TASK FORCE TO STUDY THE MARYLAND ORPHANS' COURTS

187 Harry S. Truman Parkway
Annapolis, MD 21401

December 14, 2021

The Honorable Lawrence J. Hogan
Governor
100 State Circle
Annapolis, Maryland 21401

The Honorable William C. Ferguson, IV
President of the Senate
The State House
Annapolis, Maryland 21401

The Honorable Adrienne A. Jones
Speaker of the House
The State House
Annapolis, Maryland 21401

Dear Governor Hogan, President Ferguson and Speaker Jones:

It is our pleasure to present to you the following report as required under Chapter 525 of the 2021 Laws of Maryland by the Task Force to Study the Maryland Orphans' Court.

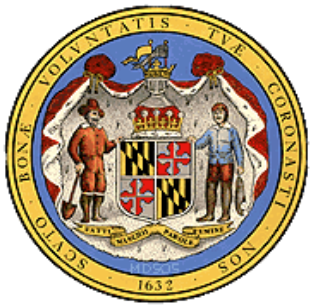
Once all members were officially appointed, we began our work in earnest in late September 2021. The Task Force met six times during the Fall of 2021 and discussed all of the issues mandated by the enacted legislation as well as additional topics believed pertinent to its goals. We adopted this report on December 13, 2021, and the five recommendations herein were either unanimously supported or supported by the majority.

We thank you for the opportunity to serve the State of Maryland in the assessment of the Orphans' Court system, offering suggestions for improvement, and to assist in improving the quality of life for all Marylanders.

Sincerely,

Eric Wargotz

Judge Eric Wargotz
Chair



Task Force to Study the Maryland Orphans' Courts

2021 Laws of Maryland, Chapter 525
(House Bill 681)

Task Force Report

December 13, 2021

Judge Eric Wargotz
Chair

Delegate Vanessa Atterbeary
Delegate Jason Buckel
Allan J. Gibber, Esq.
Judge Athena Malloy Groves
Senator Ronald Watson
Senator Christopher West
Register of Wills Paul Zimmermann

Executive Summary

As mandated, the Task Force to Study the Maryland Orphans' Courts examined the composition and purpose of the Orphans' Courts in Maryland as well as reviewed, analyzed and compared the Orphans' Courts in each local jurisdiction, and researched the laws and practices of probate courts throughout the Nation. Following this examination, the Task Force formulated a detailed list of matters to consider. The matters were discussed and debated extensively and concluded with the development of five recommendations which were either unanimously supported or supported by the majority.

The Task Force to Study the Maryland Orphans' Courts offers the following recommendations:

1) Orphans' court judges be elected to a term of eight years. Upon a vacancy the governor shall appoint a replacement to serve the remainder of the term in accordance with current Code.

2) Candidates for judge of the Orphans' Court shall not specify a political party affiliation, shall not appear on primary election ballots, and thus will appear on the general election ballot only.

3) Except in Montgomery County and Harford County, the judges of the courts shall receive an annual salary and any benefits as set by their respective County Executives and County Councils, City Mayor and City Council or County Commissioners.

4) An Orphans' Court judge may not act as an attorney in a civil or criminal matter during a term of office in any matter which is within the jurisdiction of any Orphans' Court of the state or in any matter related to the administration of an estate or guardianship of a minor.

5) A Cross-Jurisdictional Probate Court be established for the purpose of adjudicating complex estate matters upon election by a party to the anticipated proceeding at the local Orphans' Court level. The Orphans' Courts as presently established would be retained. The current option of framing an issue for consideration by a Circuit Court will thus be eliminated. Jurisdictions would be based on the current Circuits. The attorney judge(s) of the Cross-Jurisdictional Probate Court would be appointed by the Circuit Judge(s) of the Circuit, be state judiciary employees, and be compensated as such.

Introduction: The Orphans' Court - Purpose, History, Process

Members of the Task Force to Study the Maryland Orphans' Court are acutely aware that the role of the Orphans' Courts in Maryland, a court of limited jurisdiction specific to probate matters and responsible for some matters pertaining to guardianships, may not be understood by all who read this report. Therefore, we provide the following information for context and edification.

Purpose: The Orphans' Court are charged by Estates and Trusts Article §2-102 with performing judicial probate, directing personal representatives, and issuing orders necessary for the administration of a decedent's estate. In other words, the responsibility of the Orphans' Court is to ensure that the provisions of a will are followed, that the rights of heirs are protected in the absence of a will, that creditor's rights are preserved, and that the personal representative duties are met. The Orphans' Court settles disputes over estates and may rule on such matters as testamentary capacity**,** fraud**,** and other matters related to validity of a will such as undue influence and proper execution. The Orphans' Court also secures the rights of minors and rules on fees for attorneys and personal representatives. Administration of Trusts is not within the jurisdiction of the Orphans' Court as that responsibility is within the jurisdiction of the Circuit Court.

History: The beginnings of probate in the English colony of Maryland can be traced back to 1635 when estates were probated by the Secretary of the Province until 1671 and then by the Prerogative Court from 1671 to 1776. Orphans' Courts were first created in the State of Maryland under the Acts of 1777. They were established in each county and served by a Register of Wills. The thinking behind the name "Orphans' Court" was based on the Court of the Orphans of the City of London and was deemed applicable since children of deceased male landowners were considered orphans when the father died. Thus, this system was developed to protect their inheritance interests. In 1851, the judges of the Orphans' Court became Constitutional Judges. The Constitutional Convention of 1867 considered the elimination of the Orphans' Court, ultimately choosing instead a substitute which provided for three elected judges. Constitutional recognition of the Orphan's Court can be found in Maryland Constitution Article IV, §§ 1 and 40.

Maryland court structure places the Orphans' Court at a horizontal level with the Circuit Court and although its jurisdiction is limited to probate and property guardianship, it has full power to enforce rulings within that jurisdiction.

Three Orphans' Court judges sit in the City of Baltimore and each of Maryland's counties, except Harford and Montgomery counties, for a total of sixty-six Orphans' Court judges seated in Maryland. In 1964 and 1972, Montgomery County and Harford County, respectively, became exempted from Section 40 of Article IV of the Constitution, which otherwise requires that there

be an Orphans' Court in every county and Baltimore City. Section 20(b) of Article IV provides that the judges of those two counties "shall each, alternately and in rotation...sit as an Orphans' Court for their county..." The Constitution has been amended to require the judges in Baltimore City, Baltimore County and Prince George's County to be attorneys and barred in the State of Maryland. Those judges may preside over cases alone, whereas in the other jurisdictions, the three judges sit together in a panel to hear matters. The three-judge panel must function as a team. As part of the local community, they must blend their different perspectives and experiences in the decision-making process for the good of the people being served. Candidates for election and reelection as Orphans' Court judge declare a party affiliation and appear on primary election ballots for the declared party. The top three vote-getters from each party advance to the general election. Candidates for election and reelection as Orphans' Court judge stand for election every four years, corresponding with the Maryland gubernatorial cycle. Maryland's Constitution requires Orphans' Court judges to be Maryland citizens and residents of their jurisdiction for at least 12 months before their election.

Process: The central responsibility of the Orphans' Court is to supervise the administration of estates of people who have died (legally known as a "decedent") who own property in their sole name. The responsibility applies whether there is a will or not (intestate.) The Orphans' Court has the authority to direct the conduct of personal representatives (referred to as executor in some states), has jurisdiction over the guardianship of the property of minors and in some counties, appoints guardians of minors. At the request of an interested person, an issue of fact arising in the Orphan's Court may be transferred to the Circuit Court. If a person dies owning assets that do not otherwise automatically pass to the decedent's beneficiaries or heirs, Maryland laws provide for an orderly process to transfer those assets. This process is known as probate.

Regardless of the presence of a will, when there are probate assets in the decedent's sole name, a personal representative is appointed to administer the estate. The personal representative is responsible for identifying the decedent's assets, ensuring that any final debts are valid and then paid by the estate, paying administration expenses and taxes from the estate, and distributing any remaining assets to the beneficiaries if there is a will, or to legal heirs if there is no will.

Typically, a personal representative must file an inventory of the nature and value of probate assets, and within nine months of appointment the personal representative must file an administration account representing what the decedent owned at death, what has been received since death, and what payments or distributions have been made or are expected to be made to legal heirs and/or beneficiaries. Following that initial filing, an administration account must be filed every six months until the estate is closed.

Orphans' Courts are responsible for examining and ultimately approving administration accounts, ensuring that only appropriate payments are made from estate assets, and that distributions are made to the proper beneficiaries or heirs. Payment of attorney's fees and

personal representative's commissions made from estate assets requires consent in certain cases, or must be approved by the Orphans' Court.

The Orphans' Court judges are also responsible for adjudicating disputes which may arise concerning an estate. Among such issues are questions over validity of a will or codicil, validity of beneficiaries or heirs, disputes over claims of debt owed, disputes centering on distributions to heirs, personal representative fees, attorney fees, and other matters being challenged. In formal hearings, the Orphans' Court judges, like other trial court judges, must consider the evidence and testimony and apply the appropriate Maryland laws to resolve the dispute. A decision rendered by an Orphans' Court may be appealed to the Circuit Court where it will be heard *de novo* (as a new case) or to the Court of Special Appeals where it will be heard as an extension of the existing record. Furthermore, issues of fact may be referred to other courts for determination by judge or jury. The matter would then return to the Orphans' Court for any further proceedings.

Legislation, Mandates, and Members

In the 2021 session of the Maryland General Assembly, the House of Delegates passed House Bill 681 – Task Force to Study the Maryland Orphans' Court. The Senate supported and passed it without changes and the legislation was enacted into law under Article II, § 17(c) of the Maryland Constitution, May 30, 2021.

The legislation was borne out of a desire to examine why there exists three structural forms of Orphans' Courts in Maryland (as described with more detail in the "History" section earlier) though tasked with applying the same body of law: local Orphans' Courts sitting as a panel of three judges; local Orphans' Courts with three judges sitting individually; Circuit Court judges sitting as an Orphans' Court. Additional questions underpinning the legislation centered on the education and any specific requirements of those sitting as Orphans' Court judges. The mandates were explicit and broad, as defined below. The law mandates a report due on or before January 1, 2022.

The entirety of the legislation can be found in Appendix C.

From Section 1, (f): The Task Force shall:

(1) examine the composition and purpose of the Orphans' Courts in Maryland;
(2) review and compare the Orphans' Courts in each local jurisdiction in Maryland;
(3) analyze and compare the laws and practices of other states relating to probate courts;
(4) examine any other research, analysis, or guidance related to the best practices of probate courts; and
(5) make recommendations to improve the Orphans' Courts in Maryland.

Membership

The Task Force membership as specifically dictated by the legislation:

"(b) The Task Force consists of the following members:

(1) two members appointed by the President of the Senate;
(2) two members appointed by the Speaker of the House;
(3) one member appointed by the Register of Wills Association;
(4) one member appointed by the Maryland Bar Association;
(5) an Orphans' Court judge residing in a jurisdiction of more than 250,000 people, appointed by the Governor;
(6) an Orphans' Court judge residing in a jurisdiction of less than 250,000 people, appointed by the Governor.

(c) The Governor shall designate the chair of the Task Force."

Members

Legislative members of the Task Force:

- The Honorable Vanessa Atterbeary, Delegate, District 13, Howard County
- The Honorable Jason Buckel, Delegate, District 1B, Allegany County
- The Honorable Ronald Watson, Senator, District 23, Prince George's County
- The Honorable Christopher West, Senator, District 42, Baltimore County

Gubernatorial appointees:

- The Honorable Athena Malloy Groves, Orphans' Court Judge, Prince George's County
- The Honorable Eric Wargotz, Orphans' Court Judge, Queen Anne's County

Register of Wills Association Appointee:

- The Honorable Paul Zimmermann, Register of Wills, Carroll County

Maryland Bar Association Appointee:

- Allan J. Gibber, Esq.

The Chair, as determined under the legislation by appointment of Governor Lawrence Hogan, Jr., is Judge Eric Wargotz, M.D.

Staff to the Task Force is Dawn Ellison, Esq., Associate Legal Counsel, Internal Affairs Division, Administrative Offices of the Court.

Meetings, Research, and Discussion

The Task Force to Study the Maryland Orphans' Court met seven times spanning late September to mid-December 2021. Although the first meeting of the Task Force was held in late September 2021 (due to delays in the appointment process) research began in earnest just after Labor Day once the Chair and some members were seated and administrative support was assigned. All Agendas in chronological order are included as Appendix A. All meeting minutes in chronological order are included as Appendix B. Research and other materials which were distributed to the Task Force Members are found in Appendix C. The meetings were livestreamed and recorded with access available at https://mgaleg.maryland.gov/mgawebsite/Committees/Details?cmte=tfo, and all distributed material except for "draft" documents are posted online for the public to access.

In the course of its work, the Task Force came to recognize that the current Orphans' Courts throughout Maryland function well and serve the public needs. However, underlying concerns at the foundation of the Task Force legislation require further analysis and evaluation of current practices to seek improvements including consideration of uniformity, despite the current legislative processes which allow for changes to individual Orphans' Court jurisdictions as considerations may arise.

Each of the mandates required varying degrees of research be conducted and reviewed often resulting in lively debate and discussion. Below is a brief synopsis of how the Task Force to Study the Maryland Orphans' Court addressed the first four of the five mandates and some conclusions.

(1) E*xamine the composition and purpose of the Orphans' Courts in Maryland:*
Estates and Trusts Article §2-102 was reviewed and discussed as to "purpose." Research to examine the "composition" found that although the Judiciary does not maintain demographic information on Orphans' Court judges it should be noted that diversity of gender, race, and age does exist among Orphans' Court judges. The Task Force also noted that the educational background also varies among Orphans' Court judges: some have obtained a J.D. degree, but a majority have not.

(2) R*eview and compare the Orphans' Courts in each local jurisdiction in Maryland:*
As noted earlier, there exist three structures of the Orphans' Court in Maryland, although a majority of the twenty-four Orphans' Courts maintain the form whereby three Orphans' Court judges sit together. The Task Force examined all three forms in comparison. We reviewed the requisite educational requirement of a J.D. degree existing for some jurisdictions and whether there ought to be a uniform requirement to have a J.D. degree to serve as an Orphans' Court judge.

An attempt to examine competency of the different Orphans' Courts throughout the state was attempted through examining appeals data. The effort was abandoned when specific parameters sought were not attainable. However, what could be gleaned from what was obtained is that the number of appeals does not appear excessive across the jurisdictions. Additionally, we examined how often the Orphans' Court met and what day(s), and the number of judges required to render decisions if sitting as a panel (majority rules). We discussed attorney judges' ability to practice law in some jurisdictions, while not in others, and the restrictions for the former. The manner in which compensation is approved for judges of the Orphans' Court, was also examined as it differs among the jurisdictions: some require approval by the legislature while others do not.

(3) A*nalyze and compare the laws and practices of other states relating to probate Courts:*
The Task Force performed a comparative evaluation with review and discussion of probate process among the fifty United States. This was tabulated and can be found in Appendix C.

(4) E*xamine any other research, analysis, or guidance related to the best practices of probate courts:*
There exists a document entitled "National Probate Court Standards" produced under the auspices of the National College of Probate Court Judges with the most recent edition published in 2013 (found in Appendix C). The Task Force reviewed and discussed this document and concluded that the Orphans' Courts of Maryland were complying. A substantial body of material in the document pertain to Guardianships and we decided to defer consideration of "Guardianship matters in the Orphans' Court" due to ongoing legislative consideration of the broader topic of Guardianships. The concept of a "Cross-Jurisdictional Probate Court" was discussed in detail. Continuing education of Orphans' Court judges through the Judicial College was examined and determined that since the Orphans' Court judges have the same requirements for continuing education as all judges in Maryland, then no further consideration of this topic was necessary. Non-partisan versus partisan election of Orphans' Court judges was discussed, as well as length of term. We also considered the topic of timeframes of estate closures and tape recording versus transcripts of Orphans' Court proceedings but did not consider these worthy of further discussion based on the nuances of estates and existing court practices.

Recommendations

The Task Force to Study the Maryland Orphans' Courts concluded its work on December 13, 2021. The fifth and final mandate:

(5) M*ake recommendations to improve the Orphans' Courts in Maryland.*

This mandate is met by the offering of five recommendations as follows which were either unanimously supported or supported by the majority:

Recommendation #1

On the matter of the length of terms for Orphans' court judges.

Md. Code pertaining to length of terms –

Md. Constitution Article XVII, § 3:
All State and county officers elected by qualified voters (except judges of the Circuit Courts, judges of the Supreme Bench of Baltimore City, judges of the Court of Appeals and judges of any intermediate courts of appeal) shall hold office for terms of four years, and until their successors shall qualify. (*Section effective until approval of amendments proposed by Acts 2021, c. 82, § 1, and Acts 2021, c. 83, § 1. See, also, Art. 17, § 3 effective after approval of amendments proposed by Acts 2021, c. 82, § 1, and Acts 2021, c. 83, § 1.*)

Recommendation:

That the code be amended to stipulate Orphans' Court judges are elected to a term of eight years. Upon a vacancy the governor shall appoint a replacement to serve the remainder of the term in accordance with current Code.

Recommendation #2

On the matter of candidates for Orphans' Court Judge specifying a party affiliation.

Md. Code pertaining to party affiliation -

Md. Code Annotated Election Law § 5-203(a)(2):
Unless the individual is a registered voter affiliated with the political party, an individual may not be a candidate for:
(i) an office of that political party; or
(ii) except as provided in subsection (b) of this section, nomination by that political party.

Md. Code Ann., Election Law § 5-203(b):
The requirements for party affiliation specified under subsection (a) of this section do not apply to a candidate for:
(1) a judicial office; or
(2) a county board of education.

Recommendation:

That the Code be amended to reflect those candidates for judge of the Orphans' Court shall not specify a political party affiliation, shall not appear on primary election ballots, and thus will appear on the general election ballot only.

Recommendation #3

On the matter of Orphans' Court judge Compensation.

The following changes are recommended (in bold):

Md Code Estates & Trusts, Section 2-108 - Judges' compensation

(a)(1) Except in Montgomery County and Harford County, the judges of the courts shall receive compensation and allowances as prescribed by law.

(2) Unless otherwise provided **by their respective jurisdictions**, the compensation shall be paid in monthly installments.

(3) Mileage or travel expenses may not be allowed to a judge for attending sessions of the judge's court except as specifically provided **by their respective jurisdictions**.

(b) Except in Montgomery County and Harford County, the judges of the courts shall receive an annual salary and any benefits as set by their respective County Executives and County Councils, City Mayor and City Council or County Commissioners.

(c) (**1)** Except in Montgomery County and Harford County, a county shall pay a pension, as determined by their respective County Executives and County Councils, City Mayor and City Council or County Commissioners, in the same manner as salaries are paid during active service, to each judge of the Orphans' Court who:

(i) Has terminated active service;
(ii) Has reached 60 years of age; and
(iii) Has completed at least **eight years** of office.

Recommendation #4

On the matter of establishing a uniform provision for attorney practice parameters as Orphans' Court judges.

ISSUE: The Task Force believes that the current law is unfair to attorneys serving as Orphans' Courts judges as they are prevented from practicing any aspect of law in a majority of the jurisdictions. Est and Trusts § 2-109 addresses the restriction of an Orphans' Court judge to practice law. Generally, it provides that an Orphans' Court judge may not act as an attorney at law in a civil or criminal matter during a term of office. It then creates exceptions for judges in seven counties, of which the exceptions are not uniform. The Task Force believes that restrictions should be uniform throughout the State and should be limited to matters that may come before the orphans' court or are related to the administration of an estate. The change recommended below represents the entirety of a "new" § 2-209.

PROPOSED LEGISLATION (changes in bold)
§ 2-109. Restriction on judge's practice of law
In general - **A judge of the court may not act as an attorney at law in a civil or criminal matter during a term of office in any matter which is;**

(a) within the jurisdiction of any Orphans' Court of the state, or
(b) related to the administration of an estate or guardianship of the minor.

Recommendation #5

On the matter of establishing a Cross- Jurisdictional Probate Court.

Article IV of the Maryland Constitution should be amended to create a new Section 40A, entitled "Cross-Jurisdictional Probate Judges." Under this new heading, the amended text should provide that the judges of each of Maryland's eight Circuit Court judicial circuits shall appoint one or more Cross-Jurisdictional Probate Judges, as determined by the Legislature. Each Cross-Jurisdictional Probate Judge shall be a citizen of the State of Maryland, shall have been a resident of the Circuit Court judicial circuit for which the judge was appointed for the twelve months preceding the judge's appointment, shall have been admitted to practice law in this State, shall be a member in good standing of the Maryland Bar, and shall be most distinguished for integrity, wisdom and sound legal knowledge.

Each of the Cross-Jurisdictional Probate Judges shall be paid such compensation as may be regulated by Law, to be paid by the State of Maryland. Each Cross-Jurisdictional Probate Judge shall serve for a term of six years and shall be eligible for re-appointment. In case of a vacancy in the office of Cross-Jurisdictional Probate Judge, the judges of the applicable Circuit Court judicial circuit shall appoint a suitable person to fill the vacancy for the residue of the term.

The Cross-Jurisdictional Probate Judges shall have and exercise all the power, authority, and jurisdiction to adjudicate disputes arising in the Orphans' Courts within the Circuit Court judicial circuit of which the present Orphans' Courts preside.

In the event of a controversy before the Orphans' Court requiring a hearing, any of the parties to the case may, prior to the commencement of the hearing, file a request with the Orphans' Court that the hearing be conducted before a Cross-Jurisdictional Probate Judge. Upon the filing of such a request, the case will be heard and decided before a Cross-Jurisdictional Probate Judge appointed by the Circuit Court judges of that Circuit Court judicial circuit. The current option of framing an issue for consideration by a Circuit court will thus be eliminated.

Any hearing before a Cross-Jurisdictional Probate Judge shall follow the rules of practice and procedure set forth in the Maryland Rules or under any statute.

The Court of Special Appeals shall have exclusive appellate jurisdiction over any reviewable judgement, decree, order, or other action of a Cross-Jurisdictional Probate Judge. The appeal shall be heard on the record established at the hearing before the Cross-Jurisdictional Probate Judge. As provided in Section 12-701 of the Courts and Judicial Proceedings Article, an appeal from a judgement, decree, order, or other action of a Cross-Jurisdictional Probate Judge shall stay all proceedings concerning the issue appealed.

Appendix A

TASK FORCE TO STUDY THE MARYLAND ORPHANS' COURTS

Meeting Agenda

September 30, 2021
11:00am

Maryland Judicial Center, Room 133, 187 Harry S. Truman Parkway, Annapolis, MD 21401 and via Zoom for Government

I. Welcome and Call to Order—Chair, Hon. Eric Wargotz

- Notice to Participants of Meeting Recording
- Roll call
- Review of Task Force Mandates from House Bill 681
- Review of Task Force Operating Procedures

II. New Business—Review of Foundational Research

a) Composition and Purpose of the orphans' courts in Maryland

b) Review and compare the orphans' courts in each local jurisdiction in Maryland

c) Examine any other research, analysis, or guidance related to the best practices of probate courts

d) Analyze and compare the laws and practices of other states relating to probate courts

III. Adjournment

TASK FORCE TO STUDY THE MARYLAND ORPHANS' COURTS

Meeting Agenda

October 14, 2021
11:00am

Maryland Judicial Center, Room 238, 187 Harry S. Truman Parkway, Annapolis, MD 21401 and via Zoom for Government

I. Welcome and Call to Order—Chair, Hon. Eric Wargotz

- Notice to Participants of Meeting Recording and Live Stream
- Roll call
- Approval of Minutes

II. Old Business

- Foundational Research Information from 9 -30 -21 – Questions?

III. New Business

- Origins of the Task Force Legislation: Query of and Discussion with Sponsor Delegate Buckel (2021 Legislation)
- Update regarding "Appeals Research."

IV. Adjournment

TASK FORCE TO STUDY THE MARYLAND ORPHANS' COURTS

Meeting Agenda

October 28, 2021
11:00am

Maryland Judicial Center, Rooms 322/323,
187 Harry S. Truman Parkway, Annapolis, Maryland
and via Zoom for Government

I. Welcome and Call to Order—Chair, Hon. Eric Wargotz

- Notice to Participants of Meeting Recording and Live Stream
- Roll call
- Approval of Minutes

II. Old Business

- James Findley, Note, *The Debate over Nonlawyer Probate Judges: A Historical Perspective*, (attachment) *https://www.law.ua.edu/pubs/lrarticles/Volume%2061/Issue%205/findley.pdf*
- Appeals research

III. New Business

1. Current (recent and historical) approach to modification

A. Local Jurisdiction "origination" (local ballot non-binding and/or binding referenda; council & executive; Commission):

1) Orphans' Court Judge(s) vs. Circuit Court Judge presiding
2) Orphans' Court judges: attorneys or non-attorneys
3) *In particular, consider pertinence to our mandates* - Orphans' Court attorney judges: matter of practicing law with the exception of Probate Law

B. State “origination” (legislature; executive action; agency):

4) Training for Orphans’ Court Judges: Orientation and Continuing education requirements
5) Partisan vs. Non-partisan
6) Term Length
7) Elected vs. Appointed
8) Guardianship matters

2. Other

9) Salaries, days, and hours worked for Orphans’ Court Judges vs. Circuit Court Judges
10) Tape recordings vs. transcripts.
11) Unanimity of decisions between courts vs. a majority vote
12) Concept: multi-jurisdictional Orphans’ Court system
13) Timeframe of Estate Closures

IV. Adjournment

TASK FORCE TO STUDY THE MARYLAND ORPHANS' COURTS

Meeting Agenda

November 4, 2021
11:00am

Maryland Judicial Center, Conference Rooms 322/323,
187 Harry S. Truman Parkway, Annapolis, Maryland
and via Zoom for Government

I. Welcome and Call to Order—Chair, Hon. Eric Wargotz

- Notice to Participants of Meeting Recording and Live Stream
- Roll call
- Approval of Minutes

II. Old Business

1) Orphans' Court Judge(s) vs. Circuit Court Judge presiding
2) Process by which compensation is approved for Orphan Court Judges
3) Orphans' Court attorney judges: matter of practicing law with the exception of Probate law
4) Orphans' Court judges: attorneys or non-attorneys
5) Elected vs. Appointed
6) Partisan vs. Non-Partisan
7) Term Length

III. New Business

- Remaining Task Force Timeline

IV. Adjournment

TASK FORCE TO STUDY THE MARYLAND ORPHANS' COURTS

Meeting Agenda

November 18, 2021
11:00am

Maryland Judicial Center, Conference Room 241,
187 Harry S. Truman Parkway, Annapolis, Maryland
and via Zoom for Government

I. Welcome and Call to Order—Chair, Hon. Eric Wargotz

- Notice to Participants of Meeting Recording and Live Stream
- Roll call
- Approval of Minutes

II. New Business

- Discussion of Draft Recommendations (5)

III. Adjournment

TASK FORCE TO STUDY THE MARYLAND ORPHANS' COURTS

Meeting Agenda

December 2, 2021
11:00am

Maryland Judicial Center, Training Room 133,
187 Harry S. Truman Parkway, Annapolis, Maryland
and via Zoom for Government

I. Welcome and Call to Order—Chair, Hon. Eric Wargotz

- Notice to Participants of Meeting Recording and Live Stream
- Roll call
- Approval of Minutes

II. New Business

- Review of final draft (5) recommendations.

III. Adjournment

Appendix B

Minutes of the Task Force to Study the Maryland Orphans' Court

September 30, 2021, 11:15am

Honorable Eric Wargotz, presiding

Via Zoom for Government and at Maryland Judicial Center, Room 133,

187 Harry S. Truman Pkwy, Annapolis, MD 21401

Members Present:

Judge Eric Wargotz, Chair
Senator Ron Watson
Allan J. Gibber, Esq.
Senator Chris West

Others Present:

Dawn Ellison, Esq., Staff
Suzanne Pelz
Heather Marchione

Minutes

The meeting was called to order and a roll call was taken. Notice was given to participants that the meeting was being recorded and livestreamed for purposes of public viewing. House Bill 681 was reviewed with members, with each of the five mandates under (2)(f) read into the record. Members agreed that the task force would identify areas of research they feel will be useful, they will discuss which matters should be researched, and the chair will direct Staff to conduct the research.

All documents distributed to the members prior to the meeting were reviewed, "Foundational Information for Task Force Mandate (1) and (2)," "National Probate Standards version 2013," "Orphans' Court Transcript Options," "History of the Orphans' Court," and "Probate Court Nationwide Information."

It was noted that one document should be edited to reflect that in Harford and Montgomery Counties, circuit court judges sit as an Orphans' Court for the respective counties.

Members discussed what might be areas of focus for the members to address the mandates. A question was raised as to whether the task force should look into guardianships, but members

agreed that specifically looking into guardianships could require more time than what is allotted, and this was not further considered. Local jurisdictional authority and legislative process over changes to the orphans' court and the potential role of state legislative authority impacting the orphans' courts was discussed. Although a number of topics for potential consideration were raised and not further considered, members focused on two potential areas for the task force in some detail: (1) operation of the Orphans' Court in the timely disposition of estates and (2) need for continuing education (CE). Clarification of Orphans' court judges CE activities was provided. These two topics were not further considered. There was further discussion among the members regarding which matters the task force should review and study, and a consensus desire was expressed to request the sponsor of the task force legislation to offer insight as to its formulation and goals.

