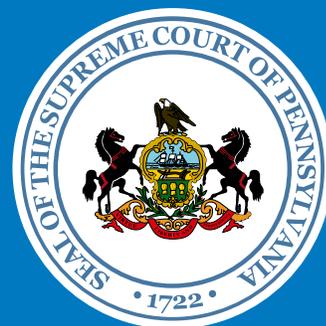


The Supreme Court OF PENNSYLVANIA



REPORT AND RECOMMENDATIONS OF THE ELDER LAW TASK FORCE

NOVEMBER 2014

The Elder Law Task Force



Explanatory Statement

While we recognize that many adults live long, healthy and productive lives well beyond the age of 60, for the purposes of this Report, the Elder Law Task Force defines an elder as a person 60 and over, based on the use of that age by the Pennsylvania Department of Aging, the Area Agencies on Aging, the United States Administration on Aging and most aging services providers. This age originally comes from the Federal Older Americans Act (which created the “aging network” of services for older Americans). In addition, Pennsylvania Act 70 of 2010, which created Adult Protective Services (a reporting and investigative system for the under 60 population), defines an “adult” as an individual between the ages of 18-59. Thus, the Task Force determined an “older adult,” or “elder,” would be defined as 60 and over.

While some of these recommendations are equally applicable to younger adults with diminished capacity, the focus of the Elder Law Task Force is on elders.

Disclaimer Statement

The materials contained herein, and the opinions expressed in this Report and Recommendations of the Elder Law Task Force, represent the views of the Elder Law Task Force and do not necessarily represent the official views of the Supreme Court of Pennsylvania. The Report is for informational purposes only as a service to the public and other interested entities. This Report does not constitute legal advice or a substitute for the advice of legal counsel.

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November 2014

It is said that societies are judged on how they help their most vulnerable.

In 2013, the Supreme Court of Pennsylvania formed the Elder Law Task Force, chaired by Madame Justice Debra Todd, to study the growing issues that impact the elder community, including guardianship, abuse and neglect, and access to justice. The mission of the task force has been to lay the foundation for substantive improvements in the way elderly citizens in Pennsylvania interact with the court system and to deliver a blueprint to address those challenges.

Elder abuse is estimated to affect about 5 million Americans each year. The direct medical costs associated with violent injuries to elders are estimated to add more than \$5.3 billion to the nation's annual health expenditure.

Research suggests that one out of every 10 people 60 and older who live at home suffers abuse, neglect or exploitation. Only one in 24 cases of elder abuse is reported to authorities. Abuse also occurs in institutional settings. In a 2000 study, 44 percent of nursing home residents report having been abused and 95 percent reported that they or another resident had been neglected.

Tragically, elder abuse is also deadly. According to a study published in the *Journal of the American Medical Association*, victims of abuse, neglect and financial exploitation have three times the risk of dying prematurely.

Contained in this report, prepared by 38 experts who comprised the task force, are recommended solutions to issues involving guardianship, elder abuse and neglect, and access to justice, including court rules, legislation, education and best practices. Next steps include review by the Supreme Court of recommendations related to the courts and referral to the General Assembly of those recommendations that require legislative consideration.

Pennsylvania currently ranks fourth in the nation in percentage of people 60 and older. As of the 2010 census, nearly 2.7 million Pennsylvanians – 21.4 percent of the state's population – were over 60 and that number is projected to continue to increase to 3.3 million by 2020. With these statistics in mind, there can be little doubt that serious consideration of the report's findings is timely.

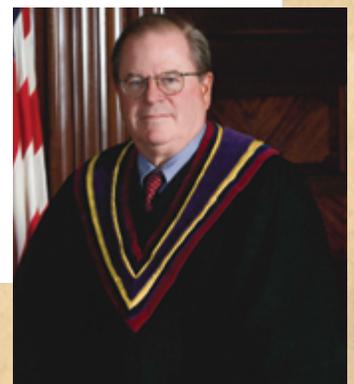
Now is the time to put in place solutions, such as those contained in this report, which will allow older Pennsylvanians to age without worries that they will be abused or their money will be stolen.

On behalf of my fellow justices and the entire judiciary, I thank Justice Todd, Court Administrator of Pennsylvania Zygmont A. Pines, who served as the task force administrative chair, and the entire task force for their work.

Sincerely,

Ronald D. Castille

Chief Justice Ronald D. Castille



Supreme Court of Pennsylvania



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Justice Debra Todd

November 2014

Greetings,

When Chief Justice Ronald D. Castille asked me to undertake the formation and leadership of the Pennsylvania Supreme Court's Elder Law Task Force, I was both honored and challenged by the daunting responsibility this would entail. My first task was to assemble a "blue-ribbon" panel of experts in all areas of elder law to bring to the table the diverse and critical perspectives of myriad stakeholders in the aging network.

The thirty-six Task Force members who joined Court Administrator Zygmunt A. Pines and me on this journey are to be commended for their devotion, their time, and their energy. Each of them provided invaluable insight into the preparation of proposed approaches and solutions to the challenges faced by our Commonwealth in addressing the growing needs of our elderly population.

This Report came to fruition in large part due to the leadership of Court Administrator Pines and our Committee Chairs and Vice Chairs, Judge Joseph O'Keefe, Judge Penny Blackwell, Judge Paula Ott, Attorney Rise Newman, District Attorney Stephen Zappala, and Department of Aging Director Wilmarie Gonzalez, and due to the tireless efforts of our Task Force staff, especially Cherstin Hamel, AOPC Assistant Director of Judicial Programs, and Rhonda Campbell, my Chief Judicial Assistant. I am eternally grateful to Court Administrator Pines and the Task Force members, as well as our capable and dedicated staff, for their commitment to this important project.

Vice President Hubert H. Humphrey once said, "The moral test of a government is how it treats those who are at the dawn of life, the children; those who are in the twilight of life, the aged; and those who are in the shadow of life, the sick, the needy, and the handicapped." With the release of this Report and Recommendations, the Elder Law Task Force has taken bold and significant steps toward enhancing the quality of life for our Commonwealth's elder population, and I could not be more proud of the work which has been accomplished.

Sincerely,

A handwritten signature in blue ink that reads "Debra Todd".

Justice Debra Todd



Supreme Court of Pennsylvania



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November, 2014

Dear Pennsylvanians:

Public service often provides a great opportunity to participate in a project that leads to a better understanding of the lives and struggles of our citizens. The Elder Law Task Force is a good example.

Among the documents in my "elders file" is a "Dear Harry" letter that appeared in Harry Gross's newspaper column. A son and daughter turned to the financial consultant for help. Ten years ago they persuaded their father, who had a superstitious belief against wills, to give his long-time caretaker a general power of attorney. The children later discovered that the "caretaker" had executed a will for their father, leaving the bulk of his life's savings to the caretaker. Their father is now mentally incapacitated. What, they asked, could they do to help him?

Elder abuse, we have learned, affects both rich and poor alike. It can take many forms — financial, physical, or mental. It can happen in the privacy of one's home, in an open community like a nursing home, or at the bank teller's window. For years, we have recognized the vulnerability of children and our obligation to protect them. Today, we are beginning to realize how much more needs to be done for those at the other spectrum of life, our elders.

It is perhaps easy to read this report and conclude that it concerns "them." But this report is ultimately about us. Some of us are healthy and happy elders. But there is no guarantee that such good fortune will continue. We cannot assume that our basic needs — physical and mental health, economic self-sufficiency and stability, a supportive family — will be met. Someday, all of us, if Providence allows, will join the ranks of elders. It is we, the vulnerable, who may need the support and protections identified in this report.

This report reflects the dedication and labor of so many individuals. First and foremost is the leadership and support of Chief Justice Ron Castille and the Supreme Court of Pennsylvania, especially Justice Debra Todd, who was continually motivated by a genuine concern and passion for our elders. Her insistence and persistence, as well as her inspiring presence, resulted in the comprehensive, detailed report that is the product of 18 months of discussion, debate and deliberation.

This report is admittedly comprehensive and ambitious in scope. It is a report that is intended to be a roadmap for years to come. The reports from the three committees (Elder Abuse and Neglect, Guardians and Counsel, Guardianship Monitoring) represent hundreds, perhaps thousands, of hours of reading, researching and thinking by the Task Force members who, without recompense, devoted themselves wholeheartedly to an endeavor that would improve the lives of our elders and those who care for them.

Likewise, this report would not have been possible without the exceptional diligence, competency and labor of the AOPC staff, particularly those individuals (Darren Breslin, Owen Kelly and Kim Cataldo) who were the AOPC liaisons to the committees. Critical to the realization of this project was the AOPC Assistant Director of Judicial Programs, Cherstin Hamel. She served as an invaluable resource, coordinator, and contributor to this project.

To the Supreme Court, members of the Task Force and all those who made this report possible, I am deeply grateful and proud. It has been a privilege to participate in this important endeavor.

This report reflects much wisdom. Now the challenge is for all Pennsylvanians — especially government, the bar, social service agencies, and financial institutions — to support our elders through action.

Sincerely,

A handwritten signature in black ink, appearing to read "Zygmunt A. Pines".

Zygmunt A. Pines



Preface

Our nation and Commonwealth are truly blessed to have an increasing number of elders who are living longer, healthier and active lives. Those of the “Greatest Generation” who served our country, and others of advanced years, have contributed, and continue to contribute, to our society. These citizens impart a wealth of wisdom, a deep understanding of our past and an abiding faith that links the past, present, and future. They enable us to pass down traditions from one generation to another, providing stability and continuity. Indeed, many elders are not only active in the workplace, but also are volunteers in our hospitals, nonprofits and government where they selflessly devote countless hours to others. Yet, with the aging population, which has given so much to subsequent generations, come unique challenges that affect our institutions, including the judiciary.

As the Commonwealth’s population continues to age, the court system is facing unprecedented needs. Court cases dealing with the protection of vulnerable elders, including guardianships and elder abuse proceedings, are expected to increase substantially.¹ The Pennsylvania courts’ capacity to “provide services and remedies must be bolstered to meet the growing numbers and needs of older adults. The range, efficacy, and quality of services that abused, neglected, and exploited older persons receive from the courts is a matter of public trust and confidence.”²

As the National Center for State Courts (“NCSC”) policy paper on elder abuse states, “[t]he judicial system supports proposed budgets and laws that provide resources for the courts that enable them to develop practices and responses to a host of issues impacting the older population....Additional court resources will become critical as the courts experience an increase in cases involving elder abuse and an aging population as a result of the demographic shift in American society.”³ The Elder Law Task Force (“Task Force”) concurs with this assessment.

With challenges, however, come opportunities: “State courts are uniquely positioned to create programs and policies that will improve court responses to the growing problem of elder abuse,” guardianships, and access to justice for elders.⁴ “Although courts have neither the power of the sword nor the purse, they do have the neutral moral authority to call public and private officials together to discuss how best to address a shared problem. Courts around the country have exercised this authority to explore more effective (and cost-effective) ways of dealing with such matters as substance abuse, child protection, and domestic violence....These endeavors demonstrate how judicial leadership at state and local levels can fuel improvements in the legal system to better address elder law issues.”⁵

The Task Force believes the recommendations contained in this Report lay the foundation for substantive improvements in the way Pennsylvania’s court system interacts with elders, and provide a practical and achievable blueprint to enable the Commonwealth’s courts, as well as other entities, to successfully address the many challenges presented by Pennsylvania’s expanding aging population.

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Scope of the Challenge Nationally and in Pennsylvania

“The large numbers of older persons living longer will have an impact on every social institution – government, health care, justice systems, and the economy.”

Brenda K. Uekert and Richard Van Duizend
*Elder Abuse and Exploitation: How Courts Can Take Leadership in Developing Effective Responses.*⁶

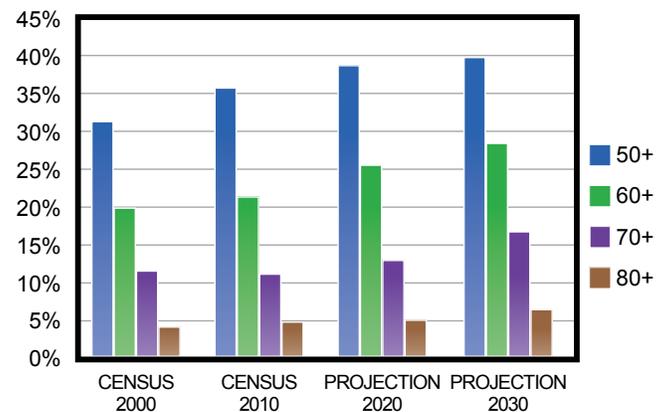


The Conference of Chief Justices (“CCJ”) and the Conference of State Court Administrators (“COSCA”) predict “state courts are likely to experience a substantial increase in adult guardianships and conservatorship cases as a result of the large population of older adults, increased longevity, greater awareness of mental health and capacity issues, and an increase in the numbers of adults with disabilities.”⁷ Cases in which elder abuse is an underlying factor are anticipated to be heard with increasing frequency. Judges and Court Administrators will be challenged by access to justice issues related to elders.

The 2010 United States Census recorded “the greatest number and proportion of people age 65 and older in all of decennial census history: 40.3 million, or 13% of the total population,” and predicts the “‘Boomer Generation’ effect will continue for decades.”⁸ By 2050, an anticipated 88.5 million people 65 and over will comprise 20 percent of the total population.⁹ In 2010, there were 5.8 million people 85 and over. It is projected this age group will increase to 19 million by 2050.¹⁰

Population trends in the Commonwealth are reflective of national trends.¹¹ Pennsylvania has nearly 2.7 million persons (21.4%) 60 and over, and more than 300,000 persons (2.4%) 85 and over. By the year 2020, it is predicted approximately 3.3 million Pennsylvanians will be 60 and over, and by 2030, this population is expected to exceed 3.6 million.¹²

Age totals as % of PA population



Pennsylvania Department of Aging,
State Plan on Aging (2012-16), Page 9

According to the U.S. Census Bureau’s 2010 census, the Commonwealth is the nation’s fourth “oldest state in the percentage of the population 65 and over, after Florida, West Virginia, and Maine.”¹³ As of July 2013, more than 2 million Pennsylvania residents were 65 and over, and the population is continuing to age. The rural counties of Sullivan, Cameron, Potter, Forest, and Warren comprise the counties with the largest proportion of those 65 and over.¹⁴ Approximately 280,000 elders in Pennsylvania have been diagnosed with Alzheimer’s Disease, and 675,000 adults 65 and over have some form of disability.¹⁵

As the population in the United States continues to age, courts, including those in our Commonwealth, are facing unprecedented challenges. The increasing population of elders anticipated during the next 20 years “is likely to result in a substantial increase in court cases regarding the protection of vulnerable elderly persons, including guardianship, conservatorship, and elder abuse proceedings.”¹⁶ Elders will also seek redress in civil, criminal, and other types of cases.

According to an article by Max Rothman and Burton Dunlop in the *Journal of the American Judges Association*, the number of older people being arrested and jailed for domestic violence, assaults, drug-related charges, misdemeanor charges and motor vehicle violations is growing. In addition, civil matters such as landlord-tenant and property disputes, and litigation arising from a variety of other factual situations involving elders is also increasing. The article notes that more elders will also enter the courthouse to serve as jurors and witnesses, seek divorces, and obtain information and assistance, and that these elders may be dealing with dementia, mental illness, substance abuse, or complex medical conditions.¹⁷

“Numerically, aging with concomitant age-related degenerative illness accounts for the largest anticipated increase in the number of people with potentially diminished capacity.”¹⁸ By 2025, most states are expected to see an increase in Alzheimer’s Disease prevalence. Close to half of all people over 85, the fastest growing segment of our

population, have Alzheimer’s Disease or another kind of dementia. A 2013 study conducted by the RAND Corporation found that nearly 15 percent of individuals 71 and over, about 3.8 million people, have dementia, and that by 2040, the number will “balloon” to 9.1 million.¹⁹

According to the National Center on Elder Abuse (“NCEA”), “[r]esearch indicates that people with dementia are at greater risk of elder abuse than those without. Approximately 5.1 million American elders over 65 have some kind of dementia. One 2009 study revealed that close to 50% of people with dementia experience some kind of abuse. A 2010 study found that 47% of participants with dementia had been mistreated by their caregivers.”²⁰ Related thereto, COSCA asserts the growing number of elders with diminished capacity will increase caseloads significantly in probate, civil, and criminal courts which must appoint and monitor guardians and adjudicate disputes involving governmental services related to mental health matters, abuse, and exploitation.²¹

In the Commonwealth, the increasing population of elders impacts all layers of the judiciary and all types of cases to one degree or another. The number of Pennsylvania elders who will be plaintiffs and defendants in civil actions, defendants and victims in criminal actions, and witnesses and jurors in all actions will continue to grow, and the guardianship system is expected to be significantly impacted.²²

Guardianships

“[N]o matter your age, finances or social status, none of us in this room today are beyond potential abuse or neglect and any one of us at any time could become incapacitated and in need of assistance.”

Senator Gordon H. Smith,
United States Senate Special Committee on Aging²³



A guardianship protects the interests of an incapacitated person (“IP”), particularly an elder, and is a relationship created by state law in which the court gives a person or entity (the guardian) the duty and power to make decisions (personal and/or property) for another (the ward).²⁴ For purposes of this Report, “incapacitated person” is used in lieu of the term “ward.”

In Pennsylvania, cases concerning guardianship (called “conservatorship” in some states) are heard in the Orphans’ Court (called “Probate Court” in many states). The court may appoint a “guardian of the person,” who makes decisions about the health, safety, and physical well-being of the IP, or a “guardian of the estate,” who oversees the management of the person’s resources, or both.

Judges recognize that guardianship decisions are weighty ones. “Each time a guardianship petition [for adjudication of capacity] is filed, the life of a person with diminished capacity may be forever changed. A favorable outcome could mean the court makes a well-informed decision to appoint a guardian with appropriate powers to provide for the basic needs and protection of the person with diminished capacity or to dismiss the petition

as unnecessary. Alternatively, an unfavorable outcome could subject the person with diminished capacity to an unnecessary loss of fundamental rights, restriction of self-determination, loss of the freedom to choose and take risks[,] or abuse, neglect and exploitation.”²⁵ Given the loss of individual rights and the seriousness of a person’s incapacity, guardianship is considered an option of “last resort.”²⁶

Although a number of state entities aid the court in ensuring an IP receives care and is kept safe from harm, it is the court that plays a significant leadership role in providing the IP with decision-making assistance. The court is charged with making a formal determination of incapacity, ensuring that the IP’s procedural due process rights are protected, determining the scope of a guardian’s duties and powers, limiting the restrictions on the IP’s autonomy, if necessary, and assuring that guardians perform their fiduciary responsibilities.²⁷

According to an estimate from the NCSC, there are at least 1.5 million open (i.e., current) guardianships nationally.²⁸ However, a reliable number of current adult guardianships does not exist, and solid data on the incidence of guardianship abuse is also lacking. “While some of this information is available at the individual court level, few states can provide accurate and reliable numbers....Most courts in the United States are not able to readily document the number of open guardianship cases without reviewing actual case files. Where statistics are available, the perpetual nature of guardianships and the poor level of court monitoring have resulted in questionable case status data.”²⁹

The Pennsylvania Joint State Government Commission (“JSGC”) observes, “[b]ecause of the potentially rising need for guardianships, it is important to determine the number of current

guardianships as a predictor of future needs and future costs for the Commonwealth.”³⁰

The 2013 caseload statistics of the Unified Judicial System of Pennsylvania (“UJS”), compiled by the Administrative Office of Pennsylvania Courts (“AOPC”), show 2,812 new guardianship cases were filed statewide, and 967 cases remained pending at the end of 2013.³¹ Filings have remained relatively stable over the past three years. Due to a dearth of data tracking and guardianship monitoring procedures, the AOPC is unable to produce key statistics relating to guardianship cases, including the number of current guardianships in any given year. Although the Orphans’ Court Clerks are required to report the number of guardianships granted yearly, no express responsibility is placed on them to track when a guardianship is terminated or missed submissions of guardian reports. In all but five counties, Orphans’ Court Clerks are elected officials. The clerks generally do not have a direct relationship with the judicial district’s president judge or court administration office and operate independently. In order to provide the number of current guardianships, it will be necessary for each Orphans’ Court Clerk to monitor the status of guardian report submissions as well as the point at which a guardianship is no longer active.

Another source of statewide data on guardianship cases is provided by the Act 24 reports filed annually by Orphans’ Court Clerks. In 1992, Act 24 amended 20 Pa.C.S. Chapter 25 to, *inter alia*, make greater use of limited guardianships.³² These reports assist the Commonwealth in evaluating the operation and costs of the guardianship system. Act 24 data provided to the AOPC in 2013 shows 2,991 guardianship petitions were filed, and 2,547 guardianships were granted.³³ There were 1,921 petitions filed (or 64% of 2,991 new petitions), in which the alleged incapacitated person (“AIP”) was 60 and over.

For over 25 years, reports and studies have criticized courts for failing to monitor guardians or hold them accountable. A 1987 nationwide study by the Associated Press asserted that “courts ‘routinely take the word of guardians and attorneys without independent checking or full hearings.’ In short, it claimed that sometimes courts responsible for overseeing guardianships ‘ignore their wards.’”³⁴

In 2010, a U.S. Government Accountability Office (“GAO”) report, *Guardianships: Cases of Financial Exploitation, Neglect, and Abuse of Seniors*, identified hundreds of allegations in 45

states and the District of Columbia between 1990 and 2010 that involved physical abuse, neglect, and financial exploitation by guardians. The GAO found several common themes:

1. state courts failed to adequately screen potential guardians, appointing individuals with criminal convictions and/or significant financial problems to manage estates worth hundreds of thousands or millions of dollars;
2. state courts failed to adequately oversee guardians after their appointment, allowing the abuse of vulnerable seniors and their assets to continue; and
3. state courts failed to communicate with federal agencies about abusive guardians once the court became aware of the abuse, which in some cases enabled the guardians to continue to receive and manage federal benefits.³⁵

In *Guardianship of the Elderly*, Brenda K. Uekert and Thomas Dibble observe “Congress, national advocacy organizations, and the media have increasingly highlighted the use of guardianships and conservatorships as a means to further exploit older persons. The ease at which guardianships are granted, the lack of court oversight, the questionable qualifications of guardians, the general lack of accountability, soaring caseloads, and poor data management make the guardianship system primed for further abuse, neglect, and exploitation of elders.”³⁶

News articles about theft, misuse of funds, and power of attorney abuse are appearing with increasing frequency in the Commonwealth. In 2012 and 2013, the press reported charges against a number of Pennsylvanians who had depleted elders’ estates of hundreds of thousands of dollars through financial misconduct: “York County woman arrested after stealing more than \$300,000 from elderly aunt” (York Daily Record, 12/31/12); “Woman gets probation for stealing more than \$100,000 from mother” (Intelligencer Journal/Lancaster New Era, 5/29/13); “Nephew stole 93-year-old’s life savings, Lehigh County authorities say” (Lehighvalleylive.com, 8/10/13); “Police: Couple charged in death of older woman, misused victim’s trust fund” (The Morning Call, 7/10/13); and “Knox Man Sentenced to Prison for \$250k Theft from Elderly Aunt” (Explore Venango, 10/24/12).

COSCA points out that:

Other allegations, [against guardians] allege mental anguish caused to the person with diminished capacity or their family members as a result of inconsistent and sometimes poor decision-making by well-meaning, but unqualified guardians. In those instances, the actions of the guardian may result in unwarranted loss of self-determination or treatment that does not reflect the values, choices and preferences of the person with diminished capacity or best address that person's well-being, or unnecessary separation from a loved one, involuntary confinement or placement in settings more restrictive than individual need demands. Occasionally, allegations relate to overtreatment or, conversely, the withholding of necessary medical care. Although the extent and severity of guardian abuse or neglect of the person with diminished capacity has not been satisfactorily quantified, the seriousness of these persistent, wide-spread allegations warrants attention.³⁷

Guardianship cases involve many issues, but five areas pose a particular challenge to courts across the nation:

1. the determination of capacity,
2. costs associated with the administration of guardianships,
3. education/training for judges and court staff,
4. court monitoring of the guardianship, and
5. data collection.³⁸

Determination of Capacity

According to Brenda Uekert and Thomas Dibble, the determination of “capacity” is not “an exact science,” as capacity is both situational and transient, and can be affected by external factors (e.g., medications). They posit that objective criteria as well as an analysis of how specific capacities impact a person's ability to function in various settings must be factored into the court's determination of capacity.³⁹

Guardianship Costs

These same authors also observe that documentation regarding the costs of guardianships in the United States does not exist, and they predict that improving guardianship practices will require funds to hire specialized staff, order medical and/

or psychological assessments, require specialized training for judges and court staff, collaborate with community resources, collect guardianship case data and create court monitoring programs. They suggest that the lack of federal and state funding, together with the growing number of impoverished elders who require the assignment of public guardians, “creates an undue burden on individual courts to fund improvements.”⁴⁰

Guardianship Education/Training

Concerns also have been raised about the need for better education of the judiciary. According to Uekert and Dibble, “judicial training has not kept pace with demands....The lack of judicial training is associated with the greater use of full guardianships, questionable monitoring practices, and difficulties in identifying and replacing poor performing guardians. The status of judicial training is compounded by insufficient training for court managers, staff, and volunteers assigned to review reports, make home visits, and/or investigate cases. In addition to limited judicial and court staff training opportunities, guardians – both professional and family members, are unlikely to be fully trained.”⁴¹

Guardianship Monitoring

As stated by Sally Balch Hurme and Erica Wood, in *Guardian Accountability Then and Now: Tracing Tenets for an Active Court Role*, “[t]he incapacitated person is a living being whose needs may change over time. This argues for a more active court role in oversight.”⁴² Uekert and Dibble point out that “[i]t is the responsibility of the court to actively oversee and monitor guardianship cases – indeed, court monitoring is the only way to ensure the welfare of wards, discourage and identify neglect, abuse, or exploitation of wards by guardians, and sanction guardians who demonstrate malfeasance. Yet court monitoring is an expensive and timely proposition.”⁴³

A recommendation promulgated at the Third National Guardianship Summit (“National Guardianship Summit”) stressed:

The court should monitor the well-being of the person and status of the estate on an on-going basis, including, but not limited to:

- Determining whether less restrictive alternatives will suffice
- Monitoring the filing of plans, reports, inventories, and accountings

- Reviewing the contents of plans, reports, inventories, and accounting
- Independently investigating the well-being of the person and status of the estate
- Ensuring the well-being of the person and status of the estate, improving the performance of the guardian, and enforcing the terms of the guardianship order.⁴⁴

COSCA concludes that, “[e]nsuring positive outcomes for persons with diminished capacity in guardianship proceedings requires establishing consistent best practices and procedures.”⁴⁵

Data Collection

In order for courts to address guardianship cases effectively, it is essential that timely, accurate, and complete guardianship data be available.⁴⁶ Many courts are unable to produce reliable data on the number of guardianship cases filed or the number of current guardianships, and do not have accurate caseload measurements. An Orphans’ Court Clerk, as an independently elected or appointed official, is not directly under the court’s supervision regarding the collection of data. The difficulties courts face in providing reliable guardianship caseload data illustrate the challenges involved in tracking cases that may span many years.⁴⁷ An online survey conducted by the Center for Elders and the Courts (“CEC”) found that the inability to produce reliable adult guardianship case data is “compounded by the lack of statewide case management systems that can identify key case events for guardianships.”⁴⁸

An additional issue that poses a challenge for state courts involves the lack of coordination with federal agencies that administer representative-payment or fiduciary programs. The Social Security Administration (“SSA”) appoints representative payees to manage income benefits for persons who are determined to be incapable of handling their financial affairs. As of 2012, representative payees were managing the Social Security benefits of approximately 700,000 elders 65 and over.⁴⁹ Other agencies with representative-payment programs include the Office of Personnel Management (“OPM”) and the Railroad Retirement Board (“RRB”).

The Veteran’s Fiduciary Program was established by the Veterans Benefit Administration of the Department of Veterans Affairs (“VA”). Fiduciaries are appointed for veterans who are unable to manage their financial affairs. As of

July 2011, fiduciaries were managing the benefit payments of 56,077 VA beneficiaries 65 and over — a 21 percent increase since September 2003.⁵⁰

SSA and other representative-payment and fiduciary programs are responsible for monitoring representative payees to identify any misuse of benefits. The misuse of funds and violations by representative-payment programs have included the exploitation of benefits, control of funds beyond the benefits, a failure to keep records and submit required reports, and charging excessive fees.⁵¹

The GAO found that, while the state courts and federal agencies are charged with protecting many of the same IPs, there is no systematic coordination between federal agencies and state and local courts; their entities generally work together only on a case-by-case basis. In addition, the various federal agencies do not systematically exchange information among themselves. If federal agencies and the courts do not notify each other when, for example, a beneficiary is incapacitated or when a guardian is identified as abusive or neglectful, “an incapacitated person may remain at risk of having an identified abuser in charge of his or her benefit payments.”⁵²

The extent to which Pennsylvania’s courts send notices of guardianship appointment and other information to federal agencies that administer representative-payment or fiduciary programs is unknown. The AOPC does not exchange guardianship case data with any federal agencies.

According to research conducted by the AOPC, Pennsylvania’s Orphans’ Courts are confronting many of the same guardianship issues challenging courts nationwide. Among them are: standards for determining capacity, inadequate monitoring of guardianship cases, the need for guardianship education and training, insufficient data collection, and fiduciary misconduct. Orphans’ Court judges advise the AOPC that the majority of abuses they observe arise from the abuse of powers of attorney, and that such abuse has been increasing.

Guardianship Case Process

The Orphans’ Courts’ core function of protecting the welfare of older IPs by the appointment of a guardian is governed by Chapter 55 of Title 20 of the Pennsylvania Consolidated Statutes. An IP is defined by statute as: “[a]n adult whose ability to receive and evaluate information effectively and communicate decisions in any way is impaired to such a significant extent that he is partially or totally



unable to manage his financial resources or to meet essential requirements for his physical health and safety.”⁵³

The process of obtaining a guardianship begins with an interested party filing a petition in Orphans’ Court seeking the appointment of a guardian for an alleged incapacitated person (“AIP”). An interested party may be a family member, friend, private/professional guardian, guardianship support agency (“GSA”), or public agency. Anyone concerned about a person’s welfare may file a petition for guardianship.⁵⁴

A court hearing is then scheduled to determine if the AIP needs a guardian. “Because a ruling of ‘incapacity’ and appointment of a guardian involves the curtailing of many important legal rights, high standards must be met.”⁵⁵ If clear and convincing evidence supports the need for a guardianship, a guardian is appointed.⁵⁶ A guardian can be any “qualified” individual such as a spouse, family member, attorney or member of the clergy. A guardian may also be a corporate fiduciary, a non-profit corporation, a guardianship support agency, or a county agency.⁵⁷

The court may grant either a plenary or limited guardianship.⁵⁸ A plenary guardian has unlimited powers, allowing him or her to make virtually every kind of decision for the IP, while a limited guardian’s powers are more constrained. Pursuant to 20 Pa.C.S. § 5512.1(a)(6), the “court shall prefer limited guardianship.”

The court may appoint a “guardian of the person,” who has the duty to assert the rights and best interests of the IP, or a “guardian of the estate,” who oversees the management of the IP’s resources, or both.⁵⁹ A guardian of the person is obligated to respect the person’s wishes and preferences, encourage the person’s participation, to the extent possible, and assist the person in developing and regaining the capacity to manage his or her personal affairs.⁶⁰ Both a guardian of the person and a guardian of the estate must file annual reports and accountings with the court detailing their activities on behalf of the person.⁶¹ If an IP regains the ability to make reasoned decisions, the guardianship will be terminated by the court, or the court may modify the scope of the guardianship if the person regains some capacity.⁶²

In its policy paper on guardianships, COSCA found, “[i]ndividually, state court judges regularly wrestle with [guardianship] decisions on a case-by-case basis, resulting in thousands of positive outcomes. But inadequate fiscal and program resources, inconsistent practices, insufficient coordination among courts and service agencies, and the lack of consensus about standards and acceptable performance outcomes limit the courts’ ability to implement innovative reforms needed to increase positive outcomes for persons with diminished capacity.”⁶³

Elder Abuse and Neglect

“We must take a stand to ensure that older Americans are safe from harm and neglect. For their contributions to our nation, to our society, and to our lives, we owe them nothing less.”

U.S. Associate Attorney General Tony West⁶⁴



According to Brenda Uekert and Denise Dancy, “[e]lder abuse is a national problem with far reaching consequences for individuals, families, communities, and institutions.”⁶⁵ In a July 2014 press release, the Department of Justice and Department of Health and Human Services (“HHS”) “called on all Americans to take a stand against the serious societal problem of elder abuse, neglect and financial exploitation.”⁶⁶ “The cost, on top of the human suffering, is immense: in stolen and squandered savings; the strain on the court system from abusive guardianships; the cost to Medicare and Medicaid from fraud; and from the care of fleeced victims who end up destitute in nursing homes.”⁶⁷

An NCSC policy paper on elder abuse asserts that state courts are vital in addressing the needs of elder abuse victims, and suggests a court’s ability to assist elders “essentially determines whether individuals live their remaining years with respect and dignity, or are further alienated from the justice system with personal safety jeopardized.”⁶⁸

According to the NCEA, “[i]n general, elder abuse refers to intentional or neglectful acts by a caregiver or ‘trusted’ individual that lead to, or may lead to, harm of a vulnerable elder.... Physical abuse; neglect; emotional or psychological abuse; financial abuse and exploitation; sexual abuse; and abandonment are considered forms of elder abuse. In many states, self-neglect is also considered mistreatment.”⁶⁹ In Pennsylvania, pursuant to the Older Adults Protective Services Act (“OAPSA”), 35 P.S. §§ 10225.101-10225.5102, self-neglect is considered elder abuse. The definition of “self-neglect” is contained within the OAPSA’s definition of “neglect”.⁷⁰

Elder abuse is estimated to affect nearly 5 million Americans each year.⁷¹ The direct medical costs associated with violent injuries to elders are estimated to add more than \$5.3 billion to the nation’s annual health care expenditures.⁷²

Research suggests that one out of every ten people 60 and over who live at home suffers abuse, neglect, or exploitation.⁷³ It is estimated that only one of every 24 cases of elder abuse is reported to authorities.⁷⁴ Many factors, including poor health, the onset of infirmities, and the inability to request assistive services, can impact an elder’s response to abuse.⁷⁵

Dementia and other cognitive impairments place older individuals at significant risk for elder abuse. One 2009 study found that nearly half of individuals with dementia had experienced some form of abuse, and that many of those individuals

were not equipped to report the abuse.⁷⁶ Several other studies concluded that half of those individuals with dementia were abused or neglected by their caregivers.⁷⁷ Cognitive impairment also reduces financial capacity, increasing the risk of financial exploitation.⁷⁸

Women and “older” elders are more likely to be victims of elder abuse.⁷⁹ “African American, Latino, poor, and isolated older adults are disproportionately victimized.”⁸⁰ A national study found that, sadly, the vast majority of abuse (90%) is perpetrated by family members, most often adult children, spouses, partners, and others.⁸¹

While abuse is often perpetrated in an elder’s home by a family member, abuse also occurs in institutional settings, such as long-term care facilities.⁸² In a study of 2,000 nursing home residents conducted in 2000, 44 percent reported they had been abused, and 95 percent reported they or another resident had been neglected.⁸³

An abused elder is three times more likely to die prematurely than someone who has not been abused, and has significantly higher levels of psychological distress.⁸⁴ Compared with other older adults, abused elders are more likely to have health problems, including increased bone or joint problems, digestive problems, depression or anxiety, chronic pain, high blood pressure, and heart problems.⁸⁵

The financial exploitation of elders has been described “as an epidemic with society-wide repercussions.”⁸⁶ A 2011 national study by MetLife estimated that the annual financial loss suffered by victims of elder financial abuse in the United States was at least \$2.9 billion — a 12 percent increase from 2008.⁸⁷ The American Bar Association (“ABA”) asserts the financial exploitation of vulnerable elders and other adults who are unable to manage their financial affairs is growing, and posits that the recession has fueled motives for financial malfeasance.⁸⁸

To ascertain the scope of the growing problem of financial exploitation of elders in Pennsylvania, the Pennsylvania Department of Aging’s Institute on Protective Services (“Institute”) at Temple University considered the findings of the aforementioned MetLife study, as well as the New York State Elder Abuse Prevalence Study, which found that “for each case of financial exploitation that reached authorities, 44 cases went unreported.”⁸⁹ The Institute then conducted an internal unpublished study of 129 cases of reported financial

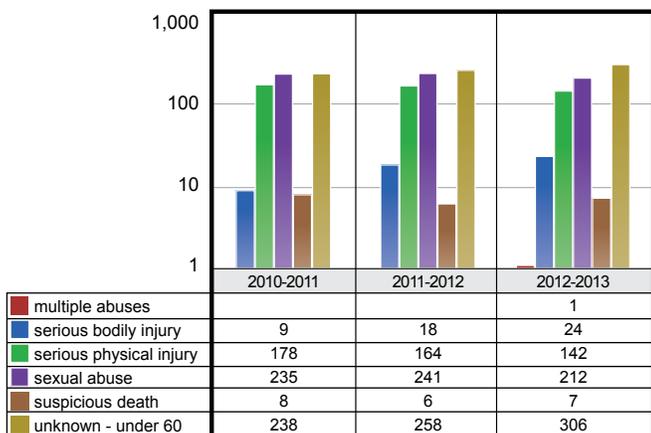
exploitation in three representative counties.⁹⁰ It was the Institute’s projection that the average loss suffered by an exploited elder was \$50,000, with a range of between \$25,000 to \$700,000. Based on this figure, the Institute estimated that the loss to the Commonwealth’s elders through financial exploitation is between \$400,000,000 and \$1,900,000,000 annually. The problem of financial exploitation is particularly acute in Philadelphia, which has the highest proportion of elders in the nation’s ten largest cities.⁹¹

The National Adult Protective Services Association (“NAPSA”) found a significant growth in the number and complexity of reports involving financial abuse of elders during the past decade. These incidents commonly involve “trusted” persons in the elder’s life, such as caretakers, family members, neighbors, friends and acquaintances, attorneys, bank employees, pastors, and doctors and nurses.⁹² Further, the financial abuse of elders is vastly underreported, with an estimated one in every 44 cases reported. Elder abuse victims are four times more likely to be admitted into a nursing home. Almost one of every ten financial abuse victims will turn to Medicaid as a direct result of their own money being stolen. Finally, cognitive impairment and the need for help with daily activities make victims more vulnerable to financial abuse.⁹³ A study in the August 2014 *Journal of General Internal Medicine* found that roughly 80 percent of 4,000 adults 60 and over in New York State had their money or property stolen or misused during the past year.⁹⁴

The Pennsylvania Department of Aging observes that with the recent economic downturn, reported incidents of elder abuse, neglect, abandonment, and exploitation in the Commonwealth continue to rise.⁹⁵ In Fiscal Year (“FY”) 2012-2013, 18,542 reports stating a need for protective services were received by Area Agencies on Aging (“AAAs”).⁹⁶ Seventy-four percent (13,627) of the reports were deemed appropriate for investigation.⁹⁷ Investigations substantiated that 37 percent (4,991) of the cases required protective services.⁹⁸ In FY 2011-2012, there were nearly 18,000 reports of need for protective services, a 17 percent increase from the prior year.⁹⁹ During FY 2012-2013, the most frequent reports of elder abuse concerned self-neglect (42%), caretaker neglect (22%), financial exploitation (16%), and emotional abuse (15%).¹⁰⁰

In Pennsylvania, the age group most often found in need of protective services is 81 and over

ACT 13 - Number of Reports of Alleged Abuse by Fiscal Year



Pennsylvania Department of Aging,
The Older Adults Protective Services Annual Report
(FY 2012 – 2013), Page 15

(36%).¹⁰¹ The majority are Caucasian women, most of whom live alone in their own homes.¹⁰² Fifty-one percent of the perpetrators are between 30-59 years of age, and 53 percent are women.¹⁰³ Family members constitute the largest group of abusers, a finding consistent with national studies.¹⁰⁴

According to the NCEA’s Research Brief titled Abuse of Residents in Long Term Care Facilities, “3.2 million Americans resided in nursing homes in 2008,” and “more than 900,000 people nationwide live in assisted living settings.”¹⁰⁵ Two out of three residents are female, and six out of seven are 65 and over. As noted above, a study in which 2,000 nursing home residents were interviewed found 44 percent said they had been abused, and 95 percent said they had been neglected or had seen another resident neglected.¹⁰⁶ In a different study, over 50 percent of nursing home staff admitted to mistreating (e.g., physical violence, mental abuse, neglect) older patients within the prior year.¹⁰⁷

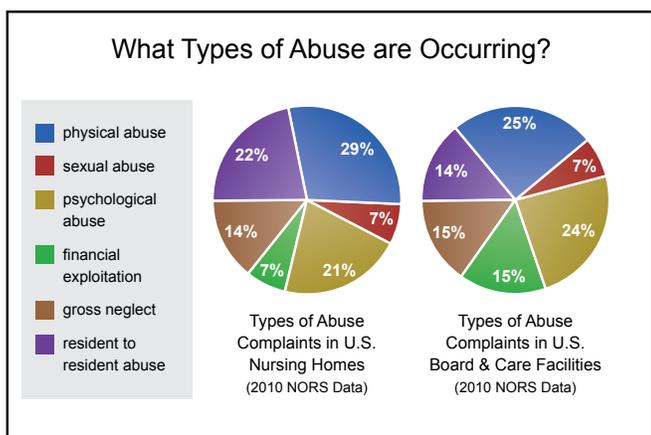
Most elder abuse statistics in Pennsylvania are generated by the Department of Aging. Neither the AOPC nor the courts collect data on elder abuse. Although the AOPC compiles filing and disposition statistics about the number of protection from abuse (“PFA”) emergency orders obtained from the courts, information about *who* is being abused, e.g., whether the person is an elder, is not collected.

The CEC notes that, because elder abuse may be an issue in criminal, civil, family, or probate cases, jurisdiction for cases involving elder abuse lies in a variety of courts; further, elder abuse may be an underlying issue in cases in which elder abuse is not the primary substantive issue before the court.¹⁰⁸ CCJ and COSCA adopted a joint resolution recognizing that “elder abuse, neglect, and exploitation involve complex civil and criminal issues that require a sustained and committed response by the courts.”¹⁰⁹

Many cases identified as elder abuse “go unrecognized as they are not brought to the court with a specific ‘elder abuse’ criminal charge.”¹¹⁰ In some states, elder abuse is a specific crime defined in the criminal code.¹¹¹ Types of offenses include: physical abuse, sexual abuse, psychological abuse, neglect, abandonment and isolation, financial or fiduciary abuse, and self-neglect.¹¹²

According to Brenda Uekert and Denise Dancy, the number of criminal cases identified as “elder abuse” is relatively small due to the challenges involved in prosecution. The most difficult aspects of prosecuting such cases include: diminished mental capacity and/or physical health of the victim, lack of cooperation by the victim, proving undue influence, and victim intimidation. The nature of the abuse and neglect may be subtle, and without screening and training, “the problem remains hidden from the view of the courts.”¹¹³

Civil cases also may involve elder abuse, including protection from abuse orders, claims for damages or other relief from identity theft, financial exploitation, undue influence, fraud, deceptive practices, petitions for access to an elderly person, and petitions for removal of durable power of attorney.¹¹⁴ Cases within the probate courts likewise may involve issues related to elder abuse and financial exploitation, including amendments of wills and trusts, exercise of a power of attorney, and guardianship of the person or estate.¹¹⁵



NORS is the National Ombudsman Reporting System
NCEA Research Brief Abuse on Residents
in Long Term Care Facilities, Page 2

The CEC notes that most states have a statutory requirement to report elder abuse, neglect, or exploitation. The reporting requirements

are complex, and vary according to the state.¹¹⁶

In Pennsylvania, protective services for elders are mandated by statute. The OAPSA authorizes protective services (activities, resources and support) for elders “to detect, prevent, reduce or eliminate abuse, neglect, exploitation and abandonment.”¹¹⁷ These acts and relevant definitions are set forth in the OAPSA as follows:

Abuse - The occurrence of one or more of the following acts:

1. The infliction of injury, unreasonable confinement, intimidation or punishment with resulting physical harm, pain or mental anguish.
2. The willful deprivation by a caretaker of goods or services which are necessary to maintain physical or mental health.
3. Sexual harassment, rape or abuse, as defined in the act of October 7, 1976 (P.L. 1090, No. 218), known as the Protection From Abuse Act.¹¹⁸

Neglect is defined as “[t]he failure to provide for oneself or the failure of a caretaker to provide goods or services essential to avoid a clear and serious threat to physical or mental health.”¹¹⁹

Exploitation is defined as “[a]n act or course of conduct by a caretaker or other person against an older adult or an older adult’s resources, without the informed consent of the older adult or with consent obtained through misrepresentation, coercion or threats of force, that results in monetary, personal or other benefit, gain or profit for the perpetrator or monetary or personal loss to the older adult.”¹²⁰

Abandonment is defined as “[t]he desertion of an older adult by a caretaker.”¹²¹

Under the OAPSA, an “[o]lder adult in need of protective services” is “[a]n incapacitated older adult who is unable to perform or obtain services that are necessary to maintain physical or mental health, for whom there is no responsible caretaker and who is at imminent risk of danger to his person or property.”¹²² Incapacity in this context has no direct reference to the term “incapacitated person” as defined in the Incapacitated Persons Act (Act of June 30, 1972, P.L. 508, No. 164, 20 Pa.C.S. §§ 5501-5555, as amended).¹²³

The OAPSA safeguards the rights of elders and “[p]rovide[s] access to services necessary to protect the health, safety and welfare of older adults (age 60+) who lack the capacity to protect

themselves and who are at imminent risk of abuse, neglect, exploitation or abandonment.”¹²⁴

The Department of Aging, which is responsible for the oversight and implementation of the OAPSA, works closely with county AAAs to implement protective services at the local level.¹²⁵ The AAAs are the Department of Aging’s “local” providers of services, and operate in 52 planning and service areas that encompass the 67 counties in the Commonwealth.¹²⁶

Elder Abuse Case Process and the Role of Courts

Under the OAPSA, administrators and employees of certain facilities, including assisted living residences and long-term care nursing facilities, are mandated to report suspected abuse of a recipient of care to the local AAA and licensing agencies.¹²⁷ If the suspected abuse involves sexual abuse, serious physical injury, serious bodily injury or a suspicious death, additional mandatory reporting is required, which includes contacting licensing agencies, law enforcement, the Department of Aging, and the local AAA. Using information in the report about the allegation of abuse, the AAA determines if the alleged victim meets the criteria for a protective services investigation as specified by law. If the criteria are not met, the case is referred to a local resource (e.g., licensing agency or community resource) for investigation and/or assistance to ensure the elder receives the necessary care and services.¹²⁸

An AAA may seek court orders to assist in its investigations or to provide for services (e.g., nursing home care) for elders in need of protective services. Depending on the circumstances, access to records and PFA orders may be sought. In an emergency situation, the AAA may petition the court for guardianship or seek to relocate an elder who is at risk of death or serious physical harm.¹²⁹ If a perpetrator and sufficient evidence of abuse are uncovered during an investigation, the protective services investigator refers the matter to law enforcement.

Under Pennsylvania law, the Office of Attorney General (“OAG”) may investigate cases involving elder abuse, including unfair or deceptive practices, and may, in certain circumstances, prosecute individuals for criminal violations.¹³⁰ “Statistically, senior citizens are favored targets for many kinds of consumer fraud including identity theft, charities, telemarketing and sweepstakes fraud.”¹³¹

Complaints are received through the OAG's toll-free Elder Abuse Hotline.

During FY 2012-2013, 262 petitions were filed by AAAs with the courts, an increase of 11 percent over the previous year, and 231 of those petitions were granted. "Guardianship petitions were the most common with 76% granted. Involuntary emergency interventions accounted for the second highest number (21%). Access to records (2.3%), access to persons (0.4%), and injunctions against interference (0.4%) account for the remaining petitions granted."¹³²

Pennsylvania courts' ability to identify and respond to elder abuse and neglect cases may be impaired by insufficient judicial education and training, and a lack of collaboration with executive agencies. While occasional educational presentations have been offered to judges by the AOPC Judicial Education Department, annual education focusing on issues of aging, the special concerns and challenges involving elders engaged in the legal system, guardianships, and elder abuse and neglect cases, has not been provided.

Judicial training is an important concern because "very few older persons will demonstrate obvious signs of physical, financial, and emotional abuse."¹³³ In addition, elder abuse and neglect cases may involve elders who "have physical, emotional or cognitive impairments or other issues that could have implications for the court's actions and outcomes for the person."¹³⁴ According to the ABA, when a judge is confronted with a case involving an elder with a cognitive impairment, "understanding the source of a victim's dementia and degree of cognitive impairment is critical" because, "[w]hile Alzheimer's and cerebral vascular incidents are the most common causes of dementia in the elderly, there are over 200 possible causes of dementia, including alcoholism, diabetes, and drug interactions."¹³⁵ "[T]here are solutions that can help courts improve the identification of and response to elder abuse. Judicial and court staff awareness is the first step toward recognizing ways in which elder abuse may be impacting cases in front of the court."¹³⁶

HHS observes that elder abuse "is a complex cluster of distinct but related phenomena involving health, legal, social service, financial, public safety, aging, disability, protective services, and victim services, aging services, policy, research, education, and human rights issues. It therefore requires a coordinated multidisciplinary,

multi-agency, and multi-system response."¹³⁷ Yet, collaboration between the courts and elder justice agencies varies from county to county.

The CEC asserts that, because of the multiplicity of issues in an elder abuse case, a court's response is most effective when it works with community stakeholders engaged with elder abuse issues and taps into their expertise and resources. Stakeholders suggested by the CEC include: law enforcement, state and local prosecutors' offices, social services, adult protective services ("APS"), long-term care ombudsman programs, mental health agencies, the medical community, and other agencies and organizations in the community that provide services for older people.¹³⁸ Moreover, "elder abuse and exploitation is not a short-term problem. These cases will take up an increasing share of judicial, law enforcement, and social services caseloads for many years. The courts are in the best position to call attention to the problem."¹³⁹ The CEC further offers that the courts "can play a pivotal role in bringing together the key stakeholders to build a coordinated community response to elder abuse, neglect, and exploitation."¹⁴⁰

Access to Justice

“Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit.”

James Madison
*The Federalist Papers No. 51*¹⁴¹



In 2008, recognizing that a fundamental requirement of access to justice is access to the courts, CCJ and COSCA passed a resolution encouraging their members “to continue to take steps to ensure that no citizen is denied access to the justice system,” and urging them to “take a leadership role in their respective jurisdictions to prevent denials of access to justice.”¹⁴²

Access to justice for elders is an issue affecting all courts and types of cases. “Although the demographics on aging in America will impel judicial systems to accommodate larger numbers of older adults in the courthouse, it is the special needs of many elders that present the administrative challenge for court administrators or judges.”¹⁴³

Addressing the needs of Pennsylvania’s elders so they have complete access to justice and an ability to fully participate in legal proceedings is one of the major challenges facing the Commonwealth’s courts. Obstacles to an elder’s full access to justice include barriers, both physical and attitudinal, and court practices.

Elders may face physical obstacles in the courthouse. They may encounter courtrooms that have not been modified or retrofitted to accommodate their physical limitations.¹⁴⁴ Devices that may help an elder follow courtroom proceedings, such as a hearing amplification system, may not be available. Elders who are no longer able to drive or who live in remote or rural areas not served by public transportation may have difficulty getting to the courthouse.¹⁴⁵ “[O]lder persons who are homebound or bedbound may be incapable of traveling to the courthouse even though they are capable of testifying.”¹⁴⁶ In Pennsylvania’s rural communities, 44 percent of all single households are comprised of persons 65 and over,¹⁴⁷ and many suffer from one or more chronic health conditions.¹⁴⁸

Elders’ attitudes about pursuing legal remedies, shame and fear about having an abusive situation aired publicly — particularly when the abuser is a family member — or a lack of understanding regarding the court system and their individual rights, may pose additional barriers to obtaining justice. A judge’s lack of knowledge and/or lack of sensitivity to elder abuse can be viewed as “inhibiting prosecutors, civil lawyers, and abused persons from bringing cases into the courts.”¹⁴⁹

Court practices and procedures may also create obstacles for elders. Most courts, both nationally and in Pennsylvania, do not make special provisions for elders through their case management practices. For example, “cases can be sped up to ensure that justice is served during an older person’s lifetime. Similarly, cases involving older victims can be scheduled around physical impairments or limitations that impact cognitive ability during certain hours of the day.”¹⁵⁰

The Supreme Court of Pennsylvania and the Task Force are committed to ensuring full access to justice for our Commonwealth’s elders.

Need for the Elder Law Task Force



The Task Force is the product of the collective wisdom of Chief Justice Ronald D. Castille and Zygmunt A. Pines, Court Administrator of Pennsylvania. Mr. Pines, as both the state court administrator and co-chair of CCJ/COSCA's Elders and the Courts Committee, has observed the many efforts courts, particularly those in Pennsylvania, have made to protect abused and neglected children. He noticed, however, that other state court systems are beginning to pay closer attention to "the other side of life's spectrum, the so-called 'twilight years,' when infirmities and isolation increase one's helplessness in dealing with the evils of abuse and neglect...the other side of dependency."

Recognizing the realities behind Pennsylvania's rank as the fourth "oldest" state in the nation, with 21.4 percent of the population 60 and over, the Pennsylvania judicial system, through the AOPC, began to examine the myriad issues relating to the aging population and the courts.

In 2006, the AOPC was invited to participate in the JSGC's Working Group on Guardianships. The Working Group was requested "to review current guardianship statutes and programs and make findings and recommendations on their effectiveness in meeting the needs of vulnerable incapacitated persons."¹⁵¹ The resulting report revealed serious issues in Pennsylvania, specifically:

- an inability to determine the total number of active guardianships in any given year;

- the lack of a uniform, statewide process of collecting guardianship data;
- the failure of guardians to file annual reports regarding the person/estate as required by statute;
- the lack of training for most court staff, lawyers, and guardians regarding guardianships; and
- the lack of mandated qualifications to serve as a guardian.¹⁵²

In response to those findings, in 2007, the AOPC conducted an internal study to determine the total number of guardianships in Pennsylvania and whether statutorily mandated reports were being filed by guardians. The study showed that the failure to file guardianship reports was a serious problem in many counties — 54.8 percent of active guardianships did not have any reports filed.

In May 2008, Philadelphia served as a host to a national conference, "The Role of Court Leaders in Supporting Public Policy," co-sponsored by the NCSC and the Pew Center on the States. More than 60 chief justices and state court administrators, including Chief Justice Castille and Mr. Pines, discussed the role courts should play in supporting and reforming public policy affecting elders in the administration of justice. Adult guardianships were identified as one of the important emerging issues facing society and the courts, and an area in which court leadership could be the catalyst for reform.

Shortly after the conference, CCJ and COSCA passed two resolutions. The first supported a policy paper that urged the creation of a national resource for courts on aging issues, elder abuse, and guardianships, and the development of national and statewide model practices.¹⁵³ The second resolution supported the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, which outlined interstate jurisdiction of guardianship cases.¹⁵⁴ CCJ and COSCA also established a task force to address elder issues and guardianships. "These actions signal an oncoming wave of court awareness of the problem and suggest the potential for real solutions that can filter down to courts nationwide."¹⁵⁵

In March 2009, Mr. Pines and AOPC staff met with district court administrators from the counties of Philadelphia, Chester, Dauphin, Montgomery, Allegheny, Erie, and Schuylkill to discuss the findings of the AOPC's study to determine the total number of current guardianships and learn about problems courts face in guardianship cases. Many problems were identified, including: a lack of education and training for judges and court personnel; the need for case management best practices; a lack of resources to review, monitor, and address required guardianship reports; the growing problem of power of attorney abuse; non-compliance with court orders; the need for training and resources for guardians; and improved collaboration between the courts and agencies that provide services to elders; public access to and control of guardianship records given concerns about identity theft; and the vital need for better standardized data collection statewide.

During the June 2009 President Judge/Pennsylvania Association for Court Management Conference, AOPC staff and representatives from the Allegheny County Orphans' Court presented information about the AOPC's 2007 guardianship study, best practices in guardianship cases, and issues involved in guardianships. These presentations elicited great interest and requests for more information, training, and presentations related to guardianships at future conferences.

In 2010, AOPC staff contributed information to the formulation of CCJ/COSCA's 2010 policy paper, which focused on the increasing number of persons with diminished capacity and the potential impact on the responsibilities and limited resources of the courts. The policy paper encouraged each state to convene a statewide guardianship task force to review its guardianship process, court rules, and statutes; make and prioritize recommendations for improvement; and implement best practices.¹⁵⁶

As COSCA noted, "[p]rotecting the rapidly growing number of persons with diminished decision-making capacity is an important societal responsibility that the courts and state governments cannot address alone."¹⁵⁷ COSCA contended that, in order to ensure that elders, persons with intellectual or cognitive impairments or mental illnesses, and veterans with disabilities receive the decision-making assistance needed to continue living life to the fullest extent, a coordinated national response is required.¹⁵⁸

COSCA's policy paper articulated a prescription for action: "National guardianship experts

consistently have recommended that states use a multidisciplinary approach to address guardianship issues. Experience has shown that involving key stakeholders in a collaborative decision-making process to resolve guardianship issues increases the likelihood of successful program outcomes. Accordingly, the chief justice and state court administrator of each state, working with other judiciary leaders, should convene a task force to review the guardianship process, court rules, and statutes; to make and prioritize recommendations for improvement; and to implement best practices."¹⁵⁹

In 2011, Mr. Pines participated as a voting member of the National Guardianship Summit. The National Guardianship Summit represented an extraordinary effort to "produce recommendations on widely recognized and understood standards to guide guardians in their duties."¹⁶⁰ Mr. Pines provided insight on the growing problem of the financial exploitation of elders in the Commonwealth, particularly power of attorney abuse, and he assisted in formulating specific recommendations on the topic of guardianship fees.

Based on the involvement of Chief Justice Castille, Mr. Pines, and the AOPC with aging issues affecting courts in Pennsylvania and nationally, the Supreme Court of Pennsylvania ("Supreme Court") concluded that it was necessary to effect change in the way the Commonwealth's courts address the needs of elders, but that courts cannot do so alone. Thus, the Supreme Court decided to convene a multi-disciplinary task force focused on how courts can address the particular concerns regarding elders and also be proactive about addressing the impact of the growing population of elders in the Commonwealth's court system. Regarding the formation of a task force, Chief Justice Castille noted: "The increased population of older Pennsylvanians has strained the resources of our courts and their ability to provide services to these individuals. The needs of this growing population will continue for years to come, especially in regards to guardianship, elder abuse and access to justice. Now is the time to put into place solutions that will allow older Pennsylvanians to age without worries that they will be abused or that their money will be taken."

At the request of Chief Justice Castille, Madame Justice Debra Todd agreed to assume the responsibility of forming a task force on elder law issues and directing its efforts. Upon her appointment, Madame Justice Todd remarked that, "[a]s a society we have increased concentration on child abuse, but the issue of elder abuse has



Elder Law Task Force meeting in Harrisburg, September 2014

not kept pace. This Task Force is the judiciary's attempt to study the issues and make adjustments now." Madame Justice Todd serves as the Task Force's Chair, and Mr. Pines serves as the Task Force's Administrative Chair. The timing for

the Task Force's work is opportune, given the increased national focus on guardianships, elder abuse, and access to justice issues, as well as the Department of Aging's statewide examination of current guardianship practices.¹⁶¹

Mission of the Elder Law Task Force

The Task Force was charged by Chief Justice Castille to review current practices and problems, examine promising practices in other states, and deliver a blueprint of recommendations to address the needs and challenges of the Commonwealth's aging population. To accomplish such a solemn and important mission, Madame Justice Todd, Mr. Pines, and the members of the Task Force have been steadfast in the pursuit of practical solutions

that will improve and protect access to justice for our elders. It is the Task Force's collective hope that the recommendations offered herein will serve as model practices and inspire leaders in government and our communities to be both advocates and instruments of reform in service to those who increasingly need and deserve assistance – our elders.

Structure and Focus of the Elder Law Task Force



It was the Supreme Court’s belief that for the Task Force to be effective, its membership should be comprised of representatives from various groups with an interest in elders and their interaction with the courts. The selection of members resulted from a lengthy deliberative process. That process was undertaken to ensure the issues assigned to the Task Force would be studied by a broad and diverse group of professionals with subject matter expertise in the areas of guardianship, elder abuse, and access to justice. The experts came from urban and rural counties across the Commonwealth, and represented many different perspectives on how elder Pennsylvanians engage with the judicial system. As a result, the Task Force was well equipped to employ a multi-disciplinary approach to achieve its mission.

One of the great benefits of the Task Force’s work has been the forging of new collaborations between the courts and other elder justice-related entities. Since the Task Force’s initiatives depend on multi-agency efforts, the collaborative relationships developed through its deliberations have been vitally important.

In order to address the wide range of issues it was assigned, the Task Force was divided into the following committees to examine specific issues.

Guardians and Counsel Committee

Judge Joseph D. O’Keefe, Chair
 Senior Judge Penny L. Blackwell, Vice Chair
 Keelin S. Barry, Esquire
 Drew Grivna
 Neil E. Hendershot, Esquire
 Jeffrey R. Hoffman, Esquire
 Stephen P. Paschall, Esquire
 Raymond Pepe, Esquire
 Paul Stefano, Esquire

The Guardians and Counsel Committee, with the assistance of AOPC staff members Owen Kelly, Esquire, and Patricia Ranieri, Esquire, examined the following issues:

1. Sources of Guardians
2. Powers, Duties, and Responsibilities of Guardians
3. Guardian’s Scope of Liability
4. Qualifications and Screening of Guardians
5. Bonding of Guardians
6. Retention of Guardians
7. Right to Appointed Counsel
8. Role of Counsel
9. Guardian and Counsel Fees
10. Guardianship Education and Training for Judges, Court Staff, Attorneys, Guardians and Others

Guardianship Monitoring Committee

Judge Paula Francisco Ott, Chair
 Risè P. Newman, Esquire, Vice Chair
 Carol Ruckert Fiorucci
 Judge Jay J. Hoberg
 Judge Todd A. Hoover
 Crystal Lowe
 Diane A. Menio
 Joseph M. Olimpi, Esquire
 John B. Payne, Esquire
 Wendy M. Welfley
 Harriet Withstandley, Esquire

The Guardianship Monitoring Committee, with the assistance of AOPC staff members Kim Cataldo, Dr. Kim Nieves and Amy Ceraso, Esquire, examined the following issues:

1. Preliminary Assessment Process – Determining Capacity
2. Preliminary Assessment Process – Identifying Abuse
3. Reporting Requirements and Standardization of Forms
4. Effective Monitoring and Enforcement of Reporting Requirements
5. Data Collection
6. Removal, Replacement and Discharge of Guardians

Elder Abuse and Neglect Committee

D.A. Stephen A. Zappala, Jr., Chair
 Wilmarie González, Vice Chair
 Ronald Barth
 Karen C. Buck, Esquire
 Ronald W. Costen, PhD, Esquire
 Kathleen Gustine, Esquire
 Judge Lois E. Murphy
 A.D.A. Deborah Cooper Nixon
 Judge Lawrence J. O’Toole
 Katherine C. Pearson, Esquire
 Robert N. Peirce, Esquire
 Louise A. Rynd, Esquire
 Carol Sikov Gross, Esquire
 Catharine E. Thurston, Esquire
 D.A. Eugene Vittone
 President Judge George Zanic

The Elder Abuse and Neglect Committee, with the assistance of AOPC staff Darren Breslin, Esquire, examined the following issues:

1. Financial Abuse and Exploitation of the Elderly
2. Training, Information and Collaborations
3. Effective Court Practices to Address Elder Abuse and Promote Access to Justice for Pennsylvania’s Elders
4. Funding Elder Abuse Initiatives

Subcommittee on Funding

Karen C. Buck, Esquire
 Ronald W. Costen, PhD, Esquire
 D.A. Eugene Vittone

The Subcommittee on Funding, with the assistance of AOPC staff members Cherstin M. Hamel and Darren Breslin, Esquire, explored potential funding sources and opportunities for the proposed initiatives and recommendations of the Task Force.

Subcommittee on Slayer Statute

Neil E. Hendershot, Esquire
 John B. Payne, Esquire
 Katherine C. Pearson, Esquire

The Subcommittee on Slayer Statute, with the assistance of AOPC staff member Darren Breslin, Esquire, studied the possible expansion of Pennsylvania’s Slayer Statute.

Integral to the cohesiveness and effectiveness of the Task Force was the administrative oversight and guidance provided by Cherstin M. Hamel, Assistant Director of the AOPC Judicial Programs Department.

Elder Law Task Force and Committee Meetings

The inaugural meeting of the Task Force was held on April 16-17, 2013. Subsequent meetings were held on October 29-30, 2013; June 17-18, 2014; and September 23, 2014. All meetings were chaired by Madame Justice Todd and Mr. Pines, and were held at the Pennsylvania Judicial Center in Harrisburg.

Between April 2013 and October 2014, when the Task Force concluded its work, the Committees met numerous times. Meetings were held in person, by videoconference, and by telephone conference calls. Each Committee also broke into smaller subcommittees to address discrete tasks. Committee chairs and AOPC staff also held monthly conference calls.

Legislative staff from the General Assembly was invited to attend the October 29, 2013 meeting.

The Task Force believed it was important for these staff members to better understand the scope of guardianship, elder abuse, and access to justice issues facing the judicial system, and to have an opportunity to pose questions to the Task Force's experts.

Presentations Made to the Elder Law Task Force

Two nationally renowned experts were invited to address the Task Force at its inaugural meeting. The Task Force was fortunate to hear the national perspective on the issues it studied from Brenda K. Uekert, Principal Court Research Consultant at the NCSC in Virginia, and Sally Balch Hurme, Project Advisor for Education and Outreach at AARP in Washington, DC.

The following presentations were made to the Task Force during the course of its work:

National Overview of Aging, Guardianships and Elder Abuse

Presented by Dr. Brenda K. Uekert, Principal Court Research Consultant, National Center for State Courts

Demographics of Aging, Guardianships, and Elder Abuse in Pennsylvania

Presented by Wilmarie González, Director, Bureau for Advocacy, Protection & Education, Pennsylvania Department of Aging

Ronald W. Costen, PhD, Esquire, Director, Institute on Protective Services, Temple University

Pennsylvania Guardianship and Elder Abuse Court Data

Presented by Dr. Kim Nieves, Director, Research & Statistics, Administrative Office of Pennsylvania Courts

Kim Cataldo, Research Analyst, Research & Statistics, Administrative Office of Pennsylvania Courts

Carol Ruckert Fiorucci, Register of Wills & Orphans' Court Clerk, Beaver County

Guardianships

Presented by Sally Balch Hurme, Project Advisor for Education and Outreach, AARP

Overview of Proposed Guardianship and Power of Attorney Legislation

Presented by Neil E. Hendershot, Esquire

Legislation of Interest to the Elder Law Task Force

Presented by James J. Koval, Communications Manager, Administrative Office of Pennsylvania Courts

Damian Wachter, Esquire, Assistant for Intergovernmental Relations, Legislative Affairs Unit, Administrative Office of Pennsylvania Courts

Dr. Brenda K. Uekert, Principal Court Research Consultant, National Center for State Courts

Funding for Task Force Initiatives

Presented by Dr. Brenda K. Uekert, Principal Court Research Consultant, National Center for State Courts

Social Security Administration Representation Pay Process

Presented by Robert Raughley, Social Insurance Specialist, Social Security Administration, Philadelphia Region

Overview of Financial Exploitation Issues

Presented by Ronald W. Costen, PhD, Esquire, Director, Institute on Protective Services, Temple University

Linda Mill, CFE, Investigations Manager, Institute on Protective Services, Temple University

Prosecution of Elder Abuse Cases

Presented by District Attorney Stephen A. Zappala, Jr., Allegheny County

Deborah Cooper Nixon, Esquire, Elder Justice Project Coordinator, District Attorney's Office of Philadelphia

Orphans' Court Rules Update

Presented by Daniel A. Durst, Esquire, Chief Counsel, Supreme Court Rules Committees

Collaboration and Networking for Task Force Initiatives

Presented by Angela Sager, Judicial Analyst, Office of Children and Families in the Courts, Administrative Office of Pennsylvania Courts

Dr. Brenda K. Uekert, Principal Court Research Consultant, National Center for State Courts

Third World Congress on Adult Guardianships

Presented by Judge Paula Francisco Ott, Superior Court of Pennsylvania

Funding for Task Force Initiatives

Presented by Karen C. Buck, Esquire, Executive Director, SeniorLAW Center

Ronald W. Costen, PhD, Esquire, Director, Institute on Protective Services, Temple University

Elder Law Task Force Research and Analysis

The issues selected for study by the Task Force were the result of careful consideration by the Supreme Court and the AOPC. The issues required significant research, analysis and discussion.

