but it does not deal with the subject more generally as does the Uniform Trust Code.

An important issue for a prospective conservator is whether the conservator must furnish bond, which normally involves the purchase of a fiduciary bond from a surety company, an expense that will be charged to the estate. The Summit standards require a conservator to take all steps necessary to obtain a bond to protect the estate. Under the UGPPA, requiring bond is at the discretion of the court. The state guardianship and conservatorship statutes are split over whether bond is required. Waiving bond can save considerable expense. On the other hand, without a bond, there may be no protection against loss if the conservator lacks personal assets. The National College of Probate Judges recently recommended that bond be required, reversing its prior position that the matter of bond is best left to the court’s discretion.

G. Guardian Fees

The UGPPA provides that a guardian or conservator is entitled to reasonable compensation, which is the approach taken in most states. The UGPPA does not specify the factors the court must consider in setting compensation. Instead, that issue is addressed in the official comment, which lists factors relevant to fiduciaries generally. The Third National Guardianship Summit working group on guardianship fees developed a long list of factors tailored to guardianship. That list should be considered for the official comment to the UGPPA, if not for the statute itself.

Even if reasonable, the amount of compensation can be a surprise if there is a lack of advance notice. For this reason, the Summit recommended that a guardian: 1) disclose in writing the basis for fees at the time of the guardian’s appointment; 2) disclose a projection of annual fiduciary fees within 90 days of appointment; and 3) disclose fee changes.

Requiring that the guardian project annual fees could be problematic. It is often difficult for guardians to estimate how much time will be re-
quired until they have had a chance to assess the situation following appointment. Also, the condition and needs of the person under guardianship may change.

Unless the size of the estate is substantial, the expense of providing for the care of the person under conservatorship often exceeds the available income. Properly managing a depleting estate is a significant challenge. Even with careful management, estate funds often become exhausted. The Third National Guardianship Summit report recommends that the guardian inform the court of the likelihood that funds will be exhausted. This requirement could certainly be added to the plans and reports already required under the UGPPA. But if the funds run out, the Summit report recommends that the guardian be required to remain in office if the guardian failed to raise the issue of exhaustion of assets with the court and failed to make appropriate succession plans. The shortage of available guardians for those of modest means is a problem that a statute alone cannot solve.

IV. Conclusion

Revising the UGPPA will take at least two years. The project will not be completed until 2017 at the earliest. It is hoped that the drafting committee will produce a consensus product that many states will enact.

But even in jurisdictions where it has not been enacted, the UGPPA in its current version has greatly influenced the development of guardianship law. What often counts most are the ideas expressed, not the exact statutory wording. Even if the exact wording of the revised UGPPA is not enacted in all states, the ideas expressed in the revision hopefully will influence guardianship reform far into the future.

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138 Standard 3.2.
139 UGPPA §§ 317 (guardians); 418, 420 (conservators) (1997).
140 Standard 3.2.
APPENDIX A

Third National Guardianship Summit Standards and Recommendations Relevant to Amending the Uniform Guardianship and Protective Proceedings Act

Omitted are standards and recommendations that are not statutory in nature, including those relating to best practices, training of guardians, and the formation by states of Working Interdisciplinary Networks of Guardianship Stakeholders (WINGS).

The comments below the standards and recommendations were written by David English and Linda Whitton, who constituted the subcommittee of the National Guardianship Network charged with determining which standards and recommendations should be considered in the revision of the Uniform Guardianship and Protective Proceedings Act (UGPPA).

Standards

1. Core Standards

Standard 1.1

The guardian shall develop and implement a plan setting forth short-term and long-term goals for meeting the needs of the person.

- Plans shall emphasize a “person-centered philosophy.”

Comment: Revise UGPPA § 317 to incorporate this standard; create new section in Article 4 that incorporates this standard and the other inventory and reporting requirements from § 418.

Standard 1.3

The guardian shall make a good faith effort to cooperate with other surrogate decision-makers for the person.

- These include, where applicable, any other guardian, conservator, agent under a power of attorney, health care proxy, trustee, VA fiduciary, and representative payee.

Comment: Revise UGPPA §§ 314 and 418 to include this standard in an expanded list of duties. See Uniform Power of Attorney Act § 114(b) for a similar construct.

