PROTECTIVE ORDERS AND LIMITED GUARDIANSHIPS: LEGAL TOOLS FOR SIDELINING PLENARY GUARDIANSHIP

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ABSTRACT

By encouraging use of limited guardianships and protective orders instead of full guardianships, states can reduce the likelihood of unnecessarily stripping adults of their civil rights. Yet, although such less restrictive alternatives have long been available to most courts, in practice, their use remains limited and sporadic. This article argues that this lack of use suggests that it is not sufficient for the law to state a preference for these less restrictive alternatives, it must actually create systems that incentivize their use and actively discourage the use of full guardianships. This article then shows, using the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act as a guide, how states can adopt statutes that create such incentivized systems.

INTRODUCTION

In every state, courts are empowered to appoint a guardian for adults who are at risk because they are unable to make decisions for themselves. While these appointments are designed to protect individuals in need and further their best interests, the overuse of guardianship and the imposition of overly broad guardianships can have the opposite effect: unnecessarily denying individuals their basic rights and liberties and potentially exposing them to exploitation by misguided or unscrupulous guardians.

As this article explains, United States jurisdictions have responded to concerns about the overuse and overbreadth of guardianships by authorizing courts to impose limited guardianships instead of full ones, and by empowering courts to enter protective orders in lieu of guardianship. Unfortunately, best available evidence suggests that the vast majority of guardianships remain full and that the use of protective orders instead of guardianship remains sporadic.[1] As a result, those who find themselves the subject of a petition for guardianship are likely to be stripped of most of their legal rights even when this major intrusion on liberty is neither legally justified nor necessary to protect the person from harm. Recognizing this serious problem, the article explores the further reforms needed to increase the use of less restrictive court orders and limited guardianships and discourage the use of full guardianships.

1. *See* discussion *infra* Section I.C.

This article proceeds in three major sections. The first describes the evolution of guardianship law with respect to limited guardianship and court protective orders in lieu of guardianship. The second shows how innovations in the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA) can help create systems that discourage overuse of full guardianship. Specifically, it shows how the UGCOPAA discourages use of full guardianship not only by adopting rules that prohibit a full guardianship where a limited one would meet an individual's needs, but also by creating systems that incentivize both courts and petitioners to favor limited guardianships over full ones, and by expanding the availability of protective orders (referred to in the Act as "protective arrangements"). The third section offers a series of concrete recommendations for state-based law reform.

For the sake of simplicity, the term "guardianship" includes "conservatorship" unless otherwise indicated, although many states use the term "guardian" exclusively to refer to the individual appointed by the court to make decisions about personal affairs and the term "conservator" to refer to the individual appointed by the court to manage an individual's property and financial affairs.

I. HISTORY OF LIMITED GUARDIANSHIP & PROTECTIVE ORDERS IN LIEU OF GUARDIANSHIP

Over the past several decades, guardianship law has evolved to enable courts to enter orders that are less restrictive than full guardianship: orders imposing limited guardianships and orders for protective arrangements instead of guardianship. This Section outlines the evolution of each of these less restrictive alternatives to full guardianship.

A. History of Limited Guardianship

A limited guardianship is one in which the guardian is granted fewer than all powers available under state law. A limited guardianship can be created in one of two ways. First, the court can exercise its equitable jurisdiction to limit a guardian's powers regardless of whether the statute mentions limited guardianship.[2]

2. *See* Maureen A. Sanders & Kathryn Wissel, *Limited Guardianship for the Mentally Retarded*, 8 N.M. L. REV. 231, 236 n.38 (1978) (listing cases recognizing this authority); *See* Symposium, *Guardianship: An Agenda for Reform*, 13 MENTAL & PHYSICAL DISABILITY L. REP. 271, 294 (1989) [hereinafter *An Agenda for Reform*] (also listing cases prior to 1980).

Second, the state can enact a statute authorizing the appointment of a limited guardian. This subsection of the article outlines the history and development of limited guardianship, highlighting its origins, and how the concept has been advanced both by the Uniform Law Commission and by a series of national conferences.

1. Origin of Limited Guardianship Statutes

Guardianship law in the United States is controlled by state, not federal, law. All fifty states and the District of Columbia have their own separate guardianship laws.[3] Accordingly, the first limited guardianship statutes were state statutes. The first of these appears to have been enacted in 1976 in Idaho, followed by a 1978 enactment in North Carolina.[4] The Uniform Law Commission then joined the list of entities promulgating limited guardianship legislation in 1982 upon its approval of the Uniform Guardianship and Protective Proceedings Act. Expansion of limited guardianship statutes was rapid: by 1987, over forty states had enacted limited guardianship statutes.[5]

Adoption of these limited guardianship statutes emerged out of the movement in the 1960s and 1970s to place limits on the state's authority to involuntarily commit adults for mental health treatment. Limited guardianship—and the corresponding rejection of full guardianship—was viewed as consistent with the "least restrictive alternative" doctrine. That doctrine was first applied to civil commitment in 1966 in *Lake v. Cameron*,[6] a holding that was soon followed by other courts.[7] The issue reached the U.S. Supreme Court in 1975 in *O'Connor v. Donaldson*, where the Court held that the state could not civilly confine an individual who was not a danger to self or to others.[8] Concluding that similar deprivations of rights occur in guardianship proceedings, early advocates for limited guardianship,

3. For a list of state guardianship statutes and key provisions, *see* AM. BAR ASSOC. COMM'N ON L. & AGING, ADULT GUARDIANSHIP STATUTORY TABLE OF AUTHORITIES (2021), https://www.americanbar.org/content/dam/aba/administrative/law_aging/2019-adult-guardianship-statutory-table-of-authorities.pdf (listing state guardianship statutes).

4. Sanders & Wissel, *supra* note 2, at 243 (acknowledging Idaho's 1976 adoption of the Uniform Probate Code); *id.* at 242–45 (discussing both the North Carolina statute and a Minnesota statute which applied only if a state agency or employee was appointed as guardian).

5. *An Agenda for Reform*, *supra* note 2, at 294.

6. *Id.* (citing 364 F.2d 657 (D.C. Cir. 1966)).

7. *Id.* For a list of the early cases, see Neal Dudovitz, *Protective Services and Guardianship: Legal Services and the Role of the Advocate*, *in* REPRESENTING OLDER PERSONS: AN ADVOCATE'S MANUAL 79–87 (Bruce M. Fried ed., 1985).

8. 422 U.S. 563, 575 (1975).

including the participants in the Wingspread conference discussed later in this article, agreed that the least restrictive alternative doctrine should also be applied to guardianship.[9] This goal could best be accomplished either by avoiding the appointment of a guardian in the first instance or where a guardianship could not be avoided, by appointing where possible a limited instead of a full guardian.[10]

While all states now recognize the ability of courts to impose limited guardianships, terminology varies slightly. Most state statutes use the term "limited guardian" to describe a guardian with limited powers.[11] Others do not employ the term but achieve the same result by providing that the court may restrict the powers of the "guardian."[12]

2. Role of the Uniform Law Commission

The Uniform Law Commission (ULC), a quasi-governmental entity that develops model legislation for states' consideration,[13] has

9. *See An Agenda for Reform*, *supra* note 2, at 293–94. Notably, many state guardianship statutes now include explicit reference to least restrictive alternatives. *See* HALDAN BLECHER, AM. BAR ASS'N COMM'N ON L. & AGING, LEAST RESTRICTIVE ALTERNATIVE REFERENCES IN STATE GUARDIANSHIP STATUTES (2018), https://www.americanbar.org/content/dam/aba/administrative/law_aging/06-23-2018-lra-chart-final.pdf (providing a chart listing references to least restrictive alternatives in state guardianship laws).

10. *See An Agenda for Reform*, *supra* note 2, at 293–94. For an extended list of expert writings relating to limited guardianship as of 1981, see Lawrence A. Frolik, *Plenary Guardianship: An Analysis, a Critique and a Proposal for Reform*, 23 ARIZ. L. REV. 599, 600 n.5 (1981).