Comment was offered in support of the manner in which the current Orphans' Court system operates and in particular in comparison to other states, and in following what is described in the "National Probate Standards" document. The members discussed the need to underpin any recommendations in the Task Force final report with research (facts, data/metrics) which would serve to support any suggested changes to the current system. Taking that approach, members agreed to review appeals of Orphans' Court cases as an attempt to examine competency of Orphans' Court judges as some jurisdictions require judges to be attorneys and a majority of the jurisdictions do not require judges to be attorneys. Specifically, group consensus was to review the number of appeals from each jurisdiction to the circuit court, number of appeals that went directly to Court of Special Appeals, the type of appeal (de novo vs. other appeal), the reason for the appeal and final outcome of the appeal. Staff was asked to obtain this appeal data from Orphans' Courts in the State.

The mask requirement was reviewed for meeting in person at the Maryland Judicial Center.

The meeting was adjourned at 12:19pm.

Next meeting: October 14, 2021 at 11:00am.

Minutes of the Task Force to Study the Maryland Orphans' Court

October 14, 2021, 11:04am

Honorable Eric Wargotz, presiding

Via Zoom for Government and at Maryland Judicial Center, Room 238,

187 Harry S. Truman Pkwy, Annapolis, MD 21401

Members Present:

Judge Eric Wargotz, Chair
Del. Vanessa Atterbeary
Allan J. Gibber, Esq.
Judge Athena Groves
Sen. Chris West
Hon. Paul Zimmerman

Others Present:

Dawn Ellison, Esq., Staff
Suzanne Pelz, Esq.
Brenda Mulju

Minutes

The meeting was called to order. Notice given to participants that meeting was being recorded and livestreamed for purposes of public viewing.

Notice given to members that they can submit travel vouchers to be reimbursed for travel. Staff was tasked to advise Task Force members on how to submit those vouchers.

The minutes from the September 30, 2021 meeting were approved by unanimous consent.

Since Delegate Buckel, a member of the Task Force and the sponsor of the Task Force legislation was unable to participate in follow-up to a request from the prior meeting, he requested that his letter of February 12, 2020 to his colleagues in the legislature, re "Task Force to Study the Maryland Orphans' Court," be distributed to the members for review. He had conveyed to the Chair that this letter summed up his main concerns which led to creation of the Task Force.

Roll call was taken.

Questions regarding the February 12, 2020 letter were presented, followed by a lengthy and in-depth discussion among members regarding the topics to be considered by the task force. As an overriding consideration, the matter of current local jurisdictional control of many of these matters versus State Legislative and Executive control to ensure uniformity, was also discussed. Members agreed that at the next meeting they would further this discussion and decide which of the topics to move forward towards further consideration. The topics are listed below:

1) Orphans' Court Judge vs. Circuit Court Judge sitting over proceedings

2) Must the Orphans' Court judge be an attorney or not

3) Should there be a multi-jurisdictional Orphan's Court system installed

4) Orphans' Court judges allowed to continue their private practice with the exception of Probate Law

5) More training for Orphans' Court Judges

6) Partisan vs. Non-partisan

7) Elected vs. Appointed

8) Discuss the different salaries, days and hours worked for Orphans' Court Judges vs. Circuit Court Judges

9) Unanimity of decisions between courts vs. a majority vote

10) Tape recordings vs. transcripts.

11) Guardianship matters in the Orphans Court

12) Timeframes of Estate Closures

13) Term Length

It was mentioned that the current Continued Education requirements (and ethics requirements) for Orphans' Court judges is the same as all other judges, which is two (2) full days of courses.

Members agreed that discussion would be held off until the next meeting when a full panel was expected to be in attendance.

A member received a letter from Harford County Administrative Judge and will forward to Staff to disseminate to all members. Update was provided on appeals data research. Staff notified members that she was informed research would be complete by 10/28 meeting. Staff was asked to communicate that the data is needed by 10/26.

Meeting adjourned at 12:04pm.

Next Meeting: October 28, 2021, at 11:00am.

Minutes of the Task Force to Study the Maryland Orphans' Court

November 4, 2021, 11:00am

Honorable Eric Wargotz, presiding

Via Zoom for Government and at Maryland Judicial Center, Room 322,

187 Harry S. Truman Pkwy, Annapolis, MD 21401

Members Present:

Judge Eric Wargotz, Chair
Del. Vanessa Atterbeary
Del. Jason Buckel
Allan J. Gibber, Esq.
Judge Athena Groves
Sen. Chris West
Hon. Paul Zimmermann

Others Present:

Dawn Ellison, Esq., Staff
Brenda Mulju

Minutes

Meeting called to order. Notice given to participants that meeting was being recorded and livestreamed for purposes of public viewing.

Roll call was taken.

The minutes from the October 28th, 2021 meeting were approved unanimously.

Three corrections were made to the record: (1) The Orphans' Court does not have jurisdiction over Trusts; (2) Orphans' Courts in the State of Maryland that sit as a panel do not need to have unanimity among the panel members for rulings; (3) Estates and Trusts §2-108 covers Judicial Compensation for Orphans' Court judges and specifies which jurisdictions do not require the State's approval to determine compensation of Orphans' Court judges.

Old Business Was Discussed:

Members discussed each of the items from the list at length. After spirited debate and in-depth discussion, the members concluded that they would develop recommendations for the final report pertaining to the following matters (with any lead member responsible for the initial draft indicated in parentheses) : (1) a regional or multi-jurisdictional Probate Court with appointment of its attorney judges, retention of the local Orphans' Courts, and charged with

handling complex cases once elected by the parties (Senator West) (2) Uniform provisions to allow attorneys to practice law as Orphans' Court judges (Counselor Gibber) (3) Jurisdiction over determining Orphans' Court Judge Compensation (Judge Groves) (4) cross-filing (no party affiliation) for election of Orphans' Court judges, (5) Orphans' Court Judge term extension to 8 years from 4 years.

New Business was deferred to the next meeting.

Meeting adjourned at 12:20pm.

Next Meeting: November 18, 2021 at 11:00am.

Minutes of the Task Force to Study the Maryland Orphans' Court

November 18, 2021, 11:00am

Honorable Eric Wargotz, presiding

Via Zoom for Government and at Maryland Judicial Center, Conference Room 241,

187 Harry S. Truman Pkwy, Annapolis, MD 21401

Members Present:

Judge Eric Wargotz, Chair
Del. Jason Buckel
Allan J. Gibber, Esq.
Judge Athena Groves
Sen. Ron Watson
Sen. Chris West
Hon. Paul Zimmermann

Others Present:

Dawn Ellison, Esq., Staff

Minutes

Meeting called to order at 11:01am. Notice given to participants that meeting was being recorded and livestreamed for purposes of public viewing.

Roll call was taken.

The minutes from the October 28th, 2021 meeting were approved unanimously.

Old Business Was Discussed:

After an in-depth discussion, the members finalized their thoughts on the draft recommendations which included a few edits as follows:

Draft Recommendation #1:

If a vacancy occurs during the term, the Governor will appoint someone to complete the term as is currently in the Code.

Draft Recommendation #2:

Eliminate the primary election for Orphans' Court Judges and have the candidates for judge on ballot for general election only.

Draft Recommendation #3:

Compensation, including benefits for Orphans' Court judges would be determined by respective jurisdictions.

Draft Recommendation #4:

Attorney Orphans' Court Judges may not act as an attorney in any manner within the jurisdiction of any Orphans' Court or related to the administration of an estate or guardianship of a minor but can serve in any other matter.

Draft Recommendation #5:

Creation of cross-jurisdictional probate judges, that will be appointed in each of the judicial circuits. This will provide parties an option to have case heard before the probate judge and remove option of having case heard by Circuit Court, except only as to appeal from the Orphans' Court.

New Business was discussed:

Members reviewed the remaining objectives and timeline between now and the final meeting. Draft report to be sent to members for circulation within the last two weeks before final meeting. With discussion of the final report at the last meeting

Meeting adjourned at 12:08pm.

Next Meeting: December 2, 2021 at 11:00am.

Minutes of the Task Force to Study the Maryland Orphans' Court

December 2, 2021, 11:00am

Honorable Eric Wargotz, presiding

Via Zoom for Government and at Maryland Judicial Center, Room 133,

187 Harry S. Truman Pkwy, Annapolis, MD 21401

Members Present:

Judge Eric Wargotz, Chair
Allan J. Gibber, Esq.
Judge Athena Groves
Senator Ron Watson
Senator Chris West
Hon. Paul Zimmermann

Others Present:

Dawn Ellison, Esq., Staff
Brenda Mulju

Minutes

Meeting called to order at 11:01am. Notice given to participants that meeting was being recorded and livestreamed for purposes of public viewing.

Roll call was taken.

The minutes from the November 18th, 2021 meeting were approved unanimously.

New Business Was Discussed:

Members reviewed the final draft of the five (5) recommendations.

Recommendation (1): No changes.

Recommendation (2): There was discussion regarding the elimination of candidates appearing on the Primary Election. However, the members concluded that everyone who met the requirements would appear on the general election ballot.

Recommendation (3): There was discussion regarding the proposed language governing the payment of salary and benefits to Orphans' Court Judges possibly permitting the jurisdictions to pay less than what they currently pay. However, it was concluded that a jurisdiction could not reduce a pension that they have earned and are already vested. Members agreed to modify this recommendation to state that an Orphans' Court Judge would be eligible for a pension after eight years rather than after two terms.

Recommendation (4): No changes.

Recommendation (5): No changes.

Final Timeline Discussion

A tentative remaining timeline was outlined. It was agreed that a draft of the cover letter and report would be completed by December 10, 2021, and shared with the members. Members would be asked to share any comments with the chair no later than 12pm on December 14, 2021. The final report to the Governor, Speaker of the House and Senate President would include all agendas, minutes, and materials distributed as appendices.

Meeting adjourned at 11:20am.

Next Meeting: December 16, 2021, at 11:00am.

These minutes were approved via email on 12/13/21

Appendix C

Chapter 525

(House Bill 681)

AN ACT concerning

Task Force to Study the Maryland Orphans' Courts

FOR the purpose of establishing the Task Force to Study the Maryland Orphans' Courts; providing for the composition, chair, and staffing of the Task Force; prohibiting a member of the Task Force from receiving certain compensation, but authorizing the reimbursement of certain expenses; requiring the Task Force to study and make recommendations regarding certain matters; requiring the Task Force to report its findings and recommendations to the Governor and the General Assembly on or before a certain date; providing for the termination of this Act; and generally relating to the Task Force to Study the Maryland Orphans' Courts.

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That:

(a) There is a Task Force to Study the Maryland Orphans' Courts.

(b) The Task Force consists of the following members:

(1) two members appointed by the President of the Senate;

(2) two members appointed by the Speaker of the House;

(3) ~~one member appointed by the Maryland Judiciary;~~

~~(4)~~ one member appointed by the Register of Wills Association;

~~(5)~~ (4) one member appointed by the Maryland Bar Association;

~~(6)~~ (5) an orphans' court judge residing in a jurisdiction of more than 250,000 people, appointed by the Governor; and

~~(7)~~ (6) an orphans' court judge residing in a jurisdiction of less than 250,000 people, appointed by the Governor.

(c) The Governor shall designate the chair of the Task Force.

(d) The Administrative Office of the Courts shall provide staff for the Task Force.

(e) A member of the Task Force:

(1) may not receive compensation as a member of the Task Force; but

(2) is entitled to reimbursement for expenses under the Standard State Travel Regulations, as provided in the State budget.

(f) The Task Force shall:

(1) examine the composition and purpose of the orphans' courts in Maryland;

(2) review and compare the orphans' courts in each local jurisdiction in Maryland;

(3) analyze and compare the laws and practices of other states relating to probate courts;

(4) examine any other research, analysis, or guidance related to the best practices of probate courts; and

(5) make recommendations to improve the orphans' courts in Maryland.

(g) On or before January 1, 2022, the Task Force shall report its findings and recommendations to the Governor and, in accordance with § 2–1257 of the State Government Article, the General Assembly.

SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect July 1, 2021. It shall remain effective for a period of 1 year and, at the end of June 30, 2022, this Act, with no further action required by the General Assembly, shall be abrogated and of no further force and effect.

Enacted under Article II, § 17(c) of the Maryland Constitution, May 30, 2021.

Foundational Information for Task Force Mandates (1) and (2)[i]

"The Task Force shall:

(1) **Examine the composition and purpose of the orphans' courts in Maryland**;

Composition of MD Orphans' Courts

- 3 judges in each jurisdiction, except Harford and Montgomery. In Harford County and Montgomery County, judges on the respective circuit courts rotate to hear orphans' court matters.

  https://www.mdcourts.gov/sites/default/files/import/orphanscourt/pdfs/ocjudgesregisters.pdf

  - NOTE: Per, The Judiciary Human Resources Department (JHRD), the vacancy in Kent County has been filled by the Hon. Susan W. Pritchett (per a letter from Governor Hogan dated April 20, 2021).

- Attempts were made to collect demographic information on the judges of the orphans' courts in Maryland. However, this data is not reliably available as JHRD does not have demographic information for the Judges. We are aware however, through interactions with Orphans' Court judges that diversity in the Court exists.

Purpose

"Orphans' Court

The Orphans' Court is Maryland's probate court and presides over the administration of estates. In simpler terms, the main job of the Orphans' Court is to supervise the management of estates of people who have died – with or without a Will – while owning property in their sole name. It has authority to direct the conduct of personal representatives, has jurisdiction over the guardianship of the property of minors and in some counties, appoints guardians of minors. "

Source: https://mdcourts.gov/orphanscourt

Maryland Constitution Article IV, § 40--Judges

(a) "The qualified voters of the several Counties, except Montgomery County and Harford County, shall elect three Judges of the Orphans' Courts of Counties who shall be citizens of the State and residents, for the twelve months preceding, in the County for which they may be elected.
(b) The qualified voters of the City of Baltimore shall elect three Judges of the Orphans' Court for Baltimore City who shall be citizens of the State and residents, for the twelve months preceding, in Baltimore City and who have been admitted to practice law in this State and are members in good standing of the Maryland Bar.
(c) The qualified voters of Prince George's County shall elect three Judges of the Orphans' Court for Prince George's County who shall be citizens of the State and residents, for the twelve months preceding, in Prince George's County and who have been admitted to practice law in this State and are members in good standing of the Maryland Bar.
(d) The qualified voters of Baltimore County shall elect three Judges of the Orphans' Court for Baltimore County who shall be citizens of the State and residents, for the twelve months preceding, in Baltimore County and who have been admitted to practice law in this State and are members in good standing of the Maryland Bar.
(e) The Judges shall have all the powers now vested in the Orphans' Courts of the State, subject to such changes as the Legislature may prescribe.
(f) Each of the Judges shall be paid such compensation as may be regulated by Law, to be paid by the City or Counties, respectively.
(g) In case of a vacancy in the office of Judge of the Orphans' Court, the Governor shall appoint, subject to confirmation or rejection by the Senate, some suitable person to fill the vacancy for the residue of the term.

(2) **Review and compare the orphans' courts in each local jurisdiction in Maryland**;"

- Two jurisdictions with Orphans' Courts meet to hear cases 3 or more times a week
- 20 jurisdictions with Orphans' Courts meet to hear cases less than 3 times a week
- 20 jurisdictions with Orphans' Courts meet to hear cases on Tuesdays

Jurisdiction	# of Judges	Judge must be an Attorney	Cases heard by	How often hear cases	When cases are heard
Allegany County	3	No	Panel	2x a week	Tuesdays & Fridays
Anne Arundel County	3	No	Panel	2x a week	Tuesdays & Thursdays
Baltimore City	3	Yes	Individual	5x a week	Monday-Friday
Baltimore County	3	Yes	Individual	5x a week	Monday-Friday
Calvert County	3	No	Panel	1x a week	Every Tuesday
Caroline County	3	No	Panel	1x a week	Every Tuesday
Carroll County	3	No	Panel	2x a week	Mondays & Tuesdays
Cecil County	3	No	Panel	1x a week	Tuesdays (approx. 8:30a-1pm)
Charles County	3	No	Panel	1x a week	Tuesdays
Dorchester County	3	No	Panel	1x a week	Tuesdays (from 2-4pm)
Frederick County	3	No	Panel	2x a week	Tuesdays &Thursdays

Jurisdiction	# of Judges	Judge must be an Attorney	Cases heard by	How often hear cases	When cases are heard
Garrett County	3	No	Panel	1x a week	Tuesdays (from 10am-12pm)
***Harford County**	Circuit Court Judges rotate	Circuit Court Judge	Individual	Docket held 1x a week	Thursdays
Howard County	3	No	Panel	1x a week	Wednesdays
Kent County	3	No	Panel	1x a week	Tuesdays
***Montgomery County**	Circuit Court Judges rotate	Circuit Court Judge;	Individual; (Judge assigned civil motions that week handles the docket)	Docket held 4x a week	Tuesdays-Fridays;
Prince George's County	3	Yes	Individual	3x-5x a week	Tuesdays, Wednesday & Thursdays (standing days) Monday & Friday (for cases that require multiple days)
Queen Anne's County	3	No	Panel	1x a week	Tuesdays
St. Mary's County	3	No	Panel	1x a week (pre-COVID 2x a week) every 2nd & 4th Tuesday)	Fridays (pre-COVID every 2nd & 4th Tuesday)
Somerset County	3	No	Panel	1x a week	Tuesdays
Talbot County	3	No	Panel	1x a week	Tuesdays
Washington County	3	No	Panel	1x a week	Tuesdays

Wicomico County	3	No	Panel	1x a week	Tuesdays
Worcester County	3	No	Panel	1x a week	Tuesdays

**MD Constitution Art. IV §20(b) "The judges of the Circuit Courts for Montgomery and Harford Counties shall each, alternately and in rotation and on schedules to be established by those judges, sit as an Orphans' Court for their County, and shall have and exercise all the power, authority and jurisdiction which the present Orphans' Courts now have and exercise, or which may hereafter be provided by law".*

[i] All information in this document is as of September 2021.

NATIONAL PROBATE COURT STANDARDS

Borchard Foundation
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TASK FORCE ON REVISION OF THE NATIONAL PROBATE COURT STANDARDS

MARY JOY QUINN, *President, National College of Probate Judges (2010-2011), Director (ret.), Probate, Superior Court, San Francisco, CA*

HON. **TAMARA CURRY**, *Executive Committee, National College of Probate Judges (2010-2012), Associate Judge, Probate Court, Charleston, SC*

ANNE MEISTER, *Register of Wills, Probate Division, Superior Court, Washington, DC*

HON. **WILLIAM SELF**, *President, National College of Probate Judges (2011-2012), Judge, Probate Court, Macon, GA*

HON. **JEAN STEWART**, *Secretary-Treasurer, National College of Probate Judges (2010-2012), Judge (ret.), Probate Court, Denver, CO*

HON. **MIKE WOOD**, *President, National College of Probate Judges (2012-2013), Judge, Probate Court No. 2, Houston, TX*

KEVIN BOWLING, *President, National Association for Court Management (2011-2012), Court Administrator, 20th Judicial Circuit Court, Ottawa County, MI*

JUDE DEL PREORE, *President, National Association for Court Management (2010-2011), Trial Court Administrator, Superior Court, Mount Holly, NJ*

PROF. **MARY RADFORD**, *President, American College of Trust and Estate Counsel (2011-2012), Georgia State University College of Law, Atlanta, GA*

ROBERT SACKS, *Esq., American Bar Association Section on Real Property, Trust and Estate Law, Los Angeles, CA,*

RICHARD VAN DUIZEND, *Standards Reporter, National Center for State Courts*

BRENDA K. UEKERT, Ph.D., *Standards Research Director, National Center for State Courts*

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NATIONAL PROBATE COURT STANDARDS

National College of Probate Court Judges

Richard Van Duizend
Reporter

Brenda K. Uekert
Research Director

Borchard Foundation
Center on Law & Aging

State Justice Institute

ACTEC FOUNDATION

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Introduction

Evolution of Probate Courts

Although individual cases involving traditional probate matters such as wills, decedents' estates, trusts, guardianships, and conservatorships have garnered considerable public and professional attention, relatively little attention has been focused until recently on the courts exercising jurisdiction over these cases. Unlike other types of courts (e.g., criminal courts), the evolution of probate courts has differed considerably from state to state.

In England, probate court jurisdiction began in the separate ecclesiastical courts and the courts of chancery. The early probate courts in America exercised equity jurisdiction. Modern counterparts of these equity courts are chancery, surrogate, and orphan's courts. In other American jurisdictions, a judge within a court of broader jurisdiction would typically be given responsibility for probate cases (usually in addition to other duties) because of that judge's expertise or interest in the area or to expedite the handling of this group of cases. Over time, this caseload became sufficiently large to necessitate the assignment of full-time probate judges or the establishment of a separate probate court in some jurisdictions.

This evolution, however, occurred differently in every state, and even within different jurisdictions within a given state. As a result, there is considerable variation between (and often within) the various states in the way in which the state courts handle probate matters.

Need for National Probate Court Standards

This evolution has provided little opportunity for the development of uniform practices by courts exercising probate jurisdiction. Meanwhile, a call for the study of probate court procedures has come from both within and outside the probate courts, including judicial leaders and organizations, bar associations, academicians, and the public. The administration, operation, and performance of courts exercising probate jurisdiction have been identified as areas in need of attention.

In 1987, after numerous stories of abuses, the Associated Press (AP) conducted a study of the nation's guardianship/conservatorship system, resulting in a report, "Guardians of the Elderly: An Ailing System." The report described a "dangerously burdened and troubled system that regularly puts elderly lives in the hands of others with little or no evidence of necessity, and then fails to guard against abuse, theft, and neglect." Specifically identified problems were lack of resources to adequately monitor the activities of guardians/conservators and the financial and personal status of their wards; guardians/conservators who have little or no training; lack of awareness of alternatives to guardianship/conservatorship; and the lack of due process.[1]

Active involvement in guardianship/conservatorship issues provided the foundation for the sponsorship by the American Bar Association (ABA) of the 1988 Wingspread National Guardianship Symposium. Experts from across the country attended the meeting, including probate judges, attorneys, guardianship and conservatorship service providers, doctors, aging network representatives, mental health experts, government officials, law professors, a bioethicist, a state court administrator, a judicial educator, an anthropologist, and ABA staff. The symposium produced recommendations for reform of the national guardianship/conservatorship system, which were largely adopted by the ABA's House of Delegates in February 1989. The recommendations, especially those pertaining to judicial practices, reflected the need for improvement of practices and

[1] Associated Press, Guardians of the Elderly: An Ailing System (Special Report, September 1987). *See also* Fred Bayles & Scott McCartney, *Declared "Legally Dead": Guardian System is Failing the Ailing Elderly*, The Record (September 20, 1987); American Bar Association, Guardianship: An Agenda For Reform (1989).

procedures related to guardianship/conservatorship in probate courts.[2] These initial examinations of the exploitation, neglect, and/or abuse of persons under guardianship or conservatorship have been followed by additional articles in the press,[3] government and private studies,[4] state task forces,[5] and sets of national recommendations.[6]

Efforts to reform the administration of decedents' estates predate guardianship reform. A Model Probate Code was promulgated in 1946 and provided the basis for reform in the 1950s and 1960s. In 1969, the National Conference of Commissioners on Uniform State Laws and the ABA approved the Uniform Probate Code (UPC), which was drafted by which was jointly drafted by the Commissioners and by the ABA Section of Real Property, Probate and Trust Law. The UPC has been adopted by 18 jurisdictions, and has been adopted in part or has influenced reform in still others.[7] It has been revised numerous times since 1969, most recently in 2008, and has been followed by related uniform legislation such as the Uniform Guardianship and Protective Proceedings Act, the Uniform Guardianship and Protective Proceedings Jurisdiction Act, and the Uniform Trust Code.[8]

The need for reform of courts exercising probate jurisdiction has been expressed not only by those outside of the courts but also by the court leadership itself. In 1990, in order to determine the need for national probate court standards and to assess the support for a project to develop such standards, the National College of Probate Judges (NCPJ) and the National Center for State Courts (NCSC) polled 42 state representatives of the NCPJ. Responses were received from 30 of these representatives and four state court administrators in states that do not have separate probate courts or probate divisions of general or limited jurisdiction courts. The overwhelming number of respondents stated that current standards, including those of the ABA, did not sufficiently address the concerns of probate courts. Twenty-seven (79%) of the 34 respondents cited the need for separate probate court standards.

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[2] Recommendations for improved judicial practices include removal of barriers, use of limited guardianship/conservatorship and other less intrusive alternatives, creative use of non-statutory judicial authority, and enhanced judicial role in providing effective legal representation. American Bar Association, *supra,* note 1, at 19-22

[3] *See e.g.,* Paul Rubin, *Checks & Imbalances: How the State's Leading Private Fiduciary Helped Herself to the Funds of the Helpless*, Phoenix New Times (June 15, 2000); Carol D. Leonnig *et al.*, *Misplaced Trust/Guardians in the District: Under Court, Vulnerable Become Victims*, The Washington Post, (June 15-16, 2003); S. Cohen et al., *Misplaced Trust: Guardians in Control*, The Washington Post, (June 16, 2003); Kim Horner, Lee Hancock, *Holes in the Safety Net,* Dallas Morning News (January 12, 2005); S.F. Kovalski, *Mrs. Astor's Son to Give Up Control of Her Estate*, The New York Times, (October 14, 2006); Robin Fields, Evelyn Larrubia, Jack Leonard, *"Justice Sleeps While Seniors Suffer,"* Los Angeles Times (November 14, 2005); Kristin Stewart, *Some Adults' 'Guardians' Are No Angels,* The Salt Lake Tribune, (May 14, 2006); Cheryl Phillips, Maureen O'Hagan and Justin Mayo, *Secrecy Hides Cozy Ties in Guardianship Cases*, Seattle Times (December 4, 2006); P. Kossan and R. Anglen, *Task Force to Probe Arizona Probate Court*, The Arizona Republic (May. 4, 2010); Todd Cooper, *Ward's Assets Vulnerable*, Omaha World Herald (August 16, 2010).

[4] *See e.g.*, Sen. Gordon.H. Smith & Sen. Herbert. Kohl, Guardianship for the Elderly: Protecting the Rights and Welfare of Seniors with Reduced Capacity (US Senate Special Committee on Aging, December 2007); Government Accountability Office, Guardianships: Cases of Financial Exploitation, Neglect, and Abuse of Seniors (GAO-10-1046, 2010); David. C. Steelman, Alicia. K. Davis, Daniel. J. Hall, Improving Protective Probate Processes: An Assessment of Guardianship and Conservatorship Procedures in the Probate and Mental Health Department of the Maricopa County Supreior Court (NCSC, July 2011); Pamela B. Teaster, Erica F. Wood, Naomi Karp, Susan A. Lawrence, Winsor.C. Schmidt, Jr., Marta S. Mendiondo, Wards of the State: A National Study of Public Guardianship (2005); Oversight of Probate Cases: Colorado Judicial Branch Performance Audit, (Colorado Legislative Audit Committee, 2006); Naomi Karp & Erica Wood, Guardianship Monitoring; A National Survey of Court Practices (AARP 2006); Ellen M. Klem, Volunteer Guardianship Monitoring Programs: A Win-Win Solution (ABA Commission on Law and Aging 2007); Pamela B. Teaster, Winsor C. Schmidt, Jr., Erica. F. Wood, Susan A, Lawrence, & Marta Mendiondo, Public Guardianship: In the Best Interest of Incapacitated People? (Praeger Publishers, 2007); Judicial Determination of Capacity of Older Adults in Guardianship Proceedings (ABA Commission on Law and Aging, American Psychological Association, National College of Probate Judges 2006); Naomi Karp and Erica Wood, Guarding the Guardians: Promising Practices for Court Monitoring (AARP 2007); Brenda.Uekert, Adult Guardianship Court Data and Issues: Results from an Online Survey (NCSC 2010).

[5] *See e.g.,* Ad hoc Committee on Probate Law and Procedure, Final Report to the Utah Judicial Council (February 23, 2009); Joint Review Committee on the Status of Adult Guardianships and Conservatorships in the Nebraska Court System, Report of Final Recommendations (2010); Committee on Improving Judicial Oversight and Processing of Probate Court Matters, Final Report to the Arizona Judicial Council (2011).

[6] Third National Guardianship Summit: Standards of Excellence, Guardian Standards and Recommendations for Action, 2012 Utah L. Rev. No. 3, 1191 (2013); Conference of State Court Administrators (COSCA), The Demographic Imperative: Guardianships and Conservatorships, 8 (December 2010). *Recommendations, Wingspan – The Second National Guardianship Conference* 31 Stetson Law Review 595 (2002); National Guardianship Network, National Wingspan Implementation Session: Action Steps on Adult Guardianship Progress (2004); Jeanne. Dooley, Naomi. Karp, Erica. Wood, Opening the Courthouse Door: An ADA Access Guide for State Courts (1992); Court-Related Needs of the Elderly and Persons with Disabilities: A Blueprint for the Future (American Bar Association and National Judicial College, 1991).

[7] http://www.uniformlaws.org/Act.aspx?title=Probate Code.

[8] http://www.uniformlaws.org/Act.aspx?title=Guardianship and Protective Proceedings Act; http://www.uniformlaws.org/Act.aspx?title=Adult Guardianship and Protective Proceedings Jurisdiction Act; http://www.uniformlaws.org/Act.aspx?title=Trust%20Code.

Even those who did not advocate special probate court standards believed that guidance in some areas, such as automated case processing, would be helpful to probate courts. Most respondents believed that national probate standards were needed in the areas of fees and commissions, court automation, judicial education, judicial officer and support staff, and financial and fund management, and to address the performance of courts exercising probate jurisdiction.

