WINGSPAN — THE SECOND NATIONAL GUARDIANSHIP CONFERENCE, RECOMMENDATIONS[1]

I. OVERVIEW

CHANGES IN STATUTE OR REGULATION

The Conference recommends that:

1. Standard procedures be adopted to resolve interstate jurisdiction controversies and to facilitate transfers of guardianship cases among jurisdictions.

   Comment: State legislatures can look to the model legislation proposed by the National College of Probate Judges.[2] Guardianship portability, including adoption of a formal validation process for legal recognition of surrogate authority (*e.g.*, healthcare and financial powers) in other countries, should be addressed nationally and internationally.

2. Functional and multi-disciplinary assessment be used in determining diminished capacity. The terms "incapacity,"

---

1. Wingspan — The Second National Guardianship Conference, meeting in plenary session, adopted these Recommendations on December 2, 2001. Primary sponsors were the National Academy of Elder Law Attorneys, Stetson University College of Law, host of the Conference, and the Borchard Center of Law and Aging. Co-sponsors were the ABA Commission on Legal Problems of the Elderly, the National College of Probate Judges, the Supervisory Council of the ABA Section on Real Property, Probate and Trusts, the National Guardianship Association, the Center for Medicare Advocacy, the Arc of the United States, and the Center for Social Gerontology, Inc. The Recommendations, authored by the Wingspan Conferees, do not purport to have the endorsement of the Wingspan Conference's individual sponsor organizations. To view commentary or dissenting opinions, as well as the Recommendations on-line, visit the National Academy of Elder Law Attorneys' Web site at <http://www.naela.com>.

2. *See* Natl. College of Prob. JJ., *Standards, National Probate Court Standards* Stand. 2.1.1 <http://www.ncpi.org/standard.html> (last revised Feb. 10, 2002) (providing that the final judgments of probate courts in one jurisdiction should be "afforded comity and respect in other jurisdictions").

"incapacitated," and "incompetent" should be rejected and in place, the term "diminished capacity" should be used.

3. Medicare and Medicaid laws be amended to cover the cost of respondents' functional assessment.

CHANGES IN PRACTICE PRECEPTS OR GUIDELINES

The Conference recommends that:

4. A uniform system of data collection within all areas of the guardianship process be developed and funded.

   Comment: Although significant legislative revisions have been adopted, little data exists on the effectiveness of guardianship within each state or across the states, and less information is available about how the system actually affects the individuals involved.

5. Dialogue between the legal and medical professions on the determination of diminished capacity and all aspects of guardianship be encouraged.

6. State and local jurisdictions have an interdisciplinary entity focused on guardianship implementation, evaluation, data collection, pilot projects, and funding.

   Comment: This entity would be charged with responsibility of monitoring the implementation of guardianship and surrogacy laws.

RECOMMENDATION FOR EDUCATION, RESEARCH AND FUNDING

The Conference recommends that:

7. Innovative and creative ways be developed by which funding sources are categorically directed to guardianship. States and organizations should be informed about these sources.

8. Funding be supported for multi-disciplinary assessments that must be linked to the least restrictive criteria throughout the judicial process.

9. All guardians receive training and technical assistance in carrying out their duties. Organizations, including the National Guardianship Network,[3] should develop and offer specially designed introductory and continuing guardianship courses for judges, court personnel, families, guardians, proposed fiduciaries, and attorneys practicing in the guardianship area, including training on minimum guardianship standards and ethics.

10. Attention be given to the need for mandatory education for all judges in courts hearing guardianship cases, with special attention to the educational needs of general jurisdiction judges.

11. The Internet and other technology be used to educate and communicate with lawyers, judges, guardians, and other professionals in the guardianship arena.

12. Multi-disciplinary tools be developed and used in educating all professionals involved in guardianship matters, including family guardians.

13. Research be undertaken to measure successful practices and to examine how the guardianship process is enhancing the well-being of persons with diminished capacity.

    Comment: The research should examine how the system is working. The Conference co-sponsors to should work together to identify increased funding for research, court operations, and training for the bench and bar.

