STANDARDS FOR FINANCIAL DECISION-MAKING: LEGAL, ETHICAL, AND PRACTICAL ISSUES

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I. INTRODUCTION

This Article reviews the standards for guardians of the estate when making financial decisions. Guardianship is a particularly statutory mechanism, and there are differences among the states as to the statutes. Thus, in discussing the standards for guardians in making financial decisions, this article will focus generally on the National Guardianship Association (NGA) Standards,[1] with some state statutes or cases provided as illustrations.

Since this Article focuses on the standards for guardians in making financial decisions, it is important to understand what the term "standard" means. According to Black's Law Dictionary, a standard is "[a] model accepted as correct by custom, consent, or authority . . . [or a] criterion for measuring acceptability, quality, or accuracy . . . ."[2] A standard is not the same thing as a duty.[3]

A standard is then the "model behavior" for a guardian of the estate in discharging the guardian's duties—the way the guardian should conduct business. Much like the National Academy of Elder Law Attorneys (NAELA) Aspirational Standards,[4] a standard informs the guardian of the ethical and professional way to

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[1] Of course, any professional fiduciary might want to consider the NGA's suggested Standards for establishing a decision-making strategy. In fact, even nonagency (e.g., family) fiduciaries can benefit from review of the Standards as they might be utilized by a professional agency. STANDARDS FOR AGENCIES AND PROGRAMS PROVIDING GUARDIANSHIP SERVICES (Nat'l Guardianship Ass'n 2007), *available at* www.guardianship.org/pdf/09/AgencyStandards.pdf.

[2] BLACK'S LAW DICTIONARY 1535 (9th ed. 2009). One might think of the line from Pirates of the Caribbean: The Curse of the Black Pearl, when Captain Barbossa explains the "pirate code" to Elizabeth Swann, stating: "the code is more what you'd call 'guidelines' than actual rules." PIRATES OF THE CARIBBEAN: THE CURSE OF THE BLACK PEARL (Walt Disney Pictures 2003); *Memorable Quotes for Pirates of the Caribbean: The Curse of the Black Pearl*, IMDB, http://www.imdb.com/title/tt0325980/quotes (last visited Mar. 28, 2012).

[3] BLACK'S LAW DICTIONARY, *supra* note 2, at 580 (defining duty as "[a] legal obligation that is owed or due to another and that needs to be satisfied; an obligation for which somebody else has a corresponding right").

[4] Gregory S. French et al., Professionalism & Ethics Comm. of the Nat'l Acad. of Elder Law Attorneys, *Aspirational Standards for the Practice of Elder Law with Commentaries*, 2 NAELA J. 5, 6–7 (2006), *available at*

do things. However, absent incorporation into a statute, the standard would not have the force of law. A guardian who does not conduct business in compliance with the standard may not be subject to sanctions under local law, but the standard may still have significant effect as a method of setting and identifying community and professional expectations. There is a possibility that professional guardians may be liable for professional malpractice, ethical violations, or even removal and surcharge for failure to follow well-recognized standards if those standards have become community practice.[5]

This Article will look at background, terminology, and general principles; review the standards applicable to the guardian of the estate, with emphasis on the NGA Standards; review some of the more common financial decisions made by guardians and how the standards apply to them; consider some of the issues for the future; and will conclude with a summary of recommendations. Because this Article reviews a number of common financial decisions, it does not provide an in-depth discussion of the types of decisions. Instead, this Article briefly describes the decision, applies the NGA standard, and discusses the practical approach to making the decision. For consistency, we recognize that in some states, "guardian" is used to refer to the person and "conservator" to the property. In this Article, however, "guardian of the estate"—or just "guardian"—will be used as a shorthand to encompass terms including guardian of the property or estate, or conservator, unless there is a need to make a distinction for the purpose of clarity,[6] or when

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http://www.naela.org/App_Themes/Public/PDF/Media/AspirationalStandards.pdf ("The . . . Aspirational Standards of professionalism and ethical behavior for Elder Law Attorneys . . . are the product of study and deliberation by NAELA members and, specifically, NAELA's Professionalism and Ethics Committee. Each state's professional responsibility rules mandate the minimum requirements of conduct for attorneys to maintain their licenses. These Aspirational Standards build upon and supplement those rules. Attorneys who aspire to and meet these Standards will elevate their level of professionalism in the practice of Elder Law, and enhance the quality of service to their clients. As attorneys meet these Standards, the practice of Elder Law will be raised to a higher standard of professionalism."). Unlike the NGA Standards, NAELA members are required to "pledge[] to support the Academy's Aspirational Standards" as a condition of membership. *Who Can Join NAELA? Criteria for Membership*, NAELA, http://www.naela.org/Public/MemberServices/Join_NAELA/Public/Membership/Join_NAELA/Join_Main_Page.aspx?hkey=13e6096e-f669-4d0d-9973-434c5d65794d (last visited Mar. 28, 2012).

[5] *Cf.* Hawes v. Chua, 769 A.2d 797, 803–07 (D.C. 2001) (referring "to a published standard" as one of the indicators of a failure to abide by the relevant standard of care in a medical malpractice case); *see also* 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 (reviewing prior thinking on guardian's duties, increased interest in standards, examining existing standards and their role, discussing feasibility of differing standards for family and professional guardians, and discussing whether standards should be used to judge guardians' conduct).

[6] *See, e.g.*, STANDARDS OF PRACTICE pmbl. at 1 (Nat'l Guardianship Ass'n 2007). The NGA Standards define "guardian" as "[a]n individual or organization named by order of the court to exercise any or all powers and rights of the person and/or the estate of an

referring to a particular law that uses conservatorship—such as the Uniform Guardianship and Protective Proceedings Act (UGPPA).[7]

II. BACKGROUND AND GENERAL PRINCIPLES

What is a guardian of the property, guardian of the estate, or a conservator? Under the UGPPA, a conservator is "a person who is appointed by a court to manage the estate of a protected person. The term includes a limited conservator."[8] The UGPPA goes on to provide that the guardian of the estate "is a fiduciary and [must] observe the standards of care applicable to a trustee."[9] This does not mean

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individual." *Id.* definitions at 21. The NGA Standards define "guardian of the estate" as "a guardian who possesses any or all powers and rights with regard to the property of the individual." *Id.* NAT'L PROBATE COURT STANDARDS REVIEW DRAFT (Aug. 2012) (http://www.ncpj.org/images/stories/documents/Standards_Review_Draft_7-12.doc) § 3.3, at 51("Although the terminology varies considerably across the country, this report will use the definitions of *conservator* and *guardian* found in the Uniform Probate Code, [a] *conservator* means a person appointed by a probate court to manage the estate of the respondent on a temporary and permanent basis, [whereas a] *guardian* is a court-appointed person responsible for the care, custody, and control of the respondent on a temporary and permanent basis.") (citing UNIF. PROBATE CODE § 1-201(1) (2008) and UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 102(2) (1997)). The Probate Court Standards point out that "the terminology varies considerably across the country." *Id.* § 3.3, at 51. NAT'L PROBATE COURT STANDARDS REVIEW DRAFT (Aug. 2012) (http://www.ncpj.org/images/stories/documents/Standards_Review_Draft_7-12.doc).

[7] UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT (1997).

[8] *Id.* § 102(2). The UGPPA uses "guardian" to refer to guardian of the person and "conservator" to refer to guardian of the property. *See id.* § 102(2), (4). The UGPPA also makes a distinction referring to the incapacitated person. *Id.* § 102(5). Although commonly referred to as the ward, the UGPPA refers to the person for whom a conservator is appointed as "a minor or other individual for whom a conservator has been appointed or other protective order has been made." *Id.* § 102(11).

Arizona uses guardian ("'Guardian' means a person who has qualified as a guardian of a minor or incapacitated person pursuant to testamentary or court appointment but excludes a person who is merely a guardian ad litem.") and conservator ("'Conservator' means a person who is appointed by a court to manage the estate of a protected person."). ARIZ. REV. STAT. ANN. § 14-1201(8), (22) (Supp. 2011). Florida uses guardian of the person and property ("'Guardian' means a person who has been appointed by the court to act on behalf of a ward's person or property, or both."). FLA. STAT. ANN. § 744.102(9) (2010).

[9] UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 418(a). The comment to this section explains:

> This section reflects the dual role of a conservator. On the one hand, a conservator is a fiduciary charged with management of another's property. Consequently, subsection (a) requires a conservator to observe the standard of care applicable to trustees. On the other hand, a conservator, like a guardian, also owes obligations directly to the protected person . . . .

that a guardian is the same as a trustee, although the duties may be the same or similar.[10]

The NGA Standards define fiduciary as "[a]n individual, agency, or organization that has agreed to undertake for another a special obligation of trust and confidence, having the duty to act primarily for another's benefit and subject to the standard of care imposed by law or contract."[11] Recognizing the guardian as a fiduciary having certain duties sets a standard for appointment (as in who should be the guardian) as well as a standard for decision-making by the guardian. As noted in the *National Probate Court Standards* § 3.1.2(a): "Probate courts should appoint as fiduciaries only those persons who are: (1) competent to serve, (2) aware of and understand the duties of the office, and (3) capable of performing effectively. . . ."[12]

According to the comments, a fiduciary is "'one who must exercise a high standard of care in managing another's money or property. . . ."[13] The power of the fiduciary is significant— meaning the court should give careful scrutiny to the qualifications of the proposed fiduciary.[14]

Id. § 418 cmt.; *see also* STANDARDS OF PRACTICE 25.I, at 19 ("Guardianship is a fiduciary relationship and as such is bound by the fiduciary obligations recognized by the community and the law.").

The Restatement (Third) of Trusts explains the similar "nontrust relationships" and notes that the "fiduciary duties and relationships" are markedly different from that of a trustee:

> *Analogous nontrust relationships.* There are a number of widely varying relationships that more or less closely resemble trusts but are not trusts, although the terms "trust" and "trustee" are often used loosely in relation to some of these relationships. It is important to differentiate trusts from these other relationships because many of the rules applicable to trusts are not applicable to them. . . . Thus, an executor, guardian, agent, or corporate officer or director is a fiduciary, but the fiduciary duties and relationships involved differ in many ways from those of a trustee.

RESTATEMENT (THIRD) OF TRUSTS, at intro. note (2001); *see also In re* Estate of Lieberman, 909 N.E.2d 915, 920–22 (Ill. App. Ct. 2009) (discussing the difference between a trustee and a guardian).

[10] *See* RESTATEMENT (THIRD) OF TRUSTS, at intro. note.

[11] STANDARDS OF PRACTICE definitions at 21.

[12] NAT'L PROBATE COURT STANDARDS REVIEW DRAFT, § 3.1.2(a), at 40 (Aug. 2012); (http://www.ncpj.org/images/stories/documents/Standards_Review_Draft_7-12.doc).

[13] *Id.* § 3.1.2 cmt., at 40 (footnotes omitted).

[14] *Id.* The standards provide:

> Because trust and confidence are needed between the fiduciary and the beneficiaries, the court should examine the credentials of potential fiduciaries with care. Experience, honesty, the absence of a conflict of interest, reputation and ability, and any prior service as a fiduciary are some factors that the probate courts may consider in reviewing a person's ability to perform the duties of the

A guardian of the estate is a fiduciary[15]: "[a] person who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, trust, confidence, and candor . . . [o]ne who must exercise a high standard of care in managing another's money or property."[16] But is a guardian of the estate *only* a fiduciary, or something more? We offer that the guardian of the estate is, in fact, "something more."[17] This concept is reflected in the comments to UGPPA § 418:

> This section reflects the dual role of a conservator. On the one hand, a conservator is a fiduciary charged with management of another's property. Consequently, subsection (a) requires a conservator to observe the standard of care applicable to trustees. On the other hand, a conservator, like a guardian, also owes obligations directly to the protected person, obligations emphasized in subsection (b). Subsection (b) emphasizes the concept of limited conservatorship by limiting the exercise of the conservator's authority and requiring the participation of the protected person in decision making. The conservator must encourage the participation of the protected person in decisions as well as encourage the protected person to develop or regain the capacity to act without a conservator. Before making a decision, the conservator should also make an effort to learn the personal values of the protected person and ask the protected person about the protected person's desires. The conservator should be particularly cognizant of the views expressed by the protected person prior to the conservator's appointment.[18]

A guardian of the estate (or conservator) is, indeed, a fiduciary, but with more obligations and subject to more considerations than other types of fiduciaries.

> office. The court should determine if anything would disqualify the person being considered (e.g., statutory disqualifications) or make the appointment unsuitable.

Id., pg. 40–41 (footnotes omitted).

[15] *See, e.g.*, UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 418 cmts. (1997); STANDARDS OF PRACTICE definitions at 21.

[16] BLACK'S LAW DICTIONARY, *supra* note 2, at 702; *see also* NAT'L PROBATE COURT STANDARDS REVIEW DRAFT, § 3.1.2(a), at 40 (Aug. 2012); (http://www.ncpj.org/images/stories/documents/Standards_Review_Draft_7-12.doc) (noting that fiduciary "generally includes personal representatives, guardians, conservators, and trustees"); STANDARDS OF PRACTICE definitions at 21 (defining "fiduciary").

[17] *But see* UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 418(a) ("A conservator, in relation to powers conferred by this [article] or implicit in the title acquired by virtue of the proceeding, is a fiduciary and shall observe the standards of care applicable to a trustee."). *See also* Boxx & Hammond, *supra* note 5, at 1240–42 (arguing that "[g]uardians must be placed at the stricter end of the scale with trustees").

[18] UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 418 cmts., at 104.

III. IS THE APPOINTMENT OF A GUARDIAN OF THE ESTATE TANTAMOUNT TO A FINDING OF INCAPACITY? IF NOT, WHAT ROLE DOES OR SHOULD THE WARD PLAY IN MAKING FINANCIAL DECISIONS AFTER APPOINTMENT OF A GUARDIAN OF THE ESTATE/CONSERVATOR?

The answer to this question is the classic law school answer—it depends on the state statute and the judge's ruling. For example, does the statute require a finding, order, or declaration of incapacity before a guardian of the estate is appointed? Under the UGPPA, it is possible for a protective order to be entered or conservatorship to be established without finding the protected person to be incapacitated.[19]

Assuming that a court finds the person incapacitated, then the next question is whether the judge removes all of the ward's rights, creating a plenary guardian, or only those rights the ward is incapable of exercising, thereby creating a limited guardianship.[20] Even in a case where the ward has no legal authority to make decisions, the ward may still be able to participate in a meaningful way in decision-making.[21] According to the NGA Standards, the guardian has a duty to consult with and involve the ward in decision-making to the extent the ward can participate.[22] The more important the decision, the more important it becomes for

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[19] *Id.* § 409(d) ("The appointment of a conservator or the entry of another protective order is not a determination of incapacity of the protected person.").

[20] *See, e.g.*, *id.* § 403(c)(3) (discussing the requirements for petitions seeking various types of conservatorship; if an unlimited conservatorship is sought, an explanation of why a limited conservatorship is not sufficient is required; if a limited conservatorship is sought, the property subject to the conservatorship and the conservator's duties and powers must be delineated); FLA. STAT. ANN. §§ 744.331(6), 744.344(6) (West 2010) (discussing the procedure for determining incapacity and the order for appointing a guardian, respectively).

[21] *See, e.g.*, A MODEL CODE OF ETHICS FOR GUARDIANS § II.1 cmt., at 10–12 (Nat'l Guardianship Ass'n 1988), *available at* http://www.guardianship.org/documents/Code_of_Ethics.pdf ("The ability of a guardian to ascertain the preferences of the ward may vary according to both the type and nature of the ward's disability. . . . Nevertheless, the guardian has an affirmative obligation to make a diligent effort to involve the ward in the decision making process. . . . When making a decision on behalf of a ward, the guardian also has an obligation to thoroughly investigate the current preferences of the ward. A prerequisite to accomplishing this is the ability to conduct a careful interview of the ward. This requires the guardian to be educated and trained in the field of disabilities as well as in interview techniques, whenever possible.").

[22] *See, e.g.*, STANDARDS OF PRACTICE 6.V (explaining that the guardian shall evaluate decisions with a well-defined understanding of the issue, the conditions requiring treatment, and advise the ward of the decision, and if possible learn the ward's preference); *id.* at 9.I, II, IV (requiring a guardian to give the ward a chance to exercise what rights the ward can as pertains to the ward's person; and where possible maximize the ward's independence and self-sufficiency and urge the ward to participate as much as the ward is able in decision-making; and, as much as possible, work toward or regain capacity); *id.* at 18.I.B (requiring the guardian to meet with the ward as soon as possible after being appointed and explain the guardian's role, explain what rights the ward retains—and the grievance process—consider the ward's wishes, and evaluate them in light of the ward's

the ward to participate.[23] This involvement on the part of the ward might, in the case of a reasonably capable ward, amount to joint decision-making. It should be a goal to integrate the ward's participation and preincapacity wishes as much as possible into the process.[24]

IV. FIDUCIARY STANDARDS AND RESPONSIBILITIES— MAKING FINANCIAL DECISIONS ON BEHALF OF SOMEONE ELSE— A BRIEF SURVEY AND ANALYSIS OF EXISTING STANDARDS FOR MAKING FINANCIAL DECISIONS

A. Overview

According to the Guardianship Summit website, there are a number of widely recognized sources of standards, including the NGA Standards of Practice, the NGA Code of Ethics, the NGA Standards for Agencies and Programs Providing Guardianship Services, the National Probate Court Standards, and the Council on Accreditation Standards for Guardians of Adults.[25] Why should there be standards for guardians when making financial decisions for wards? As the practice evolved, it became clear to the NGA that standards were needed:

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current awareness, and try to get information about the estate from the ward"); A MODEL CODE OF ETHICS FOR GUARDIANS § 1 (providing general principles for a guardian's decision-making; recommending using great care and thoroughness, protecting the ward's rights and attempting to learn the ward's preferences, using those to guide decision-making, unless doing so would be likely to result in serious harm to the ward).

