

# PERSON-CENTERED PLANNING IN GUARDIANSHIP: A LITTLE HOPE FOR THE FUTURE

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## I. INTRODUCTION

Across the states, territories, and the District of Columbia, American guardianship<sup>1</sup> functions as a statutory grant of legal authority to a person or entity over an adjudicated incompetent or incapacitated person (“AIP”).<sup>2</sup> It is widely described as the most intrusive of the fiduciary powers,<sup>3</sup> having earned such a reputation in recent decades as to have AIPs declared “legally dead.”<sup>4</sup>

America’s inherited collective form of guardianship originated over the course of centuries and across many cultures of western civilization.<sup>5</sup> A primary

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<sup>1</sup> The scope of this article is limited to guardianship of adults. The words “guardian” and “guardianship” in this Article include the broad spectrum of words and language used across the country to describe surrogate decision-making for another person through court appointment that transfers the power over an individual’s rights, liberties, placement, and finances to another person or entity. These words and phrases include, but are not limited to, the following: “conservatorship”; “interdiction”; “committee”; “curator”; “fiduciary”; “visitor”; “public trustee”; and “next friend.”

<sup>2</sup> See NATIONAL PROBATE COURT STANDARDS §§ 3.3, 3.4 (Comm’n on Nat’l Prob. Court Standards & Advisory Comm. on Interstate Guardianships) (citing UNIF. PROBATE CODE § 1-201(8) (amended 2006), 8 U.L.A. 44 (1998)); UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT (1997).

<sup>3</sup> See John J. Regan, *Protecting the Elderly: The New Paternalism*, 32 HASTINGS L.J. 1111 (1981); John J. Regan, *Intervention Through Adult Protective Services Programs*, 18 GERONTOLOGIST 250, 252 (1978).

<sup>4</sup> See Fred Bayles & Scott McCartney, *Many Elderly Declared “Legally Dead” by a Troubled System*, LAWRENCE J.-WORLD, Sept. 20, 1987, at 2C.

<sup>5</sup> See A. Frank Johns, *Guardianship Folly: The Misgovernment of Parens Patriae and the Forecast of its Crumbling Linkage to Unprotected Older Americans in the Twenty-First Century—A March of Folly? Or Just a Mask of Virtual Reality?*, 27 STETSON L. REV. 1, 6–

component rooted in the inheritance was the doctrine of *parens patriae*.<sup>6</sup> The focus of *parens patriae* was the Crown's (now state probate and guardianship judges') exercise of its paternal royal prerogative over its subjects unable to protect themselves,<sup>7</sup> but with the singular objective of protecting the subjects' properties for the Crown.<sup>8</sup> This myopic concern for guardianship property has continued in American jurisprudence, where concern for the AIPs themselves was considered beyond the expertise of the courts, and better relegated to public and private social agencies.<sup>9</sup> This continues to be the indictment of guardianship, where vulnerable citizens, those mentally ill or mentally or physically challenged,<sup>10</sup> have been condemned to a perverse legal system that protects property over the person.<sup>11</sup> While countless American studies<sup>12</sup> have found that guardianship protects those

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28 (1997) (examining, in part, the origins of guardianship in the Greek, Roman, English and American cultures). It is noted that Louisiana law is derived from French, German, and Spanish legal codes. See LA. CIV. CODE ANN. art 389 (2007).

<sup>6</sup> See Peter M. Horstman, *Protective Services for the Elderly: The Limits of Parens Patriae*, 40 MO. L. REV. 215, 220 (1975) (explaining that, in the Middle Ages, mentally disabled persons were often treated as social outcasts, and driven out of the city).

<sup>7</sup> See Lee Coleman & Trudy Solomon, *Parens Patriae "Treatment": Legal Punishment in Disguise*, 3 HASTINGS CONST. L.Q. 345, 345–62 (1976); Richard Neugebauer, *The Treatment of the Mentally Ill in Medieval and Early Modern England: A Reappraisal*, 14 J. HIST. BEHAV. SCI. 158, 159 (1978).

<sup>8</sup> See Neugebauer, *supra* note 7, at 159.

<sup>9</sup> See SALLY BALCH HURME ET AL., AM. BAR ASS'N, STEPS TO ENHANCE GUARDIANSHIP MONITORING 6–8 (1991) (noting that historically, factions of the ABA and other organizations stood strongly behind the assertion that the court system is not a place for delivery of social services).

<sup>10</sup> Current politically correct descriptions belie the less-than-human subclassifications to which these members of western society had been relegated. It has only been since the 1970s and 1980s that "lunatic," "idiot," and "imbecile" remained enmeshed in the statutory definitions of those subjected to involuntary commitment in hospitals for the insane, or subjected to the degradation of exile to a "farm colony" hidden from the public. See William F. Fratcher, *Toward Uniform Guardianship Legislation*, 64 MICH. L. REV. 983, 984–87 (1966); Comm. on Problems Relating to Persons Under Disability, *Conservatorship: Present Practice and Uniform Probate Code Compared*, 5 REAL PROP. PROB. & TR. J. 507, 507 (1970). See generally UNIF. PROBATE CODE, 8 U.L.A. 44 (1998 & Supp. 2011) (the first attempt at eliminating arcane and embarrassing terms, bringing them into modern American jurisprudence).

<sup>11</sup> See Barbara A. Cohen et al., *Tailoring Guardianship to the Needs of Mentally Handicapped Citizens*, 6 MD. L. F. 91, 92 (1976) (describing how the mentally disabled ward's property, but not the person, has always been cared for).

<sup>12</sup> See RICHARD C. ALLEN ET AL., MENTAL IMPAIRMENT AND LEGAL INCOMPETENCY 14–29 (1968) (this compilation of several studies in the 1960s began with The Mental Competency Study in 1961); see also AM. BAR FOUND., THE MENTALLY DISABLED AND THE LAW xvi–xvii (Samuel J. Brackel & Ronald S. Rock eds., rev. ed. 1971) (stating that the first American Bar Association committees addressing issues related to the mentally ill, mentally incompetent, and physically disabled were organized in the 1940s); Johns, *supra*

adults amongst us who are helpless and vulnerable, they have also uncovered evils in guardianship: removing all individual rights;<sup>13</sup> denying access, connection, and voice<sup>14</sup> to those lost in guardianship's gulag;<sup>15</sup> and still continuing a process rooted in systemic perversities.<sup>16</sup> Recent reexaminations of monitoring<sup>17</sup> and public guardians<sup>18</sup> acknowledge that guardianship still limits the autonomy, individuality, self-esteem, and self-determination of AIPs.<sup>19</sup>

At Wingspan, the Second National Guardianship Conference,<sup>20</sup> Richard Van Duizend, Executive Director of the National Center of State Courts, ended his keynote address with three provocative alternatives: 1) continuing to tinker with the existing guardianship system; 2) abolishing the guardianship system; or 3) creating a disability accommodation and support model, rather than a state sponsored preemption of individual rights model.<sup>21</sup> If the second alternative were to be considered, something similar to the third alternative would have to follow.

A disability accommodation and support model would probably be fashioned after the American concept of person-centered decision making for persons with developmental disabilities,<sup>22</sup> or after the European and Canadian concept of supported decision making for people with disabilities.<sup>23</sup> On a stand-alone basis, it is not clear that there is a difference between this concept of person-centered

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note 5, at 28–66 (discussing 22 projects, studies, and conferences on guardianship from 1961 to 1996).

<sup>13</sup> See A. Frank Johns, *Midnight Approaches in Guardianship's Garden of Good and Evil*, 10 NAT'L ACAD. ELDER L. ATT'YS Q. 6 (1997).

<sup>14</sup> See Peter Margulies, *Access, Connection, and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Capacity*, 62 FORDHAM L. REV. 1073, 1076–80 (1994).

<sup>15</sup> See Denise M. Topolnicki et al., *The Gulag of Guardianship*, MONEY MAG. (Mar. 1, 1989), [http://money.cnn.com/magazines/moneymag/moneymag\\_archive/1989/03/01/84988/index.htm](http://money.cnn.com/magazines/moneymag/moneymag_archive/1989/03/01/84988/index.htm).

<sup>16</sup> See Johns, *supra* note 5, at 87.

<sup>17</sup> NAT'L ACAD. OF ELDER LAW ATTORNEYS ET AL., NATIONAL WINGSPAN IMPLEMENTATION SESSION: ACTION STEPS ON ADULT GUARDIANSHIP PROGRESS 12–13 (2004), available at [http://www.americanbar.org/content/dam/aba/migrated/aging/PublicDocuments/action\\_steps\\_adult\\_g\\_ship\\_prog.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/aging/PublicDocuments/action_steps_adult_g_ship_prog.authcheckdam.pdf).

<sup>18</sup> Naomi Karp & Erica Wood, *Guarding the Guardians: Promising Practices for Court Monitoring*, AARP PUB. POL'Y INST., Dec. 2007, at 12–13, available at [http://assets.aarp.org/rgcenter/il/2007\\_21\\_guardians.pdf](http://assets.aarp.org/rgcenter/il/2007_21_guardians.pdf).

<sup>19</sup> Pamela Teaster et al., *Public Guardianship After 25 Years: In the Best Interest of Incapacitated People?*, A.B.A., at 9–12 (2007), [http://www.americanbar.org/content/dam/aba/migrated/aging/docs/Guard\\_report\\_Exec\\_Summ.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/aging/docs/Guard_report_Exec_Summ.authcheckdam.pdf).

<sup>20</sup> See A. Frank Johns & Charles P. Sabatino, *Wingspan—The Second National Guardianship Conference: Introduction*, 31 STETSON L. REV. 573, 575–76 (2002).

<sup>21</sup> *Id.*

<sup>22</sup> *Key Elements of A System for Supported Decision-Making*, INCLUSION EUROPE (2008), <http://nagano.dee.cc/IE%20Position.pdf>.

<sup>23</sup> CONNIE LYLE O'BRIEN & JOHN O'BRIEN, THE ORIGINS OF PERSON CENTERED PLANNING: A COMMUNITY OF PRACTICE PERSPECTIVE 8–9 (Responsive Systems Assocs. ed., 2000), available at [http://thehp.syr.edu/PCP\\_History.pdf](http://thehp.syr.edu/PCP_History.pdf).

decision-making and the concept of supported decision-making, which seems to have its origin in Canada.<sup>24</sup> However, it received recognition and high visibility after the 2006 passage of Article 12 of the United Nations Convention on the Rights of Persons with Disabilities.<sup>25</sup>

In addition to the United Nations, other nations have supported decision making more as a replacement for guardianship,<sup>26</sup> meaning that there is no judicial process or legal intervention that removes a person's individual rights.<sup>27</sup> However, the possibility is less than remote that the American states and territories would ever consider abolishing their models of state sponsored preemption of individual rights. Their independently crafted guardianship statutes and regulations have been a part of their jurisprudence since their statehood, or territorial organization.<sup>28</sup> This makes Van Duizend's second and third options no options at all.

