

Excerpted from

**Guardian Accountability Then and Now:
Tracing Tenets for an Active Court Role**

Sally Balch Hurme and Erica Wood

32 Stetson L. Rev.867 (2002)

Adult guardianship can be viewed as having a “front end” (the determination of incapacity and appointment of a guardian) and a “back end” (accountability of the guardian and court monitoring). The Associated Press in its landmark 1987 series *Guardians of the Elderly: An Ailing System* disparaged both. It charged that guardianship in the United States “regularly puts elderly lives in the hands of others with little or no evidence of necessity, then fails to guard against abuse, theft and neglect.”¹ The guardianship system can’t function effectively unless both “ends” are in working order. This paper is about the back end. It reviews the Associated Press charge, the 1988 American Bar Association “Wingspread” conference recommendations on guardianship monitoring,² and what has occurred since then. It asks where we stand now, what barriers block effective monitoring, and what imaginative yet practical steps we can take to bolster guardian accountability.

...

III. Guardian Standards, Licensing, and Certification

History. An essential component of guardianship monitoring is the standard by which guardian performance is judged. The statutes provide only rudimentary guidance to judges and guardians as to how guardians should carry out their duties. The

¹ [Fred Bayles](#) & Scott McCartney, *Guardians of the Elderly: An Ailing System*, Associated Press series (Sept. 1987) [hereinafter AP Report].

² American Bar Association Commission on the Mentally Disabled and Commission on Legal Problems of the Elderly, *GUARDIANSHIP: AN AGENDA FOR REFORM, RECOMMENDATIONS OF THE NATIONAL GUARDIANSHIP SYMPOSIUM* (1989) [hereinafter AGENDA]. The conference is known informally as “the Wingspread conference” after the Johnson Foundation’s Wingspread Conference Center in Wisconsin where it was held.

Wingspread conferees concluded that the absence of guardian performance standards “makes it difficult to measure guardians performance...[and that] model guardian performance standards would be useful in setting out basic principles, duties and requirements.”³ They recommended that model guardian performance standards be developed and distributed nationally and adapted for local use.⁴

Various guardianship associations, often in cooperation with the legislature and judiciary, have taken the initiative to create codes of professional ethics and standards of practice to promote the quality of guardians.⁵ The Center for Social Gerontology developed an early code of ethics for guardians that provided a basis for later versions.⁶ Michael Casasanto, Director of the Office of Public Guardian, and other New Hampshire advocates also developed a code of ethics. The National Guardianship Association (NGA) officially adopted the New Hampshire version and widely distributes it to members, courts, and legislatures.⁷ In addition to advocating a code of ethics, NGA has also developed *Standards of Practice*.⁸ The practice standards are designed to provide detailed guidance to guardians on how to carry out their responsibilities, along the lines of “this is how you should,” as distinguished from the more direct “you shall” of the ethics code. As part of its legislative policy, the NGA Board is urging state legislatures to adopt the *Code of Ethics* and *Standards of Practice* to use to evaluate guardian performance.

Licensing. Another step a few states have taken to enhance the quality of professional guardianship services is to require licensing or registration. Professional guardians register with the courts by disclosing information that might reveal either

³ AGENDA, *supra* note 2, at 25.

⁴ *Id.* Recommendation V-D.

⁵ Penelope A. Hommel & Lauren B. Lisi, *Model Standards for Guardianship: Insuring Quality Surrogate Decisionmaking Services*, CLEARINGHOUSE REV. 433-443 (Special Issue, Summer 1989).

⁶ HOUSE SELECT COMM. ON AGING; MODEL STANDARDS TO ENSURE QUALITY GUARDIANSHIP AND REPRESENTATIVE PAYEESHIP SERVICES, COMM. PUB. NO. 101-729 (Oct. 1989).

⁷ Michael D. Casasanto, Mitchell Simon, & Judith Roman, *A MODEL CODE OF ETHICS FOR GUARDIANS* (1988) (available from the National Guardianship Association, 1604 North Country Club Road, Tucson, AZ 85716-3102 and online at www.guardianship.org).

⁸ National Guardianship Association, *STANDARDS OF PRACTICE* (2000) [hereinafter NGA STANDARDS]. <http://www.guardianship.org/pdf/sofp.pdf>

incapability or unsuitability for appointment. *California* requires “private professional conservators or guardians”⁹ to report annually on the extent of their practices, submit to a fingerprint check, and disclose if they have been removed from a guardianship case.¹⁰ *Texas* also has a registration process for “private professional guardians,” defined as anyone engaged in the business of providing guardianship services.¹¹ *Florida* Statewide Public Guardianship Office maintains a registry of professional guardians who have completed the 40-hour training.