Standard 1.4

The guardian shall promptly inform the court of any change in the capacity of the person that warrants an expansion or restriction of the guardian’s authority.

Comment: Revise UGPPA §§ 318 and 431 to match.

2. Guardian’s Relationship to the Court

Standard 2.2

The guardian and conservator shall keep the court informed about the well-being of the person and the status of the estate through personal care and financial plans, inventory and appraisals, and annual reports and accountings.

Comment: Same comment as for Standard 1.1. However, do not require mandatory appraisals — they are too costly and could drain the assets of the estate.

Standard 2.3

The guardian shall seek assistance as needed to fulfill responsibilities to the person.

Comment: Consider adding a statutory provision to the UGPPA that would permit a court to grant a guardian the authority to temporarily delegate the guardian’s powers. See Uniform Power of Attorney Act § 201(a) for a similar construct.
3. Fees
Standard 3.1
The guardian, as a fiduciary, shall:
- Disclose in writing the basis for fees (e.g., rate schedule) at the time of the guardian's first appearance in the action.
- Disclose a projection of annual fiduciary fees within 90 days of appointment.
- Disclose fee changes.
- Seek authorization for fee-generating actions not contained in the fiduciary's appointment.
- Disclose a detailed explanation for any claim for fiduciary fees.

Comment: Revise UGPPA § 417 to include these requirements but perhaps without requiring the guardian to project annual fiduciary fees.

Standard 3.2
A guardian shall report to the court any likelihood that funds will be exhausted and advise the court whether the guardian intends to seek removal when there are no longer funds to pay fees. A guardian may not abandon the person when funds are exhausted in cases in which the spend down occurred over several reporting periods and the guardian failed to address the probability of exhaustion with the court and failed to make appropriate succession plans.

Comment: The objectives of the first sentence could be handled in the reporting provisions discussed in the comment for Standard 1.1. The objective of the second sentence might not be achievable by statute.

4. Financial Decision-Making
Standard 4.1
The conservator, as a fiduciary, shall manage the financial affairs in a way that maximizes the dignity, autonomy, and self-determination of the person.

Standard 4.2
The conservator shall consider current wishes, past practices, reliable evidence of likely choices, and best interests of the person.

Standard 4.3
A conservator shall, consistent with court order and state statutes, promote the self-determination of the person and exercise authority only as necessitated by the limitations of the person.

Standard 4.4
The conservator shall encourage and assist the person to act on his or her own behalf and to participate in decisions.

Standard 4.5
When possible, the conservator shall assist the person to develop or regain the capacity to manage the person's financial affairs. The conservator's goal shall be to manage, but not necessarily, eliminate risk.

Comment: Recommend statutory revision to UGPPA § 418 to incorporate Standards 4.1 through 4.5. In some instances, alternate paragraphs will be needed to distinguish between conservators for adults and conservators for minors.

Standard 4.7
The conservator shall avoid all conflicts of interest and self-dealing, and all appearances of conflicts of interests and self-dealing.
- Portion of Standard 4.7 not statutory in nature omitted.
- The conservator may enter into a transaction that may be a conflict of interest or self-dealing only when
necessary, or when there is a significant benefit to the person under the conservatorship, and shall disclose such transactions to interested parties and obtain prior court approval.

Comment: Recommend including provisions dealing with conflicts of interest in UGPPA §§ 314 and 418. The objectives covered in § 423 should be moved to § 418. See Uniform Trust Code § 802 and Uniform Power of Attorney Act § 114 for similar constructs.

Standard 4.8
The conservator shall, when making decisions regarding investing, spending, and management of the income and assets, including asset recovery:
- Give priority to the needs and preferences of the person
- Weigh the costs and benefits to the estate
- Apply state law regarding prudent investment practices.

Comment: Revise UGPPA §§ 418 and 425 accordingly.

Standard 4.9
The conservator shall take all steps necessary to obtain a bond to protect the estate, including obtaining a court order.

Comment: To be realistic, a mandatory bond provision should include court discretion to grant exceptions.

Standard 4.12
The conservator shall, as appropriate for the estate, implement best practices of a prudent conservator, including responsible consultation with and delegation to people with appropriate expertise.

