

THE FOURTH NATIONAL GUARDIANSHIP SYMPOSIUM: AN INTRODUCTION

David English[†]

This issue of the Syracuse Law Review contains the proceedings of the Fourth National Guardianship Summit, an interdisciplinary online conference with some 125 participants which was held in May 2021 and hosted by the Syracuse University College of Law. In addition to this Introduction, this issue of the Law Review contains the Recommendations approved by the Summit attendees, and the articles prepared for the Summit. The theme of the Fourth Summit was Maximizing Autonomy and Ensuring Accountability. The Recommendations fit this theme, including Recommendations to enhance the rights of persons subject to guardianship,¹ to improve and increase the use of supported decision-making,² to increase the use of limited guardianship, including the possible elimination of plenary guardianship,³ to rethink guardianship monitoring,⁴ to reduce tensions between fiduciary roles,⁵ and to create and fund a court improvement program for adult guardianship.⁶ The Recommendations and other details of the Fourth Summit are best considered after a discussion of the history of the prior three conferences.

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[†] W. F. Fratcher and Earl L. Jenkins Professor of Law, University of Missouri; Chair, National Guardianship Network, 2021–2022. The author thanks David Hutt, Professor Nina A. Kohn, Elizabeth Moran, and Charles Sabatino for their helpful comments.

1. Discussed *infra* text accompanying notes 51–71.
2. Discussed *infra* text accompanying notes 72–95.
3. Discussed *infra* text accompanying notes 96–114.
4. Discussed *infra* text accompanying notes 115–139.
5. Discussed *infra* text accompanying notes 140–158.
6. Discussed *infra* text accompanying notes 159–171.

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I. THE FIRST THREE CONFERENCES & THEIR IMPACT

The Fourth National Guardianship Summit was held during the media frenzy concerning the conservatorship case of pop star Britney Spears, but this timing was coincidental. The guardianship summits have a history extending back more than three decades. Responding to deficiencies identified in the 1987 Associated Press report, *Guardians of the Elderly: An Ailing System*,⁷ in 1988, the First National Guardian Symposium was held. Sponsored by the American Bar Association, the first conference was held at the Wingspread conference center, a Frank Lloyd Wright designed facility in Racine, Wisconsin. The conference produced a report officially entitled *Guardianship: An Agenda for Reform*,⁸ but because of the hospitable facility where the conference was held, the report quickly became known as the Wingspread Report. The Wingspread Report contains thirty-one recommendations to better safeguard rights while at the same time providing for the needs of individuals with diminished capacity.⁹

The Wingspread Report had considerable influence. Over the subsequent decade, there were numerous “changes in state laws involving improved due process, a more functional determination of

7. See FRED BAYLES & SCOTT MCCARTNEY, *GUARDIANS OF THE ELDERLY: AN AILING SYSTEM*, reprinted in SELECT COMMITTEE ON AGING, *ABUSES IN GUARDIANSHIP OF THE ELDERLY AND INFORM: A NATIONAL DISGRACE*, H.R. REP. NO. 100-639, at 13 (Dec. 1987), <https://files.eric.ed.gov/fulltext/ED294080.pdf>.

8. See Am. Bar Ass’n, *Guardianship: An Agenda for Reform*, 13 MENTAL & PHYSICAL DISABILITY L. REP. 271 (1989) [hereinafter Wingspread Report].

9. See Sally Hurme & Erica Wood, Symposium, *Third National Guardianship Summit: Standards of Excellence, Introduction*, 2012 UTAH L. REV. 1157, 1158–60 (summarizing discussion).

capacity not based on labels or age, use of less restrictive alternatives, and greater guardian accountability.”¹⁰ Significant portions of the Wingspan recommendations were also incorporated into the 1997 revision of the Uniform Guardianship and Protective Proceedings Act (UGPPA),¹¹ although some, including mandatory appointment of counsel, remained to be achieved.¹²

The Second National Guardianship Conference assembled in 2001 at Stetson Law School, whose law review devoted a special issue to the conference proceedings, including the conference recommendations¹³ and background articles.¹⁴ This conference, known as Wingspan, “identified sixty-eight steps in education, training, practice, data collection, funding and research to improve the adult guardianship process.”¹⁵ Among the impacts of Wingspan was the drafting of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, completed in 2007 and since enacted in forty-six states.¹⁶

The first two conferences dealt with a wide array of issues. The Third National Guardianship Symposium, which was held at the University of Utah in 2011, focused on the development of post-

10. *Id.* at 1160.

11. See David M. English, *Amending the Uniform Guardianship and Protective Proceedings Act to Implement the Standards and Recommendations of the Third National Guardianship Summit*, 12 NAELA J. 33, 35–36 (2016) (providing a brief discussion of the portions of the Wingspan recommendations that were incorporated into the 1997 revision of the UGPPA); see also David M. English & Rebecca C. Morgan, *The Uniform Guardianship and Protective Proceedings Act (1997)*, 11(2) NAELA Q. 3 (1998) (providing a longer discussion of the portions of the Wingspan recommendations that were incorporated into the 1997 revision of the UGPPA).

12. Under the 1997 Act, the enacting jurisdiction was given a choice between mandatory and discretionary appointment of counsel. See UNIF. GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT §§ 305 (guardians), 406 (conservators) (UNIF. L. COMM’N 1997).

13. See generally *The Second National Guardianship Conference: Recommendations*, 31 STETSON L. REV. 595 (2002).

14. See generally A. Frank Johns & Charles P. Sabatino, *Wingspan – The Second National Guardianship Conference: Introduction*, 31 STETSON L. REV. 573 (2002) (summarizing the articles prepared for the conference).

15. Hurme & Wood, *supra* note 9, at 1159–60.

16. See *id.* at 1160 n.17; see also English, *supra* note 11, at 36; ADULT GUARDIANSHIP & PROTECTIVE PROCEEDINGS JURISDICTION ACT (UNIF. L. COMM’N 2007); *Adult Guardianship Protective Proceedings Jurisdiction Act Enactment History*, UNIF. LAW COMM’N, (last visited Feb. 25, 2022) <https://www.uniformlaws.org/committees/community-home?communitykey=0f25ccb8-43ce-4df5-a856-e6585698197a> (providing a list of jurisdictions that have enacted the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act).

appointment standards for guardians of adults. Building on prior work on this issue,¹⁷ the Summit participants approved forty-three standards of practice for guardians, twenty-one recommendations directed more at courts, legislators, and guardianship organizations, and six recommendations directed at how to best implement the Summit results. The Summit's Standards and Recommendations¹⁸ and background articles were published in a special issue of the *Utah Law Review*.¹⁹

The influence of the Third Summit was significant. The National Guardianship Association Standards were revised in 2013 to incorporate the Summit results,²⁰ the Probate Court Standards were also revised in 2013,²¹ and the Uniform Law Commission incorporated many of the standards and recommendations into the Uniform Guardianship, Conservatorship, and Other Protective Proceedings Act (UGCOPAA),²² which was approved in 2017. Finally, between 2013 and 2020, several states formed WINGS (Working Interdisciplinary Network of Guardianship Stakeholders) with funding at various points in time from the State Justice Institute, the Borchard Foundation Center on Law and Aging, and the Administration for Community Living. Other states created similar networks on their own.²³ These are state level task forces that evaluate guardianship practice in individual states and develop action plans to

17. See Karen E. Boxx & Terry W. Hammond, *A Call for Standards: An Overview of the Current Status and Need for Guardian Standards of Conduct and Codes of Ethics*, 2012 UTAH L. REV. 1207, 1209-1222 (discussing the history of standards with a focus on NAT'L GUARDIANSHIP ASS'N, STANDARDS OF PRACTICE (2000, amended 2007). The NGA standards as amended through 2007 are reproduced as an appendix to the Boxx and Hammond article. See Boxx & Hammond, 2012 UTAH L. REV. at 1243-73.