In sum, the need for reform and improvement of the administration, operations, and performance of courts exercising probate jurisdiction has been clearly expressed by groups and individuals both inside and outside of these courts.

Accordingly, the NCPJ, in cooperation with the NCSC, undertook a two-year project in 1991 to develop, refine, disseminate, and promulgate national standards for courts exercising probate jurisdiction—the National Probate Court Standards Project. Support was provided by a grant from the State Justice Institute, with a supplemental grant provided by the American College of Trust and Estate Counsel Foundation. The standards were intended to provide a common language to facilitate description, classification, and communication of probate court activities; and, most importantly, a management and planning tool for self-assessment and self-improvement of courts throughout the country exercising probate jurisdiction.

The National Probate Court Standards were prepared by a 15-member Commission on National Probate Court Standards (Commission) chaired by Hon. Evans V. Brewster of New York, then President of NCPJ,[9] assisted by NCSC staff led by Dr. Thomas Hafemeister.[10] Comments on the Standards were solicited and received from a number of individuals with expertise and interest in the operation of the probate courts, who served collectively as a Review Panel.

The National Probate Court Standards were published in 1993 and widely disseminated. In 1999, a chapter was added to address interstate guardianship matters. By 2010, it was recognized that much had changed in the court's world generally, and probate law specifically. Significant technological, legal, policy, procedural, and demographic developments that affect the way probate courts can and should operate include:

- The widespread use of automated case management systems that enable courts to exercise greater control over their dockets.
- The growing availability of electronic filing systems and the resulting greater use of electronic records, that provide courts with not only the capability of operating more efficiently, but also of more easily analyzing the information contained in those records to identify patterns and anomalies that may indicate abuses (*e.g.*, unwarranted expenditures by conservators, exorbitant fiduciary fees, and relationships between service providers and guardians that may constitute conflicts of interest).[11]
- The promulgation of new and revised uniform acts such as those cited earlier.
- The issuance of additional national recommendations regarding guardianship and conservatorship as a result of the 2001 "Wingspan" Second National Guardianship Conference, the 2004 Wingspan Implementation conference, the 2011 Third National Guardianship Summit, the reports by the US Government Accountability Office, the American Bar Association Commission on Law and Aging, the AARP, the Conference of Chief Justices/Conference of State Court Administrators

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[9] Other Commission members were: Hon. Arthur J. Simpson, Jr., retired judge, NJ Superior Court, Appellate Division (Vice-Chair); Hon. Freddie G. Burton, Chief Judge, Wayne County Probate Court, Detroit, MI; Hon. Ann P. Conti, Union County Surrogate's Court, Elizabeth, NJ; Hon. George J. Demis, Tuscarawas County Probate/Juvenile Court, New Philadelphia, OH; Hon. Nikki DeShazo, Probate Court, Dallas, TX; Hon. John Monaghan, St. Clair County Probate Court, Port Huron, MI; Hon. Frederick S. Moss, Probate Court, Woodbridge, CT; Hon. Mary W. Sheffield, Associate Circuit Judge, 25th Circuit Court, Division 1/ Probate Division, Rolla, MO; and Hon. Patsy Stone, Florence County Probate Court, Florence, SC.; Emilia DiSanto, Vice President of Operations, Legal Services Corporation Washington, DC; Hugh Gallagher, Deputy Court Administrator, Superior Court of Maricopa County, Phoenix, AZ; Prof. William McGovern, University of California-Los Angeles Law School, Los Angeles, CA; James R. Wade, Esq., Denver, CO; and Raymond M. Young, Esq., Boston, MA

[10] Other members of the staff were Dr. Ingo Keilitz, Dr. Pamela Casey, Shelley Rockwell, Hillery Efkeman, Brenda Jones, Thomas Diggs, and Paula Hannaford-Agor.

[11] *See* Winsor C. Schmidt, Fevzi Akinci, & Sarah A. Wagner, *The Relationship Between Guardian Certification Requirements and Guardian Sanctioning: A Research Issue in Elder Lay and Policy,* 25(5) Behavioral Sciences and the Law 641-653 (September/October 2007).

Joint Task Force on Elders and the Courts, the Conference of State Court Administrators, and the National Center for State Courts' Center on Elders and the Courts.

- Expanded services being provided directly to court users by probate courts including court staff serving as visitors/ investigators in guardianship and conservatorship cases
- Increased use of volunteer programs to monitor guardianships and conservatorships and the development of collaborative programs to improve the quality, delivery, and coordination of services to persons under the jurisdiction of probate courts
- Implementation of initiatives by probate courts around the nation to address problematic areas, especially in guardianship and conservatorship, such as assigning employees to screen all the filings and accountings and to perform both routine and spot investigations including interviewing the incapacitated person,
- The advent of State Supreme Court Commissions on elders and the courts, and, more negatively,
- The increasing instances of financial abuse in conservatorships/ guardianships, in decedent's estates, in trusts under court supervision, and in guardianships of minors.

Adding urgency to the need generated by these developments is the impact that the "Baby Boom" population bulge will have on the probate courts. Within the next decade, the number of Americans age 65 or older will increase by 50 percent, from nearly 40 million to about 60 million. This demographic bulge has had significant impact on various sets of courts at each stage of its life. In the 1960s and 1970s, teenage baby boomers strained the capacity, procedures, and resources of the juvenile courts. In the 1970s and 1980s, when this generation was in its most criminogenic years, the resulting "War on Crime" required sweeping changes in the way the criminal courts operated. In the 1990s and first decade of the 21st century, family cases including divorce, child custody, domestic violence, and neglect and abuse have dominated the court-reform landscape. The probate courts will be the next segment of the judicial system to be spotlighted by this demographic surge.[12]

Accordingly, with generous support from the State Justice Institute, the Borchard Foundation Center on Law and Aging, and the ACTEC Foundation, a new Task Force was formed including members of the leadership of NCPJ and representatives from the American Bar Association Section on Real Property, Trust and Estate Law, the American College of Trust and Estate Counsel, and the National Association for Court Management (NACM).[13] Staff support was again provided by NCSC.[14]

After defining the issues, staff conducted a web-based survey of members of NCPJ and NACM. The survey requested examples of effective practices and programs being used by probate courts to address the issues on the issues list and other key standards. Based on the issues list, the results of the survey, each section of the standards was revised with the drafts reviewed and modified by the Task Force. The revisions sought to update the standards in light of the developments, reports, and recommendations cited above, add examples of how courts have been able to implement the concepts and approaches contained in the standards, and decrease repetition of material (*e.g.*, by combining the original separate sections on guardianship and conservatorship of adults.). In addition, a new set of standards on guardianship and conservatorship of minors was prepared. This was an iterative process stretching over 18 months.

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[12] Richard Van Duizend, *The Implications of an Aging Population for the State Courts*, Future Trends in State Courts–2008 (Williamsburg, VA: NCSC, 2008), http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/famct&CISOPTR=208.

[13] Task Force members include: Mary Joy Quinn, President, National College of Probate Judges, Director, Probate, Superior Court, San Francisco, CA; Hon. Tamara Curry, Associate Judge, Probate Court, Charleston, SC; Anne Meister, Register of Wills, Probate Division, Superior Court, Washington, DC; Hon. William Self, President-Elect, National College of Probate Judges, Judge, Probate Court, Macon, Georgia; Hon. Jean Stewart, Judge, Probate Court, Denver, CO; Hon. Mike Wood, Secretary-Treasurer, National College of Probate Judges, Judge, Probate Court No. 2, Houston, TX; Kevin Bowling Court Administrator, 20th Judicial Circuit Court, Ottawa County, MI (2011-2012)/Jude del Preore, Trial Court Administrator, Superior Court, Mount Holly, NJ (2010-2011), President, National Association for Court Management; Prof. Mary Radford, President, American College of Trust and Estate Counsel, Georgia State University College of Law, Atlanta, GA; and Robert Sacks, Esq., Los Angeles, CA; Observers, Edward Spurgeon Executive Director of the Borchard Foundation Center on Law and Aging; Prof. David English, Executive Director, Joint Editorial Board for Uniform Trust and Estate Acts.

[14] Richard Van Duizend, Standards Reporter, Dr. Brenda K. Uekert, Research Director.

Following completion of a full review draft, the Revised National Probate Court Standards were sent, for comment, to each member of NCPJ, members of the Conference of Chief Justices and the Conference of State Court Administrators, the Boards or Executive Committees of the National Association for Court Management, the American Bar Association Section of Real Property Trust and Estate Law, and the American College of Trust and Estate Counsel. Copies were also sent for comment to the American Bar Association Commission on Law and Aging, the National Council of Juvenile and Family Court Judges, the participants in the Third National Summit on Guardianship, and others. The Task Force reviewed the comments received and made necessary changes. The final draft was submitted for adoption to the membership of NCPJ at its November 2012 meeting.

Structure, Organization, and Caseloads of Probate Courts and Divisions of Courts in the United States

Seventeen states have specialized probate courts in all or a few counties. In the remaining 33 states, the District of Columbia and the Territories, jurisdiction over probate and related issues lies within courts of general jurisdiction, with assignment or designation periodically rotating among the several judges in circuits or districts having more than one judge. The following table based on data collected by NCPJ shows which approach states have taken.[15]

Caseload Volume and Composition

The level of public debate and directions in public policy tend to shift dramatically as the nation's media highlight particularly heinous or unfortunate cases (*e.g.*, neglected or abused wards in guardianship, estates depleted by unscrupulous executors). The rush to reform often leads to proposed solutions based more on ideology and doctrinal analysis than on fact. The absence of a national database on the volume and composition of cases handled by probate courts hinders attempts to answer critical broad-based questions about the scope and nature of the problem, or its possible solutions.[16]

The pragmatic justification for caseload statistics on wills, decedents' estates, trusts, conservatorships, and guardianships is compelling. Caseload statistics are the single best way to describe the courts' current activities as well as to predict what they will likely face in the future. Caseload statistics are analogous to the financial information used by the private sector to organize their operations. Well-documented caseload statistics provide powerful evidence for claims for needed resources.

Comprehensive and reliable caseload statistics can increase understanding of the functioning of courts with probate jurisdiction and direct efforts to enhance and improve their performance.

Scope and Purpose of the Standards

The Revised National Probate Court Standards are intended to promote uniformity, consistency, and continued improvement in the operations of probate courts. The Standards and associated commentary, footnotes, and references to specific courts using promising practices bridge gaps of information, provide organization and direction, and set forth aspirational goals for both specialized probate courts and general jurisdiction courts with probate jurisdiction. Although the Standards include both concrete recommendations and the rationale behind them, they are not intended to serve as statements of what the law is or should be, nor otherwise infringe on the decision-making authority of probate court judges or state legislatures. They do not address every aspect of the nation's probate courts, but, rather, set forth some guiding principles to assist the evolution of these courts. They seek to capture the philosophy and spirit of an effective probate court and encourage effective use of limited resources.

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[15] http://www.ncpj.org/images/stories/StateProbateJurisdictions.pdf.

[16] CCJ/COSCA Joint Task Force on Elders and the Courts, Adult Guardianship Court Data and Issues: Results from an On-Line Survey (Williamsburg, VA: NCSC, 2010) http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/famct&CISOPTR=266; Brenda K. Uekert & Richard Van Duizend, *Adult Guardianships: A "Best Guess" National Estimate and the Momentum for Reform*, Future Trends in State Courts – 2011 (NCSC, 2011), http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctadmin&CISOPTR=1846.

These Standards may be used by individual probate courts and by state court systems in a number of ways, including as:

- A source of ideas for improving the quality of justice, the effectiveness of operations, and efficient use of resources;
- A basis for requests for needed budgetary support in those instances in which implementation of Standards-based improvements require additional resources;
- A tool for charting the path toward greater excellence and measuring the progress;
- A template for state standards reflecting state statutory requirements, rules of procedures, and demographic, geographic, organizational, and fiscal factors.

The Standards are divided into three major sections. Section 1 sets forth a set of guiding principles in four major areas: (1) access to justice, (2) expedition and timeliness, (3) equality, fairness and integrity, and (4) independence and accountability. Although tailored specifically for probate courts, this section draws upon the standards and commentary of the Trial Court Performance Standards applicable to all trial courts.[17]

Section 2 includes standards for administrative policies and procedures for courts exercising probate jurisdiction regarding: (1) jurisdiction and rule making, (2) caseflow management, (3) judicial leadership, (4) information and technology, and (5) referral to alternative dispute resolution.

Section 3 covers probate practices and proceedings relating to (1) common practices and proceedings, (2) decedents' estates, and (3) guardianship, and conservatorship of adults and minors. Other types of "probate" proceedings are considered only indirectly within the general areas of performance, administrative policies and procedures, and the common practices and proceedings category within the probate practices and proceedings section. These include adoptions, elder abuse and neglect, name change applications, marriages, divorces, assessment and collection of inheritance and estate taxes, hearings of petitions from minors whose parents refuse to consent to abortions, and involuntary civil commitment.

The standards and accompanying commentaries are presented in a common format. Each standard is presented in a succinct statement—the "blackletter." Commentary follows each standard to explain and clarify its underlying rationale. When there are "Promising Practices" that illustrate how jurisdictions have implemented the standard, they are presented in a highlighted box with appropriate references and links to further information. Footnotes accompany the commentary to illustrate examples of the issues discussed. Although the commentaries and notes may be extensive, they are explanatory and do not incorporate all available materials on the various points addressed. For example, when cases or statutes are cited as examples, one should not assume that they exhaust all available legal precedent. Rather, they are exemplary of the issue being discussed. Similarly, the Standards frequently refer to the Uniform Probate Code (UPC), the Uniform Guardianship and Protective Proceedings Act (UGPPA) the Uniform Guardianship and Protective Proceedings Jurisdiction Act (UGGPJA) and other Uniform Acts. The Standards do not endorse or adopt these Uniform Acts in their entirety, but they have influenced the content of portions of this report and serve as an important source for possible reform. Although the Standards cover a wide range of issues, they do not and could not address all potential issues. Given the diversity of probate courts, this would have been an impossible task.

The purpose of these Standards is not to supplant state laws or court rules. Rather, they seek to fill gaps left unaddressed by the various states and to provide goals and standards for judges regarding issues not directly covered by state laws or court rules. Judges exercising probate jurisdiction and the parties appearing before them must comply with applicable state law and state or local court rules. These Standards, based on a national perspective, suggest ways to improve the handling of probate matters

[17] Commission on Trial Court Performance Standards, Trial Court Performance Standards With Commentary (NCSC, 1990).

Jurisdiction in Probate Cases

Specialized Probate Courts

Alabama	Code of Ala. §12-13-1
Connecticut	Conn. Gen. Stat. §45a-98
Georgia	O.C.G.A. §15-9-30
Maine	4 M.R.S. §251
Maryland	MD. Estates & Trusts Code Ann. §2-101
Massachusetts	A.L.M. G.L .ch. 215 §3
Michigan	M.C.L. §205.210
New Hampshire	R.S.A. §547.3
New Mexico	N.M. Stat. Ann. §45-1-302
New York	NY CLS SCPA §§201 & 205
Ohio	O.R.C. §2101.01
Rhode Island	R.I. Gen. Laws §§8-9-9
South Carolina	S.C. Code Ann. §§62-1-301 & 302
Texas (urban areas only)	Tex. Prob. Code §4A
Vermont	4 V.S.A. §272

General Jurisdiction Trial Courts

Alaska	Alaska Stat. § 22.10.020
Arizona	A.R.S. §14-1302
Arkansas	A.C.A. §28-1-104
California	Cal. Prob. Code §§800, 7050
Colorado[1]	C.R.S. §§13-6-103 & 13-9-105
Delaware	10 Del.C. §341
District of Columbia	D.C. Code §11-921
Florida	Fla. Stat. §26-012
Hawaii	H.R.S. §603-21.6
Idaho	Idaho Code §1-2208
Illinois	Illinois Const., Art.VI §9
Indiana[2]	Burns Ind. Code Ann. §§33-28-1-2 & 33—31-1-10
Iowa	Iowa Code §633
Kansas	K.S.A. §20-301
Kentucky	K.R.S. §24A-120
Louisiana	LA. Constitution Art. V, §16
Minnesota	Minn. Stat §484.011
Mississippi	Miss. Code. Ann §9-5-83
Missouri[3]	§§478.070 & 461.076 R.S. MO
Montana	Mont Code Anno. §3-4-302
Nebraska	R.R.S. Neb §30-2211
Nevada	Nev. Rev. Stat. Ann §132.116§
New Jersey	NJ Stat. §3B:2-2
North Carolina	N.C. Gen. Stat. §47-1
North Dakota	N.D. Cent. Code §30.1-02-02
Oklahoma	58 Okl. Stat. §1
Oregon	O.R.S. §111.075
Pennsylvania	42 Pa. C. S. §§912 & 3131
South Dakota	S.D. Codified Laws §§6-6-8 & 29-1-301
Tennessee	Tenn. Code Ann. §§30-1-301, 32-2-101
Utah	Utah Code Ann. §§75-1-302
Virginia	Va. Code Ann. §64-1-75
Washington	Rev. Code Wash. 11.96A-040
West Virginia	W.Va. Code §41-5-4
Wisconsin	Wis. Stat. §§753.03 & §856.01
Wyoming	Wyo. Stat. §2-2-101

Notes:
[1] Except the Denver Probate Court.
[2] Except in St. Joseph County.
[3] Except in Greene, Jackson, & St. Louis Counties and St. Louis City.

that often lie with the inherent powers and duties of probate court judges. However, all the Standards need to be read in light of the applicable law of each particular state and it is recognized that all states may not be able to incorporate all of the Standards because of the requirements of their own state laws.

Because they are aspirational in nature, some Standards may assume the existence of resources that a particular probate court does not have. In general, however, the goals set by the Standards should be obtainable by probate courts that are provided with reasonable levels of resources.

Although these Standards focus on the probate court, they are also generally applicable to any judge responsible for a probate matter. Furthermore, the operation of an effective and efficient court is necessarily dependent upon the cooperation and assistance of all persons appearing before the court or otherwise employing the court's services. As a result, these Standards encompass and address such persons as well.

SECTION 1: PRINCIPLES FOR PROBATE COURT PERFORMANCE

The Trial Court Performance Standards (TCPS)[18] were the first in a series of efforts to create a framework for assessing the performance of trial courts in four key areas – Access; Timeliness; Equality, Fairness and Integrity; and Independence and Accountability. This section draws upon the TCPS provisions to establish the principles from which flow the more detailed standards contained in Sections 2 and 3 concerning the operation and performance of courts exercising probate jurisdiction (hereinafter referred to as probate courts). Adherence to these principles and the resulting standards will enhance greater public trust and confidence in probate courts.

1.1 ACCESS TO JUSTICE

A. Proceedings and other public business of the probate court should be conducted openly, except in those cases and proceedings that require confidentiality pursuant to statute or rule.
B. Probate court facilities should be safe, accessible, and convenient to use.
C. All interested persons who appear before the probate court should be given the opportunity to participate without undue hardship or inconvenience.
D. Judges and other probate court personnel should be courteous and responsive to the public and should treat with respect all who come before the court.
E. Access to the probate court's proceedings and records—measured in terms of money, time, or the procedures that must be followed—should be reasonable, fair, and affordable.

COMMENTARY

Probate courts should be open and accessible. Because location, physical structure, procedures, and the responsiveness of its personnel affect accessibility, the four principles grouped under Access to Justice urge probate courts to eliminate unnecessary barriers. Barriers to access can be physical, geographic, economic, linguistic, informational or procedural. Additionally, psychological barriers can be created by unduly complicated and intimidating court procedures. These principles should not be limited only to those who are represented by an attorney but should apply to all litigants, witnesses, jurors, beneficiaries of decedents in probate matters, parents of children before the court, guardians and other court appointees, persons seeking information from court-held public records, employees of agencies that regularly do business with the courts, and the public.[19]

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[18] Commission on Trial Court Performance Standards, Trial Court Performance Standards With Commentary (National Center for State Courts (NCSC), 1997), *available at* www.ncjrs.gov/pdffiles1/161570.pdf; *see also* NCSC, CourTools, (NCSC, 2005), *available at* www.courtools.org; Brian Ostrom & Roger Hanson, Achieving High Performance: A Framework for Courts (NCSC, Apr., 2010), *available at* http://ncsc.contentdm.oclc.org/cgi-bin/showfile.exe?CISOROOT=/ctadmin&CISOPTR=1874; *High Performance Courts*, NCSC (2011), http://www.ncsc.org/information-and-resources/high-performance-courts.aspx.

[19] Probate courts are using a variety of approaches to facilitate access: *e.g.*, the establishment of an access center to provide information and assist *pro se* litigants in filling out forms (San Francisco, CA, Denver, CO); monthly clinics with volunteer lawyers (Los Angeles, CA), videos (Washington, DC); electronic access to information regarding probate matters (California, Washington, DC, Fort Worth, TX, GA Council of Probate Judges, Ottawa County, MI) electronic access to basic forms (California, Ottawa County, MI, Philadelphia, PA, Phoenix, AZ, SC); and access to public records through the internet and at kiosks (Phoenix, AZ). *See also Self-Representation Resource Guide*, NCSC, http://www.ncsc.org/Topics/Access-and-Fairness/Self-Representation/Resource-Guide.aspx (July 10, 2012).

Probate courts should conduct openly all proceedings, contested or uncontested, that are public by law. There may be occasions when the court will properly hold proceedings in chambers or outside the courthouse (*e.g.*, in a nursing home or hospital), albeit open to the public. Because of the vulnerability of some of the parties in probate proceedings and the sensitivity of the matters in those proceedings (*e.g.*, guardianship/conservator proceedings) there are circumstances in which it is appropriate to deny access by the public. In order to ensure that such closures are carried out so as to protect both the interests of the litigants and those of the public, the standard recommends that the authority to close probate proceedings be defined by statute or rule.

Further, probate courts should ensure that proceedings are accessible and understandable to all participants, including litigants, court personnel, and other persons in the courtroom as well as attorneys, with special attention given to responding to the needs of persons with disabilities. Plain language should be used in these proceedings to the greatest extent possible. Language difficulties, mental impairments, or physical disabilities should not be permitted to stand in the way of complete participation or representation. Accommodations made by probate courts for individuals with a disability should include the provision of interpreters for hearing or speech-impaired persons and special courtroom arrangements or equipment for court participants who are visually or speech impaired.[20] Probate courts should be sensitive to the needs of persons who may benefit from dimmed or enhanced lighting, microphones, or special seating.

Probate courts should attend to the security of persons and property within the courthouse and its facilities, and the reasonable convenience and accommodation of those unfamiliar with the court's facilities and proceedings. They should be concerned about such things as:

- The centrality of their location in the community they serve
- The adequacy of parking, the availability of public transportation
- The degree to which the design of the court provides a secure setting
- The ease with which persons unfamiliar with the facility can find and enter the office or courtroom they need
- The availability of elevators and convenient, accessible restrooms
- Seating areas outside the courtroom
- The availability of electronic access to information about the court and the procedures for initiating, responding to, and participating in probate matters

Probate courts should also endeavor to adjust their calendaring procedures to permit effective participation by elderly or disabled litigants. Long calendar calls at which parties must be present should be avoided and hearings should be set for specific times to the greatest extent possible. Judges should exercise flexibility in taking breaks in hearings to accommodate litigant needs and try not to set matters involving elderly litigants early or late in the court day. Probate courts should also tailor their procedures (and those of others under their influence or control) to the reasonable requirements of the matter before the court. Means to achieve this include simplification of procedures and reduction of paperwork in uncontested matters, simplified pretrial procedures, fair control of pretrial discovery, and establishment of appropriate alternative methods for resolving disputes (*e.g.*, referral services for cases that might be resolved by mediation, court-annexed arbitration, early neutral evaluation, tentative ruling procedures, or special settlement conferences).

A responsive court ensures that judicial officers and other court employees are available to meet both routine and exceptional needs of those they serve. Court personnel should assist those unfamiliar with the court and its procedures by providing standard

[20] For example, ADA-compliant facilities, use of court or commercial interpreter services in various languages including sign language, audio-assist devices. Stetson University College of Law maintains a model courtroom designed to facilitate participation by elderly and disabled litigants. For a description, see *Eleazer Courtroom*, Stetson University College of Law, http://www.law.stetson.edu/academics/elder/home/eleazer-courtroom.php (July 11, 2012).

procedural information, though not legal advice. [21] In keeping with the public trust embodied in their positions, judges and other court employees should reflect, by their conduct, the law's respect for the dignity and value of all persons who come before or request information and assistance from the court. No court employee should by words or conduct demonstrate bias or prejudice of any kind. This should also extend to the manner in which court employees treat each other.

To facilitate access and participation in its proceedings, court fees should be reasonable. Fees and costs should be related to the time and work expended by the court. In addition, probate courts may consider either waiving fees for individuals who are economically disadvantaged or taking other steps to enable such individuals to participate in its proceedings.[22]

Probate courts should maintain records of their own public proceedings as well as important documents generated by others. These records must be readily available to those who are authorized to receive them in either physical or electronic form, or both. Probate courts should maintain a reasonable balance between their actual cost in providing documents or information and what they charge users.

RELATED STANDARDS

2.1.2 Rulemaking
2.2.2 Time Standards Governing Disposition
2.2.3 Scheduling Trial and Hearing Dates
2.4.1 Management Information System
2.5.1 Alternative Dispute Resolution
3.1.1 Notice
3.1.4 Attorney and Fiduciary Compensation
3.1.6 Sealing Court Records
3.2.1 Unsupervised Administration (of Estates)
3.2.4 Small Estates
3.3.1 Petition
3.3.4 Court Visitor
3.3.5 Appointment of Counsel
3.3.7 Notice
3.3.8 Hearing
3.3.11 Qualifications and Appointment of Guardians and Conservators
3.4.3 Transfer of Guardianship or Conservatorship
3.4.4 Receipt and Acceptance of a Transferred Guardianship/Conservatorship
3.5.1 Petition
3.5.2 Notice
3.5.4 Representation for the Minor
3.5.5 Participation of the Minor in the Proceedings

[21] For a discussion of the distinction between legal information and legal advice, see J.M. Greacen, *"No Legal Advice from Court Personnel": What Does That Mean?*, 34 Judges J. 10, (Winter 1995); Iowa Judicial Branch Customer Service Advisory Committee, Guidelines and Instructions for Clerks Who Assist *Pro Se* Litigants in Iowa's Courts 7 (July 2000), *available at* http://www.ajs.org/prose/pdfs/Iowa_Guidelines.pdf; *but see* Wash. St. Bar Assoc. v. Great Western Federal Savings & Loan Ass'n., 91 Wash. 2d. 49, 54-55 586 P.2d 870 (1999) – the practice of law includes selection and completion of forms.

[22] The amount and structure of the filing fees assessed in probate matters varies considerably. In some jurisdictions, the amount of the fee is based on the size of the estate (*e.g.*, CT, DC, and SC); in others it depends on the number of hearings and other proceedings (*e.g.*, CA); in a few there is a flat filing fee for all cases or no fee for certain types of cases such as guardianship (DC) or involuntary commitment (FL). Most jurisdictions have some provision to waive or defer fees in probate matters.

1.2 EXPEDITION AND TIMELINESS

A. Probate courts should establish and maintain guidelines for timely case processing.
B. Probate courts should promptly implement changes in law and procedure affecting court operations.

COMMENTARY

Unnecessary delay may have serious consequences for the persons directly concerned and cause injustice, hardship, and diminished public trust and confidence in the court. Timely disposition is defined in terms of the elapsed time a case requires for consideration by a court, including the time reasonably required for pleadings, discovery, trial, and other court events.[23] Any time beyond that necessary to prepare and to conclude a case constitutes delay.

Probate courts should control the time from case filing to trial or other final disposition.[24] Early and continuous control establishes judicial responsibility for timely disposition, identifies cases that can be settled, eliminates delay, and assures that matters will be heard when scheduled. During and following a trial or hearing, probate courts should make decisions in a timely manner. Judges should attempt to rule from the bench while the parties are present whenever possible, particularly where questions of status are involved (*e.g.*, when considering the establishment of a guardianship or conservatorship). When it is necessary for a probate court to take a relatively complex matter under advisement, the court should, nevertheless, issue its decision promptly. Ancillary and post-judgment or post-decree proceedings also need to be handled expeditiously to minimize uncertainty and inconvenience.

Probate courts should also manage their caseload to avoid backlog. For example, the court should consider the use of caseload management systems and periodic status reports.

If probate courts hold funds for others, timely and proper disbursement of those funds following a determination of who is entitled and the amount to be disbursed is particularly important. For some recipients, delayed receipt of funds may be an accounting inconvenience; for others, it may create personal hardships. Regardless of who is the recipient, when a court is responsible for the disbursement of funds, performance should be expeditious and timely.

Tradition and formality can obscure the reality that both the law and the procedures affecting court operations are subject to change.[25] Changes in statutes, case law, and court rules affect what is done in probate courts, how it is done, and who conducts business in the court. Probate courts should implement mandated changes promptly. Whether a probate court can anticipate and plan for change, or must react to change quickly, the court should make its own personnel aware of the changes, and notify court users of such changes to the extent practicable. This is particularly true when the court is the body that has implemented the change by court rule or other means. It is imperative that changes mandated by statute, case law, or court rules be integrated into court operations as they become effective.

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[23] *See* Richard Van Duizend, David C. Steelman & Lee Suskin, Model Time Standards for State Trial Courts, 32 (NCSC, 2011).

[24] *Id.* at 31-34; . Steelman & Davis, *supra*, note 4.