State Certification. *Washington* has also developed an extensive certification program that goes further than just registration. The Supreme Court has adopted the recommendations of a study group convened by the Office of the Administrator for the Court to establish a Professional Certified Guardian Board.¹² The program features an application process, certification guidelines, training requirements, practice standards,¹³ and disciplinary procedures.¹⁴ To be appointed, professional guardians must be certified.¹⁵ Certification requires an application that includes stating whether any criminal complaint or unsatisfied liens have been filed against the applicant; if the applicant has been convicted, plead guilty or no contest to any felony or misdemeanor; has filed on a bond guarantee; has been disciplined by an administrative or licensing board; had a driver’s license suspended; has filed for bankruptcy; or, if any attorney, has had any bar

⁹ The California regulations apply to person or entity appointed over person or estate or both of two or more unrelated persons. CAL. PROBATE CODE § 2340 (West 2000).

¹⁰ The annual report must contain the following information for each person or staff of an entity who serves as conservator: name and telephone numbers, educational background, three professional references, names of current conservatees being served, aggregate dollar value of assets being managed, whether removed or resigned from a case, and the case names and numbers of all closed cases. CAL. PROBATE CODE §§ 2340-2343 (West 2000).

¹¹ Attorneys and corporate fiduciaries are exempt. TEX. PROBATE CODE ANN. § 601 (West 2000). They must give a statement of educational background and professional experience; provide three professional references and a list of all incapacitated persons servicing; and disclose the aggregate fair market value of property being managed and whether ever removed or resigned from a case. *Id.* § 697.

¹² Professional guardian is defined as one who acts as guardian for a fee for three or more non-family members. WASH. REV. CODE § 11.88.008 (2000).

¹³ The Standards of Practice are based on the National Guardianship Association Model Code of Ethics, the Wingspread Conference, and the U.S. Senate Select Committee on Aging hearings. [Http://www.courts.wa.gov/programs/guardian/final.cfm](http://www.courts.wa.gov/programs/guardian/final.cfm)

¹⁴ WASH. REV. CODE § 11.88.020 (2000).

¹⁵ Professional guardian is defined as one who acts as guardian for a fee for three or more non-family members. WASH. REV. CODE § 11.88.008 (2000).

complaints or disbarment proceedings filed.¹⁶ The King and Spokane County Bar Associations and the University of Washington collaborated on developing the required training materials. A certifying examination and continuing education requirements are still being considered. The cost of developing and implementing a certifying examination was considered prohibitive, requiring specific budget allocation.¹⁷

Washington's disciplinary process for handling any complaints against a certified professional guardian encompasses substantial due process and review procedures.¹⁸ The Office of the Administrator for the Courts screens initial complaints, forwards valid complaints to the Board, which reviews the matter in executive session after the guardian has had an opportunity to provide an explanation. The Board can ask a review panel to hold hearings or to settle and dispose of complaints without a hearing. Sanctions for violation of the *Standards of Practice* include decertification, prohibition against taking new cases, a letter of reprimand, or other remedies such as changes in practice methods or additional training.¹⁹

Arizona has implemented the most comprehensive certification program of all the states' efforts.²⁰ It is actually a licensing program for just about everyone, other than family members, who serves as a guardian or conservator, called a fiduciary in Arizona.²¹ The statute²² requires each private fiduciary to register with the Supreme Court before being appointed. The registration process includes submitting to a fingerprint check,

¹⁶ <http://www.courts.wa.gov/programs/guardian>

¹⁷ *Id.*

¹⁸ <http://www.courts.wa.gov/programs/guardian/disiplin.cfm>

¹⁹ *Id.*

²⁰ An earlier version of this section previously appeared as Sally Balch Hurme, *Progress in Guardian Certification*, 11 NAT'L. GUARDIAN 1-3 (Fall 1998) and Sally Balch Hurme, *Progress in Guardian Certification*, 32 CLEARINGHOUSE REV. 344-345 (1998).

²¹ "Any person who for a fee serves as guardian or conservator for one or more unrelated persons or is a court-appointed personal representative for a non-relative, not named in the will or not a devisee." ARIZ. REV. STAT. § 14-5651 (2001) (banks, their trust departments and independent trust companies were exempted from certification in a 2001 amendment). California's private professional conservator registration requirement exempts banks, state agencies that serve as conservators and public conservators. CAL. PROBATE CODE §§ 2340-2343 (West 2000). WASH. REV. CODE ANN. § 11.88.020 (2000) exempts certain financial institutions from its certification requirements.