18. See Symposium, *Third National Guardianship Summit: Standards and Recommendations*, 2012 UTAH L. REV. 1191.

19. See Hurme & Wood, *supra* note 9, at 1164-65 (providing summaries of the articles).

20. See NAT'L GUARDIANSHIP ASS'N, STANDARDS OF PRACTICE (4TH ed. 2013).

21. See NAT'L COLL. OF PROB. COURT JUDGES, NATIONAL PROBATE COURT STANDARDS (2013), <https://ncsc.contentdm.oclc.org/digital/collection/spcts/id/240>.

22. See English, *supra* note 11, at 37, app. A (describing the process by which the 2011 Summit results were incorporated into the 2017 UGCOPAA).

23. See Erica F. Wood, *Taking WING: Next Steps in Guardianship Reform*, 23 EXPERIENCE 4, 5-6 (2013), <https://www.americanbar.org/content/dam/aba/administrative/law-aging/2020-wings-briefing-paper>.

advance reform and promote less restrictive options.²⁴ By 2021, there were approximately twenty-five active WINGS states.²⁵

II. THE FOURTH SUMMIT

The Fourth Summit was organized by the National Guardianship Network (NGN), which is a group of 14 national organizations involved with guardianship.²⁶ The lead organizers were the National Disability Rights Network (NDRN) and the ABA Commission on Law and Aging. Significant financial support was provided by the State Justice Institute and the Borchard Foundation, Center on Law & Aging. Operational planning for the conference was supervised by the Summit Organizing Committee chaired by David Hutt of NDRN.

Each of the fourteen NGN members were entitled to appoint up to five delegates to attend and vote at the Summit. Delegates were also appointed by ten other groups interested in guardianship.²⁷ The discussion was greatly enriched by the attendance of several family guardians and, due to the online format, international observers. Total attendance was approximately 125.

The purpose of the conference was to develop consensus recommendations on the future development and reform of state guardianship and conservatorship systems within the broad theme of

24. See AM. BAR ASS'N COMM'N ON LAW & AGING, WINGS BRIEFING PAPER: ADVANCING GUARDIANSHIP REFORM & PROMOTING LESS RESTRICTIVE OPTIONS 10 (2020).

25. See *State WINGS*, AM. BAR ASS'N (Dec. 23, 2021), https://www.americanbar.org/groups/law_aging/resources/wings-court-stakeholder-partnerships0/state-wings (list of WINGS), <https://www.americanbar.org/content/dam/aba/administrative/law-aging/2020-wings-briefing-paper>.

26. The fourteen members of the NGN in alphabetical order are the ABA Commission on Law and Aging, the ABA Section of Real Property, Trust and Estate Law Section, the AARP Public Policy Institute, Advancing States, the Alzheimer's Association, the American College of Trust and Estate Counsel, the Center for Guardianship Certification, the National Academy of Elder Law Attorneys, the National Association of Protective Services Agencies, the National Center for State Courts, the National Center on Elder Abuse, the National College of Probate Judges, the National Disability Rights Network, and the National Guardianship Association.

27. The Arc of the United States; the American Association on Intellectual and Developmental Disabilities; the American Civil Liberties Union; the Autistic Self-Advocacy Network; the Center for Public Representation; Justice in Aging; the Michigan Elder Justice Initiative; the National Association of Councils on Developmental Disabilities; Quality Trust for Individuals with Disabilities; and the National Association to Stop Guardianship Abuse.

Maximizing Autonomy and Ensuring Accountability.²⁸ All twenty-two final recommendations were passed with near unanimity.²⁹

A. Pre-Summit Information Gathering

During the year prior to the Summit, several of the NGN organizations conducted meetings with their delegates and other members to gain input on issues to be addressed at the Summit. A focus group discussion with seven family guardians was also conducted. Among the findings:

- While recognizing the importance of the process, most of the family guardians had mixed feelings about guardianship.
- None of the family members had petitioned the court for full or partial restoration of rights.
- Guardians struggle to differentiate between their parental role and their guardian role.
- Most participants have had a positive experience overall with the court system.
- The participants were concerned about financial burdens, particularly the costs of the petition and court process.
- Guardians find the one-size-fits-all approach some states take to guardianship proceedings to be problematic.
- The family guardians were conflicted about wanting to protect their family member's rights and were personally worried their rights in making decisions and other aspects of helping their family member will be restricted. On the other hand, they believe that the rights to legal representation approved by the individual under guardianship is a right in need of more protection.
- The fact that guardianship laws are passed at the state level, and therefore vary from state to state, is challenging.
- Views on supported decision making are generally positive, especially among those who have experienced it.
- The number one piece of advice for others is to seek out those who have been guardians.

28. *The Fourth National Guardianship Summit: Maximizing Autonomy and Ensuring Accountability*, SYRACUSE UNIV. COLL. OF LAW, <http://law.syr.edu/academics/conferences-symposia/the-fourth-national-guardianship-summit-autonomy-and-accountability> (last visited Feb. 1, 2022) (providing a statement of the Summit's purpose).

29. *Fourth National Guardianship Summit Standards & Recommendations*, 72 SYRACUSE L. REV. 29, 29–40 (2022).

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- Sentiments toward the role that school systems play in guardianship and transition lean negative.
- The family guardians encourage others to understand that plenary guardianship is not the only answer and to explore minimally restrictive conditions.
- All of the guardians worried about what would happen after they died or were not able to fulfill their duties as guardian.³⁰

B. Summit Format

The conference proper began on Monday, May 10, 2021, with a plenary session for all participants. There were short videos or oral presentations by the authors of each of the background papers. Professor Israel Doron then gave a keynote address entitled “The Tale of Two Guardianships.” Following the keynote address, the plenary session concluded with a charge to the six working groups by the plenary facilitators, Louraine Arkfeld and Robert Fleischner.³¹

Each of the six working groups then met separately for the remaining time on Monday and on Tuesday and Wednesday to develop their three or four individual recommendations. These recommendations were then edited on Thursday by the Summit Organizing Committee to eliminate overlap and to assure consistency of terminology. The participants then reconvened in a plenary session on Friday to vote on and, where appropriate, amend the proposed recommendations. The Summit Organizing Committee then met the following week for final editing.

C. The Keynote Address

Professor Israel Doron of Haifa University gave the keynote address entitled “The Tale of Two Guardianships.” Professor Doron began with a quotation from an article by Professor Lawrence Frolik that compares guardianship reform efforts to the effect of waves crashing against a large rock:

Like the waves and the rock, reform efforts crash again and again against the rock of historical guardianship culture and practice with little real effect. Reform has modified the

30. LAKE RESEARCH PARTNERS, FINDINGS FROM ONE FOCUS GROUP AMONG GUARDIANS 2 (May 2021) (on file with *Syracuse Law Review*).