[23] A MODEL CODE OF ETHICS FOR GUARDIANS § 1 cmt., at 11.

> The obligation to inform and involve the ward in decision making increased in direct proportion to the significance of the decision . . . must be made from both an objective and subjective point of view. That is, a guardian must recognize that the obligation to inform and involve the ward in decisions does not only increase when the decision is factually significant . . . ; the guardian must also view the decision from the ward's standpoint. For example, a request . . . may appear minor to the guardian but may, in fact, be critical to the ward. This underscores the importance of the guardian forming as close a personal relationship with the ward and his or her caregivers as is possible under the circumstances.

Id.

[24] *See id.* § 2 cmt., at 13 ("To the extent the ward is able to participate, there exists an informative duty on the part of the guardian to share relevant information with the ward and thus aim toward the goal of joint decision making.").

[25] *Existing Guardian Practice Standards*, GUARDIANSHIP SUMMIT 2011, http://www.nationalguardianshipnetwork.org/existing-standards/. Boxx and Hammond engage in a more focused look at the range of published standards and a general discussion of the NGA Standards. *See* Boxx & Hammond, *supra* note 5.

> Developing standards for guardians has been an ongoing challenge for the National Guardianship Association (NGA). Not only has the profession undergone rapid change . . . , but the basic issues have been, and remain, imprecise and difficult to define for a national, membership-based organization. A basic philosophical element complicating the process has been the need to strike a consistent balance between standards that represent an ideal and those that recognize practical limitations, whether for a family guardian or for a professional guardian. . . .
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> These discussions centered on the need to state what is "right" versus the need to recognize and accept the inevitability of the status quo—too many clients, not enough funding or staff. While we all agree that such restrictions are all too commonplace, . . . little is gained by simply accepting a substandard or unacceptable state of affairs. The NGA has, therefore, adopted standards that . . . reflect as realistically as possible the best or highest quality of practice. In many cases, best practice may go beyond what state law requires of a guardian.[26]

B. State Standards

Some states have adopted additional standards in varying formats.[27] Statutes may also contain standards, especially if standards are viewed as creating a duty for the guardian of the estate.[28]

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[26] STANDARDS OF PRACTICE pmbl. at 1.

[27] *State Guardianship Standards*, GUARDIANSHIP SUMMIT 2011, http://www.nationalguardianshipnetwork.org/existing-standards/state-guardianship-standards (mentioning Alaska and North Dakota (NGA Standards adopted); Arizona, California, Texas, and Washington (NGA Standards as template); New Hampshire (NGA Standards basis for court-adopted process); Oregon (optional certification; similar to NGA Standards); and Michigan (state guardianship association standards)).

Alaska: ALASKA STAT. § 13.26.001 (2010) ("[A]ll guardians and conservators, when making decisions for their wards or protected persons, shall abide by the highest ethical standards of decision making and shall consider the standards of practice adopted by the department by regulation. The department shall adopt standards of practice for guardians and conservators and, before doing so, shall review the standards of practice adopted by a national organization with expertise in the area of standards of practice for guardians and conservators, such as the National Guardianship Association."); *see also id.* §§ 08.26.020, 08.26.030 (provisions for licensing private professional guardian or conservator: "certified as a guardian by a nationally recognized organization in the field of guardianships."). Failing to comply with the standards adopted under section 13.26.001 is grounds for discipline. *See id.* § 08.26.130 (Department may discipline guardian or decline to issue/renew license if it has been determined by the department that the person failed to comply "with the standards of conduct established by the department under . . . [§] 13.26.001 . . . .").

Arizona: ARIZ. CODE JUD. ADMIN. § 7-202(J) (2012) (establishing the "minimum standards of performance for licensed fiduciaries," adopted by the Arizona Supreme

Court); *Fiduciary Licensing Program*, ARIZ. JUD. BENCH, http://azcourts.gov/cld/FiduciaryLicensingProgram.aspx (last visited Mar. 29, 2012) (explaining Arizona's Fiduciary Licensing Program). *See generally* ARIZ. CODE JUD. ADMIN. § 7-202 (setting forth the rules and procedures for licensing of fiduciaries in Arizona).

California: CAL. BUS. & PROF. CODE § 6533(h) (West Supp. 2012) (requiring licensees to "[a]gree to adhere to the Professional Fiduciaries Code of Ethics and to all statutes and regulations"); *id.* § 6584(d) (denying, revoking, or suspending license of professional fiduciary for engaging in "unprofessional conduct"). Section 6584(d) explains that "unprofessional conduct includes, but is not limited to, acts contrary to professional standards concerning any provision of law substantially related to the duties of a professional fiduciary." *Id.*; *see also* CAL BUS. & PROF. CODE §6520 (2007) (directing creation of a code of ethics for fiduciaries). See also CAL. CODE REG. tit. 16 §§ 4470-4484 (2007).

New Hampshire: N.H. REV. STAT. ANN. § 464-A:2(XIV-b) ("'Professional guardian' means a competent person who provides guardianship services for a fee to a ward and who is not related to the ward by blood, adoption, marriage, or civil union. To be eligible for appointment, a professional guardian shall meet criteria established by the administrative judge of the probate court."); N.H. PROBATE COURT, ADMINISTRATIVE ORDER 16, CRITERIA FOR PROFESSIONAL GUARDIANS (2009) (setting forth the requirements for certification as a professional guardian, including requiring the guardian to "be a national certified guardian or national master guardian with the Center for Guardianship Certification (CGC)," to "maintain th[e] registration as required by CGC or its successor organization," to "adhere to the *Standards of Practice* published by the National Guardianship Association (NGA) or its successor organization," and to "adhere to the *Model Code of Ethics* published by the NGA").

North Dakota: N.D. GUARDIANSHIP STANDARDS OF PRACTICE FOR ADULTS intro. cmt. (2006), *available at* http://www.nd.gov/dhs/info/pubs/docs/aging/guardianship-standards.pdf ("All [North Dakota Guardianship] standards apply to professional guardians, corporate guardians or family guardians unless otherwise indicated. Adapted with permission from the National Guardianship Association . . . .").

Texas: TEX. GOV'T CODE ANN. §§ 111.001–.044 (West Supp. 2011). Note especially section 111.041, requiring the guardianship board to "adopt minimum standards for . . . guardianship services . . . programs; and . . . private professional guardians," and to "design the standards to protect the interests of an incapacitated person or other person needing assistance making decisions concerning the person's own welfare or financial affairs." *Id.* § 111.041; *see also* TEX. MINIMUM STANDARDS FOR GUARDIANSHIP SERVICES, pmbl. (2011), *available at* http://www.courts.state.tx.us/gcb/pdf/MinimumStandards.pdf ("The National Guardianship Association (NGA) Standards of Practice were of great assistance in the development of these Minimum Standards, and the organization and form of the Minimum Standards generally follows that of the NGA Standards of Practice.").

Washington State: WA. REV. CODE ANN. § 11.88.020 (West Supp. 2012) ("Any suitable person over the age of eighteen years, or any parent under the age of eighteen years or, if the petition is for appointment of a professional guardian, any individual or guardianship service that meets any certification requirements . . . may, if not otherwise disqualified, be appointed guardian or limited guardian of the person and/or the estate of an incapacitated person. A financial institution . . . and a federally chartered financial institution when authorized to do so, may act as a guardian of the estate of an incapacitated

As noted above, some states have adopted the NGA Standards or similar standards for application to professional fiduciaries' activities. Generally speaking, the application of NGA Standards appears to be limited in application to a professional fiduciary, and not to most family members acting as a fiduciary, especially if unpaid. In *In re Guardianship of Stephens*,[29] the court noted that adherence to the Standards by professional fiduciaries is one of the significant differences between professional and family fiduciaries—along with the practical reality that family members do not generally have prior training or experience in the field.[30]

In Arizona, the NGA Standards formed the basis for the Arizona Code of Conduct first adopted in 2001 and applicable to professional fiduciaries licensed by the Arizona Supreme Court.[31] The Arizona Code of Conduct, however, represents a significant reworking of the NGA Standards, resembling them only in broad terms. Organization, language and coverage are all significantly different from the NGA Standards.

A number of questions and concerns arise from those state regulations modeled after the NGA Standards, including:

1. *Difficulty maintaining consistency*. The gradual evolution of the NGA Standards (the result of state experiences leading to changes in state versions) will adversely affect the consistency of state approaches. This can and will result in

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person without having to meet the certification requirements . . . ."); WASH. STANDARDS OF PRACTICE REG. 400–08 (2011), *available at* http://www.courts.wa.gov/committee/?fa=committee.child&child_id=30&committee_id=117 (setting forth requirements for certified professional guardians).

Other states may have adopted standards via an organization but not by law, or are looking at the adoption of standards. For a discussion of state adoptions of standards, see Boxx & Hammond, *supra* note 5, at 1212–28.

[28] *See, e.g.*, UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT §§ 418, 425 (1997).

[29] 965 So. 2d 847 (Fla. Dist. Ct. App. 2007).

[30] *Id.* at 851 n.9 ("We would further note that the appointment of a professional guardian in this case is even more appropriate because such guardians, unlike family members, adhere to objective, national standards under the auspices of the National Guardianship Association, available at http://www.guardianship.org/pdf/standards.pdf. Family members, regardless of their good intentions, are not required to adhere to these standards, nor do they generally have prior guardian training or experience."); Boxx & Hammond, *supra* note 5, at 18–20 (explaining that courts have applied different standards to family guardians); Colloquium, *Wingspan—The Second National Guardianship Conference, Recommendations*, 31 STETSON L. REV. 595, 597 (2002) [hereinafter *Wingspan*] (recommending in Recommendation 9 that "all guardians receive training and technical assistance in carrying out their duties"); *Professional Guardian Certification*, GUARDIAN/CONSERVATOR ASS'N OR., http://www.gcaoregon.org/train_cert.html (last visited Mar. 29, 2012) ("Certification is not currently required by Oregon law, but it may be difficult for a professional practitioner to obtain court appointment, bonding, malpractice insurance or client referrals without it.").

[31] *See* ARIZ. CODE JUD. ADMIN. § 7-202(J) (2012).

differing standards for different states. Some states may incorporate the standards by reference while others will adopt a then-current version—or even modify the NGA Standards before adoption. It is not difficult to imagine a circumstance in which an individual fiduciary's responsibility under state law (and/or court regulations) might conflict with adherence to the principles enunciated by a national organization to which she belongs.

2. *Aspirational vs. mandatory approaches*. The NGA Standards speak in terms of absolutes, yet are aspirational in nature. When adopted as a court-mandated or legislatively mandated code, however, the aspirations become expressly enforceable directions.

3. *Detail*. The Arizona Code of Conduct is over 2000 words and includes a surprising amount of detail. In independent audits conducted by the Arizona Supreme Court, one of the five most commonly cited violations is the repeated failure of licensed fiduciaries to include their licensure number on court pleadings.[32] Auditors then pore over files looking for instances in which the license number has been omitted from one pleading, even though the same file may have dozens or hundreds of instances of use of the number. The level of detail mandated by the Arizona Code focuses not on quality of service (or transparency of fiduciary administration), but also on rote detail. Similarly, one wonders if it is necessary to mandate that every disposition of real or personal property of the ward requires judicial, administrative, or other independent review (NGA Standard 19(I)). Is it possible that some kinds of property dispositions are simply too small to require review, or that review mechanisms might be reasonably constructed to provide adequate protections but not slavish attention to an expensive and sometimes cumbersome standard?

4. *Ossification*. Prevailing standards and acceptable behavior (both personal and professional) evolve over time. For example, NGA Standard 18(IX), requiring the guardian to "oversee the disposition of the ward's assets to qualify the ward for any public benefits program," may not be in the ward's best interest in individual cases. That analysis has almost certainly shifted—substantially so—in the past decade. Tellingly, the Arizona Code of Conduct modifies this mandate, requiring guardians and conservators to "ensure" that their wards are "receiving all medical and financial benefits to which [they] may be entitled."[33]

5. *The need for states to adopt standards*. Although the NGA Standards represent thoughtful analysis and comprehensive guidance, absent some form of state-level adoption, the Standards have no force.[34]

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[32] *5 Most Common Fiduciary Audit Findings*, ARIZ. JUD. BRANCH, http://www.azcourts.gov/portals/26/fiduciary/pdf/5MostCommonFiducAuditFindings.pdf (last visited Mar. 30, 2012).

[33] *See* ARIZ. CODE JUD. ADMIN. §§ 7-202(J)(3)(q), 7-202(J)(4)(h) (establishing standards for guardians and conservators, respectively).

[34] According to Terry Hammond, former executive director of NGA, a member of NGA does not have to agree to comply with the standards as a condition of membership, and NGA does not discipline members for failing to comply with the standards. Hammond notes that according to the certification requirements, a guardian certified by the Center for

Although there may be concerns about the widespread adoption of the NGA Standards—or any standards—in individual states, they represent the best effort to date. The NGA Standards have already been adopted, or have been the inspiration for standards adopted in at least a handful of states, and they are recognized by professional guardians in multiple jurisdictions. We have recommended that each state consider adoption of the NGA Standards. Failing that option, states should consider standards with similar goals and organization.

C. How Do the Standards Guide the Guardian of the Estate in Financial Decision-Making?

This section will examine the standards for the guardians of the estate in making financial decisions. This section will primarily review the NGA Standards, briefly the NGA Code of Ethics and the Probate Court Standards,[35] but will place emphasis on the NGA Standards since they were written by guardians for guardians[36] and have undergone the most revision.[37] Although NGA refers to these as standards, in the Preamble, the authors note that

> [t]he NGA has, therefore, adopted standards that we feel reflect as realistically as possible the best or highest quality of practice. In many cases, best practice may go beyond what state law requires of a guardian.
>
> In reading this document, it is important to recognize that some of the standards enunciate ideals or philosophical points, while others speak to day-to-day practical matters. Both approaches are critically important. It is not our ambition to prescribe a precise program description or management manual. Rather, we have sought to shape a mirror that practitioners and funders can use to evaluate their efforts. The standards also reflect the mandate that all guardians must perform in accordance

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Guardianship Certification has to agree to abide by the Code of Ethics but not the standards. However, Hammond goes on to note that the certification exam includes questions about the standards. E-mail from Terry Hammond, Former Exec. Dir., Nat'l Guardianship Ass'n, to Rebecca Morgan, Dir., Center for Excellence in Elder Law at Stetson Unversity College of Law (July 20, 2011) (on file with authors).

[35] The Probate Court Standards are currently undergoing revision, so we will not discuss them in detail. *See* NAT'L PROBATE COURT STANDARDS REVIEW DRAFT (Aug. 2012); (http://www.ncpj.org/images/stories/documents/Standards_Review_Draft_7-12.doc).

[36] Some may take issue with our point, in that guardians writing for guardians may have a self-serving aspect. We believe that the NGA Standards truly are aspiring to create standards for the profession.

[37] The NGA Standards are now in the third edition (2007). The initial standards were adopted in 1991. STANDARDS OF PRACTICE, pmbl. (Nat'l Guardianship Ass'n 2007). They were first adopted by the NGA Board and members in 2000. *Id.*

with current state law governing guardianships and certification of guardians.[38]

D. NGA Standards Specific to a Guardian of the Estate

The NGA Standards provide four standards[39] that are specific to the guardian of the estate. Standard 17 is wide-ranging in its application, requiring transparency,[40] competent management[41] that benefits the ward,[42] correct record-keeping and accounting,[43] limits on comingling,[44] prosecuting if in the ward's best interest and defending to protect the ward's estate,[45] use of prudent accounting methods,[46] management of the ward's estate in accordance with the ward's estate plan,[47] and use of the prudent person or investor rule.[48]

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[38] *Id.*

[39] The NGA Standards contain a total of 25 standards: (1) Applicable Law; (2) The Guardian's Relationship to the Court; (3) The Guardian's Professional Relationship with the Ward; (4) The Guardian's Relationship with Family Members and Friends of the Ward; (5) The Guardian's Relationship with Other Professionals and Providers of Service to the Ward; (6) Informed Consent; (7) Standards for Decision-Making; (8) Least Restrictive Alternative; (9) Self-Determination of the Ward; (10) The Guardian's Duties Regarding Diversity and Personal Preference of the Ward; (11) Confidentiality; (12) Duties of the Guardian of the Person; (13) Guardian of the Person: Initial and Ongoing Responsibilities; (14) Decision-Making About Medical Treatment; (15) Decision-Making About Withholding and Withdrawal of Medical Treatment; (16) Conflict of Interest: Ancillary and Support Services; (17) Duties of the Guardian of the Estate; (18) Guardian of the Estate: Initial and Ongoing Responsibilities; (19) Property Management; (20) Conflict of Interest: Estate, Financial, and Business Services; (21) Termination and Limitation of the Guardianship/Conservatorship; (22) Guardianship Service Fees; (23) Management of Multiple Guardianship Cases; (24) Quality Assurance; and (25) Sale or Purchase of a Guardianship Practice. STANDARDS OF PRACTICE 1–25.