14. Further study be conducted to determine whether states should adopt statutes and regulations to provide for separate

---

3. The National Guardianship Network is an informal coalition of associations interested in improving guardianship services for individuals as they age and for those with disabilities. The National Guardianship Network was formed in 2000 and its membership includes the ABA Commission on Legal Problems of the Elderly, the American College of Trust and Estate Counsel, the National Academy of Elder Law Attorneys (NAELA), the National Center for State Courts, the National College of Probate Judges, the National Guardianship Association, and the National Guardianship Foundation. For more information about the National Guardianship Network, contact NAELA at its address, 1604 North Country Club Road, Tucson, Arizona 85716, by telephone (520)881-4005, by facsimile (520)325-7925, or through its Web site at <http://www.naela.com>.

guardianship procedures for persons with developmental disabilities.

15. The National Guardianship Network provide leadership in research and advocacy for guardianship reform.

16. The National Institute on Aging and other federal agencies fund research on guardianship.

    Comment: The federal agencies could include, for example, the Agency for Healthcare Research and Quality, the Administration on Aging, the Assistant Secretary for Planning and Evaluation of Health and Human Services, and the Center for Medicare and Medicaid Services. Areas of research might include the appropriate placement of wards by guardians, end of life decision-making by surrogates, and how any universal health-care system would affect guardianships.

II. DIVERSION AND MEDIATION

CHANGES IN STATUTE AND REGULATION

The Conference recommends that:

17. States adopt statutes requiring agents under durable powers of attorney to maintain fiduciary standards.

18. Statutes give preference to the person nominated in the advance directive, power of attorney, or other writing in appointing the guardian.

19. States adopt surrogate medical consent statutes.

    Comment: Such statutes will reduce the need for guardianship of the person for medical decision-making where the person with diminished capacity does not have an advance health-care directive.

20. Statutes require that guardianship petitions include a review of alternatives and a statement as to why none are appropriate.

Comment: Information should be available at the courthouse on each alternative, including mediation and counseling. The court visitor or other investigator should verify that available alternatives to guardianship have not been overlooked or underutilized.

CHANGES IN PRACTICE PRECEPTS OR GUIDELINES

The Conference recommends that:

21. Practice precepts or ethics rules should provide that lawyers drafting powers of attorney represent and meet with the principal rather than solely with the prospective agent.

22. Standards and training for mediators be developed in conjunction with the Alternative Dispute Resolution community to address mediation in guardianship related matters.

    Comment: Standards and training should include identification of issues appropriate for mediation, participants in the mediation, use and role of legal representatives, and procedures to maximize self-determination of individuals with diminished capacity. The development of standards should take into consideration the recommendations of the 2000 Joint Conference on Legal and Ethical Issues in the Progression of Dementia[4] on dispute resolution, and of The Center for Social Gerontology,[5] and study whether these recommendations should be extended to all types of disability. Mediators should adhere to such standards even if not statutorily required.

23. Multi-disciplinary diversion programs be developed with collaboration among financial institutions, law enforcement, and adult protective services as an early intervention process to avoid the need for guardianship.

---

4. *Recommendations of the Joint Conference*, 35 Ga. L. Rev. 423, 423–450 (2001).

5. Susan J. Butterwick, Penelope A. Hommel & Ingo Keilitz, *Evaluation of Mediation as a Means of Resolving Adult Guardianship Cases* (Ctr. for Soc. Gerontology 2001). Copies of the study are available for a fee by contacting The Center for Social Gerontology by telephone at (734) 665-1126 or by e-mail at <tcsg@tcsg.org>. A copy in PDF format is available through its Web site at <http://www.tcsg.org>.

RECOMMENDATIONS FOR EDUCATION AND ADVOCACY

The Conference recommends that:

24. Awareness of risks and benefits of guardianship and planning alternatives to guardianship be raised, and the use of mediation for conflict resolution and as a pre-filing strategy alternative be increased.

    Comment: Conference co-sponsors should develop model educational curricula to be implemented by the bench, bar, and medical profession on the state level. Education efforts should be targeted to financial and healthcare institutions, aging and disability advocates, legal and medical professionals, and the public.

