

## INTRODUCTION

### WINGSPAN — THE SECOND NATIONAL GUARDIANSHIP CONFERENCE

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#### *I. INTRODUCTION AND KEYNOTES*

In July of 1988, the American Bar Association Commission on Legal Problems of the Elderly and Commission on the Mentally Disabled<sup>1</sup> convened a National Guardianship Symposium that became known as Wingspread,<sup>2</sup> after the conference center of that name in Racine, Wisconsin. The 1988 Wingspread Symposium produced a set of landmark recommendations for reform of the nation's guardianship system.<sup>3</sup> Wingspan — The Second National Guardianship Conference,<sup>4</sup> was convened

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1. The Commission on the Mentally Disabled is now named the Commission on Mental and Physical Disability Law.

2. The Johnson Foundation's Wingspread Conference Center in Wisconsin hosted the National Guardianship Symposium, which was sponsored by the ABA Commissions on Legal Problems of the Elderly and on Mental Disability.

3. Commn. on Mentally Disabled & Commn. on Leg. Problems of the Elderly, *Guardianship: An Agenda for Reform — Recommendations of the National Guardianship Symposium and Policy of the American Bar Association* (ABA 1989) [hereinafter *Wingspread Recommendations*].

4. Primary sponsors of the Wingspan Conference were the National Academy of Elder Law Attorneys, Stetson University College of Law, host of the Conference, and the

November 30 through December 2, 2001, more than a decade after the original 1988 Wingspread Symposium, to examine the progress made in the interim, and the steps that should be recommended for the future with respect to guardianship law, policy, and practice.<sup>5</sup>

The 2001 Wingspan Conference utilized a select, multidisciplinary cadre of experts in a working meeting of plenary and small-group sessions. Conferees were appointed by several collaborating groups, including the following: the National Academy of Elder Law Attorneys, the Borchard Foundation Center on Law and Aging, Stetson University College of Law, the ABA Commission on Legal Problems of the Elderly, the ABA Section on Real Property, Probate and Trust Law, the American College of Trust and Estate Counsel, the National College of Probate Judges, the National Guardianship Association, the Center for Medicare Advocacy, the Arc of the United States, AARP, and the Academy of Florida Elder Law Attorneys. Seven commissioned papers provided an analytical starting point and framework for discussions; each paper addressed different aspects of guardianship reform and current practice across America. In addition, two conference participants, Marshall B. Kapp and Winsor C. Schmidt, Jr., were inspired to add additional contributions to the literature from Wingspan. Each paper is included as an article in this issue of the *Stetson Law Review*.

The idea that guardianship must be reexamined germinated from the work of the late John J. Regan, one of the founding fathers of elder law and the Distinguished Professor of Health Care Law at Hofstra University. Although recognized as a consummate advocate for older Americans, Professor Regan was equally a visionary — he often wrote and spoke about the future of law in our society, and of older Americans in it. In the guardianship area, Regan pioneered ardent professional

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Borchard Center of Law and Aging. Co-sponsors were the ABA Commission on Legal Problems of the Elderly, the National College of Probate Judges, the Supervisory Council of the ABA Section on Real Property, Probate and Trusts, the National Guardianship Association, the Center for Medicare Advocacy, the Arc of the United States, and the Center for Social Gerontology, Inc.

5. As used in the Conference and in this Article, the term “guardianship” is meant to include all forms of judicial intervention for purposes of protecting or managing the affairs or property of an adult with impaired capacity. Terminology under state law may use differing terms to apply to different kinds of court intervention, including conservatorship, interdiction, and guardianship. Likewise, the term “guardian” is intended to include the person or agency appointed under any of these variations.

examination and personal advocacy.<sup>6</sup> He left sounding an alarm.<sup>7</sup>

His alarm warned of a fundamental disconnection between judicial administration of guardianship and conservatorship and the lived experience of those persons placed under such legal protection — older Americans.<sup>8</sup> In the broader context, the judicial process of guardianship affects many other categories of people, such as those with developmental disabilities. The convening of the 2001 Wingspan Conference also recognized that other alarms, still out of earshot, might be sounding in guardianship and need to be investigated.

The opening keynotes at the 2001 Wingspan Conference focused on the history of guardianship reform and its future. Richard Van Duizend, Executive Director of the National Center of State Courts, guided conferees through the history of guardianship reform. He opened with two questions: first, how can society best take care of persons and their property when they are not able to do so, and second, how can society ensure that it steps in only when necessary and only to the extent necessary? Van Duizend briefly summarized guardianship through history and a number of cultures, and then identified three currents of reform in guardianship: procedural, operational, and avoidance. He concluded by asking two questions: where are we, and what are we to do? His answers were both positive and negative. The negative aspects included routine circumvention of due-process guarantees, ill-trained guardians failing to perform basic responsibilities, inadequate public services, wide variances in funding for services, not only among states, but within states, inadequate monitoring of guardianships and conservatorships by courts, and the failure of available alternatives to obviate the need and demand for guardianships and conservatorships.

Van Duizend challenged the group with three provocative alternatives to the question of what to do. As a society, we could

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6. *E.g.* John J. Regan et al., *Tax, Estate & Financial Planning for the Elderly* ch. 16 (Matthew Bender 2001) (titled "Guardians and Conservators"); John J. Regan, *Protecting the Elderly: The New Paternalism*, 32 *Hastings L.J.* 1111 (1981); John J. Regan, *Protective Services for the Elderly: Commitment, Guardianship, and Alternatives*, 13 *Wm. & Mary L. Rev.* 569 (1972); John J. Regan, *Intervention through Adult Protective Services Programs*, 18 *Gerontologist* 250 (1978).