The Task Force decided it was necessary to quantify and measure the practices and operations of the courts that hear guardianship cases. Surveys were created and distributed to the Orphans' Court Judges and Orphans' Court Clerks in each county. The survey findings provided context for the issues addressed by the Task Force, and have shaped the recommendations in this Report. Data collected by the AOPC, the Orphans' Courts, the Department of Aging and other agencies that work with the Commonwealth's elders were also examined.

The Task Force reviewed the national literature on guardianships, elder abuse and access to justice issues in order to identify problems, innovations and best practices. Materials from the NCSA and its CEC, the National Guardianship Summit, the National Guardianship Association ("NGA"), the NCEA, the ABA, and many other organizations were studied. The reports and activities of the state task forces that dealt with elder issues affecting the courts in Arizona, California, Florida, Indiana, Michigan, Nebraska, Oregon, South Carolina, and Utah were examined. To assist in the Task Force's research, the AOPC created a website library containing more than 100 resource materials.

The Task Force reviewed studies and reports regarding elder issues, including those from the Department of Aging and the Center for Advocacy of the Rights and Interests of the Elderly. Further, a review of statutes and case law in Pennsylvania, as well as national law, was undertaken.

Additionally, in May 2014, three Task Force members and two committee staff members attended the 3rd World Congress on Adult Guardianship in Washington, D.C. Seventeen countries participated in the Congress, which focused on addressing common issues and problems related to guardianships.

A helpful repository of information was contained in the following reports from the JSGC's Advisory Committee on Decedents' Estates Laws:

The Proposed Pennsylvania Uniform Trust Act and Amendments to the Probate, Estates and Fiduciaries Code (April 2005);¹⁶²

The Probate, Estates and Fiduciaries Code: Proposed Amendments to Title 20 of the Pennsylvania Consolidated Statutes (October 2007);¹⁶³

Powers of Attorney: Proposed Amendments to the Probate, Estates and Fiduciaries Code (March 2010);¹⁶⁴

The Probate, Estates, and Fiduciaries Code: Proposed Amendments to Title 20 of the Pennsylvania Consolidated Statutes (June 2010);¹⁶⁵

Powers of Attorney and Health Care Decision-Making, Proposed Amendments to the Probate, Estates and Fiduciaries Code (June 2011);¹⁶⁶

Guardianship Law: Proposed Amendments to the Probate, Estates and Fiduciaries Code (October 2012);¹⁶⁷ and

Guardianship Law in Pennsylvania, Report of the Working Group on Guardianships (May 2007).¹⁶⁸

The Task Force also considered the transcripts of the Pennsylvania House of Representatives' Aging and Older Adult Services Committee's public hearings on elder abuse held November 19-20, 2013 and December 9-11, 2013.

The Task Force reviewed pending legislation addressing elders and their interaction with the courts, including, but not limited to:

House Bills

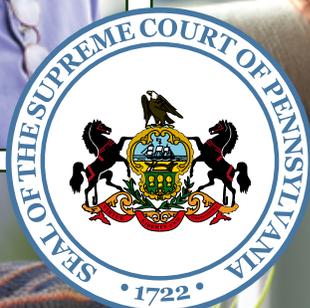
31 of 2013, Pr. No 10
 651 of 2013, Pr. No. 728
 1429 (enacted into law as Act 95 of 2014)
 2007 of 2014, Pr. No. 3441
 2014 of 2014, Pr. No. 3326
 2057 of 2014, Pr. No. 3054



Senate Bills

117 of 2013, Pr. No. 73
620 of 2013, Pr. No. 627
621 of 2013, Pr. Nos. 2111 and 2322

All of the proposed bills reviewed and discussed by the Task Force remain under consideration by Pennsylvania's Legislature and have not yet been enacted into law with the exception of House Bill 1429. The Task Force recognizes that amendments may occur to the legislation by the time this Report is distributed.



Reports of the Elder Law Task Force Committees



COMMITTEE REPORT

Guardians and Counsel

Judge Joseph D. O'Keefe, Chair
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Raymond Pepe, Esquire
Paul Stefano, Esquire

AOPC Staff:
Owen Kelly, Esquire
Patricia Ranieri, Esquire

Guardians and Counsel Committee Findings and Recommendations

Introduction

The concepts of guardians and guardianships are quite broad and encompass minors, the mentally incapacitated, and elders. The Guardians and Counsel Committee recognized that each of these populations has their own distinct issues; however, for the purposes of these recommendations, the Committee focused solely on issues that affect elders.

I. Sources of Guardians

A. Issue Statement

The Committee was asked to address the issue of available sources of guardians of the person and guardians of the estate, and to make recommendations for creating a uniform approach to providing the courts in each county with a ready pool of candidates to serve as guardian of an incapacitated person (“IP”). Based on the Committee’s research and discussions, it appeared that there was no unified approach among the counties on this issue, and counties created their own approaches, which, in many instances, have been hampered by funding problems.

B. Committee Findings

1. The courts of each county routinely favor the appointment of a family member to serve as guardian of the person. In all instances, however, the courts do not routinely favor the appointment of a family member as guardian of the estate when the estate consists of substantial assets, unless the proposed guardian of the estate posts a bond.
2. With regard to the appointment of a family member, courts have been willing to consider appointing both immediate family members and non-immediate family members who demonstrate that they are willing to take on such a responsibility.
3. If a guardian of the person and/or estate is needed for an alleged incapacitated person (“AIP”) and there is no family member available or qualified to serve as such, the various counties look to other county organizations, if available. If there is no such organization available, the courts have been left to their own creativity to create sources of guardians.
4. It is even more difficult for an institution such as a nursing home or hospital filing a petition to have one of its residents declared incapacitated when there is no established list of available and approved persons or entities to serve as guardian of the person from which to select.

C. Committee Recommendations

1. Practices and Procedures

The Committee, pursuant to its findings in (I)(B), recommends as follows:

- a. Guardian of the Person
 - i. When a guardian of the person is required, the courts should favor the appointment of a family member whenever possible. The Committee recommends, however, that the term “family member” not be limited to immediate family, but rather, attempts to contact other relatives and friends of the IP should be encouraged. In determining who should act as guardian, the Committee recommends that the courts be encouraged to consult 20 Pa.C.S. § 5461(d)(1) for guidance.¹ Specifically, courts should generally favor

an individual designated by the IP as a health care representative who is reasonably available unless it determines that the individual should be disqualified or the IP's selection should not otherwise be followed for "cause shown" pursuant to § 5461(e). In this event, the court should consult the following hierarchy set forth in § 5461(d)(1) for further guidance:

- (i) The spouse, unless an action for divorce is pending, and the adult children of the principal who are not the children of the spouse.
- (ii) An adult child.
- (iii) A parent.
- (iv) An adult brother or sister.
- (v) An adult grandchild.
- (vi) An adult who has knowledge of the principal's preferences and values, including, but not limited to, religious and moral beliefs, to assess how the principal would make health care decisions.²

ii. When family and friends are not a viable option, the Committee recommends that each county have a list of individuals and agencies qualified to act as guardian of the person, and that their contact information be made available. The list should be created, maintained, and expanded as described in (I)(C)(2) below and may include local attorneys, individuals, private agencies (both for-profit and as non-profit), and public agencies.

b. Guardian of the Estate

- i. The Committee recommends that when a guardian of the estate is required for an individual, the courts should favor the appointment of a family member when the estate consists of minimal assets, or when the proposed guardian has the skills and experience necessary to manage the estate and is able to obtain a bond or provide other assurance of financial responsibility.
- ii. In all other instances, the Committee recommends that a qualified attorney, accountant, financial advisor, institutional trustee, individual, or agency be proposed as the guardian of the estate. Each county should have in place a list of individuals and agencies qualified to act as guardians of the estate, and their contact information should be made available. This list should be created, maintained, and expanded as described in (I)(C)(2) and may include local attorneys, individuals, private agencies (both for-profit and non-profit), and public agencies.

2. Implementation of Recommendations

- a. Recommendations (I)(C)(1)(a)(i) and (b)(i) should be implemented by rule of court.
- b. The recommendation that lists of qualified guardians of the person or estate be created should be implemented through court rule. Creation of the lists in each county should be as follows:
 - i. Creation of the lists in each county should be coordinated by the Office of Elder Justice in the Courts ("OEJC") in conjunction with the local guardianship support agency ("GSA"), if one exists and is able to do so. If a GSA is not available or is unwilling or unable to assist, the OEJC should work with the local interdisciplinary teams recommended in (II)(C)(1)(d). If a local interdisciplinary team has not been created, the OEJC and the President Judge of the judicial district (or his/her designee) should create the list in conjunction with a work group composed of persons and entities active in guardianship matters in the county.

- ii. Once the list has been created, its maintenance and expansion should be overseen by a local non-profit agency such as a GSA. If such a non-profit agency is not available, the list should be overseen by the local interdisciplinary team or, if there is no local interdisciplinary team, by the President Judge (or designee) with the assistance of the work group described above.

Model Program:

In Lehigh County, the local guardianship support agency, GSA, Inc. (“GSAI”) was created in 2004. GSAI accepts court appointments to serve as guardian, provides “guardianship-like” services for decision-impaired individuals (e.g., serving as representative payee for benefits, helping with housing, medical, and financial assistance), supports and trains professional and volunteer staff required to perform its functions, provides support to other individuals acting as guardians, and accepts appointments to serve as other types of fiduciaries such as personal representatives and special needs trustees. GSAI is funded by a combination of public funds, private donations, and fees for some services for clients who can afford to pay.³

- c. The education and training of individuals and agencies qualified to act as guardian should be as recommended in Section (X)(C)(2).

D. Timing and Impact

The recommendation to create lists of qualified guardians can be enacted fairly quickly and should have significant impact on improving the supply of guardians. The expansion of the lists, as well as the ongoing training and education needed for these persons, will require a significant amount of time to implement, and guidelines should be set forth by the OEJC that provide flexibility in both implementation and maintenance.

E. Fiscal Impact

The most significant fiscal impact of the creation of guardian lists will be in establishing the program that will provide the necessary training and education to qualify guardians, the fiscal impact of which is discussed in (X)(E)(1). Flexibility in implementing the recommendations set forth in this section may allow for the utilization of existing resources, which could reduce the overall fiscal impact.

F. Additional Comments

Ideally, each county would have a GSA create a list of qualified guardians, establish a volunteer guardianship program, and provide training, education, and oversight to augment the list. If, this is not feasible in the near future, the OEJC should work with the local interdisciplinary team recommended in (II)(C)(1)(d). If there is no local interdisciplinary team, the OEJC and President Judge (or his/her designee) should convene a work group consisting of a partnership with the local bar association and attorneys routinely coming before the court on guardianship matters, as well as existing agencies and/or businesses who currently provide guardianship services, to create an available list of qualified individuals. Such a list can be maintained and expanded over time.

II. Powers, Duties and Responsibilities of Guardians

A. Issue Statement

The Committee was asked to examine whether the lack of clarity, consistency, and understanding of the powers, duties, and responsibilities of a guardian affect the quality of guardianship services and, if so, to determine what could be done to remedy the situation.

B. Committee Findings

1. Once an individual is placed under guardianship, there is little guidance beyond basic reporting requirements as to how a guardian should fulfill his or her duties and responsibilities.

2. The guardianship statutes are largely silent on some of the most important duties of the guardian.
3. Different Pennsylvania jurisdictions, and even judges within the same judicial district, have varying expectations of a guardian's duties and responsibilities.
4. Guardian monitoring is weak, if it occurs at all.
5. Training is not mandated for professional or non-professional guardians.
6. Non-professional guardians are not adequately advised as to the duties and responsibilities of managing the affairs of an IP.
7. There are currently no programs for certifying professional guardians in Pennsylvania as there are in some other states.⁴ A state certification program would give courts assurance that a professional guardian possesses sufficient knowledge of Pennsylvania guardianship law and procedure.
8. The duties of a guardian are interdisciplinary, requiring financial management, health care coordination, communication, conflict resolution, medical decision-making, and other skills.
9. The quality of guardianship services varies widely, placing our most vulnerable citizens at great risk.
10. The Committee recognized and endorsed the preference for limited guardianships expressed by the General Assembly in 20 Pa.C.S. § 5512.1(a)(6), which states that the court "shall prefer limited guardianship."⁵ The Committee found, however, that in reality many limited guardianships are impractical and create controversy and confusion. Moreover, there is little, if any, education and training for judges or attorneys to allow them to ascertain when a limited guardianship would be appropriate under the circumstances and how a limited guardianship could be made effective in circumstances where it is appropriate. Lack of judicial education and training may be related to greater use of plenary guardianships in situations where a limited guardianship would be more appropriate.⁶ The Committee, therefore, found that education and training would advance the General Assembly's preference for limited guardianships by making their use more effective.
11. The Committee found that the National Guardianship Association's Standards of Practice ("NGA Standards") contain much useful information to guide guardians in their powers and duties.⁷ (See Appendix A). Due to significant differences between the NGA Standards and Pennsylvania law and practice, the Committee could not recommend their adoption in Pennsylvania beyond the specific recommendation in II(C)(1)(a). The Committee, however, found that provisions of the NGA Standards could be incorporated into future education and training for guardians to the extent they are consistent with Pennsylvania law and practice.
12. The Committee found that the National Guardianship Association's Model Code of Ethics for Guardians ("Model Code") contains much useful information to guide guardians in their powers, duties, and ethical responsibilities.⁸ (See Appendix B). Due to significant differences between the Model Code and Pennsylvania law and practice, the Committee could not recommend its wholesale adoption in Pennsylvania. The Committee, however, found that provisions of the Model Code could be incorporated into future education and training for guardians to the extent they are consistent with Pennsylvania law and practice.

C. Committee Recommendations

1. Practices and Procedures

- a. The Committee, pursuant to its findings in II(B)(1) - (6) and (11), recommends the following NGA Standards be adopted in Pennsylvania by statute or by court rule as Supreme Court recommended best practices.

NGA Standard 12 – Duties of the Guardian of the Person

I. The guardian shall have the following duties and obligations to the person under guardianship unless the order of appointment provides otherwise:

A. To see that the person is living in the most appropriate environment that addresses the person's goals, needs, and preferences.

1. The guardian shall have a strong priority for home or other community based settings, when not inconsistent with the person's goals and preferences.

2. The guardian shall authorize moving a person to a more restrictive environment only after evaluating other medical and health care options and making an independent determination that the move is the least restrictive alternative at the time, fulfills the current needs of the person and serves the overall best interest of the person.

3. The guardian shall consider the proximity of the setting to those people and activities that are important to the person when choosing a residential setting.

4. At a minimum the guardian shall report to a court before a move to a more restrictive residential setting, and the justification for the move.

5. When the guardian considers involuntary or long-term placement of the person in an institutional setting, the bases of the decision shall be to minimize the risk of substantial harm to the person, to obtain the most appropriate placement possible, and to secure the best treatment for the person.

B. To ensure that provision is made for the support, care, comfort, health, and maintenance of the person.

C. To make reasonable efforts to secure for the person medical, psychological, therapeutic, and social services, training, education, and social and vocational opportunities that are appropriate and that will maximize the person's potential for self-reliance and independence.

D. To keep the affairs of the person confidential, except when it is necessary to disclose such affairs for the best interests of the person.

E. To seek specific judicial authority when a civil commitment, the dissolution of a marriage, or another extraordinary circumstance is being addressed.

F. To file with the court, on a timely basis but not less often than annually, all reports required by state statute, regulations, court rule, or the particular court pursuant to whose authority the guardian was appointed.

G. To adhere to the requirements of Standard 17 - Duties of the Guardian of the Estate . . . to the extent that the guardian of the person has been authorized by the court to manage the person's property.

H. To petition the court for limitation or termination of the guardianship when the person no longer meets the standard pursuant to which the guardianship was imposed, or when there is an effective alternative available.

I. To promptly report to the appropriate authorities abuse, neglect and/or exploitation as defined by state statutes.⁹

NGA Standard 17 – Duties of the Guardian of the Estate

I. The guardian, as a fiduciary, shall manage the financial affairs of the person under

guardianship in a way that maximizes the dignity, autonomy, and self-determination of the person.

II. When making decisions the guardian shall:

- A. Give priority to the goals, needs and preferences of the person, and*
- B. Weigh the costs and benefits to the estate.*

III. The guardian shall consider the current wishes, past practices, and reliable evidence of likely choices. If substantial harm would result or there is no reliable evidence of likely choices, the guardian shall consider the best interests of the person.

IV. The guardian shall assist and encourage the person to act on his or her own behalf and to participate in decisions.

V. The guardian shall use reasonable efforts to provide oversight to any income and assets under the control of the person.

VI. The guardian shall, consistent with court order and state statutes, exercise authority only as necessitated by the limitations of the person.

VII. The guardian shall act in a manner above reproach, and his or her actions will be open to scrutiny at all times.

VIII. The guardian shall provide competent management of the person's property and, shall supervise all income and disbursements of the estate.

IX. The guardian shall manage the estate only for the benefit of the person.

X. The guardian shall keep estate assets safe by keeping accurate records of all transactions and be able to fully account for all the assets in the estate.

XI. The guardian shall keep estate money separate from the guardian's personal money; the guardian shall keep the money of individual estates separate unless accurate separate accounting exists within the combined accounts.

XII. The guardian shall make claims against others on behalf of the estate as deemed in the best interest of the person and shall defend against actions that would result in a loss of estate assets.

XIII. The guardian shall apply state law regarding prudent investment practices, including seeking responsible consultation with and delegation to people with appropriate expertise when managing the estate.

XIV. The guardian shall employ prudent accounting procedures when managing the estate.

XV. The guardian shall determine if a will exists and obtain a copy to determine how to manage estate assets and property.

XVI. The guardian shall obtain and maintain a current understanding of what is required and expected of the guardian, statutory and local court rule requirements, and necessary filings and reports.

XVII. The guardian shall promptly report to the appropriate authorities abuse, neglect and/or exploitation as defined by state statute.¹⁰

b. The Committee took no position regarding any of the NGA Standards, other than 12 and 17, or regarding the Model Code of Ethics. As discussed in (II)(B)(11)&(12), the Standards and Model Code contain much useful information to guide guardians in their powers and

duties. Although the Committee recommends adoption of only NGA Standards 12 and 17, it was not opposed to the use of other provisions of the NGA Standards or the Model Code by the OEJC for purposes of education and training of guardians to the extent they are consistent with Pennsylvania law and practice.

c. The Committee, pursuant to its findings in (II)(B)(1) - (6), (8) - (12), recommends that training be required for guardians and that training be developed for and made available to judges who hear guardianship cases, court administrative staff, attorneys, and others involved in guardianship matters. In addition, training for judges and attorneys should be developed to allow them to ascertain when a limited guardianship would be appropriate under the circumstances and how to make them effective in circumstances where they are appropriate.

d. The Committee, pursuant to its finding in (II)(B)(8), recommends that local courts be encouraged to develop interdisciplinary teams modeled after the Office of Children and Families in the Courts' ("OCFC") Pennsylvania Children's Roundtable Initiative pioneered by Pennsylvania Supreme Court Justice Max Baer to advise and support guardians and the court, based on the following rationale:

- i. Several states report that interdisciplinary teams have been critical to implementation of successful guardianship reform.
- ii. In Pennsylvania, there is precedent in the Children's Roundtable Initiative system, which has successfully implemented dependency court reform. See textbox below for a description of the Children's Roundtable Initiative.
- iii. Guardianship and dependency are both interdisciplinary.
- iv. Local community-based interdisciplinary advisory groups can link guardians to local resources and help the courts to implement guardianship reform recommendations.

Model Program:

The Children's Roundtable Initiative was pioneered by Justice Max Baer of the Supreme Court of Pennsylvania in 2006. The goal of the Children's Roundtable Initiative is to gather, disseminate, and implement best practices by way of a three-tiered statewide communication infrastructure.

The first tier is comprised of the local Children's Roundtables in each of Pennsylvania's 60 judicial districts. The Children's Roundtables are convened by a judge and consist of supervisory and dependency judges, children and youth professionals, county solicitors, child and parent advocates, academic experts, and anyone interested in making a positive contribution to the functioning of the dependency system at the local level.

The second tier is comprised of eight Leadership Roundtables divided into groups based on size. Each Leadership Roundtable is comprised of three members from the Children's Roundtables within its area. The three members include a dependency judge, the Children and Youth administrator, and one additional Children's Roundtable member. The Leadership Roundtable provides a forum for its members to identify, discuss, and share concerns and solutions.

The final tier is the State Roundtable comprised of at least two members of each Leadership Roundtable and others with specific expertise in child dependency matters. The State Roundtable addresses issues identified at Leadership Roundtable meetings, facilitates intrastate communication, and sets priorities for dependency court improvement efforts. The State Roundtable also stays involved in the national dependency reform movement to keep Pennsylvania informed of evolving trends and best practices. The State Roundtable also has a number of Workgroups to address issues identified by it as priorities.¹¹

- e. The Committee, pursuant to its findings in (II)(B)(1) - (6), recommends that the creation of local GSAs be encouraged by the OEJC, and that the GSAs be relied upon to take an active role in supporting local guardianship improvement and in implementing education and training. Pennsylvania statutes encourage the creation of GSAs.¹²
- f. The Committee, pursuant to its finding in (II)(B)(7), recommends that the OEJC, with input from experienced guardians, develop a program for the certification of professional guardians appropriate to Pennsylvania guardianship law and practice.

2. Implementation of Recommendations

- a. Adoption of the NGA Standards recommended in (II)(C)(1)(a) should be implemented as follows:
 - i. To the extent that the recommended NGA standards are consistent with existing Pennsylvania statutes, these standards should be adopted as soon as is practicable as Supreme Court recommended best practices and disseminated to all judicial districts in the Commonwealth. The Committee believes that many of these practices may be implemented by court rule.¹³
 - ii. Best practices should be adopted through legislation or court rule, as the Advisory Council on Elder Justice in the Courts (“Advisory Council”) deems appropriate, to ensure statewide continuity among the counties.
 - iii. To the extent that the NGA Standards recommended in (II)(C)(1)(a) are inconsistent with existing Pennsylvania statutes, and to the extent that the Advisory Council deems appropriate, Pennsylvania statutes should be made consistent with the recommended NGA Standards through proposed legislation as in (II)(C)(2)(a)(iv) immediately below.
 - iv. The Advisory Council and the OEJC should approach the General Assembly to recommend review and adoption of these standards where legislative changes are appropriate.
 - v. These best practices should be presented through training sessions for judges, court staff, guardians, attorneys, and others involved in guardianship matters.
- b. The recommendation that education and training be required for guardians should be implemented by rule of court. The education and training should be implemented as stated in (X)(C)(2).
- c. The Supreme Court, through the OEJC, should encourage local courts to develop local interdisciplinary teams to advise and support guardians and the court.
- d. The Supreme Court, through the OEJC, should encourage local courts to support creation of GSAs in their communities.
- e. Training for judges should be implemented as stated in (X)(C)(2)(d).
- f. The OEJC, with input from experienced guardians, should develop criteria for the certification of professional guardians appropriate to guardianship law and practice in the Commonwealth of Pennsylvania.

D. Timing and Impact

- 1. Incorporation of the NGA Standards recommended in (II)(C)(1)(a) should be initiated as soon as is practicable with the understanding that complete adoption of these standards will be a multi-phase, multi-year project. Incorporation of these standards promises to raise the standard of guardianship services in Pennsylvania, in part, because the courts and the guardians will have the same understanding of a guardian’s duties and responsibilities. Such standard language will provide consistency and more meaningful consideration.

2. The timing and impact of the education and training recommendations in (II)(C)(1) should be as stated in (X)(D).
3. As soon as is practicable, the OEJC should assemble a working group of experienced guardians to develop the program for certification of professional guardians. The creation of such a program will have a substantial impact by providing courts with reassurance that all professional guardians possess sufficient knowledge of Pennsylvania guardianship knowledge and practices.
4. Formation of the interdisciplinary teams at the local and state level will help to incorporate Task Force recommendations and allow for local input into statewide changes. The OEJC, with the participation of local courts, should initiate the formation of the local teams. The OEJC should facilitate formation of a state level interdisciplinary team.
5. Local GSAs should be encouraged and relied upon to assist with the implementation of standards and training as soon as is practicable.
 - a. GSAs can provide another strong tool for implementation of reform.
 - b. With support from the court and interdisciplinary team members, local GSAs can be expected to have a strong impact in implementing proposed reforms given the anticipated high volume of guardianships.
 - c. The Supreme Court through the OEJC should encourage local courts to support the formation of such agencies.

E. Fiscal Impact

1. Adoption of the NGA Standards recommended in (II)(C)(1)(a) will require minimal financial commitment, such as disseminating the NGA Standards to local courts as best practices. Similarly, encouraging passage of the recommended NGA Standards as part of the guardianship statute, or as a court rule, will have minimal fiscal impact.
2. The fiscal impact of education and training programs will be as stated in (X)(E)(1).
3. Development of local interdisciplinary teams will have limited fiscal impact as team members will be volunteers. Members attending periodic statewide meetings would incur expenses for travel, lodging, and food. There would also have to be some funds available to pay for materials and speakers at the local and state levels.
4. Local GSAs should be funded outside the court, for example, by the potential sources of funding identified in the Overarching Findings and Recommendations of the Elder Law Task Force Concerning Court Administration, Judicial Education, Funding, and Public Awareness. Local courts should work with interested non-profits or other interested parties to support creation of these agencies.

Regarding fees to finance these agencies, the Committee generally does not favor the imposition of filing fees because of their potential negative impact on litigants' right of access to the courts, and believes they should only be a last resort. If other funding sources have been thoroughly explored, however, and are found to be unavailable, the Committee believes that a graduated fee structure, similar to the approach used by Register of Wills' offices around the state, could impose a "filing fee surcharge for elder protection" in guardianship cases on petitions for adjudication of incapacity and/or inventories based on the amount of assets under guardianship. In cases with significant assets, a graduated fee could be imposed. The Committee believes that such an approach would balance the need for funding with litigants' right of access to the courts. The OEJC should be responsible for considering and developing the graduated fee structure.

5. Development of a program for certification of professional guardians could have significant costs. In determining the structure such a program should have, the OEJC and Advisory Council should consider the potential costs and develop a program that is fiscally sustainable.

III. Guardian's Scope of Liability

A. Issue Statement

The Committee was asked to address the scope of a guardian's liability. The Committee noted that currently there is no mandatory training for guardians regarding their ethical obligations and potential liabilities, and, as a consequence, many guardians may be unclear about these issues. In addition, there is pending legislation that may alter the liability of a guardian of the person in a problematic manner.

B. Committee Findings

1. There is presently no mandatory training for individual guardians on matters of liability and ethics.
2. There is a pending legislative change to 20 Pa.C.S. § 5521(g), Senate Bill 117 of 2013, Pr. No. 73 ("Senate Bill 117"),¹⁴ that would reduce a non-agency guardian of the person's liability by requiring proof of gross negligence before the guardian can be held liable for his/her actions as guardian.
3. To the extent that Senate Bill 117 would lower the standard for liability of a non-agency guardian of the person, the Committee found the proposed change to § 5521(g) to be problematic for the following reasons:
 - a. The IP would immediately have less protection.
 - b. Because the standard of liability would be lowered, the guardian of the person would no longer have to act in the best interests of his/her charge; rather, the guardian of the person must simply refrain from committing gross negligence.
 - c. The current fiduciary duty standard is not an onerous standard of liability given the broad powers a guardian of the person is granted.
 - d. Attracting people who will only serve if they have less responsibility is not in the best interests of the IP.
 - e. Social science experiments with our most vulnerable elders may be ill-advised and be accompanied by unintended consequences.
 - f. If the standard of liability is presumably being lowered to attract potential guardians of the person, there is no evidence to support the conclusion that more individuals would serve as guardians of the person if only they were not exposed to fiduciary liability.
 - g. No change would be required and no potential financial impact felt if the General Assembly would remove this change while the new legislation is still pending. If the pending legislation goes into effect, however, there could be significant costs associated with increased harm done to IPs, who would then be less likely to recover from their guardian of the person.
 - h. In "A Call for Standards: An Overview of the Current Status and Need for Guardianship Standards of Conduct and Code of Ethics," Karen E. Boxx and Terry W. Hammond underscore the application of fiduciary law to reduce the risks of delegation.¹⁵ There is no reason that the standard imposed on a guardian of the person acting under court appointment for someone incapable of monitoring their performance should be lower than that of agents acting under a power of attorney who are serving voluntarily for persons who are often capable of monitoring their performance.

NOTE: There was a strong and substantial minority view regarding the finding in (III)(B)(3). A significant number of Task Force members believed that where a guardian of the person is making difficult health care decisions as an agent of the court, he or she should enjoy the limited immunities in the proposed legislation; otherwise family members might be unwilling to take on such difficult responsibilities. In addition, the minority believed that the proposed legislation merely levels the playing field by giving individual, non-agency guardians of the person the same immunity enjoyed by local government units, nonprofit corporations, and GSAs under the current version of § 5521(g). Finally, these members concluded that giving limited immunities to individual guardians of the person was analogous to statutory immunities currently offered in other contexts.¹⁶ Consequently, a significant minority of Task Force members did not agree with finding (III)(B)(3) or recommendation (III)(C)(1)(b).

C. Committee Recommendations

1. Practices and Procedures

- a. The Committee, pursuant to its finding in (III)(B)(1), recommends some form of mandatory education and training for individual guardians on matters of liability and ethics.
- b. The Committee, pursuant to its findings in (III)(B)(2) - (3), recommends that the proposed change to 20 Pa.C.S. § 5521(g) be removed from Senate Bill 117.

2. Implementation of Recommendations

- a. Implementation of the requirement that guardians have education and training on matters of liability and ethics should be by rule of court. The education and training programs themselves should be implemented as stated in (X)(C)(2).
- b. The recommendation in (III)(C)(1)(b) above should be communicated by the OEJC to the General Assembly as soon as is practicable after the Task Force Report is released.

D. Timing and Impact

1. Development of education and training for guardians on ethics and liability should begin as soon as is practicable. The requirement that the training be mandatory can be implemented by rule of court once the education and training programs are ready.
2. A copy of the Task Force Report should be delivered to the General Assembly as soon as is practicable following its release, to communicate the Committee's recommendation regarding the amendment to 20 Pa.C.S. § 5521(g).

E. Fiscal Impact

1. The fiscal impact of the education and training recommended in (III)(C)(1)(a) will be as stated in (X)(E)(1).
2. Recommendation (III)(C)(1)(b) regarding the amendment to 20 Pa.C.S. § 5521(g) will have no fiscal impact.

IV. Qualifications and Screening of Guardians

A. Issue Statement

The Committee addressed the statutory qualifications, if any, for guardians in Pennsylvania, as well as whether screening or training of a guardian is required.

B. Committee Findings

1. Pursuant to 20 Pa.C.S. § 5511(f), “[t]he court may appoint as guardian any qualified individual, a corporate fiduciary, a nonprofit corporation, a guardianship support agency under Subchapter F (relating to guardianship support) or a county agency.” Section 5511 (f) further states that: “The court shall not appoint a person or entity providing residential services for a

fee to the incapacitated person or any other person whose interests conflict with those of the incapacitated person.”¹⁷

2. Section 5511(f) does not, however, define what constitutes a “qualified” individual. In addition, while § 5511(e) requires that the “qualifications” of the proposed guardian be set forth in the guardianship petition, there are no mandated qualifications in the statute, and presumably any individual over age 18 would qualify, provided there is no interest adverse to the IP.¹⁸ The statute does not require that a guardian have a minimum education level or prior experience. Moreover, the statute does not require that proposed guardians be certified by the state or a national guardianship organization or that the guardian be licensed or required to attend any training before being appointed. The statute also does not require a proposed guardian to undergo any specified screening process before being appointed.

3. No uniform practice is followed in the counties with respect to minimum qualifications of guardians or the screening mechanism employed by the courts. In most counties, it is left to the sole discretion of the presiding judge to determine on a case-by-case basis the qualifications of the proposed guardian. The screening, if any, typically takes place on the day of the hearing when the judge has the opportunity to question the proposed guardian. The Committee found, however, that in several counties, administrative or judicial staff conducts criminal and/or civil background checks on proposed guardians, but this procedure was not mandated by any local court rules governing guardianship practice and may not be consistently followed in each guardianship case.

4. The National Probate Court Standards recommend that courts consider a variety of factors in assessing a prospective guardian’s qualifications to serve, including familiarity with health care decision-making, residential placements, and social services benefits, as well as the guardian’s access to qualified legal, financial, and health care experts to assist the guardian in his or her decision making.¹⁹

5. As discussed in Section V below, the decision whether to require a bond is at the discretion of the presiding judge. The Committee believes that this approach should be maintained but finds that in situations where a bond is not required, the proposed guardian should submit a credit report as stated in (IV)(C)(1)(b).

6. The Committee finds that there is not currently a requirement that a court determine whether a prospective guardian has the willingness and ability to visit with the AIP on a regular basis and be available at all times to confer with the AIP’s physicians, nurses, and other care providers.

C. Committee Recommendations

1. Practices and Procedures

a. The Committee, pursuant to its findings in (IV)(B)(2) - (3), recommends that all individual guardians, family and professional, be required to undergo criminal background checks similar to those used in foster care and adoption cases, i.e., a Pennsylvania State Police criminal record check and a Federal Bureau of Investigation (“FBI”) clearance check.

b. The Committee, pursuant to its findings in (IV)(B)(5), recommends that in all guardianship matters where the court does not require a bond, the proposed guardian should be required to submit a current credit report. This requirement should be an ongoing one and, after appointment, the guardian should be required to supply a current credit report each year together with the annual report. The guardian’s credit reports should be kept confidential and not be publicly available. For good cause shown, the court may waive the requirement of a credit report. If the court waives the requirement of a credit report, however, it should still require an assurance of financial responsibility as recommended in (V)(C)(1)(d).

c. The Committee, pursuant to its findings in (IV)(B), recommends that, in addition to not having any interest adverse to the AIP, the proposed guardian should have the willingness

and ability to visit with the AIP on a regular basis and be available at all times to confer with the AIP's physicians, nurses, and other care providers. Ideally, the proposed guardian should have some education and/or experience in guardianship or in providing services to elders or the disabled. In lieu of adopting specific requirements concerning minimum education and/or experience for all guardians, the Committee believes that the goal of assuring that qualified guardians are appointed would similarly be met by mandating that all guardians undergo training before assuming their duties.

2. Implementation of Recommendations

In order to ensure statewide uniformity, these recommendations should be implemented by appropriate changes to the Supreme Court Orphans' Court Procedural Rules.²⁰ All local courts would therefore be required to follow the same procedures regarding qualifications and screening of proposed guardians (i.e., criminal and civil background searches and mandatory training). Implementation of the education and training should be as stated in (X)(C)(2).

D. Timing and Impact

While the Committee believes that the above recommendations could theoretically be implemented immediately, since it is recommended that the changes be implemented via rule changes, sufficient time will be required to allow the Orphans' Court Procedural Rules Committee to meet, adopt pertinent rules, and comply with all relevant rule-making requirements. The recommendation should significantly increase protection of IPs. The timing and impact of the education and training component in (IV)(C)(1)(c) will be as stated in (X)(D).

E. Fiscal Impact

Additional costs would be incurred for criminal background searches and/or credit reports. The cost of credit reports should be negligible as consumers are entitled to a certain number of free credit reports per year. The fiscal impact of the education and training programs is as stated in (X)(E)(1).

V. Bonding of Guardians

A. Issue Statement

The Committee addressed the question of whether current law concerning bonding of guardians is adequate or needs to be changed. Current law gives the presiding judge discretion to decide whether to require that a bond be posted. There is pending legislation, Senate Bill 117, that would affect bonding requirements.²¹ The Committee addressed the question of whether the proposed legislation is advisable and whether, in the absence of requiring a bond, the presiding judge should require some other form of financial assurance.

B. Committee Findings

1. A proposed statute, 20 Pa.C.S. § 5515.3 in Senate Bill 117 would require a bond be set for every guardian of an estate.²² Specifically, the proposed legislation would initially remove the court's discretion to set a bond but reserve discretion to waive the bond requirement if there is "cause shown."²³
2. The Committee cannot recommend proposed new § 5515.3 without additional clarification as described in (V)(C)(1).
3. The Committee does not believe that a bond should be mandated for guardians of the estate in all cases but rather that the decision as to whether or not to require a bond should remain at the court's discretion, except that no bond should be required if the prospective guardian is a bank or trust company.
4. The Committee found, however, that the court should require in all cases an assurance of financial responsibility.

5. The Committee found that online bonding services may help alleviate access to bond issues.

C. Recommendations

1. Practices and Procedures

- a. The Committee, pursuant to its findings in (V)(B)(1) - (2) above, recommends that the General Assembly provide guidance as to what factors the courts should consider regarding “cause shown” and whether such determinations of “cause shown” are appealable.
- b. The Committee, pursuant to its finding (V)(B)(3), further recommends that the General Assembly should set a minimum total value for an estate before making a bond mandatory in every situation for the following reasons:
 - i. While bonding may be the best way to prevent a guardian from misappropriating the funds of an IP, it must be recognized that most bonding companies have minimum amounts below which they will not provide bonding services.
 - ii. Bonding companies require credit checks, and mandatory bonds may eliminate a large percentage of potential guardians, which could also lead to a problem in recruiting new guardians and retaining current guardians.
 - iii. Bonding companies may not want to provide bonding services if the standard of liability of guardians is lowered by the proposed changes to 20 Pa.C.S. § 5521(g), which are also proposed in Senate Bill 117. (See III. Guardians Scope of Liability).
- c. The Committee, pursuant to its finding (V)(B)(3), recommends that the decision whether to require a bond when a guardian of the estate is appointed should remain at the discretion of the court.
- d. The Committee, pursuant to its finding (V)(B)(4), further recommends that in all cases where a guardian of the estate is appointed, the court should require an assurance of financial responsibility. To that end, legislative authorization is necessary to allow for the acceptance of forms of financial security for guardians other than bonds. The submission of an assurance of financial responsibility does not eliminate the need for the proposed guardian to provide a credit report as recommended in (IV)(C)(1)(b) unless the court waives that requirement.
- e. The Committee, pursuant to its finding (V)(B)(5), recommends that courts, particularly those in counties with limited access to bonding sources, consider online bonding as an alternative, providing that the online bonding companies are on the list of approved sureties.

2. Implementation of Recommendations

The recommendations in (V)(C)(1)(a) – (d) should be communicated to the General Assembly by the OEJC as soon as is practicable after the Task Force Report is released. In addition, the OEJC should work with the General Assembly to draft legislation which would grant the authorization in recommendation (V)(C)(1)(d). The recommendation that courts consider online bonding should be communicated by the OEJC to the courts.

D. Timing and Impact

The recommendations can be implemented as soon as is practicable after the release of the Task Force Report. The OEJC can begin working with the General Assembly as soon as is practicable following its creation. The impact of keeping bonding at the discretion of the court should be minimal as it retains the existing status quo. The impact of allowing assurances of financial responsibility in lieu of a bond presumably could be significant as it may allow individuals who could not otherwise serve as guardians because they could not obtain a bond to do so while at the same time offering protection to IPs.

E. Fiscal Impact

The recommendations in this section should have little or no fiscal impact.

VI. Retention of Guardians

A. Issue Statement

The Committee explored the question of how best to retain guardians and what sort of incentives or benefits could be offered to induce guardians to continue to serve.

B. Committee Findings

1. Retention of guardians is one of the primary concerns of guardianship policy around the country. A survey of Area Agencies on Aging (“AAAs”) conducted by the Working Group on Guardianships of the Joint State Government Commission (“JSGC”) found that 84.1 percent of responding AAAs stated that current guardianship programs and services will not be able to meet future need.²⁴ As is often the case, funding will be the main problem in this area.
2. The Committee found that providing financial and/or other types of benefits or incentives to guardians could result in higher retention rates.

C. Recommendations

1. Practices and Procedures

In order to retain existing guardians, the Committee, pursuant to its findings in (VI)(B) above, recommends consideration of the following:

- a. Identifying funding sources, such as the state lottery, to develop guardianship support services;
- b. Providing continuing legal education (“CLE”) credit for *pro bono* service to attorneys who provide guardianship services;
- c. Providing small tax deductions to guardians for certain guardianship expenses;
- d. Equipping and assisting local agencies to develop methods to retain guardians;
- e. Assisting agencies handle a greater number of guardianships rather than relying on ill-equipped family members;
- f. Encouraging and expanding the use of GSAs which are already favored under Pennsylvania law;
- g. Providing free training for non-attorney guardians to show them how, what, and when to file required guardianship documents;
- h. Limiting appointment to a guardianship of the person for some to avoid potential intra-familial disagreements as well as any financial responsibility of a potential guardian;
- i. Placing “how to” videos online to answer questions and provide more detailed instructions for the completion of guardianship tasks such as filing reports and inventories; and
- j. Strongly encouraging a dialogue with representatives of federal agencies that administer representative-payment and fiduciary programs such as, but not limited to, Social Security Administration (“SSA”), Department of Veterans Affairs (“VA”), the Railroad Retirement Board (“RRB”), and the Office of Personnel Management (“OPM”) to develop training for guardians regarding the management of an IP’s benefits.

2. Implementation of Recommendations

- a. The recommendations in (VI)(C)(1)(g),(i) and (j) should be implemented as stated in (X)(C)(2).
- b. The recommendations in (VI)(C)(1)(a) and (c) should be studied by the Advisory Council and the OEJC which should determine how best to implement them.
- c. The recommendations in (VI)(C)(1)(d)–(f) should be implemented by the OEJC.
- d. The recommendations in (VI)(C)(1)(b) and (h) should be implemented by rule of court.

D. Timing and Impact

Most of the recommended changes will have to be implemented over time but will likely have a significant impact, since retention is one of the most important aspects of guardianship policy.

E. Fiscal Impact

Some of the recommended changes will require significant fiscal resources, e.g., funding local agencies, and providing training and CLEs, etc. The fiscal impact of funding local agencies is as stated in (II)(E)(4). The fiscal impact of education and training programs is as stated in (X)(E)(1).

VII. Right to Appointed Counsel

A. Issue Statement

The Committee addressed the question of whether all AIPs should have appointed counsel or, if the current statutory case-by-case “appropriateness” standard continues, whether specific criteria should be adopted to determine when appointment of counsel is appropriate. If counsel is appointed in all cases, how will they be paid?

B. Committee Findings

1. Current Pennsylvania law invokes a case-by-case “appropriateness” standard, but there is no statutory requirement for counsel on behalf of an AIP in all cases and no guidance as to circumstances making appointment of counsel appropriate:

Petitioner shall be required to notify the court at least seven days prior to the hearing if counsel has not been retained by or on behalf of the alleged incapacitated person. In appropriate cases, counsel shall be appointed to represent the alleged incapacitated person in any matter for which counsel has not been retained by or on behalf of that individual.²⁵

2. The petitioner’s attorney typically bears the responsibility of determining whether to recommend appointment of counsel for a Pennsylvania guardianship respondent.
3. In Pennsylvania, appointed counsel for the AIP is paid for by the AIP or where the AIP has insufficient assets, by the Commonwealth:

If the alleged incapacitated person is unable to pay for counsel or for the evaluation, the court shall order the county to pay these costs. These costs shall be reimbursed by the Commonwealth in the following fiscal year.²⁶

4. The National Probate Court Standards recommend a case-by-case appropriateness standard, but assume that an independent court visitor will meet with the respondent and evaluate whether appointment is appropriate.²⁷
5. The Uniform Guardianship and Protective Proceedings Act of 1997²⁸ proposes two separate options for counsel: (1) independent court visitor, similar to that recommended in the National Probate Court Standards; or (2) appointment of counsel in every case.

6. Some jurisdictions appoint counsel for a guardianship respondent in every case where the respondent has not retained private counsel.

7. Pennsylvania is a leader in the national movement to address the “civil justice gap,” which includes discussion of a potential civil right to counsel in areas of basic human need. Chief Justice Ronald D. Castille, Honorary Chair of the Pennsylvania Civil Legal Justice Coalition, remarked at a May 23, 2013 hearing of the Senate Judiciary Committee: “The unfortunate and often tragic fact is that many Pennsylvanians face formidable legal situations in our civil courts where those citizens may face dire consequences as the result of a civil legal matter that can greatly impact their lives or their futures. The vast majority of those citizens are left to fend for themselves in an unfamiliar courtroom without legal representation.”²⁹ The Chief Justice further remarked that the Commonwealth should treat civil legal services for indigent individuals, families, and elders as an important government service.³⁰

8. Requiring an AIP to have counsel in all proceedings involving a determination of capacity is consistent with the Chief Justice’s remarks above. If the AIP does not have his or her own counsel, then counsel should be appointed.

C. Committee Recommendations

1. Practices and Procedures

a. The Committee, pursuant to its findings in (VII)(B)(7) - (8), recommends that in all cases where the AIP does not have private counsel, counsel should be appointed.

b. The Committee, pursuant to its findings in (VII)(B)(1) - (2), also recommends that the Orphans’ Court Procedural Rules be amended to require counsel for an AIP to enter his or her appearance as soon as possible to allow the court to quickly identify when counsel needs to be appointed.

c. The Committee, pursuant to its findings in (VII)(B)(3), (7) - (8), recommends that counsel fees be paid by the AIP whenever possible and, if resources are insufficient, then by the Commonwealth as under the existing approach.

2. Implementation of Recommendations

a. The Orphans’ Court Procedural Rules should be amended to require counsel in all petitions for appointment of a guardian as recommended in (VII)(C)(1) above.

b. The Orphans’ Court Procedural Rules should be amended to require private counsel to enter their appearance so that the court may quickly ascertain whether court appointed counsel is necessary.

D. Timing and Impact

1. The Orphans’ Court Procedural Rules should be amended as soon as is practicable following release of this Report.

2. The impact of the proposed recommendations should be immediate in protecting the rights of AIPs.

E. Fiscal Impact

1. Funding for counsel for AIPs whose estates cannot cover the cost of counsel will be required.

2. It is unclear if the existing funding system of 20 Pa.C.S. § 5511(c) (see (VII)(B)(3)) will be sufficient to cover this cost.

3. If the existing funding system proves to be insufficient, the OEJC should explore funding sources for the recommendations in this section.

VIII. Role of Counsel

A. Issue Statement

The Committee was asked to address the role of counsel in guardianship matters. The role of counsel, both during hearings on capacity and after a guardian is appointed, is confusing. Should counsel for a respondent be a zealous advocate for the respondent's stated position, or should counsel exercise his or her own judgment in pursuit of the respondent's best interests? Does petitioner's counsel have a heightened responsibility because the respondent allegedly lacks capacity? Given the potential risk to vulnerable persons, is training and guidance on the role of counsel necessary?

B. Committee Findings

1. Roles of counsel: There are at least six different roles that attorneys assume with regard to proceedings involving determinations of capacity, some of which need clarification, including:

a. Representation of diminished capacity client

The Pennsylvania Rules of Professional Conduct provide excellent and adequate guidance.³¹ To the extent reasonably possible, the attorney should maintain a normal client-attorney relationship, but if the attorney reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken and cannot adequately act in the client's own interest, the attorney may take reasonably necessary protective action. This rule is a national standard for conduct of attorneys, based on the American Bar Association's Model Rules of Professional Conduct.³²

b. Representation of respondent during proceedings to adjudicate incapacity

The attorney must balance both best interests and zealous advocacy. Pa.R. Prof'l Conduct 1.14, including comments, provides an excellent roadmap for the appropriate application of each standard.³³

c. Representation of guardianship respondent after adjudication

Following adjudication of incapacity, the role of the attorney retained or appointed to represent a respondent during guardianship proceedings is unclear. Generally, no withdrawal as counsel is filed. It is not clear whether appointed or retained counsel should continue to represent the respondent after appointment of a guardian.

d. Representation of petitioner in incapacity proceedings

Petitioner's counsel has a heightened responsibility, different from when the respondent is presumed to have capacity. Pennsylvania's current guardianship statute directs petitioner's counsel to request that the court appoint counsel for the person with diminished capacity, if appropriate, and provide notice in a manner most likely to be understood given the nature and extent of the guardianship respondent's diminished capacity.³⁴ In proceedings involving a determination of capacity, even the petitioner's attorney has a duty to protect the best interests of the respondent.

e. Representation of the guardian

There is little guidance in Pennsylvania statutes, court rules, or case law to define the role of counsel for a guardian.

f. Attorney serving as guardian

Guardianship services vary substantially according to the needs of the individual IP. While some courts prefer to appoint attorneys as guardians, the work of a guardian is different from the typical work of an attorney. Attorneys who serve as guardians must ensure that non-legal needs of the guardianship client are addressed.

C. Committee Recommendations

1. Practices and Procedures

The Committee, pursuant to its findings in (VIII)(B), recommends:

- a. Discussions among attorneys and judges to better define the roles of counsel should be encouraged. The Pennsylvania Bar Association (“PBA”) and local bar associations should be invited to participate in these discussions at the state and local levels.
- b. Attorneys serving as guardians should complete the same training and other requirements as professional guardians, unless the court specifically waives that obligation. CLE credit, including ethics credit, should be available to attorneys for this training.
- c. Support, advice, and ethical counsel for attorneys wanting to assume any of the above roles should be available through either the PBA, local bar association, the local AAA, or GSA.
- d. Attorneys serving in any of the roles above should have an affirmative responsibility to clarify to the client, the court, and all other interested parties the role or roles counsel is assuming. Specifically, counsel should be required to have a letter of engagement stating who is being represented and describing counsel’s role, and counsel should restate this role to the court when entering an appearance with the court.
- e. Where the court appoints counsel to represent an AIP, the court should indicate whether, except for pursuing rights of appeal, counsel for the AIP is discharged or is to continue representing the person now under guardianship in the event the petition is granted and a guardian is appointed.
- f. Model language, pertaining to the retention or discharge of counsel, should be developed and inserted into a final decree of incapacity and appointment of a guardian.
- g. Guardians and IPs should have access to legal counsel for consultation following adjudication.

2. Implementation of Recommendations

The foregoing recommendations should be implemented as follows.

- a. The OEJC should encourage discussions among attorneys and judges to better define the roles of counsel. The PBA and local bar associations should be invited to participate in these discussions at the state and local levels.
- b. The requirement of attorney training should be implemented by rule of court and/or disciplinary rules, as appropriate. The training sessions themselves should be developed as stated in (X)(C)(2).
- c. The OEJC should work with the PBA, local bar associations, local AAAs, and GSAs to ensure that at least one of these entities is available in each county to provide support, advice, and ethical guidance for attorneys wanting to assume any of the roles identified in (VIII)(B).
- d. The requirement that attorneys serving in any of the roles above have an affirmative responsibility to clarify his/her role should be implemented by rule of court and/or disciplinary rule, as appropriate.
- e. The requirement that a court appointing counsel indicate whether, except for pursuing rights of appeal, counsel for the AIP is discharged or is to continue representing the person now under guardianship in the event the petition is granted and a guardian is appointed, should be implemented by rule of court.

- f. The Orphans' Court Procedural Rules Committee should develop model language, pertaining to the retention or discharge of counsel, which can be inserted into a final decree or adjudication of incapacity and appointment of a guardian.
- g. The recommendation that guardians and IPs have access to legal counsel for consultation following adjudication should be implemented by rule of court.

D. Timing and Impact

1. The OEJC should commence implementation of recommendations (VIII)(C)(1)(a) and (c) as soon as is practicable after the release of this Report.
2. The OEJC should consult with the PBA and local bar associations as soon as is practicable after the release of this Report.
3. The OEJC should communicate with the Supreme Court regarding requested directions to the appropriate rules committees regarding proposed rules changes in (VIII)(C)(2)(d)-(g) as soon as is practicable after the release of this Report.

E. Fiscal Impact

The fiscal burden of implementing these recommendations is limited to the administrative costs of developing the recommended education and training. The fiscal impact of developing the education and training will be as stated in (X)(E)(1).

IX. Guardian and Counsel Fees

A. Issue Statement

The Committee was asked to address the issue of guardian and counsel fees and to determine what improvements could be made. Reasonable compensation — or lack thereof — is tied to retention of good guardians, the quality of guardianship services, and premature placement of persons under guardianship in nursing homes. The Committee also addressed what can be done regarding Pennsylvania's current fee standard to strengthen the quality of guardianship services, to allow for more effective monitoring of guardians, and to reduce fee disputes.

B. Committee Findings

1. Although the guardianship statutes are silent on the matter of guardian fees, a review of case law shows that Pennsylvania, like most other states, compensates guardians based on each trial judge's assessment of what constitutes "reasonable" compensation.³⁵
2. Some jurisdictions have established fees based on either a percentage of the estate assets or an hourly rate for services performed.³⁶
3. Setting fees based on a percentage of assets is easier to evaluate and calculate. This approach, however, has been criticized as unfair where there is a large estate and the services provided are routine and few.³⁷ Moreover, basing fees on assets also could be unnecessarily unfair to those with small estates having a need for intensive services and an asset, such as a house that could be sold to retroactively pay for those intensive guardianship services. Basing fees on the gross estate could have a chilling effect by encouraging a guardian to move the person living in a community into a nursing home.
4. Some jurisdictions periodically set an hourly rate for guardianship services. The hourly rate is based on a local survey or on the recommendation of a work group. Additional guidance as to whether certain items are billable, i.e., travel, faxes, etc., is also included. The rates reward additional years of experience.³⁸
5. The Third National Guardianship Summit Standards and Recommendations § 3.1 - 3.8³⁹ state that guardians are entitled to reasonable compensation for their services and support a fee determined by a weighing of factors. Pennsylvania's approach is similar, but the

factors generally relied upon in Pennsylvania pertain to all estates and are not restricted to guardianship matters.

6. Some jurisdictions include time expectations or time caps in the fee schedule. For example, in Florida's Thirteenth Judicial Circuit, the court anticipates that each guardian will visit each IP monthly, the guardian will accompany the IP to non-routine doctor's appointments, will spend up to two hours a month on bill paying, will spend up to two and one half hours per month shopping for an IP who lives in the community or up to one hour per month shopping for a nursing home resident, and provide up to one hour a month of clerical work.⁴⁰

7. Arizona's Supreme Court Committee on Improving Judicial Oversight and Processing of Probate Matters encourages each guardian to disclose fees soon after appointment to reduce "sticker shock" when fees are requested later.⁴¹

8. A recent survey found that guardian fees charged in Pennsylvania vary from \$0 per hour to \$160 per hour.⁴² Individual courts' determinations of what is reasonable vary as widely as the type of fees charged.

9. Family members who serve as guardians do so at considerable personal financial and emotional cost, and compensation for this time and effort should be awarded where possible and appropriate.

10. Professionalization of guardians in Pennsylvania will improve the quality of services, set clear standards and expectations, and better facilitate monitoring.

11. Reasonable, predictable and documented fees are a prerequisite to professionalizing the field of guardianship and are likely to reduce the number of fee disputes.

12. A public funding mechanism (e.g., public guardianship program) could help to ensure reasonable fees.

13. GSAs, allowed under current Pennsylvania law, could provide a mechanism for securing charitable support to pay reasonable fees for guardianship services and other guardianship support services such as training, managing volunteers, and community outreach regarding guardianship prevention.

C. Committee Recommendations

1. Practices and Procedures

a. The Committee, pursuant to its findings in (IX)(B), recommends that a fee schedule be developed and offered to local courts as a model uniform court rule by the OEJC with the help of a working group composed of guardianship stakeholders, preferably the guardianship advisory system.⁴³

b. The Committee, pursuant to its findings in (IX)(B), recommends that the fee schedule establish reasonable amounts of time which may be spent on specific guardianship tasks.

c. The Committee, pursuant to its findings in (IX)(B), recommends that the fee schedule should be presumed "reasonable," although the court should be permitted to adjust fees upward or downward based upon special circumstances.

d. The Committee, pursuant to its findings in (IX)(B)(5), recommends that where a judge deviates from the fee schedule, an explanation should be provided, as advocated in the Third National Guardianship Summit Recommendations § 3.6.⁴⁴

e. The Committee, pursuant to its findings in (IX)(B), recommends that assets of the IP be used for the purpose of maintaining the best possible quality of life for the IP.

- f. The Committee, pursuant to its finding in (IX)(B)(5), recommends that the Third National Guardianship Summit Standards and Recommendations §§ 3.1 - 3.8, pertaining to fees, should be adopted in the State of Pennsylvania, to the extent appropriate.⁴⁵
- g. The Committee, pursuant to its finding in (IX)(B)(12), recommends that a fund be established to pay for guardianship services for those with limited resources.
- h. The Committee, pursuant to its finding in (IX)(B)(11), recommends that fee disputes be resolved in a timely, efficient manner.

2. Implementation of Recommendations

- a. The OEJC should supervise the implementation of the recommendations in this section.
- b. A fee schedule should be developed by the OEJC with the help of a working group composed of guardianship stakeholders.
- c. Annual reports of guardians of the estate should include guardian fees, and their method of computation. This information should be forwarded to and compiled by the Administrative Office of Pennsylvania Courts (“AOPC”) for analysis and use in clarifying what constitutes reasonable guardian fees in a manner to be determined by the OEJC.
- d. The OEJC should work with local courts and other stakeholders to develop GSAs as permitted by current law.
- e. The Advisory Council and the OEJC should explore the feasibility of asking the General Assembly to establish a fund to pay for guardianship services for those with limited available resources.
- f. The recommendations in (IX)(C)(1)(a)-(e) and (h) should be implemented by rule of court.
- g. The Advisory Council and the OEJC should study the Third National Guardianship Summit Standards and Recommendations §§ 3.1 – 3.8 and determine to what extent — and, if so, in what manner — these should be adopted in Pennsylvania.⁴⁶

D. Timing and Impact

- 1. The fee schedule should be developed and provided to local courts as soon as is practicable following the release of this Report. The fee schedule should be reviewed and updated by the OEJC in alternate years.
- 2. The impact of the creation of the fee schedule should be significant by strengthening the quality of guardianship services, helping to retain guardians, allowing better monitoring of guardians and reducing fee disputes. Ensuring reasonable fees will also improve the quality of guardianship services, including allowing IPs to age in place.

E. Fiscal Impact

- 1. The fiscal impact of developing a fee schedule will be limited to the costs of convening a working group to develop the fee schedule, to distribution of the fee schedule, and to advocating for implementation of the schedule.
- 2. Ensuring reasonable fees will improve the quality of guardianship services, including allowing IPs to age in place. Aging in place will save taxpayers significant amounts of money because community-based services are less costly to the Commonwealth than skilled nursing home services.

X. Guardianship Education and Training for Judges, Court Staff, Guardians, Attorneys, and Others

A. Issue Statement

The Committee was asked to consider whether current education and training for judges, court staff, guardians, attorneys, and others interested in guardianship matters is adequate and, if not, how it can be improved.

B. Committee Findings

1. As described in (II)(B), there is little guidance for guardians, judges, court staff, attorneys, and others on the powers, duties, and responsibilities of guardians.
2. Moreover, as found in (IV)(B)(2), 20 Pa.C.S. § 5511(f)⁴⁷ does not define what constitutes a “qualified” individual. The statute also does not require a proposed guardian to undergo any specific screening process before being appointed.
3. As found in (II)(B)(10), the lack of training for judges and attorneys on limited guardianships may result in such guardianships being under-utilized and thus less effective.
4. The appointment of an emergency guardian pursuant to 20 Pa.C.S. § 5513 is useful, particularly in situations of suspected financial exploitation.⁴⁸ There is, however, little or no training for judges on the proper use of emergency guardianships, especially the need to appoint an emergency guardian of the estate, as well as review and supervise any outstanding powers of attorney in situations of suspected financial exploitation. In addition, there is currently no training for financial institutions on how to deal with an emergency guardianship. Education and training for judges and financial institutions on emergency guardianships would rectify this situation.
5. The Committee found that there is little or no coordination between Pennsylvania’s courts and agencies that administer representative-payment or fiduciary programs such as the SSA, VA, RRB, and OPM. Although these agencies may give consideration to an applicant’s status as a guardian, they are not obligated to select that person as representative payee.⁴⁹ Moreover, there may be situations where the applicant for representative payee benefits is not the guardian and the federal agency is unaware that a guardian has been appointed.

The Committee further found that there is little or no training for guardians on their responsibilities for management of an IP’s benefits when they are appointed as representative payees.

Consequently, the Committee agreed with Resolution 4 of the Conference of Chief Justices/Conference of State Court Administrators (“CCJ/COSCA”) which urges improved coordination between state courts and state and federal agencies that administer representative-payment and fiduciary programs in order to protect vulnerable adults placed under a guardianship.⁵⁰ The Committee found that a collaborative approach to education and training by the courts and federal agencies that administer these programs would be helpful to further the goal of Resolution 4.

C. Committee Recommendations

1. Practices and Procedures

- a. The Committee, pursuant to its findings in (X)(B)(1) - (4), recommends that training be required for guardians and also that training be developed for, and made available to, judges who hear guardianship cases, court administrative staff, attorneys, and others involved in guardianship matters (e.g. financial institutions, health care providers, etc.).
- b. The Committee, pursuant to its finding in (II)(B)(7), recommends that professional guardians, i.e., those guardians with more than two guardianships at the same time, should

be certified by the professional guardian certification program recommended in (II)(C)(1)(f) as a means of ensuring their adequate education and training.

c. The Committee, pursuant to its findings in (X)(B)(1) - (2), recommends that the required training for guardians be divided into pre-service training and some form of continuing education that would cover the powers, duties, and responsibilities of the guardian, including reporting requirements. In addition, training for guardians on matters of ethics and liability should be part of the required curriculum.

d. The Committee, pursuant to its findings in (II)(B)(1) - (6), recommends that creation of local GSAs be encouraged, and that the GSAs be relied upon to implement standards and training.

e. The Committee, pursuant to its findings in (VI)(B), recommends that free training be provided for non-attorney guardians to show them how, what, and when to file required guardianship documents.

f. The Committee, pursuant to its findings in (VI)(B), recommends that “how to” videos be placed online to answer questions and provide more detailed instructions for the completion of guardianship tasks such as filing reports and inventories.

g. The Committee, pursuant to its findings in (VI)(B) and (X)(B)(5) respectively, recommends that the OEJC collaborate and coordinate with SSA, VA, RRB, and OPM representatives to develop training to address questions guardians may have regarding the management of an IP’s benefits.

h. The Committee, pursuant to its findings in (VIII)(B) and (X)(B)(1) respectively, recommends that attorneys serving as guardians complete the same training and other requirements as professional guardians, unless the court specifically waives that obligation. CLE credit, including ethics credit, should be available to attorneys for this training.

i. The Committee, pursuant to its finding in (II)(B)(10), recommends that education and training for judges and attorneys include information on how to ascertain when a limited guardianship is appropriate and on how to make one effective when they are appropriate.

j. The Committee, pursuant to its findings in (II)(B) and (X)(B)(1) respectively, recommends that a guardianship bench book be developed to assist judges handling guardianship matters.

k. The Committee, pursuant to its finding in (X)(B)(4), recommends that training be developed for judges and financial institutions on emergency guardianships.

2. Implementation of Recommendations

a. The best practices based on the NGA Standards referred to in (II)(C)(1)(a) should be presented through training sessions for judges, court staff, guardians, and attorneys involved in guardianship matters.

b. The education and training programs for guardians should be developed as follows:

i. The York County Guardianship Education/Training Advisory Board training module, which will cover basic reporting and other responsibilities, should be required of all new guardians and guardians not complying with reporting requirements across the Commonwealth.

Model Program:

York County, through the assistance of the State Justice Institute, the Supreme Court of Pennsylvania, and the York County Courts, has developed an educational program for individuals and/or professional guardians. Training will be provided to these entities to assure compliance with the statute governing guardianships. The intent is to assure that all guardians fully understand the role of being designated a limited or plenary guardian of the person and/or of the estate of an IP. Training will be through seminars which are open to the public. Curriculum for physicians, bankers, attorneys, and others is being developed for presentation.

- ii. The OEJC should support the completion of this basic module and make it available to all guardians across the state. This module may be made available by live training, webinar or videoconference, as recommended by the York County Guardianship Education/Training Advisory Board.
 - iii. The OEJC should monitor and support the development of additional training modules which focus on the NGA Standards recommended in (II)(C)(1)(a) and the application of these standards.
 - iv. Training development should involve interdisciplinary teams, including, but not limited to, elder advocacy groups (e.g., GSAs, AAAs, American Association of Retired Persons (“AARP”), Center for Advocacy for the Rights and Interests of the Elderly (“CARIE”), SeniorLAW Center (“SLC”), etc.), disability rights advocates (e.g., National Association for Retarded Citizens (“ARC”), etc.), medical professionals, financial abuse specialists, and others.
 - v. Attorneys representing parties in guardianship matters should be trained through the Pennsylvania Bar Institute (“PBI”) and other CLE providers and should receive CLE credit. The OEJC should assist in the development of such training programs.
 - vi. Court administrative staff should be trained through the OEJC.
 - vii. The OEJC should collaborate with the appropriate federal agencies that administer representative payee and fiduciary programs on developing training for guardians on their duties as a representative payee.
- c. Local GSAs should be encouraged and relied upon to help implement standards and training.
- i. Pennsylvania statutes encourage the creation of GSAs.⁵¹
 - ii. The Supreme Court through the OEJC should encourage local courts to support creation of GSAs in local communities to the extent possible given current budgetary constraints.
 - iii. GSAs should take an active role in supporting local guardianship improvement.
 - iv. Ideally, a GSA should oversee the training and education of guardians at the local level. If a GSA is not available, education and training should be overseen by the local interdisciplinary team or, if there is no local interdisciplinary team, by the President Judge (or designee) with the assistance of the work group described in (I)(C)(2)(b)(i).
- d. Training for judges who hear guardianship cases recommended in (X)(C)(1) should be developed by the AOPC Judicial Education Department in consultation with the interdisciplinary teams or, if interdisciplinary teams are not available, practicing guardians. In addition, the OEJC and the AOPC Judicial Education Department, in consultation with either the interdisciplinary teams or practicing professional and non-professional guardians, should develop a Guardianship Bench Book. The training should be provided as follows:

- i. New judges' training should include introductory information about the unique challenges of guardianship cases and the NGA Standards recommended in (II)(C)(1)(a).
 - ii. At least once a year, perhaps at the semi-annual judicial conferences, training should be available to all judges working with guardianship matters.
- e. The OEJC should approach financial industry groups such as the Pennsylvania Bankers Association or similar entities to encourage them to collaborate on developing education and training programs for financial institutions on guardianship matters.
- f. The training for non-professional guardians should be conducted at the following time intervals:
- i. Proposed guardians should be provided with written information about the duties and responsibilities of a guardian either prior to filing of the petition for adjudication of incapacity or when the petition is filed. These written materials should be sent to the proposed guardian.
 - ii. Within six weeks of appointment as a guardian, the non-professional guardian should be trained in the NGA Standards recommended in (II)(C)(1)(a) on how to prepare and file the inventory, the duty to produce the will, bank account management, real property management, the budget, the care plan, the mail, substituted judgment versus best interest decision-making, record keeping, limits of authority, and other topics critical during this transition to guardianship.
 - iii. Between six months and eleven months after appointment, the guardian should receive training and support in filing the first annual reports.
 - iv. During and after the initial training cycle, guardians should have access to ongoing training, peer support or discussion groups as facilitated by local courts or GSAs.

