

THIRD NATIONAL GUARDIANSHIP SUMMIT STANDARDS AND RECOMMENDATIONS

From October 13–15, 2011, the ten National Guardianship Network (NGN) sponsoring organizations, with eleven diverse cosponsors, convened the Third National Guardianship Summit at the University of Utah S.J. Quinney College of Law in Salt Lake City. With ninety-two delegates, observers, authors, funders, and facilitators participating, the Summit was a consensus conference on post-appointment guardian performance and decision-making for adults.

The Summit delegates adopted a far-reaching set of recommendations for guardian standards, as well as additional recommendations for action by courts, legislatures, and other entities. These documents from the Summit offer the groundwork for nationally recognized standards for guardians of adults.

Below are: (1) basic definitions used in the Standards and Recommendations; (2) the Summit's "Guardian Standards"; and (3) the Summit's "Recommendations for Action." The Standards and Recommendations were adopted by vote of the plenary session based on recommendations of the Summit's seven interdisciplinary working groups.

The Third National Guardianship Summit was supported by grants from the State Justice Institute, the Borchard Foundation Center on Law and Aging, and contributions from NGN and cosponsoring organizations. For a list of these entities, see www.nationalguardianshipnetwork.org.

In preparation for the Summit, the NGN commissioned nine articles by seventeen experts, which are published in this issue of the *Utah Law Review*. In addition, the existing National Guardianship Association *Standards of Practice*, and twelve Summit issue briefs helped to inform the attendees and spur thorough consideration of issues. The issue briefs included Recommendations from a Family Guardian Focus Group convened by NGN planners to promote family guardian input and a summary by the National Organization to End Elder Abuse and Guardianship Abuse.¹

DEFINITIONS FOR GUARDIANSHIP SUMMIT STANDARDS/RECOMMENDATIONS

- *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.

¹ For the issue briefs, article authors and topics, see www.nationalguardianshipnetwork.org.

- NOTE: 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 and/or financial decisions, and for whom the court has appointed a guardian and/or conservator.
- *Person-centered planning*: Person-centered planning² refers to a family of approaches designed to guide change in a person’s life. This type of planning is carried out in alliance with the person, their family and friends and is grounded in demonstrating respect for the dignity of all involved. Recognized approaches seek to discover, understand, and clearly describe the unique characteristics of the person, so that the person:
 - Has positive control over the life he/she desires and finds satisfying;
 - Is recognized and valued for contributions (current and potential) to the person’s communities; and
 - Is supported in a web of relationships, both natural and paid, within the person’s communities.

THIRD NATIONAL GUARDIANSHIP SUMMIT:
STANDARDS OF EXCELLENCE—GUARDIAN STANDARDS
OCTOBER 2011

#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.

² This definition of person-centered planning is the result of personal communication from specialists from The Learning Community for Person Centered Practices: Michael Smull, Chair; Mary Lou Bourne, and Leigh Ann Kingsbury, Support Development Associates. See THE LEARNING COMMUNITY, <http://www.learningcommunity.us> (last visited May 16, 2012); see also A LITTLE BOOK ABOUT PERSON CENTERED PLANNING (John O’Brien & Connie Lyle O’Brien eds., 2000) (compiling multiple articles addressing relevant issues relating to person-centered planning).

- 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.

#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.

#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.

#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.

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 interest 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.

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, and 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.

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.

*#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.

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.

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.

*#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.

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.

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.

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.

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.

THIRD NATIONAL GUARDIANSHIP SUMMIT:
STANDARDS OF EXCELLENCE—RECOMMENDATIONS FOR ACTION
OCTOBER 2011

#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 Working Interdisciplinary Networks of Guardianship Stakeholders (WINGS) 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.

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*.

#2. Guardian's Relationship to the Court

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, multifaceted 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.

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.

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.

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 electronic filing
- Provide public access to identified non-confidential, filed documents.

#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.

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.

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.

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; or
- A master or a special judicial resolution process.

*#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.

*#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, nontraditional partners, and underserved populations

- Establish a clear process for setting priorities and developing feasible timelines.

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.

*#6. Steps to Implement the Recommendations of the
Third National Guardianship Summit*

The National Guardianship Network organizations should work to match desired changes in policy and practice with the best possible implementation strategy.

- Strategies include statutory change, amendments to the Uniform Guardianship and Protective
- Proceedings Act, administrative rules/regulations, court rules, and best practice promotion and education.
- A campaign to build awareness of the need for adoption of the Summit recommendations and standards should build on alliances with entities such as volunteer guardianship programs, the disability community, and public guardians.

- The campaign should use case statements to create public awareness of the need for reform while offering examples of integrity, and emphasizing existing standards.

The National Guardianship Network should work with the Uniform Law Commission as a core strategy to implement the standards and recommendations from the Third National Guardianship Summit.

The National Center for State Courts should take the standards and recommendations from the Third National Guardianship Summit to the probate court standards revision process.