11. In addition to the many states that have enacted a version of the guardianship provisions of the Uniform Probate Code or Uniform Guardianship and Protective Proceedings Act, states that use the term "limited guardian" include ALASKA STAT. §13.26.005(6) (2021) (called "partial" guardian); ARK. CODE ANN. § 28-65-101(7) (2021); FLA. STAT. § 744.102(9)(a) (2021); IND. CODE § 29-3-1-6 (2021); KY. REV. STAT ANN. § 387.510(4) (West 2021); LA. CODE CIV. PROC. ANN. art. 4551(B) (2021) (called "limited interdict"); MO. REV. STAT. § 475.010(8) (2021); NEV. REV. STAT. § 159.026 (2021); OHIO REV. CODE ANN. § 2111.01(A) (LexisNexis 2021); OKLA. STAT. tit. 30 § 1-111(16)(a) (2021); 20 PA. CONS. STAT. § 5512.1(a)(6) (2021); S.D. CODIFIED LAWS § 29A-5-102(7) (2021); VA. CODE ANN. § 64.2-2000 (2021); W. VA. CODE § 44A-1-4(8) (2021). WYO. STAT. ANN. § 3-1-101(xi) (2021).

12. *See, e.g.*, DEL. CODE ANN. tit. 12 § 3921 (2021); KAN. STAT. ANN. § 59-3075(a)(2) (2021); N.H. REV. STAT. ANN. § 464-A:11(II)(d) (2021); N.Y. MENTAL HYG. LAW § 81.03(d) (McKinney 2021); VT. STAT. ANN. tit. 14, § 3069(d) (2021); WIS. STAT. § 54.18(1) (2021).

13. *See About Us*, UNIF. L. COMM'N, https://www.uniformlaws.org/aboutulc/overview (last visited Dec. 24, 2021). The Uniform Law Commission was formed in 1892. For the history of the Uniform Law Commission

played an instrumental role in advancing limited guardianship statutes in the United States. The ULC's first foray into comprehensively addressing guardianship was Article V of the Uniform Probate Code (UPC), which the ULC adopted in 1969.[14]

The guardianship provisions of the 1969 UPC were innovative when compared to the guardianship statutes in force in the states at the time. First, the 1969 UPC distinguished between issues relating to property and person. This is accomplished by separating the provisions on property from the provisions relating to guardianship of the person and placing them in different parts of the article.[15] To solidify this distinction, the UPC uses different terms for the fiduciary appointed by the court. Under the 1969 UPC and later versions of the Code, what would have been referred to at the time in most states as the guardian of the property is instead referred to as a "conservator" and the appointment of the conservator is made in a separate "protective proceeding."[16] Second, the 1969 UPC expanded the court's authority to enter orders. Prior to the 1969 UPC, guardians had limited authority to engage in transactions without prior court approval, and the courts, which were often specialized courts of probate with limited jurisdiction, lacked authority to authorize a guardian to engage in many transactions that today would be viewed as routine, such as to lease property.[17] The 1969 UPC removed this limitation. It authorized the conservator to engage in a broad range of property-related transactions without seeking prior authorization from the court.[18]

(ULC), see generally ROBERT A. STEIN, FORMING A MORE PERFECT UNION: A HISTORY OF THE UNIFORM LAW COMMISSION (LexisNexis Group ed., 2013).

14. *See* UNIF. PROB. CODE § 5 general cmt. (UNIF. L. COMM'N 1969) ("Article V, entitled "Protection of Persons Under Disability and Their Property" embodies separate systems of guardianship to protect persons of minors and mental incompetents.").

15. UNIF. PROB. CODE §§ 5-301–313, 5-401–431 (1969) (The guardianship provisions relating to adults are contained in Part 3 of Article V. The provisions relating to Protection of Property are contained in Part 4 of Article V.) For background on the process that led to the 1969 reforms, see generally William F. Fratcher, *Toward Uniform Guardianship Legislation*, 64 MICH. L. REV. 983 (1966).

16. UNIF. PROB. CODE § 5-401 (1969) (UNIF. L. COMM'N, amended 2019).

17. *See generally* William F. Fratcher, *Powers and Duties of Guardians of Property*, 45 IOWA L. REV. 264 (1960) (discussing limitations on guardians generally).

18. UNIF. PROB. CODE § 5-424(c) (1969) (listing 25 transactions in which a conservator may engage without seeking prior authorization of court).

Although the provisions of the 1969 UPC were innovative in certain regards, they did not include limited guardianship. Instead, it was not until the ULC amended Article V in 1982—and codified it separately as the Uniform Guardianship and Protective Proceedings Act (UGPPA)—that it directly embraced limited guardianship.[19] The 1982 UGPPA introduced limited guardianship to allow a court to remove only some, not all, personal decision-making authority from an individual.[20] In addition, although the 1982 UGPPA did not expressly authorize limited conservatorship by that name, it authorized it in function. Under the 1982 UGPPA, courts appointing conservators were admonished to ". . . make protective orders only to the extent necessitated by the protected person's mental and adaptive limitations and other conditions warranting the procedure."[21]

The ULC again took up the issue of guardianship when, in 1997, it revised the UGPPA and corresponding UPC provisions. The philosophy of the 1997 revision of the UGPPA has been described as follows:

> The overriding theme of the 1997 UGPPA is that a guardian or conservator should be appointed only when necessary, only for so long as necessary, and only with such powers as are necessary. The Act views guardianship and conservatorship as a last resort, emphasizes that limited guardianships or conservatorships should be used whenever possible, and requires that the guardian or conservator consult with the ward when making decisions.[22]

Consistent with this philosophy, the 1997 UGPPA implemented a variety of changes to encourage limited guardianship over full guardianship. Under the 1997 UGPPA, if a petition requests the appointment of a full guardian or conservator, the petition must explain why a limited guardianship or conservatorship is inappropriate.[23] In addition, the court may appoint a full guardian only

19. UNIF. GUARDIANSHIP & PROTECTIVE PROC. ACT § 2-206(c) (UNIF. L. COMM'N 1982).

20. *Id.* ("The Court, at the time of appointment or later, on its own motion or on appropriate petition or motion of the incapacitated person or other interested person, may limit the powers of a guardian otherwise conferred by this [Act] and thereby create a limited guardianship.").

21. *Id.* § 2-307(a).

22. David M. English & Rebecca C. Morgan, *The Uniform Guardianship and Protective Proceedings Act (1997)*, 11 NAELA Q. 3, 4 (1998).

23. UNIF. GUARDIANSHIP & PROTECTIVE PROC. ACT § 304(b)(8) (UNIF. L. COMM'N, 1997) (guardianship); *id.* § 403(c)(3) (1997) (conservatorship).

if it finds that a respondent's identified needs cannot be met by any "less restrictive means."[24] Finally, in making decisions, the guardian must "consider the expressed desires and personal values" of the individual subject to guardianship "to the extent known to the guardian,"[25] and both a guardian and conservator must encourage the individual to participate in decisions.[26]

Most recently, spurred by the Third National Guardianship Summit (discussed in the next subsection), the ULC in 2017 adopted the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA), which replaced the UGPPA.[27] The UGCOPAA made numerous changes to the predecessor UGPPA, but this article will focus on just two areas of reform. First, as discussed at length in Section III of this Article, the UGCOPAA emphasizes limited guardianship and discourages full guardianships to a greater degree than does the 1997 UGPPA. Second, and also discussed in Section III, the UGCOPAA elevates the importance and scope of limited protective orders in lieu of guardianship for meeting a respondent's personal and financial needs. Unlike prior uniform guardianship acts, the UGCOPAA emphasizes protective orders in lieu of guardianship in a separate new article (Article 5). In addition, instead of serving only as a substitute for appointment of a conservator to handle financial matters, it authorizes such orders to be used as a substitute for an appointment of a guardian to handle personal affairs.

3. The Role of National Conferences

Much of the energy behind guardianship reform in the United States has been generated by national conferences on guardianship at which experts convened and issued recommendations.[28] The first such conference, referred to as Wingspread (the name of the conference center where it was convened), was held in 1988. The conference was convened in response to a series of articles published by the Associated Press critical of guardianship practice.[29] Among the principal recommendations approved at the Wingspread conference were recommendations to: 1) emphasize limited guardianship, and 2)

24. *Id.* § 311(a)(1).

25. *Id.* § 314(a).

26. *Id.* (guardians); *id.* § 418(b) (conservators).

27. UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT, Prefatory Note (UNIF. L. COMM'N 2017).

28. This Article is written in conjunction with the most recent of these conferences.

29. *See An Agenda for Reform*, *supra* note 2, at 274.

prioritize the choices of the individual subject to guardianship and the use of "substituted judgment,"[30] which were primary objectives of 1997 UGPPA.

The 2011 Third National Guardianship Summit,[31] which focused on developing national guardianship standards, led directly to the decision to appoint a committee to draft what later became the UGCOPAA. The Summit was organized by the National Guardianship Network (NGN), a group of national organizations dedicated to effective adult guardianship law and practice.[32] An array of other groups concerned with issues of aging, intellectual disability, and mental health also participated in the Summit.[33]

Following the conclusion of the Summit, the NGN appointed an implementation committee, on which co-author English served, to consider how best to implement the seventy standards and recommendations approved at the Summit. The implementation committee concluded that thirty-six of the standards and recommendations were relevant to the possible revision of the 1997 UGPPA. Based on the report of the implementation committee, the NGN recommended to the ULC that a drafting committee be appointed to revise the UGPPA. The ULC agreed, and a drafting committee was appointed in 2014, with co-author English serving as chair and co-author Kohn as the reporter.[34] The committee was

30. *Id*. at 290. *See* UNIF. GUARDIANSHIP & PROTECTIVE PROC. ACT § 314(a) (1997).

31. *See* Symposium, *Third National Guardianship Summit Standards and Recommendations*, 2012 UTAH L. REV. 1191, 1191 (providing the text of the standards and recommendations).

32. *See* Sally Hurme & Erica Wood, *Introduction*, 2012 UTAH L. REV. 1157, 1166 n.60 (The NGN organizations at the time of the Summit were the AARP; A.B.A. Commission on Law and Aging; A.B.A. Section of Real Property, Trust and Estate Law; Alzheimer's Association; American College of Trust and Estate Counsel; Center of Guardianship Certification; National Academy of Elder Law Attorneys; National Center for State Courts, National College of Probate Judges; and the National Guardianship Association.).

33. *Id.* at 1166 n.61 (Among these groups were the A.B.A. Commission on Disability Rights, The Arc, the Center for Social Gerontology, the National Adult Protective Services Association, the National Association of State Long-Term Care Ombudsman Programs, the National Association of State Mental Health Program Directors, the National Committee for the Prevention of Elder Abuse, the National Disability Rights Network, and the Bazelon Center for Mental Health.).

34. For a discussion of the process, 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.

charged with revising "selected portions of the UGPPA in order to implement some of the recommendations of the Third National Guardianship Summit and otherwise update the Act."[35]

B. History of Protective Orders in lieu of Guardianship

The ability of a court to enter a protective order to meet the needs of an individual who would otherwise be eligible for guardianship has its roots in the 1969 UPC. The 1969 UPC granted the court "all the powers over his estate and affairs which he could exercise if present and not under a disability."[36]

This grant of broad authority to the court to enter protective orders was the origin of the "single transaction" order.[37] Under the 1969 UPC, if the basis for an appointment or other protective order exists, the court, without appointing a conservator, may approve a variety of transactions with respect to the individual's property.[38] One type of protective order relates to the protected person's estate plan and includes the making of gifts, the creation of revocable or irrevocable trusts, and changing beneficiaries under insurance and annuity policies.[39] A second category, contained in a section called "Protective Arrangements and Single Transactions Authorized," allows the court, without appointing a conservator, to "authorize, direct, or ratify any transaction necessary or desirable to achieve any security, service, or care arrangement meeting the foreseeable needs of the protected person."[40] An array of specific transactions are

33, 37 (2016). The recommendations and standards deemed relevant to the revision of the UGPPA are contained in Appendix A. *Id.* app. A, at 49–55.

35. Memorandum from David English, Professor of Law Univ. of Missouri, and Nina Kohn, Professor of Law Syracuse Univ. Coll. of Law, to Drafting Committee to Revise or Amend UGPPA (Apr. 10, 2015) (available at https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=bb04eb74-c435-eb7c-66f6-ab6d481222f4&forceDialog=1).

36. UNIF. PROB. CODE § 5-408(3) (1969). The only exception is that the court does not have the power to make the individual's will. *Id.*

37. *See id.* § 5-408.

38. *See id*.

39. Other specified powers that can be granted relating to the protected person's estate plan include the powers to release marital property and rights of survivorship under joint tenancies and tenancies by the entirety, to enter into contracts, to surrender life insurance policies for their cash value, to exercise the right to an elective share, and to renounce interests in property. *Id.* § 5-408(3).

40. UNIF. PROB. CODE § 5-409(a) (1969). The non-exhaustive list of possible protective arrangements is lengthy. They include "payment, delivery, deposit or retention of funds or property, sale, mortgage, lease or other transfer of property,

authorized under this second category, including "payment, delivery, deposit, or retention of funds or property; sale, mortgage, lease, or other transfer of property; entry into an annuity contract, a contract for life care, a deposit contract, or a contract for training and education."[41] The single transaction was the creation of the UPC drafters. It had no statutory precedent in the states or in the 1946 Model Probate Code, which was the initial starting point for the UPC drafters.[42] Because many of these transactions cannot be accomplished by the court without assistance, the 1969 UPC authorized the court to appoint a special conservator to assist in the accomplishment of any protective arrangement.[43] The result of this additional authority granted to the court by the 1969 UPC was a statutorily created and significant alternative to conservatorship. Both categories of protective orders in lieu of guardianship were carried forward into the 1982 UGPPA.[44]

The ULC's 1997 revision to the UGPPA significantly modified the provisions on single transactions and protective arrangements. In approving a single transaction or other protective arrangement, the court is to apply a "substituted judgment" standard.[45] The primary factor the court is to consider is "the decision that the protected person would have made, to the extent that the decision can be ascertained."[46]

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entry into an annuity contract, a contract for life care, a deposit contract, a contract for training and education, or addition to or establishment of a suitable trust." *Id*.

41. UNIF. PROB. CODE § 5-409(a) (1969); UNIF. GUARDIANSHIP & PROTECTIVE PROC. ACT § 2-308(a) (1982).

42. For the history of the drafting process, see generally Fratcher, *supra* note 15. The single transaction was absent from the earliest drafts of the UPC, the drafting of which began in the early 1960s. The concept makes its first appearance on June 29, 1967 in a Memorandum from the Subcommittee on Conservator-Trustees (June 29, 1967) (Papers of William F. Fratcher) (on file with Univ. of Missouri Archives in Box 73677, File 4) ("The concept of 'other protective order' is useful. This makes it possible to obtain a specific order to deal with the property of an alleged disabled person without the necessity of the appointment of a conservator-trustee.").

43. UNIF. PROB. CODE § 5-409(c) (1969).

44. UNIF. GUARDIANSHIP & PROTECTIVE PROC. ACT § 2-307(b) (1982) (estate planning changes); *id.* § 2-308(a) (1982) (single transactions).

45. *See* UNIF. GUARDIANSHIP & PROTECTIVE PROC. ACT § 314 cmt. (1997).

46. *Id.* § 411(c). The single transaction section is § 412 but § 412(b) provides that the court is to apply the factors listed in § 411(c). In addition to considering "primarily the decision the individual would have made," other factors the court is to take into account are (1) the financial needs of the protected person and the needs of individuals who are in fact dependent on the protected person for support and the interest of creditors; (2) possible reduction of tax liabilities; (3) eligibility for governmental assistance; (4) the individual's previous pattern of giving or level of support; (5) the existing estate plan; and (6) the protected person's life expectancy

Under the previous 1982 and 1969 enactments, the decision of the court was not guided by a standard stated in the statute, implying that the common law best interests standard was to apply.[47]

The 1969, 1982, and 1997 versions of the provision on single transactions have been widely enacted in the states, both in states that have otherwise enacted the guardianship provisions of the UPC or UGPPA,[48] as well as in others.[49]

Most recently, the ULC took a major step toward promoting the use of protective orders in lieu of guardianship by adopting Article V of the UGCOPAA. Article V, which is discussed in Section III, expands the court's ability to use these less restrictive alternatives to guardianship.

C. Prevalence of Limited Guardianships and Protective Orders in lieu of Guardianship

The extent to which courts employ either limited guardianships or protective orders in lieu of guardianship is unknown. Lack of reliable empirical data on guardianship and conservatorship is a decades old problem. Indeed, as the U.S. Senate Special Committee for Aging lamented in a 2018 report:

> Few states appear able to track the total number of individuals subject to guardianship, let alone record demographic information, the types of guardianship being utilized, or the extent of a guardian's authority. The lack of broad state and national data makes it very difficult to identify trends in

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and the probability that the conservatorship will terminate before the protected person's death.

47. *See, e.g.*, UNIF. PROB. CODE § 5-408(4) (1969) (applying "best interests of the protected person" to court appointment and exercise of authority over conservatorship); *id.* § 5-409(c) (finding that, before entering "Protective Arrangements and Single Transactions" the Court should consider "interests of creditors and dependents of the protected person and, in view of his disability, whether the protected person needs the continuing protection of a conservator").

48. *See* ALA. CODE § 26-2A-137 (2021); ALASKA STAT. § 13.26.440 (2021); ARIZ. REV. STAT. ANN. § 14-5409 (2021); COLO REV. STAT. § 15-14-412 (2021); D.C. CODE § 21-2056 (2021); HAW. REV. STAT. § 560:5-412 (2021); MICH. COMP. LAWS § 700.5408 (2021); MINN. STAT. § 524.5-412 (2021); MONT. CODE ANN. § 72-5-422 (2021); NEB. REV. STAT. § 30-2638 (2021); N.M. STAT. ANN. § 45-5-405.1 (West 2021); N.D. CENT. CODE § 30.1-29-09 (2021); S.C. CODE ANN. § 62-5-405 (2021); UTAH CODE ANN. § 75-5-409 (LexisNexis 2021).

49. *See* IND. CODE ANN. § 29-3-4-2 (West 2021); MO. REV. STAT. § 475.092 (2021); N.J. STAT. ANN. § 3B:12-1 to -4 (West 2021); N.Y MENTAL HYG. LAW § 81.16(b) (McKinney 2021).

> guardianship, leaving advocates and policymakers in the dark when trying to enact reform.[50]

Thus, data on the scope of guardianship orders is even more limited than data on the incidence of guardianship orders—which is also woefully inadequate for those trying to identify the impact of guardianship reform efforts.

Nevertheless, indications are that full guardianship is far more common in practice than limited guardianship. For example, a study of guardianship for individuals with intellectual and developmental disability in the District of Columbia found that limited guardianships were the exception to the rule.[51] In 2015 through 2017, a minimum of 84% of guardianships granted were full and permanent.[52] The remaining guardianships were either limited or temporary.[53]

A 2014 survey of 4,000 guardianship files in ten Iowa counties found that limited guardianships comprised only 1% of adult guardianship cases and 2% of adult conservatorship cases.[54] Contrary to the general perception that a majority of guardianship appointments are for elderly individuals, the Iowa survey found that 62% of appointments were on account of intellectual disabilities and only 10% were on account of Alzheimer's disease or dementia,[55] which are cognitive impairments ordinarily associated with the elderly. Notably, the disproportionate use of guardianship for those with developmental or intellectual disabilities strongly suggests that full guardianship was being used inappropriately.[56] Those with significant intellectual and

50. U.S. SENATE SPECIAL COMM. ON AGING, ENSURING TRUST: STRENGTHENING STATE EFFORTS TO OVERHAUL THE GUARDIANSHIP PROCESS AND PROTECT OLDER AMERICANS 25 (2018).

51. NAT'L COUNCIL ON DISABILITY, TURNING RIGHTS INTO REALITY: HOW GUARDIANSHIP AND ALTERNATIVES IMPACT THE AUTONOMY OF PEOPLE WITH INTELLECTUAL AND DEVELOPMENTAL DISABILITIES 43 (2019).

52. *Id.* at 57.

53. *Id.*

54. IOWA GUARDIANSHIP & CONSERVATORSHIP REFORM TASK FORCE, REFORMING IOWA'S GUARDIANSHIP AND CONSERVATORSHIP SYSTEM app. A at 15 (2017).

55. *Id.*

56. One factor that could account for this overuse is that to the consternation of many advocates for individuals with developmental or intellectual disabilities, it appears that many requests for guardianship are made at the behest or suggestion of school systems, with the goal of obtaining consent for such individuals to remain in school past age 18. Even if a guardian is needed in such situations—which should not be assumed as a matter of course—instead of appointing a full guardian for potentially the child's lifetime, the needs of the school system could be met by

developmental disabilities generally have the ability to make at least some decisions for themselves when provided with support.[57]

There is even less data on the use of protective orders in lieu of guardianship (e.g., single transaction orders) than there is on guardianship itself. Despite being part of the UPC since 1969 and part of the UGPPA since 1982, there is a paucity of reported case law on the use of single transactions. Perhaps this is because if the petition for a single transaction is denied it is easier to petition for the appointment of a conservator instead of appealing the denial.

Co-author English's conversations with practicing attorneys over the years and a review of the literature on single transaction orders, however, suggest that single transactions are used primarily in three overlapping contexts. First, they are used as a device for handling litigation settlements, typically through the creation of special needs trusts to avoid disqualification for Medicaid or the Supplemental Security Income (SSI) program. Second, they are used as a device for funding special needs trusts in other contexts such as on account of receipt of an inheritance. Third, they are used as a tool in crisis Medicaid planning when other planning tools, such as a durable power of attorney, are inadequate.[58]

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appointing a limited guardian with authority to make decisions only with respect to school-related activities and whose appointment would terminate when the child is no longer eligible for the specified educational services.

57. *See* Nina A. Kohn, *Legislating Supported Decision-Making*, 58 HARV. J. LEGIS. 314, 321–22 (2021) (discussing how supported decision-making can obviate the need for guardianship).

58. *See* 22 PATRICIA M. ANNINO, MASS. PRACTICE, PROBATE LAW AND PRACTICE § 37:11 (3d ed. 2021) (noting that three of the ways to create a special needs trust are (1) court using its inherent equity power; (2) single transaction; and (3) petition by conservator); Fred Rogers, *The Basics of Juveniles in Probate Court for Protective Proceedings*, 36 COLO. LAW. 15, 18 (2007) (noting use of single transactions in settlement of personal injury actions); 1A STINSON, MAG & FIZZELL, MO. PRAC., METHODS OF PRACTICE: TRANSACTION GUIDE § 36.6.30 (4th ed. 2020) (noting use of single transactions); Melissa R. Schwartz et al., *Protective Arrangements, Special Conservators, Single Transactions and Transfers of Property to Income Trusts, Disability Trusts and Pooled Trusts*, *in* 3 STEPHEN A. HESS, COLO. PRACTICE, METHODS OF PRACTICE § 100:7 (6th ed. 2021); Spencer J. Crona & Byron K. Hammond, *Personal Injury and Workers' Compensation Settlements for Incapacitated Persons: Part I*, 30 COLO. LAW. 43, 46 (2001); George D. Gaskin III, *Drafting Powers of Attorney for Elder Planning–Going Beyond the Form*, 80 ALA. LAW. 328, 333 (2019) (noting use of single transaction for crisis Medicaid planning when the durable power of attorney fails to grant the agent sufficient authority); M. Dee Biesterfield, *Personal Injury Settlements for Minors: Conservatorships,*

II. UGCOPAA'S SYSTEMS-FOCUSED APPROACH TO LIMITED GUARDIANSHIP AND PROTECTIVE ORDERS IN LIEU OF GUARDIANSHIP

As the preceding history suggests, prior statutory reforms authorizing limited guardianships, as well as those prohibiting the use of full guardianships where limited ones would suffice, have been insufficient to curtail routine use of full guardianship. This suggests that reforming practice, and not merely the law, will require more than simply directing courts to "do the right thing." It will necessitate the creation of systems that incentivize alternatives to guardianship and discourage full guardianships.

The UGCOPAA is designed to do just that. The Act goes beyond merely stating rules. In addition to prohibiting a court from establishing a full guardianship or conservatorship if a limited guardianship or conservatorship would meet the respondent's needs, it creates systems to incentivize those involved in the guardianship system—courts and petitioners alike—to favor limited guardianship and alternatives to guardianship over full guardianships. This section first provides an overview of the UGCOPAA and then continues by outlining this systems-focused approach.

A. Overview of UGCOPAA

The Uniform Law Commission adopted the UGCOPAA in 2017. The Act was a product of a multi-year collaborative process that engaged a broad range of stakeholders in the guardianship process. During the drafting process, the drafting committee received extensive input from numerous elder law experts and experts on developmental and intellectual disabilities, as well as input from family caregivers and appointed guardians. Among the groups represented at the drafting table were AARP, the American Bar Association, including the Commission on the Law and Aging, Section of Real Property Trust & Estate Law and Senior Lawyers Division, The ARC, the American College of Trust and Estate Council, the National Association to Stop Guardianship Abuse, the National Guardianship Association, the National College of Probate Judges, the National Center for State Courts, the National Disability Rights Network, and the National Academy of Elder Law Attorneys, among others.

The UGCOPAA consists of six articles. Article 1 consists of definitions and general provisions. Article 2 addresses guardianship of minors. Article 3 covers guardianship of adults, and Article 4 covers

Suitable Trusts, or UTMA Accounts, 36 COLO. LAW. 69, 71 (2007); DAVID K. JOHNS ET AL., COLORADO ESTATE PLANNING HANDBOOK § 9.3.12 (7th ed. Supp. 2020).

conservatorship of both minors and adults. Article 5 deals with other protective arrangements and grants the court authority to order a protective arrangement not only for property but also personal issues.[59] Article 6 contains optional forms of petition for the appointment of a guardian, conservator, or other protective arrangement. Consistent with prior uniform acts on guardianship, under the UGCOPAA a "guardian" makes decisions regarding an individual's personal affairs,[60] and a "conservator" makes decisions regarding an individual's property and financial affairs.[61]

As set forth in its prefatory note, the UGCOPAA has three overarching goals. First, it aims to advance a person-centered approach to guardianship.[62] Second, the Act is designed to incorporate specific reforms that had been identified as necessary to advance the rights and interests of individuals subject to guardianship, including provisions related to guardianship monitoring, less restrictive alternatives, and clearer duties for guardians.[63] Third, and most relevant for this article, it adopts rules designed to incentivize systems to make it easier for all involved in the guardianship system process—whether they be petitioners, individuals subject to guardianship or conservatorship, guardians or conservators, or judges—to achieve these objectives.[64]

B. UGCOPAA's Limitations on Court Authority

Recognizing that imposition of guardianship or conservatorship should always be a last resort, the Act bars courts from imposing full guardianships or conservatorships for adults where less restrictive approaches could meet the adult's needs.[65] The result is that courts lack authority to appoint either a full or limited guardian if the adult's needs could be met by providing the individual with support for decision making, adaptive devices, caregiving services, or any number of other interventions that would meet the individual's needs without removing rights. In addition, the Act prohibits courts from establishing

59. *See* UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 502 (2017).

60. *Id.* § 102(9).

61. *Id.* § 102(5).

62. *Id.* at Prefatory Note.

63. *Id.*

64. UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT, Prefatory Note (2017).

65. *See id.* § 301(guardianship); *id.* § 401 (conservatorship).

a full guardianship or conservatorship where a limited one would meet the respondent's needs.[66]

Thus, even if the court tasked with considering the petition finds there is a good reason to appoint a guardian, the court may not do so unless no less restrictive alternatives could meet the individual's needs at the time of appointment. The fact that a court might anticipate a future need for broader powers (as may be the case when the respondent has been diagnosed with a progressive condition such as Alzheimer's) or in good faith believes that broader powers would be in the best interest of the respondent, does not give the court authority to order broader powers.[67]

In addition, the Act recognizes limitations on courts' authority by recognizing that there are certain rights that a court may never remove from an individual, including those to challenge the existence or terms of the guardianship, or seek legal counsel to do so.[68] Thus, the Act recognizes that the guardianship system is not capable of removing an individual's legal personhood, but only capable of removing specific types of rights from an individual.

C. UGCOPAA's Procedural Reforms

Although the UGCOPAA's limitations on courts' authority to impose guardianships and especially full guardianships are important for protecting the rights of respondents, the Act does not rely solely on such prohibitions to discourage overbroad and unnecessary guardianships. To achieve those goals, it also creates a series of processes designed to better align the interests and approaches used by courts and petitioners.

1. Aligning Petitioners' Incentives

In most states, it is typically far easier for a petitioner to request a full guardianship than a limited one. A petitioner seeking a full guardianship need simply make a request for all powers available under state law; a petitioner seeking a limited guardianship must set forth exactly which powers they are requesting the court to confer

66. *See id*. § 301(b) (guardianship); *id.* § 401(c) (conservatorship).

67. *See* UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 301 cmt. (2017).

68. *See id.* §§ 318, 319, 430, 431.

upon the guardian.[69] This results in a de facto incentive to request broad powers.

The UGCOPAA attempts to reverse, or at least reduce, this counterproductive incentive by making it easier to petition for a limited guardianship than a full one. One way it does this is to require additional information and effort from petitioners seeking full powers. The petition must state whether a limited guardianship, full guardianship, or protective arrangement instead of guardianship is sought.[70] If the petitioner requests a full guardianship, the petition must include a statement as to why neither a limited guardianship nor a protective arrangement instead of guardianship would meet the respondent's needs.[71] Thus, the petitioner who is requesting greater powers has an additional burden relative to one who seeks more limited powers.

In addition, the Act nudges petitioners to consider less restrictive alternatives by requiring petitions to state that less restrictive alternatives for meeting the respondent's alleged needs have been considered or implemented, to justify any failure to pursue less restrictive alternatives in advance of the petition, and to explain why less restrictive alternatives would not meet the respondent's alleged needs.[72] Notably, the inclusion of such information also can provide the court with information that will help the court in determining whether guardianship is appropriate.

Finally, the UGCOPAA makes it easier to petition for a limited guardianship by providing, in section 603, a sample petition form that petitioners may use.[73]

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69. *See, e.g.*, MONT. CODE ANN. § 72-5-319(1)(m) (2021) (explicitly stating that a petition for a limited guardianship state "the particular powers and areas of authority that the petition seeks to have vested and the term for which the limited guardianship is requested" but stating that a petition or a full guardianship must only state "the length of time the guardianship is expected to last.").

70. *See* UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 302 (guardianship); *id.* § 403 (conservatorship); *id.* § 504 (protective arrangement).

71. *See id*. (guardianship); *id.* § 402 (conservatorship). This provision is similar in part to Uniform Guardianship and Protective Proceedings Act (UGPPA) section 304(b)(8), which required a petition requesting a full guardianship to explain why a limited guardianship was inappropriate. *See* UNIF. GUARDIANSHIP & PROTECTIVE PROC. ACT § 304(b) (1997).

72. *See* UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 302 (2017) (guardianship); *id.* §402 (conservatorship).

73. *Id.* § 603.

2. Aligning Court Processes

If courts are to avoid imposing unnecessary and overbroad guardianships, they must have access to full information about the respondent's abilities. The Act therefore creates a hearing process that will substantially increase the likelihood that the court will have access to and consider such information. It does this in several ways.

First, the Act requires the court to appoint a visitor who has "training and experience in the types of abilities, limitations, and needs alleged" in the underlying petition[74] and that the visitor provide the court with comprehensive information about the respondents' needs, abilities, and limitations.[75] Of particular importance, the visitor must provide the court with an assessment identifying tasks that the respondent could "manage without assistance or with existing supports, could manage with the assistance of appropriate supportive services, technological assistance, or supported decision making, and cannot manage."[76] Thus, the visitor must bring the respondent's abilities—and not merely the respondent's deficits—to the court's attention. This can provide the court with information it needs to determine whether the individual has a functional need that warrants imposition of guardianship or conservatorship, and the information it needs to tailor an order to the respondent's actual situation.[77]

Second, recognizing that a respondent's presence at—and ability to participate in—a hearing is key to ensuring that the court has full information, the Act prohibits the court from holding a hearing on a petition without the respondent being present except in extraordinarily

74. *Id.* § 304(a). For conservatorships, the enacting state is given the option to require an appointment in all cases or only in cases where the respondent is not represented by counsel. *See id.* § 405(b). The appointment of a visitor has been a feature of uniform guardianship acts since the original 1969 Uniform Probate Code, but the role and specific responsibilities have changed over the years. *See* UNIF. PROB. CODE § 5-308 (1969).

75. *See* UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 304(d) (2017); *id.* § 405 (conservatorship).

76. *Id.* § 304(d)(2). In a conservatorship proceeding, the visitor must investigate whether the respondent's needs could be met by a protective arrangement instead of a conservatorship or other less restrictive alternative and, if so, identify the arrangement or other less restrictive alternative. *Id.* § 405.

77. *See* Eleanor M. Crosby & Rose Nathan, *Adult Guardianship in Georgia: Are the Rights of Proposed Wards Being Protected? Can We Tell?*, 16 QUINNIPIAC PROB. L. J. 249, 280 (2003) (discussing how "meaningful" functional assessments are needed to tailor limited orders).

limited circumstances.[78] Thus, the court must arrange for the respondent to be able to attend even if that means holding court in an alternative location (e.g., the respondent's residence or care facility) to enable the respondent's presence.[79] This could also include situations where the court does not move but the respondent appears by Zoom or other electronic means. Remote guardianship hearings, a necessity during the COVID-19 pandemic, may be appropriate to facilitate respondents' presence and participation. In addition, under the Act, a respondent is entitled to be assisted at the hearing by any person of their choosing, and a court must make reasonable efforts to provide assistance to facilitate the respondent's participation if that assistance would not otherwise be available to the respondent.[80]

Third, the Act reduces the risk that a court will mistake respondents' communication barriers for a lack of ability to make decisions. To alert the court of communication barriers, it requires petitioners to disclose "whether the respondent needs an interpreter, translator, or other form of support to communicate effectively with the court or understand court proceedings."[81] It also authorizes a respondent to use supports, including decision-making supporters, as part of the hearing.[82] Furthermore, it requires the court to make "reasonable efforts to provide" the respondent with assistance that will facilitate the respondent's participation at the hearing if that assistance would not otherwise be available.[83]

A fourth major way that the Act helps ensure that courts have full information in front of them is by ensuring that those in a position to provide the court with information are aware of the proceeding and can participate in it. Thus, the Act has broad notice requirements that require notice not merely to kin but also to others involved in the respondent's life. For example, a petitioner must identify any "person

78. *See* UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 307 (2017) (guardianship); *id.* §408 (conservatorship).

79. *Id.* § 307(a)–(b) (guardianship); *id.* § 408(a)–(b) (conservatorship). Requiring that the respondent be present at the hearing has long been required in some states. *See, e.g.*, 755 ILL. COMP. STAT. ANN. 5/11a-11(a) (West 2021), which was enacted in 1979, "Unless excused by the court upon a showing that the respondent refuses to be present or will suffer harm if required to attend, the respondent shall be present at the hearing."

80. *See* UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 307(c) (2017) (guardianship); *id.* § 408(c) (conservatorship).

81. *Id.* § 302(b)(10) (guardianship); *id.* § 402(b)(10) (conservatorship).

82. *See* UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 307 (guardianship); *id*. § 408 (conservatorship).

83. *Id.* § 307(c) (guardianship); *id.* § 408(c) (conservatorship

known to have routinely assisted the respondent with decision making during the six months immediately before the filing of the petition."[84] Those persons are also entitled to receive notice of a hearing on a petition.[85]

3. Aligning Requirements for Orders

Just as it has traditionally been easier to petition for a full guardianship than to petition for a limited one, it has traditionally been easier for courts to appoint a full guardian than a limited one. To appoint a full guardian, the court traditionally simply needed to state that the guardian is granted all powers available under law.[86] By contrast, to appoint a limited guardian, the court has had to specify the powers to be granted.[87] The Act changes this imbalance by requiring a court to make additional findings when granting a full guardianship that the court is not required to make when granting a limited one. Specifically, an order establishing a full guardianship must not only state the basis for doing so but must "include specific findings that support the conclusion that a limited guardianship would not meet the functional needs of the adult subject to guardianship."[88]

The Act also creates a barrier to, and disincentive for, removing certain fundamental rights. Before the court can remove the right to vote or marry, the court must make a specific finding as to why those rights are to be removed.[89]

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84. *Id.* § 302(b)(3)(L) (guardianship); *id.* § 402(b)(3)(I) (conservatorship). Other non-relatives who must be listed in the petition include a person responsible for the patient's care, a representative payee, a trustee or custodian of a trust or custodianship of which the respondent is a beneficiary, a VA fiduciary, an agent designated under a power of attorney for health care or finances, a person nominated by respondent as guardian in the case of a guardianship petition, or a person nominated as conservator in the case of a conservatorship proceeding. UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 302(b)(3) (2017) (guardianship); *id.* § 402(b)(3) (conservatorship).

85. *Id.* § 303(c) (guardianship); *id.* § 403(c) (conservatorship).

86. *See id.* § 310 cmt.

87. *See* UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 310 cmt. (2017).

88. *Id.* § 310(c) (guardianship); *id.* § 411(c) (conservatorship).

89. *See id.* § 310(b). Likewise, a guardian is not permitted to restrict the individual's ability to communicate, visit, or interact with others for an extended period without specific court authorization. *See* UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 311(b)(6) (2017). This focus of UGCOPAA on civil rights issues is consistent with a trend in the states to add "bills of rights" to guardianship statutes. *See* MICH. COMP. LAWS §

Of course, merely increasing the burden on the court is unlikely to completely remove the court's inclination to order a full guardianship. Especially where the respondent has a progressive, degenerative condition, the court may be concerned that the matter will rapidly end up back in court as additional powers are needed.[90] The requirement that the court provide additional findings, however, creates a "speed bump" on the road to full guardianship and encourages the court to consider less restrictive approaches.

4. Aligning Procedures for Termination and Modification of Appointments

A key aspect of requiring that guardianships and conservatorships comply with the principle of the least restrictive alternative is to ensure that individuals placed into these relationships can have their rights restored if the guardianship or conservatorship ceases to be necessary (or, in the case of an initial mistake, never was necessary).

Under the Act, termination is required if the basis for appointing a guardian no longer exists.[91] Moreover, upon a presentation of prima facie evidence supporting termination, the court must order termination unless it is proven that "the basis for an appointment of a guardian … still exists."[92]

In addition to creating a standard that favors restoration of rights, the Act supports restoration by reducing the barriers to using the termination or modification options. One initial barrier is a lack of

700.5306a (2021), added by S.B. 461, 96th Leg., Reg. Sess. (Mich. 2011); MINN. STAT. § 524.5-120 (2021), added by H.R. 804, 2009 Leg., 86th Leg. Sess., (Minn. 2009); MO. REV. STAT. § 475.361 (2021), added by S.B. 806, 99th Gen. Assemb., 2d Reg. Sess. (Mo. 2018); NEV. REV. STAT. § 159.328 (2021), added by S.B. 360, 79th Leg., Reg. Sess. (Nev. 2017); S.C. CODE § 62-5-304A (2021), added by S.B. 415, Gen. Assemb., 122d Sess. (S.C. 2017); TEX EST. CODE § 1151.351 (2021), added by S.B. 1882, 84th Leg., Reg. Sess. (Tex. 2015). *See also* FLA. STAT. § 744.3215 (2021) (grandparent in this area), added by S.B. 1305, 11th Leg., 1st Reg. Sess. (Fla. 1989).

90. For a discussion of judges preferring full guardianships on the grounds that they appear "efficient" in terms of use of legal resources, see Lawrence A. Frolik, *Promoting Judicial Acceptance and Use of Limited Guardianship,* 31 STETSON L. REV. 735, 742–43 (2002).

91. UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 319(a) (2017) (guardianship); *id.* § 431(c) (conservatorship).

92. *Id.* § 319(d) (guardianship); *id.* § 431(f) (conservatorship). This provision was carried forward from the 1997 UGPPA. *See* UNIF. GUARDIANSHIP & PROTECTIVE PROC. ACT § 318(c) (1997) (guardianship); *id.* § 431(d) (conservatorship).

awareness that it is possible to terminate or modify the guardianship. To increase awareness, the Act requires the court, upon the appointment of a guardian or conservator, to provide notice regarding termination and modification rights to the individual subject to guardianship or conservatorship and to other specified persons.[93] Another way the Act facilitates requests for modification or termination is by allowing the individual and others to notify the court of the need for termination or modification through informal means, without following a traditional court process that may be beyond their abilities.[94] Just as important, the Act recognizes that an adult who seeks to terminate or modify their guardianship has a right to choose an attorney to represent the adult in the matter and directs the court to award reasonable attorney's fees to the attorney who provides such representation.[95]

D. UGCOPAA's Protective Orders in lieu of Guardianship

As a practical matter, Article 5 of the UGCOPAA may be the Act's most important contribution to efforts to reduce unnecessary guardianships. Article 5 creates a new alternative to guardianship and greatly expands an already existing alternative to conservatorship. Under Article 5, a court may enter an order that is limited in scope in lieu of guardianship or conservatorship where the limited order would meet the needs of an individual for whom guardianship or conservatorship would otherwise be warranted. Specifically, a court may grant authority for a particular transaction or treatment, or deny a third-party abuser access to an individual, without imposing a conservatorship or a guardianship that would deprive the individual of more rights and require ongoing monitoring.[96] Thus, Article 5 allows courts to enter orders of limited scope (and potentially, of limited duration) that are "precisely tailored to the individual's circumstances and needs."[97]

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93. *See* UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 311(b) (2017) (guardianship); *id.* § 412(b) (conservatorship).

94. *See id*. § 319(b)(2) (guardianship); *id.* § 431(d)(2) (conservatorship).

95. *See id.* § 319(g) (guardianship); § *id.* 431(i) (conservatorship) (creating a best practices option for states to require courts to appoint an attorney if the adult is not represented by one).

96. *See id.* § 502(b).

97. UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS § 501 cmt. (2017) ("Article 5 is responsive to the Third National Guardianship Summit's call to embrace such less restrictive alternatives."). *See*

Before entering a protective order, the court must find that the basis for the appointment of a guardian or conservator otherwise exists. The court must find that the respondent meets the incapacity threshold for the appointment of a guardian[98] or conservator.[99] The other procedural requirements on a petition for the appointment of a guardian or conservator must also be satisfied. Those include the appointment of a visitor,[100] the appointment of an attorney to represent the respondent,[101] a professional evaluation,[102] and a requirement that the respondent attend the hearing.[103]

Article 5 provides an illustrative but not exhaustive list of transactions for which a protective order in lieu of guardianship may be used. Transactions related to personal matters include consent to medical treatment or refusal of a medical treatment, "a move to a specified pace of dwelling," "visitation or supervised visitation between the respondent and another person," and restricting others from access to the respondent.[104] Transactions related to property include establishing eligibility for benefits, entering into contracts, selling property, and adding to or establishing a trust.[105] The court may also "restrict access to the respondent's property" by persons "whose access to the property place the respondent at serious risk of financial harm."[106]

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generally Symposium, *Third National Guardianship Summit Standards and Recommendations*, 2012 UTAH L. REV. 1191 (2012) (advocating "person-centered planning").

98. *See* UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 502(a)(1) (2017).

99. *See id.* § 503(a)(1).

100. *See id.* § 506.

101. *Id.* § 507.

102. *Id.* § 508.

103. UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 509 (2017).

104. *Id.* § 502(b).

105. *Id.* § 503(c). The list of authorized transactions is quite lengthy. The court may "authorize or direct a transaction necessary to protect the financial interest or property of the respondent, including: (A) an action to establish eligibility for benefits; (B) payment, delivery, deposit, or retention of funds or property; (C) sale, mortgage, lease, or other transfer of property; (D) purchase of an annuity; (E) entry into a contractual relationship, including a contract to provide for personal care, supportive services, education, training, or employment; (F) addition to or establishment of a trust; (G) ratification or invalidation of a contract, trust, will, or other transaction, including a transaction related to the property or business affairs of the respondent; or (H) settlement of a claim."

106. *Id.*

Unlike a guardianship or conservatorship, a protective order in lieu of guardianship does not necessarily involve the removal of the right to make future decisions.[107] These orders are therefore less restrictive alternatives to guardianship and conservatorship, whether full or limited.

Although Article 5 does not require the appointment of an ongoing surrogate decision-maker, it recognizes that a fiduciary will sometimes be needed to implement the transaction.[108] Article 5 therefore authorizes the court to appoint a master to implement a transaction.[109]

Article 5 orders are thus not only alternatives to ongoing appointments but may also be useful in situations in which an emergency guardianship or conservatorship might otherwise be pursued to obtain consent to a particular medical treatment or legal authority for a particular transaction. Unlike an emergency appointment, obtaining a protective order in lieu of guardianship does require a showing that the respondent has needs that cannot be met with a less restrictive alternative, but does not require a showing that substantial harm will likely otherwise occur.[110] Also, should a master be appointed to implement a transaction, the term of the appointment is not limited to sixty days as is the case with emergency appointments.[111] This is helpful because some of the more complicated property transactions, such as the establishment and funding of a suitable trust, sometimes take more time.

To avoid unnecessary burdens on courts and petitioners, and to encourage courts to take full advantage of this less restrictive alternative, the Act allows courts to order a protective arrangement instead of guardianship for an adult not only where the petitioner requested such an arrangement, but also where the petition originally requested a guardianship or conservatorship.[112]

Those provisions, while novel in their scope, are not without precedent. "Single transaction" orders were recommended by the

107. *See id.* § 501 cmt.

108. *See* UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 512 cmt. (2017).

109. *See id.* § 512.

110. *See id.* § 502.

111. *See id.* §§ 312, 413, 512

112. *See* UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT §§ 301(a)(2), 502(a) (2017) (protective order in lieu of guardianship); *id.* § 503(a) (protective order in lieu of conservatorship).

Second National Guardianship Conference[113] and are included in the prior uniform acts governing guardianship.[114]

Moreover, in a number of states, a court can order a protective order in lieu of guardianship for the making of a health-care decision.[115] However, Article 5 protective orders extend well beyond court orders granting authority for a single financial transaction, and the Article encompasses a broad array of protective arrangements in lieu of guardianship.[116] Thus, Article 5 allows courts to address a wider range of needs without appointing a guardian or conservator than did prior uniform acts. This breadth not only creates a more viable alternative to guardianship in a broad range of situations, but by allowing courts to better tailor orders to needs, may make courts more confident that they can efficiently address a respondent's needs without appointing a guardian or conservator.

What makes Article 5 so powerful, in part, is that it creates an option that is well-aligned with courts' administrative interests. A court that makes an Article 5 order can not only avoid unduly restricting an individual's liberty, it can reduce its own administrative burden by avoiding the need for ongoing court monitoring. Given the limited resources courts have for such monitoring, this incentive may be particularly effective.

Article 5 thus creates an important and viable less restrictive alternative to guardianship and conservatorship, thereby increasing the likelihood that the court will decline to impose unnecessary

113. *See* Symposium, *The Second National Guardianship Conference: Recommendations*, 31 STETSON L. REV. 595, 602 (2002).

114. *See* text accompanying *supra* notes 36–49.

115. Among the statutes authorizing a court to direct a health-care decision without necessarily appointing a guardian is Section 14 of the Uniform Health-Care Decisions Act. Representative state statutes include CAL. PROB. CODE § 3208(b) (West 2021); MO. REV. STAT. § 475.123.3 (2021); and VA. CODE ANN. § 37.2-1101 (2021).

116. The court may "authorize or direct a transaction necessary to meet the respondent's need for health, safety, or care, including: (A) a particular medical treatment or refusal of a particular medical treatment; (B) a move to a specified place of dwelling; or (C) visitation or supervised visitation between the respondent and another person." UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 502(b)(1) (2017). The court may also "restrict access to the respondent by a specified person whose access places the respondent at serious risk of physical, psychological, or financial harm." *Id.* § 502(b)(2). Finally, the court is empowered to "order other arrangements on a limited basis that are appropriate." *Id.* § 502(b)(3).

guardianships and conservatorships that unnecessarily deprive individuals of their liberty.

III. RECOMMENDATIONS

Reducing the incidence of unnecessary and overbroad guardianships will require changing incentives, not merely directing courts to do so. Accordingly, reforms must prioritize approaches that increase the burdens associated with granting full guardianships relative to limited ones and work to expand the menu—and perceived desirability—of alternatives to guardianship.

The first step is for all states to adopt the UGCOPAA in whole or in part.[117] As this article has explained, the UGCOPAA is designed not merely to require but to incentivize limited guardianships over full ones, and protective orders over long-term court appointments.[118]

States that lack the appetite or political environment for wholesale adoption of the Act, but nevertheless want to create systems to reduce the overuse and overbreadth of guardianships should, at a minimum, adopt the following statutory provisions:

1. An explicit prohibition on courts appointing a guardian where less restrictive mechanisms would meet the individual's needs; such provisions should list specific less restrictive alternatives, including decision-making support, to ensure that courts and petitioners recognize that guardianship is inappropriate when these alternatives would satisfy the respondents' identified needs.
2. An explicit prohibition on courts granting a guardian any power not necessitated by the demonstrated needs

117. This recommendation is consistent with Recommendation 3.1 of the Fourth National Guardianship Summit, which recommends that states enact UGCOPAA. For states enacting the UGCOPAA only in part, Recommendation 3.1 lists key provisions that the state should enact to ensure "better avenues, stronger protections, and greater independence for individuals being considered for guardianship, and persons seeking to terminate or modify guardianship orders." Included on this list of key provisions are provisions to "enable protective orders (or single transaction orders) instead of guardianship, thus expanding alternatives to guardianship" *Fourth National Guardianship Summit Standards & Recommendations*, 72 SYRACUSE L. REV. 29, 34–35 (2022) [hereinafter *Fourth National Guardianship Summit*].

118. There are many other good reasons to adopt the UGCOPAA as well, as the U.S. Senate Committee for Aging recognized in its 2018 report, Ensuring Trust: Strengthening State Efforts to Overhaul the Guardianship Process and Protect Older Americans. That report recommended that that every state legislature adopt the UGCOPAA. *See* U.S. SENATE SPECIAL COMM. ON AGING, *supra* note 50, at 23.

and limitations of the respondent.[119] To the extent that this prohibition was combined with a requirement that the court explicitly and specifically justify each power granted with a specific finding as to the related respondent's needs and limitations, it would be consistent with the Fourth National Guardianship Summit's call for abolishing plenary guardianship,[120] and is one mechanism for implementing that recommendation.

3. Requirements that petitions for guardianship specifically state whether less restrictive alternatives were attempted prior to the filing of the petition, or to justify the failure to do so.
4. Requirements that ensure that courts have the information necessary to understand fully the respondents' abilities, including:
    a. That courts appoint visitors with the skills and training needed to evaluate respondents' abilities as well as their challenges, and that those visitors inform the court of the respondent's abilities in addition to reporting on deficits.
    b. Hearing and notice procedures that ensure that the respondents' supportive network is aware of the petition, that hearings be conducted with the respondent present and able to participate to the maximum extent possible (e.g., by permitting the respondent to use supports at the hearing and requiring courts to facilitate supports for the respondent to participate in the hearing).
5. Procedural requirements that increase the administrative time and cost associated with ordering full guardianships relative to ordering limited ones.

119. This is consistent with the UGCOPAA's language. *See* UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 301(b) (2017) (allowing a guardian to be granted "only those powers necessitated by the demonstrated needs and limitations of the respondent").

120. Fourth Summit Recommendation 3.2 provides that "[s]tates should eliminate plenary guardianship, allowing people to retain the maximum of rights, and if guardianship is imposed, require tailored guardianship orders in all cases." *See Fourth National Guardianship Summit*, *supra* note 117, at 35.

6. Statutory provisions that enable courts to order a broad range of protective arrangements in lieu of guardianship or conservatorships, even if the underlying petition requested an appointment of a guardian or conservator.

In addition, states should promulgate model forms for petitioners, to make it easier for both pro se petitioners and those represented by counsel to request protective orders in lieu of guardianship, as well as limited guardianships in lieu of full ones. The optional form in the UGCOPAA is one such approach.[121] Such forms could also include or be supplemented by materials to help petitioners understand the nature of guardianship and the law's preference for limited guardianships over full ones, and to identify possible alternatives to meeting an individual's needs. To assist in this effort, further development of educational materials and templates for determining the appropriateness of less restrictive alternatives should also be a priority.[122] Because almost everyone has some abilities, ideally nearly every guardianship, where ordered, should be limited, and materials accompanying petition forms could help provide this perspective.

States and court systems should also consider promulgating model court orders for limited guardianships and protective orders in lieu of guardianship. Such standardized, or "fill-in-the-blank" orders, can incentivize these less restrictive arrangements by making it more efficient and straightforward for courts to grant limited powers.[123]

Such forms can also provide powerful nudges to courts. Courts imposing conservatorship because an individual is at substantial risk due to the individual's inability to manage finances typically strip individuals of the right to manage all of their finances even though it is likely that in many such cases allowing the individual to retain the right to manage a small amount of money would not pose significant risk. However, the default should therefore be that when a

121. UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 603 (2017) (providing an optional form).

122. Existing tools include: A.B.A., *PRACTICAL Tool for Lawyers: Steps in Supporting Decision-Making*, (May 7, 2016), https://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice/practical_tool/ and UMKC INST. FOR HUMAN DEV., *MO Guardianship: Understanding Your Options & Alternatives*, https://moguardianship.com/#materials.

123. Indeed, Larry Frolik made a similar suggestion in 2002 when he recommended standardized types of limited orders. *See* Frolik, *supra* note 90, at 749. This recommendation is slightly different because we are recommending individualized orders.

conservatorship is imposed, a portion of the income or assets (even if only a very small amount) remain under the control of the individual subject to conservatorship. If courts must explicitly fill out a form indicating how much the individual retains the ability to control (e.g., put either a zero or another number in the proper space), it may nudge them to not fully remove money management rights.

Where state actors are not able or willing to promulgate such forms, advocacy organizations could and should take the initiative.

Finally, the gap between the law governing the use of limited guardianships and how limited guardianships are used in practice strongly suggests the need for expanded education on the role and propriety of limited guardianship. There are two critical audiences for such training. The first is the courts. The second is those who interact with guardians and conservators. Specifically, states, court systems, and other entities could advance the use of limited guardianship by working to educate financial institutions, medical providers, and others with whom limited guardians might interact. There is anecdotal evidence that guardians having only limited powers find that third parties sometimes question their authority because those third parties do not understand the concept of limited guardianship.

CONCLUSION

The persistence of full guardianships represents a major disappointment to those who dedicated their lives and careers to reforming guardianship. As the history of reform efforts suggest, states cannot simply correct the problem by creating better rules for courts. States must create better systems—systems that discourage the use of full guardianships. Fortunately, the UGCOPAA provides a roadmap for creating such systems. Only time will tell whether its enactment will substantially reduce the current powerful incentives and inertia in favor of full guardianship. But even if only partially successful, the enactment of the UGCOPAA in the states would go a long way toward creating the rules, systems, and change in culture needed to substantially reduce the use of unnecessary and overbroad guardianships.