[25] The National College of Probate Judges posts links to the laws and rules governing probate matters as well as links to other organizations' publications on its website. National College of Probate Judges, http://www.ncpj.org/ (July 11, 2012).

RELATED STANDARDS

2.1.2	Rulemaking
2.2.1	Court Control
2.2.2	Time Standards Governing Disposition
2.2.3	Schedule Trial and Hearing Dates
2.4.2	Collection of Caseload Information
3.1.1	Notice
3.3.7	Notice
3.2.3	Timely Administration
3.3.3	Early Control and Expeditious Processing
3.4.5	Initial Hearing in the Court Accepting a Transferred Guardianship or Conservatorship
3.5.1	Notice

1.3 EQUALITY, FAIRNESS, AND INTEGRITY

A. The practices of the probate court should faithfully adhere to relevant laws, procedural rules, and established policies.
B. The probate court should give individual attention to cases, deciding them without undue disparity among like proceedings and upon legally relevant evidence.
C. Decisions of the probate court should address the issues presented with clarity and specify how compliance can be achieved.
D. The probate court should be responsible for the enforcement of its orders.
E. Records of all relevant probate court decisions and proceedings should be accurately maintained and securely preserved.

COMMENTARY

Probate courts should provide due process and equal protection of the law to all persons involved with matters and proceedings before it, as guaranteed by the federal and state constitutions. Integrity should characterize the nature and substance of probate courts procedures, decisions, and the consequences of those decisions. Integrity refers not only to the lawfulness of a court's actions (*e.g.*, compliance with constitutional rights to legal representation, a record of legal proceedings), but also to the results or consequences of its orders. A court's performance is diminished when, for example, its mechanisms and procedures for enforcing court orders are ineffective or nonexistent, or when the orders themselves are issued slowly. The court's authority and its orders should guide the actions of those under its jurisdiction both before and after a case is resolved.

Fairness should characterize all probate courts processes. This principle is derived from the concept of due process, which includes provision for notice and a fair opportunity to be informed and heard at all stages of the judicial process. Probate courts should respect the right to legal counsel and the rights of confrontation, cross-examination, impartial hearings, and, where applicable, jury trials. They should afford fair judicial processes through adherence to constitutional and statutory law, case precedent, court rules, and other authoritative guidelines, including policies and administrative regulations. Adherence to established law and court procedures contributes to achieving predictability, reliability, and integrity.

Litigants should receive individual attention without variation due to judge assignment or to legally irrelevant characteristics of the parties such as race, religion, ethnicity, gender, sexual orientation, color, age, disability, or political affiliation. Persons

similarly situated should receive similar treatment. The outcome of the case should depend solely upon legally relevant factors. This standard refers to all judicial decisions, including court appointments.[26]

An order or decision that sets forth consequences or articulates rights but fails to connect the actual consequences resulting from the decision to the antecedent issues breaks the connection required for reliable review and enforcement. A decision that is not clearly communicated poses problems both for the parties and for judges who may be called upon to interpret or apply it. In order to facilitate clarity and comprehension of decisions and orders by those who must apply or comply with them, plain language should be used to the greatest extent possible, and the excessive use of formal legal terms and Latin phrases should be avoided.

How compliance with court orders and judgments is to be achieved should be clear. An order that requires compliance within a stated time period, for example, is clearer and easier to enforce than one that establishes an obligation but sets no time frame for completion.

It is common and proper in some matters for courts to remain passive with respect to judgment satisfaction until called on to enforce the judgment. Nevertheless, probate courts should ensure that their orders are enforced. The integrity of the judicial process is reflected in the degree to which parties adhere to awards, settlements, and decisions arising out of this process. Noncompliance may indicate miscommunication, misunderstanding, misrepresentation, or lack of respect toward or confidence in probate courts.

Probate court responsibility for enforcement and compliance varies from jurisdiction to jurisdiction, program to program, case to case, and event to event. In some matters, particularly when affected individuals may be unlikely to voice their concerns (*e.g.*, in guardianship/conservatorship proceedings), probate courts may need to actively monitor compliance and enforce their orders. If a probate court becomes aware that an order is not being carried out by a party in a timely fashion, and the party is not represented by an attorney, direct notice should be given to the party as soon as possible.. If an attorney represents the party, both the attorney and the party should be put on notice of the failure to carry out the court's order. Monitoring and enforcement of proper procedures and interim orders while cases are pending are within the scope of this principle.

Probate courts should preserve an accurate record of all proceedings, decisions, orders, and judgments. Relevant court records include original wills, indexes, dockets, and various registers of court actions maintained to assist inquiry into the existence, nature, and history of actions at law. Documents associated with particular cases that make up official case files and the verbatim records of proceedings should be included as well. Preservation of the case record, whether in paper or digital form, entails the full range of records management systems. Because records may affect the rights and duties of individuals for generations, their protection and preservation over time are vital. Record systems must ensure that the location of case records is always known and whether the case is active and in frequent circulation, inactive, or in archive status. Inaccuracy, obscurity, loss of court records, or untimely availability of such records seriously compromises the court's integrity and subverts the judicial process.

At the same time, an effective records management program does not necessitate the retention of all records for all time. Most states have statutes addressing the creation, retention, and disposition of public records that apply to all branches of government. Although the public records law may dictate the basic parameters for retaining, maintaining, and storing probate records, probate courts retain considerable discretion in determining which records should be kept, how long they should be kept, what medium they should be stored in, and how they should be maintained. Failure to purge unneeded court records can exhaust available storage space and require probate courts to expend funds for the retention and maintenance of these records.

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[26] Kevin Burke & Steve Leben, Procedural Fairness: A Key Ingredient In Public Satisfaction: A White Paper of the American Judges Association, (American Judges Association, 2007), http://aja.ncsc.dni.us/pdfs/AJAWhitePaper9-26-07.pdf; E. Allan Lind & Tom R. Tyler, The Social Psychology of Procedural Justice (Plenum Press, 1988); E. Allen Lind, Bonnie E. Erickson, Nehemia Freidland, & Michael Dickenberger, *Reactions to Procedural Models for Adjudicative Conflict Resolution,* 22 Conflict Res.. 318 (1978); Jonathan D. Casper, Tom Tyler, & Bonnie Fisher, *Procedural Justice in Felony Cases,* 22 Law & Soc. Rev. 483 (1988).

RELATED STANDARDS

2.2.1	Court Control
2.2.2	Time Standards Governing Disposition
2.4.1	Management Information Systems
2.4.2	Collection of Caseload Information
2.4.3	Confidentiality of Sensitive Information
2.5.1	Alternative Dispute Resolution
3.1.2	Fiduciaries
3.1.3	Representation by Persons Having Substantially Identical Interest
3.1.5	Accountings
3.2.2	Determination of Heirship
3.3.2	Initial Screening
3.3.4	Court Visitor
3.3.6	Emergency Appointment of a Temporary Guardian or Conservator
3.3.8	Hearing
3.3.9	Determination of Incapacity
3.3.10	Less Intrusive Alternative
3.3.11	Qualifications and Appointment of Guardians and Conservators
3.3.12	Background Checks
3.3.13	Order
3.3.14	Orientation, Education, and Assistance
3.3.15	Bonds for Conservators
3.3.16	Reports
3.3.17	Monitoring
3.3.18	Complaint Process
3.3.19	Enforcement of Orders; Removal of Guardians and Conservators
3.3.20	Final Report, Accounting, and Discharge
3.4.1	Communication and Cooperation Between Courts
3.4.2	Screening, Review, and Exercise of Jurisdiction
3.5.3	Emergency Appointment of a Temporary Guardian/Conservator for a Minor
3.5.6	Background Checks
3.5.7	Order
3.5.8	Orientation, Education, and Assistance
3.5.9	Bonds for Conservators
3.5.10	Reports
3.5.11	Monitoring
3.5.12	Complaint Process

1.4 INDEPENDENCE AND ACCOUNTABILITY

A. Probate courts should maintain their institutional integrity as part of the third branch of government and observe the principle of comity in its governmental relations.
B. Probate courts should make efficient, effective, and economic use of their resources.
C. Probate courts should use fair employment and appointment practices.
D. Probate courts should develop procedures to inform the community of their proceedings.
E. Probate courts should seek to adapt to changing conditions or emerging issues.

COMMENTARY

Independence and accountability engender public trust and confidence as they permit government by law, access to justice, and timely resolution of disputes with equality, fairness, and integrity. Because judicial independence protects individuals from the arbitrary use of government power and ensures the rule of law, it defines court management and legitimates the judiciary's claim for respect as the third branch of government. Courts possessing institutional independence and accountability protect judges from unwarranted pressures. They operate in accordance with their assigned responsibilities and jurisdiction within the state judicial system.

Independence is not likely to be achieved if a court is unwilling or unable to manage itself. Accordingly, probate courts should establish and support effective leadership, operate effectively within the state court system, develop plans of action, obtain resources necessary to implement those plans, measure their performance accurately, and account publicly for their performance.

An effective court resists being absorbed or managed by the other branches of government. A court compromises its independence when it serves primarily as a revenue- producing arm of government, or perfunctorily places its imprimatur on decisions made by others.[27] Effective court management enhances independent decision making by judges exercising probate jurisdiction.

The court's independent status, however, should be achieved without avoidable damage to the reciprocal relationships that must be maintained with others. Probate courts are necessarily dependent upon the cooperation of other components of the justice system over which they have little or no direct authority. For example, elected clerks of court are components of the justice system, but may function independently of the court. Sheriffs and process servers perform both a court-related function and a law enforcement function. If a court is to attain institutional independence, it must clarify, promote, and institutionalize effective working relationships with all the other components of the justice system. The boundaries and the effective relationships between the court and other segments of the justice system must, therefore, be apparent in both form and practice.

To appropriately carry out their responsibilities, probate courts should have sufficient financial resources and personnel. They should seek the resources required to meet their judicial responsibilities, use available resources prudently, and account for their use. If the legislative (or funding) branch of government does not provide the necessary funding, the court may, if necessary, need to resort to legal proceedings to acquire funding to accomplish its purposes.

Probate courts should use available resources efficiently to address multiple and often conflicting demands. Information collected by probate courts should be used in the courts' planning, monitoring, research, and assessment activities. Resource allocation to cases, categories of cases, and case processing is at the heart of court management. Assignment of personnel and allocation of other resources must be responsive to established case processing goals and priorities, implemented effectively, and evaluated continuously. Monitoring of staff and resources will provide information to evaluate whether needs are being met adequately and whether reallocation of resources is necessary.

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[27] For example, in Michigan, probate courts are charged with the responsibility of determining inheritance taxes, with those taxes collected upon the order of the probate court. MICH. COMP. LAWS ANN. § 205.213 (West 2012).

Because equal treatment of all persons before the law is essential to the concept of justice, probate courts should operate free from bias on the basis of race, religion, ethnicity, gender, sexual orientation, marital status, color, age, disability, or political affiliation in their personnel practices and decisions. Fairness in the recruitment, appointment, compensation, supervision, and development of court personnel helps ensure judicial independence, accountability, and organizational competence. A court's personnel practices and decisions should establish the highest standards of personal integrity and competence among its employees. Continuing competence can be enhanced through court-sponsored training programs.

Most members of the public have little direct contact with or knowledge of probate courts. Information about the court is filtered through, among others, the media, lawyers, litigants, jurors, political officeholders, and employees of other components of the justice system. Probate courts, either independently or in conjunction with the state court system, other local trial courts, the bar and other interested groups, should take steps to inform and educate the public. Descriptive informational brochures and annual reports help the public to understand and appreciate the administration of justice. Participation by court personnel on public affairs commissions, advisory committees, study groups, and boards should be encouraged.

An effective court recognizes and responds appropriately to emergent public issues such as the rapidly increasing proportion of persons over age 65 in the US population, the even more rapid increase in the proportion of persons over age 85, and the advances in medical care that enable persons with developmental disabilities as well as victims of catastrophic illnesses and accident to live longer.[28] A court that moves deliberately in response to emergent issues is a stabilizing force in society and acts consistent with its role of maintaining the rule of law. Responsiveness may also include informing responsible individuals, groups, or entities about the effects of emerging issues on the judiciary and about possible solutions. The creation of a task force consisting of, among others, bench and bar members can help to identify new problems and keep probate courts informed about new issues. Court-sponsored training for judges, probate court staff, attorneys, and appointees of probate courts can also help probate courts to adjust its operations to address new conditions or events.

RELATED STANDARDS

2.1.2	**Rulemaking**
2.2.1	**Court Control**
2.2.2	**Time Standards Governing Dispositions**
2.2.3	**Scheduling Trial and Hearing Dates**
2.3.1	**Human Resources Management**
2.3.2	**Financial Management**
2.3.3	**Performance Goals and Strategic Plan**
2.3.4	**Continuing Professional Education**
2.4.2	**Collection of Caseload Information**
3.3.2	**Initial Screening**
3.3.3	**Early Control and Expeditious Processing**
3.4.1	**Communication and Cooperation Between Courts**
3.4.2	**Screening, Review, and Exercise of Jurisdiction**
3.4.3	**Transfer of Guardianship or Conservatorship**
3.4.4	**Receipt and Acceptance of a Transferred Guardianship or Conservatorship**
3.5.13	**Coordination with Other Courts**

[28] Richard Van Duizend, The Implications of an Aging Population for the State Courts, 76 (NCSC, 2008), *available at* http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/famct&CISOPTR=208.

SECTION 2: ADMINISTRATIVE POLICES AND PROCEDURES OF THE PROBATE COURT

In contrast to the standards provided in Section 1 (Probate Court Performance), the standards in this section emphasize the processes, the structures, and the means used by probate courts to accomplish their assigned duties. It is important that probate courts not overlook these aspects of their function. In addition, probate courts often are able to exercise direct control over the administrative policies and procedures they employ, and thus promptly effect needed change and reform.

The standards related to administrative policies and procedures are divided into five categories. **JURISDICTION AND RULE MAKING**, the first category, recommends that probate courts exert control over matters set before them by ensuring that the appropriate jurisdictional requirements are met, that their judgments are carried out in other jurisdictions, and that they have shaped, to the extent permitted, the rules that govern their functions. **CASEFLOW MANAGEMENT**, the second category, recommends that probate courts exert control by actively managing its caseload, by actively supervising the progress of their cases, by establishing timelines that govern the disposition of their cases, and by scheduling trial and hearing dates that ensure that cases move forward without unnecessary delay.

JUDICIAL LEADERSHIP, the third category, recommends that probate courts assume leadership in implementing an appropriate human resources management program; in obtaining, allocating, and managing their financial resources; and in instituting performance goals and a strategic plan that will allow them to determine whether they are meeting their responsibilities. **INFORMATION AND TECHNOLOGY**, the fourth category, recommends that probate courts take active steps to ensure that they carry out their duties in an efficient and responsible manner by instituting a management information system for the court's records, regularly monitoring and evaluating this system, implementing appropriate new technologies, collecting and reviewing caseload data, and establishing procedures to assure the confidentiality of information where needed. **ALTERNATIVE DISPUTE RESOLUTION**, the final category, recommends that probate courts encourage the use of non-litigation processes as a means to resolve cases.

2.1 JURISDICTION AND RULEMAKING

The standards in this category recognize the special nature of probate courts and the importance of probate courts being able to exert control over the cases brought before them, to hear those matters that fall within their expertise, and to ensure that their judgments are properly carried out.

STANDARD 2.1.1 JURISDICTION

A. Probate courts should fully exercise their jurisdiction over cases within their statutory, common law, or constitutional authorization, which commonly includes trusts, decedents' estates, guardianships, and conservatorships of adults and may also include guardianship and/or conservatorship of minors, and other matters. In jurisdictions in which general jurisdiction courts exercise probate jurisdiction, all probate matters should be assigned to a specialized probate division.

B. When a probate court in one jurisdiction properly issues a final judgment, that judgment should be afforded comity and respect in other jurisdictions, subject to each state's principles for resolving conflicts of laws.

COMMENTARY

Probate-related cases involve unique and complex issues and require specialized expertise by the judge. For example, the judge may be requested to resolve the validity of a will, rights of survival and wrongful death distributions, disputed property and creditors' claims, tax regulations, determination of death, disposition of last remains, the need for a protective order, guardianship, or conservatorship for a disabled adult or for a minor, or an individual's mental health status. Because of their accumulated experience in dealing with these cases, probate judges develop a specialized knowledge particularly well-suited for these cases. In addition, it may be more efficient to consolidate all matters related to such proceedings before probate courts.

Because of the mobility of today's society, interstate cooperation among courts is vital. Such cooperation promotes consistency, confidence in the judicial system, and the efficient use of judicial resources. As a result, comity and respect should be accorded a final order or judgment issued by a probate court when the parties subject to that order or judgment move to a different jurisdiction. The court issuing the order or judgment should also be sensitive to the possibility that the order or judgment may be applied in another jurisdiction and craft its language appropriately. At the same time, the court's jurisdiction may be subject to traditional choice of law provisions where a state as a matter of its own policy may decline to apply the law of other states. In general, however, it is preferable that there be good working relationships among the courts of the country, and, where no direct conflict of laws exists, the court exercising probate jurisdiction should respect the final order or judgment of a court from another jurisdiction. [See Standards 3.4.1 – 3.4.5.]

STANDARD 2.1.2 RULEMAKING

Probate courts should recommend changes to the state rules pertaining to probate courts consistent with these standards. Local rules may be utilized for special needs and circumstances provided they are not inconsistent with the statewide rules.

COMMENTARY

The procedural and administrative rules applicable to probate courts may suffer from various basic deficiencies. First, if each court institutes its own set of unique rules, the practice of law within that state may become unnecessarily complex and unwieldy as parties and their attorneys attempt to adhere to the various rules of each individual court. On the other hand, if all trial courts within a state are governed by one universal set of rules, those rules may fail to take into account the unique nature and responsibilities of probate courts in general and fail to allow sufficient flexibility for them to meet their needs. This is particularly likely to occur when those rules have been established by entities that are relatively unfamiliar

with probate courts. In addition, each individual court may need to be afforded sufficient discretion to modify these rules in responding to its own needs and responsibilities. When properly considered, such local rules can be accomplished without imposing substantial variations from the rules of other similarly situated courts within that jurisdiction.

Generally, a state's supreme court or, if applicable, the state legislature is responsible for articulating the general procedural and administrative rules applicable to probate courts.[29] Such an approach promotes uniformity in the rules governing the various probate courts. Where possible, a separate section of these general rules should be devoted to probate courts of that state and their special needs and responsibilities, based upon recommendations provided by the probate courts.[30] When permitted and where appropriate, however, a probate court may also find it necessary to take advantage of the opportunity to adapt these rules to meet its specific needs and circumstances by instituting local procedural and administrative rules that are not inconsistent with the state's general rules. By so doing, the probate court can increase its efficiency and ability to fulfill its duties, ensure itself of sufficient flexibility to meet emerging needs, and ensure that persons requiring access to its services encounter no unnecessary barriers. In making or proposing adaptations to the court's rules, the probate judge may wish to establish a task force consisting of court administrators, clerks, members of the local legal community, and other persons with special knowledge and experience in practice and procedure in the probate court. This will ensure that a wide range of perspectives is considered in drafting these changes and that their likely effect has been taken into consideration. Throughout this process, attention should be given to ensuring that the probate court's local rules are consistent with the state's general court rules. In addition, attempts should be made to encourage uniformity in the rules of all the probate courts of the state.

Rule revision should be completed as expeditiously as possible and resulting changes promptly published. Revision may be necessitated by changes effected by the state's supreme court or the legislature, which may require an immediate response by the probate court to bring its own rules into compliance. Where revisions are made, relevant forms (mandatory or instructive) should be produced and made available.

2.2 CASEFLOW MANAGEMENT

The standards in this category suggest several steps that probate courts may take to ensure that their heavy caseload is processed in a fair and expeditious manner.

STANDARD 2.2.1 COURT CONTROL

Probate courts should actively manage their cases.

COMMENTARY

To ensure prompt and fair justice to the parties appearing before them, probate courts should recognize the importance of controlling the progress of the cases over which they preside. To this end, the court should have in place written policies and procedures establishing and governing an appropriate caseflow management system. Scheduling of cases should, in general, reflect a realistic balance of the competing demands for a timely resolution of the matters placed before the court, the opportunity for relevant persons to participate in the proceedings, and careful consideration and exploration of the issues raised.

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[29] The general rules of the court may address such matters as what is needed to prove a will, what is needed procedurally to determine intestacy, what medical information is needed with a guardianship or conservatorship petition, or what is needed for a minor's personal injury settlement.

[30] *See, e.g.*, MICH. COMP. LAWS SERV. § 700.1302 (LexisNexis 2000).

> The court should monitor and control case progress from initiation, establish time expectations for completion of discovery and progress toward initial disposition, make an early appointment of counsel for a respondent when appropriate, use pretrial conferences and ADR to promote early resolution, and set an early date for trial or hearing. Although trials occur in only a small percentage of probate cases, they can consume a great deal of a judge's time. A trial management conference shortly before the scheduled trial date can help ensure effective use of trial time.[31]

Special considerations should be taken into account when implementing a caseflow management system. While the processing of normal, routine cases may proceed without particular attention by the court, certain parties or cases may require special handling or scheduling. The caseflow system should provide for the early identification of these parties and cases, and the court should be prepared to give them appropriate attention and accommodation. Instances where special attention may be needed include cases in which the issues raised are particularly complex; parties or witnesses have a physical or mental disability; parties or witnesses require an interpreter; or parties or witnesses are ill, elderly, or near death. The court should regularly review its caseflow management system to ensure that it addresses the needs of those parties and cases that come before the court, as well as the court's own needs and requirements. [See Commentary to Principle 1.1.]

The court's case management system should have adequate procedures to manage the motions docket and those cases requiring expeditious processing, such as authorizing or withholding life-sustaining medical treatment. In general, the system should be designed to permit resolution of most contested issues expeditiously.[32]

Ordinarily, a continuance should be granted only when the probate court finds that there is good cause and takes into consideration the interests of all parties. This case supervision, however, should not replace or supplant the attorneys' responsibility to move cases forward. Rather, it should create a joint responsibility between the bench and bar that will build upon their different perspectives in establishing appropriate case-processing timelines. Probate courts in many states now actively monitor and exercise control over caseflow [*e.g.*, Maricopa County (AZ) Superior Court, San Francisco County (CA) Superior Court, DC, FL, Franklin County (OH) Probate Court, PA, TX].

The use of standardized timelines to manage the flow of cases should be generally applicable to most cases. For special or complex cases, however, the court should adopt distinct or flexible timetables to meet the special needs and demands of such cases, subject to modification following periodic conferences with the relevant parties. A number of probate courts are beginning to apply differentiated case management to probate cases.

> Differentiated case management is an attempt to define case-specific features that distinguish among cases as to the level of case management required. Thus, the essence of differential case management is reorganization of the caseflow system to recognize explicitly that the speed and method of case disposition should depend on cases' actual resource and management requirements (both court and attorney), *not* on the order in which they have been filed.[33]

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[31] David C. Steelman, John A. Goerdt, & James E. McMillan, Caseflow Management: The Heart of Court Management in the New Millennium, 45 (NCSC, 2004).

[32] Some probate cases, such as those involving the appointment of a guardian or conservator or a decedents' large estate where the estate cannot be closed until the federal estate tax liability is settled (with the return not even due until nine months after the date of death), by their nature are going to be open ended and will extend over relatively long periods of time. Other cases, such as those involving decedents' estates where an extended period of time for the filing of claims by creditors is required, may have an initial determination subject to subsequent modification. In such cases, goals for resolving probate cases within a given time frame may need to focus on specific events or procedures associated with these cases (*e.g.*, the issuing of the initial order on the need for a guardianship or conservatorship).

[33] Steelman & Davis, *supra,* note 4, at 14-15. *of Guardianship*

In contested cases, an initial conference should ordinarily be held between the judge and the attorneys to establish appropriate deadlines, such as for pre-trial discovery and to identify special or complex cases. For example, many courts have established rules with respect to pretrial conferences and discovery timetables that are strictly enforced. Adopting this approach in contested matters could greatly reduce the delays between the filing of a petition and the ultimate trial and disposition. This initial conference will help the court monitor the progress of each case and anticipate and respond to special difficulties the case may pose. If the case is especially complex, or if circumstances change, additional conferences may be necessary. If the parties are unable to agree upon appropriate deadlines, the court should impose a default schedule. Should a party fail to meet an established deadline, the court should issue sanctions, compel parties to appear, or dismiss the action.

PROMISING PRACTICES

The **Maricopa County, AZ, Superior Court** issued a list of 11 enhancements to the probate courts system. The first enhancement concerned differentiated case management and the need for separate tracks for cases with a high-conflict potential.[34]

STANDARD 2.2.2 TIME STANDARDS GOVERNING DISPOSITION

Probate courts in each state, in collaboration with the Administrative Office of the Courts and the bar, should establish overall time standards governing case disposition of each major kind of case and intermediate standards governing elapsed time between major case events.

COMMENTARY

An initial step in developing a functional caseflow management system is the creation of time standards governing case disposition. Ideally, these should be statewide standards applicable to all courts with probate jurisdiction in the state. The *Model Time Standards for State Trial Courts*,[35] adopted by the Conference of Chief Justices, the Conference of State Court Administrators, the American Bar Association, and the National Association for Court Management, provide a basis for discussion with the Administrative Office of the Courts, the bar, and other stakeholders regarding the appropriate time standards in light of state procedures, statutory time periods, jurisdictional conditions, demographic and geographic factors, and resources.[36]

In addition to overall time standards, it is useful, for case management purposes, to include timelines governing each significant intermediate event from filing to disposition, including status conferences, arbitration hearings, or issue conferences. Intermediate timelines should be integrated with the overall standard for case disposition to create a consistent and functional organizational plan for caseflow management. Status reports should be periodically generated to maintain a record of what has occurred and to determine whether prescribed deadlines have been met. Each intermediate step should be monitored to assure compliance with the timelines, thereby ensuring orderly case development and prompt disposition.[37]

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[34] *Id.* at 9.

[35] Van Duizend, Steelman, & Suskin, *supra*, note 23, at 31 – 34 (NCSC, 2011).

[36] *Id.* at 2.

[37] *Id.* at 35-51.

STANDARD 2.2.3 SCHEDULING TRIAL AND HEARING DATES

The probate court should establish realistic trial and hearing dates based on the schedules established during the pretrial conferences.

COMMENTARY

The court should give careful attention to the scheduling of trials, hearings, conferences and all other appearances before the court. This will ensure the efficient use of judicial resources, and promote trial date certainty, one of the key factors in reducing delay.[38] To achieve accurate scheduling, among the factors the court should consider are:

- Any statutory requirements for hearings
- the likelihood that a case will proceed to trial
- the needs and disabilities of the parties[39]
- the anticipated length of the trial, including the number of court days that will be required
- the number of court days available for scheduling
- the expected judicial complement available (i.e., the number of judges assigned to the court minus anticipated and predicted judicial absences)
- the number of judge days available (i.e., the expected judicial complement multiplied by the number of court days in the period)
- the judicial capacity (i.e., the percentage of scheduled cases tried and settled with judicial participation within the court)
- fallout (i.e., the percentage of cases scheduled for trial that are continued, settled, or dismissed without judicial intervention)
- priorities or time limits imposed by statute.[40]

The likelihood and expected length of a trial or hearing should be determined by the court after consultation with the attorneys or *pro se* parties in the case. The other factors can be computed as needed by the court administrator. An additional factor that may be appropriate to take into consideration when scheduling trial and hearing dates is the court's case backlog and delays likely to result from this backlog.

Accurate scheduling requires the court to adopt firm policies on the issuance of trial and hearing dates and to restrict the availability of continuances.[41] Counsel should be expected to prepare for trial or hearing properly and adequately with the anticipation that the trial or hearing will be held as scheduled. Continuances should not be granted without a showing of good cause and never solely on the stipulation of the attorneys to a continuance.

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[38] CourTools, *supra, note 18, at* Measure 5, *available at* http://www.ncsconline.org/D_Research/CourTools/Images/courtools_measure5.pdf.

[39] Lori Stiegel, Recommended Guidelines for State Courts Handling Cases Involving Elder Abuse, Recommendations 4 & 5 (American Bar Association (ABA), 1996).

[40] *See generally* Maureen Solomon & Douglas Somerlot, Caseflow Management in the Trial Court: Now and for the Future, 18 (ABA, (1987).

[41] Steelman, Goerdt, & McMillan, *supra*, note 31, at 9-10.

2.3 JUDICIAL LEADERSHIP

The standards in this category discuss the responsibility of probate courts to ensure that they, like any other organization, are managed in a responsible and appropriate manner. Probate judges should assume a leadership role in helping probate courts meet this responsibility.

STANDARD 2.3.1 HUMAN RESOURCES MANAGEMENT

Probate courts should be responsible for implementing an effective human resources management program.

COMMENTARY

Probate courts should be administered so that their employees are treated with dignity and respect. (See Principle 1.4) To meet this goal, probate courts should implement a human resources management program. A clear chain of command should exist to prevent confusion and ensure accountability. Court employees should have clear and accurate written job descriptions, adequate training and supervision,[42] regularly conducted performance evaluations, and written policies and guidelines to follow. [See Standard 2.3.4]

Probate courts should actively support and improve the quality of the work of their personnel. Surveys of court employees should be administered periodically to identify problems and assess the level of employee satisfaction.[43] Annual development of goals should be established for each supervisor and court unit, as well as for all staff members. Training programs should be used to maintain and improve the capabilities and skills of all staff members. An employee recognition program should acknowledge the strengths and achievements of the court employees.