²² ARIZ. REV. STAT. § 14-5651 (2001). See also <http://www.supreme.state.az.us/>

posting a bond,²³ attending training, and passing an examination. To be eligible to register, the person must have not been convicted of a felony or found civilly liable in any actions involving fraud, misrepresentation, material omission, misappropriation, theft or conversions. The registration form also calls for information about the number of previous appointments as guardian and if the registrant has ever failed to file a court report, been removed as guardian, received a gift over \$100 from the ward, or has any interest in any enterprise providing services to the ward.²⁴ Certified fiduciaries must renew their certificate every two years and complete six hours of biennial continuing education.²⁵ The Fiduciary Advisory Committee is recommending requiring applicants to disclose more personal financial history and authorizing the program coordinator to conduct credit checks if necessary.²⁶

While requiring a testing component was almost rejected as being too difficult and expensive to administer and validate, the rules drafting committee became committed to requiring a qualifying test. Because this was a licensing process, rather than just registration, it considered a test mandatory to verify some minimal level of competency. The training curriculum and manual, developed by Court Services and professional fiduciaries, includes office and accounting practices, case management, decision-making, ethics, and reporting requirements. Guardians attend 12 hours of classroom presentations by judges and local experts over a two-day program and take a 50-question multiple-choice test. The extensive scope of the training is intended to balance the need of guardians with a social service background to get a solid business practices grounding and those with a financial background to be better able to handle the social aspects of making decisions for an incapacitated person. The training agenda is in the process of being expanded to 18 hours to give more coverage of business practices, ethical considerations, and practical experience in writing personal care and estate management

²³ The bonding is to compensate the judicial system for any expenses incurred in investigating the fiduciary, in addition to any bonding to secure the ward's estate.

²⁴ ARIZ. REV. STAT. § 14-5651 (2001).

²⁵ Administrative Office of the Courts, Arizona Supreme Court, *Final Report of the Fiduciary Advisory Committee to the Arizona Judicial Council* 5 (June 2001) [hereinafter *Ariz. Final Report*]. The recommendation is to raise the continuing education requirement to 20 hours.

²⁶ *Id.* at 6.

plans.²⁷ The examination is being rewritten to better test for fiduciary knowledge and screen out those who do not meet the minimum standards of the profession.²⁸

National Certification. The National Guardianship Association (NGA), through its National Guardianship Foundation (NGF), has a nationwide process to certify guardians. Interested persons must demonstrate eligibility²⁹ to sit for a qualifying examination. The certification examination is offered periodically at regional locations, frequently in conjunction with state guardianship association events, and always at NGA national meetings. Those who meet the eligibility requirements and pass the examination³⁰ become able to identify themselves as Registered Guardians (RG). During the two-year certification period, the RG must take a minimum of ten hours of continuing education. To apply for recertification the RGs must document their continued involvement with guardianship matters and re-affirm their good standing.

For more experienced guardians, NGF provides a Master Guardian (MG) certification. To be able to sit for the examination, Master Guardian applicants must be a Registered Guardian, have a substantial combination of higher education and professional guardianship experience, and submit four peer recommendations. A significant part of the application is to write an essay that sets out the applicant's competence in managing complex guardianship cases, handling significant financial estates, serving in a supervisory position, and participating in professional development or community outreach.³¹ Qualified applicants must pass an all-day test to demonstrate their ability to

²⁷ Personal conversation with J. R. Rittenhouse, Private Fiduciary Certification Project Director, Arizona Administrative Office of the Courts, Aug. 5, 2001. The first group of fiduciaries became certified in Spring 1999. As of June 2001, 308 fiduciaries have been certified.

²⁸ *Ariz. Final Report*, *supra* note 99, at 6.

²⁹ The eligibility requirements include 21 years of age or older, high school graduate (or GED) with 1 year of guardianship experience or a degree in a field related to guardianship; no felony conviction or no contest plea, never civilly liable in an action involving fraud, turpitude, theft, conversion; never relieved of responsibility by a court, employer or client for fraud, turpitude, theft, conversion; attestation that bonded in accord with state and local laws or practices; and attestation that not found liable in a bond subrogation action. <http://www.guardianship.org/pdf/Application1.pdf>

³⁰ There are approximately 600 Registered Guardians from 35 states and 21 Master Guardians representing 13 states.

³¹ <http://www.guardianship.org/pdf/booklet.pdf>

resolve complicated guardianship issues. The MG certifications are renewable every three years, with a 10-hour per year continuing education requirement.

To preserve the integrity of the two certifications, the NGF Board of Trustees has the authority to deny or remove a certificate. The denial or decertification process relies on the community to bring to the board's attention a question of concern about the actions, inactions, or honesty of an applicant for testing or recertification. By necessity the board cannot initiate investigative or disciplinary procedures. Rather it relies primarily on the findings of others, such as courts or employers, to instigate the process to remove a certificate. Reasons for removing a certificate could include making false representations or misstatements on the application regarding prior criminal, civil, or other disciplinary actions that reflect negatively on the guardian's ability to carry out fiduciary responsibilities.

State or national certification is potentially the wave of the future in being able to provide a minimum level of confidence to the community and to the courts that professional guardians have demonstrated a basic level of understanding of their fiduciary responsibilities, professional practices, and business acumen. As the need for guardians increases, the availability of family members who can competently serve declines, and funding for public guardians is not forthcoming, certified professional guardians fill the vacuum. Certification assists the public in its assessment of guardians who expect compensation for their services. However, the focus on professional certification does not address needs of family members or community volunteers who are called upon to serve as guardians with little preparation or understanding of fiduciary responsibilities and surrogate decision-making.