[40] *Id.* at 17.I ("The guardian shall act in a manner above reproach, and his or her actions will be open to scrutiny at all times.").

[41] *Id.* at 17.II ("The guardian shall provide competent management of the ward's property and shall supervise all income and disbursements of the estate.").

[42] *Id.* at 17.III ("The guardian shall manage the estate only for the benefit of the ward.").

[43] *Id*. at 17.IV ("The guardian shall keep estate assets safe by keeping accurate records of all transactions and be able to fully account for all the assets in the estate.").

[44] *Id.* at 17.V ("The guardian shall keep estate money separate from the guardian's personal money; the guardian shall keep the money of individual estates separate unless accurate separate accounting exists within the combined accounts.").

[45] *Id.* at 17.VI ("The guardian shall make claims against others on behalf of the estate as deemed in the best interest of the ward and shall defend against actions that would result in a loss of estate assets.").

[46] *Id.* at 17.VII ("The guardian shall employ prudent accounting procedures when managing the estate.").

[47] *Id.* at 17.VIII ("The guardian shall determine if a will exists and obtain a copy to determine how to manage estate assets and property."). Nothing in the Standards (and little

Standard 18, "Initial and Ongoing Responsibilities," echoes much of what may be seen in a statute regarding the duties of the guardian of the property, such as securing the property,[49] posting a bond,[50] securing insurance,[51] filing an inventory,[52] filing accountings,[53] applying for public benefits,[54] etc. Standard 18 also provides for some actions that may not always be seen in guardianship statutes which tend to be "person-based," and it provides some autonomy and self-determination for the ward, such as meeting with the ward,[55] coordinating a budget and financial plan with the care plan prepared by the guardian of the person,[56] and giving the ward a chance to manage funds if the ward is able to do so.[57]

Similarly, Standard 19, covering "Property Management," acknowledges that the guardianship is set up for the ward's benefit, noting the importance of the ward's views when the guardian is making decisions[58] in addition to the more expected "traditional-property-type" factors, such as tax implications,[59] the impact

in practice or life) helps a guardian reconcile different versions of the ward's estate plan, questions of competence or undue influence not yet resolved in interpreting the estate plan, or the proper effect of new planning undertaken after the protective proceeding was begun.

[48] *Id.* at 17.IX. ("The guardian shall apply the Prudent Person Rule and the Prudent Investor Rule when managing the estate.").

[49] *Id.* at 18.I.A.

[50] *Id.* at 18.III.

[51] *Id.* at 18.IV.

[52] *Id.* at 18.VII.

[53] *Id.* at 18.VIII.

[54] *Id.* at 18.IV, 18.IX.

[55] *Id.* at 18.I.B ("The guardian shall meet with the ward as soon after the appointment as feasible. At the first meeting the guardian shall: 1. Communicate to the ward the role of the guardian; 2. Outline the rights retained by the ward and the grievance procedures available; 3. Assess the previously and currently expressed wishes of the ward and evaluate them based on current acuity; and 4. Attempt to gather from the ward any necessary information regarding the estate.").

[56] *Id.* at 18.II ("The guardian shall prepare a financial plan and budget that correspond with the care plan for the ward. The guardian of the estate and the guardian of the person (if one exists) or other health care decision-maker shall communicate regularly and coordinate efforts with regard to the care and financial plans, as well as other events that might affect the ward.").

[57] *Id.* at 18.V. ("The guardian may allow the ward the opportunity to manage funds to his or her ability.").

[58] *See, e.g.*, *id.* at 19.II (directing the guardian of the estate, absent "reliable evidence of the ward's views" prior to the guardianship, not to "sell, encumber, convey or otherwise transfer property" unless doing so is in the ward's best interest); *id.* at 19.III (requiring the guardian to consider, when determining the "best interest" of the ward, among other things, the ward's current or prior expressed wish about the property).

[59] *Id.* at 19.III.E.

on the estate plan of the ward,[60] the likelihood the property may deteriorate,[61] or the cost of upkeep.[62]

The fourth and final specific property standard is Standard 20, covering conflicts of interest. This standard recognizes that the guardian of the property must avoid any appearance of impropriety and any self-dealing in the guardian's management of and disposition of the ward's property.[63]

E. Other NGA Standards We Believe May Apply to the Guardian of the Estate When Making Financial Decisions

Although the four standards detailed above specifically apply to the guardian of the property, certain other standards arguably could also apply to the guardian of the property in appropriate cases. For example, Standard 6, covering informed consent,[64] does not seem to have application beyond the guardian of the person[65]

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[60] *Id.* at 19.III.D.
[61] *Id.* at 19.III.J.
[62] *Id.* at 19.III.K.
[63] *Id.* at 20.
[64] *Id.* at 6. Standard 6 provides:

> I. Decisions the guardian makes on behalf of the ward shall be based on the principle of Informed Consent.
> II. Informed Consent is a person's agreement to a particular course of action based on a full disclosure of facts needed to make the decision intelligently.
> III. Informed Consent is based on complete information regarding:
> A. Adequate information on the issue;
> B. Voluntary action; and
> C. Lack of coercion.
> IV. The guardian stands in the place of the ward and is entitled to the same information and freedom of choice as the ward would have received if he or she were competent.
> V. In evaluating each requested decision, the guardian shall do the following:
> A. Have a clear understanding of the issue for which informed consent is being sought.
> B. Determine the conditions that necessitate treatment or action.
> C. Advise the ward of the decision that is required and determine, to the extent possible, the ward's current preferences.
> D. Determine whether the ward has previously stated preferences in regard to a decision of this nature.
> E. Determine the expected outcome of each alternative.
> F Determine the benefit of each alternative.
> G. Determine the risks of each alternative.
> H. Determine why this decision needs to be made now rather than later.
> I. Determine what will happen if a decision is made to take no action.
> J. Determine what the least restrictive alternative is for the situation.
> K. Obtain a second medical opinion, if necessary.
> L. Obtain information or input from family and from other professionals.

since it appears to be limited in application to medical treatment decisions made by the guardian of the person.[66] It may seem unlikely that Standard 6 will apply to most decisions of the guardian of the estate, beyond the case where the guardian, in making investment and disbursement and/or distribution decisions, should strive to be as fully informed as a guardian of the person must be in making medical and placement issues.[67]

Although Standard 6—limited as it is to medical decisions made by the guardian of the person—may not have direct application to a guardian of the property making financial decisions, it still can provide some guidance to the guardian of the property. As Standard 7 directs the guardian to use informed consent and references back to Standard 6,[68] Standard 6 could provide guidance to a decision of the guardian of the estate. For example, it is not enough to listen to the broker, who may have a vested interest in the sale of a given investment, or the sale of investments in general, and make an investment decision based solely on the broker's recommendation. The guardian of the estate should also be prepared to seek independent advice and information, and consider the global issues such as other investments not handled by that broker and therefore not included in

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M. Obtain written documentation of all reports relevant to each decision.

Id.; *see also id.* at 7.I., Standards for Decision-Making ("Each decision made by the guardian shall be an informed decision based on the principle of A [sic] Informed Consent. (see Standard 6).").

[65] It appears from reading Standard 6 that it applies to decisions by the guardian of the person, particularly medical decisions. The very concept of "informed consent," central to Standard 6, is of course usually used in a medical context. Nothing in Standard 6 limits its applicability to consent to medical decisions, though, and it is not difficult to conjure financial decisions that one could apply the same principle to. For example, a decision to enter the marketplace at all, or the delegation of investment management to a professional broker, might reasonably be said to require both the consent of the principal and adequate information to allow a reasonable person to give that consent.

[66] *See generally* Boxx & Hammond, *supra* note 5 ("[The Sixth Standard] is entitled 'Informed Consent' and is unique to a guardian fiduciary. It gives the guardian thorough guidelines on how to evaluate medical decisions and how to fully exercise the ward's right to informed consent when making such decisions on behalf of the ward. No other fiduciary, except perhaps the holder of a power of attorney for medical issues, has authority to make such personal decisions for the beneficiary of the fiduciary relationship."). *See generally* Kim Dayton, *Standards for Health Care Decision-Making: Legal and Practical Considerations*, 2012 UTAH L. REV. 1329 (discussing standards for guardians in making health care decisions for wards).

[67] STANDARDS OF PRACTICE 6.II–III ("II. Informed Consent is a person's agreement to a particular course of action based on a full disclosure of facts needed to make the decision intelligently. III. Informed Consent is based on complete information regarding: A. Adequate information on the issue; B. Voluntary action; and C. Lack of coercion."); *see also id.* at 7.I ("I. Each decision made by the guardian shall be an informed decision based on the principle of A Informed Consent. (see Standard 6).").

[68] *Id.* at 7.I.

suitability or asset allocation studies or proposals, likely expenditures in the foreseeable future, time horizon for management of the funds,[69] budgeting, etc.

Standard 7—Standards for Decision-Making.[70] Although the applicability of Standard 7 to guardianship of the person may be more obvious, it will also apply to decisions made by a guardian of the estate. This standard incorporates the substituted judgment/best interest decision-making principles,[71] sometimes referred to in health care decision-making as "Unified Substitute Decision-Making."[72] But,

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[69] Should the proper time horizon for a guardian be the life expectancy of the ward, the likely duration of the guardianship, or some other measure? This can have more than passing significance, as it may require the guardian to make an estimate based on the ward's health and family history—an undertaking fraught with potential pitfalls for a nonfamily member fiduciary. When the ward is a minor, should the time horizon be that which a prudent investor of the ward's age (if such a concept even makes sense) would select, or the time until the ward reaches majority? The good news for guardians is that lack of direction in the Standards allows for greater flexibility.

[70] *Id.* at 7. Standard 7 provides:

> I. Each decision made by the guardian shall be an informed decision based on the principle of A [sic] Informed Consent. (see Standard 6).
>
> II. SUBSTITUTED JUDGMENT
>
> A. Substituted Judgment is the principle of decision-making that substitutes, as the guiding force in any surrogate decision made by the guardian, the decision the ward would have made when competent.
>
> B. Substituted Judgment promotes the underlying values of self-determination and well-being of the ward.
>
> C. Substituted Judgment is not used when following the ward's wishes would cause substantial harm to the ward or when the guardian cannot establish the ward's prior wishes.
>
> III. BEST INTERESTS OF THE WARD
>
> A. Best Interest is the standard of decision-making the guardian should use when the ward has never had capacity or when the ward's wishes cannot be determined.
>
> B. The Best Interest standard requires the guardian to consider the least intrusive, most normalizing, and least restrictive course of action possible to provide for the needs of the ward.
>
> C. The Best Interest standard is used when following the ward's wishes would cause substantial harm to the ward, or when the guardian is unable to establish the ward's prior or current wishes.
>
> D. Best Interest decisions include consideration of the ward's current and previously expressed wishes.

Id.

[71] For a discussion of these, see Lawrence A. Frolik & Linda S. Whitton, *Surrogate Decision-Making Standards for Guardians: Theory and Reality*, 2012 UTAH L. REV. 1491, 1504–15.

[72] *See, e.g.*, UNIF. HEALTH CARE DECISIONS ACT § 2(e) (1994), *available at* http://www.law.upenn.edu/bll/archives/ulc/fnact99/1990s/uhcda93.pdf ("An agent shall make a health-care decision in accordance with the principal's individual instructions, if

this is the Standard that the guardian of the estate would rely on, for example, in continuing a pattern of tithing to church, or sending small donations to select charities. Sometimes extrapolation is necessary. The guardian of the estate might ratchet back the donations to substantially less than the ward was making just before the guardianship, but still approve smaller donations to the same charities or religious recipients to which the ward had previously donated. The NGA Ethics Code in Rule 5.4 echoes this: "Where the liquid estate of the ward is sufficient, the guardian may make such gifts as are consistent with the wishes or past behavior of the ward, bearing in mind both the foreseeable requirements of the ward and the tax advantages of such gifts."[73] The comment to ethics rule 5 expands on the appropriateness of charitable giving:

> Charitable contributions may be made, with court approval in some jurisdictions, in such a manner as to perpetuate the former practices of the ward, or consistent with a substituted judgment as to their benefit to the ward's current or future situation. Non-charitable gifts, such as those gifts which might be made to family members or close friends, may be made from the surplus income of the estate if the guardian is in possession of demonstrable evidence that the ward would make such gifts. . . . In all cases, the guardian may be held to a thorough knowledge of the principles and practices of estate planning, including the tax consequences, in the carrying out of planned giving. If the guardian does not have such expertise, he or she must seek professional advise [sic] before deciding to make any gifts.[74]

Because the guardian of the estate is directed to talk with the ward to learn the "previously and currently expressed wishes of the ward and evaluate them based on [the ward's] current acuity"[75] and consider the ward's "previously expressed or current desires . . . with regard to the property" when deciding whether it is in the

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any, and other wishes to the extent known to the agent. Otherwise, the agent shall make the decision in accordance with the agent's determination of the principal's best interest. In determining the principal's best interest, the agent shall consider the principal's personal values to the extent known to the agent."); *see also id.* § 2 cmt. ("Subsection (e) requires the agent to follow the principal's individual instructions and other expressed wishes to the extent known to the agent. To the extent such instructions or other wishes are unknown, the agent must act in the principal's best interest. In determining the principal's best interest, the agent is to consider the principal's personal values to the extent known to the agent. The Act does not prescribe a detailed list of factors for determining the principal's best interest but instead grants the agent discretion to ascertain and weigh the factors likely to be of importance to the principal.").

[73] A MODEL CODE OF ETHICS FOR GUARDIANS § 5.4 (Nat'l Guardianship Ass'n 1988).

[74] *Id.* § 5.4 cmt.

[75] STANDARDS OF PRACTICE 18.I.B.3 (Nat'l Guardianship Ass'n 2007).

ward's best interest to dispose of property,[76] we can see the application of this standard to a guardian of the estate.

Standard 8, titled "Least Restrictive Alternative,"[77] directs the guardian to use the least restrictive alternative in making decisions for the ward. On its face, this Standard applies primarily to the guardian of the person. However, the guardian of the person does not make decisions in isolation and there will be financial implications to the decisions of the guardian of the person. Thus, there will be times when, as noted in Standard 18 (Property Management), that the guardian of the estate must be consulted by the guardian of the person.[78] In fact, there will be decisions that must be made in consultation and jointly, whether in the creation of the care plan by the guardian of the person or in making individual decisions. In addition, the guardian of the estate certainly should encourage and facilitate least-restrictive-alternative planning made by the guardian of the person, and not just for financial reasons.

Standard 9 deals with the ward's self-determination,[79] and is clearly applicable to the guardian of the estate. It tells the guardian of the estate that, in an

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[76] *Id.* at 19.III.C.

[77] *Id.* at 8. Standard 8 provides:

> I. The guardian shall carefully evaluate the alternatives that are available and choose the one that best meets the needs of the ward while placing the least restrictions on his or her freedom, rights, and ability to control his or her environment.
> II. The guardian shall weigh the risks and benefits and develop a balance between maximizing the independence and self-determination of the ward and maintaining the ward's protection and safety.
> III. The guardian shall make individualized decisions; the least restrictive alternative for one ward might not be the least restrictive alternative for another ward.
> IV. The following guidelines apply in the determination of the least restrictive alternative:
>
> > A. The guardian shall become familiar with the available options for residence, care, medical treatment, vocational training, and education.
> > B. The guardian shall strive to know the ward's preferences.
> > C. The guardian shall consider assessments of the ward's needs as determined by specialists. This may include an independent assessment of the ward's functional ability, the ward's health status, and the ward's care needs.

Id.

[78] *Id.* at 18.II ("The guardian shall prepare a financial plan and budget that correspond with the care plan for the ward. The guardian of the estate and the guardian of the person (if one exists) or other health care decision-maker shall communicate regularly and coordinate efforts with regard to the care and financial plans, as well as other events that might affect the ward.").

[79] *Id.* at 9. Standard 9 provides:

appropriate case, the ward ought to be permitted to manage a small account and perhaps pay regular bills—with appropriate levels of oversight (keeping in mind that oversight can be expensive and the danger of serious problems may be slight) by the guardian of the estate.[80] The goal for a guardian of the estate should be, as it is for a guardian of the person, to effectively manage and protect the ward with minimum impact on the ward's personal autonomy or perceived quality of life. This Standard speaks to an oft-described notion of "risk" in an individual's normal daily life.

Individuals often take on risks of various levels and are able to cope. However, when an individual is placed in charge of someone else's life, it is natural and human to try to eliminate risk altogether. That is almost certainly inappropriate. The job of the guardian of the estate should be—as it should also be for a guardian of the person—to manage the risks at an appropriate level. If the ward has an "outside" checking account, with $1,000 deposited every month, and pays the utilities and has some spending money, what is the risk? Probably slight—if the ward fails to make the payments, the guardian of the estate will know within a month or two. If the ward is taken advantage of, the only money at risk is the $3,000–5,000 built up in the account. Meanwhile, the cost of paying a guardian of the estate to make those same bill payments will certainly be something, and so it may be appropriate, from a purely risk-analysis perspective, to maintain a separate account accessible to the ward. Now add in the benefits of maximum autonomy and self-direction, and the decision to "delegate" some financial decisions back to the ward seems clearer.