On the premise above, Van Duizend's first proactive alternative of tinkering with the existing guardianship system could provide guardians with education and training, empowering them to implement person-centered decision making with their AIPs. The tinkering could also enhance monitoring and accountability, assuring care giving, care planning, residential placement, and all other life planning with vulnerable elders and persons with disabilities requiring assistance.<sup>29</sup>

However, no statutes, regulations, or standards mandate person-centered guardianship.<sup>30</sup> The work to be done will require more than tinkering, and whatever is done must be guided by an understanding of how guardians act, and by the current doctrines through which they act.<sup>31</sup>

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<sup>24</sup> See John Brayley, Supported Decision-Making in Australia: Presentation Notes, OPA (Dec. 14, 2009), [http://www.opa.sa.gov.au/documents/08\\_News\\_&\\_Articles/Supported%20Decision%20Making.pdf](http://www.opa.sa.gov.au/documents/08_News_&_Articles/Supported%20Decision%20Making.pdf).

<sup>25</sup> See *Chapter Six: From Provisions to Practice: Implementing the Convention*, U.N. ENABLE, <http://www.un.org/disabilities/default.asp?id=238> (last visited April 18, 2012); Convention on the Rights of Persons with Disabilities, art. 12, Dec. 13, 2006, 2515 U.N.T.S. 3.

<sup>26</sup> Brayley, *supra* note 24.

<sup>27</sup> See Stanley S. Herr, *Self-determination, Autonomy, and Alternatives for Guardianship*, in *THE HUMAN RIGHTS OF PERSONS WITH INTELLECTUAL DISABILITIES* 429–50 (Stanley Herr et al. eds., 2003), available at <http://ruralinstitute.umt.edu/transition/Handouts/Self-Determination.Herr.pdf> (discussing “a law requiring the phasing out of all special hospitals and institutions, prohibiting new admissions, and mandating a variety of guidance and support measures, including the services of a “contact person”).

<sup>28</sup> See MICHAEL L. PERLIN, *MENTAL DISABILITY LAW: CIVIL AND CRIMINAL*, ch. 2, 149 (2d ed. Supp. 2011).

<sup>29</sup> Options and alternatives to guardianship are not the primary subject of this article and will not be further developed.

<sup>30</sup> See UNIF. LAWS COMM'N, *UPC ENACTMENT CHART* (2010).

<sup>31</sup> See Linda S. Whitton & Lawrence A. Frolik, *Surrogate Decision-Making Standards for Guardians: Theory and Reality*, 2012 UTAH L. REV. 1491 (Whitton and Frolik provide a more thorough and far-reaching treatment of these principles in their article).

Part II demonstrates that guardians' current exercise of authority is not person-centered. Part III describes person-centered planning as a solution to the problems in guardianship. Part IV describes how person-centered planning can be incorporated in guardianship. Finally, Part V describes the manner in which states can adopt (and the degree to which they already have adopted) person-centered planning.

## II. THE GUARDIAN'S EXERCISE OF AUTHORITY IS NOT PERSON-CENTERED

Although no good data regarding guardianship practice is available,<sup>32</sup> the general consensus is that a majority of guardianship adjudications are plenary, removing most, if not all, individual rights and the independence of the person.<sup>33</sup> Thus, the guardian has the authority to make decisions affecting the AIP's person, property, or both.<sup>34</sup> Rarely are limitations placed on the guardian, which would leave AIPs broader areas in which they are able to make independent choices or decisions.<sup>35</sup> Often decisions are made without input from the AIP.<sup>36</sup> Just as often, the guardian has had no prior relationship or connection with the AIP.<sup>37</sup> Even more often, guardians are provided little or no education or training.<sup>38</sup> This is the logical result when most state guardianship statutes offer no doctrines by which guardians exercise their authority, duties, and powers.<sup>39</sup> No national empirical research is available to determine how guardians exercise their powers and duties. The

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<sup>32</sup> In the 2006 GAO Report, it was noted that since the early 1990s, those testifying in public hearings and publishing articles have acknowledged the dearth of good data collection regarding guardianship from empirically based analysis could be published. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-1086T, *GUARDIANSHIPS: LITTLE PROGRESS IN ENSURING PROTECTION FOR INCAPACITATED ELDERLY PEOPLE* 6 (2006).

<sup>33</sup> See Johns, *supra* note 5 (detailing "intrusive" guardianship practices and condemning "American democracy's misgovernment of guardianship" and "the perceived need to hospitalize or restrain the disabled").

<sup>34</sup> See Lawrence A. Frolik, *Promoting Judicial Acceptance and Use of Limited Guardianship*, 31 STETSON L. REV. 735, 739 (2002). The concept of limited guardianship seeks to maximize the AIP's autonomy and independence. See *id.* at 741; Sally Balch Hurme, *Limited Guardianship: Its Implementation is Long Overdue*, 28 CLEARINGHOUSE REV. 660, 661 (1994).

<sup>35</sup> Frolik, *supra* note 34, at 661–62.

<sup>36</sup> See Karen E. Boxx & Terry W. Hammond, *A Call for Standards: An Overview of the Current Status and Need for Guardian Standards of Conduct and Codes of Ethics*, 2012 UTAH L. REV. 1207.

<sup>37</sup> See Pamela B. Teaster, Erica F. Wood, Winsor C. Schmidt, Jr., & Susan A. Lawrence, *Wards of the State: A National Study of Public Guardianship*, 37 STETSON L. REV. 193, 203 (2007) (noting that social service agencies often act as public guardians, which can often result in a conflict of interest).

<sup>38</sup> See Boxx & Hammond, *supra* note 36, at 1227–28.

<sup>39</sup> See Whitton & Frolik, *supra* note 31, at 1494–96.

exception comes from the survey that is part of the article of Professors Whitton and Frolik.<sup>40</sup>

These deficiencies are apparent at a time when census demographics and empirical research have forecasted significant increases in the aging and developmental disabilities populations.<sup>41</sup> Couple these increases with the fact that many family members no longer live within close proximity to each other and one quickly sees why nonfamily guardianship is on the rise.<sup>42</sup> The increases are occurring at a time when there are insufficient support networks, whether family, friends, church members, or individual advocates from whom guardians may be chosen to serve.<sup>43</sup> By default the courts are granting an increasing number of guardianship appointments to private professional guardians and public agencies.<sup>44</sup> The current state of the American economy and the significant reductions in state and county budgets will force many guardianship case managers to carry much larger guardianship caseloads with little or no person-centered planning.

One thing is apparent across this country: guardians act with little if any uniformity, much less adherence to person-centered philosophy.<sup>45</sup> Anecdotally, a few cases may be mentioned or individual guardians' efforts noted.<sup>46</sup> Also recognized is the push by nonprofit organizations and councils serving persons with developmental disabilities to educate a range of professionals (which could include guardians) to be more person-centered.<sup>47</sup> Beyond a scatter of cases, or advocacy operations, there are few noteworthy initiatives that infuse guardianship statutes, regulations, or practice standards with a greater semblance of person-centered planning, which focuses greater attention on the personal wants and needs of those under guardianship.<sup>48</sup> Regardless of the dire forecast, strategies could be developed to create stronger person-centered standards of decision-making and to educate all guardians about person-centered philosophy.

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<sup>40</sup> *Id.* at 1515–31. Even then, Whitton and Frolik acknowledge how few responses there were to the survey. *Id.* at 1519.

<sup>41</sup> It is not that we did not know it was coming. One of the early warnings of the tsunami of older Americas came in the AARP monograph, *AGING AND THE LAW: LOOKING INTO THE NEXT CENTURY* (Patricia R. Powers & Karen Klingensmith eds., 1989).

<sup>42</sup> *See, e.g.,* Boxx & Hammond, *supra* note 36, at 74–75 (discussing the difference in methods of decision making between family and nonfamily guardians).

<sup>43</sup> The dearth of guardians available to serve the mounting numbers of vulnerable older Americans and persons with disabilities has been forecasted for decades. *See Some Thoughts for a Roundtable Discussion on Guardianship: Workshop Before the S. Special Comm. on Aging*, 102d Cong. 21–31 (1992) (statement of John J. Regan, prof. of Healthcare Law, Hofstra University).

<sup>44</sup> *See* PAMELA B. TEASTER, ERICA F. WOOD, WINDSOR C. SCHMIDT, JR., & SUSAN A. LAWRENCE, *PUBLIC GUARDIANSHIP AFTER 25 YEARS: IN THE BEST INTEREST OF INCAPACITATED PEOPLE?*, NAT'L STUDY OF PUBLIC GUARDIANSHIP PHASE II REPORT (2007).

<sup>45</sup> *See* WHITTON & FROLIK, *supra* note 31, at 75–76.

<sup>46</sup> *See infra* Part III.

<sup>47</sup> *See infra* notes 67–69 and accompanying text.

<sup>48</sup> *See infra* notes 90–94 and accompanying text.

### III. PERSON-CENTERED PHILOSOPHY

Person-centered planning offers a solution to these problems.<sup>49</sup> This part (A) describes person-centered planning and distinguishes it from traditional guardianship and (B) illustrates how person-centered planning “tools” can be applied in certain instances.

#### A. *Person-Centered Planning Rather than Traditional Guardianship*

Person-centered planning traces its origin to the concept of normalization,<sup>50</sup> gaining sophistication during the decades of deinstitutionalization and civil rights.<sup>51</sup> Since the early seventies, person-centered planning has established a name and description singularly focused on individuals with developmental disabilities.<sup>52</sup> As noted by the O’Briens, person-centered planning came from a shared passion for understanding and teaching how the principle of normalization might be applied to improve the quality of services to people with developmental disabilities.<sup>53</sup>

Within communities of practice, the pioneers of person-centered planning had laboratories, forums, workshops, and mediums for communication where they shared general philosophical backgrounds that targeted similar outcomes.<sup>54</sup> From the communities of practice came dozens of distinct but mostly related approaches that have designed systematic ways to actionably understand persons with developmental disabilities as contributing community members.<sup>55</sup>

According to experts in the field, there is no one definition of person-centered planning; it is described more as a spectrum of processes based on one general

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<sup>49</sup> See *supra* Part II.

<sup>50</sup> Bengt Nirje, *The Normalization Principle and its Human Management Implications*, in PRESIDENT’S COMM. ON MENTAL RETARDATION, DEPT. OF HEALTH, EDUCATION, & WELFARE, CHANGING PATTERNS IN RESIDENTIAL SERVICES FOR THE MENTALLY RETARDED 179, 181–95 (Robert B. Kugel & Wolf Wolfensberger eds., 1976) (referencing the 1959 Danish Act No. 192), available at <http://www.childrenwebmag.com/articles/key-child-care-texts/the-normalization-principle-and-its-human-management-implications-by-bengt-nirje>.