7. *See* Sen. Spec. Comm. on Aging, *Roundtable Discussion on Guardianship*, 102d Cong., 2d Sess. 21–31 (June 2, 1992) (providing the testimony that Professor Regan gave to the Senate Special Committee emphasizing the need to discover and publicize effective methods of handling guardianship issues).

8. *Id.* at 21–22.

(1) continue to tinker with the existing system, (2) abolish the concept of guardianship after 3,000 years of unsuccessful tinkering, or (3) adopt a non-European approach with a disability-accommodation-and-support model, rather than a state-sponsored, preemption-of-individual-rights model.

A. Frank Johns then delivered remarks on the future of guardianship reform. Using a fire-storm metaphor, he provided an analogy of two great fire-storms of the late 1980s that produced positive results. In 1988, the Yellowstone-National-Park fire-storm burned over 790,000 acres. Research in the years that followed the fires concluded that the effects of the fires were in many ways positive and beneficial for many components of the ecosystem. Just a year prior, in 1987, a guardianship “fire-storm” burned in the groundbreaking series of investigative reports<sup>9</sup> — the largest case survey ever — by the Associated Press (AP). The AP investigated over 2,200 guardianship cases in the courts throughout America and shown a bright light on what it called “a dangerously burdened and troubled system that regularly puts elderly lives in the hands of others with little or no evidence of necessity, then fails to guard against abuse, theft and neglect.”<sup>10</sup> Research and legislative measures in the years that followed the investigative fire-storm resulted in many positive and beneficial changes in state-guardianship systems.<sup>11</sup>

Much like the Yellowstone fire-storm, in recent years, the fire-storm over guardianship has waned to a flicker. However, with the demographic forecast of an aging America and the imminent approach of Baby Boomers to old age, Johns predicted a significant increase in the number of poor, vulnerable elders and persons with disabilities being disserved by the guardianship

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9. *Guardians of the Elderly: An Ailing System*, AP Special Report (Sept. 1987), in *Abuses in Guardianship of the Elderly and Infirm: A National Disgrace*, H.R. Comm. Print 100-639, at 13 (Dec. 1987).

10. Fred Bayles & Scott McCartney, *Declared “Legally Dead” by a Troubled System*, in *Guardians of the Elderly: An Ailing System*, AP Special Report (Sept. 1987), in *Abuses in Guardianship of the Elderly and Infirm: A National Disgrace*, H.R. Comm. Print 100-639, at 13 (Dec. 1987).

11. *E.g.* Unif. Guardianship and Protective Proc. Act 8A U.L.A. 102 (Supp. 2001); Commn. on Mental & Physical Disability Law & Commn. on Leg. Problems of the Elderly, *Steps to Enhance Guardianship Monitoring* (ABA 1991) (available for order from the ABA Commission on Legal Problems of the Elderly); Dorothy Siemon, Sally Balch Hurme & Charles P. Sabatino, *Public Guardianship: Where Is It and What Does It Need?* 27 *Clearinghouse Rev.* 588 (1993); Erica Wood, *State Guardianship Legislation: Directions of Reform* (unpublished annual reviews) (available for order from the ABA Commission of Legal Problems of the Elderly for the years 1988 through 2001).

process. Johns concluded with the prospect that the flicker will ignite another fire-storm.

Johns then offered an allegory of the fire-storm as a struggle between good and evil in guardianship, based on John Berendt's 1994 novel, *Midnight in the Garden of Good and Evil: A Savannah Story*.<sup>12</sup> Johns opined, that in the context of guardianship, "midnight" is an allegory for the imminent approach of Baby Boomers to old age.<sup>13</sup> Is it midnight in guardianship's garden — that time when, as the Boomers age, they will need what is good about guardianship, but will it be available? Will there be sufficient services available in the guardianship process for them to be served? If the evil is fast approaching, it will be the failure of this society to organize and construct a national guardianship system that will serve the unprotected, poor boomers in the next century.

Johns noted the irony in the last chapter of Berendt's book that describes how Savannah has grown inward, arrogantly indifferent to what is going on outside the city, thereby breeding the extraordinary and allowing eccentrics to survive to generate warts and quirks of personality, achieving greater brilliance in the lush enclosure of Savannah.<sup>14</sup> Johns noted the striking similarity of Berendt's portrait to a description of an aging person in today's society.

Johns concluded that, in the future, the evil in guardianship's garden may come from public agencies and systemic inertia, and the good may come from individual benevolence and voluntary stewardship. Regardless of how the good and evil of guardianship is apportioned, Johns questioned whether our society will allow the "old" to maintain independent eccentric ways to the end of their lives, and to develop personal warts and quirks, creating greater brilliance in the lush, protected enclosures.

These opening keynote addresses left delegates with a challenge to examine the 1988 Wingspread Symposium

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12. John Berendt, *Midnight in the Garden of Good and Evil: A Savannah Story* (Random House, Inc. 1994).

13. The Baby Boomers (Boomers) have always broken boundaries. In the context of this Article, the boundaries that Boomers will break will be the boundaries of conformity to medical and nursing home models for the old and the elderly. Raised in the age of Aquarius, Boomers may also do to guardianship's garden what they have done to all other gardens: plowed through in the cycles in their lives, eventually busting the boundaries to smithereens!