An effective human resource plan cannot be implemented successfully without the leadership of the court. The judge and court administrator, if there is one, must demonstrate their complete support of and commitment to the plan through active involvement in court training programs and model behavior on and off the bench.

STANDARD 2.3.2 FINANCIAL MANAGEMENT

A. Probate courts should seek financial support sufficient to enable them to perform their responsibilities effectively.
B. Probate courts should inform state and local funding sources on a regular basis about the importance, breadth, and impact on the community and individuals of probate courts and their decisions, as well as about the demographic trends affecting probate court caseloads.
C. The court should institute standardized procedures for monitoring fiscal expenditures.

COMMENTARY

To carry out their duties adequately and effectively, probate courts must receive sufficient funding. Considerable variation in the sources of funding exists from jurisdiction to jurisdiction. In many jurisdictions, the state rather than local government has assumed financial responsibility for the probate courts, which may avoid fragmented and disparate levels

[42] The Probate Division of the District of Columbia Superior Court records, and has supervisors review, the responses that Division staff provide to telephonic information inquiries from the public in order to identify areas in which additional training may be needed and make certain that accurate information is provided in a timely and courteous manner.

[43] CourTools, *supra,* note 18, at: Measure 9, *available at* http://www.ncsconline.org/D_Research/CourTools/Images/courtools_measure9.pdf.

of financial support among courts. Whatever the source of funds, adequate funding is needed for probate courts to attract and retain competent judges and court personnel; to provide adequate supplies, equipment, and library materials; to purchase specialized services such as those provided by court visitors, physicians, psychologists, expert witnesses, examiners, interpreters, and consultants; and to obtain, renovate, and replace, when needed, capital items and physical facilities.

In generating a budget for a probate court, it is necessary that the court's special functions and responsibilities be taken into account. Imposition of a standardized court budget derived from other courts generally provides an inadequate representation of the budgetary needs of a probate court. Probate courts should have the opportunity to present their resource needs as part of the budget preparation process whether that takes place at the general jurisdiction court level, the administrative office of the court level, the county board level, or the state legislature level. In order to do so, it is helpful to be able to present statistical analyses of the number of cases of each type and the staff and judicial time required to dispose of each type of case. [See Standards 2.4.1 and 2.4.2] During the budget process and at other times of the year, probate judges also should take the opportunity to better inform their funding bodies about the nature of probate court work and how it affects individual litigants and the community as a whole. Information should also be presented on how demographic trends are and will affect probate caseloads.[44]

The overall level of financial support required by probate courts is likely to vary from year to year, as may the specific levels of support needed for the various activities of the courts. Probate courts should regularly review and evaluate their funding requirements and requests. Within the funds provided, probate courts should allocate expenditures according to the needs and priorities established by the courts themselves.

In addition to generating requests for financial resources for the upcoming fiscal year, the long-term needs of a probate court should be emphasized in each annual operating budget. This should include projections of court operations and corresponding financial requirements for future years. Procedures should be in place for the review and revision of these projections in light of later events. Special attention should be given to the projection of anticipated major capital expenditures. By developing projections of their future needs, probate courts will be able to better anticipate those needs and build them into their annual budgetary request. In addition, certain budgetary requests, such as major capital expenditures, may require a special request, more extensive justification, and lobbying with the funding source. Such requests may necessitate a long-term budgetary strategy. At the same time, unanticipated events may invalidate prior forecasts. Sufficient flexibility should be built into a court's budget to allow the court to respond appropriately to unanticipated events. The establishment of an advisory committee on court finance may provide helpful advice on the court's budget and on obtaining the support of the funding agency.

Because of their role as a guardian of the public trust, probate courts must carefully account for their resources. They should institute procedures that will ensure that their fiscal expenditures are adequately monitored.[45] Monthly reviews of expenditures should be conducted and probate courts should be subject to regular audits of its accounts following close of each fiscal year by an independent auditing agency. Use of generally accepted accounting principles and an independent auditing agency ensures the proper use of public funds and enhances public confidence in the probate court. In general, the fees charged in the court should be reasonably related to the time and work expended by the court. (See Principle 1.1.)

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[44] See Richard Van Duizend, *The Implications of an Aging Population for the State Courts*, *in* Future Trends in State Courts 2008 76 (NCSC, 2008).

[45] *See, e.g.,* American Bar Association Committee on Standards of Judicial Administration, Standards Relating to Court Organization §1.52 (ABA, 1990) (recommended procedures for fiscal administration "should include uniform systems for payroll accounting and disbursement; billing and presentation and pre-audit of vouchers for purchased equipment and services; receipt, deposit, and account for money paid into court; internal audits and regular, at least monthly, recapitulations of current financial operations").

STANDARD 2.3.3 PERFORMANCE GOALS AND STRATEGIC PLAN

Probates courts should:

A. Adopt quantifiable performance goals.
B. Establish multi-year strategic plans to meet its goals.
C. Continuously measure their progress in meeting those performance goals.
D. Disseminate information regarding their performance and progress.

COMMENTARY

Probate courts should adopt performance goals to fulfill their responsibilities and to achieve efficiency in their operations and in meeting these Standards. Over the past two decades, strategic planning—a systematic, interactive process for thinking through and creating an organization's best possible future"[46] —has become a fundamental management approach in individual courts and judicial systems throughout the United States and around the world. It is particularly helpful when the courts, like probate courts, are working closely with other governmental as well as community partners.

Adopting goals and establishing a plan in themselves are not sufficient. It is essential for probate courts to assess their performance by collecting and analyzing data to determine the extent to which they are achieving their goals, the progress in implementing the changes and strategies identified in the plan, the impact of those changes, and any unintended consequences.[47] There are many sets of performance measurement tools that courts can use, most notably *CourTools*, which provide a balanced approach to assessing performance and progress.[48] By simultaneously establishing a strategic plan and updating it in conjunction with periodic evaluations, probate courts can engage in a continuous cycle of improvement.

Probate courts should share their goals, plan, and reports on progress internally and with external stakeholders including the state administrative office of the courts, funding sources, the bar, and the public.

> Open communication about court performance—be it stellar, good, mediocre, or poor—builds public trust and confidence. This is particularly true if a report includes a court's strategy for improving performance.[49]

STANDARD 2.3.4 CONTINUING PROFESSIONAL EDUCATION

A. Probate courts should work with their state judicial branch education program and national providers of continuing education for judges and court staff to ensure that specialized continuing education programs are available on probate court procedures, improving probate court operations, and issues and developments in probate law.
B. Probate courts should encourage and facilitate participation of their judges, managers, and staff in relevant continuing professional education programs at least annually.

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[46] Brenda Wagenknecht-Ivey, An Approach to Long Range Strategic Planning for the Courts, 2-19 (Center for Public Policy Studies, 1992).

[47] International Consortium for Court Excellence, International Framework for Court Excellence (2009), *available at* http://www.ncsc.org/Resources/~/media/Microsites/Files/ICCE/IFCE-Framework-v12.ashx.

[48] CourTools, *supra,* note 18; for other sets of court measures, see International Consortium for Court Excellence, *supra,* note 47, at 18-22.

[49] International Consortium for Court Excellence, *supra,* note 47, at 35.

COMMENTARY

Probate law and procedures and probate court operations are distinct from those of other trial court jurisdictional areas. It is also one of the dynamic jurisdictional areas that must adjust to frequent changes in federal tax law and benefit programs, a swelling caseload due to demographic trends, and increased scrutiny of the probate court's responsibility to oversee the trans-generational transfer of property and the well-being and assets of disabled adults. Updates on legal changes and new approaches, as well as professional development on the skills required to operate a probate court effective are needed,[50] but in many states, are not readily available due to limited resources and the relatively small number of judges and staff engaged in probate work.

It is recommended that the staff training program should prepare all probate court employees for all elements of their work.[51] Training also should include components on aging and the causes and effects of dementia, the Americans with Disabilities Act; communication with disabled persons and elders, civil rights laws; employment policies including those pertaining to advancement, promotions, and grievances; courtesy and responsiveness to their fellow employees and the public; tolerance for different viewpoints; and ways to eliminate gender, racial, ethnic bias and sexual harassment.

In addition to the continuing education on probate matters offered by state judicial branch education programs and state probate judges associations, educational conferences, courses, and webinars relevant to probate court judges, registrars, clerks, and staff are offered by the National College of Probate Judges, the National Judicial College, the National Association for Court Management, and the Institute for Court Management among others.

Promising Practices

The **State Justice Institute** has for many years provided scholarships to judges, court managers, and court staff to assist them in attending continuing professional education programs—http://www.sji.gov/grant-esp.php.

2.4 INFORMATION AND TECHNOLOGY

The courts, like all of society, have undergone a technological revolution driven in part by the need to process and store increasing amounts of information, including the records associated with the greater number of cases over which they preside. At the same time, increased attention is being given to the importance of accountability and efficient caseflow within the courts. The standards in this category recognize the importance of the court with probate jurisdiction (hereinafter the court) remaining abreast of and joining in these developments.

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[50] Third National Guardianship Summit, *supra*, note 6, at Recommendation 2.1, 2012 Utah L. Rev., at 1200.

[51] *See* Core Curriculum, National Association for Court Management, http://www.nacmnet.org/CCCG/index.html (July 12, 2012).

STANDARD 2.4.1 MANAGEMENT INFORMATION SYSTEM

A. Probate courts should use a record system that is easily accessible and understandable for all persons who are entitled to the information within those records, and that effectively protects the confidentiality of sensitive information The records should be comprehensive, indexed, and cross-referenced.

B. Probate courts should regularly monitor and evaluate their management information system, and acquire and utilize new technologies and equipment when needed to assist the court in performing its work effectively, efficiently, and economically.

COMMENTARY

The records and files of probate courts should be accurate, reliable, and accessible to ensure efficient court operation. Access to these records and files is needed by a range of persons, including court personnel as they perform their duties, litigants as they develop and present their cases, and non-litigants as they conduct various research permitted under public records laws. (*But see*, Standard 2.4.3 regarding protection of sensitive personal information and information entitled to confidentiality under state law.) Probate court information systems should provide for integration of printed and digitized records and be updated regularly to allow complete and easy access to all needed information. The systems should be sufficiently flexible to permit probate courts to use new technology as it becomes available. Probate court information systems should be designed to produce all information and records in a timely manner and understandable formats, and to make them available for both case-processing and management purposes.

At least after the initial filing, probate courts should enable counsel and *pro se* litigants to file pleadings and supporting materials electronically except for those documents such as wills for which the original is required. The e-filing system should be tied directly into the probate court's case management system to permit case tracking and management without additional data entry.[52] Probate courts should ensure that digitized information is managed in a way that provides access to authorized persons, maintains the security of the data from inappropriate release and unauthorized alterations, and permits the use of improved versions of the operating software. Access to probate courts records should be user-friendly both through on-site public access terminals and through a probate court website. Websites should provide information on what case file information is available, what is confidential, how to access it along with general information on the court's jurisdiction, and how to file and respond to pleadings. Probate court staff and volunteers should be trained to explain information access and answer questions about it. Beyond this routine assistance, the Americans with Disabilities Act requires court personnel to provide additional assistance to individuals with a disability seeking access to court records.

Probate courts should periodically determine whether its management information system, including its system of filing and record keeping, is fulfilling the needs of the court. This should include an evaluation of the overall system and the system's individual components. The monitoring system should only be as complex as required to provide necessary and useful information. In addition to routine self-assessment, periodic review by a third party, who is not a member or a current employee of the court, may provide an objective and independent assessment of the court's performance.

The first and most important step in deciding whether to implement a technological innovation is to consider the needs of the probate court and its constituents, including an analysis of court operations and processes that might benefit from the introduction of new technology. The second step should be to assess the usefulness of the technological innovation with a cost-benefit analysis. Where appropriate, probate courts should rely on their own employees for the evaluation. If

[52] *See Court Specific Standards*, NCSC, http://www.ncsc.org/Services and Experts/Technology tools/Court specific standards.aspx (July 12, 2012).

necessary, outside consultants with technical expertise should be used. If the adoption of the technology is advantageous, a specific plan should be developed to implement the necessary changes. With the introduction of any new technology, probate courts, when necessary, may wish to maintain a dual recordkeeping system, simultaneously recording information via both the old and new systems, but only long enough to establish the reliability of the new system.

STANDARD 2.4.2 COLLECTION OF CASELOAD INFORMATION

Probate courts should collect and review meaningful caseload statistics including the volume, nature, and disposition of proceedings, the time to disposition including a comparison to the time standards adopted for probate courts, the certainty of hearing dates, and the number of guardianships and conservatorships being monitored.

COMMENTARY

The functioning of probate courts can be enhanced by accumulating basic information regarding their court's caseload and dispositions. These data can be useful to probate courts or the court administrator's office in managing probate court operations and measuring court performance as well as assessing job performance of court appointees and conducting needs assessments. "Excellent courts use a set of key-performance indicators to measure the quality, efficiency, and effectiveness of their services."[53] The measures suggested in the standard reflect the case management related performance measures contained in *CourTools 2-5*.[54] In addition, to helping gauge probate court performance, this information may assist in identifying trends in system use and allow the court to divert and apply its resources to meet these trends. The information may also bolster arguments for increased resources for the court. [See Standard 2.3.3]

While many courts collect and closely monitor caseload data, others do not, often because they lack the resources to do so. Such statistical data will inform the court about the number of proceedings it processes, how judicial and staff resources are allocated. Identification of statistical categories of court proceedings and activities should be consistent throughout the state. When a data collection system involving the probate court is designed, the unique nature of the court and its procedures should be taken into account, thereby ensuring that the data gathered will accurately reflect the operations and goals of the court and definitions adhering as closely as possible to those set forth in *The State Court Guide to Statistical Reporting*.[55]

At a national level, neither the justice system nor the social service system—both of which have long-standing programs for the development and reporting of "case" statistics—possess a meaningful statistical portrait of the volume and composition of probate court cases in the United States. Without such information, questions fundamental to reform and improvement of the state probate systems are difficult to answer.[56]

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[53] International Consortium for Court Excellence, *supra*, note 7, at 33.

[54] CourTools, *supra*, note 18.

[55] Court Statistics Project, State Court Guide to Statistical Reporting 10 (NCSC, 2009) *available at* http://www.courtstatistics.org/~/media/Microsites/Files/CSP/DATA%20PDF/CSP%20StatisticsGuide%20v1%203.ashx.

[56] *See* Brenda K. Uekert & Richard Van Duizend, *Adult Guardianships: A 'Best Guess' National Estimate and the Momentum for Reform*, *in* Future Trends in State Courts 2011 107 (NCSC, 2011); COSCA, *supra*, note 6; B. K. Uekert, Adult Guardianship Court Data and Issues: Results from an Online Survey, (NCSC, 2009), *available at* http://www.ncsc.org/sitecore/content/microsites/future-trends-2011/home/Special-Programs/4-3-Adult-Guardianships.aspx.

STANDARD 2.4.3 CONFIDENTIALITY OF SENSITIVE INFORMATION

Probate courts should establish procedures to maintain the confidentiality of sensitive personal information and information required to be kept confidential as a matter of law.

COMMENTARY

Probate courts should remain cognizant that sensitive and private matters may be contained both in automated case management systems and in physical case files. Probate courts should take special precautions, in accordance with state law, to ensure the confidentiality of Social Security and financial account numbers, medical, mental health, financial, and other personal information.[57]

2.5 ALTERNATIVE DISPUTE RESOLUTION

The use of alternative dispute resolution techniques to resolve disputes in probate matters is often preferable to litigation. Mediation, family group conferencing, and settlement conferences can better accommodate all interests and maintain long-term familial relations than litigation. The standard in this category recognizes the increased use and proposed use of ADR for probate matters.

STANDARD 2.5.1 REFERRAL TO ALTERNATIVE DISPUTE RESOLUTION

Probate courts should refer appropriate cases to appropriate alternative dispute resolution services including mediation, family group conferencing, settlement conferences and arbitration.

COMMENTARY

In many situations, mediation may be a highly desirable method of dispute resolution. In addition to providing relief from crowded court dockets and dispensing justice in a timely manner, participants may find the opportunity to discuss all issues fully and to craft their own solutions to be particularly satisfying. In addition, the cost of mediation may be much lower than trial, particularly when volunteer mediators are used.[58] Thus, at a minimum, probate judges should strongly encourage the parties and their families to participate in mediation, family group conferencing, or other alternative dispute resolution (ADR) processes, and consider ordering participation in appropriate cases. A number of states currently offer or require mediation in guardianship, conservatorship, and/or contested will cases (*e.g.*, CA, CT, DC, OH, OR, PA, SD, TX, WA). Others, such as AZ offer settlement conferences with trained volunteer attorneys. Family group conferencing, an ADR technique widely used in child protection cases,[59] may be useful as well in cases in which the welfare and protection of an older person or disabled person is at issue.[60]

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[57] *See* Martha W. Steketee & Alan Carlson, Developing CCJ/COSCA Guidelines for Public Access to Court Records (NCSC, 2002).

[58] *See* Susan J. Butterwick, Penelope A. Hommel, & Ingo Keilitz, Evaluating Mediation as a Means of Resolving Adult Guardianship Cases, (The Center for Social Gerontology, 2001); S.N. Gary, *Mediating Probate Disputes* 1 GP/Solo Law Trends and News, No. 3 (May 2005), *available at* http://www.americanbar.org/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/0506_estate_probate.html.

[59] *See* Susan M. Chandler & Marilou Giovanucci, *Transforming Traditional Child Welfare Policy and Practice*, 42 Fam. Ct. Rev. 216 (2004).

[60] *See e.g.*, Julia Honds, Family Group Conferencing as a Means of Decision-Making in Matters of Adult Guardianship, (University of Wellington, 2006); Laura Mirsky, Family Group Conferencing Worldwide (International Institute for Restorative Practices, 2003).

The court should be open to ADR in all situations, but especially when the parties have requested outside help in settling their dispute. It may be beneficial for resolving disputes such as will contests and contested creditor claims. ADR may also often work well for disputes involving individual treatment or habilitation plans for respondents in guardianship or civil commitment proceedings and may be appropriate to determine the extent of the guardian's or conservator's powers in a limited guardianship or conservatorship or to determine which family member(s) will be given fiduciary responsibility. ADR, however, should not be used for the threshold determination of incapacity in guardianship/conservatorship proceedings. Similarly, it may not be a viable alternative when one of the parties is at a significant disadvantage. Examples include disputes involving persons with severe depression; who are on a medication that affects their reasoning; who have difficulty asserting themselves; who have been physically or emotionally abused by another party; or who perceive themselves as significantly less powerful than the opposing party. In any of these instances as well as in proceedings related to guardianships/conservatorships, the disadvantaged party should be represented and probate court judges should exercise special care before accepting any agreement reached.[61]

In addition, probate courts should ensure that the ADR professionals and volunteers in court-connected alternative dispute resolution have received training on the nature of and key issues in probate matters. This training should include methods for effectively communicating with elders and persons with mental health and developmental disabilities.

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[61] *See* Mary F. Radford, *Is the Use of Mediation Appropriate in Adult Guardianship Cases?* 31 STETSON L. REV. 611 (2002).

SECTION 3: PROBATE PRACTICES AND PROCEEDINGS

Unlike the standards in the first two sections, the standards in this section focus on the practices and proceedings used by probate courts to resolve the issues placed before them. Because many of the issues faced by probate courts are relatively unique, specialized practices and proceedings have evolved. This section identifies and discusses these practices and proceedings.

The standards related to probate practices and proceedings are divided into four categories. **COMMON PRACTICES AND PROCEEDINGS** addresses procedural aspects that most probate matters have in common. The last three categories, **DECEDENTS' ESTATES**, **ADULT GUARDIANSHIPS AND CONSERVATORSHIPS**, and **GUARDIANSHIPS OF MINORS**, are areas of the law that almost all courts with probate jurisdiction must address. Each poses its own special issues.[62]

The standards in this category recognize the importance of probate courts adopting procedures that respond to the special needs of the parties appearing before them and the unique nature of the issues that probate courts are asked to resolve.

3.1 COMMON PRACTICES AND PROCEEDINGS

STANDARD 3.1.1 NOTICE

A. Probate courts should ensure that timely and reasonable notice is given to all persons interested in court proceedings. The elements of notice (content, delivery, timing, and recipients) should be tailored to the situation.

B. The initial notice should be non-digital and formally served. If permitted by statute or court rule, subsequent notices and pleadings may be served through electronic means to all parties, counsel, and interested persons who provide their e-mail addresses, and to the probate court if it has e-filing capabilities.

COMMENTARY

Notice and due process are important concepts in any area of the law, but particularly in probate. Persons whose interests may be affected may be unaware that an action has been filed. Although notice requirements vary from state to state, proper notice must be given, and certain levels of notice may even be constitutionally required.[63] When there is a failure to provide proper notice, any orders previously made can be vacated. Due process standards do not depend on whether an action is characterized as one *in rem* or *in personam*.[64]

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[62] Although not specifically listed, the Standards in this section also apply to the other types of cases within probate court jurisdiction including, but not limited to, testamentary and *inter vivos* trust cases.

[63] Tulsa Prof'l Collection Servs. v. Pope, 485 U.S. 478, 485 (1988) (notice by publication insufficient to bar reasonably ascertainable creditors of an estate).

[64] Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950).

The need for notice varies in different contexts. Many states allow informal probate of wills without notice, but such probate can be superseded by a formal proceeding. To have *res judicata* effect, a decree in a formal proceeding must be preceded by notice. Where notice of a hearing is required, it should indicate the time, place, and purpose of the hearing in a manner likely to be understood by the recipient. Notice should be given in a language in addition to English if appropriate to the circumstances. It should be served a reasonable time before the hearing, by mail or personal delivery where possible. Notice by publication is acceptable only as to persons whose address or identity cannot be ascertained with reasonable diligence.[65]

The "interested persons" to whom notice should be given in the context of decedents' estates includes persons with a potential property interest in the estate. When a will is offered for probate, this includes trustees, charities, and/or the state Attorney General in some circumstances, as well as the testator's heirs who would take if no will existed. If the testator executed several wills, devisees under earlier wills filed with the court that are adversely affected by the later will also have an interest because they may take if the later will is found to be invalid. However, it is not reasonable to require notice to the devisees of every will ever executed by the testator, particularly those that have not been probated or offered for probate. But if notice, even though not required by statute, is not given to known devisees under the decedent's last prior will, the probate order may not be *res judicata* as to such devisees.

When interested persons are under a legal disability, they may be represented by another. For example, virtual representation may be applicable. [See Standard 3.1.4] Similarly, provided no conflict of interest exists, a trustee of a trust that is a beneficiary under a will may represent trust beneficiaries in connection with a personal representative's accounting. However, it may be appropriate to give notice in such cases also to the persons represented by others (*e.g.*, the trust beneficiaries) so they will be kept informed and be assured that their interests are being considered.

Notice is not limited to hearings before the court. In some instances, lack of court supervision of a decedent's estate is acceptable only where the affected persons receive notice that the court is not going to supervise the matter and that the affected persons will be responsible for protecting their own interests. [See Standard 3.2.1] For example, some states allow a will to be probated without a judicial hearing, but require the personal representative to notify the heirs and devisees promptly. The notice must inform them that the estate is being administered without court supervision but that they can petition the court on any matter relating to the estate.[66] Similarly, some states allow an estate to be closed without a court proceeding by operation of law or on the basis of a closing statement executed by the personal representative, which must be sent to the court and to distributees advising them that administration of the estate has been completed.[67]

The notice requirements in proceedings for guardianship and conservatorship raise some special problems. In such proceedings, "interested persons" is a flexible concept and its meaning may change depending on the circumstances. [See Standards 3.3.7 and 3.5.2]

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[65] *See id.* at 317.

[66] *See, e.g.,* Cal. Prob. Code § 10451 (West 1991); Unif. Prob. Code § 3-705 (2008).

[67] *See* DC Stat §20-1301(c) (2012); Unif. Prob. Code § 3-1003 (2008).

To ensure that all parties and interested persons have knowledge of a probate proceeding, the initial notice should be a formal written paper document served in the traditional manner. However, to expedite the process and reduce costs, subsequent notices and pleadings may be served electronically.[68] Parties and interested persons who provide their e-mail address should be deemed to have consented to electronic service. A number of states currently permit electronic notice, at least in some instances [*e.g.*, CA, OR, and PA]. Any process for providing notice electronically should require delivery of an electronic receipt to document that notice has been served.

STANDARD 3.1.2 FIDUCIARIES

A. Probate courts should appoint as fiduciaries only those persons who are:
(1) Competent to serve.
(2) Aware of and understand the duties of the office.
(3) Capable of performing effectively. A fiduciary nominated by a decedent should be appointed by the court absent disqualifying circumstances.

B. When issuing orders appointing or directing a fiduciary, probate courts should make those orders as clear and understandable as possible and should specify the fiduciary's duties and powers, the limits on those duties and powers, and the duration of the appointment.

C. Probate courts should require a surety bond or other asset protection arrangement of a fiduciary when (1) an interested person makes a meritorious demand, (2) there is an express requirement for a bond in the will or trust, or (3) the court determines that a bond is necessary. The court should ensure that the amount is reasonably related to the otherwise unprotected assets of the estate.

D. Probate courts are encouraged to develop and implement programs for the orientation and education of unrepresented fiduciaries, to enable them to understand their responsibilities, how to perform them effectively, and how to access resources in the community.

COMMENTARY

Probate courts should appoint qualified fiduciaries. A *fiduciary* is "one who must exercise a high standard of care in managing another's money or property."[69] The term generally includes personal representatives, guardians, conservators, and trustees. *Persons* as it is used here includes natural persons, corporations, and other entities authorized to serve as a fiduciary.

Because trust and confidence are needed between the fiduciary and the beneficiaries, probate courts should examine the credentials of potential fiduciaries with care. Experience, honesty, the absence of a conflict of interest, reputation and ability, and any prior service as a fiduciary are some of the factors that probate courts may consider in reviewing a person's ability to perform the duties of the office. Probate courts should determine if anything would disqualify the person being considered (*e.g.*, statutory disqualifications) or make the appointment unsuitable.[70] [See Standard 3.3.12.]

Issuing an order that is clear and understandable to a non-lawyer fiduciary is essential for ensuring that the terms of that order are properly carried out. Specifying the responsibilities and authority of a fiduciary provides a blueprint, not only for the fiduciary, but also for beneficiaries, their families, and third parties engaged in financial and other transactions with the estate or trust.

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[68] Original documents such as wills should be filed with the probate court.

[69] Black's Law Dictionary 625 (9th ed. 2009).

[70] Currently, 13 states require that guardians undergo independent criminal background checks before being appointed. U.S. Government Accountability Office, GAO-11-878, Incapacitated Adults: Oversight of Federal Fiduciaries and Court-Appointed Guardians Needs Improvement, 7 (July 2011), http://www.gao.gov/new.items/d11678.pdf; *See, e.g.*, Tex. Prob. Code Ann. § 78 (Vernon 1995).

Another means of protecting the estate is requiring fiduciaries to post a surety bond in an amount not less than the estimated value of the personal property of the estate and the income expected from the real and personal property during the next year, less any amounts that can be otherwise protected.[71] [See Standards 3.3.15 and 3.4.8] When a testator or settlor of a trust has provided for appointment without bond, his or her wishes should be respected unless an interested person is able to show a necessity for imposing the bond. In such instances, there may be alternatives that protect assets without adding to the cost of administration of estates such as restricted bank accounts, safekeeping agreements, insurance,[72] and collateral for performance (*e.g.*, a mortgage of land).

Some states have enacted mandatory statutory preference lists, thereby limiting the discretion of probate courts in selecting the most qualified person. Other states have a statutory priority list but allow probate courts to disregard the list if in the best interest of the estate or respondent. If a statutory preference is granted to certain persons, probate courts should have authority to deny that appointment if the person is unsuitable under the evidence presented. In all situations, the court should limit appointments as required by statute, assuming the statute does not require unconstitutional distinctions.[73]

Inherent in the process of appointment is the probate court's responsibility to ensure that the fiduciary understands his or her duties under controlling state law. [See Standard 3.3.14] Probate courts should develop or use available materials and programs to assure that those appointed know what they must do to properly discharge their responsibilities. Several states offer an orientation or instructional materials to fiduciaries such as personal representatives and executors as well as to guardians and conservators [*e.g.*, AZ, DC, and VA].

PROMISING PRACTICES

District of Columbia *AFTER DEATH A GUIDE TO PROBATE IN THE DISTRICT OF COLUMBIA*[74]

Tarrant County, TX Probate Court No. 2 requires all decedents' administrators, guardians, and conservators to attend a mandatory training immediately after appointment conducted by the staff member who will be reviewing their documents and to sign an acknowledgment of understanding following the training.

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[71] *See* U.P.C. §3-604; regarding bonds for conservators *see* Third National Guardianship Summit, *supra*, note 6, at Standard 4.9, 2012 Utah L. Rev., at 1195; M.J. Quinn & H. Krooks, *The Relationship Between the Guardian and the Court*, 2012 Utah L. Rev. 1611 (2013).

[72] *See e.g.*, Wash. Ct. Gen. R. 23(d)(4) & (5).

[73] *See* Reed v. Reed, 404 U.S. 71, 74 (1971) (statute preferring males to females in selecting administrators).

[74] Probate Div. of the Superior Court of D.C., After Death – A Guide to Probate in the District of Columbia, (Jan. 2010), http://www.dccourts.gov/internet/documents/AfterDeathAGuideToProbateInTheDistrictOfColumbia.pdf.