<sup>51</sup> See generally ROBERT L. BURGDOFF, JR. & PATRICK P. SPICER, THE LEGAL RIGHTS OF HANDICAPPED PERSONS: CASES, MATERIALS, & TEXT (Supp. 1983) (containing cases regarding the civil rights of mentally handicapped people that rely on the Civil Rights Act of 1964); MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL (Matthew Bender & Co., Inc., 2d. ed. 1999) (detailing changes in the law regarding mentally disabled people after the landmark 1971 case, *Wyatt v. Stickney*).

<sup>52</sup> See O’BRIEN & O’BRIEN, *supra* note 23.

<sup>53</sup> *Id.* at 10–16.

<sup>54</sup> *Id.* at 13–16.

<sup>55</sup> *Id.*

philosophical background.<sup>56</sup> One description defines it as planning that specifically empowers individuals to be directly involved in their social inclusion, while challenging their devaluation.<sup>57</sup> It is also described as a response to systems, agencies, and services set up to respond to the problems of social exclusion, disempowerment, and devaluation of individuals with developmental disabilities—all too often unintentionally making these problems worse.<sup>58</sup> Another definition comes from the Centers for Medicare and Medicaid Services (“CMS”).<sup>59</sup>

From this spectrum of processes comes a general understanding of just how person-centered philosophy is applied. While traditional guardianship is system-driven, person-centered philosophy is a person-directed process where the individual identifies what is important.<sup>60</sup> It is a philosophy that applies the principle of self-determination.<sup>61</sup> The individual’s circle of support is expanded to include anyone important in the person’s life, thereby assisting the individual to achieve goals while maintaining safeguards.<sup>62</sup> The key elements of person-centered planning include person-directed preferences and establishing a vision based on the person’s abilities, and strengths, which are determined from informal and formal knowledge.<sup>63</sup> There is an emphasis on network building, which requires collaborative teamwork with the use of a facilitator.<sup>64</sup> Person-centered

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<sup>56</sup> *Id.* at 1 (“It is reasonable to look at person-centered planning as a collection of techniques each of which has particular defining features and a distinct history associated with particular leaders.”).

<sup>57</sup> *Id.* at 6–10 (“People select themselves into communities of practice because of personal interest in building and exchanging knowledge with others who share their commitment to an issue or a task.”).

<sup>58</sup> *Id.*

<sup>59</sup> Person-Centered Planning Process: CMS requires that a person-centered planning process and assessment be used to develop a person-centered plan. The individual directs the process, with assistance as needed or desired from a representative of the individual’s choosing. It is intended to identify the strengths, capacities, preferences, needs, and desired measurable outcomes of the individual. The process may include other persons, freely chosen by the individual, who are able to serve as important contributors to the process. The planning process must also include planning for contingencies such as when a needed service is not provided due to the worker being out sick. The contingency or “back-up” plan must become a part of the individual’s person-centered plan. As part of the contingency planning process, an assessment of the risks to the individual must be completed and a discussion about how the risks will be addressed must be held. *See* 42 C.F.R. § 440.167 (2011).

<sup>60</sup> *See* O’BRIEN & O’BRIEN, *supra* note 23, at 14–15.

<sup>61</sup> *See infra* note 81 (stating that many jurisdictions combine “using substituted judgment when it is reasonably certain” and using “the patient’s best interest when the patient’s desires are not known”).

<sup>62</sup> *See infra* note 81 (noting that a surrogate may include family or a guardian).

<sup>63</sup> *See* O’BRIEN & O’BRIEN, *supra* note 23, at 14–17.

<sup>64</sup> *See id.* at 16 (“Perhaps the most powerful idea of person-centered planning is that the way a person who needs services is seen and understood by those who deliver that service generates a powerful internal consistency in the ways the person is served.”).



planning has been successfully developed within bureaucratic environments.<sup>65</sup> Agencies and programs serving individuals with developmental disabilities, and in delivering person-centered planning, strive to make individuals the center of planning and decision making, while treating family members as partners.<sup>66</sup> Person-centered planning maintains focus on the positives of a person's life, discovering gifts, skills and capacities of the individual, and staying mindful of the person's priorities of life.<sup>67</sup>

In contrast, conventional service models operate for, not with, the individuals being served.<sup>68</sup> Instead of the individuals identifying the types of supports they need; professionals, such as care managers, medical professionals, therapists, and social workers, who make support decisions often focusing on deficits and negative behavior which can create a disempowered mindset.<sup>69</sup> This could also be the charge leveled against guardians, especially those operating in large agencies with excessive caseloads.

*B. Person-Centered Philosophy in Action:  
Person-Centered Planning Tools*

Person-centered planning could fit well within the guardianship construct because when properly implemented, both are based on human rights, values of independence, choice, and social inclusion,<sup>70</sup> even though the differences between person-centered planning and conventional service models could pose some difficulties with respect to implementation.<sup>71</sup> Person-centered planning could help guardians develop an awareness that enables them to assist AIPs to direct—to the

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<sup>65</sup> See, e.g., *Virginia Person-Centered Thinking Training*, VA. COMMONWEALTH UNIV., <http://www.vcu.edu/partnership/PCT/trainingcurrdescrip.html> (last visited Apr. 15, 2012) (describing Virginia's Person-Centered Thinking Training curriculum).

<sup>66</sup> See, e.g., *id.* (describing curriculum teaching people how to “discover[] what is important to people” and to sort out “what is important for people” from “what is important to people”).

<sup>67</sup> See *infra* Part III.B.2 and case example of Thalia L.

<sup>68</sup> *Virginia Person-Centered Thinking Training*, *supra* note 65.

<sup>69</sup> See Russell J. Kormann & Michael R. Petronko, *Crisis and Revolution in Developmental Disabilities: The Dilemma of Community Based Service*, 3 BEHAV. ANALYST TODAY, 434–39 (2003).

<sup>70</sup> See *infra* Part IV.B.

<sup>71</sup> In one of their many writings, Connie and John O'Brien noted how difficult it was for their own community of practice to make person-centered planning work: Members of the community of practice had repeated chances to look at the same world that they functioned in everyday, but from the position of outsiders charged to identify and think about what the people served experienced through the program. A discipline of accounting for what teams observed—rather than explaining why service programs were constrained from doing better—built awareness of the potential damage human services can unknowingly inflict. Many participants changed their practice on what they learned by assessing another program. O'BRIEN & O'BRIEN, *supra* note 23, at 9.

extent they can—their personalized services and supports.<sup>72</sup> This subpart demonstrates that (1) the distinguishing “important to” from “important for” sort, (2) relationship map, and (3) “working/not working” analysis, are effective tools for incorporating person-centered planning into the guardianship construct.

### 1. *Doing an Important To/Important For Sort*

We ultimately want all people to have a meaningful and balanced life. For people who receive structured services, the system has focused heavily on ensuring that people are healthy and safe; but has disregarded in many situations if people are happy. So we have a lot of people who are healthy, safe, and miserable.

By implementing person-centered practices, specifically by implementing the tools and skills of person-centered thinking, we can help find a balance in people’s lives between what is important to them and what is important for them. Distinguishing *important to* from *important for* is the foundational concept of person-centered philosophy, and is a necessary first step before implementing any person-centered tool or other type of problem solving mechanism. This helps by engaging the individual, offering a way of checking that any recorded goals for the individual make sense to them, identifying changes in the individual’s situation, and in making a sensitive assessment of an individual’s personal needs.

If we can effectively do this, we help people move from healthy, safe, and miserable to healthy, safe, and happy.

*Important To* includes what people are saying with words and behavior. When words and behavior are in conflict, we must listen to the behavior. *Important To* concepts include the things that make individuals happy, comforted, content, and satisfied.

*Important For* includes what keeps individuals safe and healthy and a valued member of community.

#### Case Study 1: Gilbert J.

Gilbert J. is a common sight on the streets of Greensboro. When he was younger he worked for a landscaper for several years and then at various other minimum wage jobs. Gilbert, who was diagnosed with bipolar disorder at age twenty-three is now thirty-seven. Gilbert received treatment and medication for the bipolar diagnosis from a community mental health provider for three years with good results. His great work ethic and easy-going personality allowed him to easily find work and he could afford a small rental house. In the mid-1990s a friend introduced him to crack cocaine, and he became addicted. Since then, he has been arrested many times for petty theft and possession of drugs, spent time in jail, and passed through several rehabilitation programs for both drug and alcohol abuse. When clean and sober, he has been employed sporadically, but the symptoms of

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<sup>72</sup> See *infra* Part IV.B.2. The tools and case studies provided in pages 10 through 15 were developed by and with Professor Richmond; see acknowledgement at the beginning of the Article.

his bipolar disorder are unpredictable and have cost him his job on several occasions. He now lives in a run-down rented trailer just out of town, but he spends most days on the streets.

One day he passed out near the Veterans' Memorial Park. The police took him to the emergency room and was admitted to the hospital with dehydration, malnourishment, alcohol poisoning, and diabetes. He is also having hallucinations that medication cannot subside. His landlord says he cannot return to his home. The Department of Social Services (DSS), in conjunction with the area mental health agency, has adjudicated Gilbert as incompetent. A DSS social worker is assigned to be Gilbert's Guardian. She has not met him, but she has begun to secure housing for Gilbert because he is going to be released next week.

The Learning Community for Person Centered Practices (TLC) in 2009 stated: "If individuals are to get a good balance of what is important to them (what makes them happy, satisfied, content, and fulfilled) and what is important for them (health, safety, and being valued), then everyone in a support role with the individual has to understand and be skilled at sorting important to and important for."

#### An Important To/Important For Sort

<b>Important To Gilbert:</b>	<b>Important For Gilbert:</b>
Being called Gil	Managing the symptoms of his bi-polar disorder
Knowing he is not being judged	Avoiding illicit substances
Living in his own place	Getting proper nutrition
Hanging out with friends	Having access to consistent mental and physical health care
Having a job and working hard	
Making his own decisions	
Being safe	
<b>What do we need to learn /know:</b>	
When Gilbert has been clean and sober in the past, what elements lead to his success?	
Does Gilbert have any friends who have been important in helping him stay off substances? Have they supported him in other ways?	