The NGA Ethics Code "provide[s] principles and guidelines for guardians."[81] Some of what is contained in the rules is echoed in the standards, although perhaps in more forceful language. For example, Rule 5, *Management of the Estate*, requires "competent management of the property and income of the estate" and requires the guardian to "exercise intelligence, prudence and diligence and avoid any self-interest" in exercising the duty.[82]

> I. The guardian shall provide the ward with every opportunity to exercise those individual rights that the ward might be capable of exercising as they relate to the care of the ward's person.
>
> II. The guardian shall attempt to maximize the self-reliance and independence of the ward.
>
> III. The guardian shall understand and advocate for person-centered planning and the least restrictive alternative on behalf of the ward.
>
> IV. The guardian shall encourage the ward to participate, to the maximum extent of the ward's abilities, in all decisions that affect him or her, to act on his or her own behalf in all matters in which the ward is able to do so, and to develop or regain his or her own capacity to the maximum extent possible.

Id.

[80] *See, e.g.*, *id.*, at 18.V ("The guardian may allow the ward the opportunity to manage funds to his or her ability.").

[81] A MODEL CODE OF ETHICS FOR GUARDIANS pmbl (Nat'l Guardianship Ass'n 1988).

[82] *Id.* § 5.

The National Probate Court Standards were adopted in 1993[83] and are currently undergoing revision, with a "Final Review Draft" circulated in September 2012.[84] Section 3.3 covers "Proceedings Regarding Guardianship and Conservatorship For Adults."[85] It is important to distinguish these standards from those by NGA—these standards are for the probate courts, and are focused on administration, caseload, and effective use of judicial resources,[86] whereas the NGA standards are intended to apply to the actions of individual guardians.

The applicable statutes themselves may have standards for financial decision-making by the guardian of the estate. Since this Article is general in nature, rather than state specific, a few examples will be given as illustrations but are no way intended to comprise an exhaustive list. For example, UGPPA § 418 provides standards for conduct[87] as well as for decision-making.[88] It is important to

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[83] NAT'L PROBATE COURT STANDARDS (1993), *available at* http://www.ncsconline.org/WC/Publications/Res_PropCt_NatlProbateCrtStandardsPub.pdf.

[84] See NAT'L PROBATE COURT STANDARDS REVIEW DRAFT (Aug. 2012); (http://www.ncpj.org/images/stories/documents/Standards_Review_Draft_7-12.doc).

[85] NAT'L PROBATE COURT STANDARDS REVIEW DRAFT, § 3.3 (Aug. 2012); (http://www.ncpj.org/images/stories/documents/Standards_Review_Draft_7-12.doc).

[86] The Introduction to the PROPOSED NAT'L PROBATE COURT STANDARDS notes:

> The Revised National Probate Court Standards are intended to promote uniformity, consistency, and continued improvement in the operations of probate courts. The Standards and associated commentary, footnotes, and references to specific courts using promising practices bridge gaps of information, provide organization and direction, and set forth aspirational goals for both specialized probate courts and general jurisdiction courts with probate jurisdiction. Although the Standards include both concrete recommendations and the rationale behind them, they are not intended to serve as statements of what the law is or should be**,** nor otherwise infringe on the decision-making authority of probate court judges or state legislatures. They do not address every aspect of the nation's probate courts, but, rather, set forth some guiding principles to assist the evolution of these courts. They seek to capture the philosophy and spirit of an effective probate court and encourage effective use of limited resources.

(2012). NAT'L PROBATE COURT STANDARDS REVIEW DRAFT, INTRODUCTION, at 8 (Aug. 2012); (http://www.ncpj.org/images/stories/documents/Standards_Review_Draft_7-12.doc).

[87] UNIF. GUARDIANSHIP & PROTECTIVE PROC. ACT § 418(a) (1997) (providing that a conservator "is a fiduciary and shall observe the standards of care applicable to a trustee."). *But see id.* § 418 cmt. (noting that conservator is more than just a fiduciary).

[88] *Id.* § 418(d) ("In investing an estate, selecting assets of the estate for distribution, and invoking powers of revocation or withdrawal available for the use and benefit of the protected person and exercisable by the conservator, a conservator shall take into account any estate plan of the person known to the conservator and may examine the will and any other donative, nominative, or other appointive instrument of the person."); *see also id.* § 427 (providing principles for distribution).

recognize that the applicable state statutes must be consulted to determine the duties, obligations and methods that apply to guardians in making financial decisions.[89]

V. PRUDENT INVESTOR RULES—WHAT THEY ARE AND HOW DOES A GUARDIAN COMPLY WHEN MAKING FINANCIAL DECISIONS?

A. History and Overview of the Uniform Prudent Investor Act

Early in the eighteenth century, the British government became embroiled in an investment scheme that dramatically altered the development of trust law.[90] The South Sea Company was formed in 1711, partly as a means of financing British government debt. When the South Sea "bubble" burst in 1720, one result was a general move to limit the types of investments permitted by (among other regulated investors) trusts and estates.[91]

One effect of those restrictions was establishment of "legal lists"[92] in most English-speaking jurisdictions. Under the legal-list approach, narrow categories of investments were endorsed by English courts of equity (and their American offspring) which regulated fiduciary investments. Only investments on the list were permitted. The lists began with government debt and well-secured mortgage

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[89] *See, e.g.*, FLA. STAT. § 744.361(7) (2011) ("The guardian shall observe the standards in dealing with the guardianship property that would be observed by a prudent person dealing with the property of another, and, if the guardian has special skills or is named guardian on the basis of representations of special skills or expertise, he or she is under a duty to use those skills."); 755 ILL. COMP. STAT. 5/11a-18(a) (2011) ("To the extent specified in the order establishing the guardianship, the guardian of the estate shall have the care, management and investment of the estate, shall manage the estate frugally and shall apply the income and principal of the estate so far as necessary for the comfort and suitable support and education of the ward, his minor and adult dependent children, and persons related by blood or marriage who are dependent upon or entitled to support from him, or for any other purpose which the court deems to be for the best interests of the ward, and the court may approve the making on behalf of the ward of such agreements as the court determines to be for the ward's best interests . . . ."); *In re* Estate of Lieberman, 909 N.E.2d 915, 919–24 (Ill. App. Ct. 2009) (discussing standard applicable to guardian investing ward's estate).

[90] *See, e.g.*, Robert J. Aalberts & Percy S. Poon, *The New Prudent Investor Rule and the Modern Portfolio Theory: A New Direction for Fiduciaries*, 34 AM. BUS. L.J. 39, 42 n.24 (1996) (citing Bubble Act, 6 Geo., c. 18 (1720) (Eng.)).

[91] *See generally* CHARLES MACKAY, EXTRAORDINARY POPULAR DELUSIONS AND THE MADNESS OF CROWDS 46–88 (Wordsworth Editions 1995) (1841) (providing the classic historical treatment of the South Sea bubble).

[92] A "legal list" is "[a] group of investments in which institutions and fiduciaries (such as banks and insurance companies) may legally invest according to state statutes. States [usually] restrict the legal list to low-risk securities meeting certain specifications." BLACK'S LAW DICTIONARY, *supra* note 2, at 977.

loans, and only expanded to include blue-chip stocks in the last few decades of legal lists—and then only in some jurisdictions.[93]

The legal lists approach was criticized as too constraining, since it focused almost exclusively on preservation of principal at the expense of both income and growth.[94] Income, especially, came to be viewed as a suitable investment goal by the mid to late eighteenth century, and trustee discretion became more highly prized. This trend led to some relaxation of investment standards, with some jurisdictions retaining the legal lists approach, while others adopted the prudent man—later prudent person—rule.[95] Generally speaking, jurisdictions would fall into one camp or the other, though trust investment standards might be somewhat more flexible than those applied to guardianships of the estate.

The most famous early expression of what came to be known as the "prudent man rule," requiring that the trustee exercise "such care and skill as a person of ordinary prudence would exercise in dealing with his own property,"[96] came from *Harvard College v. Amory*:[97]

> All that can be required of a trustee to invest, is, that he shall conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of

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[93] *See* Comment, *Legal Lists in Trust Investment*, 49 YALE L.J. 891, 892–96 (1940) (describing the development of legal lists). This piece was written at a time when legal lists were still prevalent in many jurisdictions.

[94] *See, e.g.*, Aalberts & Poon, *supra* note 90, at 43–44, 47 (citing Mayo Adams Shattuck, *The Development of the Prudent Man Rule for Fiduciary Investment in the United States in the Twentieth Century*, 12 OHIO ST. L.J. 491, 501–04 (1951)).

[95] Black's Law Dictionary refers the reader to the prudent investor rule when looking for the prudent person rule. BLACK'S LAW DICTIONARY, *supra* note 2, at 1347. The prudent investor rule is defined as:

> *Trusts*. The principle that a fiduciary must invest in only those securities or portfolios of securities that a reasonable person would buy. The origin of the prudent-investor rule is *Harvard College v. Amory*, 26 Mass. 446 (1830). This case stressed two points for a trustee to consider when making investments: probable income and probable safety. The trustee must consider both when making investments. Originally termed the *prudent-man rule*, the Restatement (Third) of Trusts changed the term to *prudent-investor rule*. — Also termed *prudent-person rule*.

Id.

[96] RESTATEMENT (SECOND) OF TRUSTS § 174 (1959).

[97] 26 Mass. (9 Pick.) 446, 473 (1830) (stating trustees should not be required to reimburse losses where the trustee has "honestly and discretely and carefully, according to the existing circumstances" discharged their duties, else "no prudent man would run the hazard of losses which might happen without any neglect or breach of good faith.").

> their funds, considering the probable income, as well as the probable safety of the capital to be invested.[98]

The prudent man rule has been soundly—and fairly—criticized for more than just its nineteenth-century sexism. Despite its generalized language, in practice it was utilized to approve after-the-fact reviews focusing on individual investments without consideration of the broader investment strategy or portfolio.[99] It also favored an emphasis on preservation of principal that did not consider the effect of inflation or missed investment opportunities.[100]

Meanwhile, by the middle of the twentieth century, economists had developed what became known as "modern portfolio theory."[101] That theory of investment

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[98] *Id.* at 469.

[99] *Cf. In re* Estate of Cooper, 913 P.2d 393, 397–99 (Wash. Ct. App. 1996) (applying the prudent investor standard by, in part, performing an after-the-fact assessment of the performance of investments undertaken by a trustee).

[100] *See, e.g.*, Stephen P. Johnson, *Trustee Investment: The Prudent Person Rule or Modern Portfolio Theory, You Make the Choice*, 44 SYRACUSE L. REV. 1175, 1181 (1993) ("A . . . criticism [of the prudent person rule is its] failure to take into account inflation. The trustee is under no duty to protect the principal from inflation. The loss of purchasing power through inflation presents a serious threat to every investment portfolio. In times of high inflation traditional investments such as stocks and bonds, for the most part, have an overall lower rate of return than the level of inflation itself."); Max M. Schanzenbach & Robert H. Sitkoff, *Did Reform of Prudent Trust Investment Laws Change Trust Portfolio Allocation?*, 50 J.L. & ECON. 681, 685 (2007) ("Critics also noted that investment in long-term, fixed-rate obligations with little default risk, which were favored under the old prudent man rule, exposed the trust fund to inflation risk.").

[101] *See* Robert B. Fleming & Lisa Nachmias Davis, *The Elder Law Answer Book*, Q 7:37 (3d ed. 2011 & Supp. 2012). Fleming and Davis explain the "modern portfolio theory of investment," and how it is related to the prudent investor rule:

> Modern portfolio theory proceeds from two premises:
>
> 1. Financial markets are efficient; therefore, the price of an asset is directly related to its expected total return and volatility; and
> 2. Diversification of assets reduces volatility.
>
> With those two concepts in mind, modern portfolio theory directs the investor to determine an appropriate mix of asset types, considering the portfolio's tolerance for risk and the desired rate of return. Once the asset mix is determined, investments should be diversified in order to approximate that asset mix. As individual assets (or funds) increase and decrease in value, some adjustment may be necessary (either of the asset mix or of the underlying assumptions), but the basic approach will not change with fluctuations in the marketplace or in the actual assets. The modern portfolio theory approach is greatly facilitated by the prudent investor rule's abandonment of individual after-the-fact investment reviews. Rather than focus on the performance of individual holdings, the prudent investor rule encourages the trustee (and any court asked to pass judgment on the trustee's performance) to consider the larger investment picture and the importance of diversification.

suggested that the investor should consider risk—both market-based and nonmarket—and that the marketplace would generally compensate investors for the degree of risk they were willing to take on.[102] One implication of modern portfolio theory is that the essential task for the investor is to determine the level of risk acceptable in the circumstances.[103] Once that determination is made, the investment return can be managed (albeit imperfectly) by managing the risk. A second important concept from modern portfolio theory is that risk, and hence return, can be managed by portfolio diversification. All of this leads to the primacy of asset allocation in analyzing portfolio investment.[104]

Modern portfolio theory has also affected fiduciary investment practice. Its emphasis on asset allocation, along with its premium on efficient investing, has been codified in the prudent investor rule.[105] The prudent investor rule recognizes that a given fiduciary account—whether trust, conservatorship, decedent's estate or other relationship—might be more concerned about preservation of principal, growth, or income, or a blend of any or all of those goals. In addition, the level of risk appropriate to a given fiduciary account might vary depending on the size of the estate, the age of the beneficiary, the predictable periodic expenditures required, the comfort of the beneficiary or others concerned for his or her welfare, the reasonable preferences of the fiduciary, and other considerations. Thus, application of the prudent investor rule will require the fiduciary to make a risk assessment, set priorities for income, growth, and preservation of principal, and work from those calculations to an asset allocation suitable for the chosen goals.[106]

The prudent investor rule has come to largely replace the prudent person (originally prudent man) rule. The Restatement (Third) of Trusts explicitly endorses the Prudent Investor approach,[107] as does the Uniform Trust Code.[108] The

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Id.; *see also* Aalberts & Poon, *supra* note 90, at 54–60 (discussing the history of Modern Portfolio Theory).

[102] *See* Aalberts & Poon, *supra* note 90, at 60–64 (discussing return and risk management).

[103] *See id.* at 63–65.

[104] *See id.* at 67–69.

[105] *See Prefatory Note* to UNIF. PRUDENT INVESTOR ACT (1995); *supra* note 95 (defining the prudent investor rule).

[106] *See* Aalberts & Poon, *supra* note 90, at 65–70.

[107] RESTATEMENT (THIRD) OF TRUSTS, ch. 17, §§ 90–92 (2007).

[108] *See, e.g.*, UNIF. TRUST CODE, art. 8 gen. cmt. (2010) ("Because of the widespread adoption of the Uniform Prudent Investor Act, it was decided not to disassemble and fully integrate the Prudent Investor Act into the Uniform Trust Code. Instead, States enacting the Uniform Trust Code are encouraged to recodify their version of the Prudent Investor Act by reenacting it as Article 9 of this Code rather than leaving it elsewhere in their statutes. Where the Uniform Trust Code and Uniform Prudent Investor Act overlap, States should enact the provisions of this article and not enact the duplicative provisions of the Prudent Investor Act. Sections of this article which overlap with the Prudent Investor Act are Sections 802 (duty of loyalty), 803 (impartiality), 805 (costs of administration), 806 (trustee's skills), and 807 (delegation).").

Uniform Prudent Investor Act of 1994[109] has been adopted by forty-three American jurisdictions.[110] In addition, its principles have been codified by Maryland.[111] Jurisdictions *not* adopting the Prudent Investor Act include Delaware, Illinois,[112] Florida, Georgia, Kentucky, Louisiana, Maryland, New York, Puerto Rico, and South Dakota.[113]

The prudent investor rule mandates the following:

- A duty to minimize investment costs
- Impartial treatment of beneficiaries. The trustee is directed not to unduly favor income generation over long-term gain, or the reverse, absent express trust authorization.
- Appropriate (and prudent) delegation of investment responsibilities, complete with a "safe harbor" treatment of investment decisions properly delegated.
- Application of modern portfolio theory, diversification, risk assessment, and asset allocation.[114]

Note that the prudent investor rule does not mandate low-risk investments. Furthermore, it does not mandate risk analysis of individual assets. Instead, it places a premium on an early determination of the degree of risk—permissible and appropriate—in a given portfolio, and diversification in order to maximize return within that risk tolerance.[115]

One of the primary complaints about the practical application, though not the letter, of the prudent person rule had been that it encouraged after-the-fact analysis of individual investment holdings.[116] Thus, if a portfolio contained, for example,

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[109] UNIF. PRUDENT INVESTOR ACT (1995).

[110] *See Legislative Fact Sheet—Prudent Investor Act*, UNIF. L. COMM'N, http://www.nccusl.org/LegislativeFactSheet.aspx?title=Prudent%20Investor%20Act (last visited March 26, 2012).

[111] MD. CODE ANN. EST. & TRUSTS § 15-114(b) (2002) ("A fiduciary shall (1) Invest and manage fiduciary assets as a prudent investor would, considering the purposes, terms, distribution requirements, and other circumstances of the governing instrument and the nature of the fiduciary appointment . . . .").

[112] *See In re* Estate of Lieberman, 909 N.E.2d 915, 921 (Ill. App. Ct. 2009) (explaining that Illinois case law adopted the prudent person standard, so the court need not adopt the prudent investor standard).

[113] *See Legislative Fact Sheet—Prudent Investor Act*, *supra* note 110.

[114] UNIF. PRUDENT INVESTOR ACT § 3 cmt. (1995).

[115] *See* Aalberts & Poon, *supra* note 90, at 63–64, 66 (providing guidance for using risk assessment and diversification strategies when managing investment portfolios).

[116] Stephen P. Johnson, *Trustee Investment: The Prudent Person Rule or Modern Portfolio Theory, You Make the Choice*, 44 SYRACUSE L. REV. 1175, 1178 (1993) ("Therefore, an investment portfolio that may realize handsome returns and at the same time draws upon too much of the trust principal, may be deemed imprudent. In addition, the trust investments must be diversified in order to avoid the pitfall of investing in only one safe investment, which consequently increases risk."); Schanzenbach & Sitkoff, *supra* note 100, at 687–88 ("Under the old law, the beneficiary had no viable cause of action for a

Enron stock (before it evaporated), the beneficiaries might complain about that single investment even though the portfolio itself performed as well as—or even better than—the market as a whole. The prudent investor rule instead encourages a global review of the fiduciary's investments. If some stocks, bonds, or mutual funds underperform in the market that may be excusable if the portfolio as a whole was properly constructed. In fact, in a case where some level of risk is appropriate, it may now be a breach of fiduciary duty to *not* diversify across reasonable risk categories, and to hold investments that might reasonably be expected to underperform—but with a potential to substantially outperform.

Thus, the core concerns in application of the prudent investor rule become:

- Diversification. Not just across classes, but across markets, asset types, and otherwise. A larger fiduciary account should ordinarily be exposed to some international equity investments and international fixed income classes. The fiduciary should even consider emerging market investments, investment-grade corporate bonds and perhaps even "junk" bonds—all set at appropriate percentages of the portfolio.
- Asset allocation. Once risk analysis has been completed, the best way to maximize return within a given risk level is to determine the appropriate asset allocation and strive to reach it.
- Rebalancing. At least annual review of the investment mix should be standard. For professional money managers, more frequent review is probably appropriate and is certainly commonplace. Somewhat counter-intuitively, the usual result of rebalancing is to require sale of high-performing assets and increased investment in underperforming ones.
- Delegation. For a fiduciary without substantial investment expertise, it is both a good plan and protective against potential liability to select an investment adviser, to follow his or her advice, and to periodically reassess whether the adviser is meeting needs and expectations. Once proper delegation is made, the Uniform Prudent Investor Act provides that the fiduciary "is not liable to the beneficiaries or to the trust for the decisions or actions of the agent to whom the function was delegated."[117]

The application of the prudent investor rule, the Uniform Prudent Investor Act, Modern Portfolio Theory, and the Restatement (Third) of Trusts, in practice, means a number of things:

- Stock-picking and market-timing are dangerous and counterproductive.
- Independent financial advisers (especially flat-fee or fee-for-service advisers) are very valuable to the fiduciary

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too-conservative portfolio (government bonds were in effect per se prudent). At the same time, if an investment in stock did not pay off, in hindsight courts sometimes deemed such an investment to have been imprudent speculation even if the investment was sensible ex ante in the context of the portfolio as a whole.").

[117] UNIF. PRUDENT INVESTOR ACT § 9(c) (1995).

- Mutual funds are often an easy way to satisfy multiple fiduciary obligations, including diversification, lower management costs, and built-in management. Index funds and Exchange Traded Funds ("ETF"s, like iShares, for instance) are often even more attractive to fiduciaries.
- Investment costs need to be considered. No-load mutual funds may not, in fact, be the most inexpensive alternative over time. But actively managed accounts will usually pay significant commissions and administrative fees.
- Do not forget to consider the tax effect (mostly income tax, but also estate tax, generation-skipping tax and even, sometimes, gift tax) of investment choices. Generally speaking, mutual funds will have less capital gains tax consequences than actively managed accounts. Index funds will usually have less tax consequences and ETFs less still. But dwarfing all of that will be the income tax effect occasioned by liquidation of all assets transferred to a fiduciary in order to permit the fiduciary to reinvest according to his, her, or its investment strategy and risk analysis.[118]

B. How Does the Prudent Investor Rule (or Prudent Person Rule) Apply to Guardians of Estates?

Statutes and the existing standards may apply the prudent investor rule to guardians.[119] It is clearly so in the NGA Standards for those states which have adopted the Uniform Prudent Investor Act.[120] The definitions accompanying the NGA Standards provide the following:

- Prudent person rule: "An investment standard that considers the reasonableness of an investment based on whether a prudent person of discretion and intelligence, who is seeking reasonable income and preservation of capital, would make that investment."[121]
- Prudent investor rule: "All investments must be considered as part of an overall portfolio rather than individually. No investment is inherently

[118] The statutory provisions, of course, would apply to all guardians—professional as well as family members—despite the possible inapplicability of the NGA Standards to a nonprofessional fiduciary. *See supra* notes 30–31 and accompanying text.

[119] *See In re* Estate of Lieberman, 909 N.E.2d 915, 921–23 (Ill. App. Ct. 2009) (acknowledging the prudent investor rule's inclusion in model codes but declining to apply the prudent investor standard to guardian based on state law precedent).

[120] The prudent person rule is incorporated into the Standards for those states that have not enacted the UPIA. E-mail from Sally Hurme, Senior Project Manager for Educ. and Outreach, Am. Ass'n of Retired Pers., to Rebecca Morgan, Bos. Asset Mgmt. Chair in Elder Law, and Dir., Ctr. for Excellence in Elder Law, Stetson Univ. (July 26, 2011, 02:45 EDT) (on file with authors).

[121] STANDARDS OF PRACTICE 22 (Nat'l Guardianship Ass'n 2007) (defining Prudent Person Rule). The prudent person rule is incorporated into the NGA Standards for those states that have not enacted the UPIA. E-mail from Sally Hurme, *supra* note 120.

> imprudent or prudent. The rule recognizes that certain nontraditional investment vehicles may actually be prudent and the guardian who does not use risk-reducing strategies may be penalized. Under most circumstances, the ward's assets must be diversified. The guardian is obligated to spread portfolio investments across asset classes and potentially across global markets to both enhance performance and reduce risk. The possible effects of inflation must be considered as part of the investment strategy. The guardian shall either demonstrate investment skill in managing assets or shall delegate investment management to another qualified party."[122]

NGA Standard 17 concerns "Duties of the Guardian of the Estate." Section (IX) directs, "The guardian shall apply the Prudent Person Rule and the Prudent Investor Rule when managing the estate."[123] The NGA Ethics Code addresses the use of the prudent investor rule and prudent person rule. Rule 5 of the NGA Ethics Code deals with the guardian's management of the estate.[124] Rule 5.3 incorporates a "prudence" standard by providing that "[t]he guardian has a duty to exercise prudence in the investment of surplus funds of the estate."[125] The comment to Rule 5 notes in part that if there are "surplus funds in the estate, the guardian must invest such funds prudently. While caution is essential in choosing nonspeculative opportunities for investment, diligent attention should be paid to opportunities which may result in a high rate of return."[126] The riskiness of an investment as well

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[122] STANDARDS OF PRACTICE 22 (defining Prudent Investor Rule).

[123] *Id.* at 17.IX. As the name of the Standard implies, the guardian has a duty to use the prudent person rule and the prudent investor rule. *See Id.* at 1 pmbl. ("To ensure consistency in the way the standards are applied, the following constructions are used: 'shall' imposes a duty, 'may' creates discretionary authority or grants permission or a power, 'must' creates or recognizes a condition precedent, 'is entitled to' creates or recognizes a right, and 'may not' imposes a prohibition and is synonymous with 'shall not.' The guidelines that appear in some standards are suggested ways of carrying out those standards."). The Standard contains both the prudent person rule and the prudent investor rule to take into account those states that have not adopted the Uniform Prudent Investor Act. E-mail from Sally Hurme, *supra* note 120.

[124] *See* A MODEL CODE OF ETHICS FOR GUARDIANS § II.5 (Nat'l Guardianship Ass'n 2007) ("The guardian of the estate shall provide competent management of the property and income of the estate. In the discharge of this duty, the guardian shall exercise intelligence, prudence and diligence and avoid any self-interest.").

[125] A MODEL CODE OF ETHICS FOR GUARDIANS § II.5.3.

[126] *Id.* § II.5 cmt. The comment goes on to provide:

> The prudent guardian will seek such opportunities to maximize the estate. The deposit of funds in interest bearing accounts is a safe investment, but one which may be less likely than others to maximize the return to the estate. Such deposits, and all other investments as well, must be made in good faith and in the name of the ward. Disclosure by the guardian of his fiduciary role is essential evidence of such good faith. In no case should the ward's funds be

as those that may have conflicts or appear improper must be taken into consideration.[127]

The UGPPA also explains the guardian's duty vis-à-vis investments. Under Section 425 of the UGPPA, "[a] conservator, acting reasonably and in an effort to accomplish the purpose of the appointment, and without further court authorization or confirmation, may . . . invest assets of the estate as though the conservator were a trustee . . . ."[128] Equating the guardian of the estate[129] to a trustee, by reference implicitly incorporates the prudent investor rule.[130] Keep in mind, however, that some states have not adopted the prudent investor rule[131] and may use a different standard, such as the prudent person rule.

To be sure, and it must be underscored, there are differences between a trustee's obligation and the duties of the guardian of the estate with regard to investment analysis. Here are some examples:

> mingled with those of the guardian, and they must be clearly identifiable at all times.

Id.

[127] *Id.* ("Funds loaned for investment purposes must be secured by sufficient collateral. Purchase of stock in private corporations, particularly when the guardian is also a stockholder, should be avoided, due to both the risky nature of such investments and the possible appearance of impropriety and self-interest on the part of the guardian. The guardian must exercise absolute good faith, reasonable judgment, discretion, and diligence. He or she must also reject speculative or risky investments as well as those which imply favoritism in favor of opportunities, which are likely to produce an income as large as possible while still being reasonably safe.").

[128] UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 425(b) (1997).

[129] The UGPPA uses "conservator."

[130] *But see* RESTATEMENT (THIRD) OF TRUSTS pt. 1, ch. 1, intro. note, at 5 (2003) ("*Analogous nontrust relationships*. There are a number of widely varying relationships that more or less closely resemble trusts but are not trusts, although the terms 'trust' and 'trustee' are often used loosely in relation to some of these relationships. It is important to differentiate trusts from these other relationships because many of the rules applicable to trusts are not applicable to them. . . . The term 'trust' is sometimes used to encompass all fiduciary relationships. . . . Thus, an executor, guardian, agent, or corporate officer or director is a fiduciary, but the fiduciary duties and relationships involved differ in many ways from those of a trustee."); *see also In re* Estate of Lieberman, 909 N.E.2d 915, 922–23 (Ill. Ct. App. 2009) (noting that the state legislature had explicitly included the prudent investor principles in its Trusts and Trustees Act, but had not mentioned it in the Uniform Probate Code, which governed a guardian's duty). Accordingly, the *Lieberman* court declined to analyze allegedly imprudent investments by the prudent investor standard and instead applied the prudent person standard. *Id.*

Also note that the *Uniform Trust Code* contains a general "prudence" standard. UNIF. TRUST CODE § 804 (2000) ("A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.").

[131] *See Legislative Fact Sheet—Prudent Investor Act*, *supra* note 110.

1. The duty of impartiality owed by a trustee to income and remainder beneficiaries[132] will, in most cases, be inapplicable. The guardian of the estate has a primary duty to her ward, and investment analysis will not require any sense of impartiality toward the "interests" of the heirs or beneficiaries of the ward's estate.[133] That said, the guardian should expect that prudent investor principles mandating consideration of the time horizon for investment, asset allocation, and suitability will be applied to minimize losses or speculative investments.

2. The distinction between "default" and "mandatory" rules[134] will be much less significant. Put another way, default rules will ordinarily be more important for the simple reason that there is no operative document detailing the ward's wishes in specific situations.

It should be clear that the prudent investor rule (and, as appropriate, the prudent person rule) applies to the actions of conservators, though not without some adjustments from the more developed law that governs trustees. Less protection should be accorded to heirs than to, for instance, the remainder beneficiaries of a trust. However, accommodations for the different circumstances in conservatorship will be minor, and the bulk of the law should be viewed as a standard applicable to conservators.

VI. EXPLOITATION RECOVERY—SHOULD THE GUARDIAN TAKE ACTION? HOW SHOULD THE GUARDIAN DECIDE?

Too often, a ward may be the victim of financial exploitation—whether before or during guardianship. In some cases, the financial exploitation is the catalyst for establishing the guardianship. When a ward has been financially exploited, the guardian needs to decide whether to pursue remedies against the perpetrator. What duties apply by statute or what guidance is provided by existing standards?[135]

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[132] UNIF. TRUST CODE § 803 (2000) ("If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests.").

[133] A similar observation is made regarding the interests of remainder beneficiaries of trusts. *In re* Esther Caplan Trust, 265 P.3d 364, 367–68 (Ariz. Ct. App. 2011).

[134] The *Uniform Trust Code* makes clear that most of the rules are "default" rules only—and that the trust document may modify or limit their applicability. UNIF. TRUST CODE §105. A handful of rules are listed as "mandatory" rules, not changeable by any trust document. This distinction may be seen as roughly analogous to the concept of "substituted judgment," in which the ward's presumed wishes are important; expressions of those wishes are thus comparable to the language of the trust document detailing deviations from the "default" trust rules.

[135] The Wingspan recommendations provided that "[t]he lawyer for the fiduciary of a person with diminished capacity who knows of neglect, abuse, or exploitation, as defined by state law, be permitted to disclose otherwise confidential information per Model Rule of Professional Conduct 1.6 to the extent necessary or appropriate to protect the person with diminished capacity." *Wingspan*, *supra* note 30, at 608 (citations omitted).

First, the guardian must recognize the guardian's duty to report suspected or actual exploitation to Adult Protective Services (APS) or law enforcement.[136] The guardian should also consider the guardian's liability (civil, criminal, or professional) if the guardian does not take steps to report or to protect the ward or the ward's estate. The next step is for the guardian to determine whether the guardian should take action outside of APS. The UGPPA provides that a guardian, in administration of the estate, may, without court approval "prosecute or defend actions, claims, or proceedings in any jurisdiction for the protection of assets of the estate and of the conservator in the performance of fiduciary duties," as long as to do so is reasonable.[137] The guardian of the estate thus may pursue a claim against the perpetrator, but the critical question to be answered is whether the guardian should do so.

The NGA Standards reference the guardian's duty to protect the estate assets[138] and the NGA ethics code, to collect the ward's debts.[139] NGA Standard 17.VI provides that "[t]he guardian shall make claims against others on behalf of the estate as deemed in the best interest of the ward and shall defend against actions that would result in a loss of estate assets."[140] Note that these provisions give discretion to the guardian—the UGPPA says the guardian "may"[141] and the Standard authorizes the guardian to move forward if "deemed in the best interest of the ward."[142] The guardian needs to determine whether the applicable statute is mandatory or discretionary. Then the guardian needs to make sure that the guardian's decision to proceed, or not, meets whatever statutory standard applies to the guardian of the estate and the decision is made carefully, prudently, using the appropriate decision-making standards, and considering the necessary factors. The guardian needs to exercise due diligence in making the decision whether the guardian should proceed.[143]

The "should" question is not as easy to answer as the "may" question. There are a number of issues the guardian must consider in deciding whether to pursue a claim against the perpetrator of financial exploitation. As noted earlier, the guardian must consider the applicable statute, whether the statute allows the guardian to bring the action on behalf of the ward, and applicable evidentiary issues. Is there a sufficient paper trail that will make the case or will the ward need

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[136] *See* LORI STIEGEL & ELLEN KLEM, AM. BAR ASS'N COMM. ON LAW & AGING, REPORTING REQUIREMENTS: PROVISIONS AND CITATIONS IN ADULT PROTECTIVE SERVICES LAWS, BY STATE (2007), *available at* http://www.americanbar.org/content/dam/aba/migrated/aging/docs/MandatoryReportingProvisionsChart.authcheckdam.pdf.

[137] UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 425(b)(24) (1997).

[138] STANDARDS OF PRACTICE 18.I.A (Nat'l Guardian Ass'n 2007).

[139] A MODEL CODE OF ETHICS FOR GUARDIANS § II.5 cmt. ("Collection of the ward's debts is the responsibility of the guardian.").

[140] STANDARDS OF PRACTICE 17.VI.

[141] UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 425(b).

[142] STANDARDS OF PRACTICE 17.VI.

[143] For a discussion of the best interest standard, see generally Frolik & Whitton, *supra* note 71, at 2–4, 16–23.

to testify? If there is insufficient evidence without the ward's testimony, does the ward have capacity to testify? If the ward does have capacity to testify, how will the litigation impact the ward's physical and emotional well-being?

The guardian should also consider the likelihood of a meaningful recovery. Does the perpetrator have any assets or is the ward's money gone entirely? If the exploitation involved tangible property, rather than money, it may be possible to sue for the return of the property or to undo the transaction (such as rescinding a deed). The guardian also needs to consider the timeline from the beginning to end of the litigation, and postlitigation, collection of any judgment. The guardian should include in his or her thought process a cost-benefit analysis of litigation, including factors such as the cost of pursuing (tangibles and intangibles), the likelihood of recovery, the likely amount of recovery, the ability to collect on a judgment, etc.

Additionally, the guardian needs to consider any claims against the guardian if the guardian fails to proceed against the perpetrator. Could a claim for breach of duty be filed against the guardian if the guardian does not attempt to recover the money or property?

Criminal prosecution is another matter. The guardian may be able to file a police report, which is different from calling the elder abuse APS reporting number to report financial exploitation[144] on behalf of the ward, but whether a case will be filed and prosecuted is out of the guardian's hands. The guardian also has to consider the impact on the ward. For example, what if the perpetrator is the only child of the ward; does the ward really want to see her son sent to prison?

The guardian also needs to take steps to protect the ward from future exploitation. The perpetrator may have continued access to the ward, and if the ward has an allowance or is under a limited guardianship, the perpetrator may continue to exploit the ward. This may be of particular importance where the guardianship is limited and the ward still has control over some aspects of the ward's estate, or has retained the ability to enter into contracts. Planning documents may need to be revoked or undone, if the ward still has the capacity to do so. The guardian may need to address ongoing or future exploitation rather than pursue the redress of past exploitation. To accomplish this, guardian may have to examine factors like the ward's living arrangements and which individuals have access to the ward. If the guardianship is limited, the guardian needs to consider whether additional rights may need to be removed from the ward, as a protective measure.

One thing that may be useful to the guardian of the estate is to obtain a credit report for the ward upon appointment.[145] This will allow the guardian to not only

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[144] *See* STIEGEL & KLEM, *supra* note 136.

[145] *See, e.g.*, Ariz. Rev. Stat. Ann. §14-5418.01(A) (Supp. 2011) ("Within ninety days after appointment, a conservator shall prepare and file with the court an inventory of the assets of the protected person on the date of the conservator's appointment, listing it with reasonable detail and indicating the fair market value of each asset as of the date of appointment. The conservator shall attach to the inventory a copy of the protected person's

obtain a picture of the ward's finances, but also help the guardian spot any anomalies—credit cards opened in the ward's name recently, loans and financial obligations in the ward's name, and alert the guardian to irregularities, possible financial exploitation, and even possible identity theft.

There may be circumstances in which the guardian is the perpetrator and uses the ward's money inappropriately.[146] A guardian can be sanctioned or removed,[147] the successor guardian can move against the bond,[148] and the guardian could be prosecuted. The UGPPA allows the ward or someone who is interested in the ward's welfare to petition for the guardian's removal.[149] The guardianship statute may also provide an option. For example, in Illinois, the guardian of the estate could file a petition seeking the court's issuance of a citation to require the perpetrator to appear when the guardian believes the perpetrator has, among other things, somehow stolen or taken any property of the ward.[150] A Florida statute lists a number of reasons for removing a guardian, any number of which could apply when a guardian financially exploits the ward.[151]

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consumer credit report from a credit reporting agency that is dated within ninety days before the filing of the inventory.").

[146] *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-655, *Guardianships: Collaboration Needed to Protect Incapacitated Elderly People* 8–9 (2004) (providing seven cases where guardians victimized their wards); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-1046, *Guardianships: Cases of Financial Exploitation, Neglect, and Abuse of Seniors* app. III (2010) (providing twenty cases where guardians victimized their wards).

[147] *See, e.g.*, NAT'L PROBATE COURT STANDARDS REVIEW DRAFT 3.3.19(A) (Aug. 2012); (http://www.ncpj.org/images/stories/documents/Standards_Review_Draft_7-12.doc). ("Probate courts should enforce their orders by appropriate means, including the imposition of sanctions.").

[148] *See, e.g.*, *In re* Estate of Berger, 520 N.E.2d 690, 699–700, 708–10 (Ill. App. Ct. 1987) (restored person proceeding against bonding company and successor conservator, among others).

[149] UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 112(b) (1997) ("A ward, protected person, or person interested in the welfare of a ward or protected person may petition for removal of a guardian or conservator on the ground that removal would be in the best interest of the ward or protected person or for other good cause.").

[150] 755 ILL. COMP. STAT. 5/16-1(a) (2011) ("Upon the filing of a petition therefor by the representative or by any other person interested in the estate or, in the case of an estate of a ward by any other person, the court shall order a citation to issue for the appearance before it of any person whom the petitioner believes (1) to have concealed, converted or embezzled or to have in his possession or control any personal property, books of account, papers or evidences of debt or title to lands which belonged to a person whose estate is being administered in that court or which belongs to his estate or to his representative or (2) to have information or knowledge withheld by the respondent from the representative and needed by the representative for the recovery of any property by suit or otherwise. The petition shall contain a request for the relief sought."); *see also Berger*, 520 N.E.2d at 695–696, 709 (discussing citation proceedings and the irrelevance of innocence).

[151] *See* FLA. STAT. § 744.474 (2001) (providing such grounds as (3) "Abuse of her or his powers"; (7) "wasting, embezzlement, or other mismanagement of the ward's

As noted above, although there is some language in the Standards that could be pieced together on the issue of Exploitation Recovery, we think it would be beneficial to have a standard specifically for this topic.

VII. MAKING CERTAIN FINANCIAL DECISIONS—WHAT GUIDANCE DO THE STANDARDS PROVIDE?

A. Selling the Home and Moving to an Institution—Whether to Sell and How to Decide

A guardian of the estate may need to decide whether to sell the ward's home. In making such a decision, there are a number of factors that must be considered, some of which will require the guardian of the estate to work in tandem with the guardian of the person. Assume that the ward can no longer live alone. The guardian needs to decide whether the ward needs round-the-clock care that is provided in a nursing home, or whether the ward needs assistance with activities of daily living (ADLs). The guardian then needs to decide whether the assistance with ADLs can be provided in the ward's home or whether the ward needs to live in supportive housing. The guardian of the estate has to figure out how to pay for the level of care the ward needs.[152] If the ward needs nursing home care, the guardian of the estate needs to consider the ward's resources as well as the availability of public benefits.[153]

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property"; (16) "improper management of the ward's assets"; and (20) "removal . . . is in the best interest of the ward").

[152] Some examples may be the ward's funds, such as savings, income from various sources, or government programs, such as Medicaid. In those states that provide a community care option, some options are "Money Follows the Person" and "Community First Choice Option."

> "Money Follows the Person" . . . provides financial incentives to states to transition Medicaid enrolled individuals from nursing homes to the community by providing an enhanced federal "match." The match permits states to obtain housing, furnishings, and the like as well as arranging appropriate home and community based services. The program's thrust was to stop the warehousing of younger disabled individuals in institutions and get them to the community. The program initially was available only to those institutionalized for six months or more, but PPACA reduces the time requirement to ninety days in conjunction with the "Community First Choice Option," providing a similar enhanced match to divert individuals from being institutionalized in the first place. . . .

ELDER LAW ANSWER BOOK, at Q 17:10.1. A reverse mortgage may also provide needed funds for the care if the ward cannot qualify for publicly funded services or programs. *See infra* note 162.

[153] If the ward has long term care insurance, then that insurance may pay for the ward's nursing home care. A ward may be eligible for Medicaid, or the guardian may need to consider whether the ward may become eligible for Medicaid. *See* STANDARDS OF

There are a number of considerations that go into the choice of a ward's residence, including the ward's preferences if the ward has capacity to express them and they are reasonable. For example, a ward may prefer to live at home, but may not have sufficient funds to pay for the required in-home care. Another consideration would be the necessity and cost of retrofitting a home to make it accessible for the ward. Also, the insurance, the cost of upkeep, taxes, utilities, etc. for the home should be factored into the decision-making equation.

Whether the ward's need for a higher level of care is permanent or temporary must be determined. That can affect the decision of the guardian of the person and the guardian of the estate. The guardian of the person should obtain an evaluation from a health care provider regarding the extent and likely duration of needed care.

Both types of guardians have a duty to prepare plans. The guardian of the person is responsible for a care plan and the guardian of the estate for a financial plan.[154] The financial plan and budget need to be correlated with the care plan.[155] This is an ongoing duty, so the guardian of the person and the guardian of the estate must stay in touch and coordinate the decision-making, such as what level of care is needed and in what setting the care may be provided.[156]

Before a decision is made about housing, the ward should be consulted.[157] An early step that the guardian should take in gathering the needed information is to review the ward's existing testamentary documents.[158] Realizing that the ward may

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PRACTICE 18.IV ("The guardian shall obtain all public and insurance benefits for which the ward is eligible."); A MODEL CODE OF ETHICS FOR GUARDIANS § II.5 cmt. ("If the ward's own funds are inadequate to provide for the needs of the ward, the guardian will find it both prudent and necessary to seek income supplementation via various income maintenance and insurance programs available through federal, state and local resources. Public benefits may not only be helpful, but essential to the guardian in providing for the needs of the ward. The guardian is, therefore, under a positive obligation to investigate their availability and seek such assistance on behalf of the ward.").

[154] STANDARDS OF PRACTICE 13.III, 18.II.

[155] *Id.* at 18.II.

[156] *Id.*

[157] *See id.* at 19.II, III ("The previously expressed or current desires of the ward with regard to the property."); *see also* UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 418(b) (1997) ("A conservator may exercise authority only as necessitated by the limitations of the protected person, and to the extent possible, shall encourage the person to participate in decisions, act in the person's own behalf, and develop or regain the ability to manage the person's estate and business affairs."); *id.* § 418 cmt. ("Before making a decision, the conservator should also make an effort to learn the personal values of the protected person and ask the protected person about the protected person's desires. When the conservator is making decisions for the protected person, the conservator should use the substitute decision-making standard.").

[158] *See* STANDARDS OF PRACTICE 19.III.D ("The provisions of the ward's estate plan as it relates to the property, if any."); *see also* UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 418(d) ("In investing an estate, selecting assets of the estate for distribution, and invoking powers of revocation or withdrawal available for the use and benefit of the protected person and exercisable by the conservator, a conservator shall take

not be able to express a decision, or that the ward's wish is not feasible, the NGA Standards offer:

> In the absence of reliable evidence of the ward's views before the appointment of a guardian, the guardian, having the proper authority, may not sell, encumber, convey, or otherwise transfer property of the ward, or an interest in that property, unless doing so is in the best interest of the ward.[159]

If the ward needs skilled care and cannot reside at home, the guardian of the estate must weigh whether to keep the property—knowing of the expense of upkeep—or sell the property, after engaging in the considerations described here.

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into account any estate plan of the person known to the conservator and may examine the will and any other donative, nominative, or other appointive instrument of the person.").

The comments to Section 418 explain the significance of reviewing the ward's estate plan ("Subsection (d) . . . allows a conservator access to and the right to examine the protected person's will and other documents comprising the protected person's estate plan. Such access is essential for the conservator to carry out the obligation, as stated in subsection (b), to consider the protected person's views when making decisions."). *Id.* § 418 cmt.

STANDARDS OF PRACTICE 4.IV also address the ward's testamentary plans: "The guardian must make reasonable efforts to preserve property designated in the ward's will and other estate planning devices executed by the ward."

[159] STANDARDS OF PRACTICE 19.II at 15. Standard 19.III also provides:

> In considering whether it is in the best interest of the ward to dispose of the ward's property, the guardian shall consider the following:
>
> A. Whether disposing of the property will benefit or improve the life of the ward.
>
> B. The likelihood that the ward will need or benefit from the property in the future.
>
> C. The previously expressed or current desires of the ward with regard to the property.
>
> D. The provisions of the ward's estate plan as it relates to the property, if any.
>
> E. The tax consequences of the transaction.
>
> F. The impact of the transaction on the ward's entitlement to public benefits.
>
> G. The condition of the entire estate.
>
> H. The ability of the ward to maintain the property.
>
> I. The availability and appropriateness of alternatives to the disposition of the property.
>
> J. The likelihood that property may deteriorate or be subject to waste.
>
> K. The benefits versus the liability and costs of maintaining the property.

Id. 19.III, at 15–16.

The family should be apprised of a decision to sell the property, so as to give the family a chance to buy the house themselves, or otherwise provide support for the ward in order to maintain "the family home."[160]

The use of a reverse mortgage may be an option to provide a stream of income for the ward to allow the ward to remain in the home. There are pros and cons to the use of a reverse mortgage, which the guardian of the estate should carefully consider. The guardian of the estate must have the power to enter into a reverse mortgage.[161] The attorney for the guardianship should be consulted and should review the mortgage documents. Any impact on the ward's public benefits should be taken into account. The guardian of the person should obtain a current medical evaluation of the ward to determine whether it is feasible for the ward to remain in the home, and the short- and long-term prognosis of the ward's physical and mental condition. If the ward's condition is likely to deteriorate within a few months, a reverse mortgage may not be the best option. Other considerations include whether the reverse mortgage will serve the ward's best interest. While a reverse mortgage produces an income stream for the ward, it also serves to encumber the title to the home.[162] Whenever appropriate, the family should also be

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[160] STANDARDS OF PRACTICE 4.III ("When disposing of the ward's assets, the guardian may notify family members and friends and give them the opportunity, with court approval, to obtain assets (particularly those with sentimental value)."); *see also* A MODEL CODE OF ETHICS FOR GUARDIANS § II. 5 cmt. (Nat'l Guardianship Ass'n 1988) ("The guardian must use the ward's income to provide for his or her needs. The guardian undertakes the responsibility to settle the ward's outstanding accounts, first from the income of the estate, and then via sale of personal property, with license from the court. Only to the extent that debts cannot be covered through these avenues may the guardian seek permission to encumber or sell real estate. Although possession of the real estate of the ward is in the hands of the guardian, title resides with the ward. Any plan to convey the ward's real estate must be contemplated only as necessary to provide for the care and maintenance of the ward, or in cases where the sale is demonstrably in the ward's best interest.").

[161] NGA Ethics Rule 5 and comments are helpful. Although the rule speaks to a mortgage, the guidance in the rule would also apply to a case of a reverse mortgage. *See* A MODEL CODE OF ETHICS FOR GUARDIANS § II.5 & cmt., at 18 ("The guardian may mortgage the property of the ward only in accord with state law and only when necessary, based on insufficiency of the income of the estate to maintain and support the ward; to discharge other obligations, liens and mortgages; to extend the length or reduce the rate of interest of the existing mortgage; or to finance improvement to the property with an eye toward increasing the value of the real estate as an asset of the estate. On the other hand, in most states, the guardian does possess the power and right to lease the property with the goal of maximizing the income of the estate.").

[162] *See* STANDARDS OF PRACTICE 19.II ("In the absence of reliable evidence of the ward's views before the appointment of a guardian, the guardian, having the proper authority, may not sell, encumber, convey, or otherwise transfer property of the ward, or an interest in that property, unless doing so is in the best interest of the ward.").

consulted[163] because they will have to pay off the reverse mortgage at the ward's death if they wish to keep the family home.

If someone else is living in the home with the ward, such as an adult child, the guardian of the estate will need to decide whether to charge that person rent or hire that person to provide care or services to the ward. Family members residing with the ward complicate the equation as they may have a legal duty to support the ward. The guardian must consider not only direct expenditures benefiting others, but also the indirect relief provided to other residents by alleviation of the support obligation.

B. Other Financial Decisions—Credit Issues and More

After assuming authority, the guardian may be faced with making other financial decisions for the ward, such as borrowing money, acquiring credit, loaning money,[164] selling assets, continuing a ward's business,[165] undertaking business or financial transactions with the adult child of the ward, and paying support.[166] The guardian has the responsibility to make financial decisions a ward

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[163] *See id.* at 4.III ("When disposing of the ward's assets, the guardian may notify family members and friends and give them the opportunity, with court approval, to obtain assets (particularly those with sentimental value)."). There will be occasions when it would not be appropriate to consult with the family, such as when a family member has been abusive to the ward.

[164] *See id.* at 20.4 ("The guardian may not loan or give money or objects of worth from the ward's estate unless specific prior approval is obtained.").

[165] UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 425(b) (1997) ("A conservator . . . may . . . continue or participate in the operation of any business or other enterprise; . . .").

[166] See, for example, UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 427, which provides as follows:

> (a) Unless otherwise specified in the order of appointment and endorsed on the letters of appointment or contrary to the plan filed pursuant to Section 418, a conservator may expend or distribute income or principal of the estate of the protected person without further court authorization or confirmation for the support, care, education, health, and welfare of the protected person and individuals who are in fact dependent on the protected person, including the payment of child or spousal support, in accordance with the following rules:
> (1) A conservator shall consider recommendations relating to the appropriate standard of support, care, education, health, and welfare for the protected person or an individual who is in fact dependent on the protected person made by a guardian, if any, and, if the protected person is a minor, the conservator shall consider recommendations made by a parent.
> . . . .
> (3) In making distributions under this subsection, the conservator shall consider:

might have been making if the ward had the capacity to do so.[167] The decision may require the use of a substituted judgment or best interest analysis.[168] For example, the UGPPA addresses the circumstances where the guardian might borrow or loan money:

> A conservator, acting reasonably and in an effort to accomplish the purpose of the appointment, and without further court authorization or confirmation, may:
> . . . .
> (19) borrow money, with or without security, to be repaid from the estate or otherwise and advance money for the protection of the estate or the protected person and for all expenses, losses, and liability sustained in the administration of the estate or because of the holding or ownership of any assets, for which the conservator has a lien on the estate as against the protected person for advances so made.[169]

> (A) the size of the estate, the estimated duration of the conservatorship, and the likelihood that the protected person, at some future time, may be fully self-sufficient and able to manage business affairs and the estate;
> (B) the accustomed standard of living of the protected person and individuals who are in fact dependent on the protected person; and
> (C) other money or sources used for the support of the protected person.

Note that the comment to § 427 specifically addresses support:

> "Dependents" is not limited to dependents whom the protected person is legally obligated to support, but refers to individuals who are in fact dependent on the protected person, such as children in college and adult children with developmental disabilities. Child and spousal support payments are now specifically included within permitted distributions to dependents. Although Section 411 allows the making of a gift, it can only be done pursuant to court order. Under this section, a conservator may make a gift without court order if the gift meets the stated limitations.

If the court has ordered support, such as alimony or child support, the guardian would be acting pursuant to a court order. If the ward's assets are no longer sufficient to pay support at the current level, then the guardian should seek a modification of the support order. *See also* STANDARDS OF PRACTICE 20.4 ("The guardian may not use the ward's income and assets to support or benefit other individuals directly or indirectly unless specific prior approval is obtained and a reasonable showing is made that such support is not detrimental to the best interests of the ward.").

[167] *See, e.g.*, UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 425 (listing a variety of powers of the conservator including entering into leases, investing assets, and depositing money, among others).

[168] *See* Frolik & Whitton, *supra* note 71, at 1504–15 (examining decision-making standards and how guardians make decisions).

[169] UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 425(b).

NGA Standard 19 reminds the guardian to consider "reliable evidence of the ward's views" before selling, conveying, encumbering, or in other ways transferring the ward's property or interest therein, unless it is in the ward's best interest to do so.[170] The guardian must also consider any tax implications from the guardian's actions.[171] The guardian at all times must be aware of potential conflicts and the appearance of impropriety.[172]

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[170] STANDARDS OF PRACTICE 19.II.

[171] *Id.* at 19.III.E.

[172] NGA Standard 20 ("Conflict of Interest: Estate, Financial, and Business Services") provides:

> The guardian shall avoid even the appearance of a conflict of interest or impropriety when dealing with the needs of the ward. Impropriety or conflict of interest arises where the guardian has some personal or agency interest that might be perceived as self-serving or adverse to the position or best interest of the ward.
>
> Rules relating to specific situations that might create an impropriety or conflict of interest include the following:
>
> 1. The guardian shall not commingle personal or program funds with the funds of the ward, except as follows:
>
> a. This standard does not prohibit the guardian from consolidating and maintaining a ward's funds in joint accounts with the funds of other wards.
>
> b. If the guardian maintains joint accounts, separate and complete accounting of each ward's funds shall also be maintained by the guardian.
>
> c. When an individual or organization serves several wards, it may be more efficient and more cost-effective to pool the individual wards' funds in a single account. In this manner, banking fees and costs are distributed among the individual wards, rather than being borne by each separately.
>
> d. If the court allows the use of combined accounts, they should be permitted only where the guardian or conservator has available resources to keep accurate records of the exact amount of funds in the account, including allocation of interest and charges, attributable to each individual ward based on the asset level of the ward.
>
> 2. The guardian may not sell, encumber, convey, or otherwise transfer the ward's real or personal property or any interest in that property to himself or herself, a spouse, a coworker, an employee, a member of the board of the agency or corporate guardian, an agent, or an attorney, or any corporation or trust in which the guardian has a substantial beneficial interest.
>
> 3. The guardian may not sell or otherwise convey to the ward property from any of the parties noted above.
>
> 4. The guardian may not loan or give money or objects of worth from the ward's estate unless specific prior approval is obtained.

C. When There Is Little Money— Representative Payee, Applying for Benefits, Use of Medicaid

It is possible to avoid the necessity of guardianship (of the estate, at least) altogether, especially where the ward's assets are limited and the ward's income is primarily Social Security or other pension income. This is usually accomplished by reliance on the Social Security Administration's (SSA) "Representative Payee"[173] system—a *de facto* guardianship arrangement established precisely to help with management of small estates.[174]

1. Process for Representative Payee Appointment and the Rep. Payee's Duties and Obligations

If SSA determines that a beneficiary needs a representative payee, then a specific process is followed.[175] Whether or not a guardian of the estate has already been appointed, the SSA will make its own determination of the need for the representative payee and select and appoint the payee according to its own

> 5. The guardian may not use the ward's income and assets to support or benefit other individuals directly or indirectly unless specific prior approval is obtained and a reasonable showing is made that such support is not detrimental to the best interests of the ward.
> 6. The guardian may not borrow funds from, or lend funds to, the ward unless there is prior notice of the proposed transaction to interested persons and others as directed by the court or agency administering the ward's benefits, and the transaction is approved by the court.
> 7. The guardian may not profit from any transactions made on behalf of the ward's estate at the expense of the estate, nor may the guardian compete with the estate, unless prior approval is obtained from the court.

STANDARDS OF PRACTICE 20. For example, the appearance of impropriety or a conflict may come up when a family guardian with gifting powers transfers the ward's assets to the guardian for the purpose of Medicaid planning to the guardian. *See, e.g.*, *In re* Adler, No. 1144IC, 2003 WL 22053309, at *4 (Pa. Comm. Pls. Mar. 19, 2003).

[173] Often referred to as a "Rep. Payee."

[174] The representative payee program is provided for by the Social Security Act, 42 U.S.C. §405(j) (2006).

[175] Social Security Administration, 20 C.F.R. § 404.2001(a) (2011) ("A representative payee will be selected if we believe that the interest of a beneficiary will be served by representative payment rather than direct payment of benefits. Generally, we appoint a representative payee if we have determined that the beneficiary is not able to manage or direct the management of benefit payments in his or her interest."); *id.* § 404.2001(b)(2) ("If we determine that representative payment is in the interest of a beneficiary, we will appoint a representative payee. We may appoint a representative payee even if the beneficiary is a legally competent individual. If the beneficiary is a legally incompetent individual, we may appoint the legal guardian or some other person as a representative payee.").

process.[176] Application for appointment as a representative payee is a two-part process. First, the applicant must show that the Social Security recipient is legally incompetent—mentally or physically incapable of managing his or her benefits[177]—or a minor.[178] That determination alone will ordinarily result in suspension of benefits until a suitable payee is located.[179] Usually, however, the application for representative payee status is considered at the same time. The SSA has a priority list of potential payees, which it will follow absent indications that the beneficiary's best interests require modification.[180] Note that, although a "guardian" appears in the first position on the list, this primary position is qualified to require that the guardian either "has custody of" the beneficiary or "demonstrates strong concern for the personal welfare of the beneficiary."[181]

2. Applying for Public Benefits

A guardian of the ward's estate has the power to handle the ward's financial matters—implicitly including the authority to make application for public benefits that might be available for the ward.[182] Oddly, nothing in the lengthy list of powers included in the UGPPA mentions the power to make public benefits applications, or to arrange the ward's affairs to maximize the availability or amount of benefits.[183] Still, the act does give some guidance: it authorizes a guardian *of the person* to use utilize all the ward's available resources (including public benefits) to provide care for the ward,[184] and it recognizes that a government agency paying (or being asked to pay) benefits to a ward in a guardianship or conservatorship

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[176] *See id.* § 404.2021(a)(1) ("As a guide in selecting a representative payee, categories of preferred payees have been established. These preferences are flexible. Our primary concern is to select the payee who will best serve the beneficiary's interest. The preferences are: . . . [a] legal guardian, spouse (or other relative) who has custody of the beneficiary or who demonstrates strong concern for the personal welfare of the beneficiary . . . .").

[177] *Id.* § 404.2010(a)(1).

[178] *Id.* § 404.2010(b).

[179] *Id.* § 404.2011(b); *see* POMS GN 00502.010, SOC. SECURITY ADMIN. (Feb. 25, 2003), http://policy.ssa.gov/poms.nsf/lnx/0200502010 (providing that "[a]dult beneficiaries who are judged legally incompetent . . . must receive benefits through a representative payee regardless of any circumstances").

[180] *See* 20 C.F.R. § 404.2021.

[181] *Id.* § 404.2021(a)(1). The same limitation applies to the other highest-priority candidates: spouses and other relatives with custody of the beneficiary. *Id.*

[182] The entire Article could be devoted to the topic of the guardian's authority to engage in Medicaid planning. An extensive discussion of the topic is beyond the scope of this Article.

[183] *See* UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 425 (1997) (enumerating more than two dozen powers given to a conservator, but silent on the subject of public benefits applications).

[184] *See id.* §§ 207(b)(3) & cmt., 208(b)(1) & cmts., 315(a)(1).

(that is, guardianship of the person or estate) might have standing in the guardianship or protective proceeding itself.[185]

Meanwhile, a guardian is permitted to sign an application for Social Security benefits[186] and (in most, if not all states) Medicaid.[187] NGA Standard 18.IV provides that "[t]he guardian shall obtain all public and insurance benefits for which the ward is eligible."[188] According to the Preamble for the Standards, the use of the word "shall" in 18.IV creates a duty for the guardian.[189] The comments to Rule 5 of the ethics code note that in some cases, the possibility of public benefits providing an important source for the guardian in the provision of services to the ward creates a "positive obligation" on the guardian to determine if such benefits are available to the ward and to "seek such assistance on behalf of the ward."[190]

A more difficult question arises when considering whether a guardian has an *obligation* to apply for means-tested public benefits.[191] In fact, it is sometimes urged that a guardian has—or should have—an affirmative obligation to not only seek benefits, but also to plan and position the ward's assets for maximum means-tested public benefits eligibility.[192]

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[185] *See id.* § 116.

[186] POMS GN 00204.003(B)(3), SOC. SECURITY ADMIN. (Jan. 13, 2012), http://policy.ssa.gov/poms.nsf/lnx/0200204003. The SSA is the only agency that can make a determination of incompetency for Social Security purposes. *See* POMS GN 00502.010, SOC. SECURITY ADMIN. (Feb. 25, 2003), http://policy.ssa.gov/poms.nsf/lnx/0200502010.

[187] COMMONWEALTH OF VA., Dept of Soc. Servs., Virginia Medicaid Eligibility Manual § M0120.200(B)(1), *available at* http://www.dss.virginia.gov/files/division/bp/medical_assistance/manual_transmittals/transmittals/transmittal96.pdf (last visited Mar. 26, 2012).

[188] STANDARDS OF PRACTICE 18.IV.

[189] *Id.* at pmbl. ("'shall' imposes a duty").

[190] NGA ETHICS CODE 5 cmts. (Nat'l Guardianship Ass'n 1988). The comment states: "The guardian must seek to obtain all available income for the ward. . . . The guardian is, therefore, under a positive obligation to investigate [public benefits] availability and seek such assistance on behalf of the ward." *Id.*

[191] STANDARDS OF PRACTICE 18.IV ("The guardian shall obtain all public and insurance benefits for which the ward is eligible."). Under this Standard, it is clear that the guardian ordinarily has a duty to apply for entitlement programs such as Social Security or even Medicare. There may be some circumstances in which a guardian might reasonably determine that it is in the best interests of the ward not to secure public benefits, such as when health insurance is provided through the ward's employer, or charitable arrangements are already in place provide for the ward's care. The more complex question is the application for means-tested public benefits, when some affirmative action is required on the part of the guardian to secure the ward's eligibility. *See infra* note 192.

[192] *See generally* Hal Fliegelman & Debora C. Fliegelman, *Giving Guardians The Power to Do Medicaid Planning*, 32 WAKE FOREST L. REV. 341 (1997) (arguing that a guardian has an affirmative duty to plan in the best interest of the ward). *See, e.g.*, *In re* Guardianship of Domey, 960 A.2d 729, 733 (N.H. 2008) ("The guardianship statute does not, however, impose a fiduciary duty upon a guardian to impoverish his or her ward in order to qualify the ward for Medicaid so that the ward's assets can be protected for the spouse . . . ."). NGA Standard 18.IX provides that "[t]he guardian shall oversee the

A guardian should be concerned about securing early public benefits eligibility because the guardian's duty should be to utilize her ward's assets for the best reasonably available care for as long as those assets survive, while anticipating that, at some future point, it may become necessary to seek supplementary assistance from the public benefits system.

There are several reasons that a guardian should seek public benefits assistance with at least some urgency. First, to the extent that the guardian is applying a "substituted judgment" analysis, it is common for individuals to express a preference for maintaining assets against not only future developments but also to provide an inheritance for their children (or other beneficiaries of their estate). Second, any ward, except the most dependent, has at least some prospect of recovery to the point that a return to the community—or to a less-restrictive setting than is available through the public benefits system. However, lack of resources may foreclose some future planning options. Third, in addition to the general desire to provide an inheritance, there is also the more specific need in individual cases to provide care for a dependent spouse, minor or adult child, or partner. With a partner, depending on state law, it may be particularly urgent to maintain resources for someone who is not entitled to protection by virtue of marital status.

3. Duty to Plan for Public Benefits

Advocates of a duty to plan, particularly for Medicaid eligibility, often cite a decades-old Illinois case as authority for the premise that a guardian may be liable for failing to consider positioning a ward for receipt of future public benefits. In *In re Guardianship of Connor*,[193] the Illinois Court of Appeals affirmed the trial court's ruling that a guardian "had violated its fiduciary duty to [the ward] by failing to expeditiously obtain public aid . . . ."[194]

More specifically, the *Connor* court found that the guardian could have, but did not, retained its ward's residence even while making a Medicaid application—

disposition of the ward's assets to qualify the ward for any public benefits program." STANDARDS OF PRACTICE 18.IX. According to the Preamble to the Standards, the use of the word "shall" creates a duty. *Id*. at pmbl. It might be argued under the comments to the NGA Ethics Code Rule 5 that the ward's funds have to be "inadequate to provide for the needs of the ward" before the guardian of the estate determines it is "both prudent and necessary to seek income supplementation via various income maintenance and insurance programs . . . ." NGA ETHICS CODE 5 cmt. The comment goes on to provide that "[p]ublic benefits may not only be helpful, but essential to the guardian in providing for the needs of the ward. The guardian is, therefore, under a positive obligation to investigate their availability and seek such assistance on behalf of the ward." *See id.* The comments do not provide a definition of what is "inadequate to provide for the needs of the ward." We imagine that it will be an unusual case where failure to secure available public benefits is in the best interests of the ward, and the determination will be very fact-specific.

[193] 525 N.E.2d 214 (Ill. App. Ct. 1988).

[194] *Id.* at 216.

the home was sold and the proceeds used to pay the ward's nursing home bills.[195] The appellate court went one step further than the trial judge, ordering the guardian to repay, from the guardian's own funds, the amount of a burial account authorized by the Medicaid eligibility rules but overlooked by the guardian in preparing the estate for Medicaid.[196]

However, reading *Connor* as establishing an affirmative duty to plan for Medicaid eligibility may be a bit of a stretch. Note that neither the trial court nor the appellate court discussed whether a guardian might have a duty to make permitted gifts, to recharacterize assets from countable to exempt, or to engage in any more assertive planning techniques.[197] The *Connor* court was critical of the guardian's failure to understand the eligibility rules, and to blindly rely on the representations of the local Medicaid eligibility office about how the process ordinarily worked.[198] Purchasing a pre-paid burial arrangement and indicating the ward's intent to return to her home on the application are both fairly simple planning techniques that any guardian, and certainly any professional guardian, might reasonably be expected to understand or determine.

Recent cases have made clear that a guardian can be given the authority to engage in more elaborate and aggressive planning, at least in some circumstances.[199] Note, however, that the reported cases tend to deal with transfers of assets[200] to spouses or to caretaker children.

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[195] *Id.* at 217.

[196] *Id.*

[197] *Id.* at 216–17.

[198] *Id.* at 214–15.

[199] *In re* Keri, 853 A.2d 909, 916 (N.J. 2004) ("[W]hen a Medicaid spend-down plan does not interrupt or diminish a ward's care, involves transfers to the natural objects of a ward's bounty, and does not contravene an expressed prior intent or interest, the plan, *a fortiori*, provides for the best interests of the ward and satisfies the law's goal to effectuate decisions an incompetent would make if he or she were able to act."); *see also* Matter of Shah v. Helen Hayes Hospital, 733 N.E.2d 1093, 1098–1101 (N.Y. 2000) (permitting a guardian of the estate to make transfers of assets to a spouse in order to qualify for Medicaid eligibility). It is necessary to examine the applicable statute to see if the guardian has the authority, whether court approval is required, what decision-making standard must be used and whether there is any evidence of the ward's intent. *See, e.g.*, *In re* Labis, 714 A.2d 335, 338–39 (N.J. Super. Ct. App. Div. 1998) (permitting transfer of assets to a spouse and applying the concept of "substituted judgment" to support the transfer); *In re* John "XX", 652 N.Y.S.2d 329, 332 (N.Y. App. Div. 1996) (authorizing a transfer to adult children in order to qualify for Medicaid eligibility); *In re* F.E.H., 453 N.W.2d 882 (Wis. 1990) (approving an interspousal transfer that did not affect eligibility for Medicaid but eliminated any concern about estate recovery upon the death of the eligible spouse).

[200] The current Medicaid eligibility rules would not permit the transfers contemplated or approved in at least some of the earlier reported cases.

4. Guardianship Standards

What standards should apply to the guardian's decision to apply, and plan for, public benefits eligibility? There are a number of references that give the guardian some guidance and direction.

The default position, of course, should be that the guardian applies for "all public and insurance benefits for which the ward is eligible."[201] This not only permits protection of the ward's remaining resources and income, but also reflects the reality that the majority of individuals in similar circumstances would reasonably be expected to pursue the same course—applying a sort of substituted judgment default position. Only in cases where the quality of the ward's care might be diminished, or there is specific evidence of the ward's prior objection to securing government assistance,[202] might the guardian forgo available benefits.

It is less clear whether standards might argue for more active planning for potential public benefits eligibility.[203] "The guardian shall oversee the disposition of the ward's assets to qualify the ward for any public benefits program,"[204] but that may not require the guardian to engage in every available—or even every "reasonably" available—planning alternative. Clearly, *Connor* argues for a standard requiring at least what might be thought of as simple and obvious planning techniques—like purchase of prepaid burial arrangements, and inquiry into the actual eligibility rules before the guardian acts.[205]

Particularly in cases where public benefits planning involves making gifts from the ward's funds, court approval should be sought in advance.[206]

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[201] STANDARDS OF PRACTICE 18.IV; *see also* NGA ETHICS CODE R. 5 cmts. ("If the ward's own funds are inadequate to provide for the needs of the ward, the guardian will find it both prudent and necessary to seek income supplementation via various income maintenance and insurance programs available through federal, state and local resources. Public benefits may not only be helpful, but essential to the guardian in providing for the needs of the ward. The guardian is, therefore, under a positive obligation to investigate their availability and seek such assistance on behalf of the ward.").

[202] It hardly seems probable that the same possibility might exist for insurance benefits. After all, if the ward was opposed to the utilization of insurance benefits it seems unlikely that he or she would have purchased insurance.

[203] *See* NGA ETHICS CODE R. 5 cmts.; STANDARDS OF PRACTICE 18.IX; *id.* at pmbl.

[204] STANDARDS OF PRACTICE 18.IX.

[205] *In re* Connor, 525 N.E.2d 214, 216–17 (Ill. App. Ct. 1988).

[206] The protection against self-dealing afforded by court approval was one of the factors considered by the court. *In re Keri*, 853 A.2d 909, 916 (N.J. 2004); *see also* NGA ETHICS CODE R. 5 cmts. ("While it is understood that the guardian must take responsibility and bear liability for his or her own negligent acts, the prudent guardian will scrupulously avoid even the appearance of self dealing in the decisions he or she makes concerning the financial affairs of the ward. This warning bears special significance for the guardian who is also a relative and future heir of the ward. Efforts to maximize the estate in this situation may be interpreted as an attempt to protect a future inheritance. For this reason, once assuring himself or herself of an absence of self-interest in decisions affecting the financial

5. When the Money Runs Out—Pro Bono, Strategies for Addressing

There will be occasions when the ward's estate will not be sufficient to last throughout the ward's life. In these cases, the guardian will need to apply for public benefits[207] and look at other ways to increase the ward's income.[208] One thing for the guardian to consider is taking reduced or no fees as guardian of the estate. For example, Guardianship Standard 22 notes that a guardian is entitled to "reasonable compensation," but keep in mind that the guardian also has a duty to "conserve the ward's estate" when deciding to charge a fee.[209] Although the

affairs of the ward, the guardian is well advised to seek court approval or license to avoid any appearance of impropriety."); STANDARDS OF PRACTICE 20.

[207] *See supra* Part VII.C.

[208] For example, if others are living with the ward in the ward's home, those others may be asked to pay rent. If the ward owns the home, the guardian may consider alternative housing options, a reverse mortgage, a home equity loan or even selling the home.

[209] STANDARDS OF PRACTICE 22. This section states:

> I. Guardians are entitled to reasonable compensation for their services.
> II. The guardian shall bear in mind at all times the responsibility to conserve the ward's estate when making decisions regarding providing guardianship services and charging a fee for those services.
> III. All fees related to the duties of the guardianship must be reviewed and approved by the court. Fees must be reasonable and be related only to guardianship duties.
> IV. Factors to be considered in determining reasonableness of the guardian's fees include:
>
> A. Powers and responsibilities under the court appointment;
> B. Necessity of the services;
> C. Time required;
> D. Degree of difficulty;
> E. Skill and experience required to carry out the duty;
> F. Needs of the ward; and
> G. Costs of alternatives.
>
> V. Fees or expenses charged by the guardian shall be documented through billings maintained by the guardian. If time records are maintained, they shall clearly and accurately state:
>
> A. Date and time spent on a task;
> B. Duty performed;
> C. Expenses incurred;
> D. Collateral contacts involved; and
> E. Identification of individual who performed the duty (e.g., guardian, staff, volunteer).

The comments to UGPPA § 417 offer other factors to be considered regarding the reasonableness of the fee:

standard gives guidance in determining the reasonableness of the fee,[210] an additional factor should be considered: the amount of the ward's estate. If the ward's estate is likely to be depleted, the guardian should consider that in determining the fee amount requested.[211] The urge to resign if the estate is exhausted may be compelling, but considering the guardian's fee may have contributed to the exhaustion of the estate, the guardian's duty to the ward, and the guardian's professional role, the guardian should remain as guardian in a pro bono capacity, unless doing so would work an exceptional hardship on the guardian.[212]

In addition to considerations regarding fees, as the money runs out, the guardian will have to consider how to prioritize what the guardian may purchase for the ward. A loss of money does not relieve the guardian from the duty to provide for the ward's necessities, or justify a contract for substandard care. Instead it would be a failure on the part of the guardian to appropriately discharge his or her duties, and would result in surcharge or removal. It becomes imperative that the guardian timely pursue public benefits for the ward, as well as investigate social programs and other services for which the ward may be eligible. The guardian may need to be creative and engage in problem solving, looking at less restrictive, and less expensive, alternatives to meet the ward's needs.[213]

> If not otherwise compensated for services rendered, a guardian, conservator, lawyer for the respondent, lawyer whose services resulted in a protective order or in an order beneficial to a protected person's estate, or any other person appointed by the court is entitled to reasonable compensation from the estate. Compensation may be paid and expenses reimbursed without court order. If the court determines that the compensation is excessive or the expenses are inappropriate, the excessive or inappropriate amount must be repaid to the estate.

See also UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 417 cmts. ("If the respondent is found to be indigent, compensation and expenses authorized by this section typically will be paid from the general fund of the county, or from whatever funding exists in the enacting state for indigent representation, such as legal aid, with the compensation most likely at a fixed rate."). The comments to § 417 go on to mention the RESTATEMENT (THIRD) OF TRUSTS § 38 cmt. c. (discussing the factors that are considered in deciding on the compensation for a conservator).

[210] Recognizing as well that the factors that are used in determining a fee will be governed by state statute or practice.

[211] *See* UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 417, cmts. ("While the size of the estate is an important factor in setting compensation, in many cases there will be no estate or the estate will not be sufficient to pay the costs of the initial proceeding.").

[212] *See* Catherine Seal & Spencer Crona, *Standards for Guardian Fees*, 2012 UTAH L. REV. 1575.

[213] For example, if the ward is only receiving Social Security, his or her remaining estate being exhausted, a representative payee may suffice in lieu of an ongoing guardian of the estate.

VIII. FUTURE CONSIDERATIONS

This section offers thoughts and observations about where to go in the next ten years.[214] Over the years, efforts have been made to minimize, if not eliminate, abuses in guardianship administration, primarily through statutory regulation and monitoring.

> It is the responsibility of the court to oversee and monitor guardianship cases—indeed, court monitoring is the only way to ensure the welfare of wards, discourage and identify neglect, abuse, or exploitation of wards by guardians, and sanction guardians who demonstrate malfeasance. Yet, court monitoring is an expensive and timely proposition, and despite twenty years of legislation designed to reform guardianship procedures, the failures of the court to provide appropriate oversight and monitoring continue to make national headlines.[215]

There are laws, standards of practice, and more, yet there are still problems with the way some guardians of the estate discharge their duties. If the focus is to minimize abuses, perhaps it is time to approach guardianship problems in a new way. It is time to recognize that those who intend to steal or otherwise misappropriate a ward's estate will do so, regardless of the laws, standards, and court orders that apply, and overregulation bogs down the whole system.

A new focus will require an examination of the current system and consideration of conflicts in the application of the guardian's substituted judgment and the best interest of the ward when the guardian is making decisions.[216] Rather than wholesale regulation of the professional industry that focuses on picayune details, but does not encourage training, holistic analysis, and good industry practices—such as adoption of general standards, like those articulated in the NGA Standards of Practice—should be encouraged.[217]

It may be time to focus more on who is appointed as the guardian of the estate. There is a documented preference by courts for appointment of family guardians.[218] While that preference makes sense on many levels,[219] perhaps it is

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[214] The ten-year time frame is used since this guardianship summit has been held every ten years.

[215] BRENDA K. UEKERT, CENTER FOR ELDERS AND THE COURTS, ADULT GUARDIANSHIP COURT DATA AND ISSUES RESULTS FROM AN ONLINE SURVEY 8 (2011), *available at* http://eldersandcourts.org/docs/GuardianshipSurveyReport.pdf.

[216] Frolik & Whitton, *supra* note 71, at 23–41.

[217] *See Wingspan*, *supra* note 30, at 604 ("States adopt minimum standards of practice for guardians, using the National Guardianship Association *Standards of Practice* as a model.").

[218] UEKERT, *supra* note 215, at 6 ("Courts prefer to appoint a family member to act as guardian over an incapacitated relative.").

[219] Including that the family would likely be handling matters anyway, historically has done so, and is likely in the best position to know the ward's wishes and desires by virtue

time to rethink the "family preference" and recognize that educational requirements and standards should apply to all guardians.[220] With statutes mandating the same education and application of standards to all guardians, family and professional, guardians may be more likely to understand the duties and obligations of serving as a fiduciary and the importance of complying with the statutes and court orders. Further, a professional guardian has more at stake than a family guardian—at least from a financial standpoint. If the professional guardian does not comply with a court order and is sanctioned or removed, the guardian has more to lose.[221]

Without the force of law, if a family member is appointed as the guardian, it is likely that the family guardian, even a well-meaning one, will not know of the existence of "aspirational" standards propounded by the professional community. A family member guardian can learn these standards through information and training. The quality of guardianship and oversight does not have to suffer for a ward who has the otherwise good fortune to have a family member actively involved in the ward's financial affairs.

Family guardians and professional guardians should be treated the same and have the same, or at least similar, requirements as far as guardian education and training, background checks, bonding, etc.[222] Some states have lower requirements

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of the family relationship. In some instances, however, especially where the family has not remained in close contact or is estranged, a family member would not be a good choice to be appointed.

[220] *See Family Guardian Focus Group Recommendations on Guardian Standards—Prepared for the Third National Guardianship Summit*, *available at* http://www.guardianshipsummit.org/wp-content/uploads/2011/07/family-guardian-focus-gp-recs-final-8-05-111.doc (to be accessed at www.nationalguardianshipnetwork.org) (noting that "[c]ore minimum guardianship duties, responsibilities and standards should be the same for *all* guardians [and] [*a*]*ll* guardians should complete a core training course on minimum guardianship duties, responsibilities and standards" (emphasis added)). *But see* Boxx & Hammond, *supra* note 5, at 54–58 (discussing, among other things, the differences between professional guardians and family guardians, and discussing the reasons for holding professionals to a higher standard).

[221] *See* Boxx & Hammond, *supra* note 5, at 54–58 (discussing reasons for holding professional guardians to higher standard and a professional guardian's "profit motive").

[222] *See generally* Brenda K. Uekert & Thomas Dibble, *Guardianship of the Elderly: Past Performance and Future Promise*, 23(4) CT. MANAGER 9, 10 ("The lack of guardianship training is especially apparent in cases where family or friends are assigned as guardians with little guidance on the boundaries of their authority or knowledge of appropriate actions."). *But see* Boxx & Hammond, *supra* note 5, at 22–23 (discussing differences between professional and family guardians and the efficacy, or lack thereof, of mandatory standards for both groups); *Wingspan*, *supra* note 30, at 597 ("All guardians receive training and technical assistance in carrying out their duties."); *Third National Guardianship Summit Releases Standards and Recommendations*, 2012 UTAH L. REV. 1191, 1199 ("Every guardian should be held to the same standards, regardless of familial relationship, except a guardian with a higher level of relevant skills shall be held to the use of those skills.").

for family guardians.[223] As noted in the probate court standards, it is important to consider who is appointed as the guardian of the property[224] and who can "do the job."[225]

In addition, more thought should be given to how the estate is managed. In this current economic climate, government benefits are scarce and perhaps even at risk as individual states and Congress look to revise entitlement programs.[226] When formulating a requisite plan, the guardian should consider that some benefits may be unavailable in the future. While budgeting should become a standard occurrence, certain questions would arise. For example, if formal budgets are used, and there is a deviation, is court approval required? Will budgeting drive up costs unnecessarily? Does it provide protection from runaway expenses? Are the courts prepared to deal with it (either in terms of time or in terms of interest)? Will a too-rigorous process with too-serious consequences drive out professional fiduciaries? What about family members who mean well, but don't understand rules and don't want to spend the money to get good assistance?

Consider the situation if there is a tension between decision-making standards (substituted judgment and best interest) and the idea of least restrictive alternative to a guardianship. Is there a need to balance the guardian's duties to the ward and the ward's desire for independence, autonomy, and control? There is a clear directive in the statutes for the use of least restrictive alternative. But is the application of the least restrictive alternative contradictory to the duties of the guardian and the best interest standard in decision-making?

IX. CONCLUSION AND RECOMMENDATIONS

The NGA Standards provide guidance to the guardians when making property decisions. The Standards are thoughtful, although somewhat general in nature. It is

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[223] *See, e.g.*, ARIZ. REV. STAT. ANN. § 14-5651(C) (2005) (imposing initial and recurrent training on professional fiduciaries, but not on family members or those who will not charge a fee to serve as fiduciary); FLA. STAT. § 744.3145 (2010) (setting out guardian education requirements and noting that "[t]he provisions of [the] section do not apply to professional guardians"); *id.* § 744.1085 (stating the educational requirements for professional guardians).

[224] NAT'L PROBATE COURT STANDARDS REVIEW DRAFT § 3.3.11, (Aug. 2012); (http://www.ncpj.org/images/stories/documents/Standards_Review_Draft_7-12.doc). ("Probate courts should appoint a guardian or conservator suitable and willing to serve as a guardian/conservator. Where appropriate, probate courts should appoint a person requested by the respondent or related to or known by the respondent.").

[225] *Id.* ("Probate courts should appoint a guardian or conservator suitable and willing to serve as a guardian/conservator."); *id.* at 3.4.11 cmts. ("Probate courts should consider the training, education, and experience of a potential guardian or conservator to determine if that person can perform the necessary tasks on behalf of the respondent competently."). *id.* at 3.3.11 cmts.

[226] *See State Cuts to Medicaid Affect Patients, Providers*, FOXNEWS.COM (Dec. 27, 2011), http://www.foxnews.com/us/2011/12/27/state-cuts-to-medicaid-affect-patients-providers-978067755/.

encouraging that the Standards have been revised over time, and revision should of course be a continuing process. But aspirational standards may not be enough as the guardianship practice continues to evolve. It may be time for state adoption of standards in order to give the Standards force and effect.[227]

Individual states should focus now on implementing standards governing guardians. Things of particular concern for regulating those handling funds in a fiduciary capacity include:

- Recognition of the individuality and, to the extent possible, self-determination of wards. To that end, state standards should emphasize substituted judgment approaches where the ward's current wishes are articulated, or where the ward's past wishes are known. Only if, or to the extent that, information is unavailable or the ward's financial well-being is implicated should a best interests analysis apply.
- Cost effectiveness should be emphasized. It should not be a requirement that the guardian of the estate always implement the cheapest available alternative, but the guardian should always be prepared to explain and defend the choice of vendors, approaches, and decisions in a cost-benefit analysis.[228]
- Training should be both mandatory and effective. Training should be available to, and required of, both professional and family (or casual) guardians. Training regimens must also be implemented for judicial officers and staff who, after all, are responsible for interpreting and monitoring the decisions of guardians.
- Standards should be general enough to be adapted to individual circumstances, but specific enough to be enforceable in individual cases. This dynamic tension requires standards that focus not on the minutiae of implementation or codification of specific approaches, but on goals, purposes, and proper analysis by guardians. Regulation should not be for the purpose of catching guardians in violation of technical standards, but

[227] *See, e.g.*, *Wingspan*, *supra* note 30, at 604 ("Professional guardians—those who receive fees for serving two or more unrelated wards—should be licensed, certified, or registered. They should have the skills necessary to serve their wards. Professional guardians should be guided by professional standards and codes of ethics, such as the National Guardianship Association's *A Model Code of Ethics for Guardians* and *Standards of Practice*.").

[228] For an interesting exposition of the duty of a guardian to weigh the costs and benefits in implementation and management of the fiduciary relationship, consider *In Re Guardianship of Sleeth*, 244 P.3d 1169 (Ariz. Ct. App. 2010) (discussing the duty of a guardian to weigh the costs and benefits in implementation and management of the fiduciary relationship). While the *Sleeth* opinion is expressly about the guardian's attorney's fees in a hotly contested guardianship/conservatorship proceeding, the discussion of the necessity to conduct a cost/benefit analysis has broader application for guardians. *Id.*

> rather for the purpose of improving the delivery of services to a vulnerable, needy, and under-protected population.[229]

It is important to recognize that the guardian does not make a decision in a vacuum and serves as more than just a fiduciary. There are a number of factors that a guardian must consider when making decisions for the ward. The guardian must involve the ward in the decision-making process, and recognize that a ward can express a preference in a number of ways, because the ward has a great stake in the outcome. The guardian must give the ward an "honest" role in expressing a preference and not just give lip service to the requirement of the ward's involvement. That is to say that while for various reasons the guardian may not always be able to honor a ward's preference, it is critical to give the ward as much autonomy and self-determination as the ward is capable of handling. The guardian plays a "holistic" role because the guardian must consider a broad range of factors when making any of the myriad of decisions that a guardian of the estate must make on a day-to-day basis for the ward.

[229] *Third National Guardianship Summit Releases Standards and Recommendations*, *supra* note 222, at 7–10.