D. Timing and Impact

1. Education and training for judges, court administrative staff, attorneys, and others involved in guardianship matters will have the strongest impact in incorporating the NGA Standards recommended in (II)(C)(1)(a) and in otherwise improving and making consistent guardianships in Pennsylvania.
2. The training for non-professional guardians by the OEJC should be developed as soon as is practicable.
3. The timing and impact of the creation of a certification program for professional guardians will be as stated in (II)(D)(3).
4. Training for judges who hear guardianship cases should be developed by the OEJC and the AOPC Judicial Education Department as soon as is practicable, in consultation with the interdisciplinary teams or, if interdisciplinary teams are not yet available, practicing guardians. Training for judges will have a substantial impact on improving guardianships (plenary and limited) and protecting IPs.
5. Training for administrative court staff should be developed as soon as is practicable by the OEJC.
6. The timing and impact of GSA involvement in implementing standards and training will be as stated in (II)(D)(5).
7. Collaboration by the OEJC with the federal agencies that administer representative-payment and fiduciary programs can begin immediately once contact persons at these agencies are identified. This collaboration will enhance coordination between the courts and these agencies on educating and training guardians on their responsibilities when appointed as representative payees.

8. Limited guardianship training can be instituted as part of the judicial education and attorney education programs. The impact of such training should be significant in increasing the use of limited guardianships and making them more effective.
9. Education and training of judges on emergency guardianships can be instituted as part of judicial education programs as mentioned above. Emergency guardianship training will improve the effectiveness of emergency guardianships.
10. Education and training for financial institutions could be developed as soon as is practicable. Collaboration between the OEJC and financial institutions on education and training regarding guardianships and financial abuse of elders could begin as soon as contact persons at these entities are identified.

E. Fiscal Impact

1. As a result of the recommendations for education and training, significant funding will be needed for the development of such training. Potential sources of funding are identified in the Report and Overarching Findings and Recommendations of the Elder Law Task Force Concerning Court Administration, Judicial Education, Funding and Public Awareness. Once training modules are developed, the cost of providing training will depend upon whether the training is online, live, or in another format. The training programs could also be funded by a surcharge added on the guardianship filing fee (similar to the technology fee) on petitions for adjudication of incapacity and/or inventories, or could be borne by the OEJC, local courts or an agency, depending upon the specific training program. Regarding the imposition of filing fees or surcharges, the Committee generally does not favor them because of their potential negative impact on litigants' right of access to the courts, and believes they should be used only as a last resort. If other funding sources have been thoroughly explored, however, and are found to be unavailable, the Committee believes that a graduated fee structure referred to in (II)(E)(4) can balance the need for funding with litigants' right of access to the courts.
2. Development of local interdisciplinary teams will have a limited fiscal burden. Team members will be volunteers. Local team representatives attending periodic statewide meetings will incur expenses for travel, lodging, and food. Ideally, there will be funds available to pay for materials and speakers at the local and state levels.
3. The fiscal impact of local GSAs will be as stated in (II)(E)(4).
4. The fiscal burden of implementing the recommendations related to the proposed Guardianship Bench Book is limited to the administrative costs of developing same.
5. The fiscal impact of outreach to federal agencies pursuant to recommendation (X)(C)(1)(g) should be minimal.
6. The fiscal impact of collaborating with financial industry groups to develop education and training programs for financial institutions on guardianship matters will vary depending upon the type of program developed and whether volunteer presenters can be obtained.

ENDNOTES AND REFERENCES

- 1 20 Pa.C.S. § 5461(d)(1) (West Supp. 2014).
- 2 *Id.*
- 3 Agency – Guardianship Support Agency Inc., Volunteer Ctr. of the Lehigh Valley (Apr. 3, 2014), <http://volunteer.truist.com/lehigh/org/10298948938.html>; Debbi Garlicki, *Guardian Angels: Agency Aids Those Who Have No One Else to Turn to for Assistance*, The Morning Call (Oct. 29, 2006), http://articles.mcall.com/2006-10-29/news/3703059_1_guardianship-guardian-angels-agency-aids.
- 4 See, e.g., *Certified Professional Guardian Program*, Washington Courts (2014), http://www.courts.wa.gov/programs_orgs/guardian/.
- 5 20 Pa.C.A. § 5512.1(a)(6).
- 6 Brenda K. Uekert, Center for Elders and the Courts, *Adult Guardianship Court Data and Issues, Results from an Online Survey*, 7 (Mar. 2, 2010), http://www.guardianship.org/reports/Guardianship_Survey_Report.pdf.
- 7 Nat'l Guardianship Ass'n, *Standards of Practice* (2013), http://www.guardianship.org/documents/Standards_of_Practice.pdf. (See Appendix A).
- 8 Michael D. Casasanto, Mitchell Simon, and Judith Roman, National Guardianship Association, *Model Code of Ethics for Guardians* (1988), http://www.guardianship.org/documents/Code_of_Ethics.pdf. (See Appendix B).
- 9 Nat'l Guardianship Ass'n, *Standards of Practice*, 9-10 (2013), http://www.guardianship.org/documents/Standards_of_Practice.pdf. (See Appendix A).
- 10 *Id.* at 17-18.
- 11 Supreme Court of Pennsylvania: Office of Children and Families in the Courts, *Mission and Guiding Principles for Pennsylvania's Child Dependency System* (May 2009).
- 12 20 Pa.C.S. §§ 5551-5555.
- 13 States that have adopted the NGA Standards, to one degree or another, have done so through various means -- statute, rule, administrative regulation, and court order. See Karen E. Boxx and Terry W. Hammond, *A Call for Standards: An Overview of the Current Status and Need for Guardianship Standards of Conduct and Code of Ethics*, 2012 Utah L. Rev. 1207, 1221-26 (2012).
- 14 S.B. 117, Session of 2013 (Pa. 2013).
- 15 Karen E. Boxx and Terry W. Hammond, *A Call for Standards: An Overview of the Current Status and Need for Guardianship Standards of Conduct and Code of Ethics*, 2012 Utah L. Rev. 1207, 1239-41 (2012).
- 16 See, e.g., 42 Pa.C.S. §§ 8331, 8332 & 8332.4 (West Supp. 2014); 35 P.S. §§ 449.47 and 7704 (West Supp. 2012).
- 17 20 Pa.C.S. § 5511(f).
- 18 *Id.* at § 5511(e).
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NationalGuardianshipAssociation

Standards of Practice



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National Guardianship Association

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Preamble

Developing standards for guardians has been an ongoing challenge for the National Guardianship Association (NGA). Not only has the profession undergone rapid change since the original seven standards were written in 1991, but the basic issues have been, and remain, imprecise and difficult to define for a national, membership-based organization. A basic philosophical element complicating the process has been the need to strike a consistent balance between standards that represent an ideal and those that recognize practical limitations, whether for a family guardian or for a professional guardian.

In July of 1991, the NGA adopted a previously published Code of Ethics to guide guardians in their decision-making process. The next task of the NGA was to formulate specific standards to be applied in the day-to-day practice of guardianship. The seven original standards of practice that were written and adopted by the NGA in 1991 have now been expanded to cover more of the duties and responsibilities that face court-appointed guardians today.

The same lengthy discussions that took place in 1991 occurred again during each updating of the standards. These discussions centered on the need to state what is "right" versus the need to recognize and accept the inevitability of the status quo-- too many clients, not enough funding or staff. While we all agree that such restrictions are all too commonplace, we also feel that little is gained by simply accepting a substandard or unacceptable state of affairs. NGA has, therefore, adopted standards that we feel reflect as realistically as possible the best or highest quality of practice. In many cases, best practice may go beyond what state law requires of a guardian.

In reading this document, it is important to recognize that some of the standards enunciate ideals or philosophical points, while others speak to day-to-day practical matters. Both approaches are critically important. It is not our ambition to prescribe a precise program description or management manual. Rather, we have sought to shape a mirror that practitioners and funders can use to evaluate their efforts. The standards also reflect the mandate that all guardians must perform in accordance with current state law governing guardianships and certification of guardians.

To ensure consistency in the way the standards are applied, the following constructions are used: "shall" imposes a duty, "may" creates discretionary authority or grants permission or a power, "must" creates or recognizes a condition precedent, "is entitled to" creates or recognizes a right, and "may not" imposes a prohibition and is synonymous with "shall not." The guidelines that appear in some standards are suggested ways of carrying out those standards.

This document embodies practices and standards from a number of professional sources. As such, it sometimes makes unavoidable use of legal and medical "terms of art" where they would commonly and most accurately be used by professionals who work in the particular area. In addition, the field of guardianship itself makes use of terms that vary widely from state to state. "Guardian" and "person under guardianship" or "person" are the terms used here to simplify the many references to these roles. Where points apply to professional, as opposed to family, guardians, they are indicated. "Guardian," as used in the standards, means guardian of the person, guardian of the estate or guardian of the person and estate, depending on the standard being addressed.

In this work we have drawn on a number of collective sources. First and foremost have been NGA members who have contributed extensive time and energy and valuable input into the development of these standards. The *Model Code of Ethics for Guardians*, developed by Michael D. Casasanto, Mitchell Simon, and Judith Roman and adopted by the NGA, has formed the

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foundation from which the standards were developed. Other very important sources that helped in the creation of our standards of practice are the U.S. Administration on Aging, the AARP, the Center for Social Gerontology, the Michigan Offices of Services for the Aging, and the state associations from Arizona, Washington, California, Illinois, Minnesota, and Michigan. We thank everyone listed above and others for their ongoing commitment to the profession of guardianship.

The *NGA Standards of Practice for Guardians* were first adopted by the NGA Board of Directors and ratified by the membership in 2000. The 2003 edition of the *Standards* incorporates language that came forth from Wingspan 2001, the National Conference on Guardianship Reform. The 2007 edition provides minor clarification of the language in the earlier editions without any substantive changes. These *Standards* were used as a starting point by the 2011 Third National Guardianship Summit in developing new standards. The 2013 edition incorporates the Summit Standards.

Please be advised that any entity adopting these standards should give attribution to NGA.

Check the NGA Website (www.guardianship.org) for the most current edition of the *NGA Standards of Practice*.

NGA Standards of Practice

⊗ NGA Standard 1 – Applicable Law and General Standards

- I. The guardian shall perform duties and discharge obligations in accordance with current state and federal law governing guardianships.
- II. The guardian who is certified, registered, or licensed by the Center for Guardianship Certification or by his or her state should be guided by professional codes of ethics and standards of practice for guardians.
- III. In all guardianships, the guardian shall comply with the requirements of the court that made the appointment.
- IV. 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.

⊗ NGA Standard 2 – The Guardian’s Relationship to the Court

- I. The guardian shall know the extent of the powers and the limitations of authority granted by the court and all decisions and actions shall be consistent with that court order.
- II. The guardian shall obtain court authorization for actions that are subject to court approval.
- III. The guardian shall clarify with the court any questions about the meaning of the order or directions from the court before taking action based on the order or directions.
- IV. The guardian shall seek assistance as needed to fulfill responsibilities to the person under guardianship.
- V. All payments to the guardian from the assets of the person shall follow applicable federal or state statutes, rules, and requirements and are subject to review by the court.
- VI. The guardian shall submit reports regarding the status of the guardianship to the court as ordered by the court or required by state statute, but no less often than annually. Ways that guardians of the person and of the estate keep the court informed about the well-being of the person and the status of the estate include but not limited to:
 - A. Personal care plans and financial plans,
 - B. Inventories and appraisals, and
 - C. Reports and accountings.
- VII. The guardian shall use available technology to:
 - A. File the general plan, inventory and appraisal, and annual reports and accountings,
 - B. Access responsible education and information about guardianships, and

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- C. Assist in the administration of the estate.
- VIII. The guardian shall promptly inform the court of any change in the capacity of the person that warrants an expansion or restriction of the guardian's authority.

✧ **NGA Standard 3 – The Guardian's Professional Relationship with the Person**

- I. The guardian shall treat the person under guardianship with dignity.
- II. The guardian shall avoid personal relationships with the person, the person's family, or the person's friends, unless the guardian is a family member, or unless such a relationship existed before the appointment of the guardian.
- III. The guardian may not engage in sexual relations with a person unless the guardian is the person's spouse or in a physical relationship that existed before the appointment of the guardian.
- V. The guardian shall seek ongoing education concerning the following:
 - A. Person-centered planning,
 - B. Surrogate decision-making,
 - C. Responsibilities and duties of guardians,
 - D. Legal processes of guardianship, and
 - E. State certification of guardians.

NGA Standard 4 – The Guardian's Relationship with Family Members and Friends of the Person

- I. The guardian shall promote social interactions and meaningful relationships consistent with the preferences of the person under guardianship.
 - A. The guardian shall encourage and support the person in maintaining contact with family and friends, as defined by the person, unless it will substantially harm the person.
 - B. The guardian may not interfere with established relationships unless necessary to protect the person from substantial harm.
- II. The guardian shall make reasonable efforts to maintain the person's established social and support networks during the person's brief absences from the primary residence.
- III. When disposing of the person's assets, the guardian may notify family members and friends and give them the opportunity, with court approval, to obtain assets (particularly those with sentimental value).
- IV. The guardian shall make reasonable efforts to preserve property designated in the person's will and other estate planning devices executed by the person.

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- V. The guardian may maintain communication with the person's family and friends regarding significant occurrences that affect the person when that communication would benefit the person.
- VI. The guardian may keep immediate family members and friends advised of all pertinent medical issues when doing so would benefit the person. The guardian may request and consider family input when making medical decisions.

Note: Refer to Standard 11 as it relates to confidentiality issues.

✦ NGA Standard 5 – The Guardian’s Relationship with Other Professionals and Providers of Service to the Person

- I. The guardian shall treat all professionals and service providers with courtesy and respect and shall strive to enhance cooperation on behalf of the person.
- II. The guardian shall develop and maintain a working knowledge of the services, providers and facilities available in the community.
- III. The guardian shall stay current with changes in community resources to ensure that the person under guardianship receives high-quality services from the most appropriate provider.
- IV. A guardian who is not a family member guardian may not provide direct service to the person. The guardian shall coordinate and monitor services needed by the person to ensure that the person is receiving the appropriate care and treatment.
- V. The guardian shall engage the services of professionals (attorneys, accountants, stock brokers, real estate agents, physicians) as necessary to appropriately meet the goals, needs, and preferences of the person.
- VI. The guardian shall make a good faith effort to cooperate with other surrogate decision-makers for the person. These include, where applicable, any other guardian, agent under a power of attorney, health care proxy, trustee, VA fiduciary and representative payee.
- VII. The guardian may consider mentoring new guardians.

✦ NGA Standard 6 – Informed Consent

- I. Decisions the guardian makes on behalf of the person under guardianship shall be based on the principle of Informed Consent.
- II. Informed Consent is an individual’s agreement to a particular course of action based on a full disclosure of facts needed to make the decision intelligently.
- III. Informed Consent is based on adequate information on the issue, voluntary action, and lack of coercion.
- IV. The guardian stands in the place of the person and is entitled to the same information and freedom of choice as the person would have received if he or she were not under guardianship.

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- V. In evaluating each requested decision, the guardian shall do the following:
- A. Have a clear understanding of the issue for which informed consent is being sought,
 - B. Have a clear understanding of the options, expected outcomes, risks and benefits of each alternative,
 - C. Determine the conditions that necessitate treatment or action,
 - D. Encourage and support the person in understanding the facts and directing a decision,
 - E. Maximize the participation of the person in making the decision,
 - F. Determine whether the person has previously stated preferences in regard to a decision of this nature,
 - G. Determine why this decision needs to be made now rather than later,
 - H. Determine what will happen if a decision is made to take no action,
 - I. Determine what the least restrictive alternative is for the situation,
 - J. Obtain a second medical or professional opinion, if necessary,
 - K. Obtain information or input from family and from other professionals, and
 - L. Obtain written documentation of all reports relevant to each decision.

✦ **NGA Standard 7 – Standards for Decision-Making**

- I. Each decision made by the guardian shall be an informed decision based on the principle of Informed Consent as set forth in Standard 6.
- II. The guardian shall identify and advocate for the person's goals, needs, and preferences. Goals are what are important to the person under guardianship, whereas preferences are specific expressions of choice.
 - A. First, the guardian shall ask the person what he or she wants.
 - B. Second, if the person has difficulty expressing what he or she wants, the guardian shall do everything possible to help the person express his or her goals, needs, and preferences.
 - C. Third, only when the person, even with assistance, cannot express his or her goals and preferences, shall the guardian seek input from others familiar with the person to determine what the individual would have wanted.
 - D. Finally, only when the person's goals and preferences cannot be ascertained, may the guardian make a decision in the person's best interest.

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- III. Substituted Judgment
 - A. Substituted Judgment is the principle of decision-making that substitutes the decision the person would have made when the person had capacity as the guiding force in any surrogate decision the guardian makes.
 - B. Substituted Judgment promotes the underlying values of self-determination and well-being of the person.
 - C. Substituted Judgment is not used when following the person's wishes would cause substantial harm to the person or when the guardian cannot establish the person's goals and preferences even with support.
- IV. Best Interest
 - A. Best Interest is the principle of decision-making that should be used only when the person has never had capacity, when the person's goals and preferences cannot be ascertained even with support, or when following the person's wishes would cause substantial harm to the person.
 - B. The Best Interest principle requires the guardian to consider the least intrusive, most normalizing, and least restrictive course of action possible to provide for the needs of the person.
 - C. The Best Interest principle requires the guardian to consider past practice and evaluate reliable evidence of likely choices.

✦ NGA Standard 8 – Least Restrictive Alternative

- I. The guardian shall carefully evaluate the alternatives that are available and choose the one that best meets the personal and financial goals, needs, and preferences of the person under guardianship while placing the least restrictions on his or her freedom, rights, and ability to control his or her environment.
- II. The guardian shall weigh the risks and benefits and develop a balance between maximizing the independence and self-determination of the person and maintaining the person's dignity, protection and safety.
- III. The guardian shall make individualized decisions. The least restrictive alternative for one person might not be the least restrictive alternative for another person.
- IV. The following guidelines apply in the determination of the least restrictive alternative:
 - A. The guardian shall become familiar with the available options for residence, care, medical treatment, vocational training, and education.
 - B. The guardian shall strive to know the person's goals and preferences.
 - C. The guardian shall consider assessments of the person's needs as determined by specialists. This may include an independent assessment of the person's functional ability, health status, and care needs.

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✧ NGA Standard 9 – Self-Determination of the Person

- I. The guardian shall provide the person under guardianship with every opportunity to exercise those individual rights that the person might be capable of exercising as they relate to the personal care and financial needs of the person.
- II. The guardian shall attempt to maximize the self-reliance and independence of the person.
- III. The guardian shall encourage the person to participate, to the maximum extent of the person's abilities, in all decisions that affect him or her, to act on his or her own behalf in all matters in which the person is able to do so, and to develop or regain his or her own capacity to the maximum extent possible.
- IV. The guardian shall make and implement a plan that seeks to fulfill the person's goals, needs, and preferences. The plan shall emphasize the person's strengths, skills, and abilities to the fullest extent in order to favor the least restrictive setting.
- V. The guardian shall wherever possible, seek to ensure that the person leads the planning process; and at a minimum to ensure that the person participates in the process.

✧ NGA Standard 10 – The Guardian's Duties Regarding Diversity and Personal Preferences of the Person

- I. The guardian shall determine the extent to which the person under guardianship identifies with particular ethnic, religious, and cultural values. To determine these values, the guardian shall also consider the following:
 - A. The person's attitudes regarding illness, pain, and suffering,
 - B. The person's attitudes regarding death and dying,
 - C. The person's views regarding quality of life issues,
 - D. The person's views regarding societal roles and relationships, and
 - E. The person's attitudes regarding funeral and burial customs.
- II. The guardian shall acknowledge the person's right to interpersonal relationships and sexual expression. The guardian shall take steps to ensure that a person's sexual expression is consensual, that the person is not victimized, and that an environment conducive to this expression in privacy is provided.
 - A. The guardian shall ensure that the person has information about and access to accommodations necessary to permit sexual expression to the extent the person desires and to the extent the person possesses the capacity to consent to the specific activity.
 - B. The guardian shall take reasonable measures to protect the health and well-being of the person.

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- C. The guardian shall ensure that the person is informed of birth control methods. The guardian shall consider birth control options and choose the option that provides the person the level of protection appropriate to the person's lifestyle and ability, while considering the preferences of the person. The guardian shall encourage the person, where possible and appropriate, to participate in the choice of a birth control method.
- D. The guardian shall protect the rights of the person with regard to sexual expression and preference. A review of ethnic, religious, and cultural values may be necessary to uphold the person's values and customs.

✦ NGA Standard 11 - Confidentiality

- I. The guardian shall keep the affairs of the person under guardianship confidential.
- II. The guardian shall respect the person's privacy and dignity, especially when the disclosure of information is necessary.
- III. Disclosure of information shall be limited to what is necessary and relevant to the issue being addressed.
- IV. The guardian may disclose or assist the person in communicating sensitive information to the person's family and friends, as defined by the person, unless it will substantially harm the person.
- V. The guardian may refuse to disclose sensitive information about the person where disclosure would be detrimental to the well-being of the person or would subject the person's estate to undue risk. Such a refusal to disclose information must be reported to the court.

✦ NGA Standard 12 – Duties of the Guardian of the Person

- I. The guardian shall have the following duties and obligations to the person under guardianship unless the order of appointment provides otherwise:
 - A. To see that the person is living in the most appropriate environment that addresses the person's goals, needs, and preferences.
 - 1. The guardian shall have a strong priority for home or other community-based settings, when not inconsistent with the person's goals and preferences.
 - 2. The guardian shall authorize moving a person to a more restrictive environment only after evaluating other medical and health care options and making an independent determination that the move is the least restrictive alternative at the time, fulfills the current needs of the person and serves the overall best interest of the person.
 - 3. The guardian shall consider the proximity of the setting to those people and activities that are important to the person when choosing a residential setting.
 - 4. At a minimum the guardian shall report to a court before a move to a more restrictive residential setting, and the justification for the move.

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5. When the guardian considers involuntary or long-term placement of the person in an institutional setting, the bases of the decision shall be to minimize the risk of substantial harm to the person, to obtain the most appropriate placement possible, and to secure the best treatment for the person.
- B. To ensure that provision is made for the support, care, comfort, health, and maintenance of the person.
- C. To make reasonable efforts to secure for the person medical, psychological, therapeutic, and social services, training, education, and social and vocational opportunities that are appropriate and that will maximize the person's potential for self-reliance and independence.
- D. To keep the affairs of the person confidential, except when it is necessary to disclose such affairs for the best interests of the person.
- E. To seek specific judicial authority when a civil commitment, the dissolution of a marriage, or another extraordinary circumstance is being addressed.
- F. To file with the court, on a timely basis but not less often than annually, all reports required by state statute, regulations, court rule, or the particular court pursuant to whose authority the guardian was appointed.
- G. To adhere to the requirements of Standard 17 - Duties of the Guardian of the Estate and Standard 18 - Guardian of the Estate: Initial and Ongoing Responsibilities, to the extent that the guardian of the person has been authorized by the court to manage the person's property.
- H. To petition the court for limitation or termination of the guardianship when the person no longer meets the standard pursuant to which the guardianship was imposed, or when there is an effective alternative available.
- I. To promptly report to the appropriate authorities abuse, neglect and/or exploitation as defined by state statutes.

✦ NGA Standard 13 – Guardian of the Person: Initial and Ongoing Responsibilities

- I. With the proper authority, initial steps after appointment as guardian are as follows:
 - A. The guardian shall address all issues of the person under guardianship that require immediate action.
 - B. The guardian shall meet with the person as soon after the appointment as is feasible. At the first meeting, the guardian shall:
 1. Communicate to the person the role of the guardian;
 2. Explain the rights retained by the person;
 3. Assess the person's physical and social situation, the person's educational,

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- vocational, and recreational needs, the person's preferences, and the support systems available to the person; and
4. Attempt to gather any missing necessary information regarding the person.
- C. After the first meeting with the person, the guardian shall notify relevant agencies and individuals of the appointment of a guardian and shall complete the intake process by gathering information and ensuring that certain evaluations are completed, if appropriate. The guardian shall:
1. Obtain an evaluation of the person's condition, treatment, and functional status from the person's treating physician or appropriate specialist, if a comprehensive medical evaluation was not completed as part of the petitioning process, or has not been done within the past year.
 2. Obtain a psychological evaluation, if appropriate.
 3. Obtain an inventory of advance directives. Such statements of intent would include, but are not limited to, powers of attorney, living wills, organ donation statements and statements by the person recorded in medical charts.
 4. Establish contact with and develop a regular pattern of communication with the guardian of the estate or any other fiduciary for the person.
- II. The guardian shall develop and implement a written guardianship plan setting forth short-term and long-term objectives for meeting the goals, needs and preferences of the person.
- A. The plan shall emphasize a "person-centered philosophy."
 - B. The plan must address medical, psychiatric, social, vocational, educational, training, residential, and recreational goals, needs and preferences of the person.
 - C. The plan must also address whether the person's finances and budget are in line with the services the person needs and are flexible enough to deal with the changing status of the person.
 - D. Short-term goals must reflect the first year of guardianship, and long-term goals must reflect the time after the first year.
 - E. The plan must be based on a multidisciplinary functional assessment.
 - F. The plan must be updated no less often than annually.
- III. The guardian shall maintain a separate file for each person. The file must include, at a minimum, the following information and documents:
- A. The person's name, date of birth, address, telephone number, Social Security number, medical coverage, physician, diagnoses, medications, and allergies to medications;
 - B. All legal documents involving the person;

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- C. Advance directives;
 - D. A list of key contacts;
 - E. A list of service providers, contact information, a description of services provided to the person, and progress/status reports;
 - F. A list of all over-the-counter and prescribed medication the person is taking, the dosage, the reason why it is taken, and the name of the doctor prescribing the medication;
 - G. Documentation of all client and collateral contacts, including the date, time, and activity;
 - H. Progress notes that are as detailed as necessary to reflect contacts made and work done regarding the person;
 - I. The guardianship plan;
 - J. An inventory, if required;
 - K. Assessments regarding the person's past and present medical, psychological, and social functioning;
 - L. Documentation of the person's known values, lifestyle preferences, and known wishes regarding medical and other care and service; and
 - M. A photograph of the person.
- IV. The guardian shall visit the person no less than monthly.
- A. The guardian shall assess the person's physical appearance and condition and assess the appropriateness of the person's current living situation and the continuation of existing services, taking into consideration all aspects of social, psychological, educational, direct services, and health and personal care needs as well as the need for any additional services.
 - B. The guardian shall maintain substantive communication with service providers, caregivers, and others attending to the person.
 - C. The guardian shall participate in all care or planning conferences concerning the residential, educational, vocational, or rehabilitation program of the person.
 - D. The guardian shall require that each service provider develop an appropriate service plan for the person and shall take appropriate action to ensure that the service plans are being implemented.
 - E. The guardian shall regularly examine all services and all charts, notes, logs, evaluations, and other documents regarding the person at the place of residence and at any program site to ascertain that the care plan is being properly followed.
 - F. The guardian shall advocate on behalf of the person with staff in an institutional setting and other residential placements. The guardian shall assess the overall

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quality of services provided to the person, using accepted regulations and care standards as guidelines and seeking remedies when care is found to be deficient.

- G. The guardian shall monitor the residential setting on an ongoing basis and take any necessary action when the setting does not meet the individual’s current goals, needs and preferences, including but not limited to:
 - 1. Evaluating the plan;
 - 2. Enforcing residents’ rights, legal and civil rights; and
 - 3. Ensuring quality of care and appropriateness of the setting in light of the feelings and attitudes of the person.

- V. The guardian shall fully identify, examine, and continue to seek information regarding options that will fulfill the person’s goals, needs, and preferences.
 - A. Guardians shall take full advantage of professional assistance in identifying all available options for long term services and supports.
 - B. Sources of professional assistance include but are not limited to area agencies on aging, centers for independent living, protection and advocacy agencies, long-term care ombudsmen, developmental disabilities councils, aging and disability resource centers, and community mental health agencies.

- VI. The guardian shall obtain and maintain a current understanding of what is required and expected of the guardian, statutory and local court rule requirements, and necessary filings and reports.

- VII. The guardian shall become educated about the nature of any incapacity, condition and functional capabilities of the person.

✪ NGA Standard 14 – Decision-Making About Medical Treatment

- I. The guardian shall promote, monitor, and maintain the health and well-being of the person under guardianship.
- II. The guardian shall ensure that all medical care for the person is appropriately provided and that the person is treated with dignity.
- III. The guardian shall seek to ensure that the person receives appropriate health care consistent with person-centered health care decision-making.
- IV. The guardian, in making health care decisions or seeking court approval for a decision, shall:
 - A. Maximize the participation of the person,
 - B. Acquire a clear understanding of the medical facts,
 - C. Acquire a clear understanding of the health care options and the risks and benefits of each option, and

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- D. Encourage and support the individual in understanding the facts and directing a decision.
- V. Use the substituted judgment standard with respect to a health care decision unless the guardian cannot determine person's prior wishes.
- VI. The guardian shall determine whether the person, before the appointment of a guardian, executed any advance directives, such as powers of attorney, living wills, organ donation statements and statements by the person recorded in medical charts. On finding such documents, the guardian shall inform the court and other interested parties of the existing health care documents.
- VII. To the extent the person cannot currently direct the decision, the guardian shall act in accordance with the person's prior general statements, actions, values, and preferences to the extent actually known or ascertainable by the guardian.
- VIII. If the person's preferences are unknown and unascertainable, the guardian shall act in accordance with reasonable information received from professionals and persons who demonstrate sufficient interest in the person's welfare, to determine the person's best interests, which determination shall include consideration of consequences for others that an individual in the person's circumstances would consider.
- IX. Absent an emergency or the person's execution of a living will, durable power of attorney for health care, or other advance directive declaration of intent that clearly indicates the person's wishes with respect to a medical intervention, a guardian who has authority may not grant or deny authorization for a medical intervention until he or she has given careful consideration to the criteria listed in Standards 6 and 7.
- X. In the event of an emergency, a guardian who has authority to make health care decisions shall grant or deny authorization of emergency medical treatment based on a reasonable assessment of the criteria listed in Standards 6 and 7, within the time allotted by the emergency.
- XI. The guardian shall seek a second opinion for any medical treatment or intervention that would cause a reasonable person to do so or in circumstances where any medical intervention poses a significant risk to the person. The guardian shall obtain a second opinion from an independent physician.
- XII. Under extraordinary medical circumstances, in addition to assessing the criteria and using the resources outlined in Standards 6 and 7, the guardian shall enlist ethical, legal, and medical advice, with particular attention to the advice of ethics committees in hospitals and elsewhere.
- XIII. The guardian shall speak directly with the treating or attending physician before authorizing or denying any medical treatment.
- XIV. The guardian may not authorize extraordinary procedures without prior authorization from the court unless the person has executed a living will or durable power of attorney that clearly indicates the person's desire with respect to that action. Extraordinary procedures may include, but are not limited to, the following medical interventions:
 - A. Psychosurgery,
 - B. Experimental treatment,

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- C. Sterilization,
 - D. Abortion, and
 - E. Electroshock therapy.
- XV. The guardian shall seek to ensure that appropriate palliative care is incorporated into all health care, unless not in accordance with the person's preferences and values.
- XVI. The guardian shall keep individuals that are important to the person reasonably informed of important health care decisions.

⊗ NGA Standard 15 – Decision-Making About Withholding and Withdrawal of Medical Treatment

- I. The NGA recognizes that there are circumstances in which, with the approval of the court if necessary, it is legally and ethically justifiable to consent to the withholding or withdrawal of medical treatment, including artificially provided nutrition and hydration, on behalf of the person under guardianship. In making this determination there shall in all cases be a presumption in favor of the continued treatment of the person.
- II. If the person had expressed or currently expresses a preference regarding the withholding or withdrawal of medical treatment, the guardian shall follow the wishes of the person. If the person's current wishes are in conflict with wishes previously expressed when the person had capacity, the guardian shall have this ethical dilemma reviewed by an ethics committee and if necessary, submit the issue to the court for direction.
- III. When making this decision on behalf of the person, the guardian shall gather and document information as outlined in Standard 6 and shall follow Standard 7.

⊗ NGA Standard 16 – Conflict of Interest: Ancillary and Support Services

- I. The guardian shall avoid all conflicts of interest and self-dealing or the appearance of a conflict of interest and self-dealing when addressing the needs of the person under guardianship. Impropriety or conflict of interest arises where the guardian has some personal or agency interest that can be perceived as self-serving or adverse to the position or best interest of the person. Self-dealing arises when the guardian seeks to take advantage of his or her position as a guardian and acts for his or her own interests rather than for the interests of the person.
- II. The guardian shall become fully educated as to what constitutes a conflict of interest and self-dealing, and why they should be avoided.
- III. Rules relating to specific ancillary and support service situations that might create an impropriety or conflict of interest include the following:
 - A. The guardian may not directly provide housing, medical, legal, or other direct services to the person. Some direct services may be approved by the court for family guardians.

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1. The guardian shall coordinate and assure the provision of all necessary services to the person rather than providing those services directly.
 2. The guardian shall be independent from all service providers, thus ensuring that the guardian remains free to challenge inappropriate or poorly delivered services and to advocate on behalf of the person.
 3. When a guardian can demonstrate unique circumstances indicating that no other entity is available to act as guardian, or to provide needed direct services, an exception can be made, provided that the exception is in the best interest of the person. Reasons for the exception must be documented and the court notified.
- B. A guardianship program must be a freestanding entity and must not be subject to undue influence.
 - C. When a guardianship program is a part of a larger organization or governmental entity, there must be an arm's-length relationship with the larger organization or governmental entity and it shall have independent decision-making ability.
 - D. The guardian may not be in a position of representing both the person and the service provider.
 - E. A guardian who is not a family guardian may act as petitioner only when no other entity is available to act, provided all alternatives have been exhausted.
 - F. The guardian shall consider all possible consequences of serving the dual roles of guardian and expert witness. Serving in both roles may present a conflict. The guardian's primary duty and responsibility is always to the person.
 - G. The guardian may not employ his or her friends or family to provide services for a profit or fee unless no alternative is available and the guardian discloses this arrangement to the court.
 - H. The guardian shall neither solicit nor accept incentives from service providers.
 - I. The guardian shall consider various ancillaries or support service providers and select the providers that best meet the needs of the person.
 - J. A guardian who is an attorney or employs attorneys may provide legal services to a person only when doing so best meets the needs of the person and is approved by the court following full disclosure of the conflict of interest. The guardian who is an attorney shall ensure that the services and fees are differentiated and are reasonable. The services and fees are subject to court approval.
 - K. The guardian may enter into a transaction that may be a conflict of interest only when necessary, or when there is a significant benefit to the person under the guardianship, and shall disclose such transactions to interested parties and obtain prior court approval.

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✦ **NGA Standard 17 – Duties of the Guardian of the Estate**

- I. The guardian, as a fiduciary, shall manage the financial affairs of the person under guardianship in a way that maximizes the dignity, autonomy, and self-determination of the person.
- II. When making decisions the guardian shall:
 - A. Give priority to the goals, needs and preferences of the person, and
 - B. Weigh the costs and benefits to the estate.
- III. The guardian shall consider the current wishes, past practices, and reliable evidence of likely choices. If substantial harm would result or there is no reliable evidence of likely choices, the guardian shall consider the best interests of the person.
- IV. The guardian shall assist and encourage the person to act on his or her own behalf and to participate in decisions.
- V. The guardian shall use reasonable efforts to provide oversight to any income and assets under the control of the person.
- VI. The guardian shall, consistent with court order and state statutes, exercise authority only as necessitated by the limitations of the person.
- VII. The guardian shall act in a manner above reproach, and his or her actions will be open to scrutiny at all times.
- VIII. The guardian shall provide competent management of the person's property and, shall supervise all income and disbursements of the estate.
- IX. The guardian shall manage the estate only for the benefit of the person.
- X. The guardian shall keep estate assets safe by keeping accurate records of all transactions and be able to fully account for all the assets in the estate.
- XI. The guardian shall keep estate money separate from the guardian's personal money; the guardian shall keep the money of individual estates separate unless accurate separate accounting exists within the combined accounts.
- XII. The guardian shall make claims against others on behalf of the estate as deemed in the best interest of the person and shall defend against actions that would result in a loss of estate assets.
- XIII. The guardian shall apply state law regarding prudent investment practices, including seeking responsible consultation with and delegation to people with appropriate expertise when managing the estate.
- XIV. The guardian shall employ prudent accounting procedures when managing the estate.
- XV. The guardian shall determine if a will exists and obtain a copy to determine how to manage estate assets and property.

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- XVI. The guardian shall obtain and maintain a current understanding of what is required and expected of the guardian, statutory and local court rule requirements, and necessary filings and reports.
- XVII. The guardian shall promptly report to the appropriate authorities abuse, neglect and/or exploitation as defined by state statute.

❖ NGA Standard 18 – Guardian of the Estate: Initial and Ongoing Responsibilities

- I. With the proper authority, the initial steps after appointment as guardian are as follows:
 - A. The guardian shall address all issues of the estate that require immediate action, which include, but are not limited to, securing all real and personal property, insuring it at current market value, and taking the steps necessary to protect it from damage, destruction, or loss.
 - 1. The guardian shall ascertain the income, assets, and liabilities of the person.
 - 2. The guardian shall ascertain the goals, needs and preferences of the person.
 - 3. The guardian shall coordinate and consult with others close to the person.
 - B. The guardian shall meet with the person under guardianship as soon after the appointment as feasible. At the first meeting the guardian shall:
 - 1. Communicate to the person the role of the guardian;
 - 2. Outline the rights retained by the person and the grievance procedures available;
 - 3. Assess the previously and currently expressed wishes of the person and evaluate them based on current acuity; and
 - 4. Attempt to gather from the person any necessary information regarding the estate.
- II. The guardian shall become educated about the nature of any incapacity, condition and functional capabilities of the person.
- III. The guardian shall develop and implement a financial plan and budget for the management of income and assets that corresponds with the care plan for the person and aims to address the goals, needs and preferences of the person. The guardian of the estate and the guardian of the person (if one exists) or other health care decision-maker shall communicate regularly and coordinate efforts with regard to the care and financial plans, as well as other events that might affect the person.
 - A. Guardian shall value the well-being of the person over the preservation of the estate.
 - B. Guardian shall maintain the goal of managing, but not necessarily eliminating, risks.

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- C. The financial plan shall emphasize a “person-centered philosophy”.
- IV. The guardian shall take all steps necessary to obtain a bond to protect the estate, including obtaining a court order.
- V. The guardian shall obtain all public and insurance benefits for which the person is eligible.
- VI. The guardian shall thoroughly document the management of the estate and the carrying out of any and all duties required by statute or regulation.
- VII. The guardian shall prepare an inventory of all property for which he or she is responsible. The inventory must list all the assets owned by the person with their values on the date the guardian was appointed and must be independently verified.
- VIII. All accountings must contain sufficient information to clearly describe all significant transactions affecting administration during the accounting period. All accountings must be complete, accurate, and understandable.
- IX. The guardian shall oversee the disposition of the person’s assets to qualify the person for any public benefits program.
- X. On the termination of the guardianship or the death of the person, the guardian shall facilitate the appropriate closing of the estate and submit a final accounting to the court.
- XI. The guardian may monitor, provide oversight or manage the personal allowance of the person.
- XII. The guardian shall, when appropriate, open a burial trust account and make funeral arrangements for the person.

🔗 NGA Standard 19 – Property Management

- I. The guardian may not dispose of real or personal property of the person under guardianship without judicial, administrative, or other independent review.
- II. In the absence of reliable evidence of the person's views before the appointment of a guardian, the guardian, having the proper authority, may not sell, encumber, convey, or otherwise transfer property of the person, or an interest in that property, unless doing so is in the best interest of the person.
- III. In considering whether to dispose of the person's property, the guardian shall consider the following:
 - A. Whether disposing of the property will benefit or improve the life of the person,
 - B. The likelihood that the person will need or benefit from the property in the future,
 - C. The previously expressed or current desires of the person with regard to the property,
 - D. The provisions of the person’s estate plan as it relates to the property, if any,

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- E. The tax consequences of the transaction,
 - F. The impact of the transaction on the person's entitlement to public benefits,
 - G. The condition of the entire estate,
 - H. The ability of the person to maintain the property,
 - I. The availability and appropriateness of alternatives to the disposition of the property,
 - J. The likelihood that property may deteriorate or be subject to waste, and
 - K. The benefits versus the liability and costs of maintaining the property,
- IV. The guardian shall consider the necessity for an independent appraisal of real and personal property.
- V. The guardian shall provide for insurance coverage, as appropriate, for property in the estate.

⊗ **NGA Standard 20 – Conflict of Interest: Estate, Financial, and Business Services**

- I. The guardian shall avoid all conflicts of interest and self-dealing or the appearance of a conflict of interest and self-dealing when addressing the needs of the person under guardianship. Impropriety or conflict of interest arises where the guardian has some personal or agency interest that can be perceived as self-serving or adverse to the position or best interest of the person. Self-dealing arises when the guardian seeks to take advantage of his or her position as a guardian and acts for his or her own interests rather than for the interests of the person.
- II. Rules relating to specific situations that might create an impropriety or conflict of interest include the following:
- A. The guardian may not commingle personal or program funds with the funds of the person, except as follows:
 1. This standard does not prohibit the guardian from consolidating and maintaining a person's funds in joint accounts with the funds of other persons.
 2. If the guardian maintains joint accounts, separate and complete accounting of each person's funds shall also be maintained by the guardian.
 3. When an individual or organization serves several persons, it may be more efficient and more cost-effective to pool the individual estate funds in a single account. In this manner, banking fees and costs are distributed, rather than being borne by each estate separately.
 4. If the court allows the use of combined accounts, they should be permitted only where the guardian has available resources to keep accurate records of the exact amount of funds in the account, including allocation of interest

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and charges attributable to each estate based on the asset level of the person.

- B. The guardian may not sell, encumber, convey, or otherwise transfer the person's real or personal property or any interest in that property to himself or herself, a spouse, a coworker, an employee, a member of the board of the agency or corporate guardian, an agent, or an attorney, or any corporation or trust in which the guardian has a substantial beneficial interest.
- C. The guardian may not sell or otherwise convey to the person property from any of the parties noted above.
- D. The guardian may not loan or give money or objects of worth from the person's estate unless specific prior approval is obtained.
- E. The guardian may not use the person's income and assets to support or benefit other individuals directly or indirectly unless specific prior approval is obtained and a reasonable showing is made that such support is consistent with the person's goals, needs and preferences and will not substantially harm the estate.
- F. The guardian may not borrow funds from, or lend funds to, the person unless there is prior notice of the proposed transaction to interested persons and others as directed by the court or agency administering the person's benefits, and the transaction is approved by the court.
- G. The guardian may not profit from any transactions made on behalf of the person's estate at the expense of the estate, nor may the guardian compete with the estate, unless prior approval is obtained from the court.

✪ NGA Standard 21 – Termination and Limitation of Guardianship

- I. Limited guardianship of the person and estate is preferred over a plenary guardianship.
- II. The guardian shall assist the person under guardianship to develop or regain the capacity to manage his or her personal and financial affairs.
- III. The guardian shall seek termination or limitation of the guardianship in the following circumstances:
 - A. When the person has developed or regained capacity in areas in which he or she was found incapacitated by the court,
 - B. When less restrictive alternatives exist,
 - C. When the person expresses the desire to challenge the necessity of all or part of the guardianship,
 - D. When the person has died, or
 - E. When the guardianship no longer benefits the person.

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✦ NGA Standard 22 – Guardianship Service Fees

- I. Guardians are entitled to reasonable compensation for their services.
- II. The guardian shall bear in mind at all times the responsibility to conserve the person's estate when making decisions regarding providing guardianship services and charging a fee for those services.
- III. All fees related to the duties of the guardianship must be reviewed and approved by the court. Fees must be reasonable and be related only to guardianship duties.
- IV. The guardian shall:
 - A. Disclose in writing the basis for fee (e.g., rate schedule) at the time of the guardian's first appearance in the action,
 - B. Disclose a projection of annual fiduciary fees within 90 days of appointment,
 - C. Disclose fee changes,
 - D. Seek authorization for fee-generating actions not contained in the fiduciary's appointment, and
 - E. Disclose a detailed explanation for any claim for fiduciary fees.
- V. A guardian shall report to the court any likelihood that funds will be exhausted and advise the court whether the guardian intends to seek removal when there are no longer funds to pay fees. A guardian may not abandon the person when estate funds are exhausted and shall make appropriate succession plans.
- VI. A guardian may seek payment of fiduciary fees from the income of a person receiving Medicaid services only after the deduction of the personal needs allowance, spousal allowance and health care insurance premiums.
- VII. Factors to be considered in determining reasonableness of the guardian's fees include:
 - A. Powers and responsibilities under the court appointment;
 - B. Necessity of the services;
 - C. The request for compensation in comparison to a previously disclosed basis for fees, and the amount authorized in the approved budget, including any legal presumption of reasonableness or necessity;
 - D. The guardian's expertise, training, education, experience, professional standing, and skill, including whether an appointment in a particular matter precluded other employment;
 - E. The character of the work to be done, including difficulty, intricacy, importance, time, skill, or license required, or responsibility undertaken;
 - F. The conditions or circumstances of the work, including emergency matters requiring urgent attention, services provided outside of regular business hours,

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- potential danger (e.g., hazardous materials, contaminated real property, or dangerous persons), or other extraordinary conditions;
- G. The work actually performed, including the time actually expended, and the attention and skill-level required for each task, including whether a different person could have rendered the service better, cheaper, faster;
 - H. The result, specifically whether the guardian was successful, what benefits to the person were derived from the efforts, and whether probable benefits exceeded costs;
 - I. Whether the guardian timely disclosed that a projected cost was likely to exceed the probable benefit, affording the court the opportunity to modify its order in furtherance of the best interest of the estate;
 - J. The fees customarily paid, and time customarily expended, for performing like services in the community, including whether the court has previously approved similar fees in another comparable matter;
 - K. The degree of financial or professional risk and responsibility assumed;
 - L. The fidelity and loyalty displayed by the guardian, including whether the guardian put the best interests of the estate before the economic interest of the guardian to continue the engagement; and
 - M. The need for a local availability of specialized knowledge and the need for retaining outside fiduciaries to avoid conflict of interest.
- VIII. Fees or expenses charged by the guardian shall be documented through billings maintained by the guardian. If time records are maintained, they shall clearly and accurately state:
- A. Date and time spent on a task,
 - B. Duty performed,
 - C. Expenses incurred,
 - D. Collateral contacts involved, and
 - E. Identification of individual who performed the duty (e.g., guardian, staff, volunteer).
- IX. All parties should respect the privacy and dignity of the person when disclosing information regarding fees.

✦ NGA Standard 23 – Management of Multiple Guardianship Cases

- I. The guardian shall limit each caseload to a size that allows the guardian to accurately and adequately support and protect the person, that allows a minimum of one visit per month with each person, and that allows regular contact with all service providers.

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- II. The size of any caseload must be based on an objective evaluation of the activities expected, the time that may be involved in each case, other demands made on the guardian, and ancillary support available to the guardian.
 - A. The guardian may institute a system to evaluate the level of difficulty of each guardianship case to which the guardian is assigned or appointed.
 - B. The outcome of the evaluation must clearly indicate the complexity of the decisions to be made, the complexity of the estate to be managed, and the time spent. The guardian shall use the evaluation as a guide for determining how many cases the individual guardian may manage.

✧ NGA Standard 24 – Quality Assurance

- I. Guardians shall actively pursue and facilitate periodic independent review of their provision of guardianship services.
- II. The independent review shall occur periodically, but no less often than every two years, and must include a review of a representative sample of cases.
- III. The independent review must include, but is not limited to, a review of agency policies and procedures, a review of records, and a visit with the person and with the individual providing direct service to the person.
- IV. An independent review may be obtained from:
 - A. A court monitoring system,
 - B. An independent peer, or
 - C. An CGC national master guardian.
- V. The quality assurance review does not replace other monitoring requirements established by the court.

✧ NGA Standard 25 – Sale or Purchase of a Guardianship Practice

- I. Guardianship is a fiduciary relationship and as such is bound by the fiduciary obligations recognized by the community and the law.
- II. A guardianship practice is defined as private, professional guardianship services provided to two or more individuals found by a court to be incapacitated and in need of a guardian.
- III. A professional guardian may choose to sell all or substantially all of a guardianship practice, including goodwill, subject to the following guidelines:
 - A. A professional guardian considering the sale of a guardianship practice shall ensure that the persons are considered in the sale process and that guardianship responsibilities continue to be met during the transition.

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- B. The professional guardian shall require documentation of the purchaser's references pertaining to qualifications to serve as guardian, as defined by state statutes.
 - C. Sale of a guardianship practice to a purchaser engaged in serving or representing any interest adverse to the interest of the persons is not appropriate.
 - D. The sale price for the guardianship practice must not be the sole consideration in selecting the purchaser.
 - E. The professional guardian shall provide formal written notice of the proposed sale to the court, to the persons, and to other interested parties, even if not required by state statutes.
 - F. Consideration should be given to requesting that the court appoint a guardian ad litem, or another third party reviewer, to protect the interests of the persons.
 - G. All parties to the sale of the guardianship practice shall take steps to ensure the continuity of care and protection for the persons during the period of the sale and transfer of ownership.
 - H. The professional guardian may not disclose confidential information regarding a person for the purpose of inducing a sale of a guardianship practice.
 - I. The fees charged to existing persons may not be increased by the purchaser of a guardianship practice solely for the purpose of financing the purchase.
- IV. Admission to, employment by, or retirement from a guardianship practice, retirement plans or similar arrangements, or sale of tangible assets of a guardianship practice may not be considered a sale or purchase under this standard.

Definitions

ADVANCE DIRECTIVE - A written instruction, such as a living will or durable power of attorney for health care, which guides care when an individual is terminally ill or incapacitated and unable to communicate his or her desires.

ADVOCATE - To assist, defend, or plead in favor of another.

ARM'S-LENGTH RELATIONSHIP - A relationship between two agencies or organizations, or two divisions or departments within one agency, which ensures independent decision-making on the part of both.

BEST INTEREST - The course of action that maximizes what is best for a person and that includes consideration of the least intrusive, most normalizing, and least restrictive course of action possible given the needs of the person.

CAPACITY - Legal qualification, competency, power, or fitness. Ability to understand the nature and effects of one's acts. (Black's)

CONFLICT OF INTEREST - Situations in which an individual may receive financial or material gain or business advantage from a decision made on behalf of another. Situations that create a public perception of a conflict should be handled in the same manner as situations in which an actual conflict of interest exists.

COURT - An arm of the government, belonging to the judicial department, whose function is the application of the laws to controversies brought before it and the public administration of justice. (Black's)

COURT ORDER - A legal document issued by the court and signed by a judge. Examples include a letter of guardianship spelling out directions for the care of the person and the estate and an authorization or denial of a request for action.

COURT-REQUIRED REPORT - A report that the guardian is required by statute or court order to submit to the court relative to the guardianship.

DESIGNATION OF GUARDIAN - A formal means of nominating a guardian before a guardian is needed.

DIRECT SERVICES - These include medical and nursing care, care/case management and case coordination, speech therapy, occupational therapy, physical therapy, psychological therapy, counseling, residential services, legal representation, job training, and other similar services.

ESTATE - Both real and personal property, tangible and intangible, and includes anything that may be the subject of ownership.

EXTRAORDINARY MEDICAL CIRCUMSTANCE - Includes abortion, removal of life support, sterilization, experimental treatment, and other controversial medical issues.

FIDUCIARY - An individual, agency, or organization that has agreed to undertake for another a special obligation of trust and confidence, having the duty to act primarily for another's benefit and subject to the standard of care imposed by law or contract.

FREESTANDING ENTITY - An agency or organization that is independent from all other agencies or organizations

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FUNCTIONAL ASSESSMENT - A diagnostic tool that measures the overall well-being of an individual and provides a picture of how well the person is able to function in a variety of multidimensional situations. (Eric Pfeiffer, M.D., Director, University of South Florida Gerontology Department)

GUARDIAN – A person or entity appointed by a court with the authority to make some or all personal decisions on behalf of an individual the court determines lacks capacity to make such decisions. The term includes conservators and certified private or public fiduciaries. All guardians are accountable to the court.

Conservator is a person or entity appointed by a court with the authority to make some or all financial decisions on behalf of an individual the court determines needs assistance in making such decisions.

Emergency/Temporary Guardian is a guardian whose authority is temporary and who is usually appointed only in an emergency.

Foreign Guardian is a guardian appointed in another state or jurisdiction.

Guardian of the Estate is a guardian who possesses any or all powers and rights with regard to the property of the individual.

Guardian of the Person is a guardian who possesses any or all of the powers and rights granted by the court with regard to the personal affairs of the individual.

Limited Guardian is a guardian appointed by the court to exercise the rights and powers specifically designated by a court order entered after the court finds that the person lacks capacity to do some, but not all, of the tasks necessary to care for his or her person or property, or after the person voluntarily petitions for appointment of a limited guardian. A limited guardian may possess fewer than all of the legal rights and powers of a plenary guardian.

Plenary Guardian is a person appointed by the court to exercise all delegable rights and powers of the person after the court finds the person lacks the capacity to perform all of the tasks necessary to care for his or her person or property.

Pre-Need Guardian is a guardian who is formally nominated before a guardian is needed.

Standby Guardian is a person, agency, or organization whose appointment as guardian becomes effective without further proceedings immediately upon the death, incapacity, resignation, or temporary absence or unavailability of the initially appointed guardian.

Successor Guardian is a guardian who is appointed to act upon the death or resignation of a previous guardian.

INFORMED CONSENT - A person's agreement to allow something to happen that is based on a full disclosure of facts needed to make the decision intelligently, i.e., knowledge of risks involved, alternatives, etc.

LEAST RESTRICTIVE ALTERNATIVE - A mechanism, course of action, or environment that allows the person to live, learn, and work in a setting that places as few limits as possible on the person's rights and personal freedoms as appropriate to meet the needs of the person.

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PERSON UNDER GUARDIANSHIP OR SIMPLY "PERSON" - A person the court has determined requires assistance in making some or all decisions, and for whom the court has appointed a guardian and/or conservator. Synonyms include Conservatee, Disabled Person, Protected Person, Incapacitated Person and Ward.

PERSON-CENTERED PLANNING¹ - A family of approaches designed to guide change in a person's life. This type of planning is carried out in alliance with the person, their family and friends and is grounded in demonstrating respect for the dignity of all involved. Recognized approaches seek to discover, understand and clearly describe the unique characteristics of the person, so that the person:

- Has positive control over the life he/she desires and finds satisfying;
- Is recognized and valued for their contributions (current and potential) to their communities; and
- Is supported in a web of relationships, both natural and paid, within their communities.

PRUDENT INVESTOR RULE - All investments must be considered as part of an overall portfolio rather than individually. No investment is inherently imprudent or prudent. The rule recognizes that certain nontraditional investment vehicles may actually be prudent and the guardian who does not use risk-reducing strategies may be penalized. Under most circumstances, the person's assets must be diversified. The guardian is obligated to spread portfolio investments across asset classes and potentially across global markets to both enhance performance and reduce risk. The possible effects of inflation must be considered as part of the investment strategy. The guardian shall either demonstrate investment skill in managing assets or shall delegate investment management to another qualified party.

SELF-DETERMINATION - A doctrine that states the actions of a person are determined by that person. It is free choice of one's acts without external force.

SOCIAL SERVICES - These services are provided to meet social needs, including provisions for public benefits, case management, money management services, adult protective services, companion services, and other similar services.

SUBSTITUTED JUDGMENT - The principle of decision-making that requires implementation of the course of action that comports with the individual person's known wishes expressed before incapacity, provided the individual was once capable of developing views relevant to the matter at issue and reliable evidence of those views remains.

¹ Personal communication with Michael Smull, Mary Lou Bourne & Leigh Ann Kingsbury, Support Development Associates, LLC (May 2, 2012). See Michael Smull, The Learning Community for Person Centered Practices, www.learningcommunity.us (April 2012). See also John O'Brien & Connie Lyle O'Brien, eds., *A Little Book About Person Centered Planning*, Inclusion Press (2000).

NGA and CGC Qualifications for Court-Appointed Guardians

Corporate Guardian - A corporate guardian is a corporation that is named as guardian for an individual and may receive compensation in its role as guardian with court approval. Corporate guardians may include banks, trust departments, for-profit entities, and nonprofit entities.

Guidelines:

A corporate guardian:

1. Shall follow the *Model Code of Ethics for Guardians*.
2. Shall follow the *NGA Standards of Practice*.
3. Should strive to have decision-making staff become national certified guardians and national master guardians.

Family Guardian - A family guardian is an individual who is appointed as guardian for a person to whom he or she is related by blood or marriage. In most cases when there is a willing and able family member who has no conflict with the prospective person, the court prefers to appoint the family member as guardian. On court approval, a family guardian may receive reasonable compensation for time and expenses relating to care of the person.

Guidelines:

A family guardian:

1. Is encouraged to recognize the resources available through the NGA.
2. Shall follow the *Model Code of Ethics for Guardians*.
3. Shall follow the *NGA Standards of Practice* when carrying out guardianship responsibilities.

Individual Professional Guardian - An individual professional guardian is an individual who is not related to the person by blood or marriage and with court approval may receive compensation in his or her role as guardian. He or she usually acts as guardian for two or more individuals.

Guidelines:

An individual professional guardian:

1. Shall follow the *Model Code of Ethics for Guardians*.
2. Shall follow the *NGA Standards of Practice*.
3. Should strive to become a national certified guardian and national master guardian, if applicable.

Standards of Practice, National Guardianship Association

National Master Guardian - A national master guardian is an individual who has met the qualifications established by the Center for Guardianship Certification.

Guidelines:

A national master guardian:

1. Shall meet the Master guardian qualifications as established by the Center for Guardianship Certification.
2. Shall follow the *Model Code of Ethics for Guardians*.
3. Shall follow the *NGA Standards of Practice*.

Public Guardian - A public guardian is a governmental entity that is named as guardian of an individual and may receive compensation in its role as guardian with court approval. Public guardians may include branches of state, county, or local government.

Guidelines:

A public guardian:

1. Shall follow the *Model Code of Ethics for Guardians*.
2. Shall follow the *NGA Standards of Practice*.
3. Should strive to have decision-making staff become national registered guardians and national master guardians.

National Certified Guardian - A national certified guardian is an individual who has met the qualifications established by the Center for Guardianship Certification.

Guidelines:

A national certified guardian:

1. Shall meet the National certified guardian qualifications as established by the Center for Guardianship Certification.
2. Shall follow the *Model Code of Ethics for Guardians*.
3. Shall follow the *NGA Standards of Practice*.
4. Should strive to become a national master guardian.

Volunteer Guardian - A volunteer guardian is a person who is not related to the person by blood or marriage and who does not receive any compensation in his or her role as guardian. The guardian may receive reimbursement of expenses or a minimum stipend with court approval.

Guidelines:

A volunteer guardian:

Standards of Practice, National Guardianship Association

1. Shall follow the *Model Code of Ethics for Guardians*.
2. Shall follow the *NGA Standards of Practice*.
3. Is encouraged to become a national certified guardian and national master guardian, if applicable.



a
model
code
of
ethics
for
guardians

AUTHORED BY

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Adopted by the National Guardianship Association

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L Introduction

The concept of guardianship has a very early origin. The literature from Rome at the time of Cicero notes procedures to protect the property of incompetent persons; no such provisions were made for protection of the person. Under our Anglo-Norman legal tradition, the King, acting under the doctrine of *parens patriae*, was the protector of his subjects. While guardianship in England applied both to the person and the estate, the primary purpose of the power was to prevent incompetent persons from becoming public charges or squandering their resources to the detriment of their heirs.¹

It is not surprising in light of this genesis that reform of the basic process by which guardianships are imposed has been a relatively recent development². While much scholarly and judicial time has been devoted to the debate over the procedural protections to be afforded incompetent persons prior to imposition of a guardianship, insufficient work has been done to guide the actions of guardians who are charged with the enormous responsibility of substituting their judgment for that of another human being. The purpose of the Model Code is to suggest ethical and legal standards designed to simplify and improve this decision making process.

Since the Model Code is designed to address the guardian-ward relationship, we have assumed that the underlying adjudication of incompetency is accurate and made in accordance with procedural due process³. Therefore, the question of whether a guardianship should have been imposed at all is beyond the scope of this article⁴.

We have not, however, assumed that all guardianships are necessarily limited to those functions that the individual is incapable of actually performing, since "limited guardianship" is not the norm in all states. In a survey conducted in 1984, Casasanto, Newman and Saunders found that the forty-one states responding to their survey, thirteen had no provision for limited guardianship⁶. Therefore, the Model Code provides a framework for making decisions both on behalf of individuals who are deemed incompetent under a statute providing for plenary guardianship but who clearly retain the functional ability to make certain decisions, and for individuals, with a narrowly limited guardianship. This distinction is significant since the ability of the ward to participate in a decision making process will vary depending on the situation. For example, the Model Code suggests that an ethical guardian should look more closely at, and possibly defer to, the expressed wishes of a ward with an overbroad guardianship in those areas where functional competence still exists. Based on the above, the Code, in some situations, adopts what may on first blush look like an anomalous position by mandating deference to the currently expressed wishes of a legally incompetent person. We believe, however, this is mandated by the important ethical precept that the individual's rights of self-determination should be observed whenever possible.

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1. S. Brakel & R. Rock, *The Mentally Disabled and the Law* 250 (Rev. ed. 1971).
 2. See, e.d., Frolik, "Plenary Guardianship: An Analysis, A Critique and a Proposal for Reform," 23 *Ariz. L. Rev.* 599 (1981). During this session of Congress, the late Congressman Claude Pepper introduced a bill seeking to establish federal procedural protections in guardianship cases. The National Guardianship Rights Act H.R. 1702, 101st Cong., 1st Sess., 135 Cong. Rec. E 1071-01 (1989).
 3. For a thorough discussion of some of the procedural questions still presented by many current guardianship statutes, see, for example, Frolik, *supra* note 2, at 599; Horstman, "Protective Services for the Elderly: The Limits of *Parens Patriae*," 40 *Mo. L. Rev.* 215 (1975).
 4. For a guide to assessing when an individual needs a guardian, see, for example, Casasanto, Covert, Saunders & Simon, "Individual Functional Assessment: An Instruction Manual," 11 *Mental and Physical Disability L. Rep.* 670 (1987).
 5. Frolik, *supra* note 2; Casasanto, Newman, Saunders, *Limited Guardianship: A State Survey (1984)* (Copies available from the New Hampshire Office of Public Guardian, 6 White Street, Concord, NH 03301).
 6. Casasanto, Newman, Saunders, *supra* note 4.



Additionally, we have tried to keep the requirements of the Code limited to fundamental precepts so that it is applicable to family and volunteer guardians, as well as to guardianship organizations. Public guardians and similar organizations should certainly meet the requirements of this Code, but may need to adopt further standards in light of the particular dangers and issues presented in these types of arrangements.⁷

A. Guardianship Models

Scholars and courts have debated at some length whether a guardian should behave like a parent and act in the ward's best interest or attempt to act as a surrogate and make the decision that most closely approximates the decision the ward would have made in the situation at hand. This debate is best put in perspective by closely evaluating the underlying cause of the disability. Only by understanding the current and past functional status of the ward can a guardian apply the proper standards to the decision. The following examples, taken from the files of the New Hampshire Office of Public Guardian, may assist the reader in understanding the methodology of decision making which applies to the major groups in need of guardianship. Individuals with impairments other than those described below can be evaluated by reference to the most closely analogous group.

CASE 1 – Mary L. is a 49-year-old resident of a state institution for the retarded. Her current diagnosis is profound mental retardation with a convulsive disorder. Mary was considered to be developing normally until the age of four when she reportedly “struck her head falling down stairs.” Shortly thereafter she had a seizure. Seizure medications were administered; however, she failed to tolerate them. Due to the high degree of care needed, the constant monitoring of her blood levels, and subsequent adjustments in type and dosage of medication, Mary was placed in an institution at the age of five by her family. There has been no family contact since shortly after Mary's placement in the institution. At the present time, Mary can indicate certain preferences for various types of food, but has demonstrated no ability to communicate preferences relating to more complex decisions.

CASE 2 – John L. is a highly intelligent 29-year-old man diagnosed as having bipolar disorder. The preferred course of treatment for John is the drug Lithium Carbonate. When John is taking his prescribed medication, he is a highly functional member of society. He is employed by a computer firm and earns a high salary; he also has an excellent relationship with his family and carries on an active social life. He maintains close contact with his psychiatrist and is reported to have excellent insight into his illness. However, two to three times per year, John discontinues taking his medication. While the reasons for this are unclear, this non-compliance leads to extremely bizarre and erratic behaviors and often concludes with a period of involuntary hospitalization. Examples of such behaviors include John's belief that he is an “operative” in the Central Intelligence Agency who must “clean up” the drug trafficking in New York City. At times John carries firearms and dresses in army fatigues in an attempt to “hunt down” drug dealers. To maintain his “investigative” efforts, John spends money at exorbitant rates, oftentimes writing bad checks and using personal and employer credit cards well beyond credit limits. These behaviors typically bring him to the attention of the police and result in involuntary institutionalization and treatment. Once John receives sufficient medication, he expresses remorse for his behavior and asks that he not be allowed to cease taking his medication in the future. These manic phases have taken a serious toll on John's professional, social and financial life. Nevertheless during the beginning phases of medication noncompliance, John will not heed anyone's requests to continue taking his medication as prescribed.

7. *Surrogate Decision Making for Adults: Model Standards to Ensure Quality Guardianship and Representative Payeeship Services*, Subcomm. on Housing and Consumer Interests of the House Select Comm. on Aging, 100th Cong., 1st Sess. (Comm. Print 1988).



CASE 3 – Alice H. is a 94-year-old resident of a county nursing home. She raised a family of four children and was an active and vocal participant in community projects. Four years ago, prior to being admitted to the nursing home, Alice fell and suffered a broken hip. She refused all treatment for her condition and consequently became bedridden. Friends and various social service providers ensured Alice’s well-being until the combination of her physical and mental condition made this task overwhelming. In 1980 she was admitted to a county nursing home despite her protests. Soon after her admission, she began to suffer memory loss and seemed to lose her sense of humor. The staff attributed this to the stress caused by her transfer. However, the deficits became worse and after a thorough examination, Alice was diagnosed as having Alzheimer’s Disease. She is now in the third stage of the disease and has virtually no ability to make decisions for herself.

1. Best Interest Standard

The Best Interest Standard mirrors the view that the guardian’s duties are akin to those imposed on a parent. Under this standard, the charge of the guardian is to make an independent decision on behalf the ward which will be in the ward’s best interest as defined by more objective, societally shared criteria⁸. This type of decision making is most appropriate for individuals without previous competency. The profoundly retarded individual described in Case 1, above, seems to meet this standard.

In developing the Model Code, we have been guided by our belief that the use of the Best Interest Standard is a last resort, to be utilized only in cases where there is no previous competency or where the ward gave no indication of preference which could guide the guardian in making the decision. The position finds support in the report of the President’s Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research (hereinafter referred to as “Report of the President’s Commission”)⁹. The Commission stated that:

[When] possible, decision making for incapacitated patients should be guided by the principle of substitute judgment, which promotes the underlying values of self-determination and well-being better than the Best Interest Standard does. When a patient’s likely decision is unknown, however, a surrogate decision maker should use the Best Interest Standard and choose a course that will promote the patient’s well-being as it would probably be conceived by a reasonable person in the patient’s circumstances¹⁰

It is important to understand that even in the situation described in Case 1, we do not believe it is ethical to simply use the Best Interest Standard to authorize custodial care and protection. The last decade has reflected a growing belief that all individuals are entitled to assistance in developing their abilities and capabilities.¹¹ We have tried to incorporate this belief in the Model Code by reflecting an ethical requirement for a guardian to apply the Best Interest Standard in accord with the goal of providing individualized habilitation and education.