## 2. *Creating the Relationship Map*

The Relationship Map offers an effective way of finding out who to talk to and who to listen to when a guardian is making decisions. It depicts emotional distance and connectedness and reflects strength and depth of feeling between individuals versus how much time they spend together. Relationship maps capture

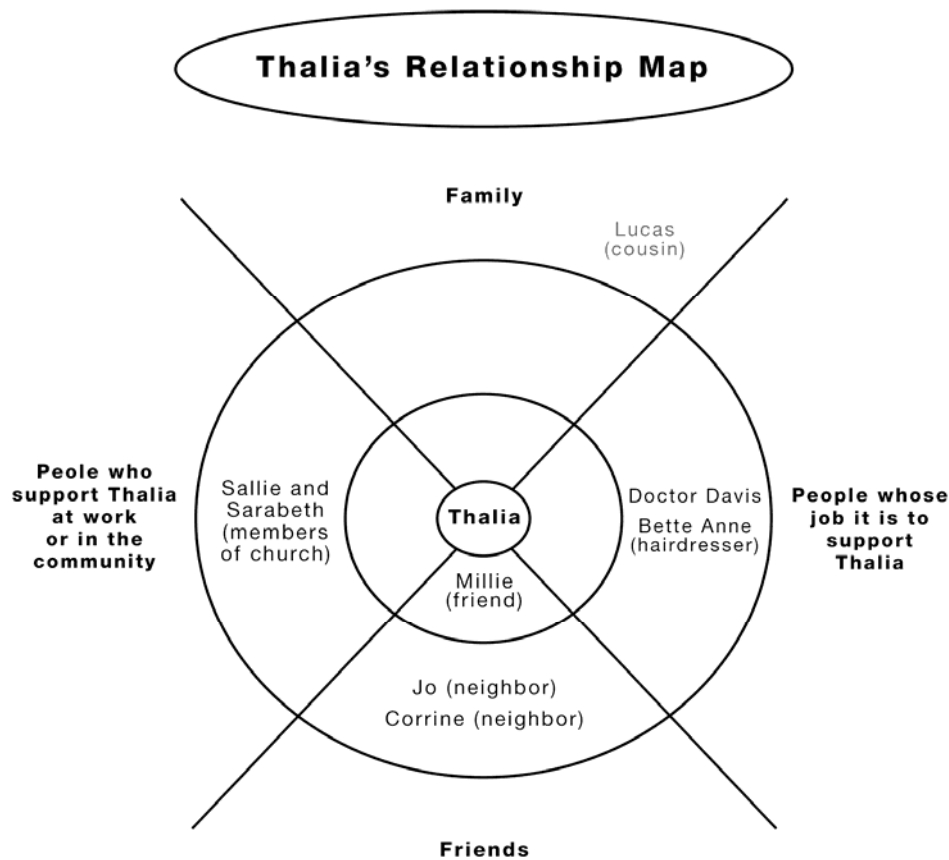
information about who is most important to an individual and in what way, identifies networks of relationships that an individual has, and gives a fuller picture of relationships that must be strengthened and supported in the individual's life. Placement of the names on the map can be determined based on "how" the person is in the individual's life, not how close the "blood" relationship is. Thus the map develops a picture of who is in an individual's life in a meaningful way and who they care about. This is an important distinction because we can get a good idea about who we should talk to in order to develop a clear picture of what is important to the individual.

#### Case Study 2: Thalia L.

Thalia is eighty-seven years old. She has lived alone in a small house that she owned in a friendly neighborhood in North Central North Carolina for forty-eight years. Her neighbors admire her for her great stories and her ability to remember everyone by name. Thalia never married and has always had an independent spirit. She is a "social butterfly" and is known by many in her community. Since her retirement, she has lived on her social security benefit and an educator's retirement account, which has been sufficient to cover all of her expenses and allow her to live comfortably and take a few extended trips. She had siblings and cousins in the area, but most have passed away and Thalia has never had close relationships with them or their surviving children who now live in California and Tennessee.

Four months ago, Thalia fell and broke her shoulder. Her best friend and neighbor, Millie, looked after her home and her cat while she was hospitalized for the shoulder surgery and rehabilitation. Thalia's physician believed she would be able to return to her own home in two to three weeks. However, Thalia had a major stroke the week after the surgery while she was still in the hospital. She is now severely physically and cognitively impaired and her physician is unsure of how much she will improve, or how long any recovery will take. The hospital contacted Lucus, Thalia's cousin and only nearby family member. Lucus agreed to serve as a guardian for Thalia. Lucus arranged for Thalia to be moved from the hospital to a long-term care facility where she receives skilled nursing care. Lucus wants to sell Thalia's home and a piece of land that she owns in a neighboring county even though her monthly income plus her retirement savings cover the cost of her room and care. Thalia has not done any advanced planning, but she has told Millie for years that she does not ever want to enter a long-term care facility.

The Relationship map identifies who is important to a person.



### 3. Using the Working/Not Working Analysis

The Working/Not Working Analysis provides a picture of how things currently are across multiple perspectives and is a negotiation tool that can be used when there are disagreements between parties. To negotiate for a meaningful and desired goal, all involved must feel listened to and their perspectives must be accurately reflected. This tool starts with common ground, remains unconditionally constructive, and is done in partnership. This analysis reflects current reality only and serves as a bridge to action planning. It can help us determine what needs to change, what needs to stay the same, and what should be enhanced.

This analysis helps resolve problems and concerns and can be used to develop goals and objectives that help people move toward the lives that they want. It can also assist with negotiation where there are disagreements. Additionally, this analysis engages people who are important in the individual's life and allows those people to contribute to improving the individual's life.

To help with action and goal planning:

- The left hand column helps with identifying those things that you wish to maintain or enhance.
- The right hand column shows things that need to change.
- Disagreements often turn up on the diagonals.

This has two of the core principles of negotiation built into it:

- If you have carefully written down everyone's perspective, they feel listened to.
- If you point out where the same items appear in the same column, but different perspectives you have started with common ground.

### Case Study 3: Sam S.

Four months ago, Sam S., fifty-nine years old, lost control of his car and went through the front windshield. He suffered a moderate traumatic brain injury, and has been at the hospital's rehabilitation facility ever since. Sam, a talented craftsman carver, is known for his great sense of humor and the beautiful Christmas ornaments he carves for a local gift shop. He has physically recovered enough to be discharged, but it is not clear where he should go. His cognitive injuries have not significantly improved since the accident.

He was married when he was younger, but he has been divorced for about ten years. He has dated a few women, but nothing serious has developed in his relationships. His sister lives twenty miles away and their relationship has never been good. Sam lived alone in a small apartment in Mt. Airy, but his sister put his things in storage after the accident and let the lease lapse. Sam has begun learning to speak again and seems to understand everything that is communicated to him, but he is somewhat slower in his progress toward regaining the ability to do self-care activities. His behavior has changed and he is often moody and irritable. His sister does not want to take Sam into her home. She believes he should move into a long-term care facility. Sam becomes loud and strikes out at the hospital social worker when she discusses long-term care options with him.<sup>73</sup>

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<sup>73</sup> Perspective-takers created more value and earned significantly more points for themselves than those from the empathy or the control group. Ass'n for Psychological Sci., *It Pays to Know Your Opponent: Success in Negotiations Improved by Perspective-Taking*, SCIENCE DAILY (Apr. 22, 2008), <http://www.sciencedaily.com/releases/2008/04/080422115014.htm>.

## Working/Not Working Analysis for Sam S.

	What works/makes sense?	What doesn't work/make sense?
Sam's Perspective	Living independently Having a means to pay for things he wants and needs Having his own things	Having difficulty expressing his wishes to live independently Having to depend on others for care Having his things taken away when the lease on the storage facility lapsed Having no home to go to
Sister's Perspective	Arranging for Sam to move to a long-term care facility	Feeling responsible for making decisions for Sam The hospital wants her to take Sam into her home

The working/not working analysis provides a picture of how things are right now and analyzes issues and situations across perspectives.

#### IV. PERSON-CENTERED PLANNING CONCEPTS IN THE CURRENT GUARDIANSHIP PROCESS

In order to understand how person-centered planning could fit into the guardianship process, doctrines<sup>74</sup> relating to how guardians exercise authority require attention. This Part describes (A) the doctrines by which guardians exercise authority and how person-centered planning concepts can be incorporated into those doctrines and (B) some of the necessary steps for this incorporation.

##### A. *The Doctrines by which Guardians Exercise Authority*

Most state statutes, codes, and laws are silent when it comes to how guardians exercise authority.<sup>75</sup> When doctrines are statutorily expressed, there is no data or research reflecting whether or not the guardians actually exercise their authority based on that doctrine. Doctrines specifically prescribed are doctrines of (1) best interest,<sup>76</sup> (2) substituted judgment,<sup>77</sup> or (3) a hybrid consisting of a blend of the

<sup>74</sup> Published research and scholarly articles use various names for describing substituted judgment and best interest—principle, doctrine, standard, or rule. Dictionaries use them to define each other, e.g., doctrine is a rule or principle, principle is a rule or doctrine, and standard is a rule or principle. See MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 368, 987, 1216 (11th ed. 2003). For consistency, this article will use the word doctrine.

<sup>75</sup> See, e.g., N.C. GEN. STAT. §§ 35A-1241, 1251 (2011).

<sup>76</sup> See Loretta M. Kopelman, *The Best Interests Standard for Incompetent or Incapacitated Persons of All Ages*, 35 J. L. MED. & ETHICS 187, 187 (2007); Whitton & Frolik, *supra* note 31, at 34–41.

two.<sup>78</sup> Even though doctrines for exercising the guardian's authority do not exist in most states, and it cannot be determined how the doctrines are applied in the other states, these doctrines are well known in American jurisprudence.<sup>79</sup> It is through these doctrines that person-centered planning has the best possibility of becoming policy, regulation, or a standard by which guardians will exercise their powers and duties.

### 1. *The Doctrine of Best Interest*

The doctrine of best interest requires surrogates to act in the best interest of the AIP regardless of it being inconsistent with what the AIP declares should be done, or would have been done by the AIP when competent.<sup>80</sup> Considered on the far end of the surrogate decision-making spectrum, the best interest doctrine is marked by determinations of the AIP's welfare, in stark contrast to self-determination.<sup>81</sup> It is understandable that this doctrine does not harmonize well with person-centered planning, looking to sources and individuals other than the AIP to make choices and decisions. One practical application of best interest comes when decisions are being made for end of life or for significant acute medical choices, including ending life.<sup>82</sup>

### 2. *The Doctrine of Substituted Judgment*

The doctrine of substituted judgment is simple to define yet difficult to apply. Cases, texts, and encyclopedias describe substituted judgment as doing what a person would have wanted to do if he or she were able to communicate his or her wishes.<sup>83</sup> Under substituted judgment, it is understood that whenever possible, decisions should be based on what the AIP has expressly declared, conveyed in some form of writing or conversation, and should be respected by the surrogate making those decisions whenever possible.<sup>84</sup> This was also expressed in a case

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<sup>77</sup> See STANDARDS OF PRACTICE 7.II (Nat'l Guardianship Ass'n 2007).

<sup>78</sup> See UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT (1997).

<sup>79</sup> Whitton & Frolik, *supra* note 31, at 1497–1514.

<sup>80</sup> See ROBERT B. FLEMING & LISA N. DAVIS, ELDER LAW ANSWER BOOK ch. 9, at 33–34 (2d ed. 2004).

<sup>81</sup> See ALAN D. LIEBERSON, ADVANCE MEDICAL DIRECTIVES § 21:7, at 386–87 (1992).

<sup>82</sup> See ALAN MEISEL & KATHY L. CERMINARA, THE RIGHT TO DIE § 4.07[B] (3d ed. Supp. 2011).