Comment: Include these duties in UGPPA § 418.

5. Health Care Decision-Making
Standard 5.1
The guardian, in making health care decisions or seeking court approval for a decision, shall maximize the participation of the person.

Standard 5.2
The guardian, in making health care decisions or seeking court approval for a decision, shall:
(a) Acquire a clear understanding of the medical facts
(b) Acquire a clear understanding of the health care options and risks and benefits of each
(c) Encourage and support the individual in understanding the facts and directing a decision.

Standard 5.3
To the extent the person cannot currently direct the decision, the guardian shall act in accordance with the person's prior directions, expressed desires, and opinions about health care to the extent actually known or ascertainable by the guardian; or, if unknown and unascertainable:
(a) Act in accordance with the person's prior general statements, actions, values and preferences to the extent actually known or ascertainable by the guardian; or, if unknown and unascertainable,
(b) Act in accordance with reasonable information received from professionals and persons who demonstrate sufficient interest in the person's welfare, to determine the person's best interests, which determination shall include consideration of consequences for others that an individual in the person's circumstances would consider.
In the event of an emergency, the guardian shall grant or deny authorization of emergency health care treatment based on a reasonable assessment of the criteria listed in Standard 5.2.

Comment: A new separate statutory section for health care decision-making standards is needed.

6. Residential Decision-Making
Standard 6.1
The guardian shall identify and advocate for the person's goals, needs, and preferences. Goals are what are important to the person about where he or she lives, whereas preferences are specific expressions of choice.

- First, the guardian shall ask the person what he or she wants.
- Second, if the person has difficulty expressing what he or she wants, the guardian shall do everything possible to help the person express his or her goals, needs, and preferences.
- Third, only when the person, even with assistance, cannot express his or her goals and preferences, the guardian shall seek input from others familiar with the person to determine what the individual would have wanted.
- Finally, only when the person's goals and preferences cannot be ascertained, the guardian shall make a decision in the person's best interest.

Comment: These objectives should be covered in the omnibus decision-making standards in UGPPA §§ 314 and 418.

Standard 6.3
The guardian shall have a strong priority for home or other community-based settings, when not inconsistent with the person's goals and preferences.

Comment: This standard is also appropriate for Practice and Education.

Standard 6.4
The guardian shall make and implement a person-centered plan that seeks to fulfill the person's goals, needs, and preferences. The plan shall emphasize the person's strengths, skills, and abilities to the fullest extent in order to favor the least restrictive setting.

Comment: This standard is similar to Standard 1.1. This standard is also appropriate for Practice and Education.

Standard 6.5
The guardian shall wherever possible, seek to ensure that the person leads the residential planning process, and at a minimum to ensure that the person participates in the process.

Comment: In lieu of adding this standard to the statute, the general decision-making standards in UGPPA §§ 314 and 418 could include examples of the types of decisions to which such standards apply (e.g., residential, financial). This standard is also appropriate for Practice and Education.

Standard 6.6
The guardian shall attempt to maximize the self-reliance and independence of the person.

Comment: This standard should be covered in UGPPA §§ 314 and 418.

Standard 6.7
The guardian shall seek review by a court or other court-designated third party with no conflict of interest before a move to a more restrictive setting.

Comment: This standard requires further discussion before a recommendation can be made.

Standard 6.8
The guardian shall monitor the resi-
Amending the Uniform Guardianship and Protective Proceedings Act

Spring 2016

Recommendations

1. Overview of Guardian Standards

Recommendation 1.1

State statutes should set forth the mandatory duties of guardians. Court or administrative rules should set forth guardian standards.

Comment: This recommendation should be covered in UGPPA §§ 314 and 418.

Recommendation 1.3

State statutes should clearly express guardian duties and apply the duties to all guardians.

- These duties should be enumerated in a clear and succinct statement supplied to guardians at time of appointment.
- These duties should be enumerated in guardian training materials.
- The guardian must acknowledge, in writing, receipt of the information.

Comment: This recommendation should be covered in UGPPA §§ 314 and 418.

Recommendation 1.4

Every guardian should be held to the same standards, regardless of familial relationship, except a guardian with a higher level of relevant skills shall be held to the use of those skills.

Comment: This recommendation should be covered in UGPPA §§ 314 and 418. See Uniform Trust Code and Uniform Power of Attorney Act for similar constructs.

Recommendation 1.5

States should adopt by statute a decision-making standard that provides guidance for using substituted judgment and best interest principles in guardian decisions.

- These standards should emphasize self-determination and the preference for substituted judgment.
- The Uniform Guardianship and Protective Proceedings Act should be revised to embody these objectives.

Comment: This recommendation should be covered in UGPPA §§ 314 and 418.

Recommendation 1.7

Where possible, the term person under guardianship should replace terms such as incapacitated person, ward, or disabled person.

Comment: This recommendation requires further discussion.

2. Guardian’s Relationship to the Court

Recommendation 2.2

The court should issue orders that implement the least restrictive alternative and maximize the person’s right to self-determination and autonomy.

- The court should develop a protocol to obtain an accurate and detailed assessment of the person’s functional limitations.
The court should conduct a factual investigation and review the assessment to determine the rights to be retained by the person and the powers to be granted to the guardian.

The factual investigation may include contact with the person, interviews with interested persons and family members, and discussions with court-appointed attorneys and court evaluators or any other court representative.

Comment: Revise UGPPA §§ 311(b) and 409(b).

Recommendation 2.3
The court should monitor the well-being of the person and status of the estate on an on-going basis, including, but not limited to:

- Determining whether less restrictive alternatives will suffice
- Monitoring the filing of plans, reports, inventories, and accounting
- Reviewing the contents of plans, reports, inventories, and accounting
- Independently investigating the well-being of the person and status of the estate
- Ensuring the well-being of the person and status of the estate, improving the performance of the guardian, and enforcing the terms of the guardianship order.

Comment: Revise UGPPA §§ 317(c) and 420(d) to incorporate.

3. Fees
Recommendation 3.2
Guardians should be entitled to reasonable compensation for their services. The court should consider these factors in determining the reasonableness of guardian fees:

- Powers and responsibilities under the court appointment
- Necessity of the services
- The request for compensation in comparison to a previously disclosed basis for fees, and the amount authorized in the approved budget, including any legal presumption of reasonableness or necessity
- The guardian’s expertise, training, education, experience, professional standing, and skill, including whether an appointment in a particular matter precluded other employment
- The character of the work to be done, including difficulty, intricacy, importance, time, skill, or license required, or responsibility undertaken
- The conditions or circumstances of the work, including emergency matters requiring urgent attention, services provided outside of regular business hours, potential danger (e.g., hazardous materials, contaminated real property, or dangerous persons), or other extraordinary conditions
- The work actually performed, including the time actually expended, and the attention and skill level required for each task, including whether a different person could have better, cheaper or faster rendered the service
- The result, specifically whether the guardian was successful, what benefits to the person were derived from the efforts, and whether probable benefits exceeded costs
- Whether the guardian timely disclosed that a projected cost was likely to exceed the probable benefit, affording the court an opportunity to modify its order in furtherance of the best interest of the estate
- The fees customarily paid, and time
customarily expended, for performing like services in the community, including whether the court has previously approved similar fees in another comparable matter.

- The degree of financial or professional risk and responsibility assumed.
- The fidelity and loyalty displayed by the guardian, including whether the guardian put the best interests of the estate before the economic interest of the guardian to continue the engagement.
- The need for and local availability of specialized knowledge and the need for retaining outside fiduciaries to avoid conflict of interest.

Comment: Reduce recommendations to core principles and add these principles to UGPPA § 417 for conservators and construct a comparable section in Article 3 for guardians.

Recommendation 3.4
In the event estate funds are exhausted and the guardian has failed to address the anticipated exhaustion, the court is justified in requiring the guardian to remain serving at least until a succession plan is in place.

Comment: Consider adding a resignation provision to UGPPA Articles 3 and 4.

4. Health Care Decision-Making
Recommendation 4.1
State guardianship statutes should provide that valid health care directives that appoint a health care agent shall remain in effect unless the court determines that the agent is unable, unwilling, or unsuitable to perform the agent’s duties under the directive.

Comment: This recommendation should be included in a new UGPPA section on health care decisions. UGPPA § 316(c) should also be included in the new section.