8. Compare Dussult, “Guardianship and Limited Guardianship in Washington State: Application for Mentally Retarded Citizens,” 13 *Conz. L. Rev.* 585 (1978) with Gauvey, Leviton, Shuger & Sykes, “Informed and Substitute Consent to Health Care Procedures; a Proposal for State Legislation,” 15 *Harv. J. Legis.* 431 (1978); See also *Matter of Conroy*, 98 N.J. 321, 486 A.2d 1209 (1985).

9. President’s Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Deciding to Forego Life-Sustaining Treatment*, at 1341 (1983) (hereinafter referred to as *Report of the President’s Commission*).

10. *Id.* at 136.

11. See *Pennsylvania Assn. for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971); Frolik, *supra* note 2.



It is now likely in many states that an individual like the one described in Case 1 will be able to live in the community, with the support from various agencies and programs and with the aid of a guardian who, in the absence of family, will be responsible for making best interest decisions for the individual. Such a disabled person is likely to have changing needs as the years go by, and may have expanding capabilities, based on the level of habilitative services available in the community. A guardian in this situation would need to monitor services being provided, develop an on-going relationship with service providers and attempt to maximize opportunities for the ward's personal growth. Such a ward may benefit from a series of placements, depending upon the success of habilitation efforts, each less restrictive than the last, and each allowing more independent functioning than the last. It is incumbent on the guardian for such a developmentally disabled person to encourage personal growth, rather than simply allow the ward to remain static.¹²

2. Substituted Judgement

The principal of substituted judgement requires the surrogate to attempt to reach the decision the incompetent person would make if that person were able to choose¹³. Use of this model for decision making allows the guardian to make decisions in accord with the incompetent person's own definition of well-being. It is critical to note that this model can only be used if the guardian, through available sources of information, is able to determine the prior preferences of the ward¹⁴. The Model Code, based as it is on the belief that this type of decision making should be utilized if possible, imposes a duty on guardians to attempt to find this information.

Since this model of decision making is ethically preferred, and since a guardian may not have had a prior relationship with the ward, the guardian will often need to look to others for assistance in learning about the ward's preferences. Relatives, friends, caretakers, and other interested persons may provide some insight as to how the ward would feel or behave in a certain set of circumstances. The ward's own behavior and choices prior to the onset of the incapacity may provide some clues, if known or discoverable. The ward, even if unable to participate fully, may indicate certain preferences by verbal or nonverbal communications. To the greatest extent possible, the guardian must exercise substituted decision making in light of all that he or she can learn about the ward's prior feelings and preferences, and should decide based on how the ward would decide if able. It is essential, though, to recognize that the guardian is the only one who makes the decision, and the guardian is the one who bears the ultimate responsibility for the decision made on behalf of the ward. Substituted judgments made after consideration of all available information about the ward are more likely to be decisions which the ward would make if able.

This situation is best understood by reference to Case 3 described above. In this case, the ward was certainly competent prior to the progression of her Alzheimer's Disease and provided much available information on her thought process. Guardians should ethically defer to this in most situations.

B. Intermittent Incompetence

Case 2 presents one of the most difficult dilemmas a guardian may face, that of the individual who has a cyclical impairment such as severe depression. The problem is that neither model of guardianship offers a satisfactory set of principals to guide the guardian.

12. See *Guardianship of the Mentally Impaired: A Critical Analysis*, National Center for Law and the Handicapped (May, 1977).

13. Report of the President's Comm., *supra* note 8, at 132.

14. *Id.* at 133.



Certainly, in this type of case the best interest model does not apply; the individual described in Case 2 has expressed his wishes on numerous occasions. Similarly, the substituted judgment model is not wholly applicable, since the individual is at times functionally, though not legally, competent. Therefore, the ethical principles favoring self-determination seem to dictate that the wishes expressed by the person be adhered to if a person is in a lucid state, despite the judicial determination that he is incompetent.¹⁵

The Model Code recognizes these situations and reflects the conclusion that a guardian is obligated, in limited situations, to respect the wishes of the ward even if contrary to the guardian's notion of best interest. One could argue that this principle is really just an application of the principle of substituted judgment, with the judgment being based on present competent statements, rather than past expressions. It matters not which concepts are used; the key point is to understand that the Model Code is based in part on the belief that self-determination and encouragement of growth of the ward through increased participation in decision making whenever possible are ethically required.

The above view may create some thorny problems for the guardian. For example, in a state that grants only plenary guardianships, the court would seem to be justified in holding the guardian responsible for the consequences of any decision within the guardian's power. If the guardian defers to the wishes of a ward, resulting in a decision contrary to that thought by the guardian to be the ward's best interest, the guardian may face potential liability. We believe, however, this is not a problem, since even in states with plenary guardianship statutes, there seems to be little dispute that the actual decision is informed by the concept of substituted judgement.¹⁶

II. The Model Code

Preamble

In its purest form, guardianship represents an exercise of the state's *parens patriae* authority to protect individuals who are incapable of making decisions for themselves. In theory, the concept of guardianship is rooted in the moral duty of beneficence. Under this theory, individuals subject to guardianship are entitled to enhanced protection from the state. That is, since the imposition of guardianship involves the removal of fundamental rights from the individual ward, the guardian is required to exercise the highest degree of trust, loyalty and fidelity in making decisions on behalf of the ward. Indeed, these requirements can be viewed as a kind of *quid pro quo* due the ward for such a fundamental imposition on his or her liberty and autonomy. This obligation for enhanced protection has been increasingly recognized in recent years by the on-going revisions to state guardianship statutes which require additional procedural protections for the proposed ward in guardianship hearings and also by the growing trend toward limited guardianship. Such changes are also the result of reported, wide spread abuses in the guardianship process as well as the increased use of guardianship—especially public guardianship—for elderly citizens who, due to advances in medical technology, are living longer lives, but are increasingly subject to chronic illnesses or conditions that oftentimes result in periods of incapacity prior to death.

In its' widest application, the imposition of guardianship bestows grave and far-reaching authority upon the person appointed as guardian. The authority of the guardian may encompass the control of

15. This same analysis may apply to individuals whose guardianships are overbroad due to the lack of a "limited" guardianship statute. See *supra* notes 5 and 6. On issues in which the ward is functionally able to make an informed decision, the same ethical principles seem to require deference to the ward despite the adjudication of incompetency. *Id.*

16. See *supra* notes 7 and 8.



the ward's bodily integrity, place of residence and personal finances. The potential scope of this authority is vast and requires the guardian to act with the greatest degree of care and circumspection. The potential for abuse of this power, whether deliberate or well-meaning, must be appreciated, acknowledged and guarded against. The guardian is in all cases a representative of the interests of the ward and shall represent only the interests of the ward.

The purpose of this Code of Ethics is to provide principles and guidelines for guardians. Since the primary duty of a guardian is to make decisions on behalf of a ward, the first section of this Code addresses general guidelines for decision making. In subsequent sections, specific subject areas are examined. Inasmuch as the areas in which a guardian may be required to make decisions are so broad, it is not possible to address all possible situations in this Code. Rather, the reader should refer to Rule 1 for guidance in situations not specifically addressed in the Code.

Rule 1 - Decision-Making: General Principles:

A GUARDIAN SHALL EXERCISE EXTREME CARE AND DILIGENCE WHEN MAKING DECISIONS ON BEHALF OF A WARD. ALL DECISIONS SHALL BE MADE IN A MANNER WHICH PROTECTS THE CIVIL RIGHTS AND LIBERTIES OF THE WARD AND MAXIMIZES INDEPENDENCE AND SELF-RELIANCE.

- 1.1 The guardian shall make all reasonable efforts to ascertain the preferences of the ward, both past and current, regarding all decisions which the guardian is empowered to make.
- 1.2 The guardian shall make decisions in accordance with the ascertainable preferences of the ward, past or current, in all instances except those in which a guardian is reasonably certain that substantial harm will result from such a decision.
- 1.3 When the preferences of the ward cannot be ascertained, a guardian is responsible for making decisions which are in the best interests of the ward.
- 1.4 The guardian shall be cognizant of his or her own limitations of knowledge, shall carefully consider the views and opinions of those involved in the treatment and care of the ward, and shall also seek independent opinions when necessary.
- 1.5 The guardian must recognize that his or her decisions are open to the scrutiny of other interested parties and, consequently, to criticism and challenge. Nonetheless, the guardian alone is ultimately responsible for decisions made on behalf of the ward.
- 1.6 A guardian shall refrain from decision making in areas outside the scope of the guardianship order and, when necessary, assist the ward by ensuring such decisions are made in an autonomous fashion.

Comment: Decision making is the fundamental responsibility of a guardian. At the inception of, and for the duration of the guardianship, the guardian is empowered to make legally binding decisions on behalf of the ward. While statutes governing guardianship vary from state to state, the obligation of a guardian to make reasoned and principled decisions remains constant. The primary component of such decisions is contained in the duty of the guardian to ascertain the preferences, opinions, and beliefs (hereinafter referred to solely as "preferences") of the ward and to have these preferences reflected in the decision that is made. The ability of a guardian to ascertain the preferences of the ward may vary according to both the type and nature of the ward's disability. Indeed, it is sometimes not possible to



obtain a reliable indication of the past or present position of the ward concerning the decision at hand. Nevertheless, the guardian has an affirmative obligation to make a diligent effort to involve the ward in the decision making process. This process begins with a thorough investigation of the historical preferences of the ward. Clear statements of choice regarding, for example, medical care are highly desirable but are, in point of fact, rarely available. More often the guardian must go beyond this and extrapolate from information obtained concerning the values and lifestyle of the ward.

When making a decision on behalf of a ward, the guardian also has an obligation to thoroughly investigate the current preferences of the ward. A prerequisite to accomplishing this is the ability to conduct a careful interview of the ward. This requires the guardian to be educated and trained in the field of disabilities as well as in interview techniques, whenever possible. Family members, friends or other non-professional guardians who do not have detailed knowledge of interview techniques should attempt to utilize people with such expertise to acquire the necessary information. The ethical obligations involved in the guardian/ward relationship are discussed in the next section of this Code. However, a fundamental principle of this relationship is that the guardian make every effort to familiarize him/herself with the ward and develop a personal relationship in the event one does not already exist. Limitations on the involvement of the ward in decisions are ethically justifiable only in limited circumstances as discussed herein.

The obligation to inform and involve the ward in decision making increased in direct proportion to the significance of the decision. The determination of the relative significance of the decision must be made from both an objective and subjective point of view. That is, a guardian must recognize that the obligation to inform and involve the ward in decisions does not only increase when the decision is factually significant (e.g., consent to major surgery); the guardian must also view the decision from the ward's standpoint. For example, a request by a nursing home for permission to relocate a ward to a different room may appear minor to the guardian but may, in fact, be critical to the ward. This underscores the importance of the guardian forming as close a personal relationship with the ward and his or her caregivers as is possible under the circumstances.

There are occasions when it may be justifiable for the guardian to override the preferences of the ward. This justification is limited to decisions in which the guardian is reasonably certain that substantial harm will result if a decision is made in accordance with the preference of the ward. The discretion allowed the guardian pursuant to this standard is further limited by the relative capacity of the ward when the preference was voiced.

In situations where the ward is unable to provide any indication of prior or current preferences and reliable or relevant background information does not exist or is not forthcoming, the guardian is responsible for making a decision which is in the best interest of the ward. The guardian should consider what choice or decision a reasonable person in similar circumstances would make. Decisions of this nature should not be made in a vacuum, and the guardian has an affirmative obligation to seek insight from all available sources. The guardian must work closely with the ward's caregivers to obtain information about the decision and its potential impact upon the ward. Also, whenever possible the guardian should look to others who may have expertise about the decision at hand. Furthermore, depending upon the relative significance of the decision, the guardian may be required to request the court with jurisdiction over the guardianship to review the matter. An example of this type of situation might be the decision to withhold food and hydration in a state without settled law on this issue. The guardian may also inform either the ward's attorney or any other representative of the decision so that those persons may have the opportunity to review the guardian's actions. Although this may not be legally required, this type of "third-party" informal review may be ethically required in certain significant decisions. If the ward is not represented by counsel the guardian may want to retain counsel or request that counsel be appointed on behalf of the ward. The guardian shall recognize, however, that unless otherwise addressed by statute, it is the



guardian's responsibility to make the decision and to be accountable for it.

The guardian must be aware of the constraints imposed by the guardianship order and must be careful not to make decisions that are beyond the scope of authority granted by the court. Furthermore, the guardian must recognize that the ward may remain entitled to make legally binding decisions independent of the guardian. Indeed, upon request of the ward, the guardian has an obligation to assist the ward in making such decisions by ensuring that the ward is free from undue influence and has access to as much information as possible concerning the alternatives and likely outcome of his or her decision.

Rule 2 - Relationship Between Guardian and Ward:

THE GUARDIAN SHALL EXHIBIT THE HIGHEST DEGREE OF TRUST, LOYALTY, AND FIDELITY IN RELATION TO THE WARD.

- 2.1 The guardian shall protect the personal and pecuniary interests of the ward and foster the ward's growth, independence and self reliance to the maximum degree.
- 2.2 The guardian shall scrupulously avoid conflict of interest and self-dealing in relations with the ward.
- 2.3 The guardian shall vigorously protect the rights of the ward against infringement by third parties.
- 2.4 The guardian shall, whenever possible, provide all pertinent information to the ward unless the guardian is reasonably certain that substantial harm will result from providing such information.

Comment: The relationship between a guardian and ward is fiduciary in nature. It is based upon trust and is characterized by the high degree of dependency of the ward and authority of the guardian. With the imposition of guardianship, the ward's legal status is reduced to that of a child. The law places a special trust and confidence in a guardian and requires that his or her actions and motives be beyond reproach. The fiduciary obligation embodied in the guardian/ward relationship has a wide penumbra of meaning and is, of necessity, proportioned to the occasion. A guardian is required to constantly achieve a balance between the seemingly contradictory duties to protect the ward and to respect and encourage the ward's independence. There is no clear formula for achieving or maintaining this balance. Nevertheless, the guardian must always be mindful of the trust inherent in the relationship and always should act in equity and good conscience.

The protection of the personal and pecuniary interests of the ward is the foremost obligation of the guardian and must always guide his or her motivations and actions. Acting within the scope of the guardianship order, the guardian has the authority to make legally binding decisions on behalf of the ward. These decisions are broad in scope and may involve the ability to control fundamental aspects of the life of another human being. The authority of a guardian may encompass the ability to make decisions concerning the treatment and care of the ward, where the ward shall live, care and management of the ward's estate, and the exercise of the legal rights of the ward. In short, a guardian is entrusted with the custody and control of the ward's person and estate. In light of these broad and far-reaching powers (which, outside of the context of the authority of government to intervene pursuant to its police powers, are unheard of in the western world), the guardian has an obligation to make well-reasoned decisions and ensure no undue harm befalls the ward.

In addition, the guardian must always act within the limitations and scope of the guardianship order. The guardian must exercise care to avoid intentional or unintentional waiver, surrender, impairment or alteration of the ward's rights outside of the guardianship order.



The guardian must subordinate his or her public or private interests to his or her fiduciary obligation to the ward whenever there is the potential for conflict of interest between guardian and ward. Where the guardian appears to have interests which are adverse to those of the ward, the guardian shall take all necessary measures to remedy the conflict immediately. Also, depending on the nature of the actual or potential harm to the ward resulting from the conflict, the guardian shall take whatever action is necessary to ensure third-party review of the situation. This may involve notifying the court, retaining legal counsel on behalf of the ward, resigning the guardianship, or any other remedy which is just and equitable for the ward.

The guardian is also responsible for protecting the rights of the ward's person and estate from infringement by third parties. When necessary, an attorney or other agent shall be retained by the guardian to represent and advocate on behalf of the ward in negotiations or litigation. In such cases it is the guardian, acting in the interest of the ward, who is the client. Nevertheless, it is the responsibility of the guardian to use due diligence in determining and utilizing the preferences of the ward in accordance with this Code. It is recognized that often a guardian will be a professional person and will have specialized knowledge of the law or of some other substantive area concerning the person or estate of the ward, and may therefore be held to a higher standard of diligence than the lay person guardian. Notwithstanding specialized knowledge, a guardian shall not provide direct services to the ward for a fee without the express knowledge and permission of the court having jurisdiction over the guardianship. Since the guardian, in the eyes of the law, stands in the shoes of the ward for the purpose of making legally binding decisions, this would result in the guardian becoming his or her own client and thus violate the prohibition against conflict of interest.

Inherent in the guardian's obligation to exhibit the highest degree of trust, loyalty and fidelity in relation to the ward is the requirement that the guardian share pertinent information with the ward about his or her condition and financial status as well as any decisions the guardian is contemplating or may have actually made. To the extent the ward is able to participate, there exists an informative duty on the part of the guardian to share relevant information with the ward and thus aim toward the goal of joint decision making. The guardian shall use common sense and tact in sharing information, and shall be mindful of the fact that certain information may be upsetting to the ward. The guardian shall attempt to minimize the negative impact of sensitive information by his or her manner of presentation, and shall anticipate the potential need for support and counseling for the ward who reacts adversely to such information. Maintaining a close working relationship with caregivers and other service providers may be helpful in this regard.

To the extent that the interested ward remains uninformed about the facts of his or her condition and the limitations imposed by that condition, and to the extent that the ward lacks information regarding the various options available, the ward will be unable to participate in even a minimally meaningful way in decisions which affect his or her personal affairs and quality of life. Similarly, to the extent that the guardian remains uninformed about the ward's capabilities, wishes, goals, ideas, and needs, the guardian will be limited in his or her own ability to exercise substituted judgment when this shall be necessary, or even to advocate for the ward's best interest in decision making.

Where advice from experts, input from caregivers, and insight from friends and relatives combine with common sense to dictate that the ward is likely to suffer substantial harm from learning facts relative to his or her condition, the guardian may appropriately withhold such potentially damaging information.

Rule 3 - Custody of the Person; Establishing a Place of Abode:

THE GUARDIAN SHALL ASSUME LEGAL CUSTODY OF THE WARD AND SHALL ENSURE THE WARD RESIDES IN THE LEAST RESTRICTIVE ENVIRONMENT AVAILABLE.



- 3.1 The guardian shall be informed and aware of the options and alternatives available for establishing the ward's place of abode.
- 3.2 The guardian shall make decisions in conformity with the preferences of the ward in establishing the ward's place of abode unless the guardian is reasonably certain that such a decision will result in substantial harm.
- 3.3 When the preferences of the ward cannot be ascertained or where they will result in substantial harm, the guardian shall make decisions with respect to the ward's place of abode which are in conformity with the best interests of the ward.
- 3.4 The guardian shall not remove the ward from his or her home or separate the ward from family and friends unless such removal is necessary to prevent substantial harm. The guardian shall make every reasonable effort to ensure the ward resides at home or in a community setting.
- 3.5 The guardian shall seek professional evaluations and assessments wherever necessary to determine whether the current or proposed placement of the ward represents the least restrictive environment available to the ward. The guardian shall work cooperatively with community based organizations which may be available to assist in ensuring that the ward resides in a non-institutional environment.
- 3.6 The guardian shall have a strong preference against placement of the ward in an institution or other setting which provides only custodial care.
- 3.7 The guardian shall monitor the placement of the ward on an on-going basis to ensure its continued appropriateness, and shall consent to changes as they become necessary or advantageous for the ward.
- 3.8 In the event that the only available placement is not the most appropriate and least restrictive, the guardian shall advocate for the ward's rights and negotiate a more desirable placement with a minimum of delay, retaining legal counsel to assist if necessary.

Comment: In establishing the place of abode for the ward, the guardian has an obligation to become as familiar as possible with the available options and alternatives for placement of the ward. The guardian must have a thorough knowledge of community services in order to ensure that the ward's right to live in the least restrictive environment available is upheld. For purposes of this code, the least restrictive environment is considered to be the placement that least inhibits the ward's freedom of movement, informed decision making and participation in the community, while achieving the purposes of habilitation and normalization. The guardian, in establishing the place of abode for the ward, undertakes the difficult task of ensuring the protection of the ward while at the same time maximizing the ward's freedom and independence.

There are many factors to be considered by the guardian in making decisions concerning placement. Foremost, the guardian must determine the preferences of the ward whenever possible. The guardian should bear in mind that, while a decision to change residence is critical for any individual, it is especially so for a disabled person. It is not unusual for a ward to be anxious and upset about a potential change. He or she may be used to the dependency fostered in an institutional setting and react negatively to even the thought of moving. In some instances the ward may be so unhappy in his or her current environment as to be unrealistic about what the move portends. The guardian is therefore cautioned to use care and circumspection in attempting to ascertain the preferences of the ward. Treatment staff, family, friends and others familiar to the ward may prove invaluable in assisting to discern the



ward's position by providing the ward with a sense of the conditions surrounding the placement in terms he or she will understand, and by evaluating his or her reaction to this information. Such individuals may arrange for the ward to visit the proposed placement location to reassure the ward about the transition process. Once the preferences of the ward can be determined, the guardian must make decisions in conformity with such preferences unless the guardian is reasonably certain that substantial harm will result. When preferences of the ward cannot be ascertained, the guardian is required to make decisions which are in conformity with the best interests of the ward. Please see the Comment to Rule 1 for guidance in making such decisions.

In considering a choice of placement location for a ward, the guardian shall also consider the needs of the ward as determined by professionals. This may include assessment of the ward's functional ability, his or her health status, and treatment and habilitation needs. The guardian should not hesitate to request clarification of the assessment or evaluation and should always reserve the right to seek additional and/or independent assessment or evaluation whenever necessary.

The guardian shall not act to remove the ward from his or her home or separate the ward from family and friends unless the guardian is reasonably certain that substantial harm will result unless such action is taken. Whenever such drastic measures become necessary, the guardian shall seek to have his or her actions reviewed by a third-party, even though this may not be required by law. This review shall take place prior to the removal or separation or, if the decision is made pursuant to an emergency, immediately thereafter. The nature of third-party review will vary depending on the particular circumstances. For example, third-party review may be made by the court having jurisdiction over the guardianship or the ward's attorney or other representative. Should none of the above individuals be available or appropriate in a specific case, the review may then be informal, such as an in-depth discussion with an individual knowledgeable about the ward's condition and desires.

Similarly, if not already required by statute or rule, the guardian shall not place the ward in an institution or any other setting which provides only custodial care, without third-party review. A third-party review is required even if the ward consents to the actions of the guardian.

The guardian shall do his or her utmost in ensuring that the ward resides in an optimal setting and shall work closely with community based organizations in achieving this goal. The guardian shall advocate for the ward's right to receive services in the least restrictive environment available and shall not hesitate to retain legal counsel to assist in this effort.

Rule 4 - Custody of the Person: Consent to Care, Treatment and Services

THE GUARDIAN SHALL ASSUME RESPONSIBILITY TO PROVIDE INFORMED CONSENT ON BEHALF OF THE WARD FOR THE PROVISION OF CARE, TREATMENT AND SERVICES AND SHALL ENSURE THAT SUCH CARE, TREATMENT AND SERVICES REPRESENTS THE LEAST RESTRICTIVE FORM OF INTERVENTION AVAILABLE.

- 4.1 The guardian shall make decisions in conformity with the preferences of the ward when providing consent for the provision of care, treatment and services, unless the guardian is reasonably certain that such decisions will result in substantial harm to the ward.
- 4.2 When the preferences of the ward cannot be ascertained or will result in substantial harm, the guardian shall make decisions with respect to care, treatment and services which are in conformity with the best interests of the ward.



- 4.3 In the event the only available treatment, care or services is not the most appropriate and least restrictive, the guardian shall advocate for the ward's right to a more desirable form of treatment, care or services, retaining legal counsel to assist if necessary.
- 4.4 The guardian shall seek professional evaluations and assessments whenever necessary to determine whether the current or proposed care, treatment and services represent the least restrictive form of intervention available.
- 4.5 The guardian shall work cooperatively with individuals and organizations which may be available to assist in ensuring the ward receives care, treatment and services which represent the least restrictive form of intervention available and are consistent with the wishes or best interests of the ward.
- 4.6 The guardian shall not consent to sterilization, electro-convulsive therapy, experimental treatment or service without seeking review by the court or the ward's attorney or other representative.
- 4.7 The guardian shall be familiar with the law of the state regarding the withholding or withdrawal of life-sustaining treatment.
- 4.8 The guardian shall monitor the care, treatment and services the ward is receiving to ensure its continued appropriateness, and shall consent to changes as they become necessary or advantageous to the ward.

Comment: The ethical precepts contained in rules 4. 1-4. 5 are simply another application of the decisional factors discussed in the previous sections. A guardian when making treatment decisions, as when making decisions concerning where the ward should live, must gather all available information and must attempt to abide by the preferences of the ward if ascertainable and not likely to cause substantial harm. See Comments to Rules 1-3.

Beyond the basic standards for decision making, this set of rules also recognizes the controversial nature of certain forms of care and singles them out for third-party review. For example, debate has raged in the courts and community concerning whether a woman with developmental disabilities has her "rights" protected or infringed by sterilization. Does sterilization violate her right to procreate? Does it permit a woman who has been unable to properly utilize contraceptives to pursue a full sex life without unwanted pregnancy? This type of treatment also presents an often difficult dilemma for the guardian: is this irrevocable decision truly in the ward's best interest or a device to simplify the guardian's responsibilities to the ward?

Regardless of how these questions are answered, the Model Code requires the ethical guardian to seek some form of appropriate third-party review. The form of this review will vary depending on the particular requirements of state law—for example, the requirement or lack thereof of court approval. If there is no court requirement, an ethical guardian will still seek informal consultation with an appropriate individual, such as the ward's attorney, doctor or family member.

The issue of withholding and withdrawing life support is governed predominantly by state law. Since a guardian who complies with ethical standards which violate state law can still be held liable for his or her actions, we have not attempted to address this issue in the Code. Rather, an ethical guardian in an area such as this, where ethical precepts have been pre-empted by state law, will look to that law for guidance.

Rule 5 - Management of the Estate:

THE GUARDIAN OF THE ESTATE SHALL PROVIDE COMPETENT MANAGEMENT OF THE PROPERTY AND INCOME OF THE ESTATE. IN THE DISCHARGE OF THIS DUTY, THE GUARDIAN SHALL EXERCISE INTELLIGENCE, PRUDENCE AND DILIGENCE AND AVOID ANY SELF-INTEREST.



- 5.1 Upon appointment, the guardian shall take steps to inform himself or herself of the statutory requirements for managing a ward's estate.
- 5.2 The guardian shall manage the income of the estate with the primary goal of providing for the needs of the ward, and in certain cases, the needs of the ward's dependents for support and maintenance.
- 5.3 The guardian has a duty to exercise prudence in the investment of surplus funds of the estate.
- 5.4 Where the liquid estate of the ward is sufficient, the guardian may make such gifts as are consistent with the wishes or past behavior of the ward, bearing in mind both the foreseeable requirements of the ward and the tax advantages of such gifts.
- 5.5 There shall be no self-interest in the management of the estate by the guardian; the guardian shall exercise caution to avoid even the appearance of self-interest.

Comment: The requirements imposed on a guardian vary according to the state of appointment. Therefore, a guardian must, at the outset, discover the particular legal requirements governing the guardian's actions. The guardian functions as the arm of the court, and as such, is accountable to the court for his or her actions. Certain obligations exist by virtue of statute and others may be granted or assigned by the court. These rules and comments do not reflect the specific law of any state. Rather, they address some of the broad ethical questions implicit in the role of guardian. A guardian must be sure to check the law of his or her state before relying on the principles contained herein.

The guardian must seek to obtain all available income for the ward. If the ward's own funds are inadequate to provide for the needs of the ward, the guardian will find it both prudent and necessary to seek income supplementation via various income maintenance and insurance programs available through federal, state and local resources. Public benefits may not only be helpful, but essential to the guardian in providing for the needs of the ward. The guardian is, therefore, under a positive obligation to investigate their availability and seek such assistance on behalf of the ward.

Collection of the ward's debts is the responsibility of the guardian. Receipt of funds on the ward's behalf discharges the debtor of his or her obligation. To the extent necessary or appropriate to the individual case, the guardian may employ an attorney to handle the debt collection function on the ward's behalf. In all such cases, transactions are negotiated and carried out in the name of the ward.

The guardian must use the ward's income to provide for his or her needs. The guardian undertakes the responsibility to settle the ward's outstanding accounts, first from the income of the estate, and then via sale of personal property, with license from the court. Only to the extent that debts cannot be covered through these avenues may the guardian seek permission to encumber or sell real estate.

Although possession of the real estate of the ward is in the hands of the guardian, title resides with the ward. Any plan to convey the ward's real estate must be contemplated only as necessary to provide for the care and maintenance of the ward, or in cases where the sale is demonstrably in the ward's best interest.

Exchange or partition of the ward's real estate must be considered only for the purpose of securing the funds necessary for the support of the ward, or for purposes otherwise in the ward's best interests. Since "license" of the court is often needed to dispose of real estate, the guardian should carefully check local requirements prior to selling or encumbering real property.



The guardian may mortgage the property of the ward only in accord with state law and only when necessary, based on insufficiency of the income of the estate to maintain and support the ward; to discharge other obligations, liens and mortgages; to extend the length or reduce the rate of interest of the existing mortgage; or to finance improvement to the property with an eye toward increasing the value of the real estate as an asset of the estate. On the other hand, in most states, the guardian does possess the power and right to lease the property with the goal of maximizing the income of the estate. Such a lease may be made in the name of the guardian and enforced by the guardian. Any warranties, therefore, are made by the guardian, and not by the ward or on his behalf. Any covenants or easements are likewise made by the guardian in his or her own name, and with the expectation that they will terminate upon the termination of the guardianship relationship.

Should there be surplus funds in the estate, the guardian must invest such funds prudently. While caution is essential in choosing non-speculative opportunities for investment, diligent attention should be paid to opportunities which may result in a high rate of return. The prudent guardian will seek such opportunities to maximize the estate. The deposit of funds in interest bearing accounts is a safe investment, but one which may be less likely than others to maximize the return to the estate. Such deposits, and all other investments as well, must be made in good faith and in the name of the ward. Disclosure by the guardian of his fiduciary role is essential evidence of such good faith. In no case should the ward's funds be mingled with those of the guardian, and they must be clearly identifiable at all times.

Funds loaned for investment purposes must be secured by sufficient collateral. Purchase of stock in private corporations, particularly when the guardian is also a stockholder, should be avoided, due to both the risky nature of such investments and the possible appearance of impropriety and self-interest on the part of the guardian. The guardian must exercise absolute good faith, reasonable judgment, discretion, and diligence. He or she must also reject speculative or risky investments as well as those which imply favoritism in favor of opportunities, which are likely to produce an income as large as possible while still being reasonably safe.

Charitable contributions may be made, with court approval in some jurisdictions, in such a manner as to perpetuate the former practices of the ward, or consistent with a substituted judgment as to their benefit to the ward's current or future situation. Non-charitable gifts, such as those gifts which might be made to family members or close friends, may be made from the surplus income of the estate if the guardian is in possession of demonstrable evidence that the ward would make such gifts. Where the guardian himself or herself, is among the potential donees of such gifts, consideration should be given to seeking independent representation for the ward from an attorney or a guardian ad litem, depending on local practice. In any case, court authorization of such a gift should be sought by the prudent guardian to avoid the appearance of any impropriety. In all cases, court authorization of such a gift should be sought by the prudent guardian to avoid the appearance of any impropriety. In all cases, the guardian may be held to a thorough knowledge of the principles and practices of estate planning, including the tax consequences, in the carrying out of planned giving. If the guardian does not have such expertise, he or she must seek professional advice before deciding to make any gifts.

The application of surplus income of the estate to the support and maintenance of the ward's dependents may be an issue of importance in certain cases where the ward is bound by custom, duty, or law to provide for his or her dependents. In such a case, the guardian shall first see to the current and future needs of the ward, and then may apply the surplus to the support of others to discharge the obligations of the ward. A substituted judgment in this regard must be supported by sufficient evidence to demonstrate to the court its propriety. In no case shall a guardian approve or allow support to himself or herself from the income of the ward's estate. Only to the extent that the expenses of the guardianship itself are met by the guardian shall he or she seek reimbursement or approval from the court for such expenses.



While it is understood that the guardian must take responsibility and bear liability for his or her own negligent acts, the prudent guardian will scrupulously avoid even the appearance of self dealing in the decisions he or she makes concerning the financial affairs of the ward. This warning bears special significance for the guardian who is also a relative and future heir of the ward. Efforts to maximize the estate in this situation may be interpreted as an attempt to protect a future inheritance. For this reason, once assuring himself or herself of an absence of self-interest in decisions affecting the financial affairs of the ward, the guardian is well advised to seek court approval or license to avoid any appearance of impropriety.

Rule 6 - Termination and Limitation of the Guardianship:

THE GUARDIAN HAS AN AFFIRMATIVE OBLIGATION TO SEEK TERMINATION OR LIMITATION OF THE GUARDIANSHIP WHENEVER INDICATED.

- 6.1 The guardian shall diligently seek out information which will provide a basis for termination or limitation of the guardianship.
- 6.2 Upon indication that termination or limitation of the guardianship order is warranted, the guardian shall promptly request court action, retaining legal counsel if necessary.
- 6.3 The guardian shall assist the ward in terminating or limiting the guardianship and arrange for independent representation for the ward whenever necessary.

Comment: The guardian shall seek evidence of any change in the capabilities of the ward and shall immediately seek complete or partial restoration of the legal capacity of the ward whenever the situation so dictates. Standards and evidence for restoration to capacity vary from state to state and the guardian is obligated to understand these matters as well as the procedure required for termination or limitation. Whenever necessary, the guardian shall not hesitate to consult with legal counsel and obtain the opinions of other professionals and care providers in making this determination.

In the even the ward expresses the desire to challenge the necessity of all or part of the guardianship, including the individual or agency acting as the guardian, it is the affirmative obligation of the guardian to assist the ward wherever necessary. This may include filing a petition on behalf of the ward, or, where the guardian does not agree with the ward, arranging for representation of the ward by independent legal counsel. The right to retain counsel for the purpose of challenging the guardianship or the actions of the guardian is fundamental and may not be waived or contracted away. Interference by the guardian with the ward's efforts to obtain full or partial restoration of capacity, or to challenge the guardianship in any way, shall constitute a breach of the guardian's fiduciary obligation to the ward.

VII. Conclusion

Individuals acting as guardian for disabled individuals are vested with enormous responsibility. The need to balance the goal of protection of the ward with the goal of minimizing the deprivation of the ward's rights, presents a complex matrix of decisional factors. The Model Code is an attempt to provide some general principles and commentary designed to improve the process of decision making so that individuals will be willing to serve as guardians, for persons in need, and so that the decisions actually made are based upon a set of agreed upon precepts.



COMMITTEE REPORT

Guardianship Monitoring

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Guardianship Monitoring Committee Findings and Recommendations

Introduction

The findings and recommendations of the Guardianship Monitoring Committee seek to improve guardianship monitoring practices and establish protections for the incapacitated person (“IP”).

I. Preliminary Assessment Processes - Determining Capacity

A. Issue Statement

The Committee was asked to examine issues related to a judge’s determination of capacity during guardianship proceedings. Chapter 55 of the Probate, Estates and Fiduciaries Code, 20 Pa.C.S. §§ 5501 *et seq.* (the “Guardianship Statute”) provides the procedure and governing law for the creation of a guardianship for an IP. The determination is made by an Orphans’ Court judge based on a petition and hearing. See Guardianship Statute, § 5511. The judge must make findings of fact after weighing the testimony, in person or by deposition, of persons qualified by training and experience to evaluate the type of incapacity alleged in the petition and why the appointment of a guardian is the least restrictive alternative based on the individual’s incapacities and disabilities. See Guardianship Statute, § 5518. An adjudication of incapacity must be based on clear and convincing evidence. Judges are familiar with the requirements of the Guardianship Statute, but currently there is little or no specialized training or materials offered to judges to assist them in evaluating the medical testimony required by Section 5518 or understanding the special needs of elders.¹ Currently, judges rely on their own experiences with family members, educate themselves on the topic, and develop a level of expertise based on the volume of guardianship cases and protective services cases assigned to them.

B. Committee Findings

1. A deposition form completed by the evaluator that contains the evaluator’s assessment of the capacity of the alleged incapacitated person (“AIP”) may be submitted to the court in the place of sworn testimony. Accepting written testimony is a cost-saving measure that relieves the evaluator of the burden of testifying in person and is especially applicable in uncontested cases. There are no requirements for the types of information to be included in the assessment. In order to assist judges in their role of determining capacity, it would be beneficial if information from the physician or licensed psychologist evaluating the AIP were submitted to the court on a standardized form. Judges need education and training to be fully knowledgeable of the pertinent considerations for making a determination of capacity. Although statutory requirements state that the AIP should be present at the hearing to determine capacity unless it would be harmful to the AIP, survey results found that this practice is not universally followed.

C. Committee Recommendations

1. It is recommended that a standardized deposition form be implemented to ensure consistent quality and quantity of pertinent information that should be considered by judges when determining capacity (see Appendix A for proposed deposition form). At a minimum, it is recommended that the deposition form include questions that assess the following topic areas:

- the AIP’s limitations and prognoses;
- the AIP’s current condition and level of functioning;
- recommendations regarding the degree of personal care the AIP can manage alone or with some degree of assistance;

- the AIP's current incapacity and how it affects his or her ability to provide for personal needs;
- whether current medication affects the AIP's demeanor or ability to participate in proceedings; and
- the evaluator's recommendation regarding the need for a guardianship.

To ensure uniformity across all counties, it is recommended that this practice be implemented by the Supreme Court through statewide procedural rule.

2. In cases where the evaluator recommends a limited guardianship, the judge and counsel for all parties may need additional information to determine the areas a partial IP can handle without a guardian. When such additional information is necessary, it is a recommended best practice for the judge to request that a deposition take place by telephone, videoconference or in person to allow for follow-up questioning and cross-examination.

3. It is recommended that judges who hear guardianship cases receive education and training on the components of the assessment process, such as:

- evaluating expert testimony;
- identifying abuse;
- tests for incapacity and their reliability;
- effects of medication on capacity;
- the role of family member testimony;
- evaluating potential conflicts of interest between the proposed guardian, AIP's attorney and AIP;
- cognitive changes that occur during the aging process; and
- the use of mediation in contested cases.

4. Senate Bill 117 of 2013 ("Senate Bill 117") would amend Section 5511 of the Guardianship Statute to clarify that the inability of the AIP to comprehend the proceeding does not, by itself, constitute harm. This is an important consideration to include in judicial training because doctors often find the AIP's inability to comprehend the proceeding to be a reason for stating the AIP should not attend the hearing. Other training topics, such as a review of the statutory requirements and evaluating report requirements submitted by the guardian (see section IV *infra*), should also be included. It is recommended that information from training materials be summarized into a bench card and provided to every Orphans' Court Judge. It is further recommended that training be coordinated through the Office of Elder Justice in the Courts ("OEJC") and presented through a variety of formats, such as the State Trial Judges' Conferences and online webinars. Orphans' Court Judges should be strongly encouraged to participate in the training sessions offered.

D. Timing and Impact

1. Implementing a standardized deposition form will require revisions to the Orphans' Court Procedural Rules. This approach is recommended to achieve statewide consistency and provide comprehensive information to judges. The timing of implementing training for judges will be determined by the OEJC.

E. Fiscal Impact

1. The fiscal consequences of implementing training for judges will be determined by the OEJC.

F. Additional Comments

1. Senate Bill 117 would amend Section 5518 by stating that, in contested hearings, the options for presenting testimony have been expanded from in-person testimony or deposition to include teleconference or videoconference. If the proceeding is not contested, and the person or counsel is present, then only a sworn statement from a qualified individual is necessary. This proposed legislation aligns with the Committee's recommendations.

2. Senate Bill 117 would amend Section 5518.1 to clarify that all witnesses are subject to cross-examination except for the sworn statement by a qualified individual in uncontested hearings. This proposed legislation aligns with the Committee's recommendations.

3. Senate Bill 117 would amend Section 5511 to require that notice will be provided to interested parties that a guardianship petition has been filed, including to those who reside out of state. This proposed legislation aligns with the Committee's recommendations.

II. Preliminary Assessment Process - Identifying Abuse

A. Issue Statement

The Committee was asked to examine the issue of identifying abuse during guardianship proceedings. Petitions filed under the Older Adults Protective Services Act ("OAPSA"), 35 P.S. §§ 10225.10110225.5102, are usually based on evidence of physical or financial abuse. In contrast, guardianship petitions typically do not contain allegations of abuse. As a result, it can be difficult for a judge to determine if there is evidence of elder abuse contributing to the AIP's alleged incapacity, particularly in uncontested guardianship hearings. There are no statewide mechanisms or tools available to the judge to assess whether financial or physical abuse is present. If the judge is suspicious that abuse is occurring, he or she has the ability to appoint a Guardian Ad Litem ("GAL") or an attorney in cases that he or she deems necessary; however, there has been no targeted training on identifying red flags associated with abuse or conflicts of interest.

B. Committee Findings

1. Judges need education and training on the indicators of abuse and conflicts of interest. During the guardianship hearing, it would benefit the AIP if a judge inquires about potential sources of conflicts of interest between the proposed guardian and the alleged AIP, consistent with the preferences stated in 20 Pa.C.S. § 5604(c).

C. Committee Recommendations

1. If the AIP was previously involved in a case under the OAPSA, it is recommended that the judge be informed, and that the guardianship petition be assigned to the same judge who heard the protective services case.

2. The training requirement for judges mentioned in Section I.C.3. should include recommended practices for determining if conflicts of interest are present or if there is evidence of elder abuse underlying the AIP's weakened capacity. Judges should also receive education on Social Security Administration ("SSA") representative-payment and the Veterans Administration ("VA") fiduciary programs.²

3. In order to uncover potential conflicts of interest, it is recommended that the judge determine if there is involvement from any of the following appointees: agent under power of attorney, SSA representative payee, or VA fiduciary. This might not be possible in every case if the petitioner or interested parties are unaware of external involvement; however, it is recommended that this type of inquiry become part of guardianship hearings. If one of these appointees is identified, the judge should determine if there is a less restrictive alternative to guardianship available, such as leaving the representative payee in place without a guardianship. If it is necessary to appoint a guardian, the judge should determine if it is necessary to void the power of attorney and/or request that the guardian become the representative payee (although this request may or may not be approved by SSA).

D. Timing and Impact

1. The timing of implementing training for judges will be determined by the OEJC.

E. Fiscal Impact

1. The fiscal consequences of implementing training for judges will be determined by the OEJC.

F. Additional Comments

1. Senate Bill 117 would amend Section 5511 to add subsections (h) and (i), which specifically enumerates the preferences for the appointment of a guardian. This proposed legislation aligns with the Committee's recommendations.

III. Reporting Requirements and Standardization of Forms

A. Issue Statement

The Committee was asked to examine the issue of standardizing and improving the documentation that guardians are required to submit to the court. Presently, the rules and statute state that a guardian is required to submit an initial inventory and an annual report for every year that the case is active. A final report is required at the time the guardianship case is terminated. A template of the Inventory, Annual Report of the Estate, and Annual Report of the Person forms are provided within the Orphans' Court Procedural Rules (Appendices B1, B2 & B3). The current forms are insufficient to monitor guardians' activities, or to detect instances of abuse or dereliction of duties, and they do not promote long-term planning. Interested parties connected to the IP report a lack of knowledge of the information submitted to the court.

B. Committee Findings

1. Without standardized forms, the amount and type of information collected from guardians may be insufficient for the judge to make decisions or for the court to properly monitor guardianship activity. It is important that information is collected within the first 90 days of appointment in order to establish a baseline from which to monitor changes that occur during the guardianship. To facilitate court oversight, forms and procedures were created to be understood by a person who is untrained in the law, comprehensive without being burdensome, and coherent for court review. Content was added to existing forms to simplify accurate reporting by guardians and to curb malfeasance.

2. In many instances, more information collected at the beginning of the guardianship can alleviate later problems after the guardian assumes his or her duties. For example, one suggested revision to the Inventory (Appendix C) requires information as to how checking/savings accounts have been set up. This information is requested to determine if the accounts have been set up with the guardian and IP as joint tenants with right of survivorship and, if they have, whether or not the account was created prior to the guardian's appointment. Frequently, guardians, whether intentionally or unintentionally, set up accounts and have themselves identified as joint owners. The proper designation on a guardian account is to identify the IP as the owner and identify the guardian as the individual who has access to the account for the IP's benefit. Other form changes request detailed information about the surety bond and the professional guardian's insurance. This information can assist the court in determining whether the bond or the insurance coverage is appropriate and if it will provide coverage in the event of misappropriation of funds under most circumstances.

3. Many newly appointed guardians do not consider investment strategies to maximize the longevity of estate funds, given the assets of the estate. Oftentimes, when such planning is not done, asset exhaustion occurs while the need for long-term care continues. Conversely, the presence of outstanding debts will factor into the guardian's financial decision making. Accordingly, a long-term care plan section has been suggested for the Inventory (Appendix C) to document both a responsible fiduciary plan for the estate, as well as potential personal care decisions such as

residential care and end-of-life decisions. The added sections to the Inventory (Appendix C) prompt the guardian to estimate and plan for the type and duration of potential care issues.

4. In addition to the content that has been added to the existing forms, guardians will be required to complete a supplementary form titled: Firearms Search (Appendix D). The Firearms Search form is being implemented as a result of 18 Pa.C.S. § 6105(a) and (c) of the Uniform Firearms Act.

5. There is a need for a monitoring tool to ensure that annual expenditures are appropriate, and that court permission is secured prior to spending principal. Revisions to the Annual Report of the Guardian of the Estate (Appendix E) request detailed information about what payments have been made for guardian's commission and attorney's fees, and whether court permission was secured before making the expenditures. In addition, the form requires the guardian to indicate if a surety bond or professional liability coverage was required by the decree appointing the guardian and if it is still in effect. If the appointed guardian is also the SSA representative payee, he/she will be required to attach a copy of the SSA report.

6. Additional information is needed about the type of medical, personal, and social support the IP is receiving, and is addressed by revisions to the Annual Report of the Guardian of the Person (Appendix F).

7. The Committee considered requiring the guardian to send copies of the forms directly to the named interested parties. It ultimately was decided that a Certificate of Filing was more appropriate. The Certificate of Filing will include the county-specific process for requesting documentation, and instruct the recipient to present a copy of the certificate along with proper identification. Guardians will be directed to send a Certificate of Filing (Appendix G) to interested parties at the time a report is filed with the court. Interested parties will be identified by the judge at the time a guardian is appointed. The objective is to facilitate information sharing among interested parties, while protecting the privacy and best interests of the IP. In cases where the guardian of the person is different than the guardian of the estate, it is advisable that each guardian send a copy of their annual report to the other guardian.

8. Dissemination of these forms is most efficiently achieved by making them made available on the Unified Judicial System's ("UJS") website in a fillable PDF format.

C. Committee Recommendations

1. It is recommended that guardians be required to complete the Inventory, as revised per Appendix C, within 90 days after appointment. A statewide procedural rule change will be required to implement the revised form.

2. It is recommended that guardians be required to complete the Annual Report of the Person, as revised per Appendix F, and/or Annual Report of the Estate as revised per Appendix E, one year after appointment. A statewide procedural rule change will be required to implement the revised forms.

3. Within 90 days of appointment, it is recommended that guardians be required to complete a Firearms Search Form (Appendix D), which is necessitated by 18 Pa. C.S. § 6105(a) and (c) of the Uniform Firearms Act. A statewide procedural rule change will be required to implement this requirement.

4. It is recommended that guardians be required to send a Certificate of Filing (Appendix G), to the persons identified at the time of adjudication, within 10 days of filing each form with the Clerk of the Orphans' Court. A statewide procedural rule change will be required to implement this requirement.

5. As a result of the personal information included in the revised forms, it is recommended that guardianship files be sealed. Interested parties that are named in the case will have the ability to access the file by presenting a copy of the Certificate of Filing. In order to assist investigative

agencies in their task of researching allegations of abuse, a request form has been created (Appendix H).

D. Timing and Impact

1. The changes will need to be implemented over time in order to follow the process of amending court rules. The impact of the proposed recommendations will be felt by the guardians responsible for completing the required documentation. The Committee was sensitive to the issue of overburdening and deterring individuals from serving as guardians. However, providing guardians with additional training and standardized forms that are designed to simplify completion and compliance will alleviate the increased requirements.

2. The Committee suggests that the recommendations in this section be tested in four pilot counties to ascertain information on the difficulties and challenges of implementation.

E. Fiscal Impact

1. The fiscal impact of the recommendations on the courts is minimal.

2. It is acknowledged that the guardian's fees may increase as a result of time spent completing additional, required documentation.

F. References

1. The Committee reviewed probate procedure and forms from the State of Alaska; Maricopa County, Arizona; Broward County, Florida; Wayne County, Michigan; Ramsey County, Minnesota; and Tarrant County, Texas.

IV. Effective Monitoring and Enforcement of Reporting Requirements

A. Issue Statement

The Committee was asked to examine the issue of the court's responsibility to monitor active guardianships. Current rules and statutes provide little guidance to court administration and the Clerks of the Orphans' Court as to the extent of responsibility in monitoring active guardianships. The Guardianship Monitoring Committee conducted a statewide survey to determine the prevalence and types of monitoring practices. The results of the survey illustrated the lack of consistent, statewide practices and provided the impetus for the recommendations listed below. From the guardians' point of view, current hearing practices do not make clear the guardians' responsibilities before they leave the court. There are no standards or training for reviewing the annual reports and other required documentation to be submitted by guardians. In addition, each county's Orphans' Court has the ability to impose fees on guardians for filing required reports.

B. Committee Findings

1. The results from the Orphans' Court Clerks and Judges' Survey indicate that monitoring practices are limited in nature and isolated to a few counties across the state (see Appendix I).³ The majority of the Clerks of the Orphans' Court reported that they do not monitor whether the inventory (75%) and annual reports (69%) are submitted by the guardian. In addition, 58% of the Clerks of the Orphans' Court reported that the guardian is charged a fee when the annual report is submitted ranging from \$10 to \$75. It is necessary to implement monitoring practices that enforce guardian compliance and increase the information that judges review. Only 47% of judges stated that all annual reports received by the court are reviewed. There are no consistent practices for reviewing the inventory, which according to the survey results, have been afforded less monitoring attention than the annual reports. Survey findings indicate a lack of information exchanged between the judges and the Clerks' offices. The recommendations below aim to clearly delineate responsibilities of all parties to ensure proper monitoring is taking place.

C. Committee Recommendations

1. It is recommended that filing fees for the Annual Report of the Person, the Annual Report of the Estate and the Inventory be prohibited. Although it is desirable to create additional funding sources, it is not reasonable to do so at the expense of adding barriers for guardians. The recommendations in this Report aim to increase compliance with reporting requirements, whereas filing fees counteract this goal. In order to ensure uniformity across all counties, it is recommended that the imposition of such filing fees by local court rule or administrative order be prohibited by the Supreme Court through a statewide procedural rule.

2. It is recommended that guardians be given written and oral instructions at the time of appointment. Such instruction will increase the quality of information submitted and compliance with reporting due dates. It is recommended that, at the time a guardian is appointed, he/she receive a packet of instructions from the judge or administrative staff and provide a written acknowledgment of receipt. The packet will include plain language instructions for completing the required forms, a copy of blank forms, and a timeline of due dates and trainings. A completed instruction packet, based on the newly revised reporting requirements, will be provided to each county. Counties will have the opportunity to incorporate local resource materials and information in their packets as needed. It is a recommended best practice that all counties utilize the provided instruction packet and ensure all guardians receive a copy upon appointment.

3. It is recommended that Clerks of the Orphans' Court be responsible for docketing and monitoring guardians' compliance with submitting the inventory and annual reports by the required due dates. To ensure uniformity across all counties, it is recommended that this practice be implemented by the Supreme Court through statewide procedural rule.

4. It is recommended that Clerks of the Orphans' Court be responsible for providing delinquency notices to guardians when required reports become past due. The judge and counsel for the IP will also receive copies of delinquency notices. To ensure uniformity across all counties, it is recommended that this practice be implemented by the Supreme Court through statewide procedural rule. If a guardian does not respond to the delinquency notice within the stated time frame, it is a recommended best practice for the judge to conduct a review hearing with the guardian present. The review hearing will serve as an additional monitoring tool and will remind the guardian of reporting requirements.

5. It is recommended that Clerks of the Orphans' Court or court administration staff be responsible for determining the reasons for failure to file. If the report is not filed due to the death of the IP, the guardian will be instructed to file a final report. If the guardian does not understand his or her responsibilities, the guardian will be directed to contact a designated person within the court's administrative office or advocacy group, and will be instructed again about the forms. If the guardian becomes derelict in his or her obligations, the judge should be notified, and can impose varying levels of sanctions, such as issuing a contempt of court order. In extreme circumstances, a guardian may be removed if requirements are not met, consistent with the language included in proposed Senate Bill 117.

6. It is recommended that the judge or judge's staff review the content of all inventories and annual reports received by the court. The judge may identify an individual trained in this area to act as the reviewer in the judge's place. In order to ensure uniformity across all counties, it is recommended that this practice be implemented by the Supreme Court through a statewide procedural rule change. The training provided to judges (mentioned in Section I: Determining Capacity) will include resources on evaluating the reports to identify areas requiring further scrutiny, additional documentation, or a review hearing. It is a recommended best practice for all annual reports to be compared to the inventory and previous annual reports.

7. It is a recommended best practice that judges hold periodic review hearings, either on a regular basis or at random, to monitor the status of the guardianship.

8. It is recommended that judicial staff or court administrative staff be available to answer a guardian's question(s) or assist a guardian with completing forms. It is recognized that staff are not permitted to give legal advice. However, making staff available for this defined purpose should be encouraged. It is recommended that resources for guardians be centrally located on a statewide website which includes training materials, forms, and instructions on completion of forms.

9. It is a recommended best practice for counties to adopt a volunteer monitoring program leveraging local/regional resources to assist the courts' monitoring responsibilities. The Orphans' Court Guardianship Program in Chester County and the Pro Bono Guardianship Monitoring Program in Dauphin County are considered model volunteer programs. Volunteers from these counties visit the IP, review submitted reports and seek court involvement when intervention is necessary.

Model Program:

Dauphin County's Pro Bono Guardianship Monitoring Program was started as a cooperative effort between the court and the Dauphin County Bar Association. In Dauphin County, attorneys are required to handle two pro bono cases a year and can fulfill this requirement by being a monitor in two guardianship cases.

The program is administered by the Court Administrator, who assigns the cases to the volunteer attorneys. Documents from the Orphans' Court file are reviewed by the monitor at the courthouse. The monitor notifies the IP, the guardian(s) and the attorney that a monitor has been appointed and a visit is scheduled. A formal appointment order is entered by the court.

On an annual basis, the monitor makes an appointment with the guardian and visits with the IP at their residence or facility. The monitors review the inventory, financial records, and the annual reports. After meeting with everyone, the monitor submits a report on his/her findings to court administration. If issues are raised, a hearing or conference is scheduled by the court.

10. It is recommended that adequate funding be provided to support the Clerks and Judges of the Orphans' Court in their ability to fulfill their monitoring responsibilities.

D. Timing and Impact

1. The recommendations in this section (unless the recommendation is noted as a best practice) will require revisions by the Supreme Court to the statewide Orphans' Court Procedural Rules. This method is recommended to achieve statewide consistency and to clearly delineate the expectations and responsibilities of the Clerks and Judges of the Orphans' Court. The Committee suggests that the recommendations in this section be tested in four pilot counties to receive feedback on the challenges and cost of implementation. As a result of the length of time that is required to implement a rule change, it is recommended that a county administrative order be utilized in the pilot counties to implement the proposed recommendations in advance of a statewide rule.

E. Fiscal Impact

1. The fiscal impact of the recommendations in this section include lost revenue to counties that currently charge the guardian filing fees for submitting required documentation. There will be counties that experience a financial impact associated with software upgrades needed to include the functionality required to comply with the stated recommendations. In addition, the recommendations will increase the responsibilities of the Clerks of the Orphans' Court, which may require additional staff in these offices until the proposed statewide automated case management system can generate notices automatically (see Section V). The Orphans' Court Clerks' survey results indicated that not having enough staff, especially in smaller counties, was a common reason for not adopting monitoring practices.

Model Program:

The Chester County Orphans' Court Guardianship Volunteer Program has been monitoring adult guardianships for over 20 years. The volunteers serve as the "eyes and ears" of the Court by visiting individuals under guardianship and reviewing court documents.

The Program is composed of three volunteer positions:

Researchers – after the hearing takes place appointing the guardian, the researcher comes into the volunteer office in the Justice Center and has access to the court file. He or she creates a file review form by gathering pertinent information from the court files to assist the visitors.

Visitors – make the actual physical visits and act as gentle observers. They submit a report back to the court with their assessment of IP's physical, emotional, and intellectual health, functioning capabilities, living situation, and relationship with guardian.

Auditors – review and address reports of the estate that require attention, such as discrepancies from the previous year, or assets being used for inappropriate purposes.

Volunteer visitors meet annually with each IP and his/her legally appointed guardian to ensure that the guardianship continues to serve the best interests of the IP. Chester County has over 500 legal guardianships in place, and, currently there are approximately 45 trained volunteers who evaluate them at least once per year.

Below is a statement by the Honorable Katherine B. L. Platt, Administrative Judge of Orphans' Court:

"As the Administrative Judge of Orphans' Court, I have seen first-hand how our dedicated volunteers can positively impact the lives and resources of some of our most vulnerable population-incapacitated adults. The causes of their incapacity can be congenital, as the result of profound injury, or as we see most often, age-related. Once a Guardian of the Person and the Estate of the Incapacitated Person is appointed, there is an ongoing obligation for those appointed to report to the court annually. However, the volume of open guardianships makes it impossible for the Orphans' Court judges to stay involved in each of the 500 or so cases that are open in the Chester County courts. Our trained volunteers are the eyes and ears of the court, and help us to be alert to and deal with issues of personal and fiscal safety for those whom we have adjudicated incapacitated. This program is a godsend to the people we serve and to the court. I, for one, sleep better at night knowing these committed volunteers are helping me and my fellow judges protect the people we serve."

F. References

1. Clerks of Orphans' Court Survey, Judges of Orphans' Court Survey (Appendix I).

G. Additional Comments

1. Senate Bill 117 would amend 20 Pa.C.S. § 751 to provide for the appointment of an examiner to make periodic or special examination of expenditures, disbursements, and withdrawals by the guardian of the estate and require the presentation of financial records to the examiner. This proposed legislation is considered an additional tool for judges and aligns with the Committee's recommendations.

2. Senate Bill 117 would amend 20 Pa.C.S. § 5512.2 by expanding who can request a review hearing from "interested party" to a "person interested in the incapacitated person's welfare." Subsection (c) allows the court to order an independent evaluation for such a hearing. This proposed legislation aligns with the Committee's recommendations.

V. Data Collection

A. Issue Statement

The Committee was asked to examine the issues of data collection and the ability to report accurate statistics on active guardianships. As a result of the dearth of monitoring and tracking procedures outlined in Section IV, the judicial computer system is unable to produce key statistics relating to guardianship cases. It is necessary for courts to be aware of the number of active guardianship cases that require monitoring. In a statewide survey, the Clerks of the Orphans' Court listed the major obstacles to data collection: vendor contract terms in some counties require the county to pay for any system changes; insufficient staff to take on additional duties; and the lack of mandates requiring Clerks of the Orphans' Court to participate in monitoring activities, including data collection and notification of guardians of late annual guardianship reports.

B. Committee Findings

1. In order to support the monitoring efforts of the courts, it is necessary for the Clerks of the Orphans' Court to collect standardized data items that will produce an active inventory of guardianships. In order to prepare for this type of reporting, the Orphans' Court will need to identify which guardianship cases are active, and which are inactive and can be purged. The long-term data collection plan includes bringing Orphans' Courts onto the statewide Common Pleas Case Management System, ("CPCMS").

C. Committee Recommendations

1. It is recommended that Clerks of the Orphans' Court have the capability to produce a standardized list of data items for each active guardianship (see Appendix J). In order to ensure uniformity across all counties, it is recommended that this practice be implemented by the Supreme Court through statewide procedural rule. Collecting this data will allow caseload reports to be generated and distributed to court administrative staff and Orphans' Court Judges for monitoring purposes. Recording case activity on an ongoing basis and reviewing the information at regular intervals is the only reliable means of managing active guardianships and protecting IPs from appointed guardians' errors and abuses. Two types of reports are recommended to be used as monitoring tools by judges, court administrative staff and Clerks of the Orphans' Court (Appendix J).

2. A case management report should be used by court personnel to identify the number of petitions for guardianship awaiting adjudication, scheduled events, and missing or outstanding filings, such as initial inventories or annual reports that are overdue.

3. Caseload reports should be used to aggregate the number of new petitions, petitions adjudicated by the court, active guardianships, and guardianships terminated by the court.

4. For those counties that utilize an automated docketing system, much of the needed capacity may already be in place or, at least, the system may have these capacities but the functions are not enabled. County-level technical assistance from the Administrative Office of Pennsylvania Courts ("AOPC") Research and Statistics Department will need to be made available upon request.

5. In order to establish an accurate inventory of active guardianships, it is recommended that each county purge inactive guardianships from its case management systems. The resulting adjusted inventory will provide an accurate baseline for ongoing data collection. It is recommended that Clerks of the Orphans' Court perform an administrative purge for those cases that have at least one delinquent annual report, by sending notice to the appointed guardian. Notices should advise the guardian to inform the court whether the guardianship remains active and, if not, the reasons why it is no longer active. If no response is received, Clerks of the Orphans' Court should use caution when evaluating any cases subject to termination because of the likelihood that the guardianship is indeed still active. Orphans' Court Judges will be provided with a list of cases subject to termination for review and approval. In order to alleviate some of the burden of conducting a purge, it is recommended that the AOPC develop a secure website where the Clerks of the Orphans' Court can perform a search to determine if the IP is still living. Following

the completion of the administrative purge, the Clerks of the Orphans' Court should complete the Orphans' Court e-form (Appendix K), noting the number of terminations which occurred during the purge. The data collected on the Orphans' Court e-form will be published as part of the AOPC's annual caseload statistics report.

6. The development of a statewide Orphans' Court case management system is within the AOPC's five-year automation plan, with software requirement specifications, joint application development sessions, and system-design planned for 2015; development during 2016; and rollout during 2017. The Orphans' Court case management system will be another module of the CPCMS, which currently includes criminal, dependency, and delinquency case processing applications. The ability to e-file Orphans' Court documents will be examined during the development of the CPCMS module. As part of the Orphans' Court system development, the AOPC plans to develop a guardianship reporting system so that annual reports may be filed online and provided to the court for review. It is recommended that this monitoring tool include the following functionality: web-based application; monitoring and auditing tools for court staff; financial accounting; automated reminders to both guardians and court staff; and interface with the Orphans' Court CPCMS application to provide guardianship monitoring data to court staff.

7. The template in Appendix K contains the data which will be published as part of the AOPC's annual caseload statistics report. This information is distributed on an annual basis and can be accessed by the public on the UJS' website.

8. Any additional requests for data or information should be directed to the AOPC and handled on a case-by-case basis. The issue of sharing data with federal and state agencies involved in guardianships (e.g., SSA, VA) is a difficult and complex problem that has been extensively documented.⁴ A notification system should be established for when it is found that a representative payee is abusing an IP. A collaborative process should be established between the courts and these agencies.

9. It is recommended that adequate funding be provided to support the Clerks of Orphans' Court in their ability to implement a local case management system prior to the release of the statewide guardianship CPCMS module.

D. Timing and Impact

1. The recommendations in this section (unless the recommendation is noted as a best practice) will require revision by the Supreme Court to the statewide Orphans' Court Procedural Rules. This method is recommended to achieve statewide consistency and to clearly delineate the expectations and responsibilities of the Clerks and Judges of the Orphans' Court. As a result of the length of time that is required to implement a rule change, it is recommended that a county administrative order be utilized to encourage counties to adopt recommendations in advance of a statewide rule. The administrative purge can be executed within each local Clerk of Orphans' Court office. The Orphans' Court CPCMS module will be implemented over time, with final completion expected in 2017.

E. Fiscal Impact

1. Counties will experience some level of impact as there may be costs associated with software upgrades to provide for the recommended functionality.

VI. Removal, Replacement and Discharge of Guardians

A. Issue Statement

The Committee was asked to examine the appropriate criteria for removing or replacing a guardian, while ensuring the well-being of the IP. The statute on guardianships provides due process and other protections for IPs. 20 Pa.C.S. §§ 5512 and 5512.2. However, there are no guidelines that establish measureable performance standards for guardians or enforcement of the IP's rights. The statute does not specify how often a guardian must have contact with an IP or any

clear delineation of the guardian's duties. Currently, there is no entity designated to provide support to guardians in fulfilling their duties.

The grounds and procedure for removing guardians are the same as the statutory grounds and procedure for removing executors/administrators of an estate. See Section 5515, which cross-references Sections 3182 and 3183 of the Decedents, Estates and Fiduciaries Code. Given that a person under guardianship has no access to funds to hire independent counsel, it is difficult for an IP to access the court and have a guardian replaced or discharged. See *In Re: Estate of Sheri Rosengarten*, 871 A.2d 1249 (Pa. Super. 2005). Additionally, there is no formalized complaint process specific to guardianships that allows individuals to bring matters of concern to the court's attention.

B. Committee Findings

1. Various Pennsylvania advocacy organizations have created a Bill of Rights for adults and children with disabilities. Such a document does not exist for IPs over age 60. A Bill of Rights would benefit the IP by reinforcing his or her statutory rights and articulating the expectations with regard to how guardians and the court should operate and make decisions on the IP's behalf. It was determined that a Bill of Rights should be written in plain language, for both AIPs and IPs to understand. A separate document based on the specifics of the statute should be provided to guardians.⁵

2. The difficulties of removing or replacing a guardian are not related to the standards or duties of a guardian, but are associated with the IP's challenges in accessing the court. An interested person or advocacy group can petition the court for a review hearing if the guardian is suspected of malfeasance or dereliction of duties. The question becomes: to whom does the IP communicate his or her need for court review, if he or she is not able to access advocacy resources or the attention of an interested party? One potential option is to have the court-appointed attorney from the guardianship proceedings (see (VIII)(B)(1)(d) of the Guardians and Counsel Committee Report), make personal contact with the IP on an annual basis to determine if assistance with access to the courts is needed. In addition, creating an easy-to-use complaint form, specific to guardianships and widely accessible from appropriate entities, would provide added protection for IPs.

3. Proposed Senate Bill 117 adds Section 5515.1, which states the conditions under which the court can remove a guardian: wasting or mismanaging the estate, becoming insolvent, failing to perform any duty imposed by law, becoming incapacitated, moving from the state or not being locatable, and jeopardizing the interest of the estate or the IP.

C. Committee Recommendations

1. It is recommended that the Bill of Rights of an Alleged Incapacitated Person (see insert) be provided to the AIP, as well as to any family members or concerned parties, at the time he or she is served with the petition, and that the Bill of Rights of an Incapacitated Person be provided to the IP and interested family members at the time the IP is adjudicated incapacitated. The guardian should receive copies of both the Bill of Rights of an Alleged Incapacitated Person and the Bill of Rights of an Incapacitated Person in the packet of instructions which the guardian receives upon appointment. It is also recommended that the OEJC create a separate document based on the specifics of the statute to be provided to guardians.

2. It is recommended that judges and guardians receive training on the Bill of Rights to provide guidelines for making decisions on behalf of the IP.