<sup>83</sup> See *In re* Guardianship of Simon, No. BA05P-1100-G11, slip op. at 31–32 (Mass. Dist. Ct. Jan. 14, 2010) (citing *Cohen v. Bolduck*, 760 N.E.2d 714, 722 (Mass. 2002)); see also FLEMING & DAVIS, *supra* note 80, ch. 9, at 33–34 (“Under the ‘substituted judgment’ standard the fiduciary acts as he or she believes the ward would have acted were the ward competent to act on his or her own behalf . . .”).

<sup>84</sup> FLEMING & DAVIS, *supra* note 80, ch. 9, at 33–34.



well known to elder law and estate and trust attorneys, *In re Shah*,<sup>85</sup> citing and quoting from a lower court opinion in the same case:

[I]t is, or should be, clear that Mr. Shah, who had the unrestricted right to give his assets to his wife, or to his children, or to anyone else for that matter, at all times up to the moment of his terrible injury, did not, on account of that injury, lose that fundamental right merely because he is now incapacitated and financial decisions on his behalf must necessarily be made by a surrogate. The relief granted pursuant to Mental Hygiene Law article 81 is designed to permit an incapacitated person to do, by way of a surrogate, those essential things such a person could do but for his or her incapacity.<sup>86</sup>

Additionally, in some jurisdictions, several factors are mandated by which judges must be guided when entering a substituted judgment of their own in place of what the AIP would decide: the AIP's expressed preferences; the AIP's religious convictions related to a denial of treatment; the impact on the AIP's family; the probability of adverse side effects to or on the AIP; and the prognosis with and without treatment.<sup>87</sup>

### 3. *The Hybrid Doctrine of Substituted Judgment and Best Interest*

The UGPPA merges the doctrines of substituted judgment and best interest,<sup>88</sup> and many states have enacted the same or similar language in their guardianship statutes.<sup>89</sup> Just how guardians implement the doctrines is not known, or whether they implement the doctrines at all.<sup>90</sup> To the extent that such a hybrid of the doctrines actually works in reality, it may be a way by which person-centered decision-making could function.

#### *B. How to Effectively Implement Person-Centered Guardianship*

Person-centered planning is described in many ways, such as through steps and tools, systems and core concepts, and guides and processes by which those serving others interact with those they are serving.<sup>91</sup> Examination of any number of articles and manuscripts by experts in person-centered planning quickly provides an understanding of how difficult it is to make such a seemingly simple concept a

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<sup>85</sup> 694 N.Y.S.2d 82 (App. Div. 1999).

<sup>86</sup> *Id.* at 87 (citations omitted); *see also* Rasmussen by Mitchell v. Fleming, 741 P.2d 667, 674 (Ariz. Ct. App. 1986).

<sup>87</sup> *See* Guardianship of Doe, 583 N.E.2d 1263, 1267–68 (Mass. 1992) (citing Brophy v. New England Sinai Hosp., Inc., 497 N.E.2d 626, 634–35 (Mass. 1986)).

<sup>88</sup> *See* UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT (1997).

<sup>89</sup> *See infra* note 139 and accompanying text.

<sup>90</sup> Whitton & Frolik, *supra* note 31, at 1564–67.

<sup>91</sup> *See* O'BRIEN & O'BRIEN, *supra* note 23, at 17–21.

reality in any service, system, or process.<sup>92</sup> As one writer suggests, the more individuals, agencies, and systems declare their approval of person-centered planning, the more they fall into the “same soup in a different cup syndrome,” announcing the launch of new labels for those things they have been doing all along.<sup>93</sup>

Person-centered planning has been developed in many different approaches or methods, including personal-futures planning, individual design sessions, getting to know you, and twenty-four hour planning.<sup>94</sup> It will take a significant effort by those in the American guardianship network to gain even a beginner’s understanding of person-centered planning, to spread the person-centered planning philosophy to others, and to help AIPs realize the benefits of person-centered planning. In addition, effectively implementing person-centered planning into current guardianship standards will require (1) accountability and monitoring, (2) training and education. In addition, Michael Smull has offered an outline of other factors that should be considered and discussed.<sup>95</sup>

### *1. Accountability and Monitoring*

Whether found in the UGPPA, in the state guardianship statutes reviewed later in this manuscript, or in any of the other state guardianship statutes, a high percentage of the state guardianship statutes have some form of required accounting or accountability;<sup>96</sup> some of the statutes have some form of monitoring;<sup>97</sup> but few of the statutes have any training.<sup>98</sup> Guardianship accountability and monitoring of guardians have had published scrutiny over the last twenty years.<sup>99</sup> In that period of time, the studies, surveys, and statutes reveal that there have been minimal to modest increases in statutory directives for guardians to make reports, or use guardianship care plans.<sup>100</sup> Thus, it is reasonable

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<sup>92</sup> *Id.*

<sup>93</sup> See Emp’t & Disability Inst., *Course 1: Introduction to Person-Centered Planning*, CORNELL UNIV., <http://www.ilr.cornell.edu/edi/pcp/course01.html> (last visited Apr. 18, 2012).

<sup>94</sup> See O’BRIEN & O’BRIEN, *supra* note 23, at 17–21.

<sup>95</sup> See *infra* Appendix.

<sup>96</sup> See Naomi Karp & Erica F. Wood, *Guardianship Monitoring: A National Survey of Court Practices*, 37 STETSON L. REV. 143, 162–63 (2007).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 164–65. As of 2005, only Florida and New York had mandatory training, but waivers are available. *Id.*

<sup>99</sup> See, e.g., Sally Balch Hurme & Erica Wood, *Guardian Accountability Then and Now: Tracing Tenets for an Active Court Role*, 31 STETSON L. REV. 867 (2002); Karp & Wood, *supra* note 96; John W. Parry & Sally B. Hurme, *Guardianship Monitoring and Enforcement Nationwide*, 15 MENTAL & PHYSICAL DISABILITY L. REP. 304 (1991).

<sup>100</sup> See Karp & Wood, *supra* note 96, at 163 n.87 (citing MARY JOY QUINN, *GUARDIANSHIPS OF ADULTS* 171–72 (Springer 2005) (“States requiring care plans include Oklahoma, Washington, Colorado, Maryland, New Hampshire, and Maine.”)). Florida has been added to this list. See *infra* note 178 and accompanying text.

to assert that the success of any created mandate of person-centered planning will require some form of accountability, monitoring, or enforcement.

In their report “Becoming a Person Centered System,” experts in the field of person-centered supports describe culture change efforts in a six state consortium and set forth the evolution of efforts they believe to underlie true culture change:

A variety of agencies in many different locations have engaged with us in a set of efforts that have evolved over time. At each location the goal has been consistent: to create person centered systems that support person directed services. The learning that has taken place from working toward that goal has changed the approach. Some of the central ideas of the effort are:

- Changes in rules and practice should be driven by learning what is and is not working in supporting individuals.
- Using a small set of value-based skills at all levels of the system will drive change throughout the system.

Using these skills in conjunction with selected quality management and organizational development tools will improve quality of life and increase organizational effectiveness and efficiency.<sup>101</sup>

## 2. Training and Education

Implementing person-centered planning into guardianship requires that guardians not only have the information necessary to make decisions about and for their AIPs, but they also need to understand person-centered planning. The UGPPA and guardianship statutes that are reviewed later<sup>102</sup> detail with clarity what guardians need to know to appropriately exercise their powers and duties.<sup>103</sup> The general descriptions of what guardians need to know about their AIPs include personal family histories, health, medical, mental and physical status and records, education, training, and work and professional records.<sup>104</sup> UGPPA, Section 314 (b) expressly requires ongoing personal relationships with AIPs sufficient to understand what they are capable of doing independently, or with minimal

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<sup>101</sup> Smull et al., *Becoming a Person Centered System*, DEPT. HEALTH & HUMAN SERVS. (April 2009), <http://www.nasdds.org/pdf/BecomingaPersonCenteredSystem-ABriefOverview.pdf>.

<sup>102</sup> See *infra* notes 110–176 and accompanying text.

<sup>103</sup> UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT (1997); see *supra* text accompanying note 2; *infra* notes 157–169 and accompanying text.

<sup>104</sup> UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT (1997); see *supra* text accompanying note 2; *infra* notes 157–169 and accompanying text. (Other articles address how current statutes, with some form of reporting, are successfully watching guardians and enforcing how guardians exercise their duties, if they exercise them at all.)

assistance, and to be currently aware of the AIPs' mental and physical health.<sup>105</sup> Additionally, as states have expanded the requirements for reports and plans, guardians have had to include social and emotional components about their AIPs.<sup>106</sup>

The American network of guardianship systems is well noted for a deep-rooted culture of paternalistic practices that rarely pursue the wants and needs of adjudicated incompetent persons.<sup>107</sup> A successful beginning may be to simply bring awareness of person-centered planning to the guardianship network and advocacy community, with more intensive education and training once awareness is embedded in the guardianship culture.<sup>108</sup>

Every style of person-centered planning is rooted in a person-centered way of thinking. It is made up of a set of value-based skills that result in seeing the person differently and give us a way of acting on what is learned. Training in person-centered planning is training in a way of thinking as much as it is in a way of developing a plan. This training helps practitioners take the skills from practice to habit. For people being supported by any services, it is not person-centered planning that matters as much as the pervasive presence of person-centered thinking. If people who use services are to have positive control over their lives, and if they are to have self-directed lives within their own communities then those who support the person, especially those who do the day to day work need to have person-centered thinking skills. Only a small percentage of people need to know how to write good person-centered plans, but everyone involved needs to have good skills in person-centered thinking, the value based skills that underlie the planning.

There are a number of reasons for this. Teaching and supporting the use of person-centered thinking skills will mean that

- it is more likely that plans will be used and acted on, that the lives of people who use services will improve; and
- there will be options for a number of ways to get plans started.

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<sup>105</sup> UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 314(b) (1997). The UGPPA uses the word “acquainted,” which may imply less contact, but enough to know the needs and capabilities of the AIP. *See id.* § 314(b)(1).

<sup>106</sup> *See infra* notes 194–195 and accompanying text.

<sup>107</sup> *See generally* Johns, *supra* note 5.

<sup>108</sup> For example, Virginia passed a statutory amendment to raise the awareness of the public guardianship program about person-centered planning. The powers and duties of the Department for the Aging, which operates as the Public Guardian and Conservator Program, has been revised to include the adoption of regulations including “person centered practice procedures” to “focus on the preferences and needs of the individual” and “empower and support the individual . . . in defining the direction for his life, promoting self-determination and community involvement.” Va. Acts of Assembly, ch. 322, § 2.2-712 (2012). In August 2011, Virginia’s local and regional public guardianship program staff received training on person-centered planning. BIENNIAL REPORT OF THE VA. DEP’T FOR THE AGING, VIRGINIA PUBLIC GUARDIAN AND CONSERVATOR PROGRAM 5–6 (Jan. 1, 2012).

Updating the plans will occur “naturally”, needing less effort and time. There are countless courses and trainings available across the country and on the Internet.<sup>109</sup>

#### V. INCLUDING PERSON-CENTERED PLANNING IN THE UGPPA AND CURRENT STATE STATUTES

The UGPPA provides the states, territories, and the District of Columbia with an easily amended vehicle for legislative and regulatory reform requiring person-centered training of guardians.<sup>110</sup> However, without empirical evidence, the antidotal facts, situations, and published cases suggest that there is no foundation of doctrines, principles, standards, or rules by which guardians act.<sup>111</sup> As shown below, the UGPPA uses language that includes the AIP in the planning process and in decision-making by the guardian.<sup>112</sup> However, language such as that found in (A) the UGPPA and (B) in most state statutes is not a mandate of person-centered philosophy, or required person-centered planning.<sup>113</sup> In addition, the National Probate Court Standards (“NPCS”)<sup>114</sup> and the National Guardianship Standards (“NGS”),<sup>115</sup> in existence for almost twenty years, address in policy and ethics how guardians are to exercise their duties and powers to serve AIPs, but analyzing these standards falls beyond the scope of this paper.<sup>116</sup>

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<sup>109</sup> An excellent online educational source is the Cornell University IRL School, Employment and Disability Institute, Person-Centered Planning Education Site. Cornell offers seven online courses, including Chapter 1 - Introduction to Person-Centered Planning; Chapter 2 - Community Membership: Opportunities for Meaningful Interaction; Chapter 3 - Self-Determination; Chapter 4 - Common Threads Between Different Person Centered Tools; Chapter 5 - Series: Popular Person-Centered Tools, 5a - Popular Person-Centered Tools (PPCT): Objectives and Framework, 5b - PPCT: Essential Lifestyle Planning, 5c - PPCT: MAPS, 5d - PPCT: Personal Futures Planning, 5e - PPCT: PATH, 5f - PPCT: Circles of Support; Chapter 6 - Organizational Change; Chapter 7 - Transition Planning. See *Person Centered Planning Education Site*, CORNELL UNIV. IRL SCH., <http://www.ilr.cornell.edu/edi/pcp/courses.html> (last visited Apr. 11, 2012).

<sup>110</sup> UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT (1997).

<sup>111</sup> See Whitton & Frolik, *supra* note 31, at 1532–37.

<sup>112</sup> See UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT (1997); *infra* notes 117–128 and accompanying text.

<sup>113</sup> Several states address guardianship of AIPs with comprehensive planning and reporting. See, e.g., FLA. STAT. §§ 744.362, .363, .367, .3675 (2011); FLA. PROB. R. 5.710; WASH. REV. CODE § 11.92.043 (2006). However, this is not person-centered philosophy or planning.

<sup>114</sup> See NAT’L PROB. CT. STANDARDS (Comm’n on Nat’l Probate Court Standards & Advisory Comm’n on Interstate Guardianships 1993).

<sup>115</sup> See STANDARDS OF PRACTICE (Nat’l Guardianship Ass’n 2007).

<sup>116</sup> See, e.g., Boxx & Hammond, *supra* note 36 (analyzing these standards).

*A. Person-Centered Planning in the UGPPA*

UGPPA addresses persons with disability and their property; Article 3 grants authority to guardians and outlines their duties while Article 4 addresses the protection of the property of protected person.<sup>117</sup> The UGPPA distinguishes guardianship, relating to the personal needs of the AIP, from conservatorship, relating to the property of the AIP.<sup>118</sup> Strikingly, however, both Articles 3 and 4 emphasize the mandate that the guardian or conservator, or both, only address the AIP's limitations.<sup>119</sup>

The UGPPA prefatory note and many of its comments highlight the intent to protect rights of the AIPs by limiting the powers and duties of guardians and conservators, and directing guardians to have ongoing contact and relationship with the AIP.<sup>120</sup> Once the respondent is found incapacitated under UGPPA 311(a)(1)(A), subsection (a)(1)(B) only gives the court the authority to enter the guardianship order if “the respondent’s identified needs cannot be met by less restrictive means, including use of appropriate technological assistance . . . .”<sup>121</sup> The limited guardianship provision first created in 1982 remains in UGPPA 311(b): “The court, whenever feasible, shall grant to a guardian only those powers necessitated by the ward’s limitations and demonstrated needs and make appointive and other orders that will encourage the development of the ward’s maximum self-reliance and independence.”<sup>122</sup>

Beyond the initial court’s order in Section 311, UGPPA Section 314 addresses the duties of guardian.<sup>123</sup> Subsection (a) begins with a broad grant of power to the guardian unless otherwise limited by the court’s order.<sup>124</sup> Then, it tempers that broad grant of power by insisting that the guardian only exercise those powers where necessitated by the AIP’s limitations.<sup>125</sup> Where possible, it involves the AIP in making decisions, in acting on the AIP’s own behalf, and in assisting the AIP to regain the ability to handle personal affairs.<sup>126</sup> Finally, it requires that

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<sup>117</sup> See UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT §§ 301–318, 401–433, 8A U.L.A. 347–427 (2007); Johns, *supra* note 5.

<sup>118</sup> See UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT, at prefatory note, 8A U.L.A. 302–04.

<sup>119</sup> See *id.* §§ 311(b), 314, 418(b), 8A U.L.A. 365, 369, 404.

<sup>120</sup> See *id.* at prefatory note, 8A U.L.A. 303–04.

<sup>121</sup> *Id.* § 311(a)(1)(B), 8A U.L.A. 364–65.

<sup>122</sup> *Id.* § 311(b), 8A U.L.A. 364–65; see also UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 2-206, 8A U.L.A. 485 (1982) (limiting a court’s authority to appoint a guardian “to the extent necessitated by the incapacitated person’s mental and adaptive limitations or other conditions warranting the procedure”).

<sup>123</sup> UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 314, 8A U.L.A. 369 (2007).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

guardians make decisions based on the AIP's expressed values and desires.<sup>127</sup> The next subsection, (b)(1), expressly mandates that the guardian become or remain "personally acquainted with the ward and maintain sufficient contact with the ward to know of the ward's capacities, limitations, needs, opportunities, and physical and mental health . . . ."<sup>128</sup> Reading similarly to substituted judgment, this directive is strikingly similar to what is accomplished through person-centered planning.<sup>129</sup>

Subsection (b)(5) instructs the guardian to "immediately notify the court if the ward's condition has changed so that the ward is capable of exercising rights previously removed."<sup>130</sup> Although the sections that consider the orders and duties of the guardian of the person include language that would complement person-centered planning,<sup>131</sup> UGPPA Section 315, declaring the powers of the guardian, grants broad-based authority to the guardian limited only by the court's prior orders, with one exception.<sup>132</sup> UGPPA subsection 315(a)(6) declares that "if reasonable under all of the circumstances, [a guardian may] delegate to the ward certain responsibilities for decisions affecting the ward's well-being."<sup>133</sup>

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.* § 314(b)(1), 8A U.L.A. 369.

<sup>129</sup> *See id.* § 314(a). The comments to section 314(a) are worth restating here:

Subsection (a) emphasizes the importance of the concept of limited guardianship by directing that the guardian only exercise the authority needed due to the ward's limitations. In the 1982 Act, the phrase "encourage the development of maximum self-reliance and independence of the incapacitated person and make appointive and other orders only to the extent necessitated by the incapacitated person's mental and adaptive limitations" was used as a standard to encourage the use of limited guardianships. That phrase may still be useful for courts in tailoring a guardianship to the needs of the incapacitated person. The guardian is admonished to encourage the ward's participation in decisions and in developing or regaining capacity to act without a guardian. The ward's personal values and expressed desires, whether past or present, are to be considered when making decisions. Although the guardian only need consider the ward's desires and values "to the extent known to the guardian," that phrase should not be read as an escape or excuse for the guardian. Instead, the guardian needs to make an effort to learn the ward's personal values and ask the ward about the ward's desires before the guardian makes a decision. Subsection (a) requires the guardian to act in the ward's best interest. In determining the best interest of the ward, the guardian should again consider the ward's personal values and expressed desires.

<sup>130</sup> *Id.* § 314(b)(5). The comment to UGPPA section 314 (b)(5) states that such action by the guardian must occur without delay: "In furtherance of the limited guardianship and least restrictive alternative concepts, subsection (b)(5) requires the guardian to immediately notify the court if the ward's condition has improved, so that the ward may have rights restored. The guardian is *not* to wait until the next reporting period."

<sup>131</sup> *See supra* notes 50–69 and accompanying text.

<sup>132</sup> *See* UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 315 (1997).

<sup>133</sup> *Id.* § 315(a)(6). The comment to UGPPA section 315(a)(6) does little to expand on this discretion granted to the guardian, simply rephrasing the black letter law.

Article 4 of the UGPPA addresses all areas of property related to a protected person. Section 409(b) declares the duties and powers of the conservator to be limited:

If a proceeding is brought for reasons other than that the respondent is a minor, after a hearing on the petition, upon finding that a basis exists for a conservatorship or other protective order, the court shall make the least restrictive order consistent with its findings. The court shall make orders necessitated by the protected person's limitations and demonstrated needs, including appointive and other orders that will encourage the development of maximum self-reliance and independence of the protected person.<sup>134</sup>

Section 409 makes clear that the appointment of the conservator does not, in itself, adjudicate the respondent incapacitated or incompetent.<sup>135</sup> Under subsection 411(a), the conservator can exercise a litany of certain acts only after required notice to all interested parties and court approval for a litany of acts.<sup>136</sup> However, under Subsection 411(c), the court must first "consider primarily the decision that the protected person would have made, to the extent that the decision can be ascertained."<sup>137</sup>

*B. Current State Laws with Statutory Language Compatible  
with Person-Centered Planning*<sup>138</sup>

There has been some success in having states, territories, and the District of Columbia enact all or part of the UPC<sup>139</sup> or the UGPPA.<sup>140</sup> These model laws have

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<sup>134</sup> *Id.* § 409(b).

<sup>135</sup> *Id.* § 409(d).

<sup>136</sup> *Id.* § 411(a).

<sup>137</sup> *Id.* § 411(c); *see supra* notes 83–87 and accompanying text for the language of the doctrine of substituted judgment.

<sup>138</sup> State guardianship statutes and the UGPPA address different kinds of guardians, including family members, companions, partners and friends, individuals not known to the AIP, public guardians, appointed governmental agents, nonprofit organizations, corporations (including bank, trust, and financial entities), and professional guardians (including nonprofit guardians and for profit guardians). This Article does not identify which kind of guardian would be implementing person-centered planning, as the author is unable to determine any difference between them if mandated to incorporate person-centered philosophy in the exercise of their duties.

<sup>139</sup> *See* UNIF. LAWS COMM'N, UPC ENACTMENT CHART (2010). As of September 2010, 17 states, one territory, and the District of Columbia had enacted (Alaska, Arizona, Idaho, Maine, Michigan, Nebraska, North Dakota, South Carolina, South Dakota, and Utah), enacted an amended version (Alabama, Colorado, Hawaii, Massachusetts, Minnesota, Montana, New Mexico, and the Virgin Islands), or enacted a substantially similar version (District of Columbia) of the UPC.

<sup>140</sup> *See* UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT (2007).



sections that address the powers and duties of guardians,<sup>141</sup> and the monitoring and accountability of guardianships.<sup>142</sup> Since the UPC, Article V prefatory note acknowledges that the codified Parts 1 through 4 on guardianship and conservatorship came from the 1997 UGPPA revisions, only the UGPPA will be cited in this Article.<sup>143</sup> Additionally, the National Probate Court Standards<sup>144</sup> and the National Guardianship Standards,<sup>145</sup> in existence for almost twenty years, address in policy and ethics how guardians are to exercise their duties and powers to serve AIPs.<sup>146</sup>

As described earlier in the manuscript, the Uniform Law Commission has charted (through September 2010) identical, substantially similar, amended version, or no state enactment of the UGPPA.<sup>147</sup> This subpart reviews state statutes from each of these four categories and compares them with person-centered planning for compatibility and ease of implementation: (1) identical—Arizona and Michigan; (2) substantially similar—District of Columbia; (3) amended version enacted—Colorado and Massachusetts;<sup>148</sup> and (4) not enacted—Florida, Vermont, and Washington.<sup>149</sup>

### *1. Statutes Identical to UGPPA—Arizona and Michigan*

Arizona enacted the UGPPA in 2001.<sup>150</sup> Arizona Revised Statute Section 14-5312 substantially incorporates UGPPA Article 3.<sup>151</sup> However, Arizona separately

<sup>141</sup> *Id.* §§ 314–15.

<sup>142</sup> *Id.* § 317.

<sup>143</sup> *See* UNIF. PROB. CODE art. V (“These provisions replace the 1982 UGPPA, which in turn replaced the guardianship and protective provisions of the original UPC.”).

<sup>144</sup> NAT’L PROB. COURT STANDARDS (Comm’n on Nat’l Prob. Court Standards & Advisory Comm. on Interstate Guardianships 2003).

<sup>145</sup> STANDARDS OF PRACTICE (Nat’l Guardianship Ass’n 2007).

<sup>146</sup> *See generally* Boxx & Hammond, *supra* note 36 (providing a thorough analysis of the National College of Probate Standards and the National Guardianship Standards).

<sup>147</sup> *See* UNIF. LAWS COMM’N, *supra* note 139.

<sup>148</sup> *Id.* Only the District of Columbia is shown as having enacted a substantially similar statute.

<sup>149</sup> *Id.* These particular states were chosen because of the visibility of their guardianship statutes to the author. There are few published cases that actually address how guardians implement planning and involvement of the AIP in the guardianship process. This article will only review the sections dealing with guardianship and protection related to the person of the AIP, and not statutes and situations related to property or conservatorship.

<sup>150</sup> *See* ARIZ. REV. STAT. ANN. § 14-5312 (2005). “If appropriate, a guardian shall encourage the ward to develop maximum self-reliance and independence and shall actively work toward limiting or terminating the guardianship and seeking alternatives to guardianship.” *Id.* § 14-5312(A)(7). “A guardian shall make reasonable efforts to secure appropriate training, education and social and vocational opportunities for his ward in order to maximize the ward’s potential for independence.” *Id.* § 14-5312(A)(10). “In making decisions concerning his ward, a guardian shall take into consideration the ward’s values

sets out the guardian's powers and duties related to an AIP with developmental disabilities, imposing a "best interest" standard when the guardian exercises those powers.<sup>152</sup> This infers that all persons labeled developmentally disabled are unable to communicate their wants, needs, and wishes, leaving it to their guardians to make those decisions in their "best interest."<sup>153</sup> Other than this distinguishing difference, the earlier analysis of the UGPPA applies as well to an analysis of the Arizona statute.

In 1998, Michigan substantially incorporated UGPPA Section 3 in its Estates and Protected Individuals Code.<sup>154</sup> In section 700.5306 (2), no powers or duties may be ordered if the AIP has a patient advocate as provided, otherwise, the courts must design the guardianship so that it encourages the development of maximum self-reliance and independence in the AIP.<sup>155</sup> The guardian must also consult and communicate with the AIP before making any major decisions.<sup>156</sup>

## 2. *Statute Substantially Similar—District of Columbia*

Interestingly, the District of Columbia is the only American governmental entity that has enacted a guardianship statute substantially similar to the UGPPA.<sup>157</sup>

DC Code Section 21-2044, Findings; order of appointment, differs from the UGPPA in that it directs the court to "exercise the authority conferred . . . so as to encourage the development of maximum self-reliance and independence of the [AIP]."<sup>158</sup> It also mandates a guardianship that is least restrictive on the AIP in

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and wishes." *Id.* § 14-5312(A)(11); *see also* 17B ARIZ. R. PROB. PROC. 30(C) (detailing procedures guardians should follow for annual reporting).

<sup>151</sup> Compare ARIZ. REV. STAT. ANN. § 14-5312, with UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT art. 3 (2007).

<sup>152</sup> ARIZ. REV. STAT. ANN. § 14-5312(A)(13) ("The guardian of an incapacitated adult who has a developmental disability as defined in § 36-551 shall seek services that are in the best interest of the ward, taking into consideration: (a) The ward's age. (b) The degree or type of developmental disability. (c) The presence of other handicapping conditions. (d) The guardian's ability to provide the maximum opportunity to develop the ward's maximum potential, to provide a minimally structured residential program and environment for the ward and to provide a safe, secure, and dependable residential and program environment. (e) The particular desires of the individual.").

<sup>153</sup> *Id.*

<sup>154</sup> Compare MICH. COMP. LAWS § 700.5306 (2011) with UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT art. 3 (2007).

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* § 700.5314 ("Whenever meaningful communication is possible, a legally incapacitated individual's guardian shall consult with the legally incapacitated individual before making a major decision affecting the legally incapacitated individual.").

<sup>157</sup> Compare D.C. CODE §§ 21-2001–21-2085 (2008), with UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT (amended 1997).

<sup>158</sup> D.C. CODE § 21-2044(a). The UGPPA expresses similar sentiments, albeit in a more limited fashion. *See* UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 311(b)

“. . . duration and scope, taking into account the [AIP’s] current mental and adaptive limitations or other conditions warranting the appointment.”<sup>159</sup>

While using somewhat different phrasing, the DC Code shows its “substantial similarity” with the UGPPA in that it mandates the exercise of the guardian’s duties and powers to make decision “as closely as possible to the standard of substituted judgment,”<sup>160</sup> but if knowing the AIP’s wishes is not possible, then the best interest standard is the guardian’s default basis for making decisions.<sup>161</sup> In the DC Code subsections that immediately follow the substituted judgment instruction, guardians are specifically required to

(7) Include the [AIP] in the decision-making process to the maximum extent of the [AIP’s] ability; and (8) Encourage the [AIP] to act on his or her own behalf whenever he or she is able to do so, and to develop or regain capacity to make decisions in those areas in which he or she is in need of decision-making assistance, to the maximum extent possible.<sup>162</sup>

DC has rules that require a guardianship report, and provides in the rules specific instructions for guardians.<sup>163</sup>

However, as one particularly infamous case illustrates, DC probate judges have not always acted in accordance with the DC code.<sup>164</sup> Mollie Orshansky had her own degree of notoriety, being credited with developing the formula for determining the poverty level.<sup>165</sup> She had carefully planned her later years, buying a residence in New York City to live with her sister when she was unable to live independently.<sup>166</sup> However, the DC Department of Social Services (“DSS”) and the probate judge did not consider Mollie’s wishes or her prior planning.<sup>167</sup> This caused a barrage of litigation in DC and in New York.<sup>168</sup> The DC appellate court decision overturned the probate judge’s paternalistic, arbitrary decisions made without “taking proper account of Ms. Orshansky’s own plans and wishes.”<sup>169</sup>

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(“The court, whenever feasible, shall . . . make appointive and other orders that will encourage the development of the ward’s maximum self-reliance and independence.”).

<sup>159</sup> D.C. CODE § 21-2044(a).

<sup>160</sup> *Id.* § 21-2047(a)(6).

<sup>161</sup> *Compare* D.C. CODE § 21-2047(a)(6), *with* UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 314(a).

<sup>162</sup> D.C. CODE § 21-2047(7)–(8).

<sup>163</sup> *See* SUPERIOR COURT OF THE DIST. OF COLUMBIA, SPECIFIC INSTRUCTIONS TO GUARDIANS & GUARDIANSHIP INFORMATION SHEET (2011), *available at* [http://www.dccourts.gov/internet/documents/SpecificInstructionsToGuardianandGuardianshipInformationSheet\(int\).pdf](http://www.dccourts.gov/internet/documents/SpecificInstructionsToGuardianandGuardianshipInformationSheet(int).pdf).

<sup>164</sup> *See In re Orshansky*, 804 A.2d 1077 (D.C. 2002).

<sup>165</sup> Gordan M. Fisher, *Remembering Mollie Orshansky—The Developer of the Poverty Thresholds*, 68 SOC. SECURITY BULLETIN 3 (2008).

<sup>166</sup> *Orshansky*, 804 A.2d at 1088, 1091.

<sup>167</sup> *Id.* at 1093–95, 1098.

<sup>168</sup> *Id.* at 1089.

<sup>169</sup> *Id.* at 1080.

### 3. *Statutes with Amended Versions Enacted—Colorado and Massachusetts*

Colorado enacted an amended version of the UGPPA in 2001.<sup>170</sup> Colorado Revised Statute 15-14-411(3) adds the following language amending UGPPA Section 411: (3) To the extent the decision cannot be ascertained, the court shall consider the best interest of the protected person.<sup>171</sup> Also added to CRS § 15-14-411(3)(g) were the words, “including the best interest of the protected person.”<sup>172</sup> However,, the provisions of the Colorado statute and the UGPPA that allows AIPs to make decisions that affect their well-being “if reasonable under all of the circumstance” resemble each other.<sup>173</sup>

Massachusetts also enacted an amended UGPPA.<sup>174</sup> In Article V, sections 5-306 and 5-309, the same descriptions detail the limitations of the guardian in exercising powers and duties, requiring guardians to maximize the independence and autonomy of AIPs.<sup>175</sup> Massachusetts has developed examples of limitations to guardianship, including care of self, medical decision making and management, home and community life, with limitations on conservatorships.<sup>176</sup>

### 4. *States Not Enacting UGPPA—Florida, Vermont, and Washington State*

#### (a) *Florida’s Guardianship Statute*

Florida recently revised its guardianship statute in 2006.<sup>177</sup> Earlier, in 1997, Florida revised its legislative intent to declare that total declarations of incapacity are unnecessary deprivations, it being more desirable for guardians to pursue lesser restrictive forms of guardianship.<sup>178</sup> It also recognized that the purpose of Florida’s guardianship act is to permit AIPs to “participate as fully as possible in all decisions affecting them . . . and in developing or regaining their abilities to the

<sup>170</sup> See COLO. REV. STAT. §§ 15-14-101 to -611 (2011).

<sup>171</sup> Compare COLO. REV. STAT. § 15-14-411(3), with UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 411(c).

<sup>172</sup> Compare COLO. REV. STAT. § 15-14-411(3)(g), with UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 411(c)(7).

<sup>173</sup> Compare COLO. REV. STAT. § 15-14-315(1)(e), with UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 208(b)(6).

<sup>174</sup> See MASS. GEN. LAWS ch. 190B, §§ 5-101 to -507 (2010) (combining general probate provisions with provisions drawn from the UGPPA).

<sup>175</sup> *Id.* §§ 306, 309.

<sup>176</sup> See *id.* §309 (laying out factors for consideration when determining the authority of the guardian).

<sup>177</sup> See FLA. STAT. § 744.101 to-715 (2011) (setting out Florida’s guardianship provisions).

<sup>178</sup> *Id.* § 744.1012.

maximum extent possible[,]” and guardians must do so by using the least amount of interference when assisting AIPs in exercising their own actions.<sup>179</sup>

The Florida legislative intent in its guardianship statute is given teeth in the revised powers and duties of section 744.361. In considering compatibility with person-centered planning, consider the preamble and specific subsections:

(1) The guardian of an incapacitated person may exercise only those rights that have been removed from the ward and delegated to the guardian. . . . (2) The guardian shall file an initial guardianship report in accordance with s. 744.362. (3) The guardian shall file a guardianship report annually in accordance with s. 744.367. (4) The guardian of the person shall implement the guardianship plan. (9) A professional guardian must ensure that each of the guardian’s wards is personally visited by the guardian or one of the guardian’s professional staff at least once each calendar quarter. During the personal visit, the guardian or the guardian’s professional staff person shall assess: (a) The ward’s physical appearance and condition. (b) The appropriateness of the ward’s current living situation. (c) The need for any additional services and the necessity for continuation of existing services, taking into consideration all aspects of social, psychological, educational, direct service, health, and personal care needs.<sup>180</sup>

In just the last few years, Florida’s statute was amended to statutorily require an initial guardian plan,<sup>181</sup> with annual guardianship reports thereafter.<sup>182</sup> The detail of the plan is impressive, insisting on information regarding the AIP’s residence, medical and health care conditions, treatment and rehabilitation needs of the AIP, information concerning the social condition of the AIP, and information addressing the issue of restoration of rights of the AIP.<sup>183</sup> While the express

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<sup>179</sup> *Id.*

<sup>180</sup> *See* FLA. STAT. § 744.361.

<sup>181</sup> *See id.* § 744.363(1).

<sup>182</sup> *See id.* § 744.367 (using “report” to mean plan: ‘. . . each guardian of the person shall file with the court an annual guardianship *plan* . . .’ (emphasis added)).

<sup>183</sup> *See id.* § 744.3675. The section is worth reprinting here:

Each guardian of the person must file with the court an annual guardianship plan which updates information about the condition of the ward. The annual plan must specify the current needs of the ward and how those needs are proposed to be met in the coming year.

(1) Each plan for an adult ward must, if applicable, include:

(a) **Information concerning the residence of the ward**, including: . . . 2. The name and address of each place where the ward was maintained during the preceding year. 3. The length of stay of the ward at each place. 4. A statement of whether the current residential setting is best suited for the current needs of the

requirement of a guardianship plan is a step in the right direction, a careful study of the plan requirements shows it is bereft of the guardian's responsibility to involve the AIP in the planning process or to include those elements that the AIP has expressed as his or her wants and needs.<sup>184</sup> This is where education and training of guardians will be needed in order for them to understand and implement a person-centered philosophy.

As for education and training, Florida has insisted that guardians must be educated.<sup>185</sup> How guardians in Florida exercise their authority, especially when related to health care and end of life issues, and the cases that interpret the statute, have had significant visibility and notoriety in the last decade.

(b) *Vermont's Guardianship Statute*

Vermont's guardianship statute begins as an expressed prohibition against any authority, power, or control that does not promote "the well-being of the individual

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ward. 5. Plans for ensuring during the coming year that the ward is in the best residential setting to meet his or her needs.

(b) **Information concerning the medical and mental health conditions and treatment and rehabilitation needs of the ward**, including: 1. A resume of any professional medical treatment given to the ward during the preceding year. 2. The report of a physician who examined the ward no more than 90 days before the beginning of the applicable reporting period. The report must contain an evaluation of the ward's condition and a statement of the current level of capacity of the ward. 3. The plan for providing medical, mental health, and rehabilitative services in the coming year.

(c) **Information concerning the social condition of the ward**, including: 1. The social and personal services currently used by the ward. 2. The social skills of the ward, including a statement of how well the ward communicates and maintains interpersonal relationships. 3. The social needs of the ward.

....

(3) **Each plan for an adult ward must address the issue of restoration of rights to the ward** and include: (a) A summary of activities during the preceding year that were designed to enhance the capacity of the ward. (b) A statement of whether the ward can have any rights restored. (c) A statement of whether restoration of any rights will be sought.

(4) The court, in its discretion, may require reexamination of the ward by a physician at any time.

*Id.* (emphasis added).

<sup>184</sup> See *id.* §§ 744.107, 744.3701; see also FLA. PROB. R. 5.720 (2011).

<sup>185</sup> FLA. STAT. § 744.3145(2).

and to protect the individual from violations of his human and civil rights.”<sup>186</sup> It follows with mandatory instruction that individual guardianships “encourage the development and maintenance of maximum self-reliance and independence in the individual and [only the least restrictive form of guardianship] shall be ordered to the extent required by the individual’s actual mental and adaptive limitations.”<sup>187</sup> Vermont recognizes the fundamental right of an adult with capacity to determine the extent of health care the individual will receive, and to execute advance directives that would either circumvent the need for guardianship, or identify the person or entity that would serve as guardian.<sup>188</sup>

(c) *Washington State’s Guardianship Statute*

Washington State significantly revised and amended its guardianship statute in 1991. The legislative intent protected the autonomy and liberty of its citizens by allowing for the maximum exercise of rights consistent with each person’s capacity.<sup>189</sup> The legislative intent also declares that people with incapacities need the help of guardians to assist them to exercise human and civil rights and to access basic needs.<sup>190</sup>

As noted in a 2005 monitoring survey,<sup>191</sup> Washington State requires personal care plans for AIPs.<sup>192</sup> In Section 11.92.043,<sup>193</sup> the personal care plan must be developed within three months after a guardian’s appointment, and the plan must include an assessment of the AIP’s physical, mental, and emotional needs.<sup>194</sup> If the statutory mandate stopped there, it would be no different than most state statutes declaring the duties of the guardians. It does not—the assessment must determine the AIP’s “. . . ability to perform or assist in activities of daily living, and b) the guardian’s specific plan for meeting the identified and emerging personal care needs of the [AIP].”<sup>195</sup> The statute goes on to assert reporting requirements annually, but if there are substantial changes in the residence or condition of the AIP, the report must be filed within thirty days.<sup>196</sup>

The author sought information from those in Washington State familiar with its guardianship statute, and the implementation of the comprehensive legislation

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<sup>186</sup> VT. STAT. ANN. tit.14, § 3060 (2010).

<sup>187</sup> *Id.*

<sup>188</sup> *See id.*

<sup>189</sup> WASH. REV. CODE § 11.88.005 (2006).

<sup>190</sup> *Id.*

<sup>191</sup> *See* Karp & Wood, *supra* note 96.

<sup>192</sup> *See id.* at 163 n.87.

<sup>193</sup> This section of the Washington Code was substantially revised and amended in 2009; more recent revisions were made in 2011. *See infra* note 197 and accompanying text (including information contributed by Jamie Lynn Shirley, PhD, RN, research assistant professor at the University of Washington).

<sup>194</sup> WASH. REV. CODE § 11.92.043(1).

<sup>195</sup> *Id.* § 11.92.043(1)(a)–(b).

<sup>196</sup> *Id.* § 11.92.043(2), (3).

that mandates planning, training, and education. Surprisingly, Professor Shirley explained that when the Washington Code was revised a few years ago, it also had a component for 100 hours of training.<sup>197</sup> While in the forefront of training and educating guardians, this system does not rise to the level of person-centered philosophy and planning.<sup>198</sup>

## VII. CONCLUSION

This Article has examined the potential for person-centered planning within the American system of guardianship. Guardians' current exercise of authority is not person-centered because it gives little attention to the person of those relegated to its paternalistic protections. Person-centered planning, though, may be a solution to this problem. This Article explained how person-centered planning can be incorporated in guardianship and included three case studies using person-centered tools in assessing the wants and needs of clients being served. Finally, this Article examined the extent to which the UGPPA and some states have incorporated person-centered planning into guardianship.

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<sup>197</sup> E-mail from Jamie Shirley, Professor, University of Washington, to Frank Johns, Attorney (July 25, 2011 5:54 AM) (on file with author); *see also Steps to Become a Certified Professional Guardian*, WASH. CTS., [http://www.courts.wa.gov/committee/?fa=committee.display&item\\_id=571&committee\\_id=114](http://www.courts.wa.gov/committee/?fa=committee.display&item_id=571&committee_id=114) (last visited Apr. 15, 2012).

<sup>198</sup> *See supra* Part III.



## VIII. APPENDIX

This Article examines person-centered planning as a successful addition to the guardianship process. More detail in the way that may be accomplished is not possible here. However, Michael Smull submitted the following outline of the things to be considered and discussed:

- a. Guardian's responsibility to require information – what information?
- b. Guardian's Meeting Obligations
- c. Understanding "Tools"
  1. Appreciation and application of person-centered "tools"
  2. Understanding Core Concepts - What is important to a person includes those things in life that help to gain satisfaction, contentment, comfort, and happiness.
- d. Training to Accomplish Reasonable Expectations
- e. Using the "Tools:"
  1. People to be with / Relationships
  2. Things to do
  3. Places to go; Rituals or Routines
  4. Rhythm or Pace of Life
  5. Things to Have
- f. What Matters the Most to the Person—Their Own Definition of Quality of Life
- g. What is Important for People—Includes Only Those Things that We Need to Keep in Mind Regarding:
  1. Issues of Health or Safety;
  2. Physical Health and Safety, Including Wellness and Prevention;
  3. Emotional Health and Safety, Including Support Needed;
  4. What Others See as Important to Help the Person be a Valued Member of Their Community;
  5. "Important to" and "Important for" Influence Each Other;
  6. No One Does Anything that Is "Important for" Them (Willingly) Unless a Piece of It Is "Important" to Them
- h. Information and Assessment Developed by Which the Guardian Makes Decisions
- i. What Do Guardians Need to Expect of Others?