RECOMMENDATIONS FOR FURTHER STUDY

The Conference recommends that:

25. Research be undertaken to identify alternative payment sources to expand the availability and affordability of mediation services.

    Comment: Such study should include an examination of the following:

    (1) allocation of costs among all parties;
    (2) court fees to cover costs;
    (3) medicaid reimbursement;
    (4) sliding fee arrangements, with courts paying costs for those lacking economic means; and
    (5) mediators on court panels taking pro bono cases along with referred fee-paying cases.

26. Study be undertaken on the extent and nature of the abuse of powers of attorney and trusts, and on statutory options to permit the court to review agents' performance.

III. DUE PROCESS

CHANGES IN STATUTE AND REGULATION

The Conference recommends that:

27. Respondents always have a mandatory right, which can be waived, to appear in court and be heard.

28. Counsel always be appointed for the respondent and act as an advocate rather than as a guardian *ad litem*.

29. The Wingspread Recommendation regarding the role of counsel as zealous advocate[6] be amended and reaffirmed as follows: *Zealous Advocacy* — In order to assume the proper advocacy role, counsel for the respondent and the petitioner shall: (a) advise the client of all the options as well as the practical and legal consequences of those options and the probability of success in pursuing any one of those options; (b) give that advice in the language, mode of communication and terms that the client is most likely to understand; and (c) zealously advocate the course of actions chosen by the client.

30. The pre-hearing process include a separate court investigator or visitor, who must identify the respondent's wants, needs, and values.

31. States hold guardianship proceedings in courts with full plenary powers.

    Comment: Some states allow guardianship matters to be heard by non-judges. Those states need to provide those hearing personnel with the judicial powers necessary to protect the due process rights of the respondent.

---

6. Recommendation II-C of the 1988 Wingspread Symposium, titled "Role of Counsel Defined." Commn. on Mentally Disabled & Commn. on Leg. Problems of Elderly, *Guardianship: An Agenda for Reform — Recommendations of the National Guardianship Symposium and Policy of the American Bar Association* 12 (ABA 1989). In 1988, the Johnson Foundation's Wingspread Conference Center in Wisconsin hosted the National Guardianship Symposium, which was sponsored by the ABA Commissions on Legal Problems of the Elderly and on Mental Disability.

32. The term "investigator" or "visitor" be used instead of guardian *ad litem*.

    Comment: The term "guardian *ad litem*" often is confused with the term "guardian," thus resulting in misunderstanding of roles and responsibilities.

33. The respondent have the following rights: the right to request a closed hearing for determining diminished capacity; the right to have medical functional evaluations by someone who is not the respondent's treating physician; the right to have the treating physician's privilege recognized and confidentiality maintained; and the right to have medical records automatically sealed at the end of the hearing.

34. Emergency proceedings require the following: actual notice to the respondent before hearing; mandatory appointment of counsel; establishment of the respondent's emergency; conduct of a hearing on the permanent guardianship as promptly as possible; and placement of limitations on emergency powers.

35. Guardianships be limited to the circumstances giving rise to the petition for emergency or temporary guardianship, and be terminated upon appropriate showing that the emergency no longer exists.

36. There be special procedures for single transactions.

37. The guardian not have the power to consent to civil commitment, electric shock treatment, or dissolution of marriage without obtaining specific judicial authority

38. Statutes be adopted and forms developed to enable courts to fashion the appropriate limited guardianship orders.

    Comment: Consistent with the Uniform Guardianship and Protective Proceedings Act, the initial petition should include the reasons why either a limited or plenary finding of diminished capacity is being sought.[7] This requirement will promote the concept of limited guardianship and preserve

7. Unif. Guardianship & Protective Proc. Act § 304(b)(7), (8), 8A U.L.A. 137 (Supp. 2001).

individual rights.

39. Orders establishing a plenary guardianship rather than a limited guardianship require proof of why the guardianship should be plenary.

    Comment: Responsible advocacy includes advising the court with respect to material aspects of the ward's financial and health-related circumstances that will promote autonomy (*i.e.*, the right to choose one's residence, vote, medical consent, participation in research).