3. It is recommended that a guide for guardians be developed by the OEJC and the Advisory Council on Elder Justice in the Courts ("Advisory Council") which includes information about the minimum standards of care and the expectations and responsibilities of the guardian. It is recommended that the guardian maintain in-person contact with the IP at a minimum of once per quarter or more often as appropriate. For the guardian of the estate, it may be acceptable to have less frequent contact, particularly if the guardian is a financial institution. The frequency of contact

between the guardian and the IP should depend on factors such as the living situation, family support, medical condition, and the type of guardianship.

4. In order to provide the IP with court access, if needed, it is recommended that the court-appointed attorney be required to make contact on an annual basis. This model of continued contact is a significant departure from attorneys' finite role of serving the IP until the guardianship is adjudicated. Annual contact by the court-appointed attorney serves a dual purpose, to determine if a guardianship continues to be necessary and if the guardian is adequately performing their duties. The court-appointed attorney can petition the court to discharge or replace a guardian for failure to perform their duties. Annual contact with the IP by the court-appointed attorney would not be a substitute for a guardianship monitoring program, nor a substitution of the guardian's statutory obligations. An annual contact from the court-appointed attorney should not substitute the number of contacts expected of the guardian (see recommendation (VI)(C)(3)). Additional research by the OEJC and Advisory Council will be needed to determine how this recommendation affects the current funding stream for court-appointed attorneys and whether there is sufficient need and resources for additional contact.

5. It is recommended that the Advisory Council examine how an effective complaint form and process, specific to guardianships, can be implemented by the appropriate stakeholders.

6. It is recommended that the possibility of a pilot program similar to the Court Appointed Special Advocates ("CASA") be researched by the OEJC and the Advisory Council. This program would provide a volunteer advocate for the AIP throughout the guardianship process who could alert the court of any observed wrongdoing.

7. It is recommended the proposed language in Senate Bill 117 amending Section 5515.1 to address the grounds and procedures for removing and replacing guardians be adopted into the Guardianship Statute.

D. Timing and Impact

The timing of implementation of the Bill of Rights, a guide for guardians, and the continued involvement of the court-appointed attorney will be determined by the OEJC and the Advisory Council.

E. Fiscal Impact

The fiscal consequences of implementing the Bill of Rights, a guide for guardians, and the continued involvement of the court-appointed attorney will be determined by the OEJC.

The following information should be provided to the Alleged Incapacitated Person, as well as any family members or concerned parties, at the time the petition is served.

Bill of Rights of An Alleged Incapacitated Person

A. Before a Guardianship Hearing occurs, YOU HAVE THE RIGHT TO:

1. Nominate in writing the person or persons you would like to serve as your guardian.¹
2. Employ less restrictive alternatives to guardianship, where appropriate, including:²
 - a. Creating a Power of Attorney;
 - b. Executing a Living Will;
 - c. Designating a representative payee to manage your benefits (e.g., Social Security); and
 - d. Requesting services through Area Agencies on Aging.
3. Receive Notice:³
 - a. You must be notified that a guardianship petition has been filed at least 20 days prior to the hearing;
 - b. You must be provided with the hearing date;
 - c. The petition must be given to you and explained to you in person; and
 - d. You should be notified of your rights that can be lost if a guardian is appointed for you.

B. YOU HAVE THE RIGHT TO challenge the appointment of a guardian, and:

1. If you do not have or cannot afford an attorney, you may request that the court appoint an attorney for you;³
2. You have a right to be present at all hearings, unless a physician or licensed psychologist states that such attendance would be harmful to you;⁴
3. If you wish to attend the hearing but are not able to attend, you may request a hearing at your residence;³
4. You may ask to have an independent evaluation of your alleged incapacities;⁵
5. You and/or your attorney may cross-examine witnesses;⁶
6. You may request that the hearing be closed to the public and kept private;³
7. You may request a trial by jury;³ and
8. You may appeal the rulings of the court.⁷

C. If a guardian is appointed, YOU HAVE THE RIGHT TO:

1. Receive prudent financial management of your property to the extent possible;
2. Have access to training, education, medical, psychiatric, and social services;
3. Have access to the courts;
4. Receive visitors and communicate with others;
5. Receive notice of all proceedings related to determination of capacity and guardianship; and

YOU ARE ENTITLED TO:

All of the rights granted by law as a resident in a setting such as a nursing home, personal care home, assisted living residence, or hospital.

D. Unless the appointment is for a "Limited Guardian," THE FOLLOWING RIGHTS WILL BE RESTRICTED BY THE COURT:⁸

1. To enter into a contract;
2. To sue and defend lawsuits;
3. To apply for government benefits;
4. To manage property or to make any gift or disposition of property;
5. To determine your residence;
6. To consent to medical treatment; and
7. To make decisions about your social environment or other social aspects of life.

1. 20 Pa.C.S. § 5604(c)(2), 5511(f).

2. 20 Pa.C.S. § 5502, 5511(e), 5518.

3. 20 Pa.C.S. § 5511(a).

4. 20 Pa.C.S. § 5511(a)(1)-(2).

5. 20 Pa.C.S. § 5511(d).

6. 20 Pa.C.S. § 5518.1.

7. 20 Pa.C.S. § 5512.1(h).

8. 20 Pa.C.S. § 5512.1(g).

The following information should be provided to the Guardian of the Incapacitated Person at the time of the appointment AND to the Incapacitated Person, as well as any family members or concerned parties.

Bill of Rights of An Incapacitated Person

An Incapacitated Person under Guardianship HAS THE RIGHT TO:¹

1. Have his or her expressed wishes and preferences respected to the greatest possible extent;²
2. Develop or regain, to the maximum extent possible, the capacity to manage his or her personal affairs by petitioning the court for a review hearing;³
3. Have an annual review of the guardianship by the court via the required annual guardianship report filed by the guardian;⁴
4. Appeal the court's determination of incapacity;⁵
5. Petition the court to modify or terminate the guardianship;⁵
6. Have his or her intentions, whether testamentary (relating to a will) or inter vivos (relating to a gift) regarding his or her estate planning considered by the court;⁶

In Limited Guardianship Matters, A Partially Incapacitated Person Shall:

1. Retain all legal rights except those designated to the guardian by court order;⁷
2. Be assured that training, education, medical and psychological services, and social and vocational opportunities will be available, as appropriate, to develop or enhance maximum self-reliance and independence.⁸

1. For purposes of this Report, the duties and responsibilities of the court and of the appointed guardian which are set forth in Pennsylvania statutes are construed by the Pennsylvania Elder Law Task Force to codify the rights of the

incapacitated person under guardianship. Additional rights may be provided, in addition to those listed herein.

2. 20 Pa.C.S. § 5511(a).

3. 20 Pa.C.S. § 5512.2.

4. 20 Pa.C.S. § 5521(c).

5. 20 Pa.C.S. § 5512.1(h).

6. 20 Pa.C.S. § 5536 (b).

7. 20 Pa.C.S. § 5512.1(g).

8. 20 Pa.C.S. § 5512.1(b)(3).

ENDNOTES AND REFERENCES

- 1 Nat'l College of Probate Court Judges, *National Probate Court Standards* (2013), <http://ncsc.contentdm.oclc.org/cdm/ref/collection/spcts/id/240>; American Bar Association [ABA], Commission on Law and Aging & American Psychological Association, *Judicial Determination of Capacity of Older Adults in Guardianship Proceedings* (2006), <http://www.apa.org/pi/aging/resources/guides/judges-diminished.pdf>.
- 2 American Bar Association, *Resolution 100A*, (Aug. 12-13, 2013), http://www.americanbar.org/content/dam/aba/images/mental_physical_disability/2013_100A.pdf.
- 3 Administrative Office of Pennsylvania Courts (AOPC), Department of Research and Statistics, *Clerks and Judges of the Orphans' Court Survey*, (2014).
- 4 American Bar Association, *Resolution 100A*, (Aug. 12-13, 2013), http://www.americanbar.org/content/dam/aba/images/mental_physical_disability/2013_100A.pdf.
- 5 Southwestern Pennsylvania Partnership for Aging, *A Guide for Guardians* (2008).

**DEPOSITION BY WRITTEN INTERROGATORIES
OF PHYSICIAN OR LICENSED PSYCHOLOGIST**

IN THE MATTER OF _____
An Alleged Incapacitated Person

DOCKET NO. _____

PART I: PROFESSIONAL BACKGROUND

1. Name: _____ Title: _____
2. Professional Address: _____
3. Complete education information:

	Name of Institution	Type of Degree Received	Date Completed
Undergraduate			
Graduate			
Post-Graduate			

4. Do you have any professional licenses?

- Yes
- No

If **yes**, indicate type of license and date obtained: _____

5. Do you have experience evaluating capacity?

- Yes
- No

If **yes**, indicate the basis of your experience: _____

6. Have you ever testified in court or in an administrative proceeding regarding capacity or competency?

- Yes
- No

If **yes**, indicate the number of proceedings: _____

PART II: ALLEGED INCAPACITATED PERSON (AIP)

7. Have you met with the AIP in person in connection with this proceeding?

- Yes
- No

If **yes**, indicate the date(s) and location of meetings with the AIP: _____

8. Did you administer any tests to the AIP?

- Yes
- No

If **yes**, summarize the results or scoring of any tests administered: _____

9. Prior to this proceeding, did you treat or counsel the AIP?

- Yes
- No

If **yes**, indicate the date(s) and location of past treatments: _____

10. What is the present condition of the AIP? List all medical and psychiatric diagnoses and current conditions:

Diagnoses	Conditions

11. List all medications, including over-the-counter, that the AIP is taking. For each medication, indicate the prescribing physician and the diagnosis for which the medication was prescribed:

Medication	Diagnosis	Prescribing Physician

12. Indicate the AIP’s ability to perform the following functions:

	Unimpaired	Slightly Impaired	Moderately Impaired	Totally Impaired
Communicating decisions				
Receiving and evaluating information effectively				
Managing finances (including paying bills, making deposits, withdrawals and working with other financial institutions)				
Making healthcare decisions (including selecting medical caregivers, and authorizing or refusing treatment)				
Managing daily activities (including using the telephone, preparing food, house-cleaning, and shopping)				
Maintaining personal care (including toileting, dressing, bathing, eating, and managing medications)				
Responding to emergency situations				

An Incapacitated Person is defined as: “An adult whose ability to receive and evaluate information effectively and communicate decisions in any way is impaired to such an extent that he/she is partially or totally unable to manage his financial resources or to meet essential requirements for his/her physical health and safety.”

13. In your professional opinion, is the AIP incapacitated?

- Yes - totally incapacitated
- Yes - partially incapacitated
- No

14. In your professional opinion, do you recommend a guardianship for the AIP?

- No
- Yes - Plenary Guardianship
- Yes - Limited Guardianship

14a. If you recommend a limited guardianship, explain the limitations of the AIP that would require assistance through appointment of a guardian, and those that the AIP can manage independently:

PART III: GUARDIANSHIP AND SERVICES

15. Are there any circumstances, medical or otherwise, that create an urgent need for the appointment of a guardian for the AIP?

- Yes
- No

If **yes**, indicate reasons for emergency guardian: _____

16. What type of assistance does the AIP require and what level of care and living circumstances do you recommend?

17. What recommendations would you make concerning services necessary to meet the essential requirements for the AIP's physical health and safety?

18. What recommendations would you make concerning management of the AIP's financial resources?

19. Do you believe the AIP can regain capacity?

- Yes
- No

19a. Indicate reason(s) for response:

20. The AIP has a right to attend the hearing and to be represented by counsel if he/she desires. The court, in making its evaluation, is generally required to see the AIP in person, absent circumstances that could cause harm. Putting aside questions of whether the court proceeding may be moderately upsetting or confusing to the AIP, do you believe that the AIP's presence in the courtroom would be harmful to the person's emotional or physical well being?

- Yes
- No

20a. Indicate reason for response:

21. Is there any other information that is relevant to your diagnosis that could assist the court in its determination of incapacity?

I verify that the foregoing information is correct to the best of my knowledge, information and belief; and that this Verification is subject to the penalties of 18 Pa.C.S. § 4904 relative to unsworn falsification to authorities.

Date

Signature

Name (type or print)

Address

City, State, Zip

Telephone

ANNUAL REPORT OF GUARDIAN OF THE PERSON

COURT OF COMMON PLEAS OF
_____ COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION

Estate of _____, an Incapacitated Person

No. _____

I. INTRODUCTION

_____, was appointed

Plenary Limited Guardian of the Person by Decree of _____, J.,
dated _____.

A. This is the **Annual Report** for the period from _____, _____
to _____, _____ (the "Report Period"); *or*

B. This is the **Final Report** for the period from _____, _____
to _____, _____ (the "Report Period"), and is filed

for the following reason:

1. The death of the Incapacitated Person. Date of death: _____

2. The Guardianship was terminated by the Court by Decree of
_____ J., dated _____.

For a Final Report, omit Sections II through IV.

Estate of _____, an Incapacitated Person

II. PERSONAL DATA

Age of the Incapacitated Person: _____ Date of Birth: _____

III. LIVING ARRANGEMENTS

A. Current address of the Incapacitated Person:

B. The Incapacitated Person's residence is:

- own home / apartment
- nursing home
- boarding home / personal care home
- Guardian's home / apartment
- hospital or medical facility
- relative's home (name, relationship and address)

other:

C. The Incapacitated Person has been in the present residence since _____

_____. If the Incapacitated Person has moved within the

past year, state prior residence and reason(s) for move:

Estate of _____, an Incapacitated Person

D. Name and address of the Incapacitated Person's primary caregiver:

IV. MEDICAL INFORMATION

A. The major medical or mental problems of the Incapacitated Person are as follows:

B. Specify what, if any, social, medical, psychological and support services the Incapacitated Person is receiving:

V. GUARDIAN'S OPINION

A. It is the opinion of the Guardian of the Person that the guardianship should:

- continue
- be modified
- be terminated

Estate of _____, an Incapacitated Person

The reasons for the foregoing opinion are:

B. During the past year, the Guardian of the Person has visited the Incapacitated Person _____ times with the average visit lasting _____ hours, _____ minutes.

The report of a social service organization employed by the Guardian to oversee and coordinate the care of the Incapacitated Person for the period covered by this Report may be attached to supplement this Report.

I verify that the foregoing information is correct to the best of my knowledge, information and belief; and that this Verification is subject to the penalties of 18 Pa. C.S.A. § 4904 relative to unsworn falsification to authorities.

Date

Signature of Guardian of the Person

Name of Guardian of the Person (type or print)

Address

City, State, Zip

Telephone

ANNUAL REPORT OF GUARDIAN OF THE ESTATE

COURT OF COMMON PLEAS OF
_____ COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION

Estate of _____, an Incapacitated Person
No. _____

I. INTRODUCTION

_____, was appointed
 Plenary Limited Guardian of the Estate by Decree of _____, J.,
dated _____.

A. This is the **Annual Report** for the period from _____, _____
to _____, _____ (the "Report Period"); *or*

B. This is the **Final Report** for the period from _____, _____
to _____, _____ (the "Report Period"), and is filed

for the following reason:

1. The death of the Incapacitated Person. Date of death: _____
Name of Personal Representative: _____
2. The Guardianship was terminated by the Court by Decree of
_____ J., dated _____

Estate of _____, An Incapacitated Person

b. List purpose and amount of expenditures:

_____	\$ _____
_____	\$ _____
_____	\$ _____
_____	\$ _____

c. Was Court approval received prior to expending the principal? Yes No

3. Were additional principal assets received during the Report Period which were not included in the Inventory or a prior Report filed for the Estate? Yes No

If yes:

a. Was Court approval requested prior to receiving the additional principal? Yes No

b. State the sources and amounts of the additional principal received:

_____	\$ _____
_____	\$ _____
_____	\$ _____
_____	\$ _____
_____	\$ _____

B. Income

1. State sources and amounts of income received during the Report Period (e.g., Social Security, pension, rents, etc.):

_____	\$ _____
_____	\$ _____
_____	\$ _____
_____	\$ _____
_____	\$ _____
_____	\$ _____

Total income received during Report Period: \$ _____

Estate of _____, An Incapacitated Person

2. How is income currently invested? (Please specify, e.g., restricted bank accounts, client care account, etc.):

C. Expenses for Care and Maintenance

Specify what expenditures were made from the principal and income for the care and maintenance of the Incapacitated Person (e.g., clothing, nursing home, medicine, support, etc.):

D. Other Expenditures

Specify what other expenditures were made during the Report Period. (Do not include any items stated in response to question C above.)

E. Guardian's Commissions

List amounts of compensation paid as Guardian's commission and state how amount was determined:

<i>Amount</i>	<i>Method of Determination</i>	<i>Court Approval Obtained</i>
_____	_____	<input type="checkbox"/> Yes <input type="checkbox"/> No
_____	_____	0.00 <input type="checkbox"/> Yes <input type="checkbox"/> No

Estate of _____, An Incapacitated Person

F. Counsel Fee

List amounts paid as counsel fee, and indicate whether Court approval was obtained.

<i>Amount</i>	<i>Court Approval Obtained</i>
_____	<input type="checkbox"/> Yes <input type="checkbox"/> No
_____	<input type="checkbox"/> Yes <input type="checkbox"/> No

I verify that the foregoing information is correct to the best of my knowledge, information and belief; and that this Verification is subject to the penalties of 18 Pa.C.S. § 4904 relative to unsworn falsification to authorities.

Date

Signature of Guardian of the Estate

Name of Guardian of the Estate (type or print)

Address

City, State, Zip

Telephone

COURT OF COMMON PLEAS OF _____ COUNTY
ORPHANS' COURT DIVISION

INVENTORY

ESTATE/GUARDIANSHIP OF _____
An Incapacitated Person

DOCKET NO. _____ DATE OF DECREE: _____

DUE DATE: _____ FILING FEE: _____

Inventory type: Initial Amended

PART I: ANNUAL INCOME

1. List all sources of income for the Incapacitated Person:

Does the Incapacitated Person receive any of the following as income?			Annual Amount
Social Security Retirement benefits	<input type="radio"/> Yes	<input type="radio"/> No	\$
Social Security Disability benefits	<input type="radio"/> Yes	<input type="radio"/> No	\$
Supplemental Security Income benefits (SSI)	<input type="radio"/> Yes	<input type="radio"/> No	\$
Public Assistance	<input type="radio"/> Yes	<input type="radio"/> No	\$
Veterans Financial benefits	<input type="radio"/> Yes	<input type="radio"/> No	\$
Trust income	<input type="radio"/> Yes	<input type="radio"/> No	\$
Wages	<input type="radio"/> Yes	<input type="radio"/> No	\$
Workman's Compensation benefits	<input type="radio"/> Yes	<input type="radio"/> No	\$
Dividends	<input type="radio"/> Yes	<input type="radio"/> No	\$
Interest income	<input type="radio"/> Yes	<input type="radio"/> No	\$
Tax refund	<input type="radio"/> Yes	<input type="radio"/> No	\$
Realized Gain on Other Asset	<input type="radio"/> Yes	<input type="radio"/> No	\$

(1. Continued)

Does the Incapacitated Person receive any of the following as income?			Amount
Rental Income	<input type="radio"/> Yes	<input type="radio"/> No	\$
Pension	<input type="radio"/> Yes	<input type="radio"/> No	\$
Annuity Income	<input type="radio"/> Yes	<input type="radio"/> No	\$
Other: _____	<input type="radio"/> Yes	<input type="radio"/> No	\$

TOTAL			

PART II. ASSETS

2. List all personal and real property below. If the property is owned by both the incapacitated person and others, indicate in the last column the name of the co-owner.

Asset	Value	Name of Co-Owner
	\$	
	\$	
	\$	
	\$	
	\$	
	\$	
	\$	
	\$	
	\$	
	\$	
	\$	
	\$	
	\$	
	\$	
	\$	
	\$	
	\$	
	\$	
	\$	
	\$	
TOTAL		

3. Is any property co-owned by the Incapacitated Person and the guardian?

Yes

No

If yes:

3a. On what date was the property acquired? ____/____/____

3b. On what date was the guardian's name added? ____/____/____

3c. The guardian is:

an individual having access or control over the account

an owner of the account

4. Does the Incapacitated Person have a homeowners insurance policy for real property?

Yes

No

If yes:

4a. Carrier: _____

4b. Coverage period: _____

Attach a copy of insurance policy identifying coverage amounts

5. Does the Incapacitated Person have a homeowners insurance policy for personal property (jewelry, collectibles, etc.)?

Yes

No

If yes:

5a. Carrier: _____

5b. Coverage period: _____

Attach a copy of insurance policy identifying coverage amounts

6. Does the Incapacitated Person have an automobile insurance policy?

- Yes
- No

If yes:

6a. Carrier: _____

6b. Coverage period: _____

Attach a copy of insurance policy identifying coverage amounts

7. Does the incapacitated person have a safe deposit box?

- No
- Yes, in sole name
- Yes, in joint names

If yes:

7a. Location of safe deposit box: _____

7b. Are there plans to inventory the contents?

- Yes
- No

PART III. LIABILITIES/DEBTS

8. List all debts the Incapacitated Person owes, including mortgages, loans, credit card debt, etc.

Liabilities/Debts	Lender	Value
		\$
		\$
		\$
		\$
		\$
		\$
		\$
		\$

12. Can the Incapacitated Person remain in their current residence with assistance, or in the home of a relative?

- Yes
- No

If yes:

12a. List the name of the responsible family member: _____

12b. What services does the Incapacitated Person require?

- Services from local Area Agency on Aging
- Private Companion/Assistance Service

Number of days per week: _____

Number of hours per day: _____

- Assistance from family members

Will compensation be provided?

- Yes
- No

If **yes**, indicate compensation amount: _____

13. Will the Incapacitated Person be moved into a supervised residential setting?

- Yes
- No

If yes:

13a. Indicate the type of supervised residential setting:

- Domiciliary Care
- Personal Care Boarding Home
- Assisted Living Facility
- Nursing Home
- Other: _____

13b. Describe the steps that are being taken to move the Incapacitated Person into a supervised residential setting? _____

PART VI. FINANCIAL PLAN

14. Complete the following table using initial inventory or most recent amended inventory.

14a. Total Annual		14b. Annual	
Income (Question 1)	\$ _____	estimated expenses	\$ _____
Net Income		14c. Total assets	
(14a minus 14b)	\$ _____	(principal)	
		(Question 2)	\$ _____

15. Is the net income listed above sufficient to care for the needs of the Incapacitated Person?

- Yes
- No, but assets (principal) are available based on petition to court requesting permission
- No, and assets (principal) are not available

16. Indicate any applications for government benefits that have been submitted:

Application type	Has an application been submitted?	Date of submission
Social Security Disability Insurance (SSDI)	<input type="radio"/> Yes <input type="radio"/> No	
Supplemental Security Income (SSI)	<input type="radio"/> Yes <input type="radio"/> No	
Social Security Retirement Benefits	<input type="radio"/> Yes <input type="radio"/> No	
Veteran's Benefits	<input type="radio"/> Yes <input type="radio"/> No	
Medical assistance, long term care	<input type="radio"/> Yes <input type="radio"/> No	
Medical assistance, Home Waiver	<input type="radio"/> Yes <input type="radio"/> No	
Other: _____	<input type="radio"/> Yes <input type="radio"/> No	

PART VII: MEDICAL INFORMATION

19. Is a "no-code" (Do Not Resuscitate) provision in place for the incapacitated person?

- Yes
- No

20. When still capacitated, did the Incapacitated Person execute a durable power of attorney for health care or some other health care directive (including, but not limited to, a POLST or a mental health care power of attorney)?

- Yes
- No

If **yes**, identify the authorized agent for making health care decisions:

21. Are you aware of any will or trust executed by the Incapacitated Person, and/or any funeral or burial wishes of the Incapacitated Person?

- Yes
- No

If **yes**, describe: _____

22. Is the Certificate of Filing attached?

Yes

No

I verify that the foregoing information is correct to the best of my knowledge, information and belief; and that this Verification is subject to the penalties of 18 Pa.C.S. § 4904 relative to unsworn falsification to authorities.

Date

Signature of Guardian

Name of Guardian (type or print)

Address

Telephone

Date

Signature of Co-Guardian (if applicable)

Name of Co-Guardian (type or print)

Address

Telephone

FIREARMS SEARCH

ESTATE/GUARDIANSHIP OF _____
An Incapacitated Person

DOCKET NO. _____ DATE OF DECREE: _____

DUE DATE: _____ FILING FEE: _____

Sections 6105(a) and (c) of the Uniform Firearms Act, prohibit a person who has been adjudicated an incapacitated person from possessing, using, controlling, selling, transferring or manufacturing, or obtaining a license to possess, use, control, sell, transfer or manufacture a firearm in the Commonwealth of Pennsylvania. The Guardian should inquire about the ownership and/or possession of any firearms by the incapacitated person and within 60 days of the Adjudication, should arrange for the sale or transfer of the incapacitated person's firearms to another eligible person who is not a member of the prohibited person's household. As well, an incapacitated person is not permitted to obtain a license to carry a firearm. Any existing license issued to the incapacitated person should be returned to the issuing authority.

1. Has the Guardian inquired about the Incapacitated Person's ownership and/or possession of any firearms?

Yes

No

If **yes**, indicate when inquiry was made: _____

2. Has the Guardian inquired about whether or not the Incapacitated Person has a license to carry a firearm?

- Yes
- No

If **yes**, indicate when inquiry was made: _____

3. Does the Incapacitated Person have a license to carry a firearm?

- Yes
- No

3a. If **yes**, has the firearm been revoked?

- Yes
- No

4. Has a firearm of the Incapacitated Person been sold?

- Yes
- No

If **yes**:

Attach copy of sales receipt

4a. Date of sale: _____

4b. Firearm sold to: _____

5. Has a firearm of the Incapacitated Person been transferred?

- Yes
- No

If **yes**:

Attach copy of transfer receipt

4a. Date of transfer: _____

4b. Firearm transferred to: _____

6. Is the certificate of filing attached?

- Yes
- No

I verify that the foregoing information is correct to the best of my knowledge, information and belief; and that this Verification is subject to the penalties of 18 Pa.C.S. § 4904 relative to unsworn falsification to authorities.

Date

Signature of Guardian

Name of Guardian (type or print)

Address

City, State, Zip

Telephone

COURT OF COMMON PLEAS OF _____ COUNTY
ORPHANS' COURT DIVISION

ANNUAL REPORT OF GUARDIAN OF THE ESTATE

ESTATE/GUARDIANSHIP OF _____
An Incapacitated Person

DOCKET NO. _____ DATE OF DECREE: _____

DUE DATE: _____ FILING FEE: _____

PART I: INTRODUCTION

1. Name of Guardian: _____
(List Co-Guardian name if applicable)

2. Type of Guardianship:

Plenary

Limited

3. Report Period

This is the **Annual Report** for the period from _____
to _____ (the "Report Period")

This is the **Final Report** for the period from _____ to
_____ (the "Report Period") and is filed for the following reason:

The death of the Incapacitated Person. Date of death: _____
Name of Personal Representative: _____

The Guardianship was terminated by the Court by Decree of
_____ J., dated _____

PART II: SUMMARY

4. If this is the first annual report, state the value of the assets (principal) reported on the Inventory or most recent amended Inventory		\$
5. If this is not the first annual report, state ending balance of the assets (principal) from the previous annual report (annual report - question 8)		\$
6. What is the total amount of income earned during the Report Period?		\$
7. What is the total amount of income and assets (principal) spent for all purposes during the Report Period?		\$
8. What are the balances remaining at the end of the Report Period?	Assets:	\$
	Income:	\$
9. Total of principal and income		\$

PART III. ASSETS (PRINCIPAL)

10. Are the assets (principal), listed in question 8 invested?

- No - Skip to question 11
- Yes - Answer question 10a.

10a. Where are the assets (principal) invested?

Name of Financial Institution	Balance of Assets (Principal)

11. Were the assets (principal) spent during the Report Period?

- Yes - Answer questions 11a. - 11c.
- No - Skip to question 12.

11a. Were the assets (principal) spent for the sole benefit of the Incapacitated Person?

- Yes
- No

11b. Complete the following information for all asset (principal) expenditures:

Expense Amount	Description of Expense	To Whom Paid	Date Paid

11c. Was Court approval received prior to spending principal?

- Yes

If **yes**, attach copy of Order.

- No

If **no**, provide an explanation as to why court approval was not obtained:

12. Were additional principal assets (principal) received during the Report Period which were not included in the Inventory or a prior report filed for the Estate?

- Yes - Answer questions 12a. - 12b.
- No - Skip to question 13

12a. Was Court approval requested prior to receiving the additional principal?

- Yes
- No

If **no**, provide an explanation as to why court approval was not obtained:

12b. Complete the following information for all additional principal received:

Source	Amount
	\$
	\$
	\$
	\$

PART IV. INCOME

13. List all sources of income for the Incapacitated Person during the report period:

Does the Incapacitated Person receive any of the following as income?	Annual Amount
Social Security Retirement benefits <input type="radio"/> Yes <input type="radio"/> No	\$
Social Security Disability benefits <input type="radio"/> Yes <input type="radio"/> No	\$
Supplemental Security Income benefits (SSI) <input type="radio"/> Yes <input type="radio"/> No	\$
Public Assistance <input type="radio"/> Yes <input type="radio"/> No	\$
Veterans Financial benefits <input type="radio"/> Yes <input type="radio"/> No	\$
Trust income <input type="radio"/> Yes <input type="radio"/> No	\$
Wages <input type="radio"/> Yes <input type="radio"/> No	\$
Workman's Compensation benefits <input type="radio"/> Yes <input type="radio"/> No	\$
Dividends <input type="radio"/> Yes <input type="radio"/> No	\$
Interest income <input type="radio"/> Yes <input type="radio"/> No	\$
Tax refund <input type="radio"/> Yes <input type="radio"/> No	\$
Realized Gain on Other Asset <input type="radio"/> Yes <input type="radio"/> No	\$
Rental Income <input type="radio"/> Yes <input type="radio"/> No	\$
Pension <input type="radio"/> Yes <input type="radio"/> No	\$
Annuity Income <input type="radio"/> Yes <input type="radio"/> No	\$
Other: _____ <input type="radio"/> Yes <input type="radio"/> No	\$
TOTAL	

14. Is the income balance (listed in question 13) invested?

- No - Skip to question 15
- Yes - Answer question 14a.

14a. Where is income invested?

Name of Financial Institution	Balance of Income

PART V. ANNUAL EXPENSES

15. Complete the following information for all expenditures that were made from the assets (principal) and income for the care and maintenance of the Incapacitated Person. Leave blank if the expense is not applicable.

Expense	Description	Annual Amount
Nursing/Assisted Living Home		
Rent Payment		
Mortgage Payment		
Utilities		
Transportation		
Medical Treatment Costs		
Medications		

15. (Continued)

Expense	Description	Annual Amount
Credit Card Payments		
Food		
Clothing		
Entertainment		
Personal expenses (including allowance)		
Income & Property Tax		
Home/Property Maintenance Costs		
Home Insurance		
Auto Insurance		
Medical Insurance		
Life Insurance		
Gifts		
Child/Spousal Support		
Fees/Cost paid to Guardian		
Other (list all other payments)		

PART VI. GUARDIANS' COMMISSION

16. Did the Guardian receive a commission?

- Yes - Answer questions 16a. - 16c.
- No - Skip to question 17

16a. List amounts of compensation paid as Guardian's commission and state how the amount was determined:

Amount	Method of Determination	Court Approval Obtained	
		Yes <input type="radio"/>	No <input type="radio"/>
		Yes <input type="radio"/>	No <input type="radio"/>
		Yes <input type="radio"/>	No <input type="radio"/>
		Yes <input type="radio"/>	No <input type="radio"/>

16b. Was the commission authorized by Decree?

- Yes

If **yes**, attach a copy of Decree and indicate paragraph number on Decree granting authorization:

If commission is based on an hourly rate, indicate the rate and number of hours expended:

- No

If **no**, explain why court permission was not obtained prior to payment of the commission:

16c. Have you maintained a log of your activities as Guardian?

- Yes
- No

If **yes**, attach copy of log

PART VII. COUNSEL FEE

17. Did the Incapacitated Person pay a counsel fee?

- Yes - Answer questions 17a. - 17b.
- No - Skip to question 18

17a. List amounts paid as counsel fee:

Amount	Name of Counsel	Court Approval Obtained	
		Yes <input type="radio"/>	No <input type="radio"/>
		Yes <input type="radio"/>	No <input type="radio"/>
		Yes <input type="radio"/>	No <input type="radio"/>
		Yes <input type="radio"/>	No <input type="radio"/>

17b. Was the counsel fee authorized by Decree?

- Yes

If **yes**, attach copy of Decree and indicate paragraph number on Decree granting authorization:

If fee is based on an hourly rate, specify the rate and number of hours expended:

- No

If **no**, explain why court permission was not obtained prior to payment of fee:

PART VIII. REPRESENTATIVE PAYEE

18. Does the Guardian act as the Incapacitated Person’s representative payee for the Social Security Administration (SSA) or Veterans Administration (VA)?

- Yes
- No

If **yes**, attach copy of SSA or VA annual report

PART IX. SURETY INFORMATION

19. Was a surety bond required?

- Yes - Answer questions 19a. - 19b.
- No - Skip to question 20

19a. Is the surety bond still in effect?

- Yes
- No

If **no**, provide an explanation as to why not:

19b. Has the value of the estate increased beyond what was originally reported in the inventory?

- Yes
- No

If **yes**, has the amount of the surety bond increased accordingly?

- Yes
- No

20. If you are a professional guardianship agency or an attorney serving as guardian, do you have professional liability coverage?

- Yes - Answer questions 20a. - 20b.
- No - Skip to question 21
- Not applicable - Skip to question 21

20a. Is the insurance policy still in effect?

- Yes
- No

If **no**, provide an explanation as to why not:

20b. Are the coverage limits and exclusions under the current professional liability coverage different than those stated in the original Inventory?

- Yes
- No

If **yes**, state the differences:

PART X. MISCELLANEOUS

21. Is the Certificate of Filing attached?

- Yes
- No

22. Since the last reporting period, has the guardian attended any trainings on guardianships?

- Yes
- No

If **yes**, please list the dates attended and a description of all trainings:

Date of Training	Training Description

23. Since the last reporting period, has the guardian had any judgments filed against them or entered into bankruptcy?

- Yes
- No

If **yes**, describe: _____

24. Is there any other reason you cannot continue to serve as guardian?

I verify that the foregoing information is correct to the best of my knowledge, information and belief; and that this Verification is subject to the penalties of 18 Pa.C.S. § 4904 relative to unsworn falsification to authorities.

Date

Signature of Guardian of the Estate

Name of Guardian of the Estate (type or print)

Address

Telephone

Date

Signature of Co-Guardian of the Estate (if applicable)

Name of Co-Guardian of the Estate (type or print)

Address

Telephone

COURT OF COMMON PLEAS OF _____ COUNTY
ORPHANS' COURT DIVISION

ANNUAL REPORT OF GUARDIAN OF THE PERSON

ESTATE/GUARDIANSHIP OF _____
An Incapacitated Person

DOCKET NO. _____ DATE OF DECREE: _____

DUE DATE: _____ FILING FEE: _____

PART I: INTRODUCTION

1. Name of Guardian: _____
(List Co-Guardian name if applicable)

2. Type of Guardianship:

Plenary

Limited

3. Report Period

This is the **Annual Report** for the period from _____
to _____ (the "Report Period")

This is the **Final Report** for the period from _____ to
_____ (the "Report Period") and is filed for the following reason:

The death of the Incapacitated Person. Date of death: _____
Name of Personal Representative: _____

The Guardianship was terminated by the Court by Decree of
_____ J., dated _____

If this is a Final Report, skip to question 16

PART II: PERSONAL INFORMATION

4. Incapacitated Person's age: _____ and date of birth: ____/____/____

5. Current address of the Incapacitated Person:

6. Name and address of the Incapacitated Person's primary caregiver:

7. The Incapacitated Person's residence is:

- Incapacitated Person's home
- Guardian's home
- Relative's home

State name, relationship and address:

- Domiciliary Care
- Personal Care Boarding Home
- Assisted Living Facility
- Nursing Home
- Other: _____

8. The Incapacitated Person has been in the residence noted in question 7 since:

11. List and describe all of the Incapacitated Person’s medical conditions (physical or mental). For each condition, indicate what services are provided.

Medical Conditions	Services the Incapacitated Person is receiving to address the condition	Is this a new condition (in the past 12 months?)
		<input type="radio"/> Yes <input type="radio"/> No
		<input type="radio"/> Yes <input type="radio"/> No
		<input type="radio"/> Yes <input type="radio"/> No
		<input type="radio"/> Yes <input type="radio"/> No
		<input type="radio"/> Yes <input type="radio"/> No
		<input type="radio"/> Yes <input type="radio"/> No
		<input type="radio"/> Yes <input type="radio"/> No
		<input type="radio"/> Yes <input type="radio"/> No
		<input type="radio"/> Yes <input type="radio"/> No
		<input type="radio"/> Yes <input type="radio"/> No
		<input type="radio"/> Yes <input type="radio"/> No
		<input type="radio"/> Yes <input type="radio"/> No

15. What was the average length of a visit?

- Less than 15 minutes
- Between 15 minutes and 1 hour
- Between 1 and 2 hours
- More than 2 hours
- Not applicable

PART V: MISCELLANEOUS

16. Is the Certificate of Filing attached?

- Yes
- No

17. Since the last reporting period, has the guardian attended any trainings on guardianships?

- Yes
- No

If **yes**, please list the dates attended and a description of all trainings:

Date of Training	Training Description

18. Since the last reporting period, has the guardian had any judgments filed against them or entered into bankruptcy?

- Yes
- No

If **yes**, describe: _____

19. Is there any other reason you cannot continue to serve as guardian?

I verify that the foregoing information is correct to the best of my knowledge, information and belief; and that this Verification is subject to the penalties of 18 Pa.C.S. § 4904 relative to unsworn falsification to authorities.

Date

Signature of Guardian of the Person

Name of Guardian of the Person (type or print)

Address

Telephone

Date

Signature of Co-Guardian of the Person (if applicable)

Name of Co-Guardian of the Person (type or print)

Address

Telephone

COURT OF COMMON PLEAS OF _____ COUNTY
ORPHANS' COURT DIVISION

CERTIFICATE OF FILING

ESTATE/GUARDIANSHIP OF _____
An Incapacitated Person

DOCKET NO. _____ DATE OF DECREE: _____

I certify that on (date) _____ I filed the following documents:

- Inventory Amended Inventory Firearms search
- Annual Report - Guardian of the Person Annual Report - Guardian of the Estate

A copy of this Certificate of Filing is being sent to:

- Incapacitated Person
- Incapacitated Person's attorney or guardian ad litem (if currently representing protected person):

- The parent or guardian with whom the Incapacitated Person resides (if any):

- The following person(s) designated by court order:

- Intestate Heirs:

- Other Interested Parties:

Certification Method:

- By mail
- By fax (number) _____
- By personal delivery
- Overnight delivery/Fed Ex
- By e-mail if requested by recipient (unless local rule permits)

 Printed Name

 Guardian's Signature

Instructions for Document Access

If you are one of the individuals noted above to whom this certificate of filing was sent, you may access and view the documents filed by presenting this certificate of filing along with proper identification to the Clerks of the Orphans Court in the county listed on the previous page.

Counties should include specific instructions on how/where individuals who receive a Certificate of Filing can request documents from the Clerk of Orphans' Court.

COURT OF COMMON PLEAS OF _____ COUNTY
ORPHANS' COURT DIVISION

REQUEST FOR GUARDIANSHIP ACCESS

ESTATE/GUARDIANSHIP OF _____
An Incapacitated Person

DOCKET NO. _____ DATE OF DECREE: _____

To the Clerk of _____ County Orphans' Court:

_____ of _____
Representative Agency

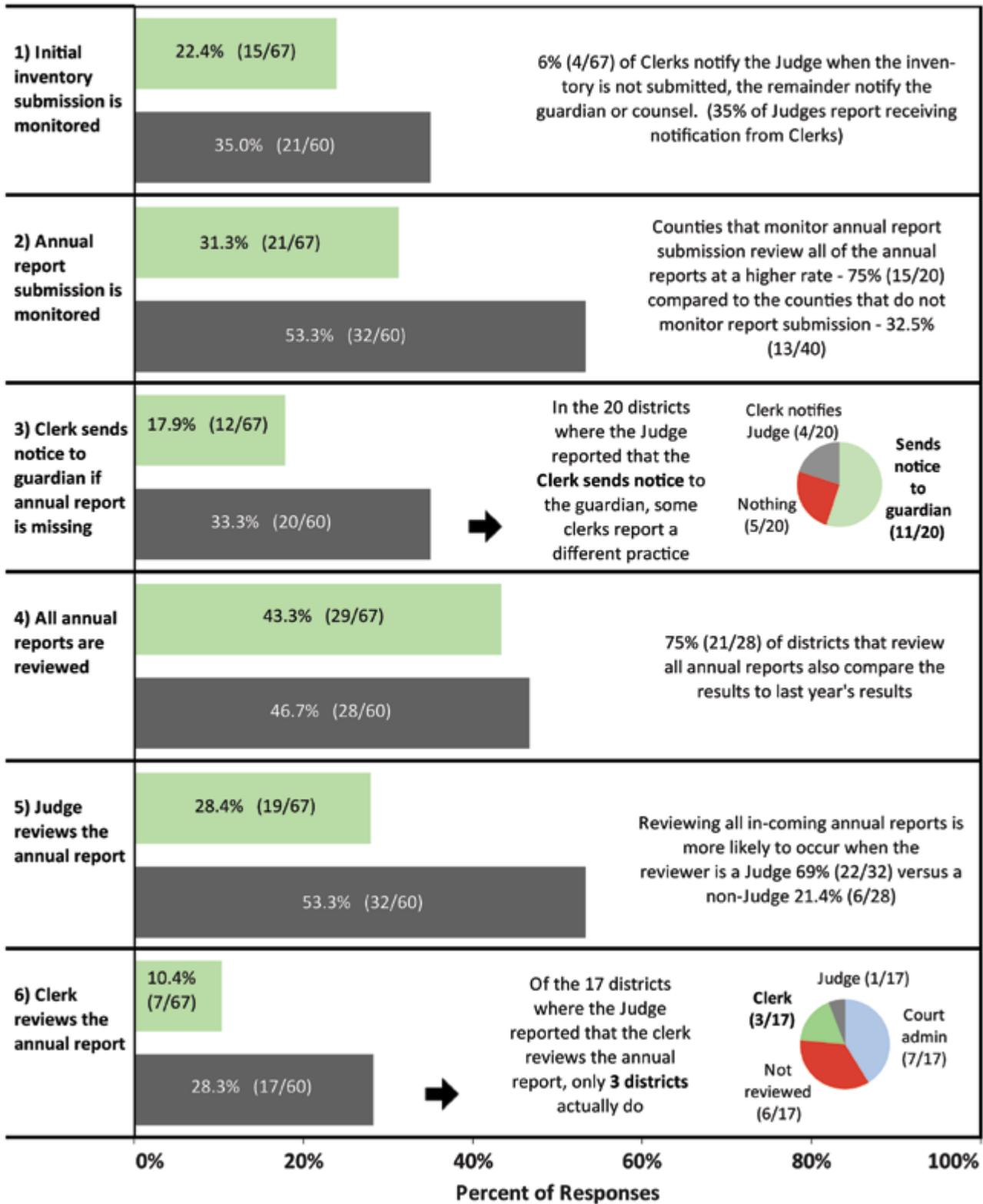
is hereby authorized to review the guardianship file in the above-captioned matter, including any sealed portions thereof.

Date

Judge of Orphans' Court

**Elder Law Task Force
Orphans' Court Survey Comparison**

■ Clerks' Responses
■ Judges' Responses



Report 1.

Case Management Report

<p>Purpose:</p> <p>The Active Guardianship Report provides the court with the number of persons with an appointed guardian, the duration of each guardianship, and the status of annual reports. The report should also have the capacity to identify guardianships of elder persons from other types.</p>	<p>Required data items:</p> <p>Docket number</p> <p>Name of ward</p> <p>Date of birth of ward</p> <p>Name of guardian</p> <p>Date of guardianship appointment/termination</p> <p>Date of last annual report</p> <p>If more than 360 days since last report, how many days overdue</p>	<p>Report circulation:</p> <p><i>Monthly to:</i></p> <p>Judge</p> <p>Clerk of the Orphans' Court</p> <p>Court Administrator</p>
---	--	--

Report 2.

Caseload Report

<p>Purpose:</p> <p>The Annual Guardianship Caseload Report offers a year-end picture of guardianship filings and dispositions. It can be used to monitor increases or decreases in guardianship cases year-to-year and assist in resource planning and allocation.</p>	<p>Required data items:</p> <p>Number of filings this year</p> <p>Number of guardians appointed</p> <p>Number of active guardianships</p> <p>Number of terminations</p> <p>Number of guardianships with missing /late reports</p> <p>Duration of existing guardianships in quartiles</p>	<p>Report circulation:</p> <p>Judge</p> <p>Clerk of the Orphans' Court</p> <p>Court Administrator</p> <p>AOPC</p>
---	---	--

Supreme Court of Pennsylvania
 Administrative Office of Pennsylvania Courts
 Orphans' Court Report

Report Covers the Month of:

County:

**Appointment of
 Guardians
 Non-Elder**

**Appointment of
 Guardians
 Elder (65+)**

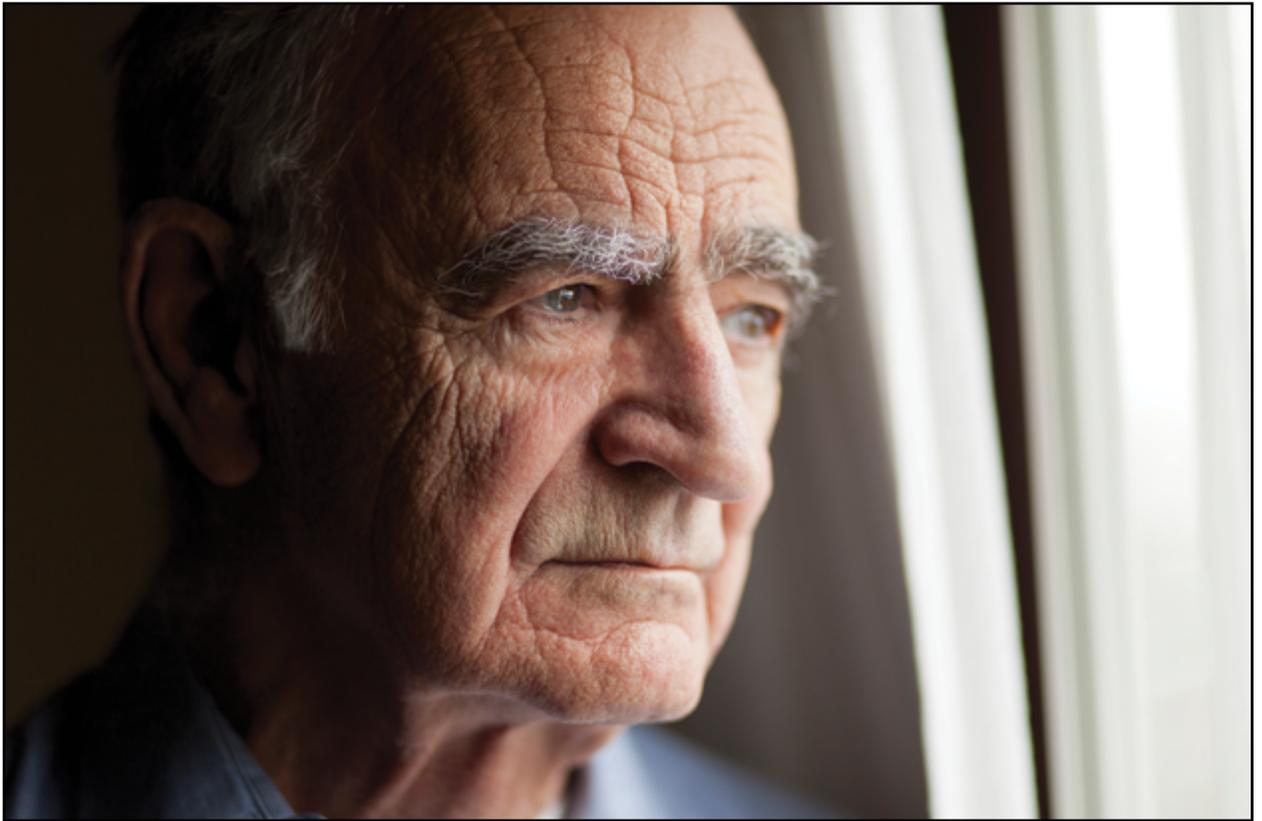
Pre-Adjudication Petitions

1. Petitions Pending from Last Month's Report	Auto-populated from previous month's 6	Auto-populated from previous month's 6
2. New Petitions Filed this Month	[]	[]
3. Subtotal: Petitions Available for Processing	1 + 2	1 + 2
4. Petitions Processed this Month:		
4a. Guardianship Granted	[]	[]
4b. Guardianship Denied	[]	[]
4c. "Other" Disposition	[]	[]
5. Subtotal: Petitions Processed this Month	4a + 4b + 4c	4a + 4b + 4c
6. Petitions Pending at the End of the Month	3 - 5	3 - 5

Active Guardianships (Post-Adjudication)

7. Active Guardianships from last month's report	Auto-populated from previous month's 10.	Auto-populated from previous month's 10.
8. New Guardianships granted this month	Auto-populated from 4a.	Auto-populated from 4a
9. Guardianships Terminated this month	[]	[]
10. Active Guardianship Inventory	7 + 8 - 9	7 + 8 - 9

Name of Person Filing Report	[]	Today's Date	[]
Title of Person Filing Report	[]	Phone Number	[]
E-mail Address	[]		



COMMITTEE REPORT
Elder Abuse and Neglect

D.A. Stephen A. Zappala, Jr., Chair
Wilmarie González, Vice Chair
Ronald Barth
Karen C. Buck, Esquire
Ronald W. Costen, PhD, Esquire
Kathleen Gustine, Esquire
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Carol Sikov Gross, Esquire
Catharine E. Thurston, Esquire
D.A. Eugene Vittone
President Judge George Zanic

AOPC Staff:
Darren Breslin, Esquire

Elder Abuse and Neglect Committee Findings and Recommendations

Introduction

The findings and recommendations of this Committee identify strategies to prevent the abuse, neglect, and exploitation of older adults in Pennsylvania, and focusing on following topics:

1. Reporting and preventing financial abuse and exploitation of elders;
2. Training, information, and collaboration;
3. Developing effective court practices to address elder abuse and promote access to justice for Pennsylvania elders.

I. Financial Abuse and Exploitation of Elders

A. Issue Statement - Power of Attorney and Financial Abuse

According to the Pennsylvania Department of Aging (“Department of Aging”), aside from self-neglect and caretaker abuse, financial abuse is the most frequent type of abuse against Pennsylvania elders. In Fiscal Year (“FY”) 2012-2013, 16.1% of abuse cases investigated by Area Agencies on Aging (“AAAs”) in Pennsylvania involved substantiated complaints of financial abuse against elders.¹ According to some estimates, 30% of elder abuse cases may involve some type of financial exploitation.² A recent study published by MetLife Mature Market Institute estimates that the annual financial loss by victims of elder financial abuse in the United States exceeds \$2.9 billion dollars annually.³

Frequently, financial abuse of elders involves the use (or misuse) of a power of attorney (“POA”).⁴ As seen in countless news reports, abuse through a POA can have devastating consequences.⁵

With this background in mind, the Committee closely studied the 2006 Uniform Power of Attorney Act (“UPAA”), the Pennsylvania Joint State Government Commission’s (“JSGC”) Report of the Advisory Committee on Decedents’ Estates Laws (“Advisory Committee”) (March 2010 and June 2011), Senate Bill 620 of 2013, Pr. No. 627 (“Senate Bill 620”), House Bill 1429 of 2013 (“House Bill 1429”) (subsequently enacted as Act 95 of 2014), House Bill 2007 of 2014, Pr. No. 3441 (“House Bill 2007”), House Bill 2014 of 2014, Pr. No. 3326 (“House Bill 2014”), House Bill 2057 of 2014, Pr. No. 3054 (“House Bill 2057”), as well as news reports, law review articles, and other professional publications.

B. Committee Findings

1. Powers of Attorney

a) Standing

In considering how best to combat elder financial abuse/exploitation in connection with the use of a POA, the Committee began by considering the issue of standing – namely who has the legal authority to question POA transactions and whether standing should be expanded to allow more interested parties to challenge actions taken on behalf of a principal.⁶ Pennsylvania law currently affords standing to principals, guardians, and government agencies acting under the Older Adults Protective Services Act, (“OAPSA”), 35 P.S. §§ 10225.101—10225.5102, and other individuals as determined on a case-by-case basis.⁷

The Committee considered both the benefits and detriments of expanding standing. Expanding standing would make it easier for concerned family members, friends, and other interested parties to seek court review and intervention when abuse is suspected. In addition, the Committee recognized that often an elder may sign a POA that grants broad powers, without understanding what authority it confers. An elder principal may unknowingly grant very broad powers, leaving him or herself susceptible to abuse. Expanding standing to challenge an agent's actions may help prevent such abuses.

Countervailing concerns were also contemplated, including the right of privacy and the right of a principal to authorize an agent to act on his or her behalf without interference. The Committee recognized that these concerns may outweigh even well-intentioned interference by family members. Moreover, the Committee recognized a key benefit of using a POA, is that court involvement is usually not required. Expanding standing may increase the possibility of litigation, which in turn could impair the utility of a POA. It was argued that if an individual has concerns about actions taken by an agent, those concerns should be reported to the local AAA or the Department of Aging, which have authority to investigate and, if necessary, have standing to bring an action through the OAPSA. If it is determined that the elder may be incapacitated, the AAA may also petition for guardianship.

The Committee considered the position of the JSGC's Advisory Committee's March 2010 Report at pages 39-41, (which reviewed the UPAA), as well as other proposals, and after considerable discussion, endorsed enactment of Section 116 of the UPAA.

The authors of the 2006 UPAA included Section 116 to address standing to request judicial review of an agent's actions under a POA. This section provides as follows:

Section § 116. Judicial Relief:

(a) The following persons may petition a court to construe a power of attorney or review the agent's conduct, and grant appropriate relief:

- (1) the principal or the agent;
- (2) a guardian, conservator, or other fiduciary acting for the principal;
- (3) a person authorized to make health-care decisions for the principal;
- (4) the principal's spouse, parent, or descendant;
- (5) an individual who would qualify as a presumptive heir of the principal;
- (6) a person named as a beneficiary to receive any property, benefit, or contractual right on the principal's death or as a beneficiary of a trust created by or for the principal that has a financial interest in the principal's estate;
- (7) a governmental agency having regulatory authority to protect the welfare of the principal;
- (8) the principal's caregiver or another person that demonstrates sufficient interest in the principal's welfare; and
- (9) a person asked to accept the power of attorney.

(b) Upon motion by the principal, the court shall dismiss a petition filed under this section, unless the court finds that the principal lacks capacity to revoke the agent's authority or the power of attorney.

UPAA § 116. The Comment to the proposal provides as follows:

The primary purpose of this section is to protect vulnerable or incapacitated principals against financial abuse. Subsection (a) sets forth broad categories of persons who have standing to petition the court for construction of the power of attorney or review of the agent's conduct, including in the list a "person that demonstrates sufficient interest in the principal's welfare" (subsection (a)(8)). Allowing any person with sufficient interest to petition the court is the approach taken by the majority of states that have standing provisions. See Cal. Prob. Code § 4540 (West Supp. 2006); Colo. Rev. Stat. Ann. § 15-14-609 (West 2005); 755 Ill. Comp. Stat. Ann. 45/2-10 (West 1992); Ind. Code Ann. § 30-5-3-5 (West 1994); Kan. Stat. Ann. § 58-662 (2005); Mo. Ann. Stat. § 404.727 (West 2001); N.H. Rev. Stat. Ann. § 506:7 (LexisNexis 1997 & Supp. 2005); Wash. Rev. Code Ann. § 11.94.100 (Supp. 2006); Wis. Stat. Ann. § 243.07(6r) (West 2001). *But cf.* 20 Pa. Cons. Stat. Ann. § 5604 (West 2005) (limiting standing to an agency acting pursuant to the Older Adults Protective Services Act); Vt. Stat. Ann. tit.14, § 3510(b) (2002 & 2006-3 Vt. Adv. Legis. Serv. 228) (limiting standing to the commissioner of disabilities, aging, and independent living).

In addition to providing a means for detecting and redressing financial abuse by agents, this section protects the self-determination rights of principals. Subsection (b) states that the court must dismiss a petition upon the principal's motion unless the court finds that the principal lacks the capacity to revoke the agent's authority or the power of attorney. Contrasted with the breadth of Section 116 is Section 114(h) which narrowly limits the persons who can request an agent to account for transactions conducted on the principal's behalf. The rationale for narrowly restricting who may request an agent to account is the preservation of the principal's financial privacy. See Section 114 Comment. Section 116 operates as a check-and-balance on the narrow scope of Section 114(h) and provides what, in many circumstances, may be the only means to detect and stop agent abuse of an incapacitated principal.

UPAA § 116, comment. As noted in the first paragraph in the comment, even before Section 116 was drafted, at least nine states had laws allowing individuals with a sufficient interest in the welfare of the principal, and upon good cause shown, to petition the court to review an agent's actions and grant appropriate relief. (The nine states include: California, Colorado, Illinois, Indiana, Kansas, Missouri, New Hampshire, Washington and Wisconsin). Since 2006, the following additional fifteen states adopted UPAA § 116: Alabama, Arkansas, Colorado, Hawaii, Idaho, Iowa, Maine, Maryland, Montana, Nebraska, New Mexico, Ohio, Virginia, West Virginia, and Wisconsin.⁸

Thus, nearly one half of the states in the country explicitly provide standing to parties interested in the welfare of a principal to seek judicial review of an agent's actions undertaken on behalf of a principal. Alabama extends standing even further, granting it to "any other person who demonstrates a sufficient legal interest in the construction or validity of the power of attorney or the agent's conduct in connection with the power of attorney, such as to give that person standing." Ala. Code 1975, § 26-1A-116(a)(10).

In addition, the UPAA authors intended Section 116 to provide an important protection for principals. Another provision of the UPAA limits the categories of persons who can demand an agent account for actions taken on behalf of a principal. UPAA § 114 (Agent's Duties). Subsection (h) provides:

"[e]xcept as otherwise provided in the power of attorney, an agent is not required to disclose receipts, disbursements, or transactions conducted on behalf of the principal unless ordered by a court or requested by the principal, a guardian, a conservator, another fiduciary acting for the principal, a governmental agency having authority to protect the welfare

of the principal, or, upon the death of the principal, by the personal representative or successor in interest of the principal's estate. If so requested, within 30 days the agent shall comply with the request or provide a writing or other record substantiating why additional time is needed and shall comply with the request within an additional 30 days."

UPAA § 114(h). The comment to UPAA § 114(h) explains the rationale for this limitation:

Subsection (h) codifies the agent's common law duty to account to a principal (see Restatement (Third) of Agency § 8.12 (2006); Restatement (First) of Agency § 382 (1933)). Rather than create an affirmative duty of periodic accounting, subsection (h) states that the agent is not required to disclose receipts, disbursements, or transactions unless ordered by a court or requested by the principal, a fiduciary acting for the principal, or a governmental agency with authority to protect the welfare of the principal. If the principal is deceased, the principal's personal representative or successor in interest may request an agent to account. While there is no affirmative duty to account unless ordered by the court or requested by one of the foregoing persons, subsection (b)(4) does create a default duty to keep records.

The narrow categories of persons that may request an agent to account are consistent with the premise that a principal with capacity should control to whom the details of financial transactions are disclosed. If a principal becomes incapacitated or dies, then the principal's fiduciary or personal representative may succeed to that monitoring function. The inclusion of a governmental agency (such as Adult Protective Services) in the list of persons that may request an agent to account is patterned after state legislative trends and is a response to growing national concern about financial abuse of vulnerable persons. See 755 Ill. Comp. Stat. Ann. 45/2-7.5 (West Supp. 2006 & 2006 Ill. Legis. Serv. 1754); 20 Pa. Cons. Stat. Ann. § 5604(d) (West 2005); Vt. Stat. Ann. tit.14, § 3510(b) (2002 & 2006-3 Vt. Adv. Legis. Serv. 228). See generally Donna J. Rabiner, David Brown & Janet O'Keeffe, *Financial Exploitation of Older Persons: Policy Issues and Recommendations for Addressing Them*, 16 J. Elder Abuse & Neglect 65 (2004). *As an additional protective countermeasure to the narrow categories of persons who may request an agent to account, the Act contains a broad standing provision for seeking judicial review of an agent's conduct. See Section 116 and Comment.*

UPAA § 114(h), comment. (emphasis added). Accordingly, UPAA § 114(h) and § 116 were designed to work together, protecting privacy by limiting the number of people who could demand an accounting by an agent, but explicitly expanding the list of individuals who could seek judicial review of an agent's actions if a principal is incapacitated. As noted in the comment to UPAA § 116, "[s]ection 116 operates as a check-and-balance on the narrow scope of § 114(h) and provides what, in many circumstances, *may be the only means to detect and stop agent abuse of an incapacitated principal.*" (emphasis added).

Importantly, Pennsylvania Act 95 of 2014, Act of July 2, 2014, P.L. 855, No. 95, ("Act 95 of 2014") includes language substantially identical to UPAA § 114(h),⁹ but does not contain the corresponding language from UPAA § 116. The Committee believes this omission should be corrected in subsequent legislation.

As noted above, in Pennsylvania, standing to challenge the actions of an agent acting under a POA is currently limited to principals, guardians, and government agencies acting under the OAPSA, and individuals who are granted standing on a case-by-case basis.

The Committee recommends that standing be expanded for the following reasons: (1) government and private studies note that financial exploitation in the country is epidemic;¹⁰ (2) nearly half of the

states in the country have expanded standing to challenge actions by agents far beyond what currently exists in Pennsylvania in an effort to prevent abuse; (3) as noted in the comment thereto, Section 116 of the UPAA “may be the only means to detect and stop agent abuse of an incapacitated principal;”¹¹ and (4) Pennsylvania has already enacted section 114(h) of the UPAA, but has not yet adopted the important corollary provisions of Section 116.

Statutorily authorizing additional interested parties to seek court review of an agent’s actions taken on behalf of an incapacitated principal is a critical step in the detection and prevention of elder abuse. Accordingly, the Committee recommends that the General Assembly enact a statute consistent with section 116 of the UPAA.¹²

b) POA Registry

The Committee discussed a POA registry as a possibility for deterring and preventing abuse through a POA. It was suggested that POAs could be registered either statewide or in county offices, thereby providing a mechanism to ensure they are legitimate.

However, the Committee members expressed several concerns over a registry. First, if POAs were filed as part of a county or statewide registry, it could expose elders to “scammers,” as their assets and otherwise private affairs would become a matter of public record. Second, it may infringe on an individual’s right to privacy. Third, the registry, without more, may give rise to an unfounded presumption that a POA is legitimate. These same concerns were noted in a policy monograph by the National Center for State Courts addressing POA abuse. See Nat’l Ctr. for State Courts, *Addressing Power of Attorney Abuse: What Courts Can Do to Enhance the Justice System Response*, 8. While possible benefits of a POA registry were recognized, the Committee ultimately decided to not recommend a POA registry.

c) Accountings

The Committee considered recommending a requirement that agents file regular accountings (as is done with guardianships). Such a requirement may allow for earlier detection of, and possibly prevention of, misdeeds, since an agent may be deterred from acting improperly if the transactions are subject to public scrutiny. However, for many of the same reasons noted in rejecting a POA registry, the Committee did not adopt this recommendation.

2. Financial Abuse

a) Assistance from Financial Institutions: Reporting and Training

The Committee was asked to consider other measures that may help prevent elder financial abuse. It was suggested that banks are often “on the front lines” of attempted elder financial abuse and exploitation and, as such, are powerful allies in the fight against such crimes. While the Committee recognized that many banks and financial institutions take steps to prevent elder exploitation and abuse, it was agreed that more can be done. In this regard, the Committee considered whether banks and other financial institutions should be required to train employees to spot potential abuse, and be designated as mandatory reporters of suspected abuse.

Initially, a question was raised whether reporting suspected abuse could potentially expose an individual or institution to liability. However, under 35 P.S. § 10225.302(d), immunity exists for reporting suspected abuse or exploitation.¹³

The Committee learned that at least eight states and the District of Columbia have mandatory reporting requirements by financial institutions if financial abuse is suspected.¹⁴ These jurisdictions include: Arkansas, California, Colorado, the District of Columbia, Florida, Georgia, Hawaii, Kansas, and Maryland.¹⁵ Maryland also has a mandatory training requirement.

The Committee considered three arguments in opposition to mandatory reporting. First, mandatory reporting requirements could be onerous to banks and other financial service providers that constitute “financial institutions.” Second, defining what constitutes a financial institution may itself be challenging.¹⁶ Third, mandatory reporting would result in AAAs being inundated by reports.

As an alternative to mandatory reporting, the Committee considered an information sharing and identification proposal. Specifically, (a) authority could be sought from the Pennsylvania Office of Attorney General (“OAG”) to enable sharing of “Suspicious Activity Reports” (“SARs”) with the Pennsylvania Department of Aging; (b) financial service providers could work with the Department of Aging on recommended protocols and training for identifying suspicious financial activity; and (c) financial service providers could be given statutory authority (and immunity) to delay for five days suspicious financial transactions attempted by or for elder customers (similar to the law in Washington).¹⁷

A brief explanation of the SAR Initiative is informative. It has been described as “a joint collaborative effort by the United States Department of Homeland Security, the Federal Bureau of Investigation, and state, local, tribal, and territorial law enforcement partners. This initiative provides law enforcement with another tool to help prevent terrorism and other related criminal activity by establishing a national capacity for gathering, documenting, processing, analyzing, and sharing SAR information.”¹⁸

Pursuant to federal regulations, banks, bank holding companies, and their subsidiaries are required to file a SAR with respect to:

Criminal violations involving insider abuse in any amount.

Criminal violations aggregating \$5,000 or more when a suspect can be identified.

Criminal violations aggregating \$25,000 or more regardless of a potential suspect.

Transactions conducted or attempted by, at, or through the bank (or an affiliate) and aggregating \$5,000 or more, if the bank or affiliate knows, suspects, or has reason to suspect that the transaction:

1. May involve potential money laundering or other illegal activity (e.g., terrorism financing).
2. Is designed to evade the [Bank Secrecy Act (“BSA”)] or its implementing regulations.
3. Has no business or apparent lawful purpose or it is not the type of transaction that the particular customer would normally be expected to engage in, and the bank knows of no reasonable explanation for the transaction after examining the available facts, including the background and possible purpose of the transaction.

12 C.F.R. § 21.11.¹⁹ SARs are confidential, and the reports or the information contained therein may only be shared with: the criminal investigative services of the armed forces; the Bureau of Alcohol, Tobacco, and Firearms; an attorney general, district attorney, or state’s attorney at the state or local level; the Drug Enforcement Administration; the Federal Bureau of Investigation; the Internal Revenue Service or tax enforcement agencies at the state level; the Office of Foreign Assets Control; a state or local police department; a United States Attorney’s Office; Immigration and Customs Enforcement; the U.S. Postal Inspection Service; and the United States Secret Service.²⁰

The Committee considered that sharing information in the SARs could benefit the Department of Aging insofar as patterns may be more easily seen. In addition, the Department of Aging could use the information provided to initiate investigations, when warranted. However, after considerable deliberation, the Committee decided the SAR sharing proposal is not sufficient, in itself, to address or stop exploitation and financial abuse.

The Committee noted that SARs are not required to be filed until 30 days, and in some cases, up to 60 days, after the suspicious activity occurs, and therefore may have limited utility in preventing financial abuse. The Committee determined that stopping transactions at the time of occurrence, and prompt reporting to local agencies, is critical to combating elder financial abuse and exploitation. Moreover, the Committee was concerned that, given federal confidentiality requirements, AAAs may not fit within the federal definition of agencies eligible to receive SARs. Nevertheless, seeking additional collaboration and requesting that the Department of Aging receive a copy of SARs may be a worthwhile inquiry for that agency to pursue. The Committee decided that this determination is best left to the discretion of the Department of Aging.