31. Louraine Arkfeld is a retired Presiding Judge of the Tempe Municipal Court and the Chair (2018–2021) of the ABA Commission on Law and Aging. Robert Fleischner was formerly the Assistant Director of the Center for Public Representation.

statutory landscape, has provided more sensible definitions of incapacity, better procedural protections for the alleged incapacitated person, and the opportunity to appoint limited guardians. But the rock of guardianship culture and practice still stands, and stands mainly unchanged.³²

Professor Doron then described his own journey in guardianship reform, which includes the writing of some basic source documents, including an article on the historical development of guardianship,³³ a comparative study revealing how guardianship is rooted in local cultures, legal traditions, and community characteristics,³⁴ an article on the significance of procedural justice in guardianship,³⁵ and an article on the importance of alternatives to guardianship.³⁶

Professor Doron then described two models of guardianship using stories. Story 1, based on the title to Professor Frolik's article, was entitled "There is no 'perfect.' There is only 'good.'" Here, the assumption is that despite all its limitations, issues, and problems, guardianship is in essence a good legal practice and, for many older people, a good legal framework. The challenge is to continue to work to improve it, refine it, and make it work better. A good guardianship system is based on eight principles:

1. Guardianship can be good for some people, it will never be perfect for all, and it cannot be perfect;
2. Guardianship is about protecting human rights, and about respecting autonomy, and personal values and preferences;
3. Guardianship is an instrument of last resort: all other alternatives must be exhausted first (and be available);
4. A good guardianship system requires data and evidence to support reforms;
5. A good guardianship system must be built from the bottom up and with participation by all players, not only professionals but also older persons and persons with disabilities;

32. Lawrence A. Frolik, Symposium, *Guardianship Reform: When the Best is the Enemy of the Good*, 9 STAN. L. & POL'Y REV. 347, 348 (1998).

33. See Israel Doron, *From Lunacy to Incapacity and Beyond: Guardianship of the Elderly and the Ontario Experience in Defining "Legal Incompetence,"* 19 HEALTH L. CAN. 95 (1999).

34. See Israel Doron, *Elder Guardianship Kaleidoscope: A Comparative Legal Perspective*, 16 INT'L J. L. POL'Y & FAMILY 368 (2002).

35. See Israel Doron, *Aging in the Shadow of Law: The Case of Elder Guardianship in Israel*, 16 J. AGING & SOC. POL'Y 59 (2004).

36. See Israel Doron & Iddo Gal, *The Emergence of Legal Prevention in Old Age: Findings from an Israeli Exploratory Study*, 21 J. CROSS-CULTURAL GERONTOLOGY 41 (2006).

6. Elder rights people must work with other groups such as disability rights groups and local groups;
7. Guardianship should be person centered and tailored; and
8. Attention must be paid to “the day after” - there is a need for monitoring and on-going reporting and reevaluation.

Professor Doron closed Story 1 by calling attention to the Uniform Guardianship, Conservatorship, and Other Protective Arrangements (UGCOPAA) as a model meeting the paradigm of a good guardianship system. But in making this endorsement, he noted there is a continued need for empirical data and evidence-based evaluation on how the UGCOPAA and other legislation are working and their real-life impact.

Story 2, entitled “Imagine There’s No Guardianship,” begins with the assumption that trying to build a good guardianship system is an illusion, that the various reform efforts are trying to fix something that is inherently wrong. Eventually, there will be no other choice than to abolish adult guardianship. As a substitute, Professor Doron proposed a Long-Term Legal Care Model which would allow an individual to nominate a legal caretaker and for a family or public legal caretaker to be appointed for those who have not made a nomination. The legal caretaker would not have complete authority but would share decision making with the individual. An appointment would not result in a loss of legal capacity.³⁷

Professor Doron concluded his presentation with the hope that the discussions, deliberations, and recommendations of the Summit will be yet another important milestone in the goal to reach a good guardianship system or eventually end guardianship itself.

D. The Working Groups

Each conference participant was assigned to one of six working groups. Each working group was provided with an issue brief based on one or two of the articles prepared for the Summit that were relevant to the group’s topics. A facilitator, assisted by a reporter, moderated each of the working group discussions. The six working groups and accompanying articles were:

³⁷ See generally Israel Doron, *From Elder Guardianship to Long-Term Legal Care*, 8 ETHICS, L. & AGING REV. 117 (2002) (describing the complete model).

1. Post-Adjudication Rights of Persons Subject to Guardianship;³⁸
2. Supported Decision-Making;³⁹
3. Limited Guardianship, Protective Arrangements, and Guardianship Pipelines;⁴⁰
4. Addressing Abuse by Guardians;⁴¹
5. Fiduciary Responsibilities and Tensions;⁴² and
6. Developing a Guardianship Court Improvement Program.⁴³

III. ANALYSIS OF FOURTH SUMMIT RECOMMENDATIONS

A. *The Preface*

Prefaces are sometimes ignored, but the Preface to the Fourth Summit Recommendations is quite important. In addition to summarizing the Summit process described above, the Preface clarifies some definitions. First, the term “guardianship” as used in the Recommendations is used broadly to encompass conservatorship and

38. Edwin M. Boyer & Rebecca C. Morgan, *Maximizing Autonomy & Ensuring Accountability Rights-Based Post-Appointment Issues in the “New Normal,”* 72 SYRACUSE L. REV. 41, 41–96 (2022).

39. Cathy E. Costanzo, Kristin Booth Glen & Anna M. Krieger, *Supported Decision-Making: Lessons from Pilot Projects*, 72 SYRACUSE L. REV. 97, 97–163 (2022); Morgan Whitlatch & Rebekah Diller, *Supported Decision-Making: Potential and Challenges for Older Persons*, 72 SYRACUSE L. REV. 164, 164–222 (2022).

40. Nina Kohn & David English, *Protective Orders and Limited Guardianships: Legal Tools for Sidelining Plenary Guardianship*, 72 SYRACUSE L. REV. 223, 223–53 (2022); Alison Hirschel & Lori Smetanka, *The Use & Misuse of Guardianship by Hospitals & Nursing Homes*, 72 SYRACUSE L. REV. 254, 254–88 (2022).

41. Sally Balch Hurme & Diane Robinson, *What’s Working in Guardianship Monitoring: Challenges and Best Practices*, 72 SYRACUSE L. REV. 289, 289–365 (2022); Morgan R. Thurston & Georgia J. Anetzberger, *Addressing Abuse By Guardians: The Roles of Adult Protective Services, Law Enforcement, and the Courts*, 72 SYRACUSE L. REV. 366, 366–418 (2022).

42. A. Frank Johns, Robert D. Dinerstein & Patricia E. Kefalas Dudek, *Guardianships vs. Special Needs Trusts & Other Protective Proceedings Arrangements: Ensuring Judicial Accountability & Beneficiary Autonomy*, 72 SYRACUSE L. REV. 419, 419–64 (2022); Catherine Anne Seal & Pamela B. Teaster, *An Argument and a Roadmap for Regulating the Court-Appointed Professional Fiduciary*, 72 SYRACUSE L. REV. 465–90 (2022).

43. Dari Pogach & Christopher Wu, *The Case for a Guardianship Court Improvement Program: Federal Funding to State Courts Could Improve Guardianship Systems & the Lives of Millions of Older Adults & People with Disabilities*, 72 SYRACUSE L. REV. 491, 491–532 (2022).

other corresponding terms used in the state.⁴⁴ The term includes both guardianship of the person and guardianship of the property.⁴⁵

Second, the term “state” or “states” includes the District of Columbia and all U.S. territories.⁴⁶ The term does not include the 574 federally recognized Indian Nations.⁴⁷ While Indian Nations may find the Summit Recommendations to be useful, the NGN did not want to presumptively conclude that it had adequately addressed Indian issues. As stated in the Preface, “The National Guardianship Network intends to reach out to Indian tribes to discuss the recommendations and how the recommendations may be applicable to various tribes.”⁴⁸

Third, the Preface contains a definition of “supported decision-making” which is copied from the work of Professor Robert Dinerstein.⁴⁹ The term is defined as “a series of relationships, practices, arrangements, and agreements, of more or less formality and intensity, designed to assist an individual with a disability to make and communicate to others decisions about the individual’s life.”⁵⁰

B. Working Group 1. Rights-Based Guardianships - Enhancing Rights of Persons Subject to Guardianship

The article by Edwin Boyer and Rebecca Morgan⁵¹ set the stage for Recommendations 1.1, 1.2, and 1.3. As stated in the article’s abstract, the authors do not attempt to address all post-appointment rights but focus on four: (1) a requirement that the post-appointment rights be listed and that the adult and the adult’s surrogates be informed of these rights

44. *Fourth National Guardianship Summit Standards and Recommendations*, *supra* note 29, at 29.

45. *Id.*

46. *Id.*

47. See NAT’L CONG. OF AM. INDIANS, TRIBAL NATIONS AND THE UNITED STATES: AN INTRODUCTION, 18 (Feb. 2020), <https://www.ncai.org/about-tribes> (listing number of Indian nations and explaining differing terminology). Indian Nation is one term among many. *Id.* at 11. Other terms in use include tribes, bands, pueblos, communities, and native villages. *Id.*

48. *Fourth National Guardianship Summit Standards and Recommendations*, *supra* note 29, at 30.

49. *Id.*; Johns et al., *supra* note 42, at 431 (citing Robert D. Dinerstein, *Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road From Guardianship to Supported Decision-Making*, 19 HUM.RTS.BRIEF 8, 10 (2011-12).

50. *Fourth National Guardianship Summit Standards and Recommendations*, *supra* note 29, at 30.

51. Boyer & Morgan, *supra* note 38.

; (2) the post-appointment rights of the adult to marry and to obtain a divorce; (3) the adult's right of visitation with others; and (4) the adult's right to seek termination of a guardianship.⁵²

The article makes note of the increasing number of states that have enacted comprehensive bills of rights.⁵³ The authors recommend that any such list include constitutional rights and other critical rights such as access to the courts, privacy, and dignity.⁵⁴

Concerning marriage and divorce, the article reviews the current state of the law, which can best be described as all over the map.⁵⁵ But one notable and recent trend, led by the UGCOPAA, is to require a specific court order before removing the right to marry.⁵⁶

Stimulated by publicity concerning celebrities such as the disc jockey Casey Kasem and the actor Peter Falk,⁵⁷ visitation of an individual under guardianship has been much discussed in recent years. Resolution of the issue requires consideration of the right of the adult subject to guardianship to interact with persons whom the adult chooses balanced against the need to protect the adult from abuse. The Boyer and Morgan article reviews the various statutory approaches to the issue of visitation in general and concludes with a discussion of the difficult visitation issues that have arisen due to COVID-19.⁵⁸

The Britney Spears conservatorship case highlights the difficulties individuals under guardianship can face in seeking to terminate their guardianship or remove a guardian, including lack of access to the court and inability to hire and pay their own counsel.⁵⁹

52. *Id.* at 47–92.

53. *See, e.g.*, FLA. STAT. ANN. § 744.3215(1) (West 2021); NEV. REV. STAT. ANN. § 159.328 (LexisNexis 2021); S.C. CODE ANN. § 62-5-304A (2021); TEX. EST. CODE ANN. § 1151.351 (West 2021).

54. Boyer & Morgan, *supra* note 38, at 92–95.

55. *Id.* at 92–93.

56. UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 310(a)(4) (UNIF. L. COMM'N 2017).

57. *See, e.g.*, Rick Anderson, *These Children of Celebrity Dads are Taking Their Stepmoms to Court*, L.A. TIMES (Mar. 16, 2016, 3:00 AM), <https://www.latimes.com/nation/la-na-elder-visitation-rights-20160315-story.html>.

58. Boyer & Morgan, *supra* note 38, at 79–83.

59. Journalistic publications on the Britney Spears case are numerous. *See, e.g.*, Ronan Farrow & Jia Tolentino, *Britney Spears's Conservatorship Nightmare*, NEW YORKER (July 3, 2021), <https://www.newyorker.com/news/american-chronicles/britney-spears-conservatorship-nightmare> (providing factual background for Britney Spears's conservatorship); *see also* Tristan Justice, *The #FreeBritney Movement Is Bigger Than Britney*, FEDERALIST (June 30, 2021), <https://thefederalist.com/2021/06/30/the-freebritney-movement-is-bigger-than-britney/> (discussing civil liberties issues in Britney Spears's conservatorship and

The Boyer and Morgan article recommends several statutory changes to better assure that the individual seeking restoration has access to the court, is represented by counsel of the individual's own choosing, and receives notice of the right to request termination or restoration.⁶⁰

Unlike the Boyer and Morgan article, which focuses on certain key rights, Working Group 1 identified many more rights. Recommendation 1.1 contains a non-exclusive list of rights that should be protected in order "to ensure dignity, privacy, autonomy, and the opportunity to fully participate in all decisions which affect them."⁶¹ The rights listed are "marriage, divorce, relationships and association, communication, due process and notice, voting, education, employment, health care (including reproductive health and end of life), place of residence, community integration, free practice of religion, and personal choices."⁶²

Recognizing that a thoughtful analysis of rights would take more time, Working Group 1 concluded that work on this topic should not conclude with the Fourth Summit but that the NGN should convene a task force to develop an enforceable bill of rights. Recommendation 1.1 provides that the task force membership should be broad-based. In addition to NGN members and other national disability and aging organizations, task force membership should include persons at risk or formerly subject to guardianship as well as family or professional guardians. In addition to developing an enforceable bill of rights, the task force is to identify inherent rights that (1) cannot be restricted, (2) can be restricted but not delegated, or (3) can be restricted but must be exercised consistent with the adult's preferences and values.

In his keynote address opening the Summit, Professor Doron emphasized the importance of procedural due process.⁶³ Recommendation 1.2 also recognizes the importance of due process. In all judicial proceedings that may impact any of an adult's rights to legal capacity, states and the courts must ensure meaningful due process. Recommendation 1.2 specifies several concrete steps to ensure meaningful due process, including: (1) the right to a qualified and compensated attorney; (2) reasonable notice in the adult's preferred language served in a manner that ensures timely receipt; (3)

how the Fourth Summit Recommendations and 2017 UGCOPAA might apply to her case).

60. Boyer & Morgan, *supra* note 38, at 93–94.

61. *Fourth National Guardianship Summit Standards and Recommendations*, *supra* note 29, at 30.

62. *Id.*

63. *See supra*, text accompanying note 35.

an impartial, valid and reliable assessment by a compensated and qualified person; and (4) protection of the adult's right to participate in the proceedings consistent with the adult's preferences.

Recommendation 1.3 addresses restoration. All state guardianship statutes provide for restoration but use of those procedures is not a practical possibility in many cases. This author, in discussing the issue of restoration in the context of the Britney Spears case, has stated:

[A]ll states feature statutes that allow for individuals to petition a court to terminate their guardianships, but practical problems present obstacles as seen in the Spears case. Does the individual know he can petition the court? Does he know how to hire an attorney? Does he have access to the funds to do so considering his finances are under someone else's control?⁶⁴

Recommendation 1.3 responds to these and many other concerns. States should have clearly defined statutes, regulations, court rules, or policies setting forth procedures for restoration and evidentiary burdens and timelines.⁶⁵ The adult seeking restoration should have the right to a qualified and compensated attorney of the adult's own choosing.⁶⁶ In addition to a formal restoration procedure, the adult should be able to trigger the process informally, such as writing a letter to the court.⁶⁷ The adult should be given notice of the right to restore rights on a periodic basis.⁶⁸ More significantly, the court or other appropriate agency should periodically review the continued need for guardianship.⁶⁹ Finally, guardians, the courts, and lawyers should be trained on the rights restoration process.⁷⁰

Recommendation 1.3 specifies that the evidentiary standard for restoration should be by a preponderance of the evidence. This is lower than the clear and convincing evidence standard applying in some states and does not go as far as the UGCOPAA. Section 319 of the UGCOPAA provides that "[o]n presentation of prima facie evidence for termination of a guardianship for an adult, the court shall

64. Justice, *supra* note 59 (quoting author).

65. *Fourth National Guardianship Summit Standards and Recommendations*, *supra* note 29, at 31.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Fourth National Guardianship Summit Standards and Recommendations*, *supra* note 29, at 32.

order termination unless it is proven that a basis for appointment of a guardian . . . exists.”⁷¹

C. Working Group 2. Supported Decision-Making

Supported decision-making (SDM) is a significant and growing alternative to guardianship. As broadly defined in the Preface to the Summit Recommendations, SDM is “a series of relationships, practices, arrangements, and agreements, of more or less formality and intensity, designed to assist an individual with a disability to make and communicate to others decisions about the individual’s life.”⁷² SDM has also been more narrowly defined as a tool under which an individual with a disability selects advisors, such as friends, family, or professionals, to help the individual make and communicate decisions.⁷³ SDM arrangements may be either informal or made pursuant to a signed agreement between the individual and “supporters.”

Assisting an individual in making decisions is not a new concept. That is a traditional function of attorneys, accountants, social workers, and other counseling professions. What is distinctive about SDM is that (1) such assistance is provided to an individual with a disability, in many cases as an alternative to guardianship; and (2) such assistance is provided in an organized manner.

Both articles assigned to Working Group 2 discuss the history of SDM.⁷⁴ SDM had its origins in Sweden⁷⁵ and in several of the Canadian provinces.⁷⁶ But SDM did not come into prominence until the approval in 2006 of the UN Convention on the Rights of Persons with Disabilities (CPRD). The CPRD has to date been ratified by or

71. UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 319(d) (UNIF. L. COMM’N 2017).

72. *Fourth National Guardianship Summit Standards and Recommendations*, *supra* note 29, at 30.

73. *Supported Decision-Making: Frequently Asked Questions*, ACLU, <https://www.aclu.org/other/faqs-about-supported-decision-making> (last visited Feb. 2, 2022); https://www.aclu.org/sites/default/files/field_document/faq_about_supported_decision_making.pdf.

74. Whitlach & Diller, *supra* note 39, at 169–203; Constanzo et al., *supra* note 39, at 100–11.

75. See Torbjörn Odlöv, *Swedish Guardianship Legislation*, NAT’L GUARDIANSHIP ASS’N, www.guardianship.org/IRL/Resources/Handouts/Guardianship%20and%20Human%20Rights_Supplement.pdf (last visited Feb. 3, 2022).

76. See Shih-Ning Then, *Evolution and Innovation in Guardianship Laws: Assisted Decision-Making*, 35 SYDNEY L. REV. 133, 149–54 (2013) (analyzing the various Canadian statutes in detail).

acceded to by 182 countries although not by the US.⁷⁷ The key provision of the CPRD relevant to guardianship is Article 12(2)–(3). Article 12(2) provides that disability may not be used as the basis for diminishing an individual’s legal capacity.⁷⁸ Article 12(3) mandates that SDM or other equivalent supports be provided.⁷⁹

In addition to the CPRD, a major impetus behind the recognition of SDM in the US was the founding in 2014 of the National Resource Center for Supported Decision-Making. The Center has acted as a catalyst for the promotion of SDM in the individual states. Administered under contract by two universities and a public advocacy group, the work of the Center is funded by the Administration on Community Living (ACL), an agency of the US Department of Health and Human Services.⁸⁰

Beginning with the Texas SDM statute in 2015, at least nineteen states have enacted statutes authorizing SDM.⁸¹ One group of statutes follow the Texas model and address SDM in detail and contain a statutory form of agreement.⁸² But the statutes with SDM form agreements otherwise vary in numerous details.⁸³ A less expansive approach is to follow the lead of the UGCOPAA and refer to SDM

77. See *Convention on the Rights of Persons with Disabilities*, UNITED NATIONS, <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html> (last visited Feb. 3, 2022).

78. The official text states: “(2) States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all respects of life.” *Convention on the Rights of Persons with Disabilities*, art. 12(2), Mar. 30, 2007, 2515 U.N.T.S. 10.

79. The official text states: “(3) States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.” *United Nations Convention on the Rights of Persons with Disabilities* art. 12(3), Mar. 30, 2007, 2515 U.N.T.S. 10.

80. For the work of the National Resource Center, see its website, supporteddecisionmaking.org.

81. See Diller & Whitlatch, *supra* note 39, at 198–99 (discussing the different statutory approaches); see also TEX. EST. CODE ANN. § 1357.001–1357.102 (West 2021).

82. See, e.g., ALASKA STAT. §§ 13.56.010–13.56.195 (2021); DEL. CODE ANN. tit. 16, §§ 9401A–9410A (2021); D.C. CODE §§ 7-2131–7-2134 (2021); IND. CODE ANN. §§ 29-3-14-1 – 29-3-14-13 (West 2021); NEV. REV. STAT. ANN. §§ 162C.010–162C.330 (LexisNexis 2021); N.D. CENT. CODE §§ 30.1–36 (2021); 42 R.I. GEN. LAWS §§ 66.13-1–66.13-10 (2021); WIS. STAT. §§ 52.10–52.32 (2021).

83. See Zachary Allen & Dari Pogach, *More States Pass Supported Decision-Making Agreement Laws*, 41 BIFOCAL A.B.A. COMM. ON L. & AGING 159, 160 (2019) (discussion of SDM form agreements); see also Nina A. Kohn, *Legislating Supported Decision-Making*, 58 HARV. J. LEGIS. 313 (2021) (providing a critical examination of the detailed SDM statutes).

agreements solely as a “less restrictive alternative” to the appointment of a guardian.⁸⁴

Perhaps the statutes are the cart before the horse, however. There is a lack of empirical evidence on the effectiveness of SDM.⁸⁵ There is a need for empirical data which could then be used to construct the most appropriate statute. Fortunately, numerous SDM projects are discussed and assessed in the two articles on SDM prepared for the Summit.⁸⁶

The Fourth Summit participants approved four recommendations intended to further enhance the use of SDM. Recommendation 2.1 encourages the states, federal government, and NGN organizations to provide education, training, and outreach concerning SDM and contains a detailed list of the professionals and others who need such education and training.⁸⁷ Of particular note is the portion of the recommendation emphasizing the need to target such education, training, and outreach to marginalized populations and to individuals across the span of age and diversity of disabilities.⁸⁸

Recommendation 2.2 emphasizes the need for governments and organizations to promote and expand sustainable funded pilot projects targeting diverse populations.⁸⁹ The Recommendation also encourages the development of best practices and contains a helpful list of the diverse populations for whom SDM should be available, including older adults at risk of guardianship.⁹⁰

84. *See, e.g.*, MO. REV. STAT. § 475.075.13(4) (2021); *see also* UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT §§ 301(a)(1)(A), 310(a)(1) (UNIF. L. COMM’N 2017) (guardian of the person); *see also id.* §§ 401(b)(1)(A), 411(b)(1) (conservator of the estate); *see also id.* §§ 502(a)(1), 503(a)(1)(A) (court intervention as alternative to appointing guardian or conservator).

85. *See* Nina A. Kohn et al., *Supported Decision-Making: A Viable Alternative to Guardianship?*, 117 PENN ST. L. REV. 1111, 1128–29 (2013).

86. The Constanzo, Glen & Krieger article discuss the (1) Massachusetts Center for Public Representation and Nonotuck Supported Decision-Making Pilot; (2) The Massachusetts Supported Decision-Making Incubator Pilots; (3) the Georgia Supported Decision-Making Pilot; and (4) the Supported Decision-Making New York (SDMNY) Pilot. *See* Constanzo et al., *supra* note 39, at 111–60. The Whitlatch & Diller article looks at a sample of US case files on adult restoration of rights petitions, at the work of Australia’s Cognitive Decline Partnership Center, and at Israel’s MARVA SDM Project. Diller & Whitlatch, *supra* note 39, at 203–14.

87. *Fourth National Guardianship Summit Standards and Recommendations*, *supra* note 29, at 32.

88. *Id.*

89. *Id.* at 33.

90. *Id.*

Recommendation 2.3 encourages the enactment of statutes, court rules, policies, and processes to encourage SDM as an alternative to guardianship.⁹¹ It requires that before a guardianship can be imposed, petitioners demonstrate that SDM has been tried or state why it is not feasible and that the court find by clear and convincing evidence that SDM is not feasible.⁹² In addition, it requires that courts institute procedures for periodic review of the need for continued guardianship, which would include a determination that SDM and other less restrictive alternatives are not feasible.⁹³

Recommendation 2.4 may be the most significant among the four. It encourages the Department of Justice and other federal and state agencies to recognize SDM as a reasonable accommodation under the Americans with Disabilities Act in supporting individuals in making their own decisions and retaining their right to do so.⁹⁴ There is a long-standing argument that guardianship appointments in particular cases violate the ADA, but there is a lack of case law supporting this position.⁹⁵ Recommendation 2.4, if implemented, would create an appropriate baseline.

D. Working Group 3. Limited Guardianship, Protective Arrangements, & Guardianship Pipelines

A limited guardian is a guardian appointed with less than maximum powers. A protective arrangement, sometimes called a single transaction, is a court intervention short of appointing a guardian for a person for whom a guardian could be appointed. Common examples of protective arrangements include a court-ordered health care decision and the court-ordered creation of a special

91. *Id.* at 33–34.

92. *Fourth National Guardianship Summit Standards and Recommendations*, *supra* note 29, at 33–34.

93. *Id.* The Recommendation largely tracks the comparable provisions of the UGCOPAA but with a greater focus on SDM. The UGCOPAA addresses all alternatives to guardianship. *See* UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT §§ 302(b)(4) (petition requirements), 310(a)(1) (order of appointment), 317(b) (annual review) (UNIF. L. COMM’N 2017).

94. *Fourth National Guardianship Summit Standards and Recommendations*, *supra* note 29, at 34.

95. *See* Alexandra Wallin, *Living in the Gray: Why Today’s Supported Decision-Making-Type Models Eliminate Binary Solutions to Court-Ordered Guardianships*, 57 SAN DIEGO L. REV. 433 (2020); Leslie Salzman, *Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans With Disabilities Act*, 81 U. COLO. L. REV. 157 (2010).

needs trust.⁹⁶ Protective arrangements, which are largely the invention of the 1969 Uniform Probate Code and successor uniform acts dealing with guardianship,⁹⁷ are less well known than limited guardianship. But although better known, limited guardianship is little used.⁹⁸ This lack of use continues despite the preference most states grant to limited guardianship. The Kohn and English article discusses how the UGCOPAA creates systems that incentivize the use of limited guardianship, protective arrangements, and other alternatives to guardianship.⁹⁹ Recommendation 3.1 encourages states to enact the UGCOPAA and lists key provisions of the UGCOPAA, many of which incentivize the use of limited guardianships, protective arrangements, and other alternatives over plenary guardianship.¹⁰⁰

But Recommendation 3.2 goes even further by calling for the abolition of plenary guardianship.¹⁰¹ Instead, all guardianships would be tailor made. More specifically, the individual should retain such key rights as the right to vote and marry unless the court makes a specific finding that a restriction is essential.¹⁰² In addition, Recommendation 3.2 mandates review of existing plenary guardianship orders to determine if continuation of the guardianship is justified, with the presumption being that continuation is not warranted.¹⁰³ Although the UGCOPAA makes obtaining a plenary guardianship more difficult, as long as plenary guardianship remains the default, the concern about overuse of plenary guardianship will continue.

96. See Kohn & English, *supra* note 40, at 236–37 (describing alternatives to guardianship of the person and guardianship of the property).

97. See *id.* at 228–29 (describing the history of protective arrangements).

98. See *id.* at 235.

99. *Id.* at 240–49.

100. *Fourth National Guardianship Summit Standards and Recommendations*, *supra* note 29, at 34–35.

101. *Id.* at 35.

102. *Id.* Other rights listed in Recommendation 3.2 for which specific findings are required are association, free practice of religion, and personal choice. *Id.* UGCOPAA § 310(a) requires a specific finding to restrict an individual’s right to marry or to vote. See UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 310(a) (UNIF. L. COMM’N 2017). A Missouri statute adds driving in addition to voting and marriage. See MO. ANN. STAT. § 475.078,4 (West 2021).

103. Recommendation 3.2 does not go into detail on how such a review hearing should be conducted but much of that detail could be gathered from Recommendation 1.3, which deals with restoration hearings in individual cases. *Fourth National Guardianship Summit Standards and Recommendations*, *supra* note 29, at 35.

Sometimes plenary guardianship is overused because the family's or petitioner's attorney lacks knowledge of alternatives. But many guardianships are instituted for the convenience of or at the insistence of third parties. A persistent and long-term problem has been the appointment of guardians for the convenience of hospitals, which is the topic of the Hirschel and Smetanka article.¹⁰⁴ Under pressure to transfer patients of diminished capacity to a different level of care or to another facility because the patient has exhausted the approved length of stay under Medicare, or for other reasons such as a desire to get Medicaid to pay the bill, hospitals will initiate the petition for guardianship so that the guardian can arrange for the transfer of the patient or file the Medicaid application.¹⁰⁵ Even though the need may be temporary¹⁰⁶ and might be satisfied by appointment of a temporary emergency guardian, a plenary and permanent guardian will usually be appointed.¹⁰⁷ Hirschel and Smetanka discuss a variety of ways the appointment of plenary guardians could be reduced in this context. In addition to emergency or limited appointments, they mention protective orders, next-of-kin searches, and temporary medical treatment guardians.¹⁰⁸

But another reason for the overuse of plenary guardianship could be lack of education about alternatives. Recommendation 3.4 calls for accessible, practical, and tailored training for individuals and entities known to be pipelines to plenary guardianship, including the hospitals and nursing homes discussed in the Hirschel and Smetanka article but also many others.¹⁰⁹ The training would address "(1) the impact of guardianship; (2) legal and ethical obligations to exhaust alternatives to guardianship before pursuing it; (3) [alternatives to guardianship . . . and (4) orders that are limited in scope and limited in time."¹¹⁰

104. See Hirschel & Smetanka, *supra* note 40.

105. See *id.* at 256–62. Other reasons given by the authors for the initiation of guardianship include freeing beds for patients with more acute needs, and fear of negative consequences resulting from unsafe or inappropriate discharges. *Id.* at 259–61.

106. "Unfortunately, for patients hospitalized for all manner of emergencies, surgery, or illness, the assessment of capacity to determine what comes next likely occurs very promptly after admission on what might be the patient's worse day. Trauma, medications, urinary tract infections, electrolyte imbalances, dehydration, or other short-term conditions can all diminish patient's capacity even if the individual's cognitive abilities will likely improve." *Id.* at 256–61.

107. See *id.*

108. See Hirschel & Smetanka, *supra* note 40, at 275–81.

109. *Fourth National Guardianship Summit Standards and Recommendations*, *supra* note 29, at 35–36.

110. *Id.*

Overuse of plenary guardianship could also be reduced if states had effective diversion programs whereby cases could be diverted before the appointment of a plenary guardian becomes almost a certainty. Recommendation 3.3 recommends the creation of such diversion programs, and then makes suggestions on how they might be structured and what they might address.¹¹¹ A multi-disciplinary approach is one possibility, with the program operated in cooperation with schools, adult protective services, healthcare, aging and disability service providers, and the legal community.¹¹² The diversion program should include education on and facilitation of the use of specific alternatives to guardianship, including ongoing training and public information.¹¹³ The creation of diversion programs is not a new concept. It was also recommended in the original Wingspread Report.¹¹⁴

E. Working Group 4. Rethinking Monitoring and Addressing Abuse by Guardians

The article by Hurme and Robinson defines guardianship monitoring as “a continuum or progression of post-appointment events that serve to protect the person under guardianship.”¹¹⁵

The article by Hurme and Robinson is a comprehensive survey of the existing state of guardianship monitoring. As stated in the National Probate Court Standards (NPCS), the goals of monitoring are to (1) ensure that required plans, reports and other documents are filed on time; (2) review promptly the contents of the filed documents; (3) independently investigate the well-being of the respondent and the status of the estate; and (4) assure the well-being of the respondent and the proper management of the estate, including enforcement of the terms of the guardianship order.¹¹⁶ Using the NPCS standard as a template, Hurme and Robinson examine how the standard has been implemented. A particular strength of the article is its discussion of innovative approaches and the wealth of material on actual monitoring practices, much of it gathered in response to a 2020 survey.¹¹⁷ A

111. *Id.* at 35.

112. *Id.*

113. *Id.*

114. *See* Wingspread Report, *supra* note 8, at 279.

115. Hurme & Robinson, *supra* note 41, at 291.

116. NAT’L COLL. OF PROB. COURT JUDGES §3.3.17, *supra* note 21, at 70.

117. *See* Hurme & Robinson, *supra* note 41, at 305–58.

particular problem identified by the authors is the lack of adequate and consistent data collection on actual guardianship files.¹¹⁸

One reason for the courts to monitor guardians is to deter, discover, and redress abuse by guardians, which is the subject of the Anetzberger and Thurston article.¹¹⁹ As the article points out, responsibility for stemming abuse by guardians is not limited to the court system. Adult Protective Services (APS) and law enforcement also have a role. Unfortunately, although there is a significant amount of research on elder abuse in general, there is almost no research on abuse by guardians. In addition, collection of data by APS and law enforcement on abuse by guardians is even weaker than data collection by the courts.¹²⁰ There is a need for effective multisystem collaborations between the courts, APS, and law enforcement. The authors discuss current collaborations and make some recommendations.¹²¹

The Summit recommendations are consistent with the recommendations of the two sets of authors. Recommendation 4.1 deals with data collection.¹²² To gather timely data, the state's highest court should establish a multidisciplinary user group to review and adopt data standards.¹²³ Among the models that the user group should examine are the National Open Court Data Standards and the Conservatorship Accountability Project.¹²⁴

The remainder of Recommendation 4.1 and all of Recommendation 4.2 deal with various aspects of monitoring. The state's highest court should see that technology is developed and implemented that includes mechanisms to validate reports, flag potential problems, and track monitoring.¹²⁵ Forms should be uniform statewide, available in both hard copy and online, and in multiple languages.¹²⁶ Sample completed forms in plain language should be provided, and the instructions for preparing forms should be clear.¹²⁷

118. *See id.* Data collection is a long-standing issue. *See* Wingspread Report, *supra* note 8, at 278-79.

119. Thurston & Anetzberger, *supra* note 41.

120. *See id.* at 372-74.

121. *Id.* at 410-15.

122. *Fourth National Guardianship Summit Standards and Recommendations*, *supra* note 29, at 36.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Fourth National Guardianship Summit Standards and Recommendations*, *supra* note 29, at 36.

These forms should be drafted by a multidisciplinary user group reflective and inclusive of the community's diversity.¹²⁸ This group could also be tasked to advise on effective case management, develop and evaluate policy, conduct research, and budget.¹²⁹

The monitoring system should be person-centered and should require care and financial management plans that can serve as baselines for subsequent reports, which can be filed either electronically or on paper.¹³⁰ In addition to reports and accountings, the monitoring system should include in-person visits, verification of financial reports, review of the choice of guardian, and continued review of less restrictive options to enhance autonomy.¹³¹ In appropriate cases, the guardian's conduct should be investigated by an independent statewide entity, not solely by the local court.¹³²

Recommendation 4.3 addresses issues relating to the court review process.¹³³ There should be sufficient funding and advocacy measures to safeguard rights and augment the review process.¹³⁴ An in-person judicial review should be done annually, and the individual should be represented by a qualified attorney.¹³⁵ There should also be a grievance process for complaining about the guardian's conduct that is accessible, transparent, and effective, and which complies with the Americans with Disabilities Act and the Rehabilitation Act of 1973.¹³⁶ Finally, without supplanting the right to a lawyer, the state should establish an advocacy program using trained volunteers to advocate for the adult's rights and preferences that would be patterned after the Court-Appointed Special Advocate Program (CASA) for children.¹³⁷

Recommendation 4.4 turns to the guardian abuse issue and the need to develop effective collaboration among different

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Fourth National Guardianship Summit Standards and Recommendations*, *supra* note 29, at 37.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* See UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 127 (UNIF. L. COMM'N 2017) (describing the grievance process under the UGCOPAA); see also Hurme & Robinson, *supra* note 41, at 343 (providing a discussion of the UGCOPAA grievance process).

137. *Fourth National Guardianship Summit Standards and Recommendations*, *supra* note 29, at 37.

stakeholders.¹³⁸ It recommends that the Administration for Community Living take the lead, in partnership with other federal agencies, national aging and disability organizations, and Protection and Advocacy Agencies, to promote state and local collaborations to combat guardian abuse.¹³⁹ Such collaborations should (1) include the development of protocols for case reporting and management; (2) have membership from relevant groups, including adult protective services, law enforcement, the courts, and self-advocates or self-advocacy organizations; and (3) should educate professionals and the public about how to report abuse by guardians and how the problem will be addressed by the multiple systems involved.

F. Working Group 5. Addressing Fiduciary Responsibilities and Tensions

The articles assigned to this working group deal with two distinct topics. The paper by Johns, Dinerstein, and Dudek deals with the conflicts that can develop when more than one type of fiduciary is acting for the same beneficiary.¹⁴⁰ Relying on case studies, their paper addresses the tension that can develop between (1) a guardian and the trustee of a special needs trust;¹⁴¹ (2) between the beneficiary and beneficiary's supporters under an SDM and the trustee of a special needs trust;¹⁴² and (3) between a guardian and a representative payee under Social Security.¹⁴³ Tension may develop simply because the parties disagree about a particular decision. Or tension may develop because the fiduciaries have different fiduciary obligations. Should resort to the courts be required, the parties may encounter a jurisdictional thicket, with a different court having jurisdiction over a guardian than over a trustee.¹⁴⁴ With regard to conflicts between trustees and guardians, the authors recommend that state guardianship and trust statutes and the related uniform acts such as the UGCOPAA and the Uniform Trust Code be amended to close these jurisdictional gaps.¹⁴⁵

138. *Fourth National Guardianship Summit Standards and Recommendations*, *supra* note 29, at 37–38.

139. *Id.* at 37.

140. *See generally* Johns et al., *supra* note 42.

141. *Id.*, at 442–47.

142. *Id.*, at 447–51.

143. *Id.*, at 452–55.

144. *Id.*, at 435–42.

145. Johns et al., *supra* note 42, at 436–37.

The paper by Seal and Teaster deals with the issue of whether court-appointed professional fiduciaries should be licensed or certified.¹⁴⁶ Although their article contains an extensive review of the existing state of guardianship and guardian certification and licensing, the crux of their argument in favor of certification and licensing is found in a single sentence: “[a]gainst a rising need for guardians, an increase in the complexity of guardianship cases, and recent and current scrutiny concerning exploitation by guardians . . . it is critical that the quality of guardianship services be as high as possible.”¹⁴⁷ The authors recommend that individuals wishing to become professional guardians must obtain a license following an examination, that a suitable educational or experience threshold be imposed, and that professional guardians fulfill mandatory continuing education requirements.¹⁴⁸

Recommendation 5.1 follows the recommendations of authors Seal and Teaster. States should impose licensure or certification, or both, on court-appointed professional guardians, accompanied by sufficient funding to vet, train, test, and discipline these guardians.¹⁴⁹ Standards also should be established for education and training.¹⁵⁰ Given the number of tasks involved to establish the system, flexibility should be given to implementation.¹⁵¹

Recommendation 5.2 tracks the recommendation of the Johns, Dinerstein, and Dudek paper that the relevant uniform acts and other statutes and rules be amended to address gaps in subject matter jurisdiction that can arise when different types of fiduciaries are in conflict.¹⁵² Other guidance for minimizing the issue of conflict between different fiduciaries include (1) encouraging education about person-centered planning and SDM, options for alternative dispute resolution, and less restrictive alternatives; (2) making certain that services are delivered in the most integrated setting in compliance with the ADA; and (3) using a variety of tools, including mediation, eldercare coordination, Protection and Advocacy agencies, appointing

146. Seal & Teaster, *supra* note 42.

147. *Id.* at 478–79.

148. *Id.* at 488–90.

149. *Fourth National Guardianship Summit Standards and Recommendations*, *supra* note 29, at 38.

150. *Id.*

151. *See id.*

152. *See id.* at 38.

a guardian ad litem, and use of ABLE accounts and special needs trusts.¹⁵³

Recommendations 5.3 and 5.4 move beyond the topics in the articles to address different issues. Recommendation 5.3 encourages state courts and other stakeholders to provide training, education, and support to enhance autonomy and reduce reliance on approaches that restrict individual rights.¹⁵⁴ This should include providing information on less restrictive alternatives, supporting, educating, and training family and friends about guardianship issues, and establishing opportunities for volunteer lawyers, law students and other to assist with completing and submitting guardianship reporting forms.¹⁵⁵ Recommendation 5.3 also encourages more states to establish Working Interdisciplinary Networks of Guardianship Stakeholder (WINGS) groups, which can coordinate such outreach efforts.¹⁵⁶

Recommendation 3.1 encourages states to adopt and implement the UGCOPAA.¹⁵⁷ Recommendation 5.4 is the companion recommendation. It encourages the National Center for State Courts and National College of Probate Judges to support states in developing rules, forms, and procedures to implement the UGCOPAA.¹⁵⁸

G. Working Group 6. Guardianship Court Improvement Programs

The article by Pogach and Wu begins by summarizing the history of guardianship reform, including the 1987 Associated Press Report, the prior three guardianship conferences and summits, numerous studies and reports, and, since the 2011 Summit, the formation of WINGS by about half the states.¹⁵⁹ But much of this work, and the ongoing work of the WINGS, has been stymied by a lack of data.

In many states, available data is limited to filings and dispositions, information that is not useful to improving case processing, and strengthening guardian oversight. Courts need a major investment in court technology, training, and standardized management to improve data collection practices. The starting point

153. *See id.*

154. *Fourth National Guardianship Summit Standards and Recommendations*, *supra* note 29, at 38–39.

155. *Id.*

156. *Id.*

157. *Id.* at 34–35.

158. *Id.* at 39.

159. Pogach & Wu, *supra* note 43, at 501–12.

of any major reform is an accurate picture of the reality the policy intends to reform.¹⁶⁰

While the child protection system in the U.S. is not perfect, it is not plagued by data collection issues to the same extent as the adult guardianship system. One reason is that since 1993 Congress has provided targeted funding to state courts through the Child Welfare Court Improvement Program (CWCIP).¹⁶¹ Observing the success of the CWCIP, in 2010, the Conference of State Court Administrators urged Congress to fund a counterpart court improvement program for adult guardianship. The proposal included the funding of a national guardianship study that, among other things, would document the number of guardianships. The proposed program would also have provided financial assistance to state and local courts in designing and implementing guardianship databases and would have created a guardianship resource center to serve as a central clearinghouse for guardianship data and research.¹⁶²

Authors Pogach and Wu agree with the state court administrators and similarly advocate for a federally funded court improvement program for adult guardianship. The elements of a court improvement program that they recommend in their paper are largely incorporated into the Summit Recommendations.¹⁶³

Recommendation 6.1 recommends the creation of a Guardianship Court Improvement Program (GCIP).¹⁶⁴ It should be modeled on the successful CWCIP and provide funding directly to the highest court of each participating state.¹⁶⁵ The purpose of the funding is (1) to enhance the rights and well-being of adults under or potentially subject to guardianship by effectuating consistent and meaningful data collection; (2) improving oversight and accountability; (3) avoiding unnecessary or overbroad guardianship; and (4) enhancing collaboration and education among courts, agencies, and organizations that impact adults under or potentially subject to guardianship.¹⁶⁶

Recommendation 6.2 adds some details. The GCIP should promote inter-agency and multi-disciplinary collaboration among

160. *Id.* at 507.

161. *Id.* at 496.

162. *Id.* at 496–97.

163. *Id.* at 531–32 (describing the authors' individual recommendations).

164. *Fourth National Guardianship Summit Standards and Recommendations*, *supra* note 29, at 39.

165. *Id.*

166. *See id.*

guardianship stakeholders, building upon such groups as local WINGS.¹⁶⁷ Funding on a formula basis should be provided similar to the \$30 million provided to the CWCIPs.¹⁶⁸ Finally, following an initial period for assessment and planning, wide latitude should be given to participating courts to set priorities and create implementation plans.¹⁶⁹

Recommendation 6.3 calls for the creation of a federal support mechanism for the new GCIPs.¹⁷⁰ It recommends that the GCIP legislation create a national, non-profit capacity building or resource center with appropriate expertise to coordinate national efforts and to provide training, technical assistance, and collaborative learning opportunities to participating courts.¹⁷¹

IV. NEXT STEPS

The Summit Recommendations will set the standard for guardianship reform for the next decade. The approval of the Recommendations does not end the work of the Summit. Work has now turned to how to best implement the Summit Recommendations. This work will involve not only the NGN organizations and state WINGS but should also involve governmental entities and the many other organizations and individuals concerned with guardianship reform. By making the Summit Recommendations and articles available and accessible to the wider public, the *Syracuse Law Review* has performed an important public service. The Fourth Summit was an important step on the effort to improve guardianship law and practice, but it is only a step. The process continues.

167. *Id.* at 39–40.

168. *Id.*

169. *Fourth National Guardianship Summit Standards and Recommendations*, *supra* note 29, at 40.

170. *See id.*

171. *Id.*