STANDARD 3.1.3 REPRESENTATION BY A PERSON HAVING SUBSTANTIALLY IDENTICAL INTEREST

Probate courts should allow representation by a person having substantially identical interest, where appropriate.

COMMENTARY

Often, in probate proceedings, interested persons are minors or incapacitated adults, unborn, unascertained, or persons whose addresses are unknown. In order for probate courts to have jurisdiction to enter a fully binding order, their interests must be represented by others—for example, "a trust providing for distribution to the settlor's children as a class with an adult child being able to represent the interests of children who are either minors or unborn."[75] Both the Uniform Probate Code and the Uniform Trust Code embrace this concept of virtual representation[76] as well as in some state statutes,[77] but it has also been recognized without explicit statutory support.[78]

Before allowing someone to represent others in this manner, probate courts should conduct a careful examination to ensure that the interests are truly identical, and when the trustee of a testamentary trust and the personal representative are the same person, a potential conflict of interest exists, and the beneficiaries, if incapacitated, should be represented by an independent person. The question of virtual representation may also arise in connection when an earlier judgment is challenged by someone who was not formally represented. In the latter situation, the probate court may decide that the challenge is barred because the challenger was virtually represented by another at the time of the prior decree.

STANDARD 3.1.4 ATTORNEYS' AND FIDUCIARIES' COMPENSATION

A. Attorneys and fiduciaries should receive reasonable compensation for the services performed.

B. In order to enhance consistency in compensation and reduce the burden on probate courts of determining compensation in each case, probate courts or the state Administrative Office of the Courts should consider establishing fee guidelines or schedules.

C. When a dispute arises that cannot be settled by the parties directly or by means of alternative dispute resolution, probate courts should determine the reasonableness of fees.

COMMENTARY

Attorneys and fiduciaries are entitled to receive fair compensation for the time, effort and expertise they are providing.[79] However, defining what is reasonable compensations for the services rendered can be a complex, thorny determination. One way of limiting the need for probate courts to engage in the review of fees on a case-by-case basis is through the use of fee schedules or guidelines set either by statute or court rule. Ohio, for example, has established a fee schedule by statute.[80] Such schedules help to ensure fairness and consistency. In establishing a fee schedule or guideline, it is essential that the fees set are reasonable and reflect or relate to customary time involvement so as not to discourage well qualified individuals from serving as fiduciaries or counsel in probate matters.

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[75] UNIF. TR. CODE comment to §304 (2010).

[76] UNIF. TR. CODE §304 (2010); UNIF. PROB. CODE §1-403(2) (iii) (2008).

[77] *See, e.g.,* NY SURR. CT. PROC. ACT § 315 (McKinney 1981); UNIF. PROB. CODE § 1-403 (2008).

[78] *See* WILLIAM M. MCGOVERN *ET AL.*, *WILLS, TRUSTS AND ESTATES* 703 (1988).

[79] UNIF. PROB. CODE 3-179 (2008); UNIF. TR. CODE §708 (2010).

[80] Probate Court of Montgomery County, Ohio, *Computation of Fiduciary Fees in Estate Cases*, http://www.mcohio.org/government/probate/docs/estate/APPENDIX_D_Computation_of_Fiduciary_Fees.pdf (Jun. 25, 2012).

When there is no guideline, in reviewing a request for a fee in excess of the scheduled amount due to the provision of extraordinary services, or when a dispute arises that requires court intervention, the factors that a probate court may consider include:

- The usual and customary fees charged within that community
- Responsibilities and risks (including exposure to liability) associated with the services provided
- The size of the estate or the character of the services required including the complexity of the matters involved
- The amount of time required to perform the services provided
- The skill and expertise required to perform the services
- The exclusivity of the service provided
- The experience, reputation and ability of the person providing the services
- The benefit of the services provided.[81]

Time expended should not be the exclusive criterion for determining fees. Probate courts should consider approving fees in excess of time expended where the fee is justified by the responsibility undertaken, the results achieved, the difficulty of the task, and the size of the matter. Conversely, a mere record of time expended should not warrant an award of fees in excess of the worth of the services performed.

In many cases, it may be helpful for probate courts to require a fiduciary, at the time of appointment or first appearance in a matter, to disclose the basis for fees (*e.g.*, a rate schedule). Probate courts may also direct that a fiduciary submit a projection of the annual fees within 90 days of appointment, disclose changes in the fee schedule and estimate, seek authorization for fee-generating actions not included in the appointment order, and provide a detailed explanation for any fees claimed.[82]

The services should be rendered in the most efficient and cost-effective manner feasible. For example, the proper delegation of work to paralegals, acting under the supervision of an attorney, reduces the cost of services, and a requested allowance for such services should be approved.[83] Probate courts should not penalize firms that reduce expenses by prudently employing paralegals or using other appropriate methods by disallowing these expenses.

In most estates, the fiduciary will retain an attorney to perform necessary legal services. The dual appointment of one person as both fiduciary and attorney may result in significant savings for the estate and should not be discouraged by denial of compensation, though the fees requested as fiduciary and as attorney should be differentiated and must still be reasonable. In most estates, the fiduciary will retain an attorney to perform necessary legal services. The dual appointment of one person as both fiduciary and attorney may result in significant savings for the estate and should not be discouraged by denial of compensation, though the fees requested as fiduciary and as attorney should be differentiated and must still be reasonable. When a person acts both as fiduciary and attorney, probate courts should be alert for the possibility that there may be a conflict of interest and that having the fiduciary serve in a dual capacity will best meet the needs of the person, trust, or estate.[84]

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[81] *See generally* Model Code of Prof'l Conduct R. 1.5(a) (2007).

[82] Third National Guardianship Summit, *supra*, note 6, at Standard 3.1, 2012 Utah L.Rev., at 1193-1194.

[83] *See, e.g.*, Cal. Prob. Code § 10811(b) (West 1993).

[84] *See* National Guardianship Association, Standards Of Practice, Standard 16(2) (J). http://www.guardianship.org/guardianship_standards.htm

When requesting fees in excess of a schedule or guideline, the attorney or fiduciary has the burden of proving the reasonableness of the fees requested. Probate courts may consider factors that made the provision of services more complicated, including the threat or initiation of litigation; the operation of a business; or extensive reporting and monitoring requirements. Improper actions by a fiduciary or a lawyer may justify a reduction or denial of compensation.[85]

Generally, probate courts are not involved in reviewing fees in unsupervised estates unless the matter is appropriately brought before the court. In extreme cases, however, even though the administration is unsupervised, a probate court may review compensation on its own motion where the personal representative is the drafting attorney or the will contains an unusually generous fee provision. Similarly, probate courts may review fees if the court observes a pattern of fee abuse.

In supervised administration of estates, unless all affected parties consent, attorneys and fiduciaries seeking payment of fees from an estate should submit to the probate court sufficient evidence to allow it to make a determination concerning compensation. [See Standard 3.2.1 for a discussion of the distinction between these two types of estate administration.]

Fee disputes can be particularly acrimonious and can involve litigation costs eventually borne by the estate or the parties far in excess of the amount in controversy. Probate courts should identify, encourage and provide opportunities for early settlement or disposition of these disputes through settlement conferences and alternative dispute resolution procedures.

STANDARD 3.1.5 ACCOUNTINGS

A. As required, probate courts should direct fiduciaries to provide detailed accountings that are complete, accurate and understandable.
B. Probate courts should have the ability to review fiduciary accountings as required.

COMMENTARY

Unless specified by statute, the format for accountings should be established by statute, the probate court or the state Administrative Office of the Courts. An accounting should include all assets, the distribution of those assets, the payments of debts and taxes, and all transactions by the fiduciary during the administration of the estate. Categorical reporting of expenditures should not be permitted in order to lessen opportunities for theft or fraud. Receipts for all expenditures and documentation of all revenue should be provided upon request. While requiring detailed information, the schedules and text of the accountings (including the formats used) should be readily accessible and understandable to all interested persons, particularly those persons with limited experience with and knowledge of estates and trusts. Although the court reviews many accountings, others are prepared for beneficiary use and review in unsupervised estates and trusts. Several jurisdictions have developed forms for fiduciaries to use in providing accountings including DC, FL, ID, OH, and PA.[86]

Unless waived, the fiduciary should distribute copies of status reports and accountings to all persons interested in the estate. The accounting entity, not the probate court, should have the responsibility for distributing the accountings to interested persons, and should incur the cost as an expense of administration. Probate court staff should review accountings individually or through an automated review process if the accounting is submitted electronically. [See Standard 3.3.17]

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[85] *See* McGovern, *supra*, note 78, at 626-27.

[86] See *e.g.*, D.C. Courts, *Search Court Forms*, http://www.dccourts.gov/internet/formlocator.jsf (Jun. 25, 2012); Fla. Courts, *E-Filling Forms*, http://www.17th.flcourts.org/index.php/component/content/article/34-17th-fl-courts/166-e-filling-forms (Jun. 25, 2012); The Philadelphia. Courts, Forms Center, http://www.courts.phila.gov/forms (Jun. 25, 2012). *See also* Standard 3.3.16.

If all interested persons agree, the court may waive a review of accountings. Many estates have expenditures that are relatively straightforward, and court review of the accountings may unnecessarily deplete the estate's resources. A waiver of an accounting should be executed by all potential distributees and beneficiaries or their representatives.

STANDARD 3.1.6 SEALING COURT RECORDS

Probate courts should not order probate records, or any parts thereof, to be sealed without a full explanation of the reasons for doing so.

COMMENTARY

Public access to governmental records has been increasingly required as a matter of policy to promote transparency and accountability.[87] The general trend in the courts has been to allow public access to court records except under specifically delineated circumstances, and, accordingly, to restrict the sealing of court records.[88]

Probate courts should not seal a record without providing a reason for their action, unless the records associated with these proceedings are sealed routinely pursuant to statute or court rule.[89] For example, confidentiality and restricted access to records may ordinarily attach to adoption records, records associated with guardianship or conservatorship proceedings, and other records containing sensitive information. Except for these routine sealings, when the court seals the record in a given case without providing in its order a reason for the ruling, public confidence in and access to the court may be impaired. When a probate court concludes that sealing a record is appropriate, it should consider whether to limit the length of time that access to the record is restricted, where this is permitted by state law.

STANDARD 3.1.7 SETTLEMENT AGREEMENTS

When required, probate courts should carefully review settlement agreements before authorizing a personal representative or conservator to bind the estate.

In some jurisdictions, state law or practice requires a personal representative or conservator to obtain court authority to enter into an agreement to settle a lawsuit or claim. For example, probate courts may be called upon to allocate the proceeds of the settlement between pre-death pain and suffering and wrongful death. In reviewing such settlements, probate courts should be alert to potential conflicts of interest, premature settlements, improper attorneys' fee arrangements, or inappropriate allocation of the award between injured parties.[90] All interested parties should be provided notice and represented in the settlement discussions. The allocation of the settlement proceeds should be closely reviewed, and, if necessary, the court should appoint a guardian *ad litem* to represent minors or incapacitated parties.[91] [See Standard 3.1.3]

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[87] Steketee & Carlson, *supra*, note 57.

[88] *See, e.g.,* In re Estate of Hearst, 67 Cal.App. 3d 777, 782-83 (1977).

[89] *See e.g.,* NBC Subsidiary v. Superior Court, 20 Cal. 4th 1178, 980 P.2d 337, 86 Cal. Rptr. 2d 778 (1999) that holds that before a trial court seals a record it must hold a hearing and find expressly that there exists "an overriding interest supporting . . .sealing; . . .a substantial probability that the interest will be prejudiced absent closure or sealing; . . . [that] the proposed . . . sealing is narrowly tailored to serve the overriding interest; and . . . [that] there is no less restrictive means of achieving the overriding interest."

[90] *See* C. Jean Stewart, *Court Approval of the Settlement of Claims of Persons Under Disability,* 35 Colorado Lawyer no. 8, 97 (Aug. 2006).

[91] Unif. Prob. Code §1-403 (2008).

3.2 DECEDENT'S ESTATES

The standards in this category attempt to facilitate the ability of probate courts to process decedent's estates using simple, inexpensive methods. Much property already transfers without court supervision by mechanisms such as joint tenancy and funded living trusts. Without simplifying and reducing the expense of estate administration, the current trend to avoid probate to transfer property at death will accelerate. These standards generally apply equally whether the decedent died testate or intestate, although special recommendations for an intestate decedent are included.

STANDARD 3.2.1 UNSUPERVISED ADMINISTRATION

Absent a need for probate court supervision, the interested persons should be free to administer an estate without court intervention.

COMMENTARY

State law varies with respect to the requirements for continued court supervision of estate administration after a fiduciary has been appointed. For example, some states do not permit independent administration of an estate if the will prohibits it,[92] or if "it would not be in the best interest of the estate to do so."[93] Other states allow it if the will so directs, or if the distributees agree and the court, in its discretion, allows it.[94] The Uniform Probate Code permits both informal administration of estates and succession without administration.[95] Unless mandated by state law or the court finds there is good cause (*e.g.*, a significant conflict within the family or a delayed opening of the estate), probate courts should not require supervised estate administration. Even if the will calls for supervision of estate administration, probate courts should waive this provision if "circumstances bearing on the need for supervised administration have changed since the execution of the will."[96]

Unsupervised or independent administration means different things in different states. In some states an unsupervised estate may be finally distributed without any probate court review of an accounting,[97] whereas in other states, court review of the accounts is required even in an independent administration.[98] This standard adopts the general view that court approval of every step in estate administration is not cost-effective and should be abandoned.

Whenever administration of an estate is unsupervised, all interested persons should be advised that the probate court is available to hear and resolve complaints about the administration. Court intervention should be available at the request of any interested person, including the fiduciary. Probate courts, on their own motion, may intervene when the circumstances warrant. The need for probate court determination of a particular issue, however, does not require court supervision of the rest of the administration.

This standard differs from Standard 3.3.17, which calls for the court monitoring of conservatorships. Conservatorships involve persons who are unable to protect their own interests, whereas the beneficiaries of estates are often competent adults, or are represented by competent adults, and thus are able to assert their own interests.

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[92] *See, e.g.,* CAL. PROB. CODE § 10404 (West 1991).

[93] TEX. PROB. CODE ANN. § 145 (Vernon 1995). *See also* CAL. PROB. CODE § 10452 (West 1991) (no independent administration where objector shows good cause).

[94] *See, e.g.,* TEX. PROB. CODE ANN. § 145 (Vernon 1995).

[95] UNIF. PROB. CODE §§301-322 (2008).

[96] UNIF. PROB. CODE § 3-502 (amended 2008).

[97] *See, e.g.,* UNIF. PROB. CODE § 3-704 (2008).

[98] *See, e.g.,* CAL. PROB. CODE § 10501 (West 1992).

STANDARD 3.2.2 DETERMINATION OF HEIRSHIP

Probate courts should determine heirship only after proper notice has been given to all potential heirs and reliable evidence has been presented.

COMMENTARY

Although probate courts are most frequently called upon to determine heirship when the decedent died intestate, the issue can arise when there is a will as well. Probate courts should require the personal representative or applicant to provide personal notice to all heirs, including purported heirs and/or persons who may claim or hold a right of inheritance, whose addresses can be found after a good faith effort which may include electronic searches..[99] [See Standard 3.1.1] Notice by publication may be required for unlocated and unascertained beneficiaries as well as the appointment of a guardian *ad litem* to represent them. In determining heirship in an intestate estate, probate courts should require reliable evidence, including testimony by persons who do not inherit and documentary evidence, because the testimony of interested persons may be suspect.

STANDARD 3.2.3 TIMELY ADMINISTRATION

All estates should be administered in a timely fashion and closed at the earliest possible opportunity.

COMMENTARY

The *Model Time Standards for State Trial Courts* recommend that administration of 75 percent of all estates should be completed within 360 days, 90 percent within 540 days, and 98 percent within 720 days.[100] Twelve jurisdictions have time standards governing administration of estates, though they vary considerably.[101] In order to facilitate the timely administration of estates, probate courts should establish rules setting forth a schedule as to when certain filings and actions associated with supervised estates should occur. This schedule may set different time frames based on the size and complexity of an estate or whether or not the matter is contested. Probate courts should ensure that the filings are completed on a timely basis or require those responsible for the filings to show cause for their failure to be so filed. The court may consider providing 30 calendar days advance notice of all filing deadlines to encourage prompt filings. Failure without cause to comply with the filing rules should result in sanction, removal, or denial of fees.[102]

Although no set formula exists to determine when an estate should be closed, probate courts should establish a system to monitor the progress of estates in probate. In supervised estates, probate courts should require brief periodic reports on the progress that the personal representative has made, and should take action when there has been little or no progress. Once the final report is filed, probate courts should review it promptly and move to close the estate as soon as possible.

The court should be aware of tax responsibilities that may require the continued existence of an estate. For example, the forms for filing the decedent's final income tax return will not be available to the personal representative until early in the calendar year following death. A federal estate tax return is not due until nine months after the date of death, and another year may pass before the return is approved or even selected for audit. Nevertheless, the personal representative may still make interim partial distributions to facilitate the processing of the estate.

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[99] *See* UNIF. PROB. CODE §3-705 (2008).

[100] VAN DUIZEND, STEELMAN & SUSKIN, *supra*, note 23, at 31 (NCSC, 2011).

[101] *Id.*, at 31.

[102] *See, e.g.,* CAL. PROB. CODE §§ 12200-12205 (West 1991).

Unsupervised administration of an estate generally permits closing without a formal accounting to the probate court, but, a probate court should ensure that even unsupervised estates are closed in a timely manner in accordance with state law (*e.g.*, by the filing of an affidavit or a release and discharge).[103]

STANDARD 3.2.4 SMALL ESTATES

Probate courts should encourage the simplified administration of small estates.

COMMENTARY

Many states have provisions for the expedited processing of "small estates."[104] Generally, one of two approaches are used – either a summary administrative procedure in which court approval is require before the personal representative can gather and distribute assets, or an affidavit procedure through which an appropriate person can use an affidavit to directly collect and distribute the decedent's property. States are almost evenly divided on which approach they use.[105]

These approaches seek to eliminate or minimize the need for full probate proceedings when the size of the estate and type of assets fit within statutory guidelines. It is important that processes be available for persons expeditiously to collect the assets of small estates and to enable them to represent themselves. Such summary procedures may also include distributions of family allowances and exempt property to surviving spouses or unmarried minors, distribution to creditors, and distribution to heirs or devisees of decedent by affidavit. Sometimes cases are opened where, upon further examination of the matter before the court, a small estate proceeding might have been more appropriate for the disposition of the matter (*e.g.*, by the filing of an affidavit to close out the estate or by using a summary proceeding). In these cases, such alternative proceedings should remain available and be considered in lieu of more formal proceedings.

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[103] *See, e.g.,* NY. Surr. Ct. Proc. Act § 2203 (McKinney 1997); Unif. Prob. Code § 3-1003 (2008).

[104] The definition of a small estate is generally established as a matter of state law. *See, e.g.,* Cal. Prob. Code §13100 (West 1996) (estates may undergo summary administration where the gross value of the decedents' real and personal property in California, subject to certain statutory exceptions, does not exceed $150,000); Colo. Rev. Stat. § 15-12-1201 (2011) (no more than $60,000); Mich. Comp. Laws Ann. 700.3982 (West 2000) (Michigan has a small estate statute that deals with estates of $15,000 or less and also applies to estates where the size of the estate is not more than the sum equal to the statutory exemptions and allowances for a surviving spouse and minor children, if any).

[105] "A total of 27 states have an Affidavit Procedure allowing a person to directly deliver an affidavit to the holder of the property to collect that property, without a court order. These 27 states can be further divided, as follows: (1) Eight of these states ... allow a person to collect those assets and never come to court, i.e., they do not need to file for a summary proceeding to close the estate (IL, CA, LA, MS, SD., WA, WI, DE) (note, however, that California still requires a "probate referee" to perform an inventory and appraisal of assets); (2) The other 19 affidavit states allow collection by affidavit but still require summary court procedure to close the estate. This means that a person could create his own affidavit and collect property without court approval and later close the estate in court. (AK, AZ, CO, GA, HI, ID, KS, KY, ME, MN, MT, NE, NV, ND., NY., N.M., PA, UT, VA). . . . The other 23 states and the District of Columbia require a person to go to court for Summary Administration before receiving the assets in question . . . .[AL, AR, CT, FL, IN, IA, MA, MD, MI, MO, NH., NJ., NC., OH, OK, OR, RI., SC., TN, TX, VT, WV, WY & DC]." Small Estate Procedures in 50 States & Recommended Missouri Revisions, paper prepared by Joseph N. Blumberg, University of Missouri College of Law (2012).

3.3 PROCEEDINGS REGARDING GUARDIANSHIP AND CONSERVATORSHIP FOR ADULTS

The standards in this chapter address guardianships and conservatorships of incapacitated adults. They are intended to serve as a basis for review and amendment, where necessary, of state law and rules. Although the terminology varies considerably across the country, this report will use the definitions of **conservator** and **guardian** found in the Uniform Probate Code:

A **conservator** means a person appointed by a probate court to manage the estate of the respondent on a temporary and permanent basis.[106]

A **guardian** is a court-appointed person responsible for the care, custody, and control of the respondent on a temporary and permanent basis.

A **respondent** is the subject of a guardianship/conservatorship proceeding.[107]

The inclusion of guardianship and conservatorship into a single section is not meant to imply that guardianships and conservatorships should be filed together. Many times a joint petition seeking both a guardianship and a conservatorship and combining both matters into a single proceeding can bring about an effective and efficient result. Indeed, it may not be necessary to file separate petitions for the two. Furthermore, it may be more efficient and effective to appoint the same person to serve as both guardian and conservator. Regardless, guardianship and conservatorship are separate matters that must be considered individually.[108]

The standards in this category recognize the important liberty interests at stake in a guardianship/conservatorship proceeding and the due process protections appropriately afforded a respondent in conjunction with such a proceeding. These standards also recognize, however, that the great majority of these cases are not contested and that they are initiated by people of goodwill who are in good faith seeking to assist and protect the respondent. Indeed, the initiating petition may have been filed at the behest of or even by the respondent. Furthermore, in the great majority of guardianship/conservatorship proceedings, the outcome serves the best interests of the respondent and an appointed guardian/conservator acts in the respondent's best interests.[109] Nevertheless, the procedural protections described here and generally in place in the various states are needed to protect the significant liberty interests at stake in these proceedings, and attempt to minimize, to the greatest extent possible, the potential for error and to maximize the completeness and accuracy of the information provided to probate courts.

Because it is the respondent's property rather than the respondent's personal liberty that is the subject of a conservatorship proceeding, the importance of this proceeding to the respondent is sometimes overlooked. Nevertheless, because diminished access to his or her property may dramatically affect the way in which the respondent lives, a conservatorship proceeding may have critical implications for the respondent. The standards in this category are intended to ensure that the respondent's interests receive appropriate protection from probate courts while responding appropriately to the needs of the parties appearing before the court.

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[106] Unif. Prob. Code § 5-102(1) (2008). UGPPA §102(2) (1997).

[107] The term respondent is used rather than ward or interdict, protected person, etc., because it is not indicative of the final outcome of the proceeding.

[108] For example, §409(d) of the Uniform Guardianship and Protective Proceedings Act (UGPPA) (1997) specifies that appointment of a conservator "is not a determination of incapacity of the protected person." [*emphasis added*]

[109] *But see*, Winsor C. Schmidt, *Medicalization of Aging: The Upside and the Downside*, 13(1) Marquette Elder's Advisor 55, 75-77 (Fall 2011).

STANDARD 3.3.1 PETITION

A. Probate courts should adopt a clear, easy to complete petition form written in plain language for initiating guardianship/conservatorship proceedings.

B. The petition form together with instructions, an explanation of guardianship and conservatorship, and the process for obtaining one should be readily available at the court, in the community, and on-line.

C. A petition to establish a guardianship or conservatorship should be verified and require at least the following information:

(1) The name, age, address, and nationality of the respondent.

(2) The address of the respondent's spouse, children, parents, siblings, or other close kin, if any, or an adult with whom the respondent has resided for at least the six months prior to the filing of the petition.

(3) The name and address of any person responsible for the care or custody of the respondent.

(4) The name and address of any legal representative of or representative payee for the respondent.

(5) The name and address of the person(s) designated under any powers of attorney or health care directives executed by the respondent.

(6) The name, address, and interest of the petitioner.

(7) The reasons why a guardianship and/or conservatorship is being sought.

(8) A description of the nature and extent of the limitations in the respondent's ability to care for herself/himself or to manage her or his financial affairs.

(9) Representations that less intrusive alternatives to guardianship or conservatorship have been examined.

(10) The guardianship/conservatorship powers being requested and the limits and duration of those powers.

(11) In conservatorship cases, the nature and estimated value of assets, the real and personal property included in the estate, and the estimated annual income.

D. The petition should be accompanied by a written statement from a physician or licensed mental health services provider regarding the respondent's physical, mental, and/or emotional conditions that limit the respondent's ability to care for herself/himself or to manage her or his financial affairs.

E. The petition should be reviewed by the probate court or its designee to ensure that all of the information required to initiate the guardianship/conservatorship proceeding is complete.

COMMENTARY

The standard lists the minimum information that probate courts and all parties to a guardianship or conservatorship proceeding need in order to proceed. It attempts to strike a balance between making guardianship/conservator proceedings available to a person concerned about the well-being of another, and protecting against frivolous or harassing filings. On the one hand it urges courts to use forms that minimize "legalese" and are as easy to complete as possible. On the other, it requires that petitioners verify the statements made and include a written statement from an appropriate medical or mental health professional regarding the conditions that are affecting the respondent's capacity to care for herself/himself or manage her/his financial affairs.[110] The standard calls for specifying the respondent's nationality because of the provision in the Vienna Convention on Consular Relations that requires notification of the local consulate whenever a guardian may be appointed for a foreign national.[111]

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[110] *See, e.g.*, Probate Court of Tarrant County, TX, *Physician's Certificate of Medical Exam,* http://www.tarrantcounty.com/eprobatecourts/lib/eprobatecourts/PhysiciansCertificateofMedicalExam.pdf (July 6, 2012); Jennifer Moye *et al., A Conceptual Model and Assessment Template for Capacity Evaluation in Adult Guardianship,* 47 GERONTOLOGIST 591 (2007); *but see* Jennifer Moye, *Clinical Evidence in Guardianship of Older Adults is Inadequate: Findings from a Tri-State Study,* 47 GERONTOLOGIST 604, 608, 610 (2007).

[111] Vienna Convention on Consular Relations, Art. 37 21 U.S.T. 77 (1963) http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf

While the standard sets forth the minimum information that should be required, good practice suggests that the following information will often be needed and should be included as part of the petition itself or as attachments to it, including:

- Whether other related proceedings are pending in this or other jurisdictions.
- Specific examples of behavior that demonstrate the need for the appointment of a guardian or conservator.
- Known nominations by the respondent of persons to be appointed if a guardian/conservator is needed.
- The proposed guardian's/conservator's qualifications.
- The relationship between the proposed guardian/ conservator and the respondent. known and potential conflicts of interest.
- The name, address, and relationship of those persons required to be given notice and those persons closely related to the respondent.[112]

A petition for conservatorship should also include information on the respondent's assets, property, and income.

Probate courts should develop and distribute forms that will assist the petitioner to meet these requirements. Whenever possible, petitions, instructions, and explanations of guardianship, conservatorship, and the process for seeking them should be available on the court website as well as at libraries, and providers of services to disabled persons and elderly persons. Probate courts should be able to provide sources of free or low-cost legal services, such as bar referral services, legal aid offices, and law school clinics. To the extent possible, petitioners should be able to complete and submit petitions electronically. Informational brochures should be available on the court website and distributed to all persons upon request or to those who file guardianship/conservatorship petitions.

When a petitioner seeks a guardianship or conservatorship for two or more respondents, separate petitions should be filed for each respondent.

Promising Practices

Several court systems and individual courts provide information regarding guardianship/conservatorship proceedings on their websites including the forms necessary to initiate a conservatorship or guardianship. For example:

California Judicial Branch http://www.courts.ca.gov/forms.htm?filter=GC
Colorado State Judicial Branch http://www.courts.state.co.us/Forms/Index.cfm
The Georgia Council of Probate Judges http://www.gaprobate.org/
District of Columbia Superior Court http://www.dccourts.gov/internet/formlocator.jsf
Maricopa County, AZ Superior Court
http://www.superiorcourt.maricopa.gov/SuperiorCourt/Self-ServiceCenter/Forms/ProbateCases/prob_group_1.asp
Philadelphia County, PA Court of Common Pleas http://www.courts.phila.gov/forms/
Tarrant County, TX http://www.tarrantcounty.com/eprobatecourts/cwp/view.asp?A=766&Q=430951

[112] See UGPPA § 304 (1997).

STANDARD 3.3.2 INITIAL SCREENING

Probate courts should encourage the appropriate use of less intrusive alternatives to formal guardianship and conservatorship proceedings.

COMMENTARY

Guardianship/conservatorship is often used to address problems that could be solved by less intrusive means. Concerned individuals may seek guardianships to provide respondents with a wide variety of needed services. However, a screening process may identify and can encourage other ways to address the respondent's needs that are less intrusive, expensive, and burdensome.

- Possible alternatives to a full **guardianship** include, but are not limited to: advance health care directives including living wills; voluntary or limited guardianships; health care consent statutes; instructional health care powers of attorney; designation of a representative payee; and intervention techniques including adult protective services, respite support services, counseling, and mediation.
- Possible alternatives to a full **conservatorship** include, but are not limited to: establishment of trusts; voluntary or limited conservatorships; representative payees; revocable living trusts; durable powers of attorney; and custodial trust arrangements.