As noted above, at least eight states and the District of Columbia require mandatory reporting by financial institutions when financial abuse or exploitation of an elder is suspected. This seems to be a growing trend, with Maryland and Hawaii becoming the latest states to mandate reporting in 2012 and 2013 respectively. State legislatures appear convinced that financial institutions play an important role in curbing and preventing elder financial abuse. As noted in one recent publication:

Banks have the potential to play a critical role in preventing the financial abuse of older people by reporting suspicious activity to protective services agencies and local law enforcement. A bank teller, for example, who sees and interacts with bank customers on a regular basis, is in a position to spot the signs of financial elder abuse.

The author also noted “[s]ome states are including banks in their efforts to combat elder financial abuse, recognizing that banks are usually the first line of defense against elder abuse because they are in the best position to spot the signs of such abuse.”²¹

Education and training are also important to enable banks to detect and prevent financial exploitation. To assist banks with education and training, for example, the Maryland Bankers Association issued a “Member Alert” in September 2012, following that state’s passage of mandatory education and reporting laws for financial institutions. Among other tools, this document includes guidance for members on an “elder abuse training and reporting program,” a link to an “elder financial abuse reporting protocol chart,” and an “elder financial abuse reporting form.”²² These tools were developed with input from the Bankers Association members, legal counsel, and Maryland’s Department of Aging and Adult Protective Services. The Committee therefore decided to recommend that a similar publication be developed for Pennsylvania financial institutions.

The Committee found Maryland to be a good model, which should help alleviate concerns that AAAs will be inundated with reports. The Department of Aging should work with financial institutions, and with the Pennsylvania Bankers Association, to develop protocols on what activity should be reported, how it should be reported, and develop a uniform reporting form for use by all financial institutions. The Committee suggests that carefully specifying what information should be reported and developing a uniform reporting template will help the AAAs in focusing on credible reports of suspected financial abuse.

The Committee believes that strong steps need to be taken to help prevent elder financial abuse and exploitation. Mandatory reporting laws for those “on the front lines” (i.e., financial institutions) can go a long way toward addressing the problem of financial exploitation of elders. Mandatory training requirements, such as those in Maryland and other states, can help ensure that all employees of financial institutions in the Commonwealth have a base of knowledge and are better able to identify, and promptly report, elder financial abuse and exploitation to authorities.²³

As a further measure, providing financial service providers with the authority to stop suspicious transactions before they occur will give the financial institutions time to inquire into the transaction and, when appropriate, notify the AAA or law enforcement. The Committee learned that often bank employees suspect a transaction may be improper, but feel powerless to stop the transaction. Because it is critically important to stop fraudulent, abusive, and exploitative transactions as they occur or risk permanent loss of the funds, the Committee decided to recommend statutory authorization for financial institutions to delay and report transactions that appear to involve financial abuse of an elder. Delaying these transactions for five days and reporting to AAAs and/or law enforcement would allow for an investigation to confirm the legitimacy of the transaction – before funds are released. Financial institutions should be afforded immunity from liability for good faith efforts undertaken in this regard.

Accordingly, the Committee recommends that the General Assembly statutorily require all financial institutions conducting business in Pennsylvania to be mandatory reporters of suspected financial abuse and exploitation against elder customers.²⁴ In addition, a state mandated training program to help identify elder financial abuse and exploitation should be established for all employees of financial institutions who process transactions for elder customers.²⁵ The specific training curriculum should be developed under the leadership of the Department of Aging, with input from relevant stakeholders,

including the banking industry and the Office of Elder Justice in the Courts (“OEJC”). Furthermore, financial institutions should be given statutory authority to delay for five days suspicious transactions and to report these to the local AAA and/or law enforcement.

b) Increased Funding for State and Local Prevention Efforts

The Committee discussed other steps that could help prevent or mitigate the damage caused by financial abuse against elders. It was noted that AAAs and local district attorneys provide the best resources for responding to suspected abuse. However, there was concern that AAAs and even district attorneys in Pennsylvania may lack sufficient resources to thoroughly investigate allegations of suspected financial abuse, particularly when complex financial audits are necessary. There was a general consensus that many AAAs and district attorneys do not have the personnel, funds, or technical ability to conduct complex forensic audits in elder financial abuse cases.

The Committee recommends increased funding for the Department of Aging, to enable the 52 AAAs to more thoroughly investigate allegations of financial abuse. Currently, the Department of Aging has only one forensic accountant providing statewide support to the AAAs. To assist, the Pennsylvania Commission on Crime and Delinquency (“PCCD”) provided a two year grant to the Department of Aging’s Institute on Protective Services at Temple University for a project entitled “Central Pennsylvania Multi-County Elder Theft Investigation Collaboration Project.” This initiative provides an additional part-time fraud examiner/financial analyst to investigate complex elder theft cases occurring in six counties in central Pennsylvania. The Committee recommends that additional funds be made available to expand the scope of this and similar projects statewide to provide financial auditing services to all counties in need of assistance.

c) Additional State-Level Assistance

i. Assistance From other Commonwealth Departments

The Committee recommends that the OAG and the Pennsylvania State Police (“PSP”) make their financial investigators available to assist local prosecutors and AAAs with especially complex cases.²⁶

ii. Comprehensive Collaboration

The Committee learned that some financial institutions charge AAAs fees to obtain copies of financial records of individuals, and often these fees can pose a barrier to a thorough investigation. The Committee agreed that AAAs should, and must, have access to bank records as referenced under the OAPSA and other regulations.²⁷ At the same time, the Committee members appreciate that copying and staff time imposes a cost on financial institutions. The Committee believes it may be prudent for the Department of Aging and representatives of financial institutions to collaborate and explore the possibility of a standard records request (and cost) for an initial review of complaints. If additional information is needed, an AAA should work with the financial institution to determine the most efficient and cost-effective way of obtaining the required information.

Finally, the Committee recommends that funds be made available to enable AAAs to obtain all records necessary to conduct a thorough evaluation. Financial institutions should be encouraged to provide this service at a reduced cost, given the shared interest in protecting elders from financial exploitation. If necessary, legislation should be enacted limiting the amount financial institutions may charge AAAs for records production.

d) Use of Court Procedures to Preserve Assets

The Allegheny County District Attorney’s Office reported it has successfully used 42 Pa.C.S. § 9728(e) and (f) allowing the Commonwealth to freeze assets simultaneously with the filing of a criminal complaint, or even earlier, upon a showing of probable cause to believe the assets will be needed to satisfy an anticipated restitution order.²⁸ The Committee believes this mechanism should be used by prosecutors statewide in cases involving elder financial abuse. The Committee encourages the Pennsylvania District Attorney’s Association (“PDAA”) to educate prosecutors about the existence and application of this statute, particularly in elder abuse cases. The Administrative Office of Pennsylvania

Courts' ("AOPC") Judicial Education Department should provide similar education to members of the judiciary.

e) Assistance from the Bar

The Committee believes access to legal services for elders is critical. Elders often have limited means, but a great need for competent legal assistance - not only in drafting estate-planning documents such as POAs but also in pursuing civil suits to recover funds improperly taken.

The Committee requests that the Supreme Court of Pennsylvania ("Supreme Court") consider authorizing a limited practice for pro bono service by retired and voluntarily inactive lawyers to work with elders and members of the aging network, such as legal service providers, to better ensure elder Pennsylvanians have access to legal counsel.

In addition, the Committee recommends that the Supreme Court consider an even more expansive program to encourage all attorneys (approximately 64,000 active and 11,000 inactive attorneys) to engage in *pro bono* work for elders. As an incentive, it is recommended that continuing legal education ("CLE") credit be given for the work.

The *pro bono* work by retired attorneys and by active attorneys in exchange for CLE credit could be part of an ambitious program in which attorneys would be authorized to counsel elders in drafting POA or other estate planning documents. Attorneys could also represent elders who have been victimized by financial exploitation in civil actions to recover their assets from perpetrators. See Section III.B.3.a. Soliciting *pro bono* attorneys to draft POA instruments might facilitate efforts to detect or deter misuse and misunderstanding of the POA. Both of these innovative initiatives could serve as models for other states.

f) Consistent Insurance Requirements

The Committee learned of a possible anomaly in Pennsylvania with regard to insurance requirements for personal care homes, assisted living residences and home health care agencies. As of June 13, 2013, the Pennsylvania Department of Human Services ("DHS") (formerly known as the Department of Public Welfare) identified 1248 licensed personal care homes in Pennsylvania and 22 licensed assisted living residences. The Pennsylvania Department of Public Health identified 491 licensed home health care agencies. Currently, these entities are not required to have liability insurance. This is in contrast to physicians, hospitals, birthing centers, nursing homes, and midwives, all of which are required to maintain liability insurance pursuant to the Medical Care Availability and Reduction of Error Act ("MCARE Act"), 40 P.S. §1303.101 *et seq.*

Committee members noted that most of these facilities do carry liability insurance, but some do not. Without facility or agency insurance, individuals who are injured as a result of negligent conduct may have no recourse to recover for damages suffered. These damages often include major medical expenses, which must be borne by the individual. However, since many of those injured as a result of negligent conduct are already the most vulnerable Pennsylvanians, and because many injured are elders, payment of these medical expenses oftentimes falls to the Commonwealth in the form of Medical Assistance payments by DHS. The failure to require insurance not only places unnecessary burdens on individuals, but also results in a financial burden to the Commonwealth.

Some Committee members expressed that the General Assembly should require all personal care homes, assisted living residences and home health care agencies to carry a minimum of liability insurance; however, others urged caution, noting the imposition of insurance requirements may force some entities out of business. The Committee recommends that the General Assembly consider this issue more fully.

C. Committee Recommendations

1. The General Assembly should adopt the provisions of Section 116 of UPAA to statutorily broaden and specify those individuals and entities who have standing to request judicial review of actions of agents operating under a POA document.

2. With regard to preventing or mitigating damages caused by financial abuse against elders, the following is recommended:
 - a. Financial Abuse and Exploitation
 - i. Financial institutions should be statutorily required to be mandatory reporters of suspected financial abuse or exploitation of elders.
 - ii. Financial institutions should be statutorily required to administer training programs similar to the ones required in Maryland to help identify, prevent, and report elder financial abuse. The training programs should be uniform statewide and should be developed under the leadership of the Department of Aging.
 - iii. Financial institutions should be given statutory authority (and immunity) to delay, for five days, suspicious financial transactions attempted by or for elders and to report the suspicious conduct to AAAs and/or law enforcement.
 - iv. The Department of Aging should consider requesting that it receive a copy of SARs.
 - b. Funding for the aging network through the Department of Aging should be increased through an appropriation, and more grant opportunities should be available through PCCD to facilitate thorough investigations of alleged financial abuse.
 - c. State-Level Assistance
 - i. The OAG and PSP should be asked to make financial investigators available to assist local prosecutors and AAAs when complex cases of elder financial abuse are alleged.
 - ii. The Department of Aging and financial institutions should work together to determine the most effective and efficient way for AAAs to obtain financial records needed to conduct investigations of financial abuse and exploitation. Funds should be made available to enable AAAs to obtain needed records from financial institutions or, if necessary, legislation should be enacted establishing the amount financial institutions may charge AAAs for record production.
 - d. Prosecutors in Pennsylvania should use 42 Pa.C.S. § 9728(e) and (f) to the fullest extent possible to help ensure funds and assets are available to satisfy anticipated restitution orders in appropriate cases, and educational initiatives should be undertaken to ensure district attorneys and Common Pleas judges are aware of this mechanism for freezing assets.
 - e. The Supreme Court should consider authorizing a limited practice for *pro bono* service by retired and voluntarily inactive lawyers to work with elders and members of the aging network to better ensure elder Pennsylvanians have access to legal counsel in drafting documents as well as in civil suits to recover misappropriated funds or assets. The Supreme Court should also consider ways to encourage active attorneys to provide *pro bono* services to elder Pennsylvanians, such as through CLE credits.
 - f. The General Assembly should consider whether all personal care homes, assisted living residences, and home health care agencies should carry a minimum of liability insurance.

D. Timing and Fiscal Impact

Recommendations 1a (standing) and 2a (financial institutions) are referred to the General Assembly. Presumably, the referral of these recommendations can be made immediately; however, a full cost analysis, particularly regarding Recommendation 2a, will need to be considered by the General Assembly. There will likely be costs, both to the Commonwealth and to financial institutions. It is not

believed such costs will be prohibitive, as other states have adopted similar training and reporting requirements. It is believed that these Recommendations will have an immediate and substantial impact on preventing financial abuse of elders.

It is believed that portion of Recommendation 2a suggesting financial institutions be authorized to delay transactions for five days will entail only minimal cost, while providing an important tool for stopping elder financial abuse before it occurs.

Cost is a central component of Recommendations 2b and 2c, as both call for increased funding for the Department of Aging and AAAs, and increased assistance to AAAs and local prosecutors by OAG and PSP. The Committee defers to the General Assembly to determine the appropriate amount and source of such funding. However, as with other recommendations in this section, it is believed that implementation of these recommendations will have an immediate and significant effect on preventing elder financial abuse.

Recommendation 2d calls for an educational effort by the PDAA and the AOPC's Judicial Education Department. It is believed education on this initiative, which will help to preserve funds to satisfy anticipated restitution orders, will be highly beneficial. Minimal costs to fund the educational initiatives can be expected.

The fiscal implications of Recommendation 2e (assistance from attorneys) will have to be determined by the Supreme Court. Other than the cost associated with studying these initiatives, no significant cost is anticipated in the near future. However, some cost will likely be associated with maintaining a database of voluntarily inactive attorneys providing *pro bono* service. Additionally, if CLE credits are to be given for *pro bono* services, some cost can be anticipated in developing a system to track credits. However, it is expected that the benefits of providing free or low-cost legal counsel to elder Pennsylvanians will far outweigh these negligible expenses.

Recommendation 2f (consistent insurance requirements) will have some cost associated with it, the amount of which will have to be determined by the General Assembly.

As noted above, the Committee believes each of these recommendations will have an immediate and significant impact on preventing financial exploitation of elders, as well as mitigating damages caused by financial abuse.

II. Training, Information and Collaborations

A. Issue Statement – Lack of Elder Abuse Education and Training, Information to the Public and the Need for Further Collaborations

The Committee agreed that in order to prevent elder abuse in Pennsylvania, and to mitigate its effects, there should be a robust effort to educate judges, court practitioners, and members of the public about elder abuse: what it is, how to prevent it, and where to report it when it is suspected. Also, there should be greater communication and collaboration among agencies and organizations that serve Pennsylvania's elders.

B. Committee Findings

1. Judicial Education – Bench Cards

The Committee noted that judges are often in a unique position to identify elders in need. Whether elders come to court as victims, litigants, or witnesses - and regardless of the type of proceeding - judges are able to observe how an individual acts or reacts in a controlled setting. While not medical doctors or psychologists, judges may be able to “raise a red flag” if elder abuse or neglect is indicated. To help judges recognize risk factors and signs of abuse and neglect, the Committee decided to recommend “bench cards” be created by the AOPC. These bench cards should be distributed to all Common Pleas and Magisterial District Court judges in the Commonwealth. If indications of elder abuse or neglect are suspected, the judge can give relevant information to an individual, counsel, family members, court staff, or others.

The Committee reviewed sample bench cards developed for local jurisdictions in Pennsylvania, as well as information from other states. The Committee determined that all judges should have useful and practical information readily available, including: a reminder of the most frequent types of elder abuse; a summary of risk factors; signs of elder abuse; and a list of relevant state and local contacts. Based on these criteria, a sample bench card was developed and is included with this Report in Appendix A. However, the final decision on what to include on bench cards should be made by the AOPC Judicial Education Department and the OEJC, with input from the Advisory Council on Elder Justice in the Courts (“Advisory Council”). Information about and from the bench cards should be included at educational conferences for trial judges and Magisterial District Court judges.

It is recommended the bench cards be developed centrally for distribution statewide, but adaptable for local modification. Specifically, local modification should include contact information for the county District Attorney’s office and for the local AAA. Information akin to that on the bench cards should also be available on pamphlets or brochures in the courthouse and Magisterial District judges’ offices. Judicial districts, with the assistance of the Department of Aging/AAs, should coordinate production and distribution. Information should also be available on court websites (both locally and on the state judiciary’s webpage).

2. Judicial Education – Elder Abuse Bench Book

The Committee also discussed the value of providing judges with a bench book regarding elder abuse. The Committee learned that bench books have been developed for Pennsylvania judges on topics such as sexual violence, dependency, public health, and witness and juror intimidation, and agreed that a bench book on topics relevant to elder abuse would be highly beneficial to the judiciary. An exemplary model has been created in California. It is recommended that the Supreme Court authorize the development of an Elder Abuse Bench Book for the Pennsylvania judiciary. It is further recommended that the bench book provide judges with information on diverse subjects, including, but not limited to, the nature of abuse; signs of abuse; substantive laws and procedural court rules relevant to cases involving elders;²⁹ financial abuse facilitated through POA; basic science on the effects of aging and conditions that may affect elders (such as dementia and Alzheimer’s Disease); and information on guardianship proceedings. It is recommended that development of this bench book be referred to the AOPC Judicial Education Department.

3. Elder Abuse Task Forces

In addition to providing information to the public, the Committee also discussed using elder abuse task forces as vehicles to provide education to and share information with judges, court staff, guardians, practitioners and others. The Department of Aging currently has approximately 33 Elder Abuse Task Forces in various counties engaged in elder abuse case reviews. Some counties have implemented elder abuse task forces where information on elder abuse and prevention is shared. Many of these local elder abuse task forces are active, with participation from district attorneys, law enforcement, AAAs, and community groups. The Committee recommends that the elder abuse task force model be expanded to include participation of judges, private attorneys, community groups, clergy members, hospitals, and any other interested parties.

Law enforcement should be included in the elder abuse task forces to ensure that elder abuse, particularly elder abuse in the form of abusive POA, is not seen as a purely civil matter. Including law enforcement and district attorneys in elder abuse task forces can help ensure the criminal justice system is as responsive as possible to allegations of elder abuse in all forms.

Some county elder abuse task forces include judicial participation, and others do not. A concern was expressed that to have judicial participation, the teams must focus on elder abuse systemically, and not on individual cases (otherwise judges will not be able to preside over matters that may come before them in an adjudicatory capacity). Nevertheless, it was suggested that in those counties/regions where judges are not involved, consideration should be given to including them to the extent possible. As with judicial participation in the AOPC Office of Children and Families in the Courts (“OCFC”) Children’s Roundtable Initiative, judicial participation is highly advisable, if not essential.³⁰

The Committee discussed community outreach efforts. It was noted that some counties, notably Schuylkill County and Montgomery County, do an outstanding job of making information available to the public through community outreach efforts. The members agreed that other counties should enhance their efforts. Specifically, counties should consider having meetings and discussions with the public and elders about elder abuse and what to do if abuse is known or suspected. In counties where funding of such meetings is an issue, consideration should be given to partnering with private and civic organizations, senior centers, and hospitals to subsidize the costs associated with meeting facilities and food/refreshments.

The Committee suggests that in those counties where elder abuse task forces do not exist, consideration should be given to legislation requiring their formation. This suggestion may be considered by the Pennsylvania House of Representatives, see House Resolution 929 of 2014, Pr. No. 4097 (“House Resolution 929”), and is also supported by the National Center on Elder Abuse, Administration on Aging.³¹

Elder abuse task forces should work in collaboration with the Department of Aging as well as with the OEJC and Advisory Council to develop and disseminate informational brochures, posters, and pamphlets to help educate citizens about elder abuse, how to prevent it and where to report it. Elder abuse task forces can be instrumental in helping to disseminate information from the Bench Cards discussed in Section 2.B.1. The statewide Elder Abuse Hotline numbers should be prominently displayed on all publications.

The Committee suggests a list of training topics for elder abuse task forces and, ultimately, the public, including:

- Warning Signs of Elder Abuse/Reporting Abuse or Neglect of an Elder

- Warning Signs of Financial Exploitation

- Scams and Identity Theft – How to Protect Yourself

- Reporting Obligations Regarding Abuse or Neglect of Elders

- Bullying of Elders

- Appropriate Use of Powers of Attorney

- Warning Signs for Exploitation of Powers of Attorney

- Guardianships (and how they differ from powers of attorney)

4. Elder Justice Roundtables

The Committee also supports a statewide Elder Justice Roundtable, similar to, and modeled after, the Children’s Roundtable Initiative developed by Justice Max Baer through the OCFC. An Elder Justice Roundtable initiative might include participation from local elder abuse task forces, DHS and the Department of Aging. The Elder Justice Roundtable could be organized to collect and disseminate information on elder abuse prevention “best practices,” provide updates on the law, enable and facilitate collaboration, and provide other relevant state and national information. Such information could be disseminated to the public through the Roundtable and elder abuse task forces.

OEJC should, through the Elder Justice Roundtable, also pursue community outreach and informational initiatives, including exploring partnerships with financial institutions, utility providers, and perhaps the United States Postal Service and other governmental entities, as vehicles to help provide information about elder abuse, neglect, and exploitation to their customers in mailings as well as on their websites.

Training materials developed through the Elder Justice Roundtable should be presented to Pennsylvania’s Common Pleas and Magisterial District Court judges at educational conferences, on state and local judiciary websites, as well as disseminated through local elder abuse task forces.

Because there is sometimes confusion when multiple entities are involved, the Statewide Elder Justice Roundtable or OEJC should also work with the United States Social Security Administration (“SSA”), the Department of Veterans Affairs (“VA”) and the Railroad Retirement Board (“RRB”) to develop a system for greater information sharing on adult guardianships and when a representative payee is appointed.

5. Public Education

Throughout this section, several recommendations were considered regarding public education. Because the Committee believes this is one of the most crucial elements of the Task Force’s mission, those recommendations are summarized below.

Local elder abuse task forces should ensure that the information about the warning signs of elder abuse and the other training topics be readily available to the public as well.

Information on these items should be produced on brochures or pamphlets and be made readily available throughout the community. Where appropriate, informational sessions should be provided in senior living centers, community gatherings, churches and other public forums. Information should also be provided on county and court websites.

All informational literature and presentations should contain information on how to recognize elder abuse, and provide local contact information for reporting suspected elder abuse or neglect, as well as the statewide Elder Abuse Hotline numbers for the Department of Aging (1-800-490-8505) and the OAG (1-866-623-2137).

C. Committee Recommendations

1. Bench Cards

- a. The Committee recommends that bench cards be developed by the AOPC and provided to all Common Pleas and Magisterial District Court judges. Bench cards should include information on the most frequent types of elder abuse, a summary of risk factors, signs of elder abuse to watch for, and a list of relevant state and local contacts.
- b. Information about the bench cards should be provided at educational conferences for Trial judges and Magisterial District Court judges.
- c. Information on the bench cards should also be available on pamphlets or brochures in courthouses and Magisterial District Judge offices, and should be available on court websites (both state and local). Information should also be disseminated through the elder abuse task forces.

2. Bench Book

The Committee recommends that the Supreme Court authorize the development of an Elder Abuse Bench Book. Research and production of the bench book should be referred to the AOPC. Educational sessions incorporating the bench book should be conducted by the AOPC Judicial Education Department for Common Pleas and Magisterial District Court judges.

3. Elder Abuse Task Forces

The Committee recommends the continuation (or creation) of elder abuse task forces in each county/judicial district to develop best practices, facilitate information sharing and enable and promote collaboration. Elder abuse task forces should include participation from, among others, judges and law enforcement personnel.

4. Elder Justice Roundtables

The Committee recommends a statewide Elder Justice Roundtable based on the initiative created by Justice Baer and the OCFC, be established, with administrative support provided by the OEJC. The Roundtable should pursue community outreach and informational initiatives, and help

facilitate the sharing of information and best practices to and through the elder abuse task forces. The Roundtable should explore partnerships and collaborations with financial institutions, utility providers, and others, as vehicles for the dissemination of information about elder abuse, neglect and exploitation.

5. Information Sharing

The Committee recommends that the OEJC collaborate with SSA, the VA, the RRB and the OPM to develop a system for greater information sharing on adult guardianships.

6. Public Education

The Committee recommends that, to the greatest extent possible, information on identifying elder abuse and neglect be disseminated to the public in public forums and through literature. Elder abuse task forces should determine the most effective ways of relaying this information in their communities. Local government websites should be included as repositories of information. Statewide elder abuse hotline numbers and contact numbers for local elder abuse resources should be prominently displayed.

D. Timing and Fiscal Impact

It is suggested these recommendations can be implemented in the near future and will have a significant impact by providing information to the judiciary and to the public on elder abuse. The statewide Elder Justice Roundtable and elder abuse task forces will foster collaborations and promote best practices in the Commonwealth's 67 counties.

There will be some cost associated with the development and distribution of bench cards and the Elder Abuse Bench Book (Recommendations 1 and 2). The precise cost can best be determined by the AOPC. If technical assistance is required, it may be available through the Bureau of Justice Assistance. The cost of developing and distributing posters, pamphlets, and other written materials can presumably be absorbed by the Department of Aging, county, community partners or elder abuse task forces. The Committee cannot determine how much additional funding will be necessary for these or other recommendations, including the creation of elder abuse task forces or the statewide Roundtable, as well as costs associated with training, education, staffing, and public education efforts. (Recommendations 3 - 5). It is suggested these matters be studied by the Advisory Council and OEJC. Local funding sources such as community, businesses, or organizations should be considered, as well as appropriation requests to the General Assembly.

III. Effective Court Practices to Address Elder Abuse and Promote Access to Justice for Pennsylvania Elders

A. Issue Statement - Court Practices and Access to Justice

The Committee was asked to consider access to justice for Pennsylvania elders as a means of addressing elder abuse. Elder abuse is an umbrella term for a complex and pervasive problem that may take many forms, including physical, sexual or emotional abuse; financial exploitation; and neglect, abandonment or self-neglect. Pennsylvania is home to one of the largest elder populations in the nation, and that population is continuing to grow. It is expected that by the year 2020, up to 25% of Pennsylvanians will be elders. It is therefore essential that courts provide appropriate judicial solutions that respect the independence, dignity, autonomy, values and wishes of elders while protecting their rights, ensuring access to the courts, and enhancing coordination among courts and community resources.³²

B. Committee Findings

1. Quantifying Elder Abuse in the Pennsylvania Courts

In Pennsylvania, statistics provide an inadequate yet disturbing picture of the gravity of elder victimization. In 2012-13, 18,542 reports of need were made for older adult protective services ("APS").

Of those reports, 74% of those cases were deemed appropriate for investigation and 37% were substantiated as needing protective services. These reports were classified as follows:

- 42.3% Self Neglect;
- 21.6% Caregiver Neglect;
- 16.1% Financial;
- 15% Emotional;
- 4% Physical; and
- 1% Sexual.³³

In addition to the statutory definitions of elder abuse under the OAPSA, courts encounter elder abuse in a variety of contexts: criminal cases such as assault, battery, forgery, fraud, murder, rape, theft; civil fraud or conversion actions to regain misappropriated property; personal injury actions; guardianship; mental health commitment; special protective proceedings initiated through AAAs; cases involving health care decisions for an incapacitated patient; and criminal or civil cases regarding institutional care in nursing homes or other long-term care facilities.³⁴ The number of petitions for civil orders of protection from abuse (“PFA”) for elders are increasing as courts, advocates, and victims recognize that violence by family members other than spouses or intimate partners also meet the statutory criteria authorizing protections.

Currently the Pennsylvania judiciary’s Common Pleas Case Management System (“CPCMS”) does not routinely record the age of the named victim.³⁵ As a result, it is extremely difficult to quantify the number of, and types of, crimes involving elder victims. If an individual is convicted of a crime specifically identified as “elder abuse,” such as Neglect of a Dependent Care Person, 18 Pa.C.S. § 2713, this form of criminal elder abuse can be quantified. However, many other crimes committed against elders, including domestic and family violence, are not documented and reported as crimes against the elderly.

The Committee recommends recording the age of the victim in criminal cases for statistical purposes and in order to accurately assess the scope of the elder abuse problem. Moreover, recording the age of the victim on the criminal complaint could be beneficial to practitioners and judges since, for some crimes, a greater penalty may be imposed if the victim is an elder.³⁶ Also, for the judiciary, a great deal of literature reveals that court practices and procedures may need to be reviewed, and likely modified, to ensure that elder crime victims have appropriate accommodations necessary to participate in, and understand, court proceedings. Quantifying the scope of elder abuse and neglect will help in this regard.

The Committee recommends either a check box or a new mandatory field on the complaint form to record the victim’s age. Presumably, that information can be electronically captured by CPCMS.³⁷

The Committee considered whether victim age or a check box should also be included for cases prosecuted without a complaint, such as summary matters initiated by citation.³⁸ Members agreed that while there could be value in collecting this information for certain crimes, such as summary harassment, there was reluctance to impose upon police the additional burden of collecting a victim’s age for relatively minor offenses. Ultimately the Committee does not recommend the collection of the victim’s age on summary citations.

In addition, the Committee recommends that data collected on the age of the victim/petitioner in PFA cases be compiled. 23 Pa.C.S. §§ 6101-6122.³⁹ Currently, Pa.R.C.P. 1905(b) directs that PFA petitions include the date of birth of the petitioner. It is suggested that this information be reported to the AOPC for statistical purposes.

2. Criminal Matters

a) Mandatory Minimum Sentences

After considerable discussion and debate, the Committee recommends that the Pennsylvania General Assembly amend 42 Pa.C.S. § 9717 to add mandatory minimum sentences for convictions of additional offenses dealing with the financial exploitation of elders.⁴⁰

While sentencing issues generally focus on the conduct of the defendant, this recommendation is designed to enhance protections of the elder victim. The Committee believes that, although there is a national trend to eliminate mandatory minimum sentences in drug trafficking cases, that trend is inapt when considering the protection of Pennsylvania's elders. The use of mandatory minimum sentences can make quick resolution of criminal cases more common, and will likely decrease court appearances for the elder crime victim.

Currently, the only financial crime against elders that falls into a mandatory minimum category is theft by deception. Historically, prosecutors in theft by deception cases have been able to offer immediate plea agreements in cases involving elder victimization, especially when immediate full or partial reimbursement can be made. Criminal defendants who have committed these crimes often have an incentive to accept such plea agreements without running the risk of being subject to the mandatory minimum if convicted at trial. This incentive has caused criminal defendants to enter a plea quickly, facilitating the recovery of stolen funds, and has prevented the re-victimization of elders by forcing them to take the stand. Most importantly, convictions have been obtained while limiting ongoing court appearances.

The Committee acknowledges the unique challenges encountered in prosecuting cases with elder victims, such as memory loss, hearing loss, physical disabilities and declining health. Should the Pennsylvania General Assembly choose to add mandatory minimums for crimes involving elders, the criminal justice system would better serve and protect elder victims.

In addition, because of the serious and arguably unique effect some crimes against elders may have, particularly those involving financial losses, the Committee also recommends that the Pennsylvania Commission on Sentencing consider increasing the offense gravity score for crimes involving elder victims, especially with regard to financial crimes.⁴¹

b) Clarification in Pa.R.Crim.P. 500

The Committee considered proposed changes to criminal procedural rules, specifically whether those rules should be amended so that the testimony of elder victims and witnesses may be preserved earlier in a criminal prosecution. This topic was raised due to concerns that long delays in bringing a case to trial often are a significant hardship on an elder victim or witness. A means to record testimony early in the prosecution may be highly beneficial.

It was suggested that consideration be given to recommending changes to Pa.R.Crim.P. 500 and 541 to allow for the preservation of testimony in criminal cases at or shortly after the preliminary hearing (assuming the defendant has been provided with discoverable material and is afforded an opportunity to cross-examine). However, after further consideration and review of the Rules, the Committee members are of the opinion that rule changes may not be necessary, but some clarity through amendment to the official comment may be beneficial. Pa.R.Crim.P. 500 (A) provides:

(A) By court order.

- (1) At any time after the institution of a criminal proceedings, upon motion of any party, and after notice and hearing, the court may order the taking and preserving of the testimony of any witness who may be unavailable for trial or for any other proceeding, or when due to exceptional circumstances, it is in the interests of justice that the witness' testimony be preserved.

- (2) The court shall state on the record the grounds on which the order is based.
- (3) The court's order shall specify the time and place for the taking of the testimony, the manner in which the testimony shall be recorded and preserved, and the procedures for custody of the recorded testimony.
- (4) The testimony shall be taken in the presence of the court, the attorney for the Commonwealth, the defendant(s), and defense counsel, unless otherwise ordered.
- (5) The preserved testimony shall not be filed of record until it is offered into evidence at trial or other judicial proceeding.

Pa.R.Crim.P. 500 (A). The comment to the Rule provides:

This rule is intended to provide the means by which testimony may be preserved for use at a subsequent stage in the criminal proceedings. When testimony is to be preserved by videotape recording, see *also* Rule 501.

This rule does not address the admissibility of the preserved testimony. All questions of admissibility must be decided by the court. See, e.g., Judicial Code § 5917, 42 Pa.C.S. § 5917 (1982); *Commonwealth v. Scarborough*, 421 A.2d 147 (Pa. 1980); *Commonwealth v. Stasko*, 370 A.2d 350 (Pa. 1977).

"May be unavailable," as used in paragraph (A), is intended to include situations in which the court has reason to believe that the witness will be unable to be present or to testify at trial or other proceedings, such as when the witness is dying, or will be out of the jurisdiction and therefore cannot be effectively served with a subpoena, or may become incompetent to testify for any legally sufficient reason.

Under paragraph (A)(4), a judge should preside over the taking of testimony. The court, however, may order that testimony be taken and preserved without a judge's presence when exigent circumstances exist or the location of the witness renders a judge's presence impracticable. Furthermore, nothing in this rule is intended to preclude counsel, the defendant(s), and the judge from agreeing on the record that the judge need not be present. Paragraph (B)(3) permits the attorney for the Commonwealth, the defendant(s), and defense counsel to determine among themselves whether a judge should be present during the taking of testimony. That determination should be made a part of the written agreement required by paragraph (B)(1).

Nothing in this rule is intended to preclude the defendant from waiving his or her presence during the taking of testimony.

The means by which the testimony is recorded and preserved are within the discretion of the court under paragraph (A) and the parties under paragraph (B), and may include the use of electronic or photographic techniques such as videotape. There are, however, additional procedural requirements for preservation of testimony by videotape recording mandated by Rule 501.

The party on whose motion testimony is taken should normally have custody of and be responsible for safeguarding the preserved testimony. That party should also promptly provide a copy of the preserved testimony to any other party upon payment of reasonable costs.

When testimony is taken under this rule, the proceeding should be adversarial, and afford the parties full opportunity to examine and cross-examine the witness. Counsel should not reserve objections for time of trial.

Paragraphs (A)(5) and (B)(5) are intended to guard against pretrial disclosure of potentially prejudicial matters.

Pa.R.Crim.P. 500 (comment). The Committee suggests consideration be given to amending the definition of “may be unavailable” in comment paragraph 3 to add the following: “‘Exceptional circumstances’ may include those cases where the victim is an elder, frail or demonstrates the symptoms of mental infirmity or dementia, creating the risk that they will not be able to testify in the future. Persons 60 and older are presumed to be elders even if they do not otherwise meet this criterion.”

The Committee recommends that an educational effort be undertaken by the AOPC to ensure that district attorneys and Common Pleas judges across the Commonwealth are aware of this Rule and the procedures authorized when an elder is involved in a case either as a victim or a witness.

c) Requiring District Attorney Approval in Certain Cases

The Committee considered the value of ensuring that district attorneys are aware from the earliest stages when a case involves an elder victim. To aid in that regard, Allegheny County instituted a new procedure pursuant to Pa. R.Crim.P. 507, that requires police departments to obtain approval from the district attorney’s office before filing Complaints when a case involves a victim 65 and older.⁴² It has been reported that this procedure is favored by municipal police departments in Allegheny County, and it is suggested other district attorneys consider a similar policy in their jurisdictions.

d) Increased Collaboration with Victim Service Providers

The Committee recognized the important role played by victim service providers, including PCCD’s Office of Victim Services (“OVS”), the Office of the Victim Advocate (“OVA”) and the diverse victim service programs (such as local district attorney-based, community-based and statewide programs). The Committee recommends that advocates, attorneys, law enforcement, and courts work collaboratively with victim service providers to continue to evaluate and improve services to elder crime victims. This effort should place special emphasis on insuring that all elders are provided their rights as outlined in the Pennsylvania Crime Victim Bill of Rights. 18 P.S. § 11.201. Determining ways to evaluate and improve services to elder crime victims should be considered by the elder abuse task forces discussed in Section II.B.3 of this report, and if implemented, by the Elder Justice Roundtable (Section II.B.4).

Elder victims of crime are a special subset of victims who, due to individual vulnerabilities, may require specialized services and assistance. In Pennsylvania, all crime victims are covered by a comprehensive Crime Victim Bill of Rights which provides guarantees of specific performance by agencies involved with victim services.

Many different agencies may be involved depending on the stage of prosecution or punishment. OVS helps to provide victims of crime access to assistance and resources to heal from their trauma and move forward with their lives, including providing financial help through the Victims Compensation Assistance Program. This program administers funding to local and statewide victim service agencies that work directly with crime victims, and provides training to victim service and allied professionals.

OVA represents the rights and interests of crime victims before the Board of Probation and Parole and the Department of Corrections, by providing notification to crime victims of the potential for inmate release and the opportunity to present testimony. It also provides referrals for crime victims to local programs and resources.

Victim services organizations, including those employed by the local AAAs, provide specific assistance at a front line level. Coordination and collaboration among these various organizations are vital to insuring that elder crime victims are properly assisted and served.

3. Civil Matters

a) Private Cause of Action

The Committee considered whether enhanced civil remedies should be recommended, especially when an individual breaches a duty to an elder through misuse of a POA. The Committee considered provisions of the UPAA, specifically Section 117, which states:

Section 117. Agent's Liability. An agent that violates this [act] is liable to the principal or the principal's successors in interest for the amount required to: (1) restore the value of the principal's property to what it would have been had the violation not occurred; and (2) reimburse the principal or the principal's successors in interest for the attorney's fees and costs paid on the agent's behalf.

Comment:

This section provides that an agent's liability for violating the Act includes not only the amount necessary to restore the principal's property to what it would have been had the violation not occurred, but also any amounts for attorney's fees and costs advanced from the principal's property on the agent's behalf. This section does not, however, limit the agent's liability exposure to these amounts. Pursuant to Section 123, remedies under the Act are not exclusive.

If a jurisdiction has enacted separate statutes to deal with financial abuse, an agent may face additional civil or criminal liability. For a discussion of state statutory responses to financial abuse, see Carolyn L. Dessin, *Financial Abuse of the Elderly: Is the Solution a Problem?*, 34 *McGeorge L. Rev.* 267 (2003).

UPAA § 117. The JSGC's Advisory Committee considered UPAA § 117 and recommended the General Assembly *not* adopt this provision and opined: "[a]lthough a comparable provision does not exist in 20 Pa.C.S. Chapter 56, the Advisory Committee believed that courts are sophisticated enough to resolve issues regarding an agent's liability and grant appropriate relief without the need for language analogous to that contained in §§ 114 and 117 of the UPAA."⁴³

However, this Committee disagrees with the JSGC's Advisory Committee assessment. Rather, the Committee suggests there should be enhanced civil remedies for financial abuse and exploitation. This would include recognition of a private right of action on behalf of an elder under the OAPSA and a right to recover attorneys' fees against an abuser. The Committee supports adoption of the private right of action recognized in House Bill 2057. Concurrently, the Committee recommends that the award of attorneys' fees or other sanctions may also be appropriate for the frivolous pursuit of causes of action alleging financial abuse or exploitation.

b) Preventing Abusers from Benefiting from the Estate of an Elder

The Committee was asked to address the possibility of seeking the General Assembly's consideration of amending the existing Slayer's Statute to cover not only homicide but also any conviction for elder abuse, neglect or exploitation, so as to bar abusers from benefitting from the estate of an elder.⁴⁴

A "slayer statute" bars a killer from inheriting from a victim. Slayer statutes are based on public policy considerations centered on morality, equity and deterrence. Nearly all states have enacted some form of slayer statute.⁴⁵ Pennsylvania's Slayer's Statute, 20 Pa.C.S. §§ 8801-15, provides that "[n]o slayer shall in anyway acquire any property or receive any benefit as the result of the death of the decedent[.]" *Id.* § 8802. A "slayer" is defined as "any person who participates, either as a principal or as an accessory before the fact, in the willful and unlawful killing of any other person." *Id.* § 8801.

These directives are declared a policy of the Commonwealth in Section 8815: "This chapter shall not be considered penal in nature, but shall be construed broadly in order to effect the policy of this State that no person shall be allowed to profit by his own wrong, wherever committed." *Id.* § 8815.

The Committee learned that in 2001, California began the movement to expand slayer statute prohibitions to address elder abuse crimes.⁴⁶ California law disinherits an abuser upon proof by clear and convincing evidence that a person abused an elder who lacked capacity at the time of abuse, and who did not regain capacity prior to death. In addition, an individual is automatically barred from receiving a share of the decedent's estate if that individual was convicted of criminally abusing the decedent. *Cal. Prob. Code* § 259.

Under a Michigan statute, an individual who is convicted of committing abuse, neglect, or exploitation with respect to the decedent is prohibited from inheriting from the decedent's estate. Michigan Compiled Laws Annotated ("MCLA") § 700.2803. The statute provides:

An individual who feloniously and intentionally kills or who is convicted of committing abuse, neglect, or exploitation with respect to the decedent forfeits all benefits under this article with respect to the decedent's estate, including an intestate share, an elective share, an omitted spouse's or child's share, a homestead allowance, a family allowance, and exempt property. If the decedent died intestate, the decedent's intestate estate passes as if the killer or felon disclaimed his or her intestate share.

MCLA § 700.2803(1).

Similarly, an Illinois statute provides that "[p]ersons convicted of [financial exploitation, abuse, or neglect of an elderly person or a person with a disability] shall not receive any property, benefit, or other interest by reason of the death of that person . . . [and that the abuser's] interest shall pass as if the person convicted . . . died before the decedent." 755 Ill. Comp. Stat. 5/2-6.6. See also Or. Rev. Stat. Ann. § 112.465 ("[p]roperty that would have passed by reason of the death of a decedent to a person who was a slayer or an abuser of the decedent . . . passes and vests as if the slayer or abuser had predeceased the decedent"); Wash. Rev. Code § 11.84.020 ("[n]o slayer or abuser shall in any way acquire any property or receive any benefit as the result of the death of the decedent.").⁴⁷

Under Maryland law, "[a] person may not knowingly and willfully obtain by deception, intimidation, or undue influence the property of an individual that the person knows or reasonably should know is at least 68 years old, with intent to deprive the individual of the individual's property." Md. Code, Criminal Law, § 8-801(b)(2). If convicted, the defendant may not inherit from the decedent's estate to the extent he or she has failed to fully restore the unlawfully obtained property, or its value. *Id.* § 8-801(e)(1).

The Committee members agree that consideration should be given to amending Pennsylvania's Slayer Statute as has been done in other states. Individuals should be prohibited from receiving financial benefit through a will, intestate succession, insurance proceeds, or in any other way, from an elder who has been abused, neglected or exploited. However, consideration will need to be given to the following, including, but not limited to, identifying the specific criminal convictions that would bar recovery under the statute; determining if a testator chooses to bequeath assets notwithstanding the occurrence of abuse, exploitation, or neglect; and determining if an heir convicted of financially abusing an elder can "cure" disinheritance by returning/repaying improperly taken funds. The Committee suggests these matters be referred to the General Assembly.

4. Access to Justice

a) American Bar Association Recommendations

Many elders face significant attitudinal and systemic factors which serve as obstacles to accessing the courts, navigating the legal system, and pursuing access to justice. The American Bar Association's ("ABA") Commission on Law and Aging enumerated these factors:

(1) The abused person's attitudes about the courts and about the pursuit of legal remedies. Attitudinal barriers identified include[]:

Older abused persons are commonly reluctant to press charges against abusive family members or caregivers because "they do not want to get that person in trouble."

Often, the abused person is dependent on the abuser for care or companionship, and, therefore, believes that he or she has "no choice" but to continue in the abusive relationship.

Older persons also fear that involving APS or law enforcement in their problems will lead to their removal from their home and placement in a

nursing home. They also fear that APS or court intervention will not prevent further abuse or retaliation.

Older abused persons are sometimes so afraid of testifying in court or so ashamed to have their abusive situation aired in public that they are willing to forego pursuit of their legal rights.

Older persons' lack of knowledge about their rights and about the judicial system also inhibits their pursuit of appropriate legal remedies.

Older abused persons may have no means of traveling to the courthouse for hearings or may have no one to provide care for their ill spouse, partner, or care-dependent adult child while they are meeting with lawyers or testifying at trial.

Older abused persons often are ignorant of the availability of APS and other services that may be able to help them correct an abusive situation. Additionally, even if they are aware of these services they may not think of themselves as abused.

(2) Systemic practices in or related to the courts. These include[]:

The lack of knowledge about and sensitivity to elder abuse by judges was seen as inhibiting prosecutors, civil lawyers, and abused persons from bringing cases into the courts.

The failure of court staff to explain the judicial process to older abused persons, particularly to those who have a mental or cognitive disability or who may be intimidated or confused, was considered to be a barrier to the pursuit of legal remedies by abused persons.

The courts' failure to recognize that older persons who are homebound or bedbound may be incapable of traveling to the courthouse even though they are capable of testifying was also considered to be a barrier to elder abuse cases.

Court delays—typical or otherwise—were thought to be particularly onerous to older abused persons who are nearing the end of their life span, and who may be losing their capacity to remember the abuse and testify about it.

Lack of knowledge about elder abuse among prosecutors, law enforcement officers, and civil lawyers was also viewed as a barrier by the participants [].⁴⁸

To address these attitudinal and systemic barriers, the Committee recommends that the Advisory Council consider, and, where appropriate, the Supreme Court adopt, the following 29 ABA recommended guidelines for state courts to increase access to justice for Pennsylvania elders consistent with the recommendations contained in the Task Force's Report:

(1) Ways in which the state courts can improve their handling of cases involving elder abuse:

Have judges and other court staff, [in partnership with the Department of Aging], obtain training on topics related to elder abuse (ABA 1 and 2). [Presumably this could be accomplished with the assistance of the AOPC Judicial Education Department, or perhaps through the OEJC].

Encourage and support the training of other relevant professionals, including prosecutors, law enforcement officers, civil lawyers, APS workers, and others about the dynamics and issues of elder abuse and about the role of the courts in addressing that problem (ABA 3).

Provide accommodations for older persons with physical or mental impairments, including holding hearings in elder abuse cases in the setting that best accommodates the older person's needs (ABA 4).

Understand that capacity to participate in judicial proceedings may fluctuate depending on time of day, medications, or other issues, and being flexible in scheduling hearings to accommodate those challenges (ABA 5).

Expedite elder abuse cases on the court's calendar (ABA 6).

Use expert witnesses, evaluators, guardians *ad litem*, court investigators, court visitors, or interdisciplinary teams who are trained and knowledgeable about the problems of older persons to assess the older person's capacity (ABA 7).

Understand gradations of diminished capacity in order to more effectively manage and adjudicate cases involving elder abuse (ABA 8).

Consider that incapacity could increase the likelihood of abuse and, if necessary, ordering that an unbiased assessment of the older person's capacity be conducted by a qualified evaluator (ABA 9).

Ensure that plea agreements meet the needs of the older abused person, including protection from further abuse, by being willing to be creative in negotiations and sentencing after exploration of the alternatives available to the older abused person (ABA 13).

Consider the ramifications of courts taking steps when necessary to reduce the level of fear experienced by an older person who is testifying against his or her abuser such as allowing the hearing to be held in a less confrontational setting, allowing testimony and cross-examination of the older abused person by videotape or closed-circuit television, and closing the courtroom to the public (ABA 15).

Develop ways of ensuring that judges become aware of cases involving older abused persons that might be underway simultaneously in different divisions of the court or that might previously have been heard and have some legally relevant bearing on a current case (ABA 17).

Consider the concept of consolidating the courts handling cases involving elder abuse (ABA 18).

Avoid or be cautious about the use of alternative dispute resolution in cases involving elder abuse (ABA 19).

(2) Ways of ensuring that cases involving elder abuse enter the court system:

Train newly appointed guardians about their role and responsibilities as guardians, and about preventing, recognizing, and reporting elder abuse (ABA 20).

Encourage and support the availability and involvement of victim services providers who are knowledgeable about elder abuse to assist older abused persons throughout the judicial process in both non-criminal and criminal court proceedings (ABA 21 and 22).

Ensure that court staff are able and available to help explain and de-mystify the court process for older abused persons who may be intimidated, confused, or experiencing a mental or cognitive disability, particularly if

there are no victim services providers available to provide such help (ABA 23).

(3) Coordination of the state judicial system with other community resources:

Encourage and support the development and continuing operation of a state or local task force or coordinating council on elder abuse issues (ABA 24).

Support existing task forces or coordinating councils on elder abuse (ABA 24).

Encourage evolving or existing task forces or coordinating councils on family violence or domestic violence to incorporate elder abuse advocates into their membership and elder abuse issues into their agenda (ABA 24).

Include APS and aging services providers on court advisory council or developing other mechanisms for establishing linkages with those organizations and others that address elder abuse (ABA 25).

Encourage and support the development and continued operation of elder abuse multidisciplinary teams (ABA 26).

Encourage and support the development of protocols or memoranda of understanding between various entities involved in elder abuse cases (ABA 27).

Ensure that judges and court personnel are familiar with APS, aging, and other social services providers in their community, and have brochures or other materials from those agencies so that they can direct an older abused person to appropriate service providers (ABA 28).

Encourage and support the development of a “court social worker” or “court ombudsman” program to help older, disabled, incapacitated, or other individuals by giving them information about social services and other community organizations, linking them to social services and other community organizations, assisting them with the completion of pro se documents, and helping them understand the court process (ABA 29) [].⁴⁹

The above guidelines were adopted by the American Bar Association, Commission on Law and Aging, Section on Real Property, Trust and Estate Law - Report to the House of Delegates: Resolution.⁵⁰ Recognition of the special challenges of elder victims should be made by all courts across the Commonwealth with the goal of making accommodations as needed to overcome these obstacles. In addition to the above, these include:

Strategizing on ways to give cases involving an elder victim priority.

Enabling at least temporary PFA orders for elder victims to be obtained through telephone or making other accommodations, particularly for those who are unable or for whom it is especially difficult to travel to court due to medical, disability, mobility or other challenges.

Physical changes or modifications to courtrooms and attendant areas, including separate waiting rooms, visual and hearing amplification systems or aids, colored carpeting, etc.

Transportation assistance and court accompaniment to enable elders to get to and from and navigate the courthouses.⁵¹

b) Pilot “Elder Court”

Specialized courts, dockets and court-based projects focused on the problems of elders are emerging “best practices” throughout the country. Their focus is on elder victims, witnesses and/or offenders. The Committee recommends that the Supreme Court encourage one or more pilot “elder courts” in jurisdictions where there are large, documented numbers of elders and/or elder victims. The purpose would be to provide focused services such as a modified courtroom or court calendar, for example, for elders based on the ABA model and guidelines.⁵² Philadelphia court leaders have expressed an interest in pursuing such a pilot court.

c) Elder Clinics and Programs

The Committee was asked to consider other potential resources that would assist elders in obtaining information and services, including materials on estate planning. Members discussed the idea of collaborating with and encouraging colleges, universities, and law schools to develop elder clinics and other programs to assist elder Pennsylvanians in accessing social services. These institutions, with appropriate supervision, could also draft or review simple documents, such as a POA or a living will. While the Committee members strongly endorse this concept, it was recognized that many details need to be carefully considered, including, but not limited to, which institutions would be most appropriate to encourage and collaborate with, what types of services could be offered, what resources could be made available to the institutions from the government or private organizations, what costs could be reasonably expected, and possible sources of funding.

d) Access to Civil Legal Aid for Pennsylvania Elders

The Committee discussed the growing number of elders who need access to civil legal aid to address critical legal issues, including those affecting basic human needs of safety, shelter, and sustenance, their rights, and access to justice.

A report released in May 2014 by the Pennsylvania Civil Legal Justice Coalition to the Pennsylvania Senate Judiciary Committee highlights a growing crisis in the state’s civil justice system. In *Toward Equal Justice for All: Report of the Civil Legal Justice Coalition to the Pennsylvania State Judiciary Committee*, live testimony, written statements, and studies presented at three statewide hearings comprehensively document that the lack of representation for low-income, unrepresented litigants negatively affects the quality of justice for those unable to afford counsel, and undermines the rule of law.⁵³

Pennsylvania Chief Justice Ronald D. Castille, Honorary Chair of the Coalition, testified at the May 23, 2013 hearing: “The unfortunate and often tragic fact is that many Pennsylvanians face formidable legal situations in our civil courts where those citizens may face dire consequences as the result of a civil legal matter that can greatly impact their lives or their futures. The vast majority of those citizens are left to fend for themselves in an unfamiliar courtroom without legal representation.”⁵⁴ The Chief Justice further remarked that the Commonwealth should treat civil legal services for indigent individuals, families and elders as an important government service. The report, which includes the Chief Justice’s testimony, concludes that increased civil legal aid is needed to ensure fairness for all in the justice system, help streamline the court system and maximize Commonwealth funds.

Our Commonwealth is facing a “civil justice crisis” in which at least 80 percent of the critical legal needs of most low-income individuals and families go unmet. According to a recent IOLTA Report, “[o]nly one in five low-income Pennsylvanians having a critical legal problem receives legal help from any source.” Legal aid organizations — the core response to serving the legal needs of the poor — are drastically underfunded. Even with *pro bono* assistance, the great majority of low-income Pennsylvanians’ legal needs are not met.⁵⁵

The stakes are enormous for elders who cannot afford an attorney for their most basic legal problems and must navigate the complex legal system alone.

The recent economic downturn has exacerbated the crisis of the unavailability of counsel. Those with low and moderate income have been severely affected, with high rates of foreclosures, abuse,

unemployment, and reductions in public benefits intended to alleviate poverty. These economic hardships have led to a growth in a wide range of legal problems while, at the same time, there has been a radical decline in funding for civil legal aid – from the federal Legal Services Corporation, the IOLTA program, the state legislature, private foundations, local government contracts, private donors, and other sources. This confluence has led to a dramatic increase in the unmet civil legal needs of low income people and a surge in the numbers of unrepresented litigants in the Pennsylvania courts.

Poverty involving elders in Pennsylvania is severe: 10.1 percent of older women live in poverty. Seniors in Pennsylvania also face alarming rates of *deep poverty*, defined as less than 50 percent of the federal poverty level, surviving on less than \$500/month. Deep poverty for Pennsylvanians 65 and over rose 11 percent between 2011 and 2012. The National Women’s Law Center reports that 750,000 female elders across the nation live in deep poverty, with dramatic increases from 2011-12.⁵⁶

The growing justice gap in Pennsylvania reflects a national trend. According to a 2009 study of the “justice gap” by the federal Legal Services Corporation, there is one attorney for every 429 people above the poverty level in the United States.⁵⁷ For people eligible for legal services, there is one attorney for every 6,415 people.

Access to civil legal services in basic human needs cases provides substantial economic and social benefits to individual litigants and the community, while significant economic and social harm to individuals and the community is inflicted when critical legal needs are not met. Funding civil legal aid produces dramatic economic and social benefits for Pennsylvania: for each dollar spent on legal aid, there is an *eleven dollar return* to Pennsylvania and its residents.⁵⁸ Civil legal representation serves Pennsylvania businesses and saves costs associated with domestic violence, foster care, child custody, housing, healthcare, crime and imprisonment.

The Committee recognizes the critical importance of access to civil legal aid, for low-income and vulnerable elders. The Committee recommends that consideration be given to how to meet the civil justice crisis in the Commonwealth.

C. Committee Recommendations

1. The Committee recommends that a victim’s age be collected by police departments on all criminal complaint forms, and that information be included in the Unified Judicial System’s Common Pleas Case Management System (“CPCMS”). The Committee also recommends that the victim’s age be reported to the AOPC Research and Statistics Department.
2. Criminal Matters
 - a. The Committee supports enhanced mandatory minimum sentences in addition to those listed in 42 Pa.C.S. § 9717 for the conviction of crimes against elders. There are strong policy and practical justifications for such enhancements. However, the Committee also recognized that there may be countervailing considerations. Ultimately, the issue of enhanced mandatory minimum sentences for crimes against elders is a legislative issue. The General Assembly should determine the specific additional crimes for which enhanced mandatory minimum penalties should apply. The Committee also recommends that the Pennsylvania Commission on Sentencing consider increasing the offense gravity score for crimes involving elder victims.
 - b. The Committee recommends that the Comment to Pa.R.Crim.P. 500 be amended to help ensure the testimony of elder victims and witnesses in criminal cases can be preserved. It further recommends that educational efforts be undertaken to ensure the bench and bar are aware of this Rule and its implications for cases involving elders.
 - c. The Committee recommends that district attorneys consider requiring municipal police departments to obtain approval before filing criminal charges in certain cases involving elder victims 60 and over.

- d. The Committee recommends that advocates, attorneys, law enforcement, and courts work collaboratively with the OVS, OVA and other victim service providers to continue to evaluate and improve services to elder crime victims.
3. Civil Matters
 - a. The Committee recommends the creation of a civil private right of action for elder abuse or exploitation, such as the one recognized in House Bill 2057. Concurrently, the Committee recommends that the award of attorneys' fees or other sanctions may also be appropriate for the frivolous pursuit of causes of action alleging financial abuse or exploitation.
 - b. The Committee recommends that the General Assembly consider enacting amendments to Pennsylvania's Slayer's Statute, 20 Pa.C.S. §§ 8801-15, to include not only homicide, but also convictions of specified crimes resulting in elder abuse, neglect, or exploitation. Such statutory expansion would be a progressive and significant step in addressing both prevention and remediation of elder abuse.
 4. Access to Justice
 - a. The Committee recommends, consistent with the recommendations of the Task Force's Report, the Advisory Council consider and, if appropriate, the Supreme Court adopt, the ABA's 29 recommended guidelines for state courts to increase access to justice for Pennsylvania's elders.
 - b. The Committee recommends the Supreme Court authorize a pilot "Elder Court" in a judicial district, with consideration given to Philadelphia.
 - c. The Committee recommends that the Advisory Council study the feasibility and benefits of collaborating with and encouraging colleges, universities, and law schools to develop elder clinics and other programs to assist elder Pennsylvanians in accessing social services and, with appropriate supervision, drafting or reviewing simple documents, such as a POA or living will. The development of such elder clinics could provide tremendous benefits to elders.
 - d. The Committee recommends that the General Assembly provide greater and more consistent funding and support of civil legal aid, including services specifically targeted to low income Pennsylvania elders. The Committee further recommends that bar associations, AAAs, the Department of Aging, law schools and other organizations in the aging network strengthen their partnership with, support and fund civil legal aid resources for elders. This recommendation is timely with the 2014 release of the Civil Legal Justice Coalition Report, and merits immediate attention. It will have a significant impact on the prevention and remediation of elder abuse, as well as the safety, shelter, and economic security of Pennsylvania's elders.

D. Timing and Fiscal Impact

For Recommendation 1, regarding the inclusion of a victim's age on criminal complaint forms, this measure should be raised with the Supreme Court for referral to the Criminal Procedural Rules Committee for a determination of whether Pa.R.Crim.P 504 should be amended. If approved, the criminal complaint form should be amended by the AOPC to include a place for the victim's age to be added. The AOPC should begin to collect data about victim ages from criminal and PFA matters. If it is determined that a Rule change is warranted, and new criminal forms be developed, some cost will be associated with the change and development of the forms; however, the Committee cannot determine the extent of that cost. This Recommendation could be implemented immediately.

Recommendation 2a regarding increases in mandatory minimum sentences for certain crimes against elders and that sentencing guidelines be enhanced should be referred to the General Assembly for a financial analysis.

For Recommendation 2b that the Comment to Pa.R.Crim.P. 500 be amended to clarify when testimony of elders may be preserved, it is suggested this matter be referred to the Criminal Procedural Rules Committee. Such an amendment could be implemented immediately.

It is suggested that the educational recommendations 2b and 2c regarding the use of procedures identified in Pa.R.Crim.P. 500 and Allegheny County Local Rule (requiring approval by the District Attorney's Office before certain cases involving elder victims are filed), be referred to the AOPC Judicial Education Department and to the PDAA. There will be some modest cost associated with increased educational efforts. These efforts could begin immediately.

Recommendation 2d, regarding collaborative efforts by OVS, OVA and victim service providers does not necessarily have a fiscal aspect to it. On the contrary, better information sharing and collaboration will likely save money for all interested parties.

There does not seem to be any fiscal impact regarding Recommendation 3a – civil matters.

The recommendation 3b to amend Pennsylvania's "Slayer Statute," to prevent abusers from benefiting from the estate of an elder, can be implemented in the near future and may have a significant impact on the prevention and remediation of elder abuse. The only costs associated with this recommendation would be those incurred through the legislative process.

It is recommended the Advisory Council consider the ABA's 29 recommended guidelines for state courts to increase access to justice for Pennsylvania's elders. (Recommendation 4a). These recommendations, if adopted, will likely need to be implemented over time.

With regard to Recommendations 4b (Elder Court) and 4c (Elder Law Clinics and Programs), there will be a financial impact. Both of these recommendations will require further study to determine their feasibility. These recommendations should be studied by the OEJC and the Advisory Council.

Recommendation 4d, civil legal aid for Pennsylvania elders, necessarily has a fiscal component. This matter should be referred to the Legislature.

The Committee believes the recommendations in this section will have a significant impact on reducing elder abuse and neglect through greater educational initiatives, mandatory prison sentences for offenders, better tracking of elder crime, greater collaboration among victim service providers, the creation of private rights of action, increased funding, and promoting access to justice for elders.

Additional funding for the recommendations in this Report may be available through appropriations from the General Assembly, or possibly through grants or collaboration with other state agencies, such as the Department of Aging and DHS. Funds for some initiatives may be available through Criminal Justice Advisory Boards or, as noted above, through the PCCD. Another consideration could be to generate funds through costs of prosecution in elder abuse cases, or through fees, although increased imposition of such fees is disfavored. The sources of such funding are matters for the General Assembly to consider.

E. Timing and Impact

Many of the initiatives in this Report call for funding, some relatively modest and some significant. The Committee urges that funding be found to support these important recommendations, as many will not occur without financial support. Given the scope of the elder abuse and neglect problem in Pennsylvania, the Committee believes finding ways to financially support these recommendations as soon as possible is critical.

ENDNOTES AND REFERENCES

- 1 Pennsylvania Dep't of Aging, *Older Adult Protective Services Annual Report, FY 2012-2013*, 7, http://www.aging.state.pa.us/portal/server.pt/community/agency_publications/17894.
- 2 US Dep't of Justice, Nat'l Inst. of Justice, *Financial Exploitation of the Elderly*, <http://www.nij.gov/topics/crime/elder-abuse/Pages/financial-exploitation.aspx>.
- 3 Nat'l Conference of State Legislatures, *Financial Crimes Against the Elderly 2012 Legislation*, 1, <http://www.ncsl.org/research/financial-services-and-commerce/financial-crimes-against-the-elderly-2012-legis.aspx>; see also United States Gov't Accountability Office, *National Strategy Needed to Effectively Combat Elder Financial Exploitation*, 1, <http://www.gao.gov/products/GAO-13-110>.
- 4 See e.g., Jane A. Black, *The Not-so-Golden Years: Power of Attorney, Elder Abuse, and Why Our Laws Are Failing a Vulnerable Population*, 82 St. John's L. Rev. 289 (2008), <http://scholarship.law.stjohns.edu/lawreview/vol82/iss1/7>.
- 5 See, e.g., Elizabeth O'Brien, *Power of attorney: It's easily abused*, Wall Street Journal Market Watch (Mar. 19, 2013), <http://www.marketwatch.com/story/power-of-attorney-its-easily-abused-2013-03-19>.
- 6 Compare UPAA §116.
- 7 In Pennsylvania, agencies operating under the Older Adults Protective Services Act have statutory authority to challenge the actions of an agent acting under a POA in certain circumstances. See 20 Pa. C.S. § 5604(d)(1). Similarly, guardians may have standing to demand an accounting. *Id.* § 5604(c)(1). Pennsylvania courts have also recognized standing to challenge a POA in various circumstances to include, for example, a trust, *In re Trust of Golub*, 27 Fiduc. Rep.2d 260, (Pa. Com. Pl. Phila. 2006); presumed intestate heirs or known beneficiaries, *Nikoden v. Losey*, 27 Fiduc. Rep.2d 28 (Pa. Com. Pl. Northampton 2005), *In re Wills, Alleged Incapacitated Person*, 20 Fiduc. Rep.2d 16 (Pa. Com. Pl. Adams 1998); and beneficiaries under a will, *Haskins, et al. v. Carroll, et al.*, 25 Fiduc. Rep.2d 361 (Pa. Com. Pl. Bradford 2005).
- 8 Ala Code § 26-1A-116; Ark Code Ann. § 28-68-116; Colo Rev. Stat. § 15-14-716; 2014 Haw. Rev. Stat. § -12; Idaho Code Ann. § 15-12-116; Iowa Code § 633B.116; Md. Code Ann. Est. & Trusts § 17-103; Me. Rev. Stat., tit. 18 § 5-916; Mont. Code Ann. § 72-31-321; Neb. Rev. Stat. § 30-4016; N.M. Stat. § 45-5B-116; Ohio Rev. Code Ann. § 1337.36; Va. Code Ann. § 64.2-1614; W.Va. Code § 39B-1-116; Wis. Stat. Ann. § 244.16.
- 9 Act. of July 2, 2014, P.L. 855 No. 95 ("Act 95 of 2014"), § 3 (amending 20 Pa. C.S. § 5601.3(d)(1)). Act 95, § 5 enables a party who in good faith accepts a POA without actual knowledge that a signature or mark thereon is not genuine may, without liability, rely upon the genuineness of the signature or mark of individuals enumerated in the Act. It is assumed this statute "legislatively overrules" the result reached in *Vine v. Commonwealth*, 9 A.3d 1150 (Pa. 2010). While other amendments have been made to the Power of Attorney statute through Act 95, such as notice and acknowledgment provisions, this Act also allows a third party to request additional assurance (e.g., certification or opinion of counsel) that a POA is valid; adds a new section governing the power to make limited gifts; enumerates what an agent may do in regard to gifts; and adds a new section outlining the duties of agents who have accepted appointment as an agent (e.g., acting in accordance with principal's reasonable interests, loyalty, good faith). On this last point it is unclear what effect, if any, this has on the fiduciary relationship between principals and agents, formerly found at 20 Pa.C.S.A. § 5601(e) (amended by Act 95, § 1).
- 10 See United States Gov't Accountability Office, *National Strategy Needed to Effectively Combat Elder Financial Exploitation*, 1, <http://www.gao.gov/products/GAO-13-110>; see also, Nat'l Conference of State Legislatures, *Financial Crimes Against the Elderly 2012 Legislation*, 1, <http://www.ncsl.org/research/financial-services-and-commerce/financial-crimes-against-the-elderly-2012-legis.aspx>.
- 11 See also J. Rhein, *No One in Charge: Durable Powers of Attorney and the Failure to Protect Incapacitated Principals*, 17 Elder L.J. 165, 181-182 (2009) (noting that many states have broad standing provisions and that § 116 of the UPAA "may be the only means to detect and stop agent abuse of an incapacitated principal.")
- 12 The National Center for State Courts noted "[c]ourt leaders would have a powerful voice on issues related to broadening standing of third parties to demand an accounting from an agent suspected of using a power of attorney against the interests of the principal." Susan Keilitz & Paula Hannaford-Agor, Nat'l Ctr. for State Courts, *Addressing Power of Attorney Abuse: What Courts Can Do to Enhance the Justice System Response*, 12 (2013), http://www.eldersandcourts.org/~media/Microsites/Files/cec/POA%20White%20Paper%20Final%209_3_2013.ashx.
- 13 In addition, while not binding on a Pennsylvania court, case law from other jurisdictions provides some guidance. See *Santucci v. Citizens Bank of R.I.*, 799 A.2d 254 (R.I. 2002)(holding there is no private right of action against a bank for failing to stop a transaction); *Shamgochian v. Bank of America*, 2013 WL 1098256 (Cal.App. 5 Dist. 2013)(same); *Repub.Nat'l Bank of Miami v. Johnson*, 622 So.2d 1015 (Fla. App.3 Dist 1993)(holding banks have no duty to halt suspicious transactions).
- 14 The Committee was advised that banks operating in jurisdictions where mandatory reporting is the law also report all suspected financial abuse in other jurisdictions where they operate (even if mandatory reporting is not required) since different policies would be impractical.
- 15 Ark. Code Ann § 12-12-1708; Cal. Welf. & Inst. Code § 15630.1; Colo. Rev. Stat. § 18-6.5-108; D.C.