14. Berendt, *supra* n. 12, at 387–388.

Recommendations to determine what progress has been made over the last twelve years and what, if any, new approaches should be considered for the future.

At lunch on the first day, Professor Marshall B. Kapp<sup>15</sup> addressed the unexamined dichotomy between the uses of legal process to deal with decisional incapacity and merely “bumbling through” to find informal solutions. He noted that, for most “gray zone” individuals and even for many individuals who are clearly *de facto* incapacitated, the capacity issue is never formally raised and the legal process of guardianship never invoked. Instead, the various parties generally “bumble through” extra-legally as best they can. When the capacity issue is raised formally, it often is done as a matter of legal self-protection for a health-care provider or financial institution, rather than primarily for the ward’s benefit.

Professor Kapp queried whether we should encourage or discourage extra-legal, bumbling-through-type handling of persons with questionable capacity rather than formal judicial involvement or a formalized court diversion. A closely-related issue is what we ought to be teaching health-care providers, financial officers, and other third parties who, in reality, are usually the ones who initially decide whether the formal guardianship process should be initiated for a particular person. Lawyers and policy-makers know what to do once the guardianship process has been started, but tend to neglect the ways in which decisions about whether to invoke the process in the first place actually affect the lives of persons with questionable capacity. In his Article, Professor Kapp offers his personal observations on the course of debate at Wingspan, revealing that some of the differing positions of the participants have deep philosophical roots.<sup>16</sup>

On the last day of the Conference, Professor Winsor C. Schmidt, Jr.<sup>17</sup> addressed the conferees on the subject of public guardianship, examining changes that have come about since his groundbreaking national study in 1981.<sup>18</sup> Professor Schmidt

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15. Professor in the Office of Geriatric Medicine & Gerontology at Wright State University.

16. Marshall B. Kapp, *Reforming Guardianship Reform: Reflections on Disagreements, Deficits, and Responsibilities*, 31 Stetson L. Rev. 1047 (2002).

17. Director and Professor of Health Policy and Administration Program at Washington State University in Spokane.

18. Winsor C. Schmidt, Jr. et al., *Public Guardianship and the Elderly* (Ballinger Publg. Co. 1981).

emphasized the need to regularly collect and maintain data on guardianship agencies and guardianship practices. Data collection should be geared to assess how the system is working and evaluate the individuals it serves. Since his study, a significant number of new public and private guardianship agencies have developed, but there is little empirical evidence to assess their real impact on vulnerable populations. In his Article, Professor Schmidt provides a social-science perspective that highlights the available empirical data related to guardianship issues.<sup>19</sup> This summary of available data should help to focus the areas in which more research is sorely needed.

Following the address of Professor Schmidt, Sally Balch Hurme of AARP and Erica Wood of the ABA Commission on Legal Problems of the Elderly engaged the participants in a game of "Guardianship Jeopardy," highlighting state statutory changes in procedural due process, the determination of incapacity, and guardianship monitoring. Finally, Sally Balch Hurme joined Judge John N. Kirkendall<sup>20</sup> in a panel exploring interstate and international guardianship issues. They focused on a complex case involving a ward originally from Germany who became incapacitated in the United States, had a guardian appointed in Michigan, and later returned to her native land.

## II. CONFERENCE GROUPS

After the opening addresses, conferees then spent the bulk of two days meeting in small working groups, each group rotating through four of six topic areas:

- Mediation and Diversion
- Due Process
- Adversarial Litigation
- Lawyers as Fiduciaries and Counsel to Fiduciaries
- Monitoring and Accountability
- Agency Guardianship.

A facilitator, assisted by a reporter, moderated each of the working group topics. In addition, a seventh pre-conference group met once to identify overarching or cross-cutting issues that did

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19. Winsor C. Schmidt, Jr., *The Wingspan of Wingspread: What Is Known and Not Known About the State of the Guardianship and Public Guardianship System Thirteen Years after the Wingspread National Guardianship Symposium*, 31 *Stetson L. Rev.* 1027 (2002).

20. Washtenaw County Probate Court, Michigan.

not necessarily fit within the six core topics. Each of the groups was given the charge to identify, examine, and prioritize the key policy and practice questions or problems salient to each topic area — both those posed by the commissioned papers and those raised by the conferees. Next, the groups were to identify necessary or promising options for reform in guardianship policy and practice. Finally, the groups were called upon to craft specific recommendations supported by consensus or near consensus.

After the working groups completed their cycles, the facilitators and reporters edited the recommendations from each topic into a set of proposed recommendations for consideration by the conferees in plenary session. More than seventy-five recommendations were considered by the conferees under procedures that permitted time-limited discussion and floor amendments. Recommendations that received more than fifty percent support of the conferees became the official 2001 Wingspan Conference Recommendations.<sup>21</sup> One measure of the success of the individual working groups is that all but a dozen of the recommendations were adopted without amendment or discussion by a supermajority of seventy-five percent or more.

The following pages present summaries of the discussions and recommendations of the working groups in the six topical areas and the overview group.

#### A. Overview Group

Immediately prior to the Conference, a small sample of participants representing each of the sponsoring groups met to consider overarching or cross-cutting issues that did not necessarily fall within one of the specific six topics. The “Overview” group proposed several broad recommendations that were adopted by the conferees and are included in the summary of recommendations.<sup>22</sup> These recommendations address interstate jurisdictional issues, preference for the terminology of “diminished capacity,” coverage of assessment costs by Medicare and Medicaid, data collection, the need for dialogue between the

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21. Wingspan — The Second Natl. Guardianship Conf., *Recommendations*, 31 Stetson L. Rev. 595, 595–609 (2002) [hereinafter *Wingspan Recommendations*]. The *Wingspan Recommendations*, authored by Wingspan Conferees, do not purport to have the endorsement of the Conference’s individual sponsor organizations. To view commentary or dissenting opinions, as well as the *Recommendations* on-line, visit the National Academy of Elder Law Attorney’s Web site at <<http://www.naela.com>>.

22. *Id.* at 595–598.



legal and medical professions, and broad oversight of the guardianship system at the state and local level.<sup>23</sup>

Three cross cutting topics that were addressed by every group were the following:

- the need for better education of all actors in the guardianship system,
- further research on several aspects of guardianship systems, and
- the crying need for more adequate funding of the systems mandated by guardianship reform and of research and education.<sup>24</sup>

These recommendations have been aggregated in the conference recommendations under the heading of "Recommendations for Education, Research and Funding."<sup>25</sup>

### B. Diversion and Mediation

The first topic area, guardianship diversion and mediation, is animated by a premise that guardianship should be used as a last resort and that alternatives should be explored and exhausted prior to the judicial intervention of guardianship. The greater the availability of and access to alternatives, the better the dignity and freedoms of individuals needing protection will be preserved. Professor Mary F. Radford's<sup>26</sup> article, *Is the Use of Mediation Appropriate in Adult Guardianship Cases?*,<sup>27</sup> examines whether mediation is an appropriate diversion option in adult-guardianship cases, and, if so, what safeguards are necessary to ensure that mediation is fair and that the adult's due-process rights are protected. She argues for greater integration of mediation services into adult-guardianship procedures with enhanced attention to standards and the due-process rights of the adult at risk.<sup>28</sup>

The group discussions of this subject covered not only the role of mediation but also a broad array of other possible diversion strategies, including health and financial powers of attorney, surrogacy statutes for medical decision-making, trust instruments, joint ownership, and other ways to title assets that

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23. *Id.*

24. *Id.* at 596–598.

25. *Id.* at 596.

26. Professor of Law at Georgia State University College of Law.

27. Mary F. Radford, *Is the Use of Mediation Appropriate in Adult Guardianship Cases?*, 31 *Stetson L. Rev.* 611 (2002).

28. *Id.*

may enable an individual to avoid the need for guardianship.<sup>29</sup>

Recommendations adopted by the conferees likewise addressed alternatives broadly. With respect to the use of durable powers of attorney (DPA), the conferees called for the application of fiduciary standards to agents.<sup>30</sup> However, little consensus was reached regarding the details of such standards, whether these standards could be waived, what decision-making standards should apply, how they should apply to practices such as self-gifting for purposes of Medicaid planning, and to whom a principal should be accountable. To elucidate the need for fiduciary standards, the conferees called for an additional study of “the extent and nature of the abuse of powers of attorney and trusts,” as well as options to permit review of agents’ performance.<sup>31</sup> Further, the conferees supported changing lawyer-ethics rules to make clear that a lawyer drafting DPAs always should meet with the principal (treating the principal as the client), rather than meeting solely with the prospective agent.<sup>32</sup>

Specifically with respect to medical decision-making, the recommendations urge states to adopt surrogate-medical-consent statutes.<sup>33</sup> These laws authorize default surrogate decision-makers, usually in next-of-kin priority, to make medical decisions for decisionally-incapacitated patients who have not appointed a health-care agent or proxy. Although adopted in many states, they are quite variable in substance and process, and a significant number of states still have no such mechanism.

A key recommendation of the 2001 Wingspan Conference in this area is to expand the programs specifically focused on guardianship diversion, and to do so in a multi-disciplinary manner “with collaboration among financial institutions, law enforcement, and adult protective services.”<sup>34</sup>

In the context of filing for guardianship, the recommendations call for all petitions to include a review of alternatives to guardianship, a statement as to why none is available, and recognition of a preference in appointment of persons nominated to be the guardian in the individual’s advance

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29. *Diversion and Mediation* (unpublished issue brief St. Petersburg, Fla., Nov. 30, 2001) (copy on file with the *Stetson Law Review*).

30. *Wingspan Recommendations*, *supra* n. 21, at 598 (Recommendation 17).

31. *Id.* at 600 (Recommendation 26).

32. *Id.* at 599 (Recommendation 21).

33. *Id.* at 598 (Recommendation 19, Comment).

34. *Id.* at 599–600 (Recommendation 23).

directive.<sup>35</sup>

As to the role of mediation in guardianship, the recommendations advocate developing “[s]tandards and training for mediators . . . in conjunction with the [ADR] community,” as well as more research “to identify[ ] payment sources to expand the availability and affordability of mediation services.”<sup>36</sup>

Finally, the recommendations in the guardianship-diversion-and-mediation-group discussions include a call for action on the education front, urging the conference co-sponsors to develop a model educational curricula for the bench, bar, and medical professionals to increase awareness of the risks and benefits of guardianship, alternatives to guardianship, and the use of mediation for conflict resolution.<sup>37</sup>

### C. Due Process and Adversarial Litigation

The second and third topic areas, due process and adversarial litigation, formed the foci of two spirited series of group discussions. We have combined their recommendations because they so readily can be integrated into one broad set of issues. Three papers examine important facets of this topic area. First, Professor Joan L. O’Sullivan,<sup>38</sup> author of *Role of the Attorney for the Alleged Incapacitated Person*,<sup>39</sup> examines the role of the attorney, conceptually, historically, and practically, in the value context of due process. She builds a case for the attorney’s role as primary protector of the due-process rights of the alleged incapacitated individual. In this framework, Professor Sullivan argues that the lawyer’s first obligation is to advocate strenuously for the client’s wishes. She also examines guardianship reform in other nations and concludes that more fundamental systemic reform is needed to move states away from formulaic, court-ordered, guardianship systems that deprive individuals of their rights, to systems structured primarily to provide the accommodations and supports needed by persons with impaired capacities.<sup>40</sup>

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35. *Id.* at 598, 599 (Recommendations 18 and 20).

36. *Id.* at 599 (Recommendation 22).

37. *Id.* at 600 (Recommendation 24, Comment).

38. Acting Director of the Law and Health Care Program and Assistant Professor of Law at the University of Maryland School of Law.

39. Joan L. O’Sullivan, *Role of the Attorney for the Alleged Incapacitated Person*, 31 *Stetson L. Rev.* 687 (2002).

40. *Id.*

Professor Lawrence A. Frolik<sup>41</sup> examines the apparent failure of court systems to use limited guardianship options in his article, *Promoting Judicial Acceptance and Use of Limited Guardianship*.<sup>42</sup> Professor Frolik concludes that judges must be the pivotal target group for the acceptance and use of limited guardianship. He emphasizes the need for judicial education on the benefits of and procedures for implementing limited guardianship, in addition to advocacy to assure adequate funding.<sup>43</sup> Professor Frolik suggests the need to consider limited guardianship for elders with dementia in the same way as limited guardianship for persons with mental illness or retardation, because limited guardianship is fundamental to the accepted goal of normalizing the lives of all three groups.<sup>44</sup>

Bruce S. Ross<sup>45</sup> tackles two tasks in his article, *Conservatorship Litigation and Lawyer Liability: A Guide through the Maze*.<sup>46</sup> First, he reviews the procedural and substantive rules governing conservatorship of the property and person in one state (California), with an emphasis on issues arising in litigation. Second, taking a national approach, he discusses the competing theories in ascertaining the relationship between the attorney representing a guardian and the ward for whom that guardian is responsible.<sup>47</sup>

In both the due-process and adversarial-litigation groups, much deliberation centered on the task of defining the roles that should be played by the various actors involved in the process to ascertain clearly the wants, needs, values, and rights of the alleged incapacitated person. Today, there are typically multiple actors whose roles are not always clear — for example, the lawyer for the respondent, a court visitor or investigator, a guardian ad litem, the lawyer for the petitioner, expert evaluators of various disciplines, and the judge.

Two themes, in particular, became focal points of robust debate in both the litigation and due-process discussions: (1) whether appointment of counsel should always be mandatory,

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41. Professor of Law at the University of Pittsburgh School of Law.

42. Lawrence A. Frolik, *Promoting Judicial Acceptance and Use of Limited Guardianship*, 31 Stetson L. Rev. 735 (2002).

43. *Id.* at 755.

44. *Id.* at 745–746.

45. Partner at Holland & Knight, LLP in Los Angeles, California.

46. Bruce S. Ross, *Conservatorship Litigation and Lawyer Liability: A Guide through the Maze*, 31 Stetson L. Rev. 757 (2002).

47. For a further discussion on this issue, see *infra* pt. II.D.

and (2) whether the lawyer for the alleged incapacitated person should be obligated to provide “zealous advocacy” on the one hand or “responsible and appropriate representation” on the other. Both issues arise out of a long history of debate, going back prior to the 1988 Wingspread Symposium, which endorsed both mandatory appointment and the obligation of zealous advocacy.<sup>48</sup>

The proposed recommendations contained alternative language on both of these issues — one alternative strongly reaffirming the Wingspread Recommendations, and the other alternative slightly limiting the circumstances in which counsel should be mandatory and redirecting the advocacy role away from the conventional, adversarial model.<sup>49</sup> However, the recommendations adopted by the conferees reaffirmed the mandatory-appointment-and-zealous-advocacy positions of the earlier Wingspread Recommendations.<sup>50</sup>

The debate over these options, which was strikingly familiar to previous debates, was waged on two levels: a semantic level and a substantive level. The differences were far more pronounced in the semantic arena, in which traditional terms such as “zealous” carry either very favorable or unfavorable connotations. In its most unfavorable light, “zealous advocacy” was described as a “scorched earth,” adversarial litigation strategy aimed at winning at all costs. In its most favorable light, it was described as the only model that ethically ensured competent, thorough, and diligent representation of extremely vulnerable persons. However, substantively, the groups’ discussions of the lawyer’s role were far more nuanced and sensitive to a high standard of advocacy necessary to ensure that the client is assessed thoroughly and objectively, that all alternatives for autonomy and care are investigated, that the client understands his or her options, and that the petitioning party is held to the high standard of proof that the law requires.

The core vision of the lawyer’s function that participants seemed to hold in common, regardless of lexicon used, might be analogized to the application of a “strict scrutiny” test in the context of constitutional litigation. As under constitutional law, a strict-scrutiny analysis is applied to evaluate alleged due-process

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48. *Wingspread Recommendations*, *supra* n. 3, at 9–13.

49. Wingspan Adversarial Litigation Workgroup, *Final Recommendations* (copy on file with the *Stetson Law Review*); Wingspan Due Process, *Summary* (copy on file with the *Stetson Law Review*).

50. *Wingspan Recommendations*, *supra* n. 21, at 601 (Recommendation 29).

or equal-protection violations when a fundamental right is at stake (in this context, the personal freedom of the alleged incapacitated person). If that threshold is met, then the proposed state action must be found to be narrowly drawn to meet a “compelling state interest” (which in the context of guardianship is the protection of the ward). Using this analogy, the lawyer’s “zealous advocacy” seeks to ensure that strict scrutiny is applied to the allegations, evidence, and proposed disposition advocated by the petitioners, court investigators, or other participants in the process. It also requires giving voice to the views and wishes expressed by the client, to the extent they can be ascertained. This role does not imply a “scorched earth” strategy or opposition to every position proposed by the other side. But it does imply holding proponents to their burden of proof and to their burden of justifying a care plan that meets the needs, values, and rights of the client.

With respect to the role of other actors in the guardianship-litigation process, the final recommendations include utilizing court investigators or visitors to serve as the objective eyes and ears of the court in place of a “guardian ad litem,” a role that has been plagued by functional and ethical ambiguity.<sup>51</sup> The recommendation would effectively eliminate guardians ad litem from the guardianship process.

Other recommendations generated a high level of consensus, including the following: an endorsement of a mandatory right of appearance of the alleged incapacitated person and right to be heard in court;<sup>52</sup> greater efforts to provide privacy, confidentiality, and timeliness in guardianship litigation;<sup>53</sup> greater due-process protection in emergency guardianships;<sup>54</sup> allowance for single transaction guardianships;<sup>55</sup> adoption of more effective strategies to encourage the use of limited guardianships;<sup>56</sup> adoption of the substituted-judgment standard for decision-making on behalf of wards or other persons with diminished capacity;<sup>57</sup> and of course, adequate funding for courts to do the job well.<sup>58</sup>

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51. *Id.* at 601, 602 (Recommendations 30 and 32).

52. *Id.* at 601 (Recommendation 27).

53. *Id.* at 602 (Recommendation 33).

54. *Id.* (Recommendations 34 and 35).

55. *Id.* (Recommendation 36).

56. *Id.* at 602–603 (Recommendations 38 and 39).

57. *Id.* at 603 (Recommendation 42).

58. *Id.* (Recommendation 40).

#### D. Fiduciary Issues

The fourth topic, fiduciary issues, examined the role of lawyers (1) serving *as fiduciaries* and (2) *representing fiduciaries* of persons with diminished capacity. Two Conference papers raise a multitude of questions especially relevant to this topic area.

The article by Edward Spurgeon<sup>59</sup> and Mary Jane Ciccarello,<sup>60</sup> *Lawyers Acting as Guardians: Policy and Ethical Considerations*,<sup>61</sup> examines two broad scenarios. The first explores the responsibilities of lawyers assuming an enhanced fiduciary role outside the context of guardianship when a client may need protective action because of diminishing capacity.<sup>62</sup> Current Model Rules of Professional Conduct 1.14 and its revisions proposed by the ABA Ethics 2000 Commission are central to this facet.<sup>63</sup> The response of the groups examining this facet exhibited a high degree of consensus in recommending support of the ABA Ethics 2000 proposed revisions to Model Rule 1.14. Generally, these revisions provide greater guidance to attorneys in carrying out their responsibility to assess capacity and to take protective action in the least intrusive manner feasible.

The second set of scenarios posed by Spurgeon and Ciccarello raise questions about the limitations, duties, and standards of practice that should apply to lawyers serving in the role of guardian or other fiduciary for individuals with impaired capacity. The need for limitations is most apparent in situations in which the lawyer is faced with serving multiple roles for a client in need of a guardian. For example, although Model Rule 1.14 permits a lawyer to petition for guardianship on behalf of his or her client (as a last resort),<sup>64</sup> may the lawyer serve simultan-

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59. Executive Director of the Borchard Foundation Center of Law & Aging in Athens, Georgia and Professor of Law at University of Georgia School of Law.

60. Lawyer with the Utah Division of Aging in Salt Lake City, Utah.

61. Edward D. Spurgeon & Mary Jane Ciccarello, *Lawyers Acting as Guardians: Policy and Ethical Considerations*, 31 Stetson L. Rev. 791 (2002).

62. *Id.* at 794.

63. ABA Model R. Prof. Conduct 1.14 (2000). On February 5, 2002, the ABA House of Delegates, at its Midyear Meeting in Philadelphia, Pennsylvania, completed its review of the recommendations of the ABA Commission on Evaluation of the Rules of Professional Conduct (the ABA Ethics 2000 Commission), revising and amending the Model Rules. For a complete summary of the revisions, see *Report 401 as Passed by the House of Delegates February 5, 2002* <[http://www.abanet.org/cpr/e2k-report\\_home.html](http://www.abanet.org/cpr/e2k-report_home.html)> (Feb. 2002). Revised Model Rules 1.6 and 1.14 are reprinted at 31 Stetson L. Rev. 791, 856-866 (2002).

64. *Id.*

ously in other potentially conflicting roles, such as lawyer for a third-party petitioner, as guardian ad litem, or as nominee for appointment as guardian? Generally, serving in these multiple roles is viewed with disfavor by the groups, except for the dual role of serving as both fiduciary and counsel to the fiduciary (for example, the lawyer or the lawyer's firm providing both fiduciary services and legal services). The latter arrangement is often deemed appropriate by its efficiency and economy, and is consistent with client desires. However, the 2001 Wingspan Conference recommendation on such arrangements calls for clear differentiation of services and fees by function and requires that services and fees be "reasonable, and be subject to court approval."<sup>65</sup>

With respect to standards, the groups uniformly recommended that "[s]tates adopt minimum standards of practice for guardians, using the National Guardianship Association *Standards of Practice* as a model."<sup>66</sup>

Bruce Ross's article, *Conservatorship Litigation and Lawyer Liability: A Guide through the Maze*, addresses fiduciary issues in the relationship among the parties in the triad made up of (a) an attorney representing (b) a guardian (or other fiduciary) who is responsible for the person or property of (c) a ward or other beneficiary.<sup>67</sup> The Article charts the lack of agreement in current law as to whether and to what extent the attorney has a duty to the ward directly and whether privity or lack of privity of contract is a viable analytic concept explaining the relationship.<sup>68</sup> The nature of the attorney-fiduciary-ward relationship determines whether the lawyer for a guardian may be held liable in malpractice or other tort action brought directly by a ward or conservatee.

Because of the variability in the law, the working groups ultimately avoided any attempt to provide a definitive description of that attorney-fiduciary-ward triadic relationship, but instead called for further study of the role and responsibility of the lawyer in this situation. However, there was little hesitation and much consensus in advocating an exception to the confidentiality requirements of Model Rule 1.6 to permit the lawyer for a

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65. *Wingspan Recommendations*, *supra* n. 21, at 608 (Recommendation 64).

66. *Id.* at 604 (Recommendation 45) (The National Guardianship Association *Standards of Practice* are reprinted at 31 Stetson L. Rev. 996, 996-1026 (2002)).

67. Ross, *supra* n. 46, at 775-789.

68. *Id.*



fiduciary to disclose otherwise confidential information when the lawyer knows of neglect, abuse, or exploitation as defined by state law. A related recommendation stresses the need for lawyers to take steps to ensure that fiduciaries whom they represent actually understand their responsibilities and good practice standards.

#### E. Monitoring and Accountability

The fifth topic area, monitoring and accountability, is described as the “back end” of guardianship by Sally Balch Hurme and Erica Wood, in contrast to the determination of incapacity and appointment of a guardian at the “front end.” In their paper, *Guardian Accountability Then and Now: Tracing Tenets for an Active Court Role*,<sup>69</sup> Hurme and Wood trace the development of guardianship-monitoring-and-accountability law and practice from the time of the Associated Press exposé and the 1988 Wingspread Symposium to the present. They illuminate where we stand now, the barriers blocking effective monitoring, and the promising practical steps jurisdictions have taken to strengthen guardianship accountability.

Not surprisingly, they find that there is no one silver bullet that solves the problem. Rather, effective monitoring and accountability requires a rich tapestry of systemic pieces, including high quality guardian orientation and training; standards, licensing, and certification for professional guardians; meaningful use of guardianship plans; periodic guardianship reports; meaningful review and audits of those reports; better judicial education; use of specialized judges; and greater public awareness. Hurme and Wood also highlight two particular barriers to monitoring reform.<sup>70</sup> One is attitudinal: judges tend to embrace a passive view of the probate courts under the Uniform Probate Code (UPC).<sup>71</sup> That is, the drafters of the UPC generally sought to make probate proceedings more administrative in nature with the court’s role passive until some interested person invokes its power to secure resolution of a matter. Historically, guardianship has been viewed as a subset of probate, so consequently, the same view has permeated guardianship. Hurme and Wood assert that, although this hands-off tenet of

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69. Sally Balch Hurme & Erica Wood, *Guardian Accountability Then and Now: Tracing Tenets for an Active Court Role*, 31 *Stetson L. Rev.* 867 (2002).

70. *Id.* at 926.

71. *Id.*

probate may be appropriate for wrapping up the financial affairs of a deceased person, it has no place in guardianship, in which an active monitoring and oversight function is key.<sup>72</sup>

The second barrier highlighted is lack of funding.<sup>73</sup> Substantial funding is needed to establish standards and training and to enforce them. Guardian plans and reports require trained staff and other resources to review and monitor them, and judges need training and support to oversee the complex process and adjudicate problems and controversies.

The discussion groups found strong consensus on the need for annual reporting with several components required, including the following:

- functional assessments,
- preference for limiting the guardianship,
- the use of annual plans, and
- inclusion of related reports, such as those required by the Social Security Administration or the Department of Veterans Affairs.<sup>74</sup>

In essence, the groups envisioned more finely-tuned guardianship orders, supplemented by annual guardianship plans with clear goals, steps, and desired outcomes that would serve as the measures used in the monitoring process. The groups also agreed strongly on the need for better data collection regarding basic case information, including compliance with required deadlines for submitting plans and reports.<sup>75</sup>

The most controversial aspect of monitoring was the question of who does it. The groups discussed several possibilities, including requiring that the hands-on task of monitoring be done by trained court personnel only, allowing the use of volunteers, or allowing the function to be contracted out to public or private organizations. Although recognizing that the ultimate responsibility must rest on the shoulders of the court, the conferees called for further research on the possible options for implementing monitoring systems.<sup>76</sup> A related, controversial issue concerned whether to require audits of annual financial reports by certified public accountants. Such a requirement would substantially raise

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72. *Id.*

73. *Id.* at 927.

74. *Wingspan Recommendations*, *supra* n. 21, at 606 (Recommendation 52).

75. *Id.* (Recommendation 53).

76. *Id.* at 607 (Recommendation 58).

the level of rigor required in financial reports and their review, but questions were raised about whether all guardians could be held to the same standard, the cost of auditing, the need to evaluate the financial report in the context of the personal circumstances of the ward, and the efficacy of alternatives. Consensus was not reached on the subject.

The training and qualifications of judges also dominated much of the discussion of monitoring. The groups decidedly favored judicial specialization to ensure that judges who handle guardianship matters have high levels of expertise and experience. Going a step further, the groups also recognized the need for public education to convey the importance of guardianship monitoring. They recommended that the recently-formed consortium of groups referred to as the National Guardianship Network take the lead in conducting such a campaign.<sup>77</sup>

#### F. Agency Guardianship

The sixth topic, agency guardianship, covered the roles and responsibilities of a range of guardianship service providers that may be more precisely broken down into three groups: public guardians (for example, publicly funded guardianship providers), agency guardians (both for-profit and not-for-profit entities that provide guardianship services for a fee), and professional guardians (for example, individuals who provide guardianship services to non-family members for a fee).

Professor Alison Barnes's<sup>78</sup> article, *The Virtues of Corporate and Professional Guardians*,<sup>79</sup> examines the nature and role of the latter two groups above, though her analysis and conclusions apply equally as well to public guardian services. As did the discussion in the working groups, the Article focuses heavily on (1) identifying the appropriate use of these forms of guardianship services, (2) identifying the characteristics of quality and effective strategies for ensuring high quality professional guardianship services, and, in particular, (3) the need to avoid conflicts of interest that arise when guardians provide *other services* such as housing, medical care, or social services. Indeed, a specific

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77. *Id.* (Recommendation 57).

78. Associate Professor of Law at Marquette University Law School in Milwaukee, Wisconsin, and Editor of *Elder's Advisor*.

79. Alison Barnes, *The Virtues of Corporate and Professional Guardians*, 31 *Stetson L. Rev.* 941 (2002).

recommendation adopted by the conferees would ban the appointment of any individual or agency guardian that provides other direct services to the ward.<sup>80</sup>

The working groups consistently recognized the need to fund high-quality, public guardianship options to serve those lacking the resources to pay private guardians. Those in need of guardians who have family involved or who have nominated, by advance directive, a particular person to serve as guardian should be able to rely upon those resources, with the preference given to nominees. Those with financial resources but with *no* family or with families in dissension should have professional guardians appointed.

The Agency Guardianship working groups consistently supported the adoption of minimum standards of practice for guardians, using the National Guardianship Association standards and ethical code as models. They also supported licensure, certification, or registration of professional guardians. Other issues in the groups' deliberations generated an appreciation for the complexity of the matter but no consensus on a direction for reform. For example, there are many circumstances that arise in which the involvement of a public guardian may be inappropriate or abused, as in the appointment of a guardian merely for purposes of nursing-home admission. Skewed funding incentives, regulatory impediments, or liability concerns may strongly influence institutional behavior in these cases. A proper response clearly requires action far beyond changes in guardianship policy and procedures.

Finally, the conferees also supported a simple-but-novel agency-guardianship recommendation that one of the functions of public guardianship programs should be to provide broad-based information and training aimed at providing education on the guardianship system and promoting less-intrusive alternatives to guardianship (and thus, reducing the case-load demands on public guardians).

### *III. WHAT IS NEXT? — THE HOPE, INTENT, AND CHALLENGE OF WINGSPAN*

Some guardianship experts submit that, although we have come a long way legislatively, we have moved very little in practice and in bettering the lives of vulnerable wards and

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80. *Wingspan Recommendations*, *supra* n. 21, at 604 (Recommendation 47).

proposed wards. In truth, we have little data to refute or substantiate this. Statistics are scant. The paucity of research makes it hard to step back and assess the results of the guardianship-reform efforts or determine where to go from here.

The hope of the 2001 Wingspan Conference is that it will be a call to revitalized advocacy by institutional, professional, and consumer constituencies interacting with the guardianship system. The intent of Wingspan is to move policy and practice ahead, with the recommendations serving as an effective map and stimulus, guiding the emerging National Guardianship Network. The challenge of Wingspan is the implementation of its recommendations.

A first step in implementation is the support and backing of the National Guardianship Network, which has emerged during the past year as a vehicle with the potential to identify and generate quality improvements in national guardianship policy and practices. Although in its infancy, the network includes several 2001 Wingspan Conference co-sponsors as well as the National Center for State Courts and Special Advocates for the Elderly. A second step in implementation will be to sustain the visibility of Wingspan's Recommendations by assuring that they are spread among the fifty state legislatures and presented to public and private agencies, governmental bodies, and consumer groups. The judgment of whether the 2001 Wingspan Conference is successful may require the collective assessment of a future national-guardianship working conference perhaps another decade down the road.