In addition to protecting the interests of the respondent, such alternative arrangements avoid court action, delay, and expense. Additionally, petitioners may be able to use social service agencies and volunteer organizations to help persons requiring assistance, or the court may ratify individual transactions rather than impose a conservatorship.

Probate courts should consider establishing a procedure for screening potential guardianship/conservatorship cases if consistent with state law and court rules. Screening may occur at various points, but at least some initial screening should occur as early as possible in the process. The screening procedure may be no more complex than instructing the court official who routinely receives petitions to initiate a guardianship/conservatorship to discuss possible alternatives with the petitioner. Where resources permit, a more formal, separate screening unit may be appropriate. In either instance, the probate court should provide training for those members of its staff who initially review petitions for guardianships and conservatorships so that they can properly screen and divert inappropriate petitions, when consistent with state law and court rule.

By providing an early screening of petitions, probate courts can minimize the expense, inconvenience, and possible indignity incurred by respondents for whom a guardianship/conservatorship is inappropriate, or for whom less intrusive alternatives exist, and conserve court resources. In addition, in most jurisdictions many petitions for a guardianship or conservatorship are filed by persons who are not represented by attorneys and who will need instruction regarding the responsibilities of a guardian or conservator, when a guardianship/conservatorship is appropriate and assistance in meeting the initial requirements for filing a petition. Such screening may be provided in several ways: by probate court staff when appropriate, by use of volunteers, or by providing access to *pro bono* legal advice.

As part of this screening, the petition should initially be reviewed for compliance with filing requirements, the completeness of the information supplied, and consideration of less intrusive alternatives. Screening also should be used to identify available services in the community that may adequately assist and protect the respondent, divert inappropriate cases, and promote consideration of less intrusive legal alternatives.[113] In addition, screening should be used to determine

[113] In conducting this screening, non-lawyer court staff should remain mindful of the distinction between providing legal information and offering legal advice. *See* John M. Greacen, *Legal Information vs. Legal Advice—Developments During the Last Five Years*, 84 JUDICATURE 198 (January-February 2001), www.ajs.org/prose/pro_greacen.asp; IOWA JUDICIAL BRANCH CUSTOMER SERVICE ADVISORY COMMITTEE, GUIDELINES AND INSTRUCTIONS FOR CLERKS WHO ASSIST *PRO SE* LITIGANTS IN IOWA'S COURTS (2000); *but see*. Wash. St. Bar Assoc. v. Great Western Federal Savings & Loan Ass'n., 91 Wash. 2d. 49, 54-55 586 P.2d 870 (1999) – the practice of law includes selection and completion of forms

whether undue influence was used to gain the respondent's participation in the process.[114] In establishing the screening process and criteria, care should be taken to ensure that they do not result in an insurmountable barrier-to-entry that leaves vulnerable persons unprotected.

Preferably this initial screening will be renewed after the court visitor has had an opportunity to make an investigation and report. [See Standard 3.3.4, Court Visitor]

Promising Practices

In **Colorado**, a *pro se* facilitator interviews unrepresented persons seeking to file a guardianship or conservatorship petition to help them understand the process and ascertain whether other services or resources may suffice.

The Probate Division of the **District of Columbia** Superior Court houses a Public Resources Center staffed by volunteer attorneys who offer information and brief legal services to unrepresented parties or potential parties. http://www.dccourts.gov/internet/documents/Public_Resources_for_Probate.pdf

In at least one **Pennsylvania county**, all petitions are first reviewed by guardianship staff who make a report and recommendation to the court. The petition is then reviewed by the judge's law clerk.

In **South Dakota**, *pro se* parties are interviewed prior to filing the petition.

STANDARD 3.3.3 EARLY CONTROL AND EXPEDITIOUS PROCESSING

The probate court should establish and adhere to procedures designed to:

A. Identify guardianship and conservatorship cases immediately upon their filing with the court.
B. Supervise and control the flow of guardianship and conservatorship cases on the docket from filing through final disposition.
C. When appropriate, make available pre-hearing procedures to narrow the issues and facilitate their prompt and fair resolution.

COMMENTARY

Unnecessary delay engenders injustice and hardship and may injure the reputation of the court in the community it serves. Probate courts should meet their responsibilities to everyone affected by its activities in a timely and expeditious manner.[115] [See Standards 2.2.1 – 2.2.3] Delay in court action may be devastating, for example, to a respondent who is experiencing considerable pain and suffering and needs authorization for a medical procedure. Once a guardianship or conservatorship case is presented, probate courts should be prepared to respond quickly by having procedures in place that allow for an expedited resolution of the case.

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[114] COSCA, *supra,* note 6, at 8.

[115] Van Duizend, Steelman & Suskin, *supra,* note 23, at 32 (NCSC, 2011); *See also* Court-Related Needs of the Elderly and Persons with Disabilities: A Blueprint for the Future (ABA 1991) http://www.americanbar.org/content/dam/aba/migrated/aging/docs/aug_1991.authcheckdam.pdf.

Guardianship/conservatorship proceedings should receive special treatment and priority as part of the court's docket, ensuring that a prompt hearing is provided where appropriate. Probate courts, not the attorneys, should control the case from the filing of the petition to final disposition.[116] Probate courts should always ensure that necessary parties are given an opportunity to be heard and that their decisions are based on careful consideration of all matters before them.

Expeditious processing must be balanced with the need for a thorough investigation and consideration of the issues. Procedures should result in the identification of petitions that need more or less attention.[117] Differentiated case management, in which some cases receive additional investigation based on information in the petition, should be considered. As part of their pre-hearing procedures, probate courts should consider establishing investigatory services to facilitate expeditious, efficient, and effective performance of their adjudicative, supervisory, and administrative duties in guardianship/conservatorship cases. Where such services are unavailable, probate courts should attempt to obtain such services by contract, recruitment, and training of volunteers, or similar options. [See Standards 3.3.4 and 3.3.17] The results of these services should be presented promptly to the court and made available to all parties. In particularly difficult or contentious cases, probate courts may schedule a hearing or status conference in advance of the hearing on the petition to resolve issues disclosed during the investigation.

Promising Practices

The Probate and Mental Health Department of the **Maricopa County, AZ** Superior Court has established a comprehensive caseflow management protocol. At the time when guardianship and conservatorship cases are filed, Court staff triage and establish separate tracks for high-conflict cases involving large dollar estates, multiple issues in controversy and those that may be susceptible to protracted litigation. Additional judicial and support resources are directed to these matters to ensure fair and timely consideration and disposition. The Court has established Probate Alternative Dispute Resolution, conducting early settlement conferences to resolve disagreements and abbreviate litigation. The Court also may set a telephonic comprehensive pre-hearing conference ("CPTC") to identify issues that have been settled, issues that still need to be resolved and a trial date.[118]

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[116] Steelman, Goerdt, & McMillan, *supra* note 31, at 55.

[117] Principles 8 and 9 of the *Principles for Judicial Administration* provide that while "Judicial officers should give individual attention to each case that comes before them[,] the attention judicial officers give to each case should be appropriate to the needs of that case." NCSC, Principles for Judicial Administration: The Lens of Change 153 (NCSC, Jan., 2011).

[118] Steelman & Davis, NCSC, *supra*, note 4, at 17-18.

STANDARD 3.3.4 COURT VISITOR

A. Probate courts should require a court appointee to visit with the respondent upon the filing of a petition to initiate a guardianship/conservatorship proceeding to:
(1) Explain the rights of the respondent and the procedures and potential consequences of a guardianship/conservatorship proceeding.
(2) Investigate the facts of the petition.
(3) Determine whether there may be a need for appointment of counsel for the respondent and additional court appointments.
B. The visitor should file a written report with the court promptly after the visit.

COMMENTARY

Persons placed under a guardianship or conservatorship may incur a significant reduction in their personal activities and liberties. When a guardianship/conservatorship is proposed, probate courts should ensure that respondents are provided with information on the procedures that will follow. Respondents also need to be informed of the possible consequences of the probate court's action.

Probate courts should appoint a person to provide the respondent with this information when counsel has not been retained or appointed to represent the respondent. Several different designations have been used to identify this appointee, including court visitor,[119] court investigator,[120] court evaluator,[121] and guardian *ad litem*[122] (collectively referred to as a court visitor in these standards).

The visitor's role is generally addressed by this standard, although their duties will also be typically established by statute.[123] In general, their role stands in contrast to that of court-appointed counsel [see Standard 3.3.5], although in some states, counsel (or guardian *ad litem*) may be assigned some of the duties delineated here. A court visitor may be better equipped to address the psychological, social, medical, and financial problems raised in guardianship and conservatorship proceedings than court-appointed counsel. Although a visitor may be a lawyer by training, it is not necessary that the visitor be a lawyer. Indeed, in many instances, other professional training such as medicine, psychology, nursing, social work, or counseling may be more appropriate. Regardless of their professional background, court visitors should have the requisite language and communication skills to adequately provide necessary information to the respondent.

Court visitors serve as the eyes and ears of probate courts, making an independent assessment of the need for a guardianship/conservatorship. Under the standard, they have additional specific responsibilities. The first is to inform the respondent about the proceedings being conducted in the manner in which the respondent is most likely to understand. Even though the respondent may not fully understand the proceedings because of a lack of capacity, this information

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[119] *See* UNIF. PROB. CODE § 5-305 (2008) cmt. ("The visitor can be a physician, psychologist, or other individual qualified to evaluate the alleged impairment, such as a nurse, social worker, or individual with pertinent expertise.").

[120] *See, e.g.,* CAL. PROB. CODE §§ 1454, 1513.

[121] *See, e.g.,* NY MENTAL HYG. LAW § 81.09 (McKinney through 2011 legislation).

[122] *See, e.g.,* MISS. CODE ANN. § 93-15-107 (West).

[123] *See, e.g.,* NY MENTAL HYG. LAW & UNIF. PROB. CODE § 5-305 (2008). In some jurisdictions, the assigned duties of a guardian *ad litem* (GAL) may be slightly different from those of a court visitor or court investigator. They may be given the additional responsibility of representing or speaking on behalf of the respondent during a guardianship proceeding. This role may overlap with that of court-appointed counsel. More typically, however, the GAL's duties are limited to those described here and, as a result, the designation court visitor is used here to subsume that of GAL.

should still be provided. When talking with a respondent, a visitor should also seek to ascertain the respondent's views about the proposed guardian, the proposed guardian's powers and duties, and the scope and duration of the guardianship/conservatorship; inform the respondent of the right to consult with an attorney at the respondent's expense or request court-appointed counsel; advise the respondent of the likely costs and expenses of the proceeding and that they will be paid from the respondent's resources;[124] as well as determining whether the respondent desires and is able to attend the hearing. Visitors should also interview the petitioner and the proposed guardian/conservator; visit the current or proposed residence/placement of the respondent; and consult, where appropriate, with professionals who have treated, advised, or prepared an evaluation of the respondent.

The visitor's report should state the respondent's views; provide an assessment of the capacity of the respondent; evaluate the fitness of the proposed guardian/conservator; contain recommendations regarding (a) whether counsel should be appointed to represent the respondent if one has not already been retained or appointed, (b) the appropriateness of a guardianship/conservatorship, including whether less intrusive alternatives are available; and (c) the need for the specific powers requested in the petition.[125] The report should be provided promptly to the petitioner and the respondent so that they can review its contents in advance of the hearing.

The court visitor may be a part of the initial screening process or independent of it. [See Standard 3.3.2] The expenses incurred by probate courts visitors should be charged to the respondent's estate where such funds are available.

Jurisdictions have adopted various approaches to performing the visitor function. Some states utilize court staff to conduct the visits (*e.g.*, Maricopa County, AZ, CA, OH, TX). Others appoint professionals in the community (*e.g.*, CO, ID, SD). Individual jurisdictions rely on community volunteers (*e.g.*, Rockingham County, NH). At least two states, (FL, KY), appoint a multi-disciplinary team to assess the respondent and perform other visitor functions.[126] Regardless of the source, visitors should be required to adhere to strict standards of confidentiality.

Promising Practices

In **Maricopa County, AZ, Los Angeles County, CA, and Harris County, TX**, court investigators are responsible for visiting respondents and reporting to the court on their findings.

STANDARD 3.3.5 APPOINTMENT OF COUNSEL

A. Probate courts should appoint a lawyer to represent the respondent in a guardianship/conservatorship proceeding if:
   (1) Requested by the respondent; or
   (2) Recommended by the visitor; or
   (3) The court determines that the respondent needs representation; or
   (4) Otherwise required by law.

B. The role of counsel should be that of an advocate for the respondent.

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[124] UGGPA, §305(c).

[125] *See* CAL. PROB. CODE §1513; THIRD NATIONAL GUARDIANSHIP SUMMIT, *supra*, note 6, at Recommendation 2.2, 2012 UTAH L. REV., at 1200.

[126] FL. STAT. ANN. §744.331(3) (2011); KY. REV. STAT. §387.540 (2011).

COMMENTARY

This standard follows the first alternative offered by the Uniform Guardianship and Protective Proceedings Act.[127] Respondents in guardianship and conservatorship proceedings are often vulnerable. They may have an incomplete or inadequate understanding of proceedings that may have a significant effect upon their lives and fundamental. The assistance of counsel provides a valuable safeguard of their rights and interests. Although there may be occasions when respondents can speak on their own behalf or where family and friends of respondents can be relied upon to fill this role, counsel is typically better equipped to provide this function.[128] Over 25 states require appointment of an attorney. When there are sufficient assets in the respondent's estate, the cost of appointed counsel may be charged to the estate. When the respondent is unable to the cost of an attorney, the appointment should be at state expense.[129]

Respondents should have the right to secure their own counsel in these proceedings. Because of a respondent's prior experience with a given attorney, the respondent may prefer to obtain the attorney's continued services in these proceedings. In such cases, it is unnecessary for the court to appoint additional counsel to represent the respondent. Respondents may also seek to waive their right to counsel, but this raises the question of whether an allegedly incompetent individual has the capacity or should be allowed to exercise this waiver. Such waivers should not be impermissible *per se*, but probate courts should have independent information confirming the competency of the respondent to make such a waiver (*e.g.*, a report from the court visitor). A visitor may also notify the court, when appropriate, that there is a need for court-appointed counsel. [See Standard 3.3.4]

In general, the role of counsel should be that of an advocate for the respondent.[130] In cases where the respondent is unable to assist counsel (*e.g.*, where the respondent is comatose or otherwise unable to communicate or indicate her/his preferences), counsel should consider the respondent's prior directions, expressed desires, and opinions, or, if unknown, consider the respondent's prior general statements, actions, values and preferences to the extent ascertainable.[131] Where the position of the respondent is not known or ascertainable, counsel should request the probate court to consider appointment of a guardian *ad litem* to represent the respondent's best interest.

Appointment of counsel will incur additional expense, but because of the valuable services provided, it is typically a necessary expense.[132] If the petition was not brought in good faith, these fees may be charged to the petitioner.[133] Good faith should be determined based on the circumstances prevailing at the time the petition was filed.

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[127] UGPPA §305, Alt. 1 (1997). (UGGPA Alternative 2 provides that the court shall appoint a lawyer unless the respondent is represented by counsel.)

[128] Wingspan – The Second National Guardianship Conference, *Wingspan – The Second National Guardianship Conference, Recommendations*, 31 STETSON LAW REVIEW 595, 601 (2002); *see also* UGPPA §305(b), Alt. 2 (1997); Application of Rodriquez, 169 Misc. 2d 929, 607 N.Y.S.2d 567 (Sup. Ct. 1992).

[129] TEASTER, SCHMIDT, WOOD, LAWRENCE, & MENDIONDO, *supra*, note 5, at 20.

[130] *Id., See e.g.,* Joan L. O'Sullivan, *Role of the Attorney for the Alleged Incapacitated Person,* 31 STETSON LAW REVIEW 686-734 (2002); Winsor C. Schmidt, *Accountability of Lawyers in Serving Vulnerable Elderly Clients,* 5 JOURNAL OF ELDER ABUSE AND NEGLECT 39-50 (1003).

[131] *Cf.* THIRD NATIONAL GUARDIANSHIP SUMMIT, *supra,* note 6, at Standard 5.3 (regarding responsibilities of guardians), 2012 UTAH L.REV., at 1196.

[132] COSCA, *supra,* note 6, at 9.

[133] *See, e.g.,* NY. MENTAL HYG. LAW § 81.10(f) ("If the petition is dismissed, the court may in its discretion direct that petitioner pay such compensation for the person alleged to be incapacitated.").

STANDARD 3.3.6 EMERGENCY APPOINTMENT OF A TEMPORARY GUARDIAN/CONSERVATOR

A. When permitted, probate courts should only appoint a temporary guardian or conservator *ex parte*:
- **(1) Upon the showing of an emergency.**
- **(2) In connection with the filing of a petition for a permanent guardianship or conservatorship.**
- **(3) Where the petition is set for hearing on the proposed permanent guardianship or conservatorship on an expedited basis.**
- **(4) When notice of the temporary appointment is promptly provided to the respondent.**

B. The respondent should be entitled to an expeditious hearing upon a motion by the respondent seeking to revoke the temporary guardianship or conservatorship.

C. Where appropriate, probate court should consider issuing a protective order (or orders) in lieu of appointing a temporary guardian or conservator.

D. The powers of a temporary guardian or conservator should be carefully limited and delineated in the order of appointment.

E. Appointments of temporary guardians or conservators should be of limited and finite duration.

COMMENTARY

Emergency petitions seeking a temporary guardianship/conservatorship require the court's immediate attention. Such appointments have the virtue of addressing an urgent need either to provide needed assistance to a respondent that cannot wait until the hearing on appointment of a permanent guardian/conservator or to supplant a previously appointed guardian or conservator who is no longer able to fulfill the duties of office. However, where abused, they have the potential to produce significant or irreparable harm to the interests of the respondent. When continued indefinitely, they bypass procedural protections to which the respondent would be otherwise entitled. Because probate courts must always protect the respondent's due process rights, emergencies, and the expedited procedures they may invoke, require probate courts to remain closely vigilant for any potential due process violation. In such cases, while providing for an immediate hearing, probate courts should also require immediate service of written notice on the respondent, appoint counsel for the respondent, and allow the respondent an appropriate opportunity to be heard.[134] Because other individuals including family, friends, and caregivers may also have an interest in the proceedings, probate courts, when appropriate, may require that they be served notice and allow them an opportunity to be heard as well.

Emergency appointment of a guardian/conservator should be the exception, not the rule. Before making an emergency appointment prior to a full guardianship/ conservatorship hearing, probate courts should require a showing of actual risk to the respondent of an immediate and substantial risk of death or serious physical injury, illness, or disease, or an immediate and substantial risk of irreparable waste or dissipation of property. Following appointment of a guardian or conservator, an emergency appointment may be required if the guardian or conservator dies, becomes incapacitated, resigns, or is removed.

By requiring the showing of an emergency and the simultaneous filing of a petition for a permanent guardianship/ conservatorship, probate courts will confirm the necessity for the temporary guardianship/conservatorship and ensure that it will not extend indefinitely. When the temporary guardianship or conservatorship is established, the date for the hearing on the proposed permanent guardianship/conservatorship should be scheduled. The order establishing the temporary guardianship/conservatorship should limit the powers of the temporary guardian or conservatorship to only

[134] *See* UGGPA §312(a).

those required by the emergency at hand and provide that it will lapse automatically upon that hearing date. Full bonding of liquid assets should be required in temporary conservatorship cases. Temporary guardianships/ conservatorships should not extend for more than 30 days.[135]

Because the imposition of a temporary guardianship/conservatorship has the potential to infringe significantly upon the interests of the respondent with minimal due process protections, probate courts should also consider whether issuing a protective order might adequately meet the needs of the situation. [See Standard 3.3.2] For example, in a guardianship case the court might issue a protective order that allows for a surgical procedure, but that defers a decision on the appointment of a temporary or permanent guardian pending further proceedings. In a conservatorship case, the court might issue a protective order that allows for the payment of medical bills, but defers a decision on the appointment of a temporary or permanent conservator pending further proceedings. The use of a protective order may be particularly appropriate in the case of a respondent who has suffered a physical injury that leaves him or her unable to make decisions for a short period of time, but who is expected to soon regain full decision-making capacity.

In some jurisdictions, *ex parte* temporary guardianships have been used to bypass the normal procedural requirements for involuntary civil commitment to a psychiatric facility. Temporary guardians may have the authority under state law to "voluntarily" admit the respondent for psychiatric care even though the respondent objects to this admission. Alternatively, a temporary guardianship may be used to supplement adult or children's protective services, again bypassing usual procedural protections. A although a temporary guardian should not be prevented from making necessary health care and placement decisions, the court should ensure that the temporary guardianship is not used for improper purposes or to bypass the normal procedural protections.

When establishing the powers of the temporary guardian or conservator, the court should be cognizant of the fact that certain decisions by a temporary guardian or conservator may be irreversible or result in irreparable damage or harm (*e.g.*, the liquidation of the respondent's estate). Therefore, it may be appropriate for the court to limit the ability of the temporary guardian or conservator to make certain decisions without prior court approval (*e.g.*, sensitive personal or medical decisions such as abortion, organ donation, sterilization, civil commitment, withdrawal of life-sustaining medical treatment, termination of parental rights).

While the appointment of a temporary guardian or conservator provides a useful mechanism for making needed decisions for a respondent during an emergency, it also can offer an option to a probate court that receives information that a currently appointed guardian or conservator is not effectively performing his or her duties and the welfare of the respondent requires that a substitute decision maker be immediately appointed. Under such circumstances, the authority of the permanent guardian or conservator can be suspended and a temporary guardian appointed for the respondent with the powers of the permanent guardian or conservator. The court should, however, ensure that this temporary guardianship/conservatorship also does not extend indefinitely by including a maximum duration for it in its order.

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[135] *Cf.* UGPPA § 313(a) (1997) (suggesting that a temporary guardianship should not exceed six months). *See* Grant v. Johnson, 757 F. Supp. 1127 (D. Or. 1991) (Oregon temporary guardianship provisions unconstitutional for lack of minimum due process protections). In addition, UGPPA §316 (d) imposes limits on the authority of a temporary guardian, such as a prohibition against initiating civil commitment proceedings.

STANDARD 3.3.7 NOTICE

A. The respondent should receive timely written notice of the guardianship or conservatorship proceedings before a scheduled hearing. Any written notice should be in plain language and in easily readable type. At the minimum, it should indicate the time and place of judicial hearings, the nature and possible consequences of the proceedings, and set forth the respondent's rights. A copy of the petition should be attached to the written notice.

B. Notice of guardianship and conservatorship proceedings also should be given to family members, individuals having care and custody of the respondent, agents under financial and health care powers of attorney, representative payees if known, and others entitled to notice regarding the proceedings. However, notice may be waived, as appropriate, when there are allegations of abuse.

C. Probate courts should implement a procedure whereby any interested person can file a request for notice.

COMMENTARY

Almost all states have a specific statutory notice requirement that the respondent in a guardianship/conservatorship proceeding receive notice within a stated number of days before a hearing (*e.g.*, 14 days).[136] This standard underscores the general notice requirements of Standard 3.1.1 (Notice) by requiring specific timely notice of guardianship and conservatorship proceedings to the respondent and others entitled to notice.[137] The notice should be written and personally delivered. When the officers serving the notice are under court control, it may be appropriate to provide them with special training to facilitate interactions with persons who may have diminished capacity and/or have hearing, sight, or other physical disabilities that may impede communications. The notice and petition should be subsequently explained to the respondent by a court visitor. Care should be taken to ensure that the visitor has the requisite language and communication skills to adequately provide this explanation to the respondent. [See Standard 3.1.1]

If the respondent is unable to understand or receive notice, provision may be made for substitute or supplemental service. The respondent may still benefit, however, from receiving notice even though he or she may not fully understand it. The use of substitute or supplemental service should not relieve the court visitor or counsel of the responsibility to communicate to the respondent the nature of the proceedings in the manner most likely to be understood by the respondent.

Failure to serve requisite notice upon the respondent will ordinarily establish a right in the respondent for *de novo* consideration of the matter and independent grounds for setting aside a prior order establishing a guardianship or conservatorship.

In addition to providing notice to the respondent, notice should ordinarily also be given to the respondent's spouse, or if none, to the respondent's adult children, or if none, to the respondent's parents, or if none, to at least one of the respondent's nearest adult relatives if any can be found.[138] In guardianship cases, notice should also be given to any persons having responsibility for the management of the estate of the respondent, including any previously appointed conservator. In conservatorship cases, notice should also be given to any individuals having care and custody of the respondent, including any previously appointed guardian. It may also be appropriate to provide notice to an individual

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[136] American Bar Association Commission on Law and Aging/Sally Hurme, Table on Notice in Guardianship Proceedings (2011), www.americanbar.org/content/dam/aba/uncategorized/2012_aging_gship_chrt_notice_06_12.authcheckdam.pdf

[137] *See, e.g.,* NY Mental Hyg. Law § 81.07(d) (Consol. Supp. 1992); Unif. Prob. Code §§ 1-401, 5-304 (2008).

[138] *See e.g.,* NY Mental Hyg. Law § 81.07(e); Unif. Prob. Code §§ 1-401, 5-309 (2008).

nominated by the respondent to serve as his or her guardian, agents appointed by the respondent under a durable health care power of attorney, a close friend providing routine care to the respondent, and the administrator of a facility where the respondent currently resides. Whenever possible, notice should be provided to at least two persons in addition to the respondent or to adult protective services if there are not contact persons.

Probate courts should establish a procedure permitting interested persons who desire notification before an order is made in a guardianship/conservatorship proceeding to file a request for notice with the court.[139] This procedure allows persons interested in the establishment or monitoring of a guardianship or conservatorship to remain abreast of developments and to bring relevant information to the court's attention. The request for notice should contain a statement showing the interest of the person making the request. Intervention in the proceedings by an interested party, including the nomination of someone else as guardian or conservator, should be permitted. A fee may be attached to the filing of the request and a copy of the request should be provided to the respondent's guardian/conservator (if any). Unless the probate court makes a contrary finding, notice should be provided to any person who has properly filed this request.[140]

STANDARD 3.3.8 HEARING

A. Probate courts should promptly set a hearing for the earliest date possible.
B. Respondents should be present at the hearing and all other stages of the proceeding unless waived.
C. Probate courts should make reasonable accommodations to enable the respondent's attendance and participation at the hearing and all other stages of the proceeding.
D. A waiver of a respondent's right to be present should be accepted only upon a showing of good cause.
E. The hearing should be conducted in a manner that respects and preserves all of the respondent's rights.
F. Probate courts may require the court visitor who prepared a report regarding the respondent to attend the hearing.
G. Probate courts should require the proposed guardian or conservator to attend the hearing.
H. Probate courts should make a complete record of the hearing.

COMMENTARY

It is critical that probate courts promptly hear a petition for guardianship or conservatorship. After the filing of the petition, probate courts should promptly set a hearing date and ensure that the hearing is held expeditiously. This permits either a prompt dismissal of the petition where warranted or a timely decision ordering the establishment of a guardianship/conservatorship or the imposition of a less intrusive alternative. With a prompt dismissal, the respondent will not have to endure unnecessary emotional stress. With a prompt order establishing a guardianship/conservatorship or a less intrusive alternative, the respondent will receive needed supervision or services in a timely fashion.

A guardianship or conservatorship hearing can have significant consequences for the respondent, and the rights and privileges of the respondent should, accordingly, be respected and preserved. The respondent should be given time and opportunity to prepare for the hearing, with the assistance of counsel. The respondent's presence at the hearing and at all other stages of the proceeding should be waived only for good cause. The standard urges probate courts to make reasonable accommodations to enable the respondent's attendance and participation (*e.g.*, mobility accommodations,

[139] *See e.g.*, NY MENTAL HYG. LAW § 8 1.07(g)(ii); UNIF. PROB. CODE §§ 5-304(a), 5-309(b) (2008).
[140] *See e.g.*, UGPPA § 116 (1997); UNIF. PROB. CODE § 5-116 (2008).

hearing devices, medical appliances, setting the hearing at a time at which the respondent is generally the most alert, frequent breaks, telephonic or video conferencing).[141] This may necessitate the moving of the hearing to a location readily accessible to the respondent (*e.g.*, a hospital conference room).

The Standard, following the practice in most states, does not recommend that the person appointed to perform the responsibilities of a court visitor [see Standard 3.3.4] be present at the hearing in each case to provide testimony based on her or his report and respond to questions from the parties. The parties should advise the probate court if they wish the visitor to testify.

The proposed guardian or conservator should attend the hearing in order to become more fully acquainted with the respondent, the respondent's identified needs and wishes, and the intended purposes of the guardianship/conservatorship. The proposed guardian/conservator should also be available at the hearing to answer relevant questions posed by the respondent, other interested parties, or the court.

The hearing should ordinarily be open to the public unless the respondent or counsel for the respondent requests otherwise. In general, any person who so desires should be able to attend these proceedings. With the court's permission, any interested person should be able to participate in these proceedings provided that the best interests of the respondent will be served thereby.[142] A stenographic, audio, or video recording should be made of the hearing and maintained for a reasonable period of time.

The respondent's due process rights should be afforded full recognition in the course of the hearing. For example, a complete record will protect the respondent should an appeal be necessary. Similarly, the respondent should be able to obtain an independent evaluation prior to the hearing, present evidence, call witnesses, cross-examine witnesses including any court-appointed examiner or visitor, and have the right to be represented by counsel.[143] [See Standard 3.3.5] In at least 24 states the respondent is entitled to or may request a jury trial.[144]

STANDARD 3.3.9 DETERMINATION OF INCAPACITY

A. The imposition of a guardianship or conservatorship by the probate court should be based on clear and convincing evidence of the incapacity of the respondent and that a guardianship or conservatorship is necessary to protect the respondent's well-being or property.

B. The court may require evidence from professionals or experts whose training and expertise may assist in the assessment of the physical and mental condition of the respondent.

COMMENTARY

The appointment of a guardian or conservator should be based on clear and convincing evidence. This is the standard of proof prescribed in at least three-quarters of the states.[145] Evidentiary rules and requirements are needed to ensure that due process is afforded and that competent evidence is used to determine incapacity. To obtain competent evidence, probate courts should allow evidence from professionals and experts whose training qualifies them to assess the physical and mental condition of the respondent.

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[141] *See* Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (Supp. 1993); Civil Rights Act of 1991, 42 U.S.C. §§ 1981-2000 (Supp. 1993).

[142] *See* UGPPA § 308(b) (1997).

[143] *Id.*, at §§ 305 & 308.

[144] American Bar Association Commission on Law and Aging/Sally Hurme, Table on Conduct and Findings of Guardianship Proceedings, (2011) http://www.americanbar.org/content/dam/aba/uncategorized/2012_aging_gship_chrt_conduct_06_12.authcheckdam.pdf .

[145] American Bar Association Commission on Law and Aging/Sally Hurme, Adult Guardianship Legislative Charts (2011) http://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice.html/

Although it may not be necessary to receive evidence from a professional or expert in every case (*e.g.*, where the evidence regarding incapacity is relatively clear), probate courts should seek the assistance of professionals and experts when their knowledge will assist the court in making a decision on whether a plenary guardianship/conservatorship is necessary or whether a less intrusive alternative may adequately protect and assist the respondent. [See Standard 3.3.10] These professionals and experts include, but are not limited to, physicians, psychiatrists, nurses, psychologists, social workers, developmental disability professionals, physical and occupational therapists, educators, and community mental health workers with skill and experience in capacity assessments. The determination of the need for the appointment of a guardian or conservator is frequently made by a physician after conducting an examination of the respondent.[146] Although a physician may provide valuable information regarding the capacity of the respondent, incapacity is a multifaceted issue and the court may consider using other professionals whose expertise and training may give them greater insight into representations of incapacity.

> Even medical diagnoses of common mental illnesses do not dictate whether an individual has legal capacity. ... "Establishing that a patient lacks decisional capacity requires more than making a psychiatric diagnosis; it also requires demonstrating that the specific symptoms of that disorder interfere with making or communicating responsible decisions about the matter at hand."[147]

The use of other professionals and experts may ensure that when a physician is appointed, his or her skills are fully utilized and, in turn, ensure that the physician is a willing and responsive participant in the proceeding. Evaluation by an interdisciplinary team can provide probate courts with a fuller and more accurate understanding of the alleged incapacity of the respondent that includes cognition, everyday functioning, values and preferences, risk and level of supervision, and the means to enhance capacity as well as the respondent's medical condition.[148] In at least some jurisdictions, however, the cost of using an interdisciplinary team may preclude its use in every case.

The written reports of professionals should be presented promptly and should be made available to all interested persons. Probate courts need not base their findings and order on the oral testimony of such professionals and experts in every case. However, where a party objects to submitted documents that contain the opinion of a professional or expert (*e.g.*, the written medical report of an examining physician), that professional or expert should appear and be available for cross-examination. Where the professional or expert is unavailable for cross-examination, the traditional rules of evidence may limit the ability of the judge to rely on the written report. Probate courts should be able to obtain as much helpful information as they need and can properly acquire.

The prescribed content of the written report should be in the discretion of the court. In general, most of the developing law in this area indicates that an evaluation of incapacity should be based upon an appraisal of the functional limitations of the respondent.[149] Among the factors to be addressed in the report are: the respondent's diagnosis; the respondent's

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[146] *See* Unif. Prob. Code § 5-306 (2008) ("[T]he respondent must be examined by a physician, psychologist, or other individual appointed by the court who is qualified to evaluate the respondent's alleged impairment.").

[147] Robert P. Roca, *Determining Decisional Capacity: A Medical Perspective*, 62 Fordham L. Rev. 1177, 1187 (1994); *see also* Mary F. Radford, *Is the Use of Mediation Appropriate in Adult Guardianship Cases?*, 31 Stetson L. Rev. 611, 628 n.85 (2002).

[148] American Bar Association Commission on Law and Aging, American Psychological Association, National College of Probate Judges, Determination of Capacity of Older Adults in Guardianship Proceedings: A Handbook for Judges (2006) http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011_aging_bk_judges_capacity.authcheckdam.pdf; *See* FL. Stat. Ann. § 744.331(3) (2011); Thomas L. Hafemeister & Bruce D. Sales, *Interdisciplinary Evaluations for Guardianships and Conservatorships*, 8 Law & Human Behav. 335 (1985); *see also,* Moye, *supra,* note 110.

[149] COSCA, *supra,* note 6, at 8.

limitations and prognoses, current condition, and level of functioning; recommendations regarding the degree of personal care the respondent can manage alone or manage alone with some assistance and decisions requiring supervision of a guardian or conservator; the respondent's current incapacity and how it affects his or her ability to provide for personal needs; and whether current medication affects the respondent's demeanor or ability to participate in proceedings. Prescribing such content avoids the unfortunate practice of professionals and expert examiners providing cursory, conclusory evaluations to the court.

Oral testimony from family and friends of the respondent is often helpful to round out the picture presented by the written reports and oral testimony of professionals. These lay witnesses may be more familiar with the functional adaptations not evident in clinical environments that enable respondents to meet their needs at home.

The Uniform Guardianship and Protective Proceedings Act specifies that appointment of a conservator is not a determination of the respondent's incapacity for other purposes.[150] However, the basis for initiating a conservatorship proceeding under UGPPA is that "the individual is unable to manage property and business affairs because of an impairment in the ability to receive and evaluate information or make decisions, even with appropriate technological assistance ... and the property will be wasted or dissipated unless management is provided ...."[151] The Standards take the position that the distinction between incapacity and impairment can more clearly be made by clear definition of the powers of a conservator in the order. [See Standard 3.3.12]

STANDARD 3.3.10 LESS INTRUSIVE ALTERNATIVES

A. Probate courts should find that no less intrusive appropriate alternatives exist before the appointment of a guardian or conservator.

B. Probate courts should always consider, and utilize, where appropriate, limited guardianships and conservatorships, or protective orders.

C. In the absence of governing statutes, probate courts, taking into account the wishes of the respondent, should use their inherent or equity powers to limit the scope of and tailor the guardianship or conservatorship order to the particular needs, functional capabilities, and limitations of the respondent.

COMMENTARY

Scientific studies show that the loss—or perceived loss—of a person's ability to control events can lead to physical or emotional illness. Indeed, complete loss of status as an adult member of society can act as a self-fulfilling prophecy and exacerbate any existing disability.[152] Allowing persons potentially subject to guardianships or conservatorships to retain as much autonomy as possible may be vital for their mental health. Therefore, probate courts should encourage the exploration and appropriate use of suitable alternatives to guardianship/conservatorship. [See Standard 3.3.2] Such alternatives may avoid unwanted intrusion, divisiveness, and expense, while meeting the needs of the respondent before establishing a guardianship/conservatorship.[153] Alternatives include but are not limited to:

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[150] UGPPA §409(d) (1997). *See also,* Unif. Prob. Code §4-409(d) (2008).

[151] UGPPA §401(2) (1997); Unif. Prob. Code § 5-401(2) (2008).

[152] American Bar Association Commission on the Mentally Disabled & American Bar Association Commission on Legal Problems of the Elderly, Guardianship: An Agenda For Reform, 20 (American Bar Association, 1989).

[153] Wingspread Conference, *Recommendations III-D & IV-B*, 13 Mental & Physical Disability L. Rep. 271, 290 & 292 (1989); Wingspan Conference, *Recommendations 38 and 39*, 31 Stetson L. Rev. 595, 602-603. (2002); Third National Guardianship Summit, *supra,* note 6, Recommendation 2.2, 2012 Utah L.Rev., at 1200; American Bar Association Commission on Law and Aging & American Psychological Association, Judicial Determination of Capacity of Older Adults in Guardianship Proceedings, 2 (American Bar Association, 2006); Utah *Ad hoc* Committee on Probate Law and Procedure, *supra*, note 5.

Alternatives for financial decision-making

- Use of a representative payee appointed by the Social Security Administration or other federal agency or a fiduciary appointed by the Department of Veterans Affairs to handle government benefits
- Use of a single transaction protective order[154]
- Use of a properly drawn trust
- Use of a properly drawn durable power of attorney
- Establishment of a joint bank account with a trusted person
- Electronic bill-paying and deposits

Alternatives for health care decision-making

- Use of properly drawn advance health care directives
- Use of a properly drawn power of attorney for medical decisions

Alternatives for crisis intervention and daily needs

- Use of mediation, counseling, and respite support services
- Engagement of community-based services[155]

When attempting to determine what constitutes a less intrusive appropriate alternative, probate courts should defer to any alternatives previously established or proposed by the respondent (*e.g.*, a durable power of attorney). In general, probate courts should be guided by the express wishes of the respondent where available, and, where not available, by past practices, reliable evidence of likely choices, and best interests of the person.[156] Even if a respondent lacks current capacity to make decisions regarding his or her personal care, probate courts should solicit the respondent's opinions and preferences and obtain information about the respondent's needs and available services and alternatives. The use of an initial screening process can facilitate the consideration of less intrusive alternatives. [See Standard 3.3.2]

On the other hand, probate courts should also be mindful that there may be downsides to less intrusive alternatives as well, especially because of the absence of judicial oversight, bonding, and other safeguards.

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[154] UGPPA § 412 (1997).

[155] Utah *Ad hoc* Committee on Probate Law and Procedure, *supra* note 5, at 24-25

[156] Third National Guardianship Summit, *supra*, note 6, at Standard 4.2, 2012 Utah L.Rev., at 1194; see also Linda S Whitton & Lawrence A. Frolik, *Surrogate Decision-Making Standards for Guardians—Theory and Reality*, 2012 Utah L. Rev., at 1491 (2013).

> Although, principals may revoke ... [a durable power of attorney (DPA)] as long as they have capacity, the lack of formality and oversight means there is no standard method for ascertaining if and when a DPA has been revoked.... Because the DPA remains in force if the principal becomes incapacitated, a lawsuit may only be filed if someone else notices a misuse of the fiduciary duty (Rhein 2009). Often it is too late to recover lost assets at this point . . . . Similarly, because they are an owner, a joint account holder cannot usually be charged with stealing funds unless there was some kind of deception or the elder was mentally incapacitated at the time the joint tenant was added. (Bailly 2007 POA Abuse pp. 7-5 - 7-19). . . . Living trusts, while avoiding probate, are vulnerable to the same abuses as other guardianship alternatives due to a lack of supervision or oversight of the trustee.[157]

If probate courts determine that a guardianship or conservatorship is necessary, the respondent's self-reliance, autonomy, and independence should be promoted by restricting the authority of the guardian or conservator to the minimum required for the situation, rather than routinely granting full powers of guardianship/conservatorship in every case. For example, where a respondent has only a limited disability, the court should grant only those powers needed to protect the respondent's health or safety. Probate courts also should require the guardian or conservator to attempt to maximize the respondent's self-reliance and independence (*e.g.*, by including the respondent in decisions to the fullest extent possible) and to report periodically on these efforts to the court.

Although many states do not have statutory provisions for limited guardianship or conservatorship, probate courts, in at least some states, have the power to create such limited guardianships/conservatorships because of their equitable nature. Similarly they can invoke (either with or without further court supervision) other less intrusive alternatives.[158] [See Standard 3.3.2]

STANDARD 3.3.11 QUALIFICATIONS AND APPOINTMENTS OF GUARDIANS AND CONSERVATORS

Probate courts should appoint a guardian or conservator suitable and willing to serve as a guardian/conservator. Where appropriate, probate courts should appoint a person requested by the respondent or related to or known by the respondent.

COMMENTARY

Different degrees of expertise will be required in guardianships and conservatorships. Probate courts should consider the training, education, and experience of a potential guardian or conservator to determine if that person can perform the necessary tasks on behalf of the respondent competently. If the court anticipates that the scope of the guardianship/conservatorship may later increase, the person appointed should be competent to handle these possible future responsibilities as well. In determining the competence of a potential guardian, probate courts should consider such factors as familiarity with health care decision making, residential placements, and social service benefits. In determining the competence of a potential conservator, probate courts should consider such factors as the size of the estate, the complexity of the estate, and the availability of financial planning experts who can give the conservator advice. Further, the guardian or conservator should act only within the bounds of the court order and should not expand the scope of the guardianship/conservatorship, except when authorized to do so by the court.

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[157] D. Saunders, Issue Paper on Abuses to Alternatives to Guardianship,1-2, (NCSC, 2011); Jennifer L. Rhein, *No One in Charge: Durable Powers of Attorney and the Failure to Protect Incapacitated Principals*, 17 University of Illinois Elder Law Journal 165 (2009); Lori Stiegel & Ellen M. Klem, Power Of Attorney Abuse: What States Can Do About It (AARP Public Policy Institute, 2008); Rose Mary Bailly et al., Financial Exploitation of the Elderly, (Civic Research Institute, 2007).

[158] UGPPA and the Uniform Probate Code require that the court find that a "respondent's needs cannot be met by less restrictive means." UGPPA §311(a)(1)(B) (1997); Unif. Prob. Code § 5-311(a)(1)(B) (2008).

Probate courts should attempt, when appropriate, to appoint as guardian or conservator a person who has been designated for this role by the respondent, or who is related to or known by the respondent. This enhances the likelihood that the guardian/conservator will obtain the trust and cooperation of the respondent and be familiar with the respondent's values and preferences. When considering appointing a person known to the respondent, probate court judges should enquire about the length, depth and nature of the relationship in order to guard against empowering individuals who may be seeking to take advantage of the respondent.

It may also be appropriate to appoint as guardian or conservator a public administrator, a public guardian, a professional guardianship/conservatorship firm, a person or corporation having special qualifications, certification, or expertise that will be beneficial to the respondent, an attorney or other professional. Eleven states require a level of certification for some non-family guardians/conservators either through the Center for Guardianship Certification,[159] or a state run program.[160] Although probate courts should not appoint any agency, public or private, that financially benefits from directly providing housing, medical, or social services as a guardian, they should use the services of such organizations, where appropriate.

Probate courts also should consider the geographical proximity of any prospective nominee and the nominee's ability to respond in a timely and appropriate fashion to the needs of the respondent. Particular care may be required in making a reappointment where a guardian or conservator has left the jurisdiction where the original order of guardianship/conservatorship was issued. If the guardian or conservator has failed to carry out the original order and is subject to a contempt charge, that person should not be reappointed as a guardian/conservator for the original respondent or appointed as a guardian/conservator for any other respondent.

In selecting the guardian or conservator, preference should be given to any written designation of a prospective guardian/conservator made by the respondent while competent (*e.g.*, as provided in a durable power of attorney) unless there are compelling reasons to appoint another.[161] In many situations, the respondent has had ample opportunity to anticipate the need for a guardian or conservator and to identify a nominee with whom he or she is comfortable. In such cases, probate courts should give great weight to the expressed desires of the respondent (although care should be taken to ensure that the respondent has not changed his or her mind about the nominee since the nomination was made, particularly when a considerable period of time has passed since the nomination). Alternatively, the respondent may have indicated in a non-guardianship or non-conservatorship context a preference for a given person in an advance written directive executed while the respondent was competent (*e.g.*, the executor in a will). Ordinarily, such preferences should also be respected. If a preference for a guardian/conservator is not stipulated, or a person designated is not suitable or willing to serve, probate courts should appoint a guardian or conservator who is capable and willing to develop a rapport with the respondent.

Generally, state law will provide a list of categories of persons who must be considered, although ultimate discretion in making this appointment remains with the court.[162] In general, probate courts should seek a guardian or conservator with the least potential for a conflict of interest with the respondent. In many cases this may disqualify individuals such as the

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[159] AK, CA, FL, IL, NV, NH, OR, WA.

[160] By the Supreme Court in AZ, and TX, or the state guardianship association in NC.

[161] *See, e.g.,* NY MENTAL HYG. LAW §§ 81.17 & 81.19(b) (McKinney through 2011 legislation); UNIF. PROB. CODE § 5-310 (2008).

[162] *See, e.g.,* NY MENTAL HYG. LAW § 81.19 ; UNIF. PROB. CODE § 5-310(a) (2008).

respondent's physician, attorney, landlord, current caregiver (particularly where there is a pecuniary interest), or creditor from serving as the respondent's guardian or conservator. Probate courts should not decline to appoint the respondent's parent, spouse, or child, however, when the appointment would be the most beneficial to the respondent. As noted above, such persons are likely to be familiar with the respondent's values and residential, health care, and other preferences. [See Standard 3.3.14 Training and Orientation]

Similarly, state law may provide a list of categories of potential nominees who are qualified for or disqualified from serving as a conservator (*e.g.*, a convicted felon may not be eligible to act as a conservator).[163] To the extent permitted, probate courts should supplement this list by making their own determination regarding the qualifications of individuals being considered for appointment as a conservator. For example, a nonfamily care provider or any person associated with a facility where the respondent is a resident should not be appointed in most instances, nor should persons of questionable honesty or integrity or any person who may have a material conflict of interest in handling the respondent's estate.

A relationship to the respondent does not, in and of itself, constitute a potential conflict of interest, and should not preclude appointment. The adult child of the respondent may stand to inherit from the respondent's estate and may technically be subject to a potential conflict of interest, yet he or she will often be particularly well suited to serve as the respondent's conservator because of the close emotional bond between the offspring and the respondent.

Probate courts should require attorneys who file guardianship/conservatorship proceedings to exercise due diligence by informing proposed guardians or conservators of the qualifications for appointment and the obligations if appointed, and inquiring whether they are willing to serve, are eligible for an appropriate surety bond and to open a bank account,, have not been convicted of a potentially disqualifying offense [see Standard 3.3.12], and do not have a bankruptcy history.

STANDARD 3.3.12 BACKGROUND CHECKS

A. Probate courts should request a national background check on all prospective guardians and conservators, other than those specified in paragraph (b), before an appointment is made, to determine whether the individual has been convicted of a relevant crime; determined to have committed abuse, abandonment, neglect, or financial or sexual exploitation of a child, spouse, or other adult; has been suspended or disbarred from law, accounting, or other professional licensing for misconduct involving financial or other fiduciary matters; or has a poor credit history.

B. Background checks should not be conducted for prospective guardians and conservators who have been the subject of such a check as part of a certification or licensing procedure, or banks, trust companies, credit unions, savings and loan associations, or other financial institution duly licensed or authorized to conduct business under applicable state or federal laws.

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[163] *See, e.g.,* NY MENTAL HYG. LAW §§ 81.20, 81.22, 81.29(a); UNIF. PROB. CODE § 5- 206(b) (2008), cmt. background.

COMMENTARY

Currently, criminal conduct disqualifies or may disqualify a person from serving as a guardian or conservator in half the states. Only 13 states require that guardians undergo independent criminal background checks before being appointed.[164] There is little empirical data demonstrating the effectiveness of background checks in reducing instances of abuse and exploitation.[165] However, given the authority of guardians and conservators, the opportunities for misuse of that authority, and the occurrence of abuse and exploitation of vulnerable adults around the country, requiring prospective guardians and conservators to undergo a thorough criminal history and credit check is an appropriate safeguard. The background information is intended to provide probate courts with information on which to base a decision whether the nominee should be appointed. Upon receiving such potentially disqualifying information, probate courts should weigh the seriousness of the offense or misconduct, its relevance to the responsibilities of a guardian or conservator, how recently the offense or misconduct occurred, the nominee's record since the offense or misconduct occurred, and the vulnerability of the respondent. If there is some concern but not enough to disqualify a potential guardian or conservator, probate courts may require periodic post-appointment criminal history and/or credit checks of a guardian or conservator.[166]

STANDARD 3.3.13 ORDER

A. Probate courts should tailor the order appointing a guardian or conservator to the facts and circumstances of the specific case. Each order should specify the duties and powers of the guardian or conservator, including limitations to the duties and powers, the rights retained by the respondent, and if the order is for a temporary or limited guardianship or conservatorship, the duration of the order.

B. Probate courts should inform newly appointed guardians regarding their responsibilities to the respondent, the requirements to be applied in making decisions and caring for the respondent, and their responsibilities to the court including the filing of plans and reports.

C. Probate courts should inform newly appointed conservators regarding their responsibilities to the respondent, the requirements to be applied in managing the respondent's estate, and their responsibilities to the court including the filing of inventories and accountings.

D. Following appointment, probate courts should require a guardian or conservator to:

(1) Provide a copy of and explain to the respondent the terms of the order of appointment including the rights retained.

(2) Serve a copy of the order to the persons who received notice of the petition initiating the guardianship/conservatorship proceeding, and file proof of service with the court.

(3) Record the order.

(4) Establish such restricted accounts as may be necessary to protect the respondent's estate.

E. Probate courts should set the due date for the initial report or accounting and periodically consider the necessity for continuing a guardianship or conservatorship.

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[164] U.S. Gov't Accountability Office, GAO-11-678, Incapacitated Adults: Oversight of Federal Fiduciaries and Court- Appointed Guardians Needs Improvement, 7 (July 2011), *available at* http://www.gao.gov/new.items/d11678.pdf; *see also* National Guardianship Association, Standards of Practice, (3d ed. 2007), *available at* http://guardianship.org/documents/Standards_of_Practice.pdf.

[165] Sara Galantowicz Et Al., Safe at Home? Developing Effective Criminal Background Checks and Other Screening Policies for Home Care Workers, 25 (AARP Policy Institute, 2010).

[166] In light of the abuses that have occurred, some probate courts may wish to require periodic updates of background checks in all cases in order to ensure that the person appointed continues to be fit to serve.

COMMENTARY

Most individuals appointed as a guardian or conservator know little about what is expected of them and the scope of their responsibilities and authority. Thus, including a clear, complete statement of duties and powers in the appointment order is an important first step in ensuring that the respondent will receive the protection and services needed and that the respondent's rights and autonomy will be respected.[167] Specifically enumerated duties and powers serve as a guide for the appointing court and other interested parties in evaluating and monitoring the guardian or conservator. Because the preferred practice is to limit the powers and duties of the guardian/conservator to those necessary to meet the needs of the respondent [see Standard 3.3.10], a probate court should specifically enumerate in its order the assigned duties and powers of the guardian/conservator, as well as limitations on them, with all other rights reserved to the respondent.[168] By listing the powers and duties of the guardian/conservator, the court's order can serve as an educational roadmap to which the guardian/conservator can refer to help answer questions about what the guardian/conservator can or cannot do in carrying out the assigned responsibilities. [See Standards 3.3.16 and 3.3.17]

When a guardianship/conservatorship is for a limited period of time (*e.g.*, when the respondent has suffered a traumatic brain injury and may recover some or all of his/her faculties), specifying the duration of a guardianship/conservatorship is particularly important so as not to unnecessarily impede the respondent's ability to return to normalcy.

When establishing the powers of the guardian/conservator, probate courts should be aware that certain decisions by a guardian or conservator may be irreversible or result in irreparable damage or harm. As a result, unless otherwise provided by statute, probate courts may specifically limit the ability of the guardian/conservator to make certain decisions without prior court approval (*e.g.*, sensitive personal or medical decisions such as abortion, organ donation, sterilization, civil commitment, termination of parental rights, change of residence, sale of residence or other major assets, or limits on visitation and contact). The ability of the guardian to make routine medical decisions should not ordinarily be curtailed, but where extraordinary decisions of an irreversible or irreparable nature are involved, authorization for those decisions should be included in the initial court order or the guardian should be required to return to the court for specific authorization before proceeding.

Generally, guardians should also be required to obtain prior court approval before a respondent is permanently removed from the court's jurisdiction. Prior court approval, however, should not be required where the removal is temporary in nature (*e.g.*, when the respondent is being taken on a vacation).

In general, the court's order should only be as intrusive of the respondent's liberties as necessary. [See Standard 3.3.10] The court's order should also include a statement of the need for the guardian/conservator to involve the respondent to the maximum extent possible in all decisions affecting the respondent. The guardian should consider the preference and values of the respondent in making decisions and attempt to help the respondent regain legal capacity.[169]

Requiring the guardian/conservator to serve a copy of the order of appointment to those persons who received notice of the petition for guardianship or conservatorship will promote their continued involvement in monitoring the respondent's situation. Explaining the order of appointment to the respondent demonstrates respect for the person, facilitates the respondent's awareness of the implementation of the guardianship/conservatorship, encourages communication between

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[167] M.J. Quinn & H. Krooks, *supra,* note 71, at 1635; *see also* Third National Guardianship Summit, *supra,* note 6, at Recommendation 1.3, 2012 Utah L. Rev., at 1199.

[168] *See, e.g.,* NY Mental Hyg. Law §§ 81.20, 81.22, 81.29(a); UNIF. PROB. CODE § 5- 206(b) (2008), cmt. Background assigned responsibilities. *See also,* Standard 3.3.14, Reports by the Guardian; Standard 3.3.15, Monitoring of the Guardian.

[169] *See* Third National Guardianship Summit, *supra,* note 6, at Standards 4.1 – 6.11, 2012 Utah L. Rev., at 1194-1198.

the respondent and the guardian/conservator, and provides an initial opportunity to involve the respondent in decision-making as much as is appropriate. Recording a guardianship/conservatorship order provides notice to others regarding who has the authority to engage in significant financial transactions including the sale of real property.

The guardian or conservator, when accepting appointment, should acknowledge that he or she consents to the court's jurisdiction in any subsequent proceedings concerning the respondent.[170]

In order to facilitate greater use of limited guardianships and other less intrusive alternatives [see Standard 3.3.10], it is critical that probate courts implement procedures for conducting periodic reviews of the guardianship or conservatorship. The initial review should ordinarily take place no more than one year after appointment. These periodic reviews should examine compliance with the order and the well-being of the respondent and the estate, and determine whether the conditions still exist that underlay the original appointment of a guardian or conservator, whether the duties and authority of the guardian or conservator should be expanded or reduced, or particularly in instances in which the injury, illness, or condition that resulted in the guardianship may be temporary, whether the guardianship or conservatorship can be abolished.

The reviews may be triggered by a review date set as part of the terms of the original guardianship order, the review of the guardian's/conservator's/court visitor's report (see Standard 3.3.17), the request of the respondent or the guardian/conservator, or at the urging of a family member or other concerned person.[171] Probate courts should establish flexible written guidelines for the submission of a *pro se* petition or other request for review of the continuing need for a guardianship or conservatorship. So as not to dissipate the court's time and resources with frequent, unnecessary reviews, however, probate courts may wish to set a limit on the frequency with which the need for a guardianship or conservatorship may be re-adjudicated, absent special circumstances.

There is a divergence of views as to whether, in connection with a petition or request for reevaluation, the burden of proof should be on the respondent to reverse or modify the court's prior order or on the guardian/conservator to reestablish the basic grounds for the guardianship/conservatorship. There are also different opinions as to whether a trial *de novo* is required or whether the court may consider evidence received in prior hearings.

Promising Practices

The **District of Columbia Superior Court** provides newly-appointed guardians and conservators with a list of mandatory filing deadlines in addition to the order itself.

[170] *See* UNIF. PROB. CODE § 3-602 (2008).

[171] *Cf*. UGPPA §§ 318(b) & 421(b) (1997).

STANDARD 3.3.14 ORIENTATION, EDUCATION, AND ASSISTANCE

Probate courts should develop and implement programs for the orientation, education, and assistance of guardians and conservators.

A key recommendation of the Third National Guardianship Summit is that "the court or responsible entity shall ensure that guardians [and conservators] . . . receive sufficient ongoing, multi-faceted education to achieve the highest quality of guardianship possible."[172] As noted previously, most newly appointed guardians and conservators are not fully aware of their responsibilities and how to meet them. While only eight states statutorily require that all guardians and conservators receive training,[173] courts throughout the country are addressing the need to inform and assist lay guardians and conservators in a variety of ways including printed manuals and information materials (*e.g.*, AK, CA, NJ, OH); videos (AK, DC, MI, TX); on-line training and information (*e.g.*, ID, NC, OH, PA, UT, WI); and in-person briefings and educational sessions by court staff (*e.g.*, DC, FL, NY, TX) or professional or public guardians (*e.g.*, CA).[174] Where appropriate, the materials should be in a language other than English to supplement the English version (*e.g.*, AZ).

Even when the appointment order clearly sets forth the duties and authority of a guardian and conservator and effective initial orientation and education has been provided, there will be instances in which guardians or conservators will be uncertain about how best to meet their responsibilities or whether they have the authority to take the actions necessary.[175] Again, there are a variety of approaches to addressing this need short of formally petitioning the court for guidance. Some probate courts have authorized staff to provide guidance short of legal advice to guardians and conservators on an on-going basis (*e.g.*, San Francisco, CA, Houston, TX, and UT).[176] In Florida, lay guardians are required to be represented by an attorney following appointment.[177] The District of Columbia offers annual conferences for guardians and conservators. Probate courts in Colorado employ facilitators whose duties include assisting guardians/conservators. The court in Suffolk County, NY employs a resource coordinator to assist in linking guardians to community resources, and the courts in Maricopa County, AZ and elsewhere utilize volunