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## **NAELA Public Policy Guidelines: Guardianship**

NAELA supports the following principles concerning adult guardianship as general guidelines, and recognizes that some guidelines and the recommendations upon which they are based may be inconsistent with existing State and Uniform laws:

### **A. Procedural Due Process**

Guardianship proceedings should ensure adequate procedural protections including: (a) timely notice in plain language, including information about the rights that are subject to being lost and the individual's rights at the hearing; (b) requirement for the individual to be present at the hearing unless there is good cause, and provisions for hearing accommodations; (c) mandatory court appointment of counsel at or before notice to act as zealous advocate for the individual, and court payment of fees for indigent respondents; and (d) hearing rights including right to compel attendance of witnesses, cross-examine, request a jury trial, and appeal the decision. In emergency proceedings, actual notice to the respondent and appointment of counsel should be required before the hearing or as promptly as possible, and the emergency order should be limited to the circumstances giving rise to the petition.

### **B. Determination of Diminished Capacity**

Judges should consider and ensure adequate evaluation of six "pillars of capacity" before a determination is made: (1) the individual's medical condition; (2) cognitive functioning; (3) daily living functional abilities; (4) consistency of the individual's functioning with his/her values, preferences and lifetime patterns; (5) the risk of harm in the context of the individual's social and environmental supports, and (6) means to enhance capacity through accommodations and effective communication techniques.

### **C. Less Restrictive Alternatives; Limited Guardianship**

Guardianship should be a last resort; and less restrictive alternatives such as appropriate durable powers of attorney, advance directives, trusts, representative payment arrangements, and other legal and social mechanisms should be explored

and exhausted prior to judicial intervention. Judges should aim to limit the scope of and tailor the guardianship order to the particular needs of the individual, granting the guardian powers only in those areas in which the individual lacks decision-making capacity. The court order should require the guardian to maximize the person's autonomy and independence, use the substituted judgment standard of decision-making, and involve the individual in decisions to the extent possible in order to maximize the person's right to self-determination and autonomy. Where possible, the term person under guardianship should replace terms such as incapacitated person, ward, or disabled person.

#### D. Guardian Standards

Court or administrative rules should set forth guardian standards, which should be promoted to improve guardian practices and enhance public confidence in guardianship. Every guardian should be held to the same standards, regardless of familial relationship, except a guardian with a higher level of relevant skills shall be held to the use of those skills.

#### E. Role of the Court in the Guardianship

1. The court should monitor the well-being of the person and status of the estate on an on-going basis. To do so, the court should use available technology and develop systems including at least annual reports and accountings, court assistance to guardians in filing of timely reports, tracking of reports filed or overdue, appropriate sanctions for failure to file and for guardian malfeasance, regular court review of reports and accountings, and use of investigatory and auditing resources to verify information in reports and accountings. A template should be created for developing a person-centered plan.
2. The court should provide continuing assistance and education to the guardian about guardianship law and procedures, the guardian's duties and responsibilities, community resources and the rights of the person to achieve the highest quality of guardianship possible. This may include assistance in:
  - Guidance on facility transfer or placement
  - Providing for care at home
  - Financial and health care decision-making
  - What to do when the person dies or disappears
  - Burial and funeral planning

- Mental health services
- Government benefits eligibility.

## F. Guardian Fees

1. Guardians should be entitled to reasonable compensation for their services. The court should consider the factors outlined in the NGS Recommendations in determining the reasonableness of guardian fees.

The court should promote sound administrative practices relating to guardianship fees by:

- Encouraging the continuity of judicial experience and expertise on the probate bench, and encouraging specialization of probate courts in accordance with the National Probate Court Standards’;
- Actively monitoring the reasonableness of fiduciary fees;
- Creating and maintaining training programs for participants in the guardianship process;
- Collecting data regarding fiduciary fees and costs;
- Promoting timely review and approval of fees; and
- Promoting electronic filing.

The court should support any rejection or reduction of fees with a statement of explanation. The court and all parties should respect the privacy and dignity of the person when disclosing information regarding fees. The court should resolve fee disputes through a process that is fair, expeditious, and economical.

2. In the event estate funds are exhausted and the guardian has failed to address the anticipated exhaustion, the court is justified in requiring the guardian to remain serving at least until a succession plan is in place.

## G. The Role of the State in the Guardianship

1. State statutes should clearly express the mandatory duties of guardians and apply them to all guardians. Materials should be developed to educate guardians about statutory duties, court rules, aspirational codes of conduct, and best practices.

2. State guardianship statutes should provide that valid health care directives that appoint a health care agent shall remain in effect unless the court determines that the agent is unable, unwilling, or unsuitable to perform the agent's duties under the directive.
3. Public and Professional Guardianship
  - a. States should support high-quality public guardianship through adequate funding and staffing, avoidance of the conflict of interest inherent in designating a social services agency as public guardian, use of a multidisciplinary screening committee to review potential cases, regular visits to clients, and development of policies and procedures as well as minimum standards. To ensure the right of access to guardianship services, states should provide public funding for Guardianship services for those unable to pay; and for Services to coordinate alternatives to guardianship, and the obligation to make such services available to all vulnerable persons.
  - b. States should support high-quality professional guardianship services by adopting minimum standards of practice, using the NGA Standards and Code of Ethics as a model; and should require guardians who receive fees for serving two or more unrelated incapacitated individuals to be certified through a state certification program.
4. States should adopt by statute a decision-making standard that provides guidance for using substituted judgment and best interest principles in guardian decisions. The standards should emphasize self-determination and a preference for substituted judgment.

#### H. Education of the Judiciary

State courts should ensure that adequate ongoing training and multi-faceted education are made available to all judges, magistrates, evaluators and other court personnel who are involved in the adjudication process to achieve the highest quality of guardianship possible. Basic education in these areas should be mandatory. The curriculum should include information regarding the impact of chronic illnesses (e.g., dementia, vascular problems, Parkinson's disease, alcoholism) on functional capacity, vulnerability to exploitation and executive functioning/judgment. Judges should be made aware of alternative resources including guardianship mediation, care managers, professional guardians and the effectiveness of legal documents as alternatives to the appointment of a guardian.

The Elder Law Bar should be directly involved in this process.

#### I. Interjurisdictional Issues

NAELA believes that state legislatures should adopt legislation and practices that recognize our mobile society which frequently creates complex jurisdictional issues in adult guardianship.

NAELA supports the recommendations of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA)(2007) as developed by the Guardianship Jurisdiction Drafting Committee, which was appointed by the National Conference of Commissioners of Uniform State Laws.

The Uniform Act targets three distinct but related areas:

1. If more than one state is involved, which state should have initial jurisdiction?
2. If the ward is moved to another state, how should the guardianship be transferred?
3. To what extent should a court in one jurisdiction recognize and enforce a guardianship order in another jurisdiction?

#### J. Overview Recommendations

States should seek to ensure a strong adult guardianship system through:

1. Development of multidisciplinary committees on guardianship and alternatives, including all community stakeholders (judges, court staff, attorneys, adult protective services, long-term care ombudsman, medical community, aging and disability networks, mental health agencies and advocates);
2. Development and regular implementation of education and training for all stakeholders;
3. Development and funding of a uniform system of data collection; and
4. Research and evaluation to measure successful practices.

#### K. Wingspan

NAELA supports the recommendations of the 2001 Wingspan Conference addressing guardianship issues, with the additional commentary to particular recommendations appended thereto. See Appendix.

## WINGS

NAELA supports the establishment of Working Interdisciplinary Networks of Guardianship Stakeholders (WINGS) to advance adult guardianship reform and implement the recommendations adopted by the Third National Guardianship Summit.

A state steering committee should establish the scope, goals and mission of WINGS as identified in the NSG Recommendation. WINGS should develop an agenda to accomplish its goals and objectives. The agenda should include implementation of the standards and recommendations adopted by the Third National Guardianship Summit. WINGS should aim to procure tangible and in-kind resources necessary to achieve its mission. WINGS should develop a plan to secure sustainability.

### L. NSG Overview Recommendations

The NGS Network organization should work to match desired changes in policy and practice with the best possible implementation strategy. The NGS Network should work with the Uniform Laws Commission as a core strategy to implement the standards and recommendations from the Third National Guardianship Summit.

The National Center for State Courts should take the standards and recommendation from the Third National Guardianship Summit to the probate court standards revision process.

NAELA supports the Recommendations of the Third National Guardianship Summit and its implementation strategies. NAELA shall strive to implement and support the Recommendations through all appropriate activities.

*Resolutions adopted by the NAELA Board of Directors July 12, 2002  
Revised June 29, 2007, November 1, 2007, and July 14, 2012*