THIRD NATIONAL GUARDIANSHIP SUMMIT
STANDARDS AND RECOMMENDATIONS

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**Support of the Endowed Chair in Urban Health Policy by the Foundation for a Healthy Kentucky and by the Kentucky Research Challenge Trust Fund is gratefully acknowledged.

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“This Summit was a multi-disciplinary consensus conference that focused on post-appointment guardian performance and decision-making.”

“The Summit delegates passed a number of substantive and sweeping recommendations for standards for decision-making for all guardians, which will be prepared for implementation and adoption by state legislatures, judiciaries, and by administrative rule.”

“Recommendations from the Summit will provide the groundwork for nationally recognized standards for guardians of adults.”

http://www.guardianshipsummit.org/
The Third National Guardianship Summit: Standards of Excellence* was convened by the National Guardianship Network (NGN) at the University of Utah College of Law Oct. 12-15, 2011.

NGN includes:

- AARP, Public Policy Institute
- ABA Commission on Law and Aging
- ABA Section of Real Property, Probate and Trust Law
- Alzheimer’s Association
- American College of Trust and Estate Counsel
- Center for Guardianship Certification
- National Academy of Elder Law Attorneys
- National Center for State Courts
- National College of Probate Judges
- National Guardianship Association

*Supported by grants from State Justice Institute and Borchard Center on Law and Aging
Co-sponsoring organizations included:

- ABA Commission on Mental and Physical Disability Law
- The Arc
- 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, Older Persons Division
- National Committee for the Prevention of Elder Abuse
- National Disability Rights Network
- Bazelon Center for Mental Health Law
- University of Utah College of Law
- University of Utah College of Social Work
- University of Utah Center on Aging
- Utah Commission on Aging
- Utah Administrative Office of the Courts
History


- In 2004, the National College of Probate Judges, the National Academy of Elder Law Attorneys and the National Guardianship Association held a joint meeting in Colorado Springs, Colorado, on implementation of the Wingspan recommendations, which resulted in a set of Action Steps.

- Third National Guardianship Summit: Standards of Excellence, University of Utah College of Law, October 13-15, 2011, Salt Lake City, Utah. (State courts and NGN should establish **WINGS**, Working Interdisciplinary Networks of Guardianship Stakeholders.)
“These conferences have been the engine driving needed reform — in procedural due process, determination of diminished capacity, use of the least restrictive alternative, development of limited guardianship orders, enhanced court oversight and guardian accountability, and development of quality public guardianship initiatives.”

“It has been ten years since the historic 2001 Wingspan conference. It has been nearly a decade of continued demographic shifts in aging and disability, striking developments in information technology, marked medical advances, and continued reform of state guardianship law yet a continued drumbeat of press articles on guardian malfeasance as well as inefficiencies in the system.”

“While the Wingspread and Wingspan Conferences addressed multiple issues across the guardianship spectrum, and from the initial petition to termination of a guardianship case, the 2011 Third National Guardianship Summit focused intensively on post-appointment guardian performance and decision-making.”

http://www.guardianshipsummit.org/summit-history/
Newspaper headlines and media scrutiny of guardians and the guardianship system persist:

- From the 1987 Associated Press national examination of 2,200 randomly selected guardianship court files (“Guardians of the Elderly: An Ailing System”),
- through the June 2003 *Washington Post* documentation of exploitation and neglect by attorney-guardians (“Misplaced Trust”),
- the January 2005 *Dallas Morning News* highlighting of Texas guardianship problems (“Holes in the Safety Net”),
- the November 2005 *Los Angeles Times* investigation of poor quality professional guardian performance in California (“Justice Sleeps While Seniors Suffer”), and
- the December 2006 *Seattle Times* perusal of cozy guardianship case ties (“Secrecy Hides Cozy Ties in Guardianship Cases”), to
- the April-October 2010 *Omaha World-Herald* revelation of shoddy guardian oversight of incapacitated persons’ health and property (“Guardian Faces Theft Counts”),
- guardians and the guardianship system have been challenged to perform their duties better in order to merit greater public and legal confidence.
Guardian = person or entity appointed by a court with the authority to make some or all **personal decisions** on behalf of an individual the court determines **lacks capacity** to make such decisions.

Conservator = person or entity appointed by a court with the authority to make some or all **financial decisions** on behalf of an individual the court determines **needs assistance** in making such decisions.

The standards and recommendations use the term “guardian” to mean guardian and conservator unless otherwise specifically indicated.

**Person under guardianship** [or person under conservatorship], or simply “person” = a person the court has determined requires assistance in making some or all personal or financial decisions, and for whom the court has appointed a guardian and/or conservator. [cf. Recommendation #1.7]
Person-centered planning process. A “person-centered planning process” is one which is led by the individual receiving services and

(1) includes people chosen by the individual;
(2) Provides necessary support to ensure that the individual has a meaningful role in directing the process;
(3) Occurs at times and locations of convenience to the individual;
(4) Reflects cultural considerations of the individual;
(5) Includes strategies for resolving conflict or disagreement within the process, including any conflict of interest concerns;
(6) Offers choices to the individual regarding the services and supports they receive and from whom;
(7) Includes a method for the individual to request updates to the plan as needed.

This process had developed over the last few decades, and adopted by federal regulation in 42 U.S.C. section 441.301.

See Johns, Frank, with Coulter, Melinda, “Person-Centered Planning in Guardianship: A Little Hope for the Future,” __ Utah L. Rev.__ (Summer 2012).
#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”.

Standard #1.2
The guardian shall treat the person with dignity.

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.

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.

Standard #1.5
The guardian shall **promptly report to the appropriate authorities abuse, neglect, and/or exploitation**, as defined by state statute.

http://www.guardianshipsummit.org/summit-guardian-standards-and-recommendations/
A recent court of appeals decision in Washington state concludes that a guardian’s “duty generally was to provide, to the extent reasonably possible, all the care [the ward] needed. We view the specific acts, such as infrequent visits, which the [Department of Social and Health Services] Board characterized as duties, to be evidence of [the guardian’s] failure to meet her general duty.” DHHS v. Raven, No. 40809-1-II (Wash. Ct. App., March 2012), at p. 23.

The guardian in DHHS v. Raven was charged with violation of the Abuse of Vulnerable Persons Act for behavior that included a log of guardian visits “evidenced only six in 2004, two in 2005 (both when Ida [the ward] was hospitalized [with severe skin ulcers]), and five in 2006” (p. 11).
#2. Guardian’s Relationship to the Court

Standard #2.1
The guardian shall seek **ongoing education** concerning:
- Person-centered planning
- Surrogate decision-making
- Responsibilities and duties of guardians
- Legal processes of guardianship
- **State certification of guardians.**

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.**

Standard #2.3
The guardian shall seek assistance as needed to fulfill responsibilities to the person.

Standard #2.4
The guardian shall use available technology to:
- File the general plan, inventory and appraisal, and annual reports and accountings
- Access responsible education and information about guardianships
- Assist in the administration of the estate.

http://www.guardianshipsummit.org/summit-guardian-standards-and-recommendations/
Washington state increased Certified Professional Guardian (CPG) training requirements to include completion of a three-course Guardianship Certificate Program offered by the University of Washington Extension, consisting of:

- 56 classroom hours and
- 34 online distance education hours.

http://www.courts.wa.gov/committee/?fa=committee.display&item_id=845&committee_id=115
On the subject of guardian standards, the Second National Guardianship Conference (“Wingspan”) recommends, “Professional guardians — those who receive fees for serving two or more unrelated wards — should be licensed, certified, or registered.”

As a follow-up to such recommendations, the National Academy of Elder Law Attorneys (NAELA), the National Guardianship Association, and the National College of Probate Judges convened a Wingspan Implementation Session to identify implementation action steps, including the following steps relating to guardian certification: “[t]he supreme court of each state should promulgate rules[,] and/or the state legislature of each state should enact a statutory framework[,] to require education and certification of guardians as well as continuing education within the appointment process to ensure that all (i.e.-professional and family) guardians meet core competencies.”

The Wingspan national guardianship conference recommends that states should “adopt minimum standards of practice for guardians, using the National Guardianship Association Standards of Practice as a model.”
There are 15 states with some provision for guardian licensing, certification or registration: Alaska, Arizona, California, Florida, Georgia, Illinois, Nevada, New Hampshire, New Jersey, New York, North Carolina, Oregon, Texas, Utah, and Washington.

For example, the Certified Professional Guardian Board in the state of Washington has formal legal responsibility for certification applications, standards of practice, training, recommendation and denial of certification, continuing education, grievances and disciplinary sanctions, and investigation of certified professional guardians. Washington publicly reports disciplinary actions for guardians and guardian agencies.

Arizona requires certification and licensing of all fiduciaries, except family members, who meet eligibility requirements. As part of the fiduciary certification program, the Arizona Supreme Court established the Fiduciary Compliance Audit Authority. The five most common fiduciary audit findings are (1) late required court case filings; (2) inaccurate required court case filings; (3) undocumented fiduciary actions and decision making; (4) business and fiduciary certification number is not used on court documents; and (5) incompetent fiduciary management of client caseload.
The private Center for Guardianship Certification (CGC) offers certification of individual professional guardians.

GAO reported that CGC did not require Social Security numbers or other identifying information, did not verify educational or professional credentials, and did not conduct background or credit checks for fictitious certification applicants. U.S. Government Accountability Office, Guardianships: Cases of Financial Exploitation, Neglect, and Abuse of Seniors, GAO-10-1046 (2010), at p. 25.

The fictitious applicants passed the National Certified Guardian Examination and “were listed on the organization’s website as nationally certified guardians.” Id. at p. 26.
Example: Certification of Professional Guardians

What are the implications of requiring certification, standards of practice, and background checks for guardians?

- Increased quality; reduced violations of standards of practice
- Increased access to higher quality guardian services; reduced competition from lower quality guardian services
- Increased cost of service; reduced cost from such things as (1) late required court case filings; (2) inaccurate required court case filings; (3) undocumented fiduciary actions and decision making; and (4) incompetent fiduciary management of client caseload.
- Improved fiduciary service; improved outcomes for persons with incapacities
- Increased professionalization of fee-based guardianship
- Reduced guardian liability
- Efficient deterrence and prevention of unqualified guardians by background checks
#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.

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.

Standard #3.3
A guardian may seek payment of fiduciary fees from the income of a person receiving Medicaid services only after the deduction of the personal needs allowance, spousal allowance and health care insurance premiums.

http://www.guardsionshipsummit.org/summit-guardian-standards-and-recommendations/
#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.

http://www.guardianshipsummit.org/summit-guardian-standards-and-recommendations/
#4. Financial Decision-Making

Standard # 4.6
The conservator shall value the well-being of the person over the preservation of the estate.

Standard # 4.7
The conservator shall avoid all conflicts of interest and self-dealing, and all appearances of conflicts of interests and self-dealing.
- The conservator shall become fully educated as to what constitutes a conflict of interest and self-dealing, and why they should be avoided.
- 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.

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.
“Under the present system of “Estate Management by Preemption” we divest the incompetent of control of his property upon the finding of the existence of serious mental illness whenever divestiture is in the interest of some third person or institution. The theory of incompetency is to protect the debilitated from their own financial foolishness or from the fraud of others who would prey upon their mental weaknesses. In practice, however, we seek to protect the interests of others. The state hospital commences incompetency proceedings to facilitate reimbursement for costs incurred in the care, treatment, and maintenance of its patients. Dependents institute proceedings to secure their needs. Co-owners of property find incompetency proceedings convenient ways to secure the sale of realty. Heirs institute actions to preserve their dwindling inheritances. Beneficiaries of trusts or estates seek incompetency as an expedient method of removing as trustee one who is managing the trust or estate in a manner adverse to their interests. All of these motives may be honest and without any intent to cheat the aged, but none of the proceedings are commenced to assist the debilitated.” (Alexander and Lewin, 1972)
Arizona psychiatrist for a county general hospital:

“for every $100,000 in a given estate a lawyer shows up, for every $25,000 a family member shows up.”

[If there is no money, then no one shows up.]
#4. Financial Decision-Making

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

Standard #4.10
The conservator shall use reasonable efforts to:
- Ascertain the income, assets, liabilities of the person
- Ascertain the needs and preferences of the person
- Coordinate with the guardian and consult with others close to the person
- Prepare a plan for the management of income and assets
- Provide oversight to any income and assets under the control of the person.

Standard # 4.11
The conservator shall obtain and maintain a current understanding of what is required and expected of the conservator, statutory and local court rule requirements, and necessary filings and reports.

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.

http://www.guardianshipsummit.org/summit-guardian-standards-and-recommendations/
In addition to bonding requirements, some courts should require insurance for fiduciaries. See, e.g., Washington Courts, General Rule 23 (d)(4) and (5):

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

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

[Links to Washington Courts' rules]

Regulation 704 Insurance
[Links to Regulation 704 Insurance]
#4. Financial Decision-Making

Standard # 4.13
The conservator shall become educated about the nature of any incapacity, condition and functional capabilities of the person.

Standard # 4.14
The conservator shall consider mentoring new conservators.

http://www.guardianshipsummit.org/summit-guardian-standards-and-recommendations/
#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.
#5. Health Care Decision-Making

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.

Standard #5.4
The guardian shall monitor, promote, and maintain the person’s health and well-being and shall seek to ensure that the person receives appropriate health care consistent with person-centered health care decision-making. [cf. Standard 6.8]

http://www.guardianshipsummit.org/summit-guardian-standards-and-recommendations/
#5. Health Care Decision-Making

Standard #5.5
The guardian shall seek to ensure that appropriate palliative care is incorporated into all health care.

Standard #5.6
The guardian shall keep persons who are important to the individual reasonably informed of important health care decisions.

http://www.guardianshipsummit.org/summit-guardian-standards-and-recommendations/
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.

Standard #6.2
The guardian shall fully identify, examine, and continue to seek information regarding options that will fulfill the person’s goals, needs, and preferences.

- Guardians shall take full advantage of professional assistance in identifying all available options.
- These include but are not limited to area agencies on aging, centers for independent living, protection and advocacy agencies, long-term care ombudsmen, and developmental disabilities councils, aging and disability resource centers, and community mental health agencies.
#6. Residential Decision-Making

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.

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.

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.

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

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.

http://www.guardianshipsummit.org/summit-guardian-standards-and-recommendations/
• Quasi-experimental study found protective services intervention including guardianships resulted in higher rate of institutionalization than control group (Blenkner, et al., 1971, 1974).

• Significant contribution of elder protective referrals, including guardianship, to institutionalization (nursing home placement) reconfirmed (Lachs, et al., 2002).
#6. Residential Decision-Making

Standard #6.8
The guardian shall **monitor the residential setting on an ongoing basis** and take any necessary action when the setting does not meet the individual’s current goals, preferences, and needs including but not limited to:

- Evaluating the plan; **enforcing residents’ rights, legal and civil rights**; ensuring quality of care and appropriateness of the setting in light of the feelings and attitudes of the person; and
- Exploring alternative opportunities for long-term services and supports where necessary to better fulfill the person’s goals and preferences.

Standard #6.9
The guardian shall promote social interactions and meaningful relationships consistent with the preferences of the person.

- The guardian shall **encourage and support the person in maintaining contact** with family and friends as defined by the person unless it will substantially harm the person.
- The guardian shall **not interfere with established relationships** unless necessary to protect the person from substantial harm.

Standard #6.10
The guardian shall consider the **proximity of the setting to those people and activities** that are important to the person when choosing a residential setting.

http://www.guardianshipsummit.org/summit-guardian-standards-and-recommendations/
National Guardianship Association (NGA) Standard of Practice 13(V) prescribes that the guardian of the person “shall visit the ward no less than monthly.”

NGA Standard 23(I) states that “The guardian shall limit each caseload to a size that allows the guardian to accurately and adequately support and protect the ward, that allows a minimum of one visit per month with each ward, and that allows regular contact with all service providers.”
A recent court of appeals decision in Washington state concludes that a guardian’s “duty generally was to provide, to the extent reasonably possible, all the care [the ward] needed. We view the specific acts, such as infrequent visits, which the [Department of Social and Health Services] Board characterized as duties, to be evidence of [the guardian’s] failure to meet her general duty.” DHHS v. Raven, No. 40809-1-II (Wash. Ct. App., March 2012), at p. 23.

The guardian in DHHS v. Raven was charged with violation of the Abuse of Vulnerable Persons Act for behavior that included a log of guardian visits “evidenced only six in 2004, two in 2005 (both when Ida [the ward] was hospitalized [with severe skin ulcers]), and five in 2006” (p. 11).
Example: Monitoring by Guardian

- The Council on Accreditation (COA) has developed and is applying adult guardianship accreditation standards.
- One of the COA Adult Guardianship Service Standards (7) prescribes that guardianship caseload sizes “support regular contact with individuals and the achievement of desired outcomes.”
- The accompanying COA Research Note states: “Studies of public guardianship programs have found that lower staff-to-client ratios are associated with improved outcomes and recommend a 1:20 ratio to eliminate situations in which there is little to no service being provided.”
- “The Council on Accreditation (COA) partners with human service organizations worldwide to improve service delivery outcomes by developing, applying, and promoting accreditation standards. . . . In 2005, COA accredited or was in the process of accrediting more than 1,500 private and public organizations that serve more than 7 million individuals and families in the United States, Canada, Bermuda, Puerto Rico, England and the Philippines.”

http://www.coastandards.org/about.php
See Wash. Rev. Code section 2.72.030(6) (Washington’s office of public guardianship is prohibited from authorizing payment for guardianship services “for any entity that is serving more than twenty incapacitated persons per certified professional guardian.”)

Adopted in 31 states, the Uniform Veterans’ Guardianship Act provides that no person may be a guardian for more than five wards at one time.

The Virginia Department for the Aging “contracted with the local [Virginia] programs for a maximum staff to ward ratio of 1:20 and the programs were able to maintain [an average of] this ratio, serving between 10 and 35 wards per evaluation year.”
A class action lawsuit in 1999 against a County Public Administrator providing public guardianship services in Nevada alleged that the

Guardian **fails to engage sufficient numbers of professional personnel** to be able to adequately assess and periodically reassess the needs of each of its individualized wards, to adequately formulate and periodically revise an individualized case plan for each of its wards, to insure the implementation of such case plans and to insure minimal professional interactions with each ward on an ongoing basis.

Tenberg v. Washoe County Public Administrator and Washoe County, No. CV99-01770 (Family Court, Second Judicial District Court, Nevada, filed March 15, 1999). The Tenberg case was settled.
Rule 3.8 In the event that the only available placement is not the most appropriate and least restrictive, the guardian shall advocate for the ward’s rights and negotiate a more desirable placement with a minimum of delay, retaining legal counsel to assist if necessary.

Rule 4.3 In the event the only available treatment, care or services is not the most appropriate and least restrictive, the guardian shall advocate for the ward’s right to a more desirable form of treatment, care or services, retaining legal counsel to assist if necessary.

#6. Residential Decision-Making

Standard #6.11
The guardian shall make reasonable efforts to maintain the person’s established social and support networks during the person’s brief absences from the primary residence.

http://www.guardshipsummit.org/summit-guardian-standards-and-recommendations/
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.

Recommendation #1.2
The National Guardianship Association, in conjunction with state guardianship associations and state WINGS (Working Interdisciplinary Networks of Guardianship Stakeholders) should promote standards to improve guardian practices and enhance public confidence in guardianship.

- Materials should be developed to educate guardians about statutory duties, court rules, aspirational codes of conduct, and best practices.

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.

http://www.guardianshipsummit.org/summit-guardian-standards-and-recommendations/
Example: Guardian Practice and Public Confidence

Twenty-seven states have specific guardian background requirements like a credit check, or disqualify felons from serving as guardian. The U.S. Government Accountability Office recently reported

hundreds of allegations of physical abuse, neglect, and financial exploitation of wards by guardians in 45 states and the District of Columbia, between 1990 and 2010. In 20 selected closed cases from 15 states and the District of Columbia, GAO found that guardians stole or improperly obtained $5.4 million from 158 incapacitated victims, many of them seniors. GAO’s in-depth examination of these 20 closed cases identified three common themes: 1) state courts failed to adequately screen the criminal and financial backgrounds of potential guardians; 2) state courts failed to adequately monitor guardians after appointment, allowing the continued abuse of vulnerable seniors and their assets; and 3) state courts failed to communicate ongoing abuse by guardians to appropriate federal agencies like the Social Security Administration (SSA), the Department of Veterans Affairs (VA), and the Office of Personnel Management (OPM), which manages federal employee retirement programs. Guardians serve as federal representative payees on one percent of SSA cases, 13 percent of VA cases, and 34 percent of OPM cases.
#1. Overview of Guardian Standards

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.**

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.

Recommendation #1.6
A template should be created for developing a person-centered plan.

Recommendation #1.7
Where possible, the term **person under guardianship** should replace terms such as incapacitated person, ward, or disabled person.


Cf., e.g., American Psychiatric Association, *Diagnostic and Statistical Manual* (DSM-IV-TR, fourth edition, text revised) (“[a] common misconception is that a classification of mental disorders classifies people, when actually what is being classified are disorders that people have”; thus, DSM-IV “avoids the use of such expressions as ‘a schizophrenic’ or ‘an alcoholic’ and uses the more accurate, but admittedly more cumbersome, ‘an individual with Schizophrenia’ or ‘an individual with Alcohol Dependence’”).
Recommendation #2.1
The court or responsible entity should ensure that guardians, court and court staff, evaluators, and others involved in the guardianship process receive **sufficient ongoing, multi-faceted education to achieve the highest quality of guardianship possible**.

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.
Clinical examinations are important evidence for judicial determinations of legal incapacity.

The determination of capacity of older adults in guardianship proceedings has received book-length treatment in a collaboration of the American Bar Association Commission on Law and Aging, the American Psychological Association, and the National College of Probate Judges:


- See also, e.g., National Center for State Courts, *Identifying and Responding to Elder Abuse, Neglect, and Exploitation: A Benchcard for Judges*;


- Cf., e.g., ABA Commission on Law and Aging & American Psychological Association, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (April 2005);


http://www.guardianshipsummit.org/summit-guardian-standards-and-recommendations/
Unfortunately, the available research finds significant problems with clinical evidence in guardianship proceedings for older adults.

Much clinical evidence is incomplete.

The mean length of written clinical reports for guardianship of older adults ranges between 83 words in Massachusetts (with two-thirds of the written evidence illegible) and 781 words in Colorado (one to three pages) compared to 24 pages for the mean length of child custody evaluations.


Accord Kris Bulcroft et al., "Elderly Wards and Their Legal Guardians: Analysis of County Probate Records in Ohio and Washington," 31 Gerontologist 156, 157, 160 (1991);

See also Jennifer Moye et al., "A Conceptual Model and Assessment Template for Capacity Evaluation in Adult Guardianship," 47 Gerontologist 591 (2007) (model and template for capacity evaluation in guardianship assessing medical condition, cognition, functional abilities, values, risk of harm and level of supervision needed, and means to enhance capacity);
Example: Loss of Rights

- make contracts;
- sell, purchase, mortgage, or lease property;
- initiate or defend against suits;
- make a will, or revoke one;
- engage in certain professions;
- lend or borrow money;
- appoint agents;
- divorce, or marry;
- keep and care for children;
- serve on a jury;
- be a witness to any legal document;
- drive a car;
- pay or collect debts; and
- manage or run a business.
“The loss of any one of these rights can have a disastrous result, but taken together, their effect is to reduce the status of an individual to that of a child, or a nonperson. The process can be characterized as legal infantalization.” [“legally dead”; “unperson”]
#2. Guardian’s Relationship to the Court

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 accountings
- 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.

http://www.guardianshipsummit.org/summit-guardian-standards-and-recommendations/
There is an extensive literature and numerous national recommendations about changing from passive court monitoring to active court monitoring.

- AARP Public Policy Institute (June 2006) (found continued wide variation in guardianship monitoring practices, a frequent lack of guardian report and accounts verification, limited visitation of individuals under guardianship, and minimal use of technology in monitoring);
- Naomi Karp [AARP Public Policy Institute] & Erica Wood [ABA Commission on Law and Aging], Guarding the Guardians: Promising Practices for Court Monitoring, Washington, D.C.: AARP Public Policy Institute (December 2007) (promising practices regarding: reports, accounts, and plans; courts actions to facilitate reporting; practices to protect assets; court review of reports and accounts; investigation, verification, and sanctions; computerized database and other monitoring technology; links with community groups and other entities; guardian training and assistance; funds for monitoring);
- National Conference of Commissioners on Uniform State Laws, Uniform Guardianship and Adult Protective Proceedings Act, Chicago (1997) (includes provisions on guardianship monitoring and commentary about the significance of “an independent monitoring system . . . for a court to adequately safeguard against abuses”);
- Third National Guardianship Summit: Standards of Excellence, Recommendations #2.3, 2.5, 3.1, 3.5 relating to active court monitoring (Oct. 2011);
In one county, a guardianship monitoring program discovered that a man who was guardian of his 98-year-old stepmother had failed to file court-required financial plans.

Further investigation showed that he was $30,000 behind in payments to her nursing home.

A subsequent criminal investigation resulted in the guardian’s conviction for stealing more than $200,000 from the guardianship estate.

#2. Guardian’s Relationship to the Court

Recommendation #2.4

The court should provide continuing assistance to the guardian about guardianship law and procedures, the guardian’s duties and responsibilities, community resources and the rights of the person. This may include assistance in:

- Completion of guardianship plan and reports
- Guidance on facility transfer or placement
- Providing for care at home
- Financial and health care decision-making
- What to do when the person dies or disappears
- Burial and funeral planning
- Mental health services
- Government benefits eligibility.

http://www.guardianshipsummit.org/summit-guardian-standards-and-recommendations/
#2. Guardian’s Relationship to the Court

Recommendation #2.5
The court should use available technology to:
  • Assist in monitoring guardianships
  • Develop a database of guardianship elements, including indicators of potential problems
  • Schedule required reports
  • Produce minutes from court hearings
  • Generate statistical reports
  • Develop online forms and/or e-filing
  • Provide public access to identified non-confidential, filed documents.
Washington publicly reports disciplinary actions for guardians and guardian agencies.

http://www.courts.wa.gov/programs_orgs/Guardian/
#3. Fees

Recommendation #3.1
The court should promote sound administrative practices relating to guardianship fees by:

• Encouraging the continuity of judicial experience and expertise on the probate bench, and encouraging specialization of probate courts in accordance with the National Probate Court Standards
• **Actively monitoring** the reasonableness of fiduciary fees
• Creating and maintaining training programs for participants in the guardianship process
• Collecting data regarding fiduciary fees and costs
• Promoting timely review and approval of fees
• Promoting electronic filing.

http://www.guardianshipsummit.org/summit-guardian-standards-and-recommendations/
#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.
Example: Outcomes

- Quasi-experimental study found protective services intervention including guardianships resulted in higher rate of institutionalization than control group (Blenkner, et al., 1971, 1974)
- Significant contribution of elder protective referrals, including guardianship, to institutionalization (nursing home placement) reconfirmed (Lachs, et al., 2002)
An area of study related to costs is the extent to which guardianship is cost effective, as well as the extent to which not having sufficient guardianship services probably costs significantly more than having sufficient guardianship services.

- Disabled and vulnerable populations like those served by guardians experience disproportionately high health care costs.
- Medicaid enrollees with disabilities are 17% of the Medicaid population nationally and account for 46% of federal Medicaid costs, and for long health care duration.
- The elderly population is 9% of the Medicaid population nationally, but accounts for 27% of program costs.
- Twenty percent of Medicaid expenditures nationally are for nursing facility care, and 8% are for home health care.
- One percent of the population accounted for 20.2% of total health care expenditures in 2008 and 20% of the population in the top 1% retained this ranking in 2009; the top 1% accounted for 21.8% of the total expenditures in 2009 with an annual mean expenditure of $90,061.
- The median intensive care unit (ICU) length of stay for incapacitated patients without a surrogate is twice as long as other ICU patients.
Sixteen percent of patients admitted to the medical ICU of a metropolitan West Coast hospital lacked capacity and a surrogate during their entire ICU stay.

The incapacitated patients without surrogates accounted for one of every four deaths in the medical ICU, and twice the median length of stay of all other ICU patients, as well as possible “systematic bias in favor of either overtreatment or undertreatment” (White, et al., *Critical Care Medicine*, 2006, page 2057).
Without sufficient appropriate guardianship services, significant health care costs are incurred through inappropriate institutionalization, insufficient deinstitutionalization, excessive emergency care, and lack of timely health care.

Guardianship studies from Florida, New York, and Virginia report annual savings by guardianship programs ranging from $3.9 million to $13 million:

a) Half of the legally incapacitated public mental hospital patients without guardians in a Florida study could have been immediately discharged if a public guardian was available.

b) The Greater New York Hospital Association lost $13 million in nine months awaiting appointment of guardians for 400 un-discharged patients.

c) Virginia saved $5.6 million in health care costs in one year with appropriate public guardian services for 85 patients.

d) Florida saved $3.9 million in health care costs in one year with appropriate public guardian services.

e) Washington State concluded that: the decrease in average costs of residential settings exceeded the cost of providing a guardian within 30 months in 2008-2011; clients with a public guardian had a decrease of an average 29 hours in personal care hours needed each month, compared with an increase in care hours for similar clients; 21% of clients with a public guardian had a reported improvement in self-sufficiency in the previous three months.

f) The Vera Institute of Justice Guardianship Project in New York City saved a reported net Medicaid cost-savings of $2,500,026 for 111 guardianship clients in 2010.
#3. Fees

Recommendation #3.3
To ensure the right of access to guardianship services, **states should provide public funding for:**
- Guardianship services for those unable to pay
- Services to coordinate alternatives to guardianship, and the obligation to make such services available to all vulnerable persons.

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.**

Recommendation #3.5
The court and court-appointed counsel should **actively and timely monitor fiduciary fees.**

http://www.guardianshipsummit.org/summit-guardian-standards-and-recommendations/
Example: Public Guardianship


#3. Fees

Recommendation #3.6
The court should support any rejection or reduction of fees with a statement of explanation.

Recommendation #3.7
The court and all parties should respect the privacy and dignity of the person when disclosing information regarding fees.

Recommendation #3.8
The court should resolve fee disputes through a process that is fair, expeditious, and economical, for example, through:

- A court-ordered alternative dispute resolution or mediation process;
- A referral to a regulatory body responsible for reviewing fees [cf. Standard #2.1]; or
- A master or a special judicial resolution process.

http://www.guardianshipsummit.org/summit-guardian-standards-and-recommendations/
#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.

http://www.guardianshipsummit.org/summit-guardian-standards-and-recommendations/
Legal documents (e.g., “living will,” durable power of attorney) prepared by persons with legal capacity

(a) expressing decisions about future mental health treatment in the event of incapacity or

(a) appointing an agent (surrogate decision-maker) to make future mental health treatment decisions in the event of incapacity
Randomized clinical trial of 469 patients with severe mental illness concluded that semi-structured interview and guided discussion resulted in completion of a psychiatric advance directive (Swanson, et al., *Am J Psychiatry*, Nov. 2006)

Intervention study facilitating completion of psychiatric ADs for 106 community-dwelling mental health center outpatients found most preferences had clinical utility and 46% appointed a surrogate decision-maker (Srebnik, et al., *Psychiatr Serv*, May 2005)
Patients prescribed medications that they requested in advance were significantly more likely to adhere to medications (Wilder, et al., *Psychiatr Serv*, April 2010)

Facilitated completion of a psychiatric advance directive was associated with lower odds of coercive interventions (Swanson, et al, *J of Mental Health*, vol. 17, no. 3, 2008)

Advance directives based on cognitive therapy significantly reduced number of hospitalizations, number of compulsory admission procedures, and number of days in psychiatric hospital in two years after intervention (Khazaal, et al., *Patient Education & Counseling*, Jan. 2009)
Nancy Hargrave, diagnosed with paranoid schizophrenia, involuntarily medicated in direct contravention of her wishes expressed in a valid Durable Power of Attorney for Health Care

Vermont law (Act 114) allowed court nullification of AD if treatment choices don’t result in improvement


Second Circuit affirmed holding that Act 114 violates the ADA and discriminates against people with mental disabilities by applying a different standard to “qualified individuals” than used for people without a mental disability: *Hargrave v. Vermont*, 340 F.3d 27 (2nd Cir. 2003), distinguished by *In re L.A.*, 182 Vt. 633, 941 A.2d 244 (2007)
Psychiatric Advance Directives

National Resource Center on Psychiatric Advance Directives (http://www.nrc-pad.org/)

KRS section 202A.420-202A.432
http://www.lrc.state.ky.us/krs/202A00/CHAPTER.HTM

Current research:
http://www.nrc-pad.org/content/blogsection/9/50/

25 states
#5. State Interdisciplinary Guardianship and Alternatives Committees

Recommendation #5.1
State courts and National Guardianship Network organizations should collaborate to establish Working Interdisciplinary Networks of Guardianship Stakeholders (WINGS) to advance adult guardianship reform and implement the recommendations adopted by the Third National Guardianship Summit.

Recommendation #5.2
A state steering committee should establish the scope, goals and mission of WINGS. The steering committee should:

- Conduct needs assessments
- Review the guardianship process, court rules and statutes
- Identify, recruit and include stakeholders with sufficient expertise and authority. Stakeholders may include, but are not limited to, judges, court administrators, agencies on aging, adult protective services, Attorneys General, state mental health association, state hospital associations, legal service providers, AARP, state guardianship associations and agencies, Alzheimer’s Association, financial institutions, service providers, disability advocates, long-term care ombudsman programs, medical professionals and associations, bar associations, family members of persons under guardianship, and members of the public who have experienced the guardianship process
- Encourage inclusivity considering local realities, non-traditional partners, and underserved populations
- Establish a clear process for setting priorities and developing feasible timelines.

http://www.guardianshipsummit.org/summit-guardian-standards-and-recommendations/
Recommendation #5.3
WINGS should develop an agenda to accomplish its goals and objectives. The agenda should include implementation of the standards and recommendations adopted by the Third National Guardianship Summit. Additional projects may:

- **Encourage and support court monitoring** and data collection
- Evaluate court procedures
- Expand the use of technology, standardized forms, and web site development
- Conduct education and cross-training
- Recommend improvements and best practices
- Advocate for **funds to support court systems and guardianship programs**.

Recommendation #5.4
WINGS should aim to procure tangible and in-kind resources necessary to achieve its mission.

- Financial resources may include budgetary allocations, donations and grants.
- Human resources may include administrative, logistical, research and technical support provided by paid staff or **volunteers**.

Recommendation #5.5
WINGS should develop a plan to ensure sustainability, including:

- Leadership development and committee member terms
- Recruitment and orientation of new members
- Measurable outcomes with ongoing self-evaluation
- Maintenance and development of resources.

http://www.guardianshipsummit.org/summit-guardian-standards-and-recommendations/
Example: Volunteers


Conference of Chief Justices and the Conference of State Court Administrators urge each state court system to review and consider implementation of the standards and recommendations adopted at the Third National Guardianship Summit. (July 25, 2012)
http://ccj.ncsc.dni.us/resolGuardianshipSummit.html

The American Bar Association adopts the *Third National Guardianship Summit Standards and Recommendations*, dated August 2012, and urges courts, as well as national, state, local, tribal and territorial policy-making bodies to implement them. (August 2012)
http://www.abanow.org/2012/06/2012am106b/

To the extent that there is no conflict with state law, these recommended standards may be considered as a "best practices" guide. (National College of Probate Judges)
Outcomes: Costs

There are several published studies of costs associated with providing public guardianship services.

a) The annual public guardian cost per client in Florida in 1983 was $2,857.00.
b) The annual public guardian cost per client in Virginia in 1997 was $2,662.00.
c) The average annual public guardian cost per client in Virginia in 2002 was $2,955.00.
d) The average annual cost per public guardian client in Florida in 2007-2008 was $2,648.00.
e) The average annual cost per public guardian client in Washington in 2008-2011 was $3,163.00.
f) The annual operating cost per guardianship client in New York City in 2010 was $8,648.60.

*Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists.*


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