CHANGES IN PRACTICE PRECEPTS OR GUIDELINES

The Conference recommends that:

40. Courts have adequate funding for investigation at the inception of the guardianship action and for oversight for the duration of the guardianship.

41. The hearing on a guardianship petition be held promptly after service upon the respondent.

42. The guardian use a substituted judgment standard in making decisions on behalf of the person with diminished capacity.

    Comment: Using this standard entails determining what the person with diminished capacity would decide if he or she had capacity.

43. The court consider the best interest of the person with diminished capacity in selecting the guardian.

    Comment: Among those persons the court should consider when selecting guardians should include nominees, family, and agencies qualified to serve.

IV. AGENCY GUARDIANSHIP AND

GUARDIANSHIP STANDARDS

CHANGES IN STATUTE OR REGULATION

The Conference recommends that:

44. States provide public guardianship services when other qualified fiduciaries are not available.

    Comment: This function may be provided through independent state agencies, contracts with private agencies, or by other means.

45. States adopt minimum standards of practice for guardians, using the National Guardianship Association *Standards of Practice*[8] as a model.

    Comment: Lawyers should not be exempt from those standards. Lawyers and courts should be educated and trained in the standards.

46. Professional guardians — those who receive fees for serving two or more unrelated wards — should be licensed, certified, or registered. They should have the skills necessary to serve their wards. Professional guardians should be guided by professional standards and codes of ethics, such as the National Guardianship Association's *A Model Code of Ethics for Guardians*[9] and *Standards of Practice*.

CHANGES IN PRACTICE PRECEPTS OR GUIDELINES

The Conference recommends that:

47. Guardians and guardianship agencies not directly provide services such as housing, medical care, and social services to their own wards, absent court approval and monitoring.

---

8. Reprinted at 31 Stetson L. Rev. ___, ___-___ (2002).

9. Michael D. Casasanto, Mitchell Simian & Judith Roman, *A Model Code of Ethics for Guardians* (Natl. Guardianship Assn. 1991). A copy of this work in PDF format is available through the National Guardianship Association's Web site at <http://www.guardianship.org/ngamembership/index.htm#modelcode>.

RECOMMENDATIONS FOR EDUCATION AND ADVOCACY

The Conference recommends that:

48. The public guardianship function include broad-based information and training.

    Comment: Broad-based education and training about guardianship and alternatives can divert pressure from the public guardianship system.

RECOMMENDATIONS FOR FURTHER STUDY

The Conference recommends that:

49. The National Guardianship Network identify and generate funding for development and improvement of public and private guardianship services from sources including (a) grants, (b) donors, (c) Interest On Lawyers Trust Accounts, (d) Medicaid, (e) increased filing fees, and (f) public-interest litigation.

50. A study be undertaken of successful professional guardianship agencies to identify features that might be used as a model for other programs.

V. MONITORING AND ACCOUNTABILITY[10]

CHANGES IN STATUTE OR REGULATIONS

The Conference recommends that:

51. There be mandatory annual reports of the person and annual financial accountings to determine the status of the person with diminished capacity. The report and the accounting should be audited as frequently as possible.

---

10. See Section IV for Recommendations concerning standards to which guardians should be held accountable.

52. To provide effective monitoring, the following are required: (a) a functional assessment of the abilities and limitations of the person with diminished capacity; (b) an order appropriate to meet the needs of the person with diminished capacity (with preference given to as limited a guardianship if possible); (c) an annual plan based on the assessment and an annual report, appropriately updated, based on the plan; and (d) inclusion of any other mandated reports which are the guardian's responsibility, such as reports to the Social Security Administration or the Department of Veterans Affairs.

CHANGES IN PRACTICE PRECEPTS OR GUIDELINES

The Conference recommends that:

53. States maintain adequate data systems to assure that required plans and reports are timely filed, and establish an electronic database to house these data while preserving privacy.

54. Courts have the primary responsibility for monitoring.

55. Monitoring is appropriate regardless of who is the guardian — family member, professional guardian, or agency guardian.

56. Guardianship issues be delegated to judges who have special training and experience in guardianship matters.

    Comment: Judicial specialization should be encouraged. There is a need to increase expertise of the judiciary and the support staff in guardianship matters. This recommendation should be communicated to legislatures and chief judges who organize court systems.

RECOMMENDATIONS FOR EDUCATION AND ADVOCACY

The Conference recommends that:

57. The National Guardianship Network take the lead in a public information campaign to emphasize the importance of monitoring and the need to adequately fund monitoring efforts.

RECOMMENDATIONS FOR FURTHER STUDY

The Conference recommends that:

58. Recognizing the ultimate responsibility of courts to monitor guardianships, a study be conducted as to whether the court should be permitted to delegate or contract out guardianship monitoring to other public or private organizations, and, if monitoring is delegated, on the nature and extent of the oversight responsibility in the court or judicial system for such alternative arrangements.

VI. LAWYERS AS FIDUCIARIES OR COUNSEL TO FIDUCIARIES

CHANGES IN STATUTE OR REGULATION

The Conference recommends that:

59. The American Bar Association (ABA) and the states adopt the ABA Ethics 2000 proposed revisions to the Model Rule of Professional Conduct 1.14.[11]

    Comment: This proposed rule gives the lawyer representing a client with diminished capacity greater flexibility to take protective action.

60. All persons, including lawyers who serve in any guardianship capacity, be subject to bonding requirements. Further, lawyers who serve as guardians should have professional liability insurance that covers fiduciary activities.

---

11. At its Midyear Meeting in February 2002, the ABA House of Delegates adopted amendments to Model Rule 1.14, which was proposed by the Commission on Evaluation of the Rules of Professional Conduct, known as the ABA Ethics 2000 Commission. ABA Ctr. Prof. Resp., *Report 401 as Passed by the House of Delegates February 5, 2002* <http://www.abanet.org/cpre2k-report_home.html> (Feb. 2000). The revised Model Rule 1.14 is reprinted at 31 Stetson L. Rev. ___, ___-___ (2002).

61. The lawyer for the fiduciary of a person with diminished capacity who knows of neglect, abuse, or exploitation, as defined by state law, be permitted to disclose otherwise confidential information per Model Rule of Professional Conduct 1.6 to the extent necessary or appropriate to protect the person with diminished capacity.[12]

CHANGES IN PRACTICE PRECEPTS OR GUIDELINES

The Conference recommends that:

62. A lawyer petitioning for guardianship of his or her client *not* (a) be appointed as the respondent's counsel, (b) be appointed as the respondent's guardian *ad litem* for the guardianship proceeding, and (c) seek to be appointed guardian except in exigent or extraordinary circumstances, or in cases where the client made an informed nomination while having decisional capacity.

63. The lawyer for a client with diminished capacity not attempt to represent a third party petitioning for guardianship over the lawyer's client.

64. The lawyer who serves in the dual roles of both lawyer and court-appointed fiduciary ensure that the services and fees be differentiated, be reasonable, and be subject to court approval.

65. Lawyers serving as guardians look to the National Guardianship Association *Standards of Practice* and *A Model Code of Ethics for Guardians*, in absence of mandatory minimum standards.

66. When the lawyer represents a fiduciary, the lawyer take reasonable steps to ensure that the fiduciary understands his or her responsibilities and good practice standards, using the

---

12. The ABA House of Delegates adopted amendments to Model Rule 1.6, which were proposed by the ABA Ethics 2000 Commission, at its Annual Meeting in August 2001 and let the amendments stand at its Midyear Meeting in February 2002. ABA Ctr. Prof. Resp., *supra* n. 11. The revised Model Rule 1.6 is reprinted at 31 Stetson L. Rev. ___, ___-___ (2002).

National Guardianship Association standards and materials as models.

67. Practitioners be informed of state law provisions regarding estate-planning responsibilities that might impose a duty on the lawyer and/or guardian to engage in such planning.

RECOMMENDATIONS FOR FURTHER STUDY

The Conference recommends that:

68. Further study be conducted on the role and responsibilities of the lawyer for the fiduciary and his or her duty to a ward with regard to any fiduciary actions that could result in the diminution of the estate while the ward is alive.