Code Ann. § 7-1903; Fla. Stat. Ann. § 415.1034; Ga. Code Ann. § 30-5-4; Haw. Rev. Stat. § 412:3-114.5; Kan. Stat. Ann. § 39-1431; Md. Fin. Inst. Code Ann. § 1-306.

16 The Committee would defer to the Legislature to determine how broadly the phrase “financial institutions” should be defined.

17 See Wash. Rev. Code § 74.34.215.

18 Nationwide SAR Initiative, *The Nationwide SAR Initiative*, <http://nsi.ncirc.gov/?AspxAutoDetectCookiesSupport=1>.

19 See also Federal Financial Institutions Examination Council, Bank Secrecy Act/Anti-Money Laundering InfoBase, *Suspicious Activity Reporting - Overview*, http://www.ffiec.gov/bsa_aml_infobase/pages_manual/OLM_015.htm.

20 *Id.* at n. 73.

21 Leslie Callaway, *Stopping the Financial Abuse of Seniors*, *ABA Bank Compliance*, July-August 2011, 14-15, <https://www.aba.com/Products/bankcompliance/Documents/JulyAug11CoverStory.pdf>.

22 Letter from Kathleen M. Murphy, President & CEO, Maryland Bankers Association, to Members, Maryland Bankers Association (Sept. 14, 2012), <http://www.mdbankers.com/External/WCPages/WCWebContent/WebContentPage.aspx?ContentID=1695>.

23 The GAO report cited above stated that elder financial exploitation is underreported by banks and that bank staff may not be aware of signs of or how to report it. See United States Gov’t Accountability Office, *National Strategy Needed to Effectively Combat Elder Financial Exploitation*, 32, <http://www.gao.gov/products/GAO-13-110>. The GAO report was based on interviews conducted in four states, including Pennsylvania. The report states that banks are important partners and well-positioned to recognize, report and provide evidence about suspected financial abuse.

24 This recommendation is at odds with the recommendation in a portion of House Bill 2014 of 2014, Pr. No. 3326, which would make financial institutions “voluntary reporters” of suspected financial abuse. The Legislature may also consider what penalties may be appropriate for the failure to report. See, e.g. Colo. Rev. Stat. §18-6.5-108(1)(c)(providing a fine of \$50 - \$750 plus six months imprisonment); Md.Fin.Inst.Code.Ann. §1-305(c)(2)(providing a civil penalty of \$1,000 to \$5,000 for willful failure to report). In California, it has been asserted that not all financial institutions are complying with mandatory reporting laws. An effort is being considered to increase the statutory fine from \$1000 to \$25,000 as an incentive to improve reporting.

25 The Committee members recognize that banks and other financial service providers may not have the date of birth for some customers who opened accounts prior to 2001.

26 It is unclear if statutory authorization would be necessary for such assistance.

27 See 35 P.S. § 10225.304 and 6 Pa. Code §§ 15.62 & 15.63.

28 42 Pa.C.S.A. § 9728(e),(f).

29 The Bench Books could include information pertaining to procedures for freezing assets that may be necessary for restitution, 42 Pa. C.S.A. § 9728(e) and (f), and procedures for recording testimony pursuant to Pa. R.Crim.P. 500.

30 The Committee suggested that if discussions turn toward a specific case likely to come before the court, the judge can decline to be present or participate in that portion of the discussion.

31 See Department of Health and Human Services, *The Elder Justice Roadmap A Stakeholder Initiative to Respond to an Emerging Health, Justice, Financial and Social Crisis*, 21, http://ncea.acl.gov/Library/Gov_Report/docs/EJRP_Roadmap.pdf; see also note 34, *infra*.

32 See National Center for State Courts, *Elder Abuse Resource Guide*, <http://www.ncsc.org/topics/children-families-and-elders/elder-abuse/resource-guide.aspx>.

33 See Pennsylvania Dep’t of Aging, *Older Adult Protective Services Annual Report, FY 2012-2013*, 7, http://www.aging.state.pa.us/portal/server.pt/community/agency_publications/17894.

34 Lori A. Stiegel, American Bar Association, *Final Technical Report to the National Institute of Justice on ‘A Multi-Site Assessment of Five Court-Focused Elder Abuse Initiatives’* (2010), 1, http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011_aging_ea_fin_rep_ct_fcus_authcheckdam.pdf, citing Lori A. Stiegel, American Bar Association, *Recommended Guidelines for State Courts Handling Cases Involving Elder Abuse* (1995).

35 Under current case law, when age is an element of an offense, or relevant to sentencing, it must be included in the Information. Victim age is not necessarily included in the Affidavit of Probable Cause or the Criminal Complaint.

36 42 Pa.C.S. § 9717. Sentences for offenses against elderly persons.

(a) Mandatory sentence.--A person under 60 years of age convicted of the following offenses when the victim is over 60 years of age and not a police officer shall be sentenced to a mandatory term of imprisonment as follows:

18 Pa.C.S. § 2702(a)(1) and (4) (relating to aggravated assault) - not less than two years.

18 Pa.C.S. § 3121 (relating to rape) - not less than five years.

18 Pa.C.S. § 3123 (relating to involuntary deviate sexual intercourse) - not less than five years.

18 Pa.C.S. § 3922 (relating to theft by deception) - not less than 12 months, but the imposition of the minimum sentence shall be discretionary with the court where the court finds justifiable cause and that finding is written in the opinion.

(b) Eligibility for parole.--Parole shall not be granted until the minimum term of imprisonment has been served.

37 The Committee members assume this can be accomplished by simply changing the criminal complaint form. It is not known if this will also require a change to Pa.R.Crim.P. 504, Contents of Complaint.

38 See, e.g., Pa.R.Crim.P. 403, Contents of Citation.

39 Petitions for emergency court orders under the OAPSA, 35 P.S. § 10225.307, necessarily apply to the elderly, so a separate recommendation is not necessary.

40 For example, offenses under the following provisions of 18 Pa.C.S.:

(1) § 3921 (relating to theft by unlawful taking or disposition).

(2) § 3922 (relating to theft by deception).

(3) § 3923 (relating to theft by extortion).

(4) § 3924 (relating to theft of property lost, mislaid, or delivered by mistake).

(5) § 3925 (relating to receiving stolen property).

(6) § 3926 (relating to theft of services).

(7) § 3927 (relating to theft by failure to make required disposition of funds received).

(8) § 4101 (relating to forgery).

(9) § 4105 (relating to bad checks).

(10) § 4106 (relating to access device fraud).

(11) § 4107 (relating to deceptive or fraudulent business practices).

(12) § 4113 (Misapplication of entrusted property and property of government or financial institutions).

(13) § 4114 (Securing execution of documents by deception).

(14) § 4117 (relating to insurance fraud).

(15) § 4120 (relating to identity theft).

This list of crimes is similar to, but more extensive than, those identified in House Bill 2057 of 2014, Pr. No. 3054.

41 204 Pa.Code § 303.1-303.18.

42 Criminal cases charging the following require approval of the Allegheny County District Attorney's office: Neglect of a Care-Dependent Person (18 Pa.C.S. § 2713); Aggravated Assault (18 Pa.C.S. § 2702); Robbery (18 Pa.C.S. § 3701); Rape (18 Pa.C.S. § 3121); Statutory Sexual Assault (18 Pa.C.S. § 3122.1); Involuntary Deviate Sexual Intercourse (18 Pa.C.S. § 3123); Sexual Assault (18 Pa.C.S. § 3124.1) or Aggravated Indecent Assault (18 Pa.C.S. § 3125); Theft by Deception (18 Pa.C.S. § 3922- Felony grade); Identity Theft (18 Pa.C.S. § 4120); Misapplication of Entrusted Property and Property of Government or Financial Institutions (18 Pa.C.S. § 4113); Home Improvement Contracts (73 P.S. § 517.7) and the victim is of 65 years old or older. ** Note: Allegheny County has determined age 65 to be key, however the Task Force recommends identifying elders as age 60 and older.

43 Joint State Government Commission, Report of the Advisory Committee on Decedents' Estates Laws, *Powers of Attorney: Proposed Amendments to the Probate, Estates and Fiduciaries Code* (March 2010), 42.

44 Katherine C. Pearson, *Should "Elder Abuse" Trigger Disinheritance?* Elder Law Prof Blog (Nov. 10, 2013), <http://lawprofessors.typepad.com/elder-law/2013/11/should-elder-abuse-trigger-disinheritance.html>.

45 Lisa C. Dumond, *The Undeserving Heir: Domestic Elder Abuser's Right to Inherit*, 23 *Quinnipiac Prob. L.J.* 214, 222-23 (2010) (comparing four statutes that disinherit elder abusers).

46 Kymberleigh N. Korpus, *Extinguishing Inheritance Rights: California Breaks New Ground in the Fight Against Elder Abuse But Fails to Build an Effective Foundation*, 52 *Hastings L. J.* 537, 569 (2001) (providing rationale for adapting the unworthy heir statute to the elder abuse context).

47 Adam D. Matherly, *Washington State Slayer and Abuser Statute Expanded*, The ADM, esq. Blog Site (May 19, 2011), <http://admesq.wordpress.com/2011/05/19/washington-state-slayer-and-abuser-statute-expanded>.

48 See Lori A. Stiegel, American Bar Association, *Final Technical Report to the National Institute of Justice on 'A Multi-Site Assessment of Five Court-Focused Elder Abuse Initiatives'* (2010), 5-6, http://www.americanbar.org/content/dam/aba/uncategorized/2011_aging_ea_fin_rep_ct_fcus.authcheckdam.pdf.

49 See *id.* at 6-8.

50 American Bar Association, Commission on Law and Aging, Section on Real Property, Trust and Estate Law, *Report to the House of Delegates*, 4-6 (Aug. 2012), <http://social.un.org/ageing-working-group/documents/egm/AmericanBarAssociation-CommissiononLawandAging-ReporttotheHouseofDelegates.pdf>.

51 It is further recommended that elders be provided with information regarding their rights during hearings, or have information available to assist the elder in contacting a local advocate.

52 National Center for State Courts, Center for Elders and the Courts, *Programs and Guidelines*, <http://www.eldersandcourts.org/Elder-Abuse/Programs-and-Guidelines.aspx>.

53 *Toward Justice For All: Report of the Civil Legal Justice Coalition to the Pennsylvania State Judiciary Committee* (April 2014), <http://www.philadelphiabar.org/WebObjects/PBA.woa/Contents/WebServerResources/CMSResources/ReportoftheCivilLegalJusticeCoalition.pdf>.

54 *Id.* at 20.

55 The Resource for Great Programs, Inc., *Report on Pennsylvania's Access to Justice Act, FY 2004-2011*, 6 (May 2012), <https://www.pabar.org/public/probono/Full%20Report.pdf>.

56 National Women's Law Center, *National Snapshot: Poverty among Women & Families, 2012* (Sept. 2013), <http://www.nwlc.org/sites/default/files/pdfs/povertysnapshot2012.pdf>; Alfred Lubrano, *Steep rise seen in deep poverty among elderly*, Philadelphia Inquirer, Oct. 11, 2013, http://articles.philly.com/2013-10-11/news/42904099_1_deep-poverty-north-philadelphia-law-center.

57 Legal Services Corporation, *Documenting the Justice Gap In America: The Current Unmet Civil Legal Needs of Low-Income Americans* (Sept. 2009), 19, http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf.

58 Pennsylvania Interest on Lawyers Trust Account Board, *The Economic Impact of Outcomes Obtained for Legal Aid Clients Benefits Everyone in Pennsylvania* (April 11, 2012), 1, <https://www.paiolta.org/wp-content/uploads/2014/05/Economic-Impact-of-Legal-Aid.pdf>.

Elder Abuse and Neglect Bench Card

What Is It?

Abuse, Exploitation, or Neglect Against Individuals Over Age 60

Most Frequently Reported Forms of Elder Abuse:

- Self Neglect
- Caregiver Neglect
- Financial Exploitation
- Emotional Abuse
- Physical Abuse
- Sexual Abuse

Primary Risk Factors

- An adult (child or individual) who is dependent upon an older adult
- A history of domestic violence in the home
- Living with others in isolation
- A possible abuser having a mental illness or substance abuse problem

Signs of Abuse

- Bruises or other injuries
- Poor Hygiene
- An elderly individual who appears unusually withdrawn or evasive
- An appearance that an individual exerts excessive control over actions or finances of an elderly individual

Resources:

Local Area Agency on Aging

PA Department of Aging
1-800-490-8505

Local resources available at www.aging.state.pa.us

PA Attorney General Elder Abuse Unit
1-866-623-2137

Email: elderabuse@attorneygeneral.gov

Office of the State Long Term Care Ombudsman
717-783-8975

Local District Attorney or other Local Resources



Overarching Findings and Recommendations of the Elder Law Task Force Concerning Court Administration, Judicial Education, Funding, and Public Awareness

I. Creation of an Office of Elder Justice in the Courts

A. Issue Statement

A sustained and significant effort will be required to implement the Task Force's recommendations and coordinate activities among the court system's elder justice partners. Many of the initiatives recommended are complex, multi-year projects.

B. Task Force Findings

1. The Task Force found that the creation of a new Office of Elder Justice in the Courts ("OEJC") within AOPC was necessary to effectively and efficiently implement the Task Force's recommendations. The functions of the new office will be consistent with CCJ and COSCA recommendations that outline activities which states should be undertaking to address issues relating to guardianship, elder abuse and access to justice.

2. COSCA calls on each state's administrative office of the courts to establish a state guardianship coordinator position to provide staff support to the recommended statewide guardianship task force (or Guardianship Court Improvement Program ("GCIP")), if created. Suggested responsibilities for the coordinator include: working with local courts to ensure compliance with guardianship case monitoring policies and procedures; identifying sources of funding for guardianship initiatives, including the availability of grants; providing training and

technical assistance to judges, court staff, attorneys, guardians and others; and overseeing the implementation of recommendations developed by the statewide guardianship task force.¹⁶⁹

3. CCJ and COSCA recommend court systems increase judicial and court awareness of aging issues and elder abuse by: increasing the availability of training for judges and court staff on elder issues; encouraging local courts to examine current responses and develop innovative methods and approaches to elder abuse; developing court performance standards and case management systems that improve documentation and oversight of cases involving elders; encouraging judicial and court participation in multi-agency partnerships to combat elder abuse; advancing the use of technology to identify and document cases that involve older persons; improving monitoring and compliance practices; developing statewide model practices; and encouraging funding agencies to provide adequate resources to enable the courts to identify and respond to elder abuse.¹⁷⁰

C. Task Force Recommendations

1. Pursuant to Findings 1, 2 and 3, the Task Force recommends that an OEJC be established to assist the Supreme Court in implementing the recommendations in this Report. The OEJC is anticipated to benefit the Commonwealth's agencies that provide guardianship services and respond to elder abuse by promoting collaborative efforts. The Task Force believes collaborations with these agencies will result in elder justice system improvements, and possibly conserve resources by eliminating the duplication of efforts.¹⁷¹ The Task Force further believes an OEJC will assist all Pennsylvanians through its efforts to protect vulnerable elders by addressing issues relating to guardianship, elder abuse, and access to justice.

2. The Task Force recommends the OEJC be staffed by a director. The director will require assistance from staff with skills in research, legal analysis and information technology, and will also need secretarial assistance.

3. During the early deliberations of the Task Force, it became clear that AOPC staff resources will be required to implement the recommendations in this Report. Given the unanimity of the Task Force's members in urging the Supreme Court to establish an OEJC, Madame Justice Todd presented the Task Force's recommendation to the Supreme Court for consideration, and the Supreme Court approved the establishment of an OEJC. The AOPC's Assistant Director of Judicial Programs will become the director of the OEJC. Research, grant-writing, legal analysis, information technology and secretarial services will be provided by AOPC staff.

D. Timing and Fiscal Impact

The OEJC will be established in January 2015. Because AOPC personnel will be able to provide services to the OEJC, there is no immediate fiscal impact. Nevertheless, as the OEJC moves forward with the implementation of the initiatives and recommendations in this Report, additional resources and funding will be necessary.

II. Creation of an Advisory Council on Elder Justice in the Courts

A. Issue Statement

Given the multitude of Task Force recommendations to be implemented, the OEJC will require guidance regarding the priorities for implementation and collaborations to be established with the court system's elder justice partners.

B. Task Force Findings

The Task Force has made numerous recommendations that will require prioritization. Coordination and collaboration with the court system's elder justice partners will also be critical. An advisory body is necessary to provide guidance to the OEJC.

C. Task Force Recommendations

Pursuant to the above finding, the Task Force recommended that an Advisory Council on Elder Justice in the Courts (“Advisory Council”) be established to serve as a liaison to the executive and legislative branches, and to communicate with the AOPC and the Supreme Court regarding the implementation of the Task Force’s recommendations and other matters involving elder justice. Task Force members were unanimous in urging that the Supreme Court create an Advisory Council. Madame Justice Todd presented the Task Force’s request to the Supreme Court for consideration, and the Supreme Court approved the creation of the Advisory Council.

D. Timing and Fiscal Impact

The Advisory Council will be established in January 2015. The financial impact is anticipated to be minimal, as costs will be limited to travel expenses for members to attend meetings at the Pennsylvania Judicial Center.

III. Inclusion of Orphans’ Court Clerks in Unified Judicial System

A. Issue Statement

The Guardianship Monitoring Committee examined guardianship case monitoring practices in Orphans’ Court Clerks’ offices across the Commonwealth, and found a lack of consistent, statewide practices. In addition to case monitoring, the offices’ management practices, training of staff and computer systems vary widely. The variance in these practices and procedures makes it difficult to establish uniform practices relating to the monitoring and collection of guardianship data.

B. Task Force Findings

1. Responsibilities of Orphans’ Court Clerks include maintaining and docketing court guardianship records, administrative record-keeping tasks, and assisting Orphans’ Court Judges and litigants. Office management practices, case management procedures, staff training and computer systems vary widely from county to county. Under current law, except in home rule counties that have opted for a different structure, Orphans’ Court Clerks are elected or appointed officials who generally do not have a relationship with the judicial district’s President Judge or court administration office, and operate independently.

The Guardianship Monitoring Committee recommends that Orphans’ Court Clerks be responsible for docketing and monitoring a guardian’s compliance with several reporting requirements, and taking follow-up action.

Research conducted by the AOPC suggests that Orphans’ Court guardianship case-docketing practices are inconsistent and in need of improvement. In 2007, the AOPC attempted to obtain a reliable number of active current guardianships. Each Orphans’ Court Clerk’s Office was requested to provide all guardianship docket sheets for one year. The terminology and amount of information captured on the docket sheets varied widely. The Orphans’ Court Clerks did not consistently track and docket when a guardianship was terminated, or enforce the annual report submissions required of guardians by statute. Because of the variance in practice among the offices, the AOPC found it difficult to obtain a reliable number of current guardianships.

As related personnel of the UJS, Orphans’ Court Clerks have a responsibility to comply with requirements pertaining to uniform procedures, indexes and dockets as approved by the Supreme Court under Pa.R.J.A. 505(11).

2. An automated, statewide Orphans’ Court case management system will promote the standardized collection of guardianship data by Orphans’ Court Clerks, and assist them in fulfilling their guardianship monitoring responsibilities.

C. Task Force Recommendations

1. Pursuant to Finding 1, the Task Force recommends that Orphans' Court Clerks become employees of the UJS. Including Orphans' Court Clerks in the UJS will ensure that uniform practices, procedures and training can be effectively and efficiently administered statewide, and coordination with court administration offices will be improved.

2. Pursuant to Finding 2, the Task Force recommends the implementation of a statewide Orphans' Court case management system, which is tentatively planned for 2017. In the interim, the Task Force recommends that Orphans' Court Clerks make necessary upgrades to their case management systems in order to comply with the Guardianship Monitoring Committee's recommendations. Upgrades are necessary not only to adopt much needed monitoring practices, but also as a precursor to migrating Orphans' Court data into the statewide system.

D. Timing and Fiscal Impact

The transition of Orphans' Court Clerks from elected officials to appointed court personnel under the direct authority of the President Judge of each judicial district requires legislative action. The Orphans' Court Clerks, like the Prothonotary and Clerk of Courts, exist solely to serve the court system. Orphans' Court Clerks do not perform duties other than court duties, although in most counties, the office is combined with another office such as Register of Wills.

It is recommended that any effort to transition Orphans' Court Clerks into the UJS be coordinated with the efforts already underway to make Prothonotaries and Clerks of Court appointed court officials. Funding for office holders would become a state responsibility and is included in the proposed Clerk of Courts/Prothonotary Transfer Act, SB 1215 of 2014, Pr. No. 1716, by using funds already allocated to the counties in the county court reimbursement grant.

Several counties already have the functionality needed to track all guardianship data items recommended in this Report. There is a subset of counties that will be able to request this functionality from their software vendors without incurring additional costs. However, depending on the maintenance agreement each county has with its software vendor, some will have to pay to have data fields added to their current case management systems. Orphans' Court Clerks will require adequate time to perform any necessary software upgrades to comply with the recommendations in this Report. Upgrades may be undertaken as soon as practicable for the Orphans' Court Clerks and their counties.

E. Additional Comments

The AOPC Research and Statistics Department will provide technical assistance to the Orphans' Court Clerks as they work with their software vendors to obtain the system upgrades.

IV. Development of Bench Books for Guardianship and Elder Abuse Cases

A. Issue Statement

Pennsylvania bench books regarding guardianship and elder abuse cases would be a beneficial resource for the judiciary.

B. Task Force Findings

Judicial education concerning guardianships and elder abuse cases is lacking in Pennsylvania. While the Commonwealth's judges have access to general, national reference materials on guardianships and elder abuse, Pennsylvania bench books for these types of cases are not available. Uniform, statewide reference materials on issues related to guardianship and elder abuse cases are essential for judges.

C. Task Force Recommendations

Based on the above findings and recommendations from the Guardians and Counsel and Elder Abuse and Neglect Committees, the Task Force recommends that the OEJC and the AOPC Judicial Education Department, in consultation with interdisciplinary groups or practicing professional and non-professional guardians, develop bench books for guardianship and elder abuse cases.

D. Timing and Fiscal Impact

The timing of the development of the bench books will be ascertained at a later date, through consultation between the AOPC Judicial Education Department and the OEJC. The bench books will be electronically available on the UJS' website resulting in a modest cost associated with the printing of a small number of copies.

V. Creation of Guardianship Mediation Program

A. Issue Statement

Mediation in the guardianship context may have the potential to benefit AIPs, IPs, guardians and other interested parties.

B. Task Force Findings

1. In 2013, the Pennsylvania Supreme Court's Orphans' Court Procedural Rules Committee published proposed new rules, including new Rule 1.6 which states:

Rule 1.6. Mediation by Local Rule or Special Order:

The Court, by Local Rule or special order, may direct the parties to participate in private or court-sponsored mediation.

Note: Rule 1.6 has no counterpart in former Orphans' Court Rules.

Explanatory Comment: The confidentiality of mediation is provided by statute, see 42 Pa.C.S. § 5949.¹⁷²

(The Task Force notes that Proposed Rule 1.6 would provide for mediation in all Orphans' Court matters, and would not be limited to guardianship matters.)

2. The Pennsylvania Bar Association ("PBA") is currently considering a proposal of the Orphans' Court Mediation Subcommittee of its Alternative Dispute Resolution Committee to facilitate and encourage mediation by way of a model local rule. The proposal would provide for mediation of all Orphans' Court matters.

3. The Task Force finds that mediation of guardianship matters has been implemented in other states and has the potential to provide benefits and ameliorate some of the problems associated with guardianship decision-making; however, there is a need to assess its disadvantages and how such a process would work in practice.

C. Task Force Recommendations

Pursuant to Findings 1, 2 and 3, the Task Force recommends that the Advisory Council, with the assistance of the OEJC, study the advisability and feasibility of creating and supporting guardianship mediation programs in Pennsylvania. If the Advisory Council determines that such programs are advisable and feasible, it should also study the question of program structure and implementation.

D. Timing and Fiscal Impact

The recommended study can begin as soon as is practicable. The fiscal impact of this recommendation should be minimal as only travel and meeting expenses are anticipated.

VI. Increase of Guardianship Fees for Medicaid Nursing Home Patients

A. Issue Statement

Given concerns that independent guardians (attorneys, professional guardians or other practitioners) frequently do not monitor or advocate for the health and safety of nursing home residents and may be unresponsive to nursing home requests for information and assistance, an increase in the Pennsylvania Department of Human Services (“DHS”) (formerly known as the Department of Public Welfare) guardianship fees is warranted to encourage higher quality guardianship services.

B. Task Force Findings

1. DHS’s policy allows guardians of Medicaid nursing home residents to retain up to \$100 per month of income (in those cases where income exists) as payment for guardianship services.¹⁷³ Pennsylvania’s statute allows for payment of guardian fees from income, but does not place a dollar limit on those fees.¹⁷⁴ The Orphans’ Court does not have the discretion to award greater fees even though they may be deemed appropriate and necessary.

2. In many cases, nursing home residents under guardianship have complicated medical diagnoses and personal situations that demand a significant amount of a guardian’s attention and time. A guardian is frequently appointed to investigate and correct financial irregularities that may be the result of prior financial exploitation, misappropriation of funds, unpaid bills, etc., which requires expertise, effort and time. Limiting a guardian’s fees to \$100 per month in these cases creates a financially untenable situation in that the low dollar amount does not allow guardians to provide the attention necessary to manage the complicated needs and issues of the IP.

C. Task Force Recommendations

Based on Findings 1 and 2, the Task Force recommends that DHS’s policy be changed to allow the Orphans’ Court to authorize payment of guardianship fees greater than \$100 per month where the court determines greater fees are necessary because of the amount of the guardian’s time required to monitor and advocate for the incapacitated nursing home resident’s needs.

D. Timing and Fiscal Impact

This recommendation may be communicated to DHS as soon as is practicable. The fiscal impact of increasing the monthly amount of income is unknown, but will likely not be significant.

VII. Guardianship Support to be Billable as a Service Under the Medicaid Home and Community-Based Services Waiver

A. Issue Statement

Low-income individuals with disabilities and functional impairments frequently are placed in a nursing home although a less restrictive, less expensive level of care would be preferable.

B. Task Force Findings

1. In FY 2014, the average cost of individual nursing home care to the Pennsylvania Medicaid program was \$59,787 per year.¹⁷⁵ The average cost of individual home and community-based services during the same period under a Medicaid Waiver was less than half the cost of a skilled nursing facility at \$25,543 per year.¹⁷⁶

2. Independent guardians (attorneys, professional guardians, or other practitioners) may be paid only from an incapacitated person’s income. However, unlike guardians for individuals in facilities, guardians for incapacitated persons receiving home and community-based services under Medicaid are not eligible for the \$100 fee for guardians.

3. Some individuals declared “incapacitated” by the Orphans’ Court can be maintained safely in the community with adequate support. Currently, however, many IPs are shifted into nursing homes.¹⁷⁷ It should be recognized that the \$100 fee would not be adequate to support IPs residing in a community setting, including the management of a household, bill payment, and the management of services.

4. As the costs for the home and community-based waiver are less than half the cost of nursing home payments, allowing IPs to age in place with community-based services has the potential to save tax dollars while improving the quality of life of those under guardianship.¹⁷⁸

C. Task Force Recommendations

Based on Findings 1, 2, 3 and 4, the Task Force recommends that DHS be encouraged to pay guardians who find alternatives to an IP’s placement in a nursing home where the total cost to DHS for community-based services is 50% or less of the cost of a nursing home placement. This may be accomplished by amending the home and community-based waiver to allow guardianship support to be billable as a waiver service, either as part of an existing service category or as a new waiver service category. Such services would be reimbursed based on the guardian’s direct time working with and on behalf of the IP.

D. Timing and Fiscal Impact

The recommendation may be communicated to DHS as soon as is practicable. The fiscal impact of amending a home and community-based services waiver to allow guardianship support to be billable as a waiver service is unknown. However, the anticipated savings to the Medicaid program due to diversion from nursing homes may be significant.

VIII. Court Collaboration with Federal Representative-Payment and Fiduciary Programs

A. Issue Statement

The need for federal and state collaboration regarding representative-payment and fiduciary programs is “accentuated by ongoing demographic trends, including increases in the population of older people, as well as adults with dementia, intellectual disabilities, mental illness, substance abuse, and traumatic brain injuries.”¹⁷⁹ “Representative-payment programs are not [systemically] coordinated with guardianship systems and other payee systems serving the same population, putting vulnerable adults at risk of financial exploitation.”¹⁸⁰

B. Task Force Findings

1. GAO found an overlap of federal agency and state court programs serving incapacitated populations, but the extent of this overlap is not known. “Some state courts and federal agencies share certain information on a case-by-case basis. However, the absence of a systematic means for compiling and exchanging pertinent information may leave many incapacitated people at risk and result in the misuse of benefits and increased federal expense.”¹⁸¹

The ABA noted that, with respect to veterans, “some coordination does take place through the Uniform Veterans Guardianship Act. In states that have adopted this Act, state courts must notify the VA when they appoint a guardian for a veteran, and send copies of court orders and accountings.”¹⁸² Pennsylvania did not fully adopt the Uniform Veterans Guardianship Act, but enacted legislation making the Veterans Bureau (the precursor of the VA) a party in interest in the guardianship of incompetent veterans.¹⁸³

2. In August 2013, the ABA issued a resolution that urged courts with jurisdiction over adult guardianships and governmental agencies administering representative-payment programs “to collaborate with respect to information sharing, training and education in order to protect vulnerable individuals with fiduciaries who make financial decisions on their behalf.”¹⁸⁴

The ABA's resolution declared that "instances of misuse and exploitation of funds by guardians, representative payees and VA fiduciaries have been identified by the U.S. Government Accountability Office and other significant studies. There is a compelling need to protect funds managed by fiduciaries in all three arenas."¹⁸⁵ The resolution asserted the "systemic" sharing of information about specific cases and "coordination among SSA field offices, VA regional offices, and state . . . courts [will] make it easier to identify trends, develop training, recruit volunteers, and educate the public."¹⁸⁶

3. In January 2014, CCJ and COSCA adopted a resolution urging improved coordination and collaboration between state courts and state and federal governmental agencies that administer representative-payment programs for the purposes of protecting vulnerable adults placed under guardianship.¹⁸⁷

4. The extent to which Pennsylvania's courts send notices of guardianship appointment and other information to federal agencies that administer representative-payment or fiduciary programs is unknown. The AOPC does not exchange guardianship case data with federal agencies.

5. In June, 2014 NCSC and the Administrative Conference of the United States ("ACUS") requested that judicial officers and court administrators nationwide participate in a survey on state court adult guardianship practices. ACUS was engaged by SSA to collect information. The intent of the survey was to improve information sharing and coordination between SSA and the state courts.¹⁸⁸ The AOPC coordinated the Pennsylvania courts' survey responses.

C. Task Force Recommendation

Pursuant to Findings 1, 2, 3, 4, and 5, the Task Force recommends the Orphans' Courts and the OEJC collaborate and coordinate with federal agencies that administer representative-payment and fiduciary programs on the exchange and collection of adult guardianship data, and on training and education for guardians about their responsibilities when they are appointed as representative payees.

D. Timing and Fiscal Impact

Outreach to representatives from representative-payment and fiduciary programs can be made as soon as is practicable. The fiscal impact is anticipated to be minimal, as only travel and meeting expenses will be incurred.

IX. Request for State Funding to Implement the Elder Law Task Force's Recommendations

A. Issue Statement

The Task Force's Report identifies the pressing needs of Pennsylvania's growing population of elders and makes recommendations for addressing them. Going forward, government and community collaboration will be needed to prioritize the recommended initiatives that address those needs.

The Task Force recognizes that economic conditions have limited the capacity of government to support new and existing initiatives in many areas. However, findings of the Task Force demonstrate that the problems facing Pennsylvania's elders will neither go away, nor, given an expanding elder population, likely diminish.

The challenge is to identify and provide available or new resources to support the needs of our elders. This report provides a solid basis from which to begin a collaborative discussion of these issues.

B. Task Force Findings

1. According to the JSGC's Report of the Working Group on Guardianships, 61.4 percent of AAA respondents surveyed stated, "[c]urrent statutes, programs and services are not effective in meeting the current demand for guardianship," and 84.1 percent predicted, "current programs and services will not be able to meet the need for guardianship services in the future."¹⁸⁹ Almost all respondents opined that the state should fund guardianship services.¹⁹⁰ The Report also noted some counties need additional funds to ensure adequate numbers of guardians are available, particularly those in which non-profit organizations provide guardianship services.¹⁹¹

2. The NCSC's Richard Van Duizend and Brenda Uekert lament that "elder abuse and exploitation is not a short-term problem. These cases will take up an increasing share of judicial, law enforcement, and social services caseloads for many years. The courts are in the best position to call attention to the problem and bring community leaders together to address it."¹⁹²

The New York City Elder Abuse Center observes that the prevention of elder abuse must be seen as an investment, not an expenditure, and asserts, "[r]esponding to and preventing elder abuse will save Medicare and Medicaid dollars in addition to ensuring the dignity of older adults."¹⁹³

A 2011 report by the GAO found that, "[w]hile the demand for APS services is increasing substantially and cases are becoming more complex...funding for staffing, training, and public awareness is not keeping pace."¹⁹⁴ Twenty-five of 38 states surveyed by the GAO ranked insufficient funding for program operations as "the most significant challenge they face."¹⁹⁵

3. Improving access to justice and the courts for elders in the Commonwealth will require funding for accommodations and/or retrofits to court facilities in many counties; statewide outreach to elder, families, and the public regarding guardianship and elder abuse resources; and the provision of legal services for elders.

4. Because of the importance of funding to the implementation of its recommendations, the Task Force created a Subcommittee on Funding ("Funding Subcommittee") to study sources of funding for its proposed initiatives, which reported the following:

Most governmental programs, including those involving the courts, are supported by funds appropriated by either state or federal legislative bodies. The importance and impact of governmental funding cannot be overstated.

The imposition of filing fees and surcharges as a vehicle to fund the elder initiatives should be a last resort because of their potential negative impact on a litigant's right of access to the courts. However, there may be circumstances for which it may be appropriate to fund some elder initiatives by allocating a portion of filing fees in those guardianship cases involving significant assets. This idea warrants study. Given the importance of implementing the Task Force's proposed initiatives and the chronic underfunding of the state court system, the Task Force concludes that the "last resort" option of utilizing a portion of filing fees only in cases involving significant assets deserves careful study.

The Funding Subcommittee assessed the availability of federal resources, and took note of these viewpoints:

"I am deeply concerned about the funding crisis that is threatening state courts across the country. Combined with the impact of federal sequestration and other harmful cuts to Justice Department programs and the federal court system, these reductions are delaying or denying access to justice for millions of Americans."¹⁹⁶
(U.S. Attorney General Eric Holder)

"Unlike drug courts and domestic violence courts, other kinds of courts have no specified source of federal funds to assist with planning and initial implementation."¹⁹⁷
(Richard Van Duizend and Brenda Uekert)

Although there is substantial federal interest in state guardianship and elder abuse issues and an awareness of state need for federal financial assistance, grant programs for the collection of guardianship data or to implement “innovative procedures and practices to prevent, detect, and address abuse and exploitation,” do not currently exist.¹⁹⁸ (CCJ and COSCA)

“To ensure the right of access to guardianship services, states should provide public funding for: [g]uardianship services for those unable to pay[;] [s]ervices to coordinate alternatives to guardianship[;] and the obligation to make such services available to all vulnerable persons.”¹⁹⁹ “States need to look for creative solutions... [which] could include Medicare and Medicaid funding sources...[possibly] from the Patient Protection and Affordable Care Act (“PPACA”), which includes provisions that are intended to reduce readmissions for Medicare beneficiaries.”²⁰⁰ (National Guardianship Summit)

The Funding Subcommittee examined the possibility of receiving funding under the Elder Justice Act (“EJA”). Introduced in 2002 and enacted in 2010 as part of the Affordable Care Act, the EJA is the first comprehensive federal legislation to address elder abuse. The EJA takes aim at developing and implementing strategies to decrease the likelihood of elder abuse, neglect and exploitation. However, no money has yet been appropriated for initiatives of the EJA. Opportunities for the Elder Law Task Force’s initiatives under the EJA may arise in the future, particularly for older adult protective services and law enforcement activities.

At the state level, legislatures elsewhere have begun to recognize the importance of elder issues, and have provided specific funding for elder justice initiatives. In 2013, Indiana Supreme Court Chief Justice Brent Dickson included a funding request of \$520,000 for adult guardianship programs in the Indiana Supreme Court’s FY 2013-2015 budget. In order to “swell” the number of volunteer guardians, the Indiana General Assembly provided \$500,000 (for each year of a two year budget cycle) to the Indiana Supreme Court to provide grants to programs and projects that manage volunteer guardians. In January 2014, an Adult Guardianship Office opened within Indiana’s State Court Administration Office, and an Adult Guardianship Advisory Committee is to be created “to set long-range goals and strategies for the grant program.”²⁰¹

Michigan Governor Rick Snyder’s 2015 budget includes “an additional \$1 million investment to prevent elder abuse. The funds will aid in reporting, training, and developing a restitution initiative for seniors subject to physical or financial abuse,” and will include additional funds for legal and advocacy services.²⁰²

C. Task Force Recommendations

1. The Task Force believes the initiatives contained in this Report are crucial to helping the court system and its elder justice partners address the needs of the Commonwealth’s growing number of elders. Based upon that belief and Findings 1, 2, 3 and 4, the Task Force recommends that the Legislature – in the interest of all Pennsylvanians – provide an annual appropriation to the Supreme Court for the implementation and ongoing support of the Task Force’s initiatives and explore the possibility of using funds from any other available sources, such as the Pennsylvania Lottery. Given the scope of guardianship, elder abuse and neglect, and access to justice issues in Pennsylvania, adequate funding from the Legislature is critical to implementing the elder law reform efforts outlined in this Report.

2. Also pursuant to Finding 4, the Task Force recommends that the Advisory Council study the feasibility and implications of allocating a portion of filing fees in those guardianship cases that involve significant assets to funding initiatives in this Report.

D. Timing and Fiscal Impact

The amount of the appropriation to be requested annually will be determined by the Supreme Court with input from the Advisory Council and OEJC, and will be based on the particular initiatives

to be implemented each year. Many of the recommendations contained in this Report will require significant funding, while others will entail only modest funding. It is anticipated that such a funding request will be made in the FY 2016-17 Budget Request.

E. Additional Comments

The Funding Subcommittee appreciates that many of the recommendations for better serving elders will not necessarily fall under the courts.

Richard Van Duizend and Brenda Uekert emphasize the benefits of a multidisciplinary approach towards funding: “[c]ollaboration...helps identify sources of possible additional funding for supplementary services from federal health, mental health, human services, and criminal justice agencies.”²⁰³ The Task Force believes that the collaborative relationships established by its members will help in identifying additional funding sources as its initiatives are implemented.

X. Request for Federal Funding to Implement the Elder Law Task Force’s Recommendations

A. Issue Statement

Congressional action is needed to increase federal funding for services to elder victims of crime and elders under guardianship. Increased federal funding could be used to implement many of the initiatives recommended in this Report.

B. Task Force Findings

1. The Elder Abuse and Neglect Committee discussed ways in which elders who are crime victims can receive assistance and services, and concluded that programs which provide services to elder victims are vastly underfunded and understaffed. The Committee believes increased federal funding for these programs is critically important.

2. The Pennsylvania Commission on Crime and Delinquency (“PCCD”) appropriates federal grant funds provided to the Commonwealth, and, as such, administers the Crime Victims Fund (“Fund”). The Fund was created by the Victims of Crime Act (“VOCA”), a special account dedicated solely to assisting an average of 3.7 million diverse victims annually.²⁰⁴

The Fund is not financed by taxpayers, but rather through fines and penalties paid by convicted federal offenders. Thus, spending is budget neutral and does not add to the national debt or deficit. Through VOCA, millions of dollars are invested annually in compensation and assistance to victims in every state.

Starting in 2000, in response to large fluctuations in deposits, Congress placed a cap on the funds available for distribution. These annual caps were intended to maintain the Fund as a stable source of support for future victim services. Today, however, the current FY 2014 cap of \$745 million severely and unduly restricts the funding of the victim services the Fund was created to support. The National Association of VOCA Assistance Administrators (“NAVAA”) notes that in 2014, there will be \$11.431 billion in the Fund according to projections from the Office of Management and Budget.²⁰⁵ The Elder Abuse and Neglect Committee feels strongly that the cap on VOCA funds should be raised so the Task Force can pursue such funding for its elder abuse initiatives, including, but not limited to, establishing elder courts and programs that improve judicial and victim services responses in elder abuse and neglect cases.

3. On March 31, 2014, eighty members of the U.S. House of Representatives sent a letter to the Chairman and Ranking Members of the U.S. House Committee on Appropriations and the Subcommittee on Commerce, Justice, Science and Related Agencies. See Appendix A. Among other things, the letter’s signers urged raising the 2015 VOCA cap “to no less than \$1.489 billion, the amount deposited in 2013.”²⁰⁶

4. On April 11, 2014, twenty-four U.S. Senators sent a letter similar to the one above to the Chairwoman and Ranking Member of the Subcommittee on Commerce, Justice, and Science of the

Senate Appropriations Committee. See Appendix B. Among other things, the Senators requested that “outlays from the Crime Victims Fund be as high as possible to support core VOCA assistance programs and fulfill the needs of victims across the country.”²⁰⁷

5. On a related front, on July 23, 2013, Chief Justice Myron T. Steele of the Supreme Court of Delaware and COSCA President Donald D. Goodnow sent a letter to the Assistant Secretary of Aging, Administration for Community Living at the U.S. Department of Health and Human Services. The letter discussed several recommendations of which the CCJ and COSCA wanted the Elder Justice Coordinating Council to be aware, including one that called for the creation of a national “GCIP or similar pilot program to improve court oversight and collaboration between courts and government agencies that administer representative-payment programs.”²⁰⁸

The letter further detailed CCJ’s and COSCA’s support of the proposed Court-Appointed Guardian Accountability and Senior Protection Act. Chief Justice Steele and President Goodnow observed the bill is modeled after the Child Welfare Court Improvement Program (“CIP”), which was established in 1993 and has effectively reduced judicial delay in dependency cases, enhanced the ability of judges and lawyers to handle complex cases and strengthened the review and monitoring of dependency cases.

At their annual meeting one week later, CCJ and COSCA issued Resolution 6, *In Support of the Court-Appointed Guardian Accountability and Senior Protection Act*. The Resolution urged Congress to enact the Act and appropriate sufficient funds to implement its provisions.²⁰⁹

C. Task Force Recommendations

1. Based on Findings 1, 2, 3, and 4, the Task Force recommends the U.S. House Committee on Appropriations and the Subcommittee on Commerce, Justice, Science and Related Agencies act on the requests contained in the March 31, 2014 letter sent by members of the House of Representatives; and that the U.S. Subcommittee on Commerce, Justice, and Science of the Senate Appropriations Committee act on the requests contained in the April 11, 2014 letter sent by U.S. Senators in order to increase the VOCA cap.

2. Based on Finding 5, the Task Force recommends that the federal government act on proposed legislation that would fund state GCIP programs similar to the CIP.

D. Timing and Fiscal Impact

The Task Force’s support for the requests outlined in the letters from the U.S. Senators and Representatives and for action by the federal government to fund a GCIP can be communicated as soon as is practicable.

In the event federal funds become available through VOCA or for the establishment of a GCIP, the Supreme Court will apply for them to support its elder abuse initiatives and the OEJC.

XI. Reporting Elder Abuse

A. Issue Statement

The U.S. Department of Justice opines that “[n]o single entity can address elder abuse by itself. Everyone can make a difference.”²¹⁰ Elder abuse is not just a domestic issue for individuals and families — communities must also become conscious of the problem. “[T]he battle against elder abuse can only be won with grassroots action at the community and individual level. ... Turning the tide against elder abuse requires much greater public commitment, so every American will recognize elder abuse when they see it and know what to do if they encounter it.”²¹¹

B. Task Force Findings

1. June 2014 was proclaimed “Elder Abuse Awareness Month” by Pennsylvania Governor Tom Corbett to call attention to the growing problem of elder abuse in the Commonwealth. Brian Duke, Secretary of the Department of Aging, urged Pennsylvanians to watch for signs of elder abuse and

to confidentially report any and all suspicions of elder abuse using a statewide hotline. “Now is the perfect time to remind every Pennsylvanian of our shared responsibility to protect the health, safety, dignity and rights of older adults. Although taking a stand against elder abuse requires a total team effort, all action starts at an individual level – one person, one action and one state.”²¹²

2. Many free publications are available on the Internet to help elders and those who care about them learn the signs of elder abuse and how to prevent it.

3. There are two statewide hotlines Pennsylvanians can use to report suspected elder abuse. The Department of Aging urges any person who believes an elder is being abused, neglected, exploited, or abandoned to call its statewide Elder Abuse Hotline at 1-800-490-8505. The Department of Aging’s hotline is operational twenty-four hours a day, seven days a week. The hotline automatically reads a caller’s area code and directs the call to the AAA in the county in which the call is placed. If the caller is reporting abuse in a different county, the call is redirected to the AAA in the county in which the abuse occurred.

The OAG’s website states, “[e]lder abuse complaints are received from the toll free Elder Abuse Hotline 1-866-623-2137....Because various state agencies, local law enforcement, criminal investigators and prosecutors work together to resolve cases of elder victimization, it may be difficult to know where to report certain elder abuse concerns. A toll free call to the Elder Abuse Unit to report the abuse, neglect, financial exploitation or victimization of an older Pennsylvania citizen, can provide necessary assistance to help address your questions efficiently and expeditiously.”²¹³ According to the testimony of OAG’s David Shallcross before the Pennsylvania House Aging and Older Adult Services Committee, after-hours callers receive a message advising that if immediate assistance is needed, callers should contact the local AAA, and if it is an emergency, callers should dial 911.²¹⁴

Local resources about elder abuse may be found on the Department of Aging’s Website: <http://www.aging.state.pa.us/>, or on the OAG’s website: <http://www.attorneygeneral.gov/>. Other local resources for elders may be found online at www.eldercare.gov or by telephoning the toll-free Elder Care Locator at 1-800-677-1116. For general information, see the Elder Law Task Force Website: <http://www.pacourts.us/courts/supreme-court/committees/supreme-court-boards/elder-law-task-force>.

For a fact sheet on “red flags” of abuse, see Appendix C. To learn about 11 things anyone can do to help prevent elder abuse, see Appendix D. Other national resources about elder abuse prevention may be found at www.ncea.aoa.gov or www.centeronelderabuse.org.

C. Task Force Recommendations

1. Based on Findings 1, 2 and 3, the Task Force believes everyone has a responsibility to protect elders from abuse, and recommends that Pennsylvanians who believe an elder is displaying any warning signs of mistreatment should report such symptoms to the Department of Aging or OAG using either hotline. Abuse reports can be made on behalf of an older adult whether the person lives in his or her home or in a care facility (nursing facility, personal care home, hospital, etc.). A caller may remain anonymous, and has legal protection from retaliation, discrimination and civil or criminal prosecution. If the person reporting the abuse is unsure whether it has occurred, the incident should still be reported, as the AAA will ascertain whether abuse has been committed.

2. Also, based on the above findings, the Task Force recommends that all Pennsylvanians learn the signs that indicate elder abuse, and take steps to prevent it.

D. Timing and Fiscal Impact

This recommendation may be implemented immediately and does not entail any costs.



Categorized Recommendations of The Elder Law Task Force

RECOMMENDATIONS TO THE SUPREME COURT OF PENNSYLVANIA

Recommendation 1: The Task Force recommends that an Office of Elder Justice in the Courts (“OEJC”) be established to assist the Supreme Court in implementing the recommendations in this Report, and that the Director of the OEJC, research, grant-writing, legal analysis, information technology and secretarial services be provided by AOPC staff. This Recommendation has been approved by the Supreme Court, and the OEJC will be established in January 2015. See *Overarching Findings and Recommendations*, §§I.C.1 and 2.

Recommendation 2: The Task Force recommends that an Advisory Council on Elder Justice in the Courts (“Advisory Council”) be established to serve as a liaison to the executive and legislative branches, and to communicate with the AOPC and the Supreme Court regarding the implementation of the Task Force’s recommendations and other matters involving elder justice. This Recommendation has been approved by the Supreme Court, and the Advisory Council will be formed in January 2015. See *Overarching Findings and Recommendations*, §§II.C.

Recommendation 3: The Task Force recommends that the AOPC Judicial Education Department and the OEJC develop training for judges and attorneys handling guardianship matters. See *Guardians and Counsel Committee Report*, §X.C.1.a.

Recommendation 4: The Task Force recommends that training for Judges and attorneys developed by the AOPC Judicial Education Department and the OEJC include information on ascertaining when a limited guardianship would be appropriate, and how to make a limited guardianship effective when it is appropriate. See *Guardians and Counsel Committee Report*, §X.C.1.i.

Recommendation 5: The Task Force recommends that the AOPC Judicial Education Department and the OEJC, in consultation with interdisciplinary groups or practicing professional and non-professional guardians, develop a guardianship bench book to assist judges. See *Guardians and Counsel Committee Report*, §X.C.1.j. See also *Overarching Administrative Findings and Recommendations*, §IV.C.

Recommendation 6: The Task Force recommends that the AOPC Judicial Education Department and the OEJC develop training for judges and financial institutions on the use of emergency guardianships. See *Guardians and Counsel Committee Report*, §X.C.1.k.

Recommendation 7: The Task Force recommends that a standardized deposition form be implemented to ensure consistent quality and quantity of pertinent information that should be considered by judges when determining capacity. See *Guardianship Monitoring Committee Report*, §I.C.1.

Recommendation 8: The Task Force recommends that, in cases where the qualified individual recommends a limited guardianship and the judge and counsel may need additional information to determine the areas a partially incapacitated person can handle without a guardian, a best practice be adopted for judges to request that a deposition take place by telephone, videoconference, or in-person to allow for follow-up questioning and cross examination. See *Guardianship Monitoring Committee Report*, §I.C.2.

Recommendation 9: The Task Force recommends that the AOPC Judicial Education Department train judges who hear guardianship cases on the components of the assessment process to determine capacity, and that the information from training materials be summarized into a bench card and provided to every Orphans' Court Judge. See *Guardianship Monitoring Committee Report*, §I.C.3 and 4.

Recommendation 10: The Task Force recommends that judges be informed when the AIP was previously involved in a case under OAPSA, and that the guardianship petition be assigned to the same judge who heard the protective services case. See *Guardianship Monitoring Committee Report*, §II.C.1.

Recommendation 11: The Task Force recommends that the training requirement for judges on the assessment of capacity include recommended practices for determining if conflicts of interest are present or if there is evidence of elder abuse underlying the AIP's weakened capacity. See *Guardianship Monitoring Committee Report*, §II.C.2.

Recommendation 12: The Task Force recommends that judges receive education on representative-payment and fiduciary programs such as those administered by SSA and the VA. See *Guardianship Monitoring Committee Report*, §II.C.2.

Recommendation 13: The Task Force recommends that judges determine if there is involvement from agents under a power of attorney, SSA representative payee, or VA fiduciary in order to uncover potential conflicts of interest. See *Guardianship Monitoring Committee Report*, §II.C.3.

Recommendation 14: The Task Force recommends that guardianship files be sealed to protect personal information included in the revised forms. Interested parties who are named in the case should have the ability to access the file by presenting a copy of the Certificate of Filing. In order to assist investigative agencies in their task of researching allegations of abuse, it is recommended that the proposed request form be used. See *Guardianship Monitoring Committee Report*, §III.C.5 and *Appendix H thereto*.

Recommendation 15: The Task Force recommends that guardians be provided with oral instructions and a packet of written instructions from the judge or administrative staff at the time of appointment. See *Guardianship Monitoring Committee Report*, §IV.C.2.

Recommendation 16: The Task Force recommends that if a guardian does not respond to the delinquency notice in Recommendation 64, it is a recommended best practice for the judge to conduct a review hearing with the guardian present. See *Guardianship Monitoring Committee Report*, §IV.C.4.

Recommendation 17: The Task Force recommends that Clerks of the Orphans' Court or the court administration office be responsible for determining the reasons for failure to file required reports and addressing those reasons with appropriate instruction to the guardian. See *Guardianship Monitoring Committee Report*, §IV.C.5.

Recommendation 18: The Task Force recommends that judges hold periodic review hearings, either on a regular basis or at random, to monitor the status of the guardianship. See *Guardianship Monitoring Committee Report*, §IV.C.7.

Recommendation 19: The Task Force recommends that judicial staff or court administration staff be available to answer a guardian's question(s) or assist a guardian with completing forms, and that resources for guardians be centrally located on a statewide website which includes training materials, forms, and instructions on completion of those forms. See *Guardianship Monitoring Committee Report*, §IV.C.8.

Recommendation 20: The Task Force recommends that counties adopt a volunteer monitoring program leveraging local/regional resources to assist the courts in their monitoring responsibilities, using The Orphans' Court Guardian Program in Chester County and the Pro Bono Guardianship Monitoring Program in Dauphin County as models. See *Guardianship Monitoring Committee Report*, §IV.C.9.

Recommendation 21: The Task Force recommends that adequate funding be provided to support the Judges and Clerks of the Orphans' Court in fulfilling their guardianship monitoring responsibilities. See *Guardianship Monitoring Committee Report*, §IV.C.10.

Recommendation 22: The Task Force recommends that courts, particularly those in counties with limited access to bonding sources, consider online bonding as an alternative, providing that the online bonding companies are on the list of approved sureties. See *Guardians and Counsel Committee Report*, §V.C.1.e.

Recommendation 23: The Task Force recommends that, to establish an accurate inventory of active guardianships, each county purge inactive guardianships from its case management system, and complete the Orphans' Court e-form, noting the number of guardianship terminations which occurred during the purge. See *Guardianship Monitoring Committee Report*, §V.C.5 and Appendix K thereto.

Recommendation 24: The Task Force recommends that the AOPC's judicial automation plan for an Orphans' Court module include a monitoring tool capable of web-based applications, monitoring and auditing tools for court staff, financial accounting, automated reminders to both guardians and court staff, and interface with the Orphans' Court Common Pleas Court Management System ("CPCMS") application to provide guardianship monitoring data to court staff. See *Guardianship Monitoring Committee Report*, §V.C.6.

Recommendation 25: The Task Force recommends that adequate funding be provided to support the Clerks of the Orphans' Court in their ability to implement a local case management system. See *Guardianship Monitoring Committee Report*, §V.C.9.

Recommendation 26: The Task Force recommends that the Bill of Rights of an Alleged Incapacitated Person be provided to the AIP, as well as to any family members or concerned parties, at the time he or she is served with the petition, and that the Bill of Rights of an Incapacitated Person be provided to the IP and interested family members or concerned parties, at the time the IP is adjudicated incapacitated. The guardian should receive copies of both the Bill of Rights of an Alleged Incapacitated Person and the Bill of Rights of an Incapacitated Person in the packet of instructions which the guardian receives upon appointment. It is also recommended that the OEJC create a separate document based on the specifics of the statute to be provided to guardians. See *Guardianship Monitoring Committee Report*, §VI.C.1.

Recommendation 27: The Task Force recommends that in order to provide the IP with access to justice, the court-appointed attorney be required to make contact with the IP on an annual basis to determine if a guardianship continues to be necessary and if the guardian is adequately performing his or her duties. See *Guardianship Monitoring Committee Report*, §VI.C.4.

Recommendation 28: The Task Force recommends that educational initiatives be undertaken to ensure judges are aware of 42 Pa.C.S. § 9728(e) and (f) to help ensure funds and assets are available

to satisfy anticipated restitution orders in appropriate cases. See *Elder Abuse and Neglect Committee Report*, §I.C.2.d.

Recommendation 29: The Task Force recommends that the Supreme Court consider authorizing a limited practice for *pro bono* service by retired and voluntarily inactive lawyers to work with elders. See *Elder Abuse and Neglect Committee Report*, §I.C.2.e.

Recommendation 30: The Task Force recommends that the Supreme Court consider providing continuing legal education (“CLE”) credits to encourage active attorneys to provide *pro bono* services to elder Pennsylvanians. See *Elder Abuse and Neglect Committee Report*, §I.C.2.e.

Recommendation 31: The Task Force recommends that the AOPC Judicial Education Department, with the assistance of the OEJC, develop and distribute bench cards for judges on identifying and reporting elder abuse, provide information about the bench cards to judges at educational conferences, and make the information available on court websites. See *Elder Abuse and Neglect Committee Report*, §II.C.1.

Recommendation 32: The Task Force recommends that the AOPC Judicial Education Department, with the assistance of the OEJC, develop an Elder Abuse Bench Book and conduct educational sessions for the judiciary on its contents. See *Elder Abuse and Neglect Committee Report*, §II.C.2. See also *Overarching Administrative Findings and Recommendations*, §IV.C.

Recommendation 33: The Task Force recommends that the Supreme Court consider the creation of a Statewide Elder Justice Roundtable similar to the one created by Justice Max Baer and the Office of Children and Families in the Courts (“OCFC”), with administrative support provided through the OEJC. See *Elder Abuse and Neglect Committee Report*, §II.C.4.

Recommendation 34: The Task Force recommends that the Supreme Court suggest that a victim’s age be documented by police departments in all criminal complaints and that information be included in the CPCMS. See *Elder Abuse and Neglect Committee Report*, §III.C.1.

Recommendation 35: The Task Force recommends that the Supreme Court suggest that the plaintiff’s age in Protection from Abuse matters be documented and reported to the AOPC Research and Statistics Department. See *Elder Abuse and Neglect Committee Report*, §III.C.1.

Recommendation 36: The Task Force recommends that the Supreme Court consider if the Comment to Pa.R.Crim.P. 500 should be amended to help ensure the testimony of elder victims and witnesses in criminal cases can be preserved. It further recommends that educational efforts be undertaken to ensure judges and attorneys are aware of this Rule and its implications for cases involving elders. See *Elder Abuse and Neglect Committee Report*, §III.C.2.b.

Recommendation 37: The Task Force recommends that the Supreme Court consider authorizing a pilot “Elder Court.” See *Elder Abuse and Neglect Committee Report*, §III.C.4.b.

Recommendation 38: The Task Force recommends the implementation of a statewide Orphans’ Court case management system. In the interim, Clerks of the Orphans’ Court should make the necessary upgrades to their case management systems in order to comply with the Guardianship Monitoring Committee’s recommendations and as a precursor to migrating data into the statewide system. See *Overarching Administrative Findings and Recommendations*, §III.C.2.

Recommendation 39: The Task Force recommends that Orphans’ Courts and the AOPC collaborate and coordinate with federal agencies that administer representative-payment programs on the exchange and collection of data, training, and education on adult guardianships. See *Overarching Administrative Findings and Recommendations*, §VIII.C.

Recommendation 40: The Task Force recommends that, whenever possible, courts should favor the appointment of a family member as guardian of the person. Through amendment to the Orphans’ Court Procedural Rules, the definition of “family member” should be expanded so as not to be limited

to immediate family, but rather attempts to contact other relatives and friends should be encouraged. In addition, the Rules should be amended to encourage courts to look to the hierarchy in 20 Pa.C.S. § 5461(d)(1) for guidance. *See Guardians and Counsel Committee Report, §I.C.1.a.i.*

Recommendation 41: The Task Force recommends that, through amendment to the Orphans' Court Procedural Rules, courts may favor the appointment of a family member to serve as a guardian of the estate when the estate of the incapacitated person consists of minimal assets or where the proposed guardian of the estate has the skills and experience necessary to manage the estate and is able to obtain a bond or provide other assurance of financial responsibility. *See Guardians and Counsel Committee Report, §I.C.1.b.i.*

Recommendation 42: The Task Force recommends that, through amendment to the Orphans' Court Procedural Rules, a list of individuals and agencies qualified to act as guardian of the person or estate to serve if family and friends are not viable options be mandated. *See Guardians and Counsel Committee Report, §§I.C.1.a.ii and I.C.1.b.ii.*

Recommendation 43: The Task Force recommends that, through amendment to the Orphans' Court Procedural Rules, training be mandated for all guardians. *See Guardians and Counsel Committee Report, §II.C.1.c.* This training should include, but not be limited to matters of liability and ethics. *See Guardians and Counsel Committee Report, §III.C.1.a.*

Recommendation 44: The Task Force recommends that, through amendment to the Orphans' Court Procedural Rules, all individual guardians, family and professional, be required to undergo criminal background checks. *See Guardians and Counsel Committee Report, §IV.C.1.a.*

Recommendation 45: The Task Force recommends that the Orphans' Court Procedural Rules be amended to require that in all guardianship matters where the court does not require a bond, the proposed guardian be required to submit a current credit report. This requirement should be ongoing and, after appointment, the guardian should be required to supply a current credit report each year together with the annual report. The guardian's credit reports should be kept confidential and not be made publicly available. For good cause shown, the court may waive the requirement of a credit report. If the court waives the requirement of a credit report, however, it should still require an assurance of financial responsibility as recommended in Section V.C.1.d. *See Guardians and Counsel Committee Report, §IV.C.1.b.*

Recommendation 46: The Task Force recommends that the Orphans' Court Procedural Rules be amended to require that in addition to not having any interest adverse to the AIP, the proposed guardian should have the willingness and ability to visit with the AIP on a regular basis and be available at all times to confer with the AIP's physicians, nurses, and other care providers. If the proposed guardian is not a family member, he or she should have some education and/or experience in guardianship or in providing services to elders and/or the disabled. In lieu of adopting specific requirements concerning minimum education and/or experience for all guardians, the Task Force believes that the goal of assuring that qualified guardians are appointed would similarly be met by mandating that all guardians undergo training before assuming their duties. *See Guardians and Counsel Committee Report, §IV.C.1.c.*

Recommendation 47: The Task Force recommends that the Orphans' Court Procedural Rules be amended to limit a potential guardian's appointment to a guardianship of the person in appropriate circumstances to avoid potential intra-familial disagreements as well as any financial responsibility of a potential guardian. *See Guardians and Counsel Committee Report, §VI.C.1.h.*

Recommendation 48: The Task Force recommends that the Orphans' Court Procedural Rules be amended to require that in all cases where the AIP does not have private counsel, counsel should be appointed. Private counsel for an AIP should be required to enter his or her appearance as soon as possible to allow the court to quickly identify when counsel needs to be appointed. Counsel fees should be paid by the AIP whenever possible and, if resources are insufficient, then by the Commonwealth, as under the existing approach. *See Guardians and Counsel Committee Report, §VII.C.1.a b and c.*

Recommendation 49: The Task Force recommends that Clerks of the Orphans' Court have the capability to produce a standardized list of data items for each active guardianship (including Case Management and Caseload Reports). To ensure uniformity across all counties, this practice should be implemented through a statewide Orphans' Court Procedural Rule. See *Guardianship Monitoring Committee Report*, §V.C.1, 2, 3, and 4 and Appendix J thereto.

Recommendation 50: The Task Force recommends that the Orphans' Court Procedural Rules and/or Disciplinary Rules be amended to require attorneys serving as guardians to complete the same training and other requirements as professional guardians, unless the court specifically waives that obligation, and that CLE credit, including ethics credit, be made available to attorneys for this training. See *Guardians and Counsel Committee Report*, §VIII.C.1.b. and §X.C.1.h.

Recommendation 51: The Task Force recommends that the Orphans' Court Procedural Rules and/or Disciplinary Rules be amended to require attorneys to clarify to the client, the court, and all other involved parties which role or roles counsel is assuming and to clarify those role(s) through a letter of engagement stating who is being represented and describing counsel's role. It should also be required that these role(s) be restated to the court when entering an appearance with the court. See *Guardians and Counsel Committee Report*, §VIII.C.1.d.

Recommendation 52: The Task Force recommends that the Orphans' Court Procedural Rules be amended to require that where the court appoints counsel to represent an AIP, the court indicate whether, except for pursuing rights of appeal, counsel for the AIP is discharged or is to continue representing the person now under guardianship in the event the petition is granted and a guardian is appointed. See *Guardians and Counsel Committee Report*, §VIII.C.1.e.

Recommendation 53: The Task Force recommends that, through amendment to the Orphans' Court Procedural Rules, model language be developed pertaining to retention or discharge of counsel which can be inserted into a final decree of incapacity and appointment of a guardian. See *Guardians and Counsel Committee Report*, §VIII.C.1.f.

Recommendation 54: The Task Force recommends that, through amendment to the Orphans' Court Procedural Rules, guardians and IPs have access to legal counsel for consultation following adjudication. See *Guardians and Counsel Committee Report*, §VIII.C.1.g.

Recommendation 55: The Task Force recommends that the Orphans' Court Procedural Rules be amended to require that the assets of the IP be used for the purpose of maintaining the best possible quality of life for the IP. See *Guardians and Counsel Committee Report*, §IX.C.1.e.

Recommendation 56: The Task Force recommends that the Orphans' Court Procedural Rules be amended to require that fee disputes be resolved in a timely, efficient manner. See *Guardians and Counsel Committee Report*, §IX.C.1.h.

Recommendation 57: The Task Force recommends that the Orphans' Court Procedural Rules be amended to require that professional guardians, i.e., those guardians with more than two guardianships at the same time, should be certified by the professional guardian certification program referred to in §II.C.1.f. See *Guardians and Counsel Committee Report*, §X.C.1.b.

Recommendation 58: The Task Force recommends that guardians be required, through amendment to the Orphans' Court Procedural Rules, to complete the inventory (as revised per Appendix C to the Guardianship Monitoring Committee Report) 90 days after appointment. See *Guardianship Monitoring Committee Report*, §III.C.1.

Recommendation 59: The Task Force recommends that guardians be required, through amendment to the Orphans' Court Procedural Rules, to complete the Annual Report of the Person (as revised per Appendix F to the Guardianship Monitoring Committee Report, and/or Annual Report of the Estate as revised per Appendix E to the Guardianship Monitoring Committee Report) one year after appointment. See *Guardianship Monitoring Committee Report*, §III.C.2.

Recommendation 60: The Task Force recommends that guardians be required, through amendment to the Orphans' Court Procedural Rules, to complete a Firearms Search (Appendix D to the Guardianship Monitoring Committee Report) within 90 days of appointment. See *Guardianship Monitoring Committee Report*, §III.C.3.

Recommendation 61: The Task Force recommends that guardians be required, through amendment to the Orphans' Court Procedural Rules, to send a Certificate of Filing (Appendix G to the Guardianship Monitoring Committee Report), to the persons identified at the time of adjudication, within 10 days of filing each form with the Clerk of the Orphans' Court. See *Guardianship Monitoring Committee Report*, §III.C.4.

Recommendation 62: The Task Force recommends that the imposition of filing fees for required annual reports by local court or administrative order should be prohibited through amendment to the Orphans' Court Procedural Rules. See *Guardianship Monitoring Committee Report*, §IV.C.1.

Recommendation 63: The Task Force recommends that the Supreme Court, through amendment to the Orphans' Court Procedural Rules, require that Clerks of the Orphans' Court be responsible for docketing and monitoring guardians' compliance with submitting the inventory and annual reports by the required due dates. See *Guardianship Monitoring Committee Report*, §IV.C.3.

Recommendation 64: The Task Force recommends that the Clerks of the Orphans' Court, through amendment to the Orphans' Court Procedural Rules, be responsible for providing delinquency notices to guardians when required reports become past due. See *Guardianship Monitoring Committee Report*, §IV.C.4.

Recommendation 65: The Task Force recommends that the judge or judge's staff be required, through amendment to the Orphans' Court Procedural Rules, to review the content of all inventories and annual reports received by the court to identify areas requiring further scrutiny, additional documentation, or a review hearing. See *Guardianship Monitoring Committee Report*, §IV.C.6.

RECOMMENDATIONS TO THE OFFICE OF ELDER JUSTICE IN THE COURTS AND TO THE ADVISORY COUNCIL ON ELDER JUSTICE IN THE COURTS

Recommendation 66: The Task Force recommends that the OEJC, in conjunction with the local GSA, if one exists, coordinate the creation of a list of individuals and agencies qualified to act as guardian of the person to be referred to when family and friends are not viable options to serve as guardian. See *Guardians and Counsel Committee Report*, §I.C.1.a.ii.

Recommendation 67: The Task Force recommends that the OEJC develop training for guardians, judges, court administrative staff, attorneys and others involved in guardianship matters. See *Guardians and Counsel Committee Report*, §II.C.1.c. and §X.C.1.a.

Recommendation 68: The Task Force recommends that the training developed by the OEJC for guardians be divided into pre-service training and some form of continuing education that would include training on the powers, duties and responsibilities of the guardian, including reporting requirements, ethics and liability. See *Guardians and Counsel Committee Report*, §X.C.1.c.

Recommendation 69: The Task Force recommends that the Supreme Court, through the OEJC, encourage local courts to develop interdisciplinary teams modeled after the existing Children's Roundtable Initiative to advise and support guardians and the court. See *Guardians and Counsel Committee Report*, §II.C.1.d.

Recommendation 70: The Task Force recommends that the Supreme Court, through the OEJC, encourage the creation of local GSAs to be relied upon to take an active role in the implementation of education and training, and to support local guardianship improvement. See *Guardians and Counsel Committee Report*, §II.C.1.e. and §X.C.1.d.

Recommendation 71: The Task Force recommends that the Supreme Court, through the OEJC, develop a program for the certification of professional guardians. See *Guardians and Counsel Committee Report*, §II.C.1.f and §X.C.1.b.

Recommendation 72: The Task Force recommends that the Supreme Court, through the OEJC, develop a program for the mandatory education and training of individual guardians on matters of liability and ethics. See *Guardians and Counsel Committee Report*, §III.C.1.a.

Recommendation 73: The Task Force recommends that the Supreme Court, through the OEJC, develop a program for the mandatory education and training of individual guardians that will be required before assuming their duties. See *Guardians and Counsel Committee Report*, §IV.C.1.c.

Recommendation 74: The Task Force recommends that the Advisory Council and the OEJC study funding sources, such as the state lottery, to develop guardianship support services and provide small tax deductions to guardians for certain guardianship expenses to determine how best to implement them. See *Guardians and Counsel Committee Report*, §VI.C.1.a & c.

Recommendation 75: The Task Force recommends that the OEJC work with the SSA, VA, RRB and other federal representative-payment and fiduciary programs to develop a system for greater information sharing on adult guardianships. See *Elder Abuse and Neglect Committee Report*, §II.C.5.

Recommendation 76: The Task Force recommends that the OEJC equip and assist local agencies in developing methods to retain guardians, focusing on helping agencies handle more guardianships as an alternative to relying on ill-equipped family members, and encouraging and expanding the use of GSAs. See *Guardians and Counsel Committee Report*, §VI.C.1.d, e, and f.

Recommendation 77: The Task Force recommends that the OEJC: develop free training for non-attorney guardians on filing required documents; put helpful “how to” videos online to answer questions and provide more detailed instructions for the completion of guardianship tasks such as filing reports and inventories; and encourage a dialog with federal agencies such as the SSA, VA, and RRB, which administer representative-payment and fiduciary programs to develop training for guardians who manage an IP’s benefits. See *Guardians and Counsel Committee Report*, §VI.C.1. g, i and j, and §X.C.1.e., f. and g.

Recommendation 78: The Task Force recommends that the Advisory Council and the OEJC study the Third National Guardianship Summit Recommendations for Action §§ 3.1-3.8, pertaining to fees, to determine to what extent these recommendations should be adopted in Pennsylvania. See *Guardians and Counsel Committee Report*, §IX.C.1.f.

Recommendation 79: The Task Force recommends that the Advisory Council and the OEJC explore the feasibility of asking the General Assembly to establish a fund to pay for guardianship services for those with limited available resources. See *Guardians and Counsel Committee Report*, §IX.C.1.g.

Recommendation 80: The Task Force recommends that the OEJC work with the SSA, VA, and the Department of Aging to establish a collaboration process among the agencies to establish a notification system to share information when it is found that a representative payee is abusing an incapacitated person. See *Guardianship Monitoring Committee Report*, §V.C.8.

Recommendation 81: The Task Force recommends that the Advisory Council and the OEJC study NGA Standards 12 and 17 to ascertain whether these standards can be adopted by court rule or if legislation is required. See *Guardians and Counsel Committee Report*, §II.C.1.a.

Recommendation 82: The Task Force recommends that the OEJC, in conjunction with the help of a working group composed of guardianship stakeholders, develop and offer a fee schedule as a model uniform court rule for compensation of guardians. See *Guardians and Counsel Committee Report*, §IX.C.1.a, b, c, and d.

Recommendation 83: The Task Force recommends that the OEJC provide training for judges and guardians on the recommended Bills of Rights provided in the Guardianship Monitoring Committee Report, §VI.C.1. See *Guardianship Monitoring Committee Report*, §VI.C.2.

Recommendation 84: The Task Force recommends that the OEJC develop a guide for guardians that includes information about the minimum standards of care for an incapacitated person, and the expectations for and responsibilities of the guardian, including requiring the guardian to maintain in-person contact with the IP at a minimum of once per quarter or more often as appropriate. See *Guardianship Monitoring Committee Report*, §VI.C.3.

Recommendation 85: The Task Force recommends that, in order to provide the IP with access to justice, the OEJC and Advisory Council research the impact of requiring the court-appointed attorney to make contact with the IP on an annual basis on the current funding stream. See *Guardianship Monitoring Committee Report*, §VI.C.4.

Recommendation 86: The Task Force recommends that the possibility of piloting a program similar to the Court Appointed Special Advocates (“CASA”) be researched by the OEJC and the Advisory Council to provide a volunteer advocate for the AIP throughout the guardianship process who could alert the court of any observed wrongdoing. See *Guardianship Monitoring Committee Report*, §VI.C.6.

Recommendation 87: The Task Force recommends that the Advisory Council examine how an effective complaint form and process, specific to guardianships, can be implemented among the appropriate stakeholders. See *Guardianship Monitoring Committee Report*, §VI.C.5.

Recommendation 88: The Task Force recommends that the Advisory Council study the feasibility and benefits of collaborating with and encouraging colleges, universities, and law schools to develop elder clinics and other programs to assist elder Pennsylvanians in accessing social services and, with appropriate supervision, drafting or reviewing simple documents, such as a power of attorney or living will. The development of such elder clinics could provide tremendous benefits to elder Pennsylvanians. See *Elder Abuse and Neglect Committee Report*, § III.C.4.c.

Recommendation 89: The Task Force recommends that the Advisory Council, with the assistance of the OEJC, study the advisability and feasibility of creating and supporting guardianship mediation programs in Pennsylvania. If the Advisory Council determines that such programs are advisable and feasible, it should also study the questions of program structure and implementation. See *Overarching Administrative Findings and Recommendations*, § V.C.

Recommendation 90: The Task Force recommends that the Advisory Council study the feasibility and implications of allocating a portion of filing fees in guardianship cases that involve significant assets to funding initiatives in this Report. See *Overarching Administrative Findings and Recommendations*, §IX.C.2.

Recommendation 91: The Task Force recommends that the Advisory Council consider, and, if appropriate, the Supreme Court adopt the ABA’s 29 recommended guidelines for state courts to increase access to justice for Pennsylvania elders. See *Elder Abuse and Neglect Committee Report*, §III.C.4.a.

RECOMMENDATIONS TO THE LEGISLATIVE BRANCH

Recommendation 92: The Task Force recommends that the proposed change to 20 Pa.C.S.A. § 5521(g) be removed from Senate Bill 117 of 2013, Pr. No. 73. See *Guardians and Counsel Committee Report*, §III.C.1.b.

Recommendation 93: The Task Force recommends that the General Assembly provide guidance as to what the courts should consider “cause shown” in proposed new 20 Pa.C.S. § 5515.3 in Senate Bill 117 of 2013, Pr. No. 73 and clarify whether determinations of “cause shown” would be appealable. See *Guardians and Counsel Committee Report*, §V.C.1.a.

- Recommendation 94:** The Task Force recommends that the General Assembly set a minimum total value for an estate before making a bond mandatory in every situation. *See Guardians and Counsel Committee Report, §V.C.1.b.*
- Recommendation 95:** The Task Force recommends that the General Assembly enact legislation allowing the acceptance of forms of financial security for guardians other than bonds. *See Guardians and Counsel Committee Report, §V.C.1.d.*
- Recommendation 96:** The Task Force recommends that the General Assembly establish a fund to pay for guardianship services for those with limited resources. *See Guardians and Counsel Committee Report, §IX.C.1.g.*
- Recommendation 97:** The Task Force recommends that adequate funding be provided to support the Clerks of the Orphans' Court and Judges in their ability to fulfill their guardianship monitoring responsibilities. *See Guardianship Monitoring Committee Report, §IV.C.10*
- Recommendation 98:** The Task Force recommends that adequate funding be provided to support the Clerks of the Orphans' Court in their ability to implement a local case management system. *See Guardianship Monitoring Committee Report, §V.C.9.*
- Recommendation 99:** The Task Force recommends that § 5515.1 of Senate Bill 117 of 2013, Pr. No. 73, addressing the grounds and procedures for removing and replacing guardians, be adopted into the Probate Code. *See Guardianship Monitoring Committee Report, §VI.C.7.*
- Recommendation 100:** The Task Force recommends that the General Assembly enact a statute consistent with § 116 of the Uniform Power of Attorney Act (Standing). *See Elder Abuse and Neglect Committee Report, §I.C.1*
- Recommendation 101:** The Task Force recommends enhanced mandatory minimum sentences, in addition to those listed in 42 Pa.C.S. § 9717, for the conviction of crimes against elders. *See Elder Abuse and Neglect Committee Report, §III.C.2.a.*
- Recommendation 102:** The Task Force recommends that the General Assembly consider enacting amendments to the existing Pennsylvania Slayer's Statute, 20 Pa. C.S. §§ 8801-15, to include not only homicide, but also elder abuse, neglect and exploitation resulting in convictions of specified crimes. Such statutory expansion would be a progressive and significant step in addressing both prevention and remediation of serious elder abuse. *See Elder Abuse and Neglect Committee Report, , §III.C.3.b.*
- Recommendation 103:** The Task Force recommends that the General Assembly consider how to provide greater and more consistent funding and support of civil legal aid, including services specifically targeted to low-income Pennsylvania elders. *See Elder Abuse and Neglect Committee Report, §III.C.4.d.*
- Recommendation 104:** The Task Force recommends that the General Assembly enact a statute requiring financial institutions to be mandatory reporters of suspected financial abuse or exploitation of elders. *See Elder Abuse and Neglect Committee Report, §I.C.2.a.i.*
- Recommendation 105:** The Task Force recommends that the General Assembly statutorily require financial institutions to administer training programs to help identify, prevent, and report elder financial abuse. *See Elder Abuse and Neglect Committee Report, §I.C.2.a.ii.*
- Recommendation 106:** The Task Force recommends that the General Assembly statutorily authorize financial institutions to delay for five days suspicious financial transactions of elder customers. *See Elder Abuse and Neglect Committee Report, §I.C.2.a.iii.*
- Recommendation 107:** The Task Force recommends that the General Assembly increase funding to the Department of Aging to facilitate thorough investigations of alleged financial abuse. *See Elder Abuse and Neglect Committee Report, §I.C.2.b.*

Recommendation 108: The Task Force recommends that the General Assembly consider if all personal care homes, assisted living residences and home health care agencies should carry a minimum of liability insurance. See *Elder Abuse and Neglect Committee Report*, §I.C.2.f.

Recommendation 109: The Task Force recommends that the Legislature mandate the creation or continuation of Elder Abuse Task Forces in each county/judicial district to develop best practices, facilitate information sharing and enable and promote collaboration. See *Elder Abuse and Neglect Committee Report*, §II.C.3.

Recommendation 110: The Task Force recommends that the General Assembly create a civil private right of action for elder abuse or exploitation, such as the one recognized in House Bill 2057 of 2014, Pr. No. 3054. An award of attorneys' fees or other sanctions may also be appropriate for the frivolous pursuit of causes of action alleging financial abuse or exploitation. See *Elder Abuse and Neglect Committee Report*, §III.C.3.a.

Recommendation 111: The Task Force recommends that Clerks of the Orphans' Court become employees of the Unified Judicial System of Pennsylvania. See *Overarching Administrative Findings and Recommendations*, §III.C.1.

Recommendation 112: The Task Force recommends that the General Assembly – in the interest of all Pennsylvanians – provide an annual appropriation to the Supreme Court for the implementation and ongoing support of the initiatives in this Report and explore other available sources of funding, such as the state lottery. See *Overarching Administrative Findings and Recommendations*, §IX.C.1.

Recommendation 113: The Task Force recommends that decisions whether to require a bond when a guardian of the estate is appointed remain at the discretion of the court. See *Guardians and Counsel Committee Report*, §V.C.1.c.

RECOMMENDATIONS TO THE EXECUTIVE BRANCH

Recommendation 114: The Task Force recommends that, to the greatest extent possible, information on identifying elder abuse and neglect be disseminated to the public in public forums, through the distribution of literature, and online. Elder Abuse Task Forces should determine the most effective ways of relaying this information to their communities. See *Elder Abuse and Neglect Committee Report*, §II.C.6.

Recommendation 115: The Task Force recommends that the Pennsylvania Department of Aging determine if it should request copies of SARs from the Pennsylvania Attorney General's Office. See *Elder Abuse and Neglect Committee Report*, §I.C.2.a.iv.

Recommendation 116: The Task Force recommends that the Department of Aging and financial institutions work together to determine the most effective and efficient way for AAAs to obtain financial records needed to conduct investigations of alleged financial abuse and exploitation. See *Elder Abuse and Neglect Committee Report*, §I.C.2.c.ii.

Recommendation 117: The Task Force recommends that the OAG and the PSP make financial investigators available to assist local prosecutors and AAAs when complex cases of elder financial abuse are alleged. See *Elder Abuse and Neglect Committee Report*, §I.C.2.c.i.

Recommendation 118: The Task Force recommends that DHS be encouraged to pay guardians who find alternatives to an IP's placement in a nursing home where the total cost to DHS for community-based services is 50% or less of the cost of a nursing home placement. This may be accomplished by amending the home and community-based waiver to allow guardianship support to be billable as a waiver service, either as part of an existing service category or as a new waiver service category. Such services would be reimbursed based on the guardian's direct time working with and on behalf of the IP. See *Overarching Administrative Findings and Recommendations*, §VII.C.

Recommendation 119: The Task Force recommends that DHS' policy be changed to allow the Orphans' Court to authorize payment of guardianship fees greater than \$100 per month where the

court determines greater fees are necessary because of the amount of the guardian's time required to monitor and advocate for the incapacitated nursing home resident's needs. *See Overarching Administrative Findings and Recommendations, §VI.C.*

RECOMMENDATIONS TO THE FEDERAL GOVERNMENT

Recommendation 120: The Task Force recommends that the U.S. Congress act on the March 31, 2014 and April 11, 2014 requests made by U.S. Senators and U.S. Representatives to raise the 2015 VOCA cap. *See Overarching Administrative Findings and Recommendations, §X.C.1.*

Recommendation 121: The Task Force recommends that the federal government act on proposed legislation that would fund a state GCIP program similar to the CIP. *See Overarching Administrative Findings and Recommendations, §X.C.2.*

RECOMMENDATIONS TO PROSECUTORS

Recommendation 122: The Task Force recommends that prosecutors utilize 42 Pa.C.S. § 9728(e) and (f) to the fullest extent to help ensure funds and assets are available to satisfy anticipated restitution orders in appropriate cases, and that educational initiatives be undertaken to ensure district attorneys and Common Pleas Judges are aware of this mechanism for freezing assets. *See Elder Abuse and Neglect Committee Report, §I.C.2.d.*

Recommendation 123: The Task Force recommends that educational efforts be undertaken to ensure prosecutors are aware of Pa.R.Crim.P. 500, and its implications for preserving testimony of elders in appropriate cases. *See Elder Abuse and Neglect Committee Report, §III.C.2.b*

Recommendation 124: The Task Force recommends that district attorneys consider requiring municipal police departments to obtain their approval before filing criminal charges in certain cases involving victims over age 60. *See Elder Abuse and Neglect Committee Report, §III.C.2.c.*

RECOMMENDATIONS TO VICTIM SERVICES PROVIDERS

Recommendation 125: The Task Force recommends that advocates, attorneys, law enforcement, and courts work collaboratively with the Office of Victim Services, Office of Victim Advocates and other victim service providers to continue to evaluate and improve services to elder crime victims. *See Elder Abuse and Neglect Committee Report, §III.C.2.d.*

RECOMMENDATIONS TO BAR ASSOCIATIONS

Recommendation 126: The Task Force recommends that discussions among attorneys and judges to better define the roles of counsel in guardianship matters be encouraged, and involve the participation of the PBA and local bar associations. *See Guardians and Counsel Committee Report, §VIII.C.1.a.*

Recommendation 127: The Task Force recommends that the PBA and local bar associations be involved in providing support, advice and ethical counsel for attorneys willing to assume any of the roles of counsel in a guardianship matter. *See Guardians and Counsel Committee Report, §VIII.C.1.c.*

Recommendation 128: The Task Force recommends that, where appropriate, the PBA, the Pennsylvania Bar Institute, and local bar associations, working with the OEJC, develop training sessions as recommended in this Report. *See Guardians and Counsel Committee Report, §X.C.1.a and i.*

RECOMMENDATIONS TO THE PUBLIC

Recommendation 129: The Task Force recommends that Pennsylvanians who believe an elder displays the warning signs of mistreatment should report such symptoms by calling either of the state's two Elder Abuse Hotlines.

Statewide Elder Abuse Hotline: 1-800-490-8505

Office of Attorney General Elder Abuse Hotline: 1-866-623-2137

Abuse reports can be made on behalf of an older adult who lives in his or her home or in a care facility (e.g., nursing facility, personal care home, hospital, etc.). A caller may remain anonymous, and has legal protection from retaliation, discrimination, and civil or criminal prosecution. See *Overarching Administrative Findings and Recommendations, §XI.C.1.*

Recommendation 130: The Task Force recommends that everyone learn the signs that indicate elder abuse, and take steps to prevent it. See *Overarching Administrative Findings and Recommendations, §XI.C.2.*

Abbreviations and Acronyms

AAA	Area Agency on Aging
AARP	American Association of Retired Persons
ABA	American Bar Association
Act 95 of 2014	Act of July 2, 2014, P.L. 855, No. 95
ACUS	Administrative Conference of the United States
ADA	Assistant District Attorney
Advisory Council	Advisory Council on Elder Justice in the Courts
Advisory Committee	Advisory Committee on Decedents' Estates Laws
AIP	Alleged Incapacitated Person
AOPC	Administrative Office of Pennsylvania Courts
APS	Adult Protective Services
ARC	National Association for Retarded Citizens
BSA	Bank Secrecy Act
CARIE	Center for Advocacy for the Rights and Interests of the Elderly
CASA	Court Appointed Special Advocates
CCJ	Conference of Chief Justices
CEC	Center for Elders and the Courts
CIP	Child Welfare Court Improvement Program
CLE	Continuing Legal Education
COSCA	Conference of State Court Administrators
CPCMS	Common Pleas Case Management System
DA	District Attorney
Department of Aging	Pennsylvania Department of Aging
DHS	Pennsylvania Department of Human Services (formerly known as the Pennsylvania Department of Public Welfare)
EJA	Elder Justice Act
FBI	Federal Bureau of Investigation
Fund	Crime Victims Fund
FY	Fiscal Year
GAL	Guardian ad Litem
GAO	United States Government Accountability Office
GCIP	Guardianship Court Improvement Program
GSA	Guardianship Support Agency
GSAI	Guardianship Support Agency, Inc. (Lehigh County's Guardianship Support Agency)
HB	House Bill
HHS	United States Department of Health and Human Services
Institute	Institute on Protective Services at Temple University's College of Health Professionals and Social Work, Harrisburg Campus
IP	Incapacitated Person
JSGC	Pennsylvania Joint State Government Commission

MCARE Act	Medical Care Availability and Reduction of Error Act
Model Code	<i>Model Code of Ethics for Guardians</i> (Nat'l Guardianship Ass'n 1988)
NAPSA	National Adult Protective Services Association
National Guardianship Summit	Third National Guardianship Summit
NAVAA	National Association of VOCA Assistance Administrators
NCEA	National Center on Elder Abuse
NCSC	National Center for State Courts
NGA	National Guardianship Association
NORS	National Ombudsman Reporting System
OAG	Pennsylvania Office of Attorney General
OAPSA	Older Adults Protective Services Act
OCFC	Office of Children and Families in the Courts
OEJC	Office of Elder Justice in the Courts
OPM	United States Office of Personnel Management
OVA	Office of the Victim Advocate
OVS	Office of Victim Services
Pa.R.Crim.P.	Pennsylvania Rule of Criminal Procedure
Pa.R.P.C.	Pennsylvania Rules of Professional Conduct
PBA	Pennsylvania Bar Association
PBI	Pennsylvania Bar Institute
PCCD	Pennsylvania Commission on Crime and Delinquency
PDA	Pennsylvania District Attorneys Association
PFA	Protection From Abuse
POA	Power of Attorney
POLST	Physician Orders for Life-Sustaining Treatment
PPACA	Patient Protection and Affordable Care Act
PSP	Pennsylvania State Police
RRB	United States Railroad Retirement Board
SAR	Suspicious Activity Report
SB	Senate Bill
SLC	SeniorLAW Center
Supreme Court	Supreme Court of Pennsylvania
SSA	United States Social Security Administration
Task Force	Elder Law Task Force
UJS	Unified Judicial System of Pennsylvania
UPAA	Uniform Power of Attorney Act
VA	United States Department of Veterans Affairs
VOCA	Victims of Crime Act

Definitions

Abandonment	“The desertion of an older adult by a caretaker”. 35 P.S. § 10225.103.
Abuse	The occurrence of one or more of the following acts: (1) The infliction of injury, unreasonable confinement, intimidation or punishment with resulting physical harm, pain or mental anguish. (2) The willful deprivation by a caretaker of goods or services which are necessary to maintain physical or mental health. (3) Sexual harassment, rape or abuse, as defined in the act of October 7, 1976 (P.L.1090, No.218), known as the Protection From Abuse Act. 35 P.S. § 10225.103.
Adjudication of Incapacity	The legal proceeding conducted pursuant to 20 Pa.C.S. § 5501 <i>et seq.</i> by which a court determines that an individual is incapacitated.
Administrative Office of the Pennsylvania Courts (AOPC)	The office of the Court Administrator of Pennsylvania, who, through AOPC, assists the Supreme Court in administering Pennsylvania’s judicial system and is responsible for the prompt and proper disposition of the business of all courts. <u>See</u> Pa.R.J.A. 501(a).
Adult Protective Services or Protective Services	[A]ctivities, resources and supports provided to older adults under [the Older Adults Protective Services Act, 35 P.S. § 10225.101 <i>et seq.</i>] to detect, prevent, reduce or eliminate abuse, neglect, exploitation and abandonment. 35 P.S. § 10225.103.
Agent	A person authorized by another to act in his or her place. <u>Black’s Law Dictionary</u> (9 th ed. 2009).
Alleged Incapacitated Person (AIP)	A person who is claimed to be incapacitated in a petition for adjudication of incapacity. If the petition is granted, the person is referred to as an Incapacitated Person (IP).
Alzheimer’s Disease	A progressive mental deterioration that can occur in middle or old age, due to generalized degeneration of the brain and which is the most common cause of premature senility.
Area Agency on Aging (AAA)	“[T]he single local agency designated by the [Department of Aging] within each planning and service area to administer the delivery of a comprehensive and coordinated plan of social and other services and activities.” 71 P.S. § 581-2.
Assisted Living Residences or Assisted Living Facility	As used in this report, a housing facility for people with disabilities.
Assurance of Financial Responsibility	As used in this report, a means, other than a bond, of assuring a proposed guardian has the ability to make the incapacitated person whole in the event of loss in the assets of the estate occasioned by the proposed guardian’s breach of the applicable standard or care, including, but not limited to, insurance, letters of credit, pledging of assets, etc.
Attorneys’ Fees	As used in this report, the payment for legal services.
Bar Association	An organization of lawyers established to promote professional competence, enforce standards of ethical conduct, and encourage a spirit of public service among members of the legal profession.

Bench Book	As used in this report, a book providing an overview of legal rules and other information for a judge, and which can be used as a resource guide to assist in the disposition of a case.
Bill of Rights	As used in this report, a formal summary of those rights and liberties considered essential to a people or group of people.
Bond	As used in this report, a type of fiduciary bond, sometimes referred to as a surety bond, required by a court to be filed by a guardian to insure proper performance of his or her duties. <u>Black's Law Dictionary</u> , 201 (9 th ed. 2009).
Clerk of Courts	An official appointed by a court or elected to oversee administrative, nonjudicial activities of the court.
Cognitive Impairment	An intermediate stage between the expected cognitive decline of normal aging and the more serious decline of dementia, which can involve problems with memory, language, thinking and judgment that are greater than normal age-related changes.
Common Pleas Case Management System	The courts' statewide, electronic case management system.
Conservatorship	See definition of Guardianship.
Continuing Legal Education (CLE)	The education requirements that active attorneys in Pennsylvania must complete every year. <u>See</u> Pa.R.C.L.E. 101 <i>et seq.</i>
Corporate Fiduciary	A corporate entity, such as a bank or trust company, serving as a guardian.
Court Administrative Staff	As used in this report, the employees of the courts involved in guardianship matters.
Court Administrator	An officer appointed or elected to oversee administrative, nonjudicial activities of the court.
Court Appointed Counsel	As used in this report, the attorney appointed by the court to represent an individual.
Court Rules	The rules promulgated by the Supreme Court to govern various legal proceedings such as the procedural rules of court, attorney and judicial disciplinary rules, CLE rules, etc.
Court-Appointed Special Advocates (CASA)	A network of 951 community-based programs that recruit, train and support citizen-volunteers to advocate for the best interests of abused and neglected children in courtrooms and communities.
Criminal Background Check	As used in this report, a criminal records check conducted by the Pennsylvania State Police and the Federal Bureau of Investigation.
Decedents' Estates Laws	Pennsylvania's Probate, Estates and Fiduciaries Code, 20 Pa. C.S. § 101 <i>et seq.</i> and related statutes.
Defendants	In a civil case, the individual or entity being sued; in a criminal case, the individual or entity charged with a crime.
Dementia	A chronic or persistent disorder of the mental processes caused by brain disease or injury and marked by memory disorders, personality changes and impaired reasoning.
Deposition	The recorded, sworn testimony of a witness taken under oath outside of court.
Diminished Capacity	As used in this report, a client's decreased capacity "to make adequately considered decisions in connection with a representation . . . due either to minority, mental impairment or some other reason." Pa.R.P.C. 1.14(a).

Disciplinary Rules	The Pennsylvania Rules of Professional Conduct (Pa.R.P.C.) for attorneys, and the Pennsylvania Rules of Disciplinary Enforcement (Pa.R.D.E.).
Durable Power of Attorney	As used in this report, the legal authorization for one person to act on behalf of another individual that remains in effect even after the individual becomes incapacitated.
Elder Court	A court designed specially to address legal proceedings involving elders.
Emergency Guardian	A guardian appointed “when it appears that the [AIP] lacks capacity, is in need of a guardian and a failure to make such appointment will result in irreparable harm to the [AIP] or their estate.” 20 Pa.C.S. § 5513.
Exploitation	An act or course of conduct by a caretaker or other person against an older adult or an older adult’s resources, without the informed consent of the older adult or with consent obtained through misrepresentation, coercion or threats of force, that results in monetary, personal or other benefit, gain or profit for the perpetrator or monetary or personal loss to the older adult. 35 P.S. § 10225.103
Fiduciary	“[P]ersonal representatives, guardians and trustees, whether domiciliary or ancillary, individual or corporate subject to the jurisdiction of the orphans’ court division.” 20 Pa.C.S. § 102.
Fiduciary Duty	“A duty to act for someone else’s benefit, while subordinating one’s personal interests to that of the other person.” <u>Black’s Law Dictionary</u> , 581 (9 th ed. 2009).
Fiduciary Program	As used in this report, a program established to protect individuals and other beneficiaries who, due to injury, disease or age, are unable to manage their financial affairs.
Final Decree	An order of the court, fully and finally disposing of litigation.
Financial Crimes	As used in this report, any of the offenses under the following provisions of 18 Pa.C.S. (relating to crimes and offenses): theft by unlawful taking or disposition; theft by deception; theft by extortion; theft of property lost, mislaid, or delivered by mistake; receiving stolen property; theft of services; theft by failure to make required disposition of funds received; unauthorized use of automobiles and other vehicles; theft from a motor vehicle; forgery; bad checks; access device fraud; deceptive or fraudulent business practices; insurance fraud and identity theft.
Financial Exploitation	As used in this report, the illegal or improper use of an elder’s funds, property or assets.
General Assembly	The legislative branch of the government of the Commonwealth of Pennsylvania comprised of the Pennsylvania House of Representatives and the Pennsylvania Senate.
Guardian	A fiduciary responsible for the care and management of the estate (i.e., a guardian of the estate) or the person (i.e., a guardian of the person) of an incapacitated person. See 20 Pa.C.S. § 102.
Guardian ad Litem	A person appointed by a court to represent interests of a minor or incapacitated person involved in legal proceedings.
Guardianship	The legal arrangement under which a guardian has the legal right and duty to care for an incapacitated person and/or his or her property. See <u>Black’s Law Dictionary</u> , 776 (9 th ed. 2009).

Guardianship Support Agency (GSA)	An agency created pursuant to 20 Pa.C.S. §§ 5551-55 “to provide services, as an alternative to guardianship, to individuals whose decision-making ability is impaired, to serve as guardian when an individual is found to need a guardian and no other person is willing and qualified to serve and to provide services to courts, guardians and others.” 20 Pa.C.S. § 5551.
Home Rule County	As used in this report, a county where the basic authority to act in municipal affairs is transferred from state law, as set forth by the General Assembly, to a local charter, adopted and amended by the voters.
Id.	A signal referring to the authority or citation immediately before. <u>Black’s Law Dictionary</u> , 813 (9 th ed. 2009).
Incapacitated Person (IP)	“[A]n adult whose ability to receive and evaluate information effectively and communicate decisions in any way is impaired to such a significant extent that he is partially or totally unable to manage his financial resources or to meet essential requirements for his physical health and safety.” 20 Pa.C.S. § 5501.
Inter vivos	An adjective describing a transfer of property during life, rather than by will or in contemplation of an imminent death. <u>Black’s Law Dictionary</u> , 898 (9 th ed. 2009).
Interdisciplinary Teams	The teams described in (II)(C)(1)(d) modeled after the Supreme Court’s Children’s Roundtable Initiative and comprised of individuals from different fields to advise and support guardians and the court.
Inventory	A guardian’s required statement, within three months of receiving any real or personal estate of his ward, of all received property and all anticipated receipt of property. <u>See</u> 20 Pa.C.S. § 5412.
Joint State Government Commission (JSGC)	The primary, non-partisan research organization for the General Assembly that provides a readily available mechanism for conducting interdisciplinary studies. <u>See</u> 46 P.S. §§ 65 & 66.
Limited Guardianship	A guardianship for a person whom the court finds to be partially incapacitated, wherein the guardian has only those powers consistent with the court’s findings of the person’s limitations. <u>See</u> 20 Pa.C.S. § 5512.1(b), (d).
Model Code of Ethics (Model Code)	The Model Code of Ethics for Guardians adopted by the National Guardianship Association in 1988, which “suggest[s] ethical and legal standards designed to simplify and improve” the guardian’s decision making process. A Model Code of Ethics for Guardians § I (Nat’l Guardianship Ass’n 1988).
National Guardianship Association Standards of Practice (NGA Standards)	The Standards, first adopted by the National Guardianship Association in 2000, which guide guardians in executing their duties and responsibilities. Standards of Practice Preamble (Nat’l Guardianship Ass’n 4 th ed. 2013).
National Probate Court Standards	The standards originally published in 1993 by the National College of Probate Court Judges and revised in 2013, which “promote uniformity, consistency, and continued improvement in the operations of probate courts.” National Probate Court Standards (Nat’l Coll. of Probate Ct. Judges 2013).

Neglect	“The failure to provide for oneself or the failure of a caretaker to provide goods or services essential to avoid a clear and serious threat to physical or mental health. An older adult who does not consent to the provision of protective services will not be found to be neglected solely on the grounds of environmental factors which are beyond the control of the older adult or the caretaker, such as inadequate housing, furnishings, income, clothing or medical care.” 35 P.S. § 10225.103.
Non-Professional Guardian	As used in this report, a guardian with two or fewer guardianships at the same time.
Offense Gravity Score	A number used under Pennsylvania Sentencing Guidelines to denote the seriousness of an offense, with higher numbers representing more serious offenses.
Online Bonding Service	As used in this report, an entity that sells bonds for guardians on the internet.
Orphans’ Court Division (Orphans’ Court)	As used in this report, the division of a court of common pleas exercising jurisdiction as provided in 20 Pa. C.S. § 711 over guardianships of incapacitated persons.
Orphans’ Court Procedural Rules	The rules governing practice and procedure in the orphans’ courts throughout the Commonwealth of Pennsylvania.
Personal Care Homes	“Any premises in which food, shelter and personal care assistance or supervision . . . are provided for a period exceeding twenty-four hours for four or more adults who are not relatives of the operator,” who do not require the services in or of a licensed long-term care facility, but “who require assistance or supervision in such matters as dressing, bathing, diet, financial management, evacuation of a residence in the event of an emergency or medication prescribed for self-administration.” 62 P.S. § 1001.
Petition for Adjudication of Incapacity	The petition filed pursuant to 20 Pa.C.S. § 5501 <i>et seq.</i> to have an alleged incapacitated person declared incapacitated.
Petitioner	As used in this report, the party filing a petition for adjudication of incapacity. 20 Pa.C.S. § 5511(a).
Plaintiff	A person, corporation, legal entity, etc., initiating a civil lawsuit, also called complainant or petitioner.
Plenary Guardianship	A guardianship for a person the court finds to be totally incapacitated and in need of complete guardianship services. <u>See</u> 20 Pa.C.S. § 5512.1(c) & (e).
Physician Orders for Life-Sustaining Treatment (POLST)	A set of medical orders, similar to a do-not-resuscitate order.
Power of Attorney (POA)	Legal authorization for one person to act on behalf of another individual.
President Judge	A judge of the court of common pleas of a judicial district who exercises general supervision and administrative authority over judges and magisterial district judges within the judicial district.

Principal	In the context of 20 Pa.C.S. § 5461(d), “an individual who executes an advance health care directive, designates an individual to act or disqualifies an individual from acting as a health care representative, or an individual for whom a health care representative acts in accordance with [the laws]. 20 Pa.C.S. § 5422. In the context of a power of attorney, the individual who has executed the power of attorney, permitting or directing another to act on his or her behalf, subject to his or her direction and control.
Private Counsel	As used in this report, an advocate, counsel or official agent employed in preparing, managing and trying cases in the courts who is employed by a private person rather than by a government or subdivision thereof.
Private Guardian	A fiduciary responsible for the care and management of the estate (i.e., a guardian of the estate) or the person (i.e., a guardian of the person) of an incapacitated person who is employed by a private person rather than by a government or subdivision thereof. See definition of Guardian.
Private Right of Action	As used in this report, and as referenced in HB 2057, any older adult who is injured by an act of financial exploitation or any person authorized to act on behalf of the older adult may institute an action, in the court of common pleas, or any other court of competent jurisdiction, for damages sustained by the older adult.
Pro Bono	Legal services performed free of charge. <u>Black’s Law Dictionary</u> , 1323 (9 th ed. 2009).
Probate Court	Court with authority to supervise estate administration.
Professional Guardian	As used in this report, persons serving as guardian for two or more non-family members at the same time.
Proposed Guardian	The person or entity proposed to the court in the petition for adjudication of incapacity to serve as guardian. 20 Pa.C.S. § 5511(e).
Protection From Abuse Order (PFA)	A court order directing an abuser to cease abusing an individual and taking additional precautions to ensure the safety of that individual.
Prothonotary	The chief clerk of a court in some states, including Pennsylvania.
Public Guardian	A fiduciary responsible for the care and management of the estate (i.e., a guardian of the estate) or the person (i.e., a guardian of the person) of an incapacitated person, who is employed by a government or governmental subdivision. See definition of Guardian.
Representative Payee	As used in this report, the person or organization selected by a federal or state agency to receive benefits on behalf of a beneficiary.
Representative-Payment Program	See definition of Fiduciary Program.
Respondent	As used in this report, the person responding to a petition for adjudication of incapacity; the alleged incapacitated person.
Sealed File	As used in this report, a file which may not be accessed in the absence of a court order.
Self-Neglect	“The failure to provide for oneself . . . the goods or services essential to avoid a clear and serious threat to physical or mental health. An older adult who does not consent to the provision of protective services will not be found to be neglected solely on the grounds of environmental factors which are beyond the control of the older adult . . . , such as inadequate housing, furnishings, income, clothing or medical care.” See 35 P.S. § 10225.103.

Serious Bodily Injury	An “injury which creates a substantial risk of death or which causes serious permanent disfigurement or protracted loss or impairment of the function of a body member or organ.” 35 P.S. § 10225.103.
Serious Physical Injury	An injury that: “(1) causes a person severe pain; or (2) significantly impairs a person’s physical functioning, either temporarily or permanently.” 35 P.S. § 10225.103.
Sexual Abuse	“Intentionally, knowingly or recklessly causing or attempting to cause rape, involuntary deviate sexual intercourse, sexual assault, statutory sexual assault, aggravated indecent assault, indecent assault or incest.” 35 P.S. § 10225.103.
Statute	An act of the General Assembly. 1 Pa.C.S. § 1991.
Statutory Right	As used in this report, a legal right granted by statute.
Surcharge	As used in this report, a fee imposed on filings in guardianship matters.
Suspicious Activity Reports (SARs)	As used in this report, a document that financial institutions must file with the Financial Crimes Enforcement Network following a suspected incident of money laundering or fraud.
Suspicious Death	As used in this report, a death that is unexpected and circumstances or cause of which are medically or legally unexplained.
Undue Influence	As used in this report, an influence by which a person is induced to act otherwise than by their own free will or without adequate attention to the consequences.
Unified Judicial System (UJS)	The unified state court system of the Commonwealth of Pennsylvania.
Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act	A model statute addressing the issue of jurisdiction over adult guardianships, conservatorships and other protective proceedings, providing a mechanism for resolving multi-state jurisdictional disputes, and seeking to ensure that only one state will have jurisdiction over a particular guardianship at any one time.
Uniform Power of Attorney Act (UPAA)	A model statute providing a procedure by which people may manage their property via a power of attorney in case of future incapacity, and including safeguards for his or her protection.
Volunteer Monitoring Program	As used in this report, a program that utilizes volunteers to monitor active guardianships and seek court involvement when intervention is necessary.
Ward	See definition of Incapacitated Person (IP).

- 27 *Id.* at 10.
- 28 Center for Elders and the Courts, *Basics*, <http://www.eldersandcourts.org/Guardianship/Guardianship-Basics/Guardianship-Data.aspx>.
- 29 Brenda K. Uekert & Thomas Dibble, *Guardianship of the Elderly: Past Performance and Future Promises*, 23 *The Court Manager* 4, 11-12 (2008), http://www.guardianship.org/reports/Guardianship_of_the_Elderly.pdf.
- 30 Joint State Government Commission, *Guardianship Law in Pennsylvania, Report of the Working Group on Guardianships*, 5 (May 2007), <http://jsg.legis.state.pa.us/resources/documents/ftp/publications/2007-30-Guardianship%20Law%20in%20PA.pdf>.
- 31 Administrative Office of Pennsylvania Courts, Department of Research and Statistics, *2013 Caseload Statistics of the Unified Judicial System of Pennsylvania*, <http://www.pacourts.us/news-and-statistics/research-and-statistics/caseload-statistics>.
- 32 Act of April 16, 1992 (P.L. 108, No. 24).
- 33 The Act 24 data provided to the Administrative Office of Pennsylvania Courts came from internal reports.
- 34 Mary Joy Quinn, Springer Series on Ethics, Law and Aging, *Guardianship of Adults: Achieving Justice, Autonomy, and Safety*, 162 (N.Y.: Springer Publ'g. Co., 2005).
- 35 U.S. Government Accountability Office, *Guardianships: Cases of Financial Exploitation, Neglect, and Abuse of Seniors*, (GAO-10-1046), 7-8 (Sept. 2010), http://www.globalaging.org/elderrights/us/2010/Finance_Neglect.pdf.
- 36 Brenda K. Uekert & Thomas Dibble, *Guardianship of the Elderly: Past Performance and Future Promises*, 23 *The Court Manager* 4, 9 (2008), http://www.guardianship.org/reports/Guardianship_of_the_Elderly.pdf.
- 37 Conference of State Court Administrators, *The Demographic Imperative: Guardianships and Conservatorships*, 6 (2010), <http://cosca.ncsc.org/~media/Microsites/Files/COSCA/Policy%20Papers/COSCA%20White%20Paper%20-2010.ashx>.
- 38 Brenda K. Uekert & Thomas Dibble, *Guardianship of the Elderly: Past Performance and Future Promises*, 23 *The Court Manager* 4, 10 (2008), http://www.guardianship.org/reports/Guardianship_of_the_Elderly.pdf.
- 39 *Id.*
- 40 *Id.*
- 41 *Id.*
- 42 Sally Balch Hurme & Erica Wood, *Guardian Accountability Then and Now: Tracing Tenets for an Active Court Role*, 31 *Stetson L. Rev.* 867, 872 (2002), <http://www.stetson.edu/law/lawreview/media/guardian-accountability-then-and-now-tracing-tenets-for-an-active-court-role.pdf>.
- 43 Brenda K. Uekert & Thomas Dibble, *Guardianship of the Elderly: Past Performance and Future Promises*, 23 *The Court Manager* 4, 10 (2008), http://www.guardianship.org/reports/Guardianship_of_the_Elderly.pdf.
- 44 *Third National Guardianship Summit Standards and Recommendations*, 2012 *Utah L. Rev.* 1191, 1200 (2012), <http://www.epubs.utah.edu/index.php/ulr/article/view/833/642>.
- 45 Conference of State Court Administrators, *The Demographic Imperative: Guardianships and Conservatorships*, 19 (2010), <http://cosca.ncsc.org/~media/Microsites/Files/COSCA/Policy%20Papers/COSCA%20White%20Paper%20-2010.ashx>.
- 46 Conference of Chief Justices and Conference of State Court Administrators, *Encouraging Collection of Data on Adult Guardianship, Adult Conservatorship, and Elder Abuse Cases by All States*, Resolution 14 (2009), <http://ccj.ncsc.org/~media/Microsites/Files/CCJ/Resolutions/08012009-Encouraging-Collection-of-Data-on-Adult-Guardianship-Adult-Conservatorship.ashx>.
- 47 Brenda K. Uekert, Center for Elders and the Courts, *Adult Guardianship Court Data and Issues, Results from an Online Survey*, 4 (Mar. 2, 2010), http://www.guardianship.org/reports/Guardianship_Survey_Report.pdf.
- 48 *Id.* at 8.
- 49 American Bar Association *Resolution 100A*, 3 (Aug. 12-13, 2013) (citing Social Security Administration Office, Office of Retirement and Disability Policy, *Annual Statistical Supplement to the Social Security Bulletin*, 2012 (Feb. 2013)).
- 50 *What You Need to Know about Guardianship*, *Herald Tribune*, July 21, 2013, <http://www.heraldtribune.com/article/20130721/ARTICLE/130729968>.
- 51 American Bar Association *Resolution 100A*, 4 (Aug. 12-13, 2013).
- 52 U.S. Government Accountability Office, *Guardianships: Collaboration Needed to Protect Incapacitated Elderly People*, (GAO-04-655), 4 (July 2004), <http://www.gao.gov/assets/250/243297.pdf>.
- 53 20 Pa.C.S. § 5501.
- 54 *Id.* § 5511.
- 55 Delaware County Bar Association, *Elder Law Handbook and Resource Guide* (2012), 23, http://www.delcosa.org/Portals/_AgencySite/Elder%20Law%20Handbook%202012%20with%202014%20update.pdf; 20 Pa.C.S. § 5511.
- 56 20 Pa.C.S. §§ 5511, 5518.
- 57 *Id.* § 5511(f).
- 58 *Id.* § 5512.1.
- 59 *Id.*
- 60 *Id.* § 5521(a).
- 61 *Id.* § 5521(c).

- 62 *Id.* § 5517.
- 63 Conference of State Court Administrators, *The Demographic Imperative: Guardianships and Conservatorships*, 1 (2010), <http://cosca.ncsc.org/~media/Microsites/Files/COSCA/Policy%20Papers/COSCA%20White%20Paper%20-2010.ashx>.
- 64 United States Department of Health and Human Services, Administration for Community Living, *DOJ and HHS call for action to address abuse of older Americans*, ACL News (July 9, 2014), http://www.acl.gov/NewsRoom/Press_Releases/archive_ACL/2014/2014_07_09.aspx (quoting Associate Attorney General Tony West).
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Congress of the United States
Washington, DC 20515

March 31, 2014

The Honorable Hal Rogers
 Chairman
 U.S. House Committee on Appropriations
 H-305, The Capitol
 Washington, D.C. 20515

The Honorable Nita Lowey
 Ranking Member
 U.S. House Committee on Appropriations
 1016 Longworth HOB
 Washington, D.C. 20515

The Honorable Frank R. Wolf
 Chairman
 Subcommittee on Commerce, Justice,
 Science, and Related Agencies
 H-309, The Capitol
 Washington, D.C. 20515

The Honorable Chaka Fattah
 Ranking Member
 Subcommittee on Commerce, Justice,
 Science, and Related Agencies
 1016 Longworth HOB
 Washington, D.C. 20515

Dear Chairman Rogers, Ranking Member Lowey, Chairman Wolf, and Ranking Member Fattah:

We greatly appreciate your efforts to help crime victims by supporting the Crime Victims Fund and Victims of Crime Act (VOCA) programs. As you begin work on the Commerce, Justice, Science, and Related Agencies appropriations bill for Fiscal Year 2015, we respectfully request that you consider adopting a long-term funding strategy for the Crime Victims Fund. In light of the desperate and growing need for these funds nationwide and the significant growth in the Fund's balance, we ask that the Committee adopt a policy of basing the annual VOCA cap on the previous year's deposits into the Fund. Doing so would set the 2015 VOCA cap at no less than \$1.489 billion.

Since 1984, the Victims of Crime Act has provided federal grants to provide essential, often life-saving services for crime victims. The Crime Victims Fund is *not financed by taxpayer dollars* but by fines, forfeitures, and other penalties paid by federal criminal offenders. By statute, the Fund is dedicated solely to supporting victim services. Because these non-tax dollars have already been collected and deposited into the Fund, raising the cap does not add to the national deficit or debt.

Every year, state VOCA victim assistance grants provide vital, direct assistance that supports thousands of public and community-based agencies nationwide in providing services to more than 3.4 million victims of assault, robbery, gang violence, intoxicated drivers, fraud, elder abuse, domestic violence, child abuse and neglect, sexual assault, stalking, and many other crimes. Additionally, VOCA supports victim assistance for those involved in the federal criminal justice system, including survivors of terrorist acts. VOCA also helps victims with financial assistance for medical care, mental health counseling, lost wages, and funeral and burial costs.

As you know, the annual amounts deposited into the Crime Victims Fund continue to grow at unprecedented rates greatly exceeding the annual cap, which means the Fund balance has likewise been greatly increasing. According to the most recent estimates by the Office of Management and Budget

U.S. House Committee on Appropriations
March 31, 2014

(OMB), the Fund balance at the beginning of 2015 will exceed \$10.2 billion – more than 13.5 times the amount of the 2014 cap. OMB also estimates that \$1.9 billion will be deposited into the Fund during FY 2015, meaning that the Fund balance will continue to grow.

Since a cap on Fund obligations was first imposed in 2000, the release of these dedicated funds has not kept pace with the need for victim assistance and compensation. In fact, our nation's ability to maintain the same level of services to crime victims has diminished while the needs continue to increase. Consider the following statistics:

- VOCA assistance funding in 2013 was 13.7 percent less in real, inflation-adjusted dollars than in 2000.
- According to Office of Victims of Crime reports, 629,993 (15.5 percent) fewer crime victims received VOCA-funded services in 2012 than in 2007.
- A recent survey by national victim organizations of 2,358 service providers found that: 1,925 (81.6 percent) said they “desperately” or “definitely” needed more VOCA funds; 1,963 (83.2 percent) said they needed additional VOCA funds to sustain current levels of service; and 1,921 (81.4 percent) said more funds were needed to increase their capacity to serve more crime victims.
- The National Network to End Domestic Violence (NNEDV) 2013 census found that on the same day that 66,500 adults and children received housing and advocacy services, 9,641 requests for services went unmet due to inadequate funding and resources.
- Eighty-eight percent of state domestic violence coalitions reported an increase in the demand for services, while 69 percent said programs have experienced funding decreases. Since 2011, at least 19 domestic violence programs have been forced to close.
- A 2013 survey by the National Alliance to End Sexual Violence (NAESV) indicated that 75 percent of rape crisis centers have lost funding resulting in layoffs, reduced services, and program closures. More than one-third of these centers have a waiting list for services – some as long as two months. More than half of these centers have reduced staff through layoffs and leaving positions unfilled.

With an obvious need for increased funding and a more than ample balance in the Fund, now is the time to establish a long-term, logical, and consistent basis for determining the annual VOCA cap in order to release additional money for the purpose Congress intended and for which it was collected. The balance in the Crime Victims Fund is more than enough to significantly increase VOCA funding without jeopardizing the Fund's future solvency.

For these reasons, we believe it is reasonable and just that the Committee adopt a policy of setting the annual VOCA funding level at no less than the amount deposited into the Fund during the last full fiscal year. As such, we strongly urge the Committee to raise the 2015 VOCA cap to no less than \$1.489 billion, the amount deposited in 2013. Establishing a “last year’s deposits” basis for the annual

U.S. House Committee on Appropriations
March 31, 2014

VOCA cap would maintain the current Fund balance and ensure there is a more than adequate balance while appropriately providing the needed resources to help victims of crime as Congress originally intended.

Thank you for your leadership and consideration of this request.

Sincerely,



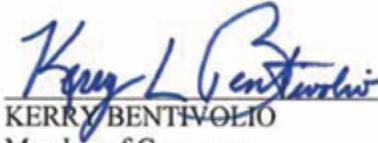
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Member of Congress



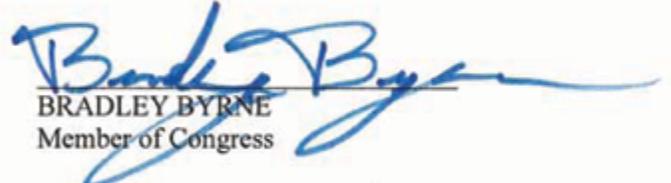
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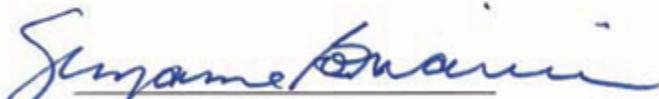
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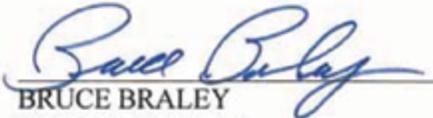
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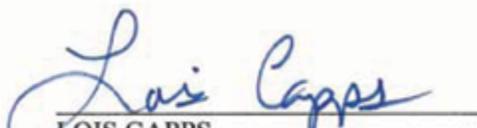


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U.S. House Committee on Appropriations
March 31, 2014


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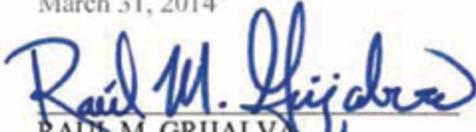

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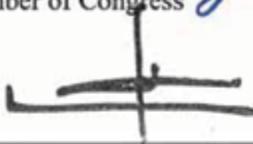

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U.S. House Committee on Appropriations
March 31, 2014


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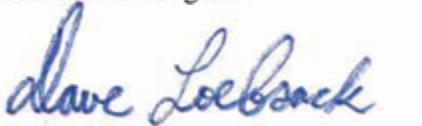


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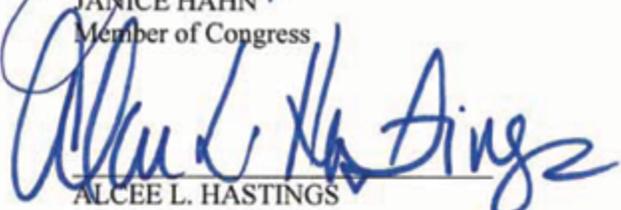

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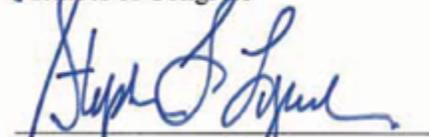

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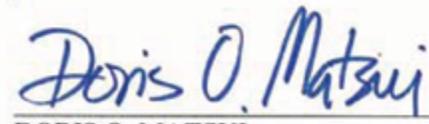

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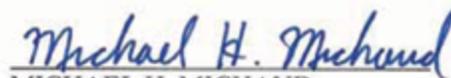

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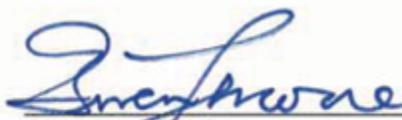

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U.S. House Committee on Appropriations
March 31, 2014


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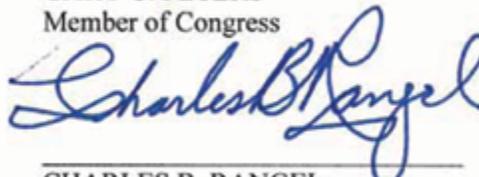

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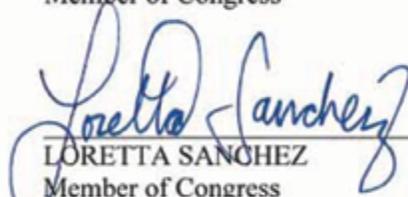

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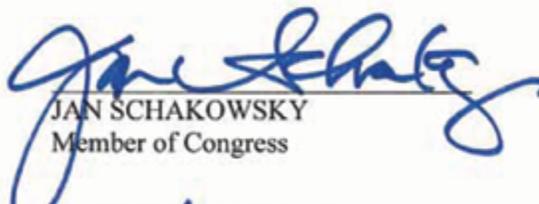

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Member of Congress

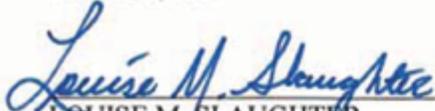

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KURT SCHRADER
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DAVID SCOTT
Member of Congress

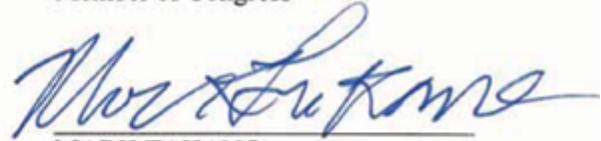

CAROL SHEA-PORTER
Member of Congress

U.S. House Committee on Appropriations
March 31, 2014

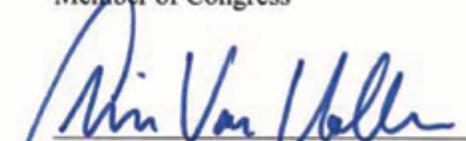

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TIM WALZ
Member of Congress

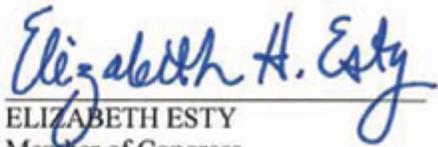

DEBBIE WASSERMAN SCHULTZ
Member of Congress

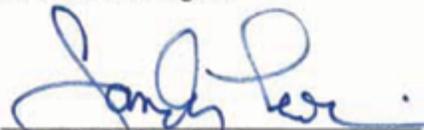

HENRY A. WAXMAN
Member of Congress

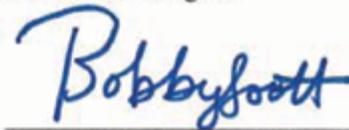

PETER WELCH
Member of Congress


FRÉDERICA S. WILSON
Member of Congress


KEITH ELLISON
Member of Congress


ELIZABETH ESTY
Member of Congress


SANDER M. LEVIN
Member of Congress


ROBERT C. "BOBBY" SCOTT
Member of Congress

U.S. House Committee on Appropriations
March 31, 2014


MARC VEASEY
Member of Congress


MAXINE WATERS
Member of Congress


JIM GERLACH
Member of Congress


DAVID G. REICHERT
Member of Congress

United States Senate

WASHINGTON, DC 20510

April 11, 2014

The Honorable Barbara Mikulski, Chairwoman
The Honorable Richard Shelby, Ranking Member
Subcommittee on Commerce, Justice, and Science
Senate Appropriations Committee
Washington, D.C. 20515

Dear Chairwoman Mikulski and Ranking Member Shelby:

As you begin work on the Commerce, Justice and Science Appropriations bill for Fiscal Year (FY) 2015, we respectfully request that outlays from the Crime Victims Fund be as high as possible to support core Victims of Crime Act (VOCA) assistance programs and fulfill the needs of victims across the country. We also request that you oppose efforts to use the Fund to cover expenses other than those authorized by VOCA.

In FY 2000, Congress began limiting the amount of Fund deposits that could be obligated each year. This was to provide a stable level of funding available for these programs in future years despite annual fluctuations in Fund deposits. Congress also amended the law to ensure that all receipts remain in the Fund for obligation in future fiscal years. In subsequent years, the balances in the Fund have grown in excess of \$10 billion. These balances are needed to support essential services to victims' assistance programs facing resource strains in every state.

We request that the Subcommittee oppose rescissions to the Fund. We are concerned the President has proposed diverting money from the Fund for other purposes without taking steps to ensure the continued viability of the Fund. As you know, the Senate has consistently voted to prevent the diversion of Fund resources to other activities. The Subcommittee should oppose efforts to use the Fund to cover expenses other than those authorized for the Fund and utilize the balances to address unmet needs.

While the Fund's balances are growing, so is the need for victim assistance and compensation. During the past year, victim service professionals have seen a clear rise in demand from a support network facing strained financial resources. The economic downturn has resulted in limits on state government funding and significant decreases in private giving. With the increased need for funding, and the growing balances in the Fund, now is the time to release additional money from the Fund for the purpose for which it was collected.

The balances in the Crime Victims Fund are sufficient to provide significantly increased funding without jeopardizing the Fund's future sustainability. Accordingly, we strongly urge the Subcommittee to release as much funding as possible to help meet the dire needs of victims of all types of crime throughout the nation and that you oppose efforts to use the Fund to cover expenses other than those authorized by VOCA.

Thank you for your leadership in this critical area and for your consideration of this request.

Sincerely,


PATRICK LEAHY
United States Senator


MIKE CRAPO
United States Senator

April 11, 2014
Page 2 of 3


ROBERT P. CASEY, JR.
United States Senator


KELLY AYOTTE
United States Senator


ANGUS S. KING, JR.
United States Senator


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United States Senator


KIRSTEN E. GILLIBRAND
United States Senator


DEB FISCHER
United States Senator


CHRISTOPHER A. COONS
United States Senator


BARBARA BOXER
United States Senator

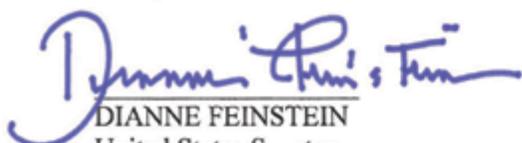

DEBBIE STABENOW
United States Senator

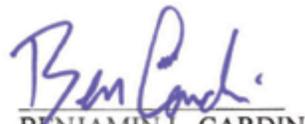

AL FRANKEN
United States Senator


JEFFREY A. MERKLEY
United States Senator


MAZIE K. HIRONO
United States Senator

April 11, 2014
Page 3 of 3


DIANNE FEINSTEIN
United States Senator

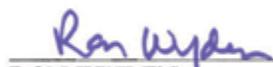

BENJAMIN L. CARDIN
United States Senator


JOHN D. ROCKEFELLER IV
United States Senator


SHELDON WHITEHOUSE
United States Senator

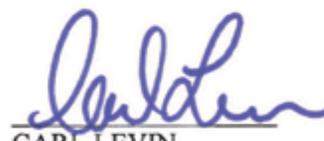

ROBERT MENENDEZ
United States Senator


JACK REED
United States Senator


RON WYDEN
United States Senator


CHARLES E. SCHUMER
United States Senator


CHRISTOPHER MURPHY
United States Senator


CARL LEVIN
United States Senator



RED FLAGS OF ABUSE

Does someone you know—a senior or adult with a disability—display any warning signs of mistreatment?



» Neglect

- Lack of basic hygiene, adequate food, or clean and appropriate clothing
- Lack of medical aids (glasses, walker, teeth, hearing aid, medications)
- Person with dementia left unsupervised
- Person confined to bed is left without care
- Home cluttered, filthy, in disrepair, or having fire and safety hazards
- Home without adequate facilities (stove, refrigerator, heat, cooling, working plumbing, and electricity)
- Untreated pressure “bed” sores (pressure ulcers)



» Financial Abuse/Exploitation

- Lack of amenities victim could afford
- Vulnerable elder/adult “voluntarily” giving uncharacteristically excessive financial reimbursement/gifts for needed care and companionship
- Caregiver has control of elder’s money but is failing to provide for elder’s needs
- Vulnerable elder/adult has signed property transfers (Power of Attorney, new will, etc.) but is unable to comprehend the transaction or what it means



» Psychological/Emotional Abuse

- Unexplained or uncharacteristic changes in behavior, such as withdrawal from normal activities, unexplained changes in alertness, other
- Caregiver isolates elder (doesn’t let anyone into the home or speak to the elder)
- Caregiver is verbally aggressive or demeaning, controlling, overly concerned about spending money, or uncaring

» Physical/Sexual Abuse

- Inadequately explained fractures, bruises, welts, cuts, sores or burns
- Unexplained sexually transmitted diseases



If you or someone you know is in a life threatening situation or immediate danger, call **911** or the local police or sheriff.

WHAT IS ELDER ABUSE?

In general, elder abuse refers to intentional or neglectful acts by a caregiver or “trusted” individual that lead to, or may lead to, harm of a vulnerable elder. *In many states, younger adults with disabilities may qualify for the same services and protections.* **Physical abuse; neglect; emotional or psychological abuse; financial abuse and exploitation; sexual abuse; and abandonment** are considered forms of elder abuse. In many states, **self-neglect** is also considered mistreatment.

WHO IS AT RISK?

Elder abuse can occur *anywhere* – in the home, in nursing homes, or other institutions. It affects seniors across all socio-economic groups, cultures, and races.

Based on available information, women and “older” elders are more likely to be victimized. Dementia is a significant risk factor. Mental health and substance abuse issues – of both abusers and victims – are risk factors. Isolation can also contribute to risk.

WHAT SHOULD I DO IF I SUSPECT ABUSE?

Report your concerns.

Most cases of elder abuse go undetected. Don’t assume that someone has already reported a suspicious situation. The agency receiving the report will ask what you observed, who was involved, and who they can contact to learn more.

You do not need to prove that abuse is occurring; it is up to the professionals to investigate the suspicions.

» **To report suspected abuse in the community,** contact your local Adult Protective Services agency. For state reporting numbers, visit www.apsnetwork.org, visit the NCEA website at www.ncea.aoa.gov or call the *Eldercare Locator* at **1-800-677-1116**.

» **To report suspected abuse in a nursing home or long-term care facility,** contact your local Long-Term Care Ombudsman. For reporting numbers, visit www.ltcombudsman.org, visit the NCEA website at www.ncea.aoa.gov or call the *Eldercare Locator* at **1-800-677-1116**.



The National Center on Elder Abuse (NCEA) directed by the U.S. Administration on Aging, helps communities, agencies and organizations ensure that elders and adults with disabilities can live with dignity, and without abuse, neglect, and exploitation. We are based at University of California, Irvine Center of Excellence on Elder Abuse & Neglect, Program in Geriatrics. NCEA is the place to turn for **education, research, and promising practices in stopping abuse.**

PREPARED FOR NCEA BY:



CENTER OF EXCELLENCE
ON ELDER ABUSE AND NEGLECT
UNIVERSITY OF CALIFORNIA, IRVINE

Visit us online for more resources!

www.ncea.aoa.gov

Find us on Facebook, YouTube and POPVOX.

This document was completed for the National Center on Elder Abuse and is supported in part by a grant (No. 90AB0002/01) from the Administration on Aging, U.S. Department of Health and Human Services (DHHS). Grantees carrying out projects under government sponsorship are encouraged to express freely their findings and conclusions. Therefore, points of view or opinions do not necessarily represent official Administration on Aging or DHHS policy.

The Center of Excellence is grateful to its generous supporters: the Archstone Foundation, the National Institute of Justice, the National Institute on Aging, UniHealth Foundation, and individual donors. www.centeronelderabuse.org



11 Things that Anyone Can Do to Prevent Elder Abuse

1 Learn the **signs of elder abuse and neglect**



2 **Call or visit an elderly loved one** and ask how he or she is doing

3 Provide a respite **break for a caregiver**



4 Ask your bank manager to train tellers on **how to detect elder financial abuse**

5 **Ask your doctor** to ask you and all other senior patients about possible family violence in their lives



6 **Contact your local Adult Protective Services or Long-Term Care Ombudsman** to learn how to support their work helping at-risk elders and adults with disabilities

7 Organize a **“Respect Your Elders” essay or poster contest** in your child’s school

8 Ask your religious congregation’s leader to **give a talk about elder abuse** at a service or to put a message about elder abuse in the bulletin

9 **Volunteer to be a friendly visitor** to a nursing home resident or to a homebound senior in your neighborhood

10 Send a letter to your local paper, radio or TV station suggesting that they cover **World Elder Abuse Awareness Day** (June 15) or **Grandparents Day** in September



11 Dedicate your **bikeathon/marathon/other event** to elder mistreatment awareness and prevention

Find local resources for Seniors, People with Disabilities, and Caregivers!
Call the **ElderCare Locator** at **1-800-677-1116** or visit **www.eldercare.gov**.

For more information on elder abuse prevention,
please visit **www.ncea.aoa.gov** or **www.centeronelderabuse.org**.

Find us on Facebook, YouTube and POPVOX!

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UNIVERSITY of CALIFORNIA, IRVINE

For more information: **www.ncea.aoa.gov**

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If you suspect an elder is being abused, please call:

Statewide Elder Abuse Hotline: 1-800-490-8505

or

Office of Attorney General Elder Abuse Hotline: 1-866-623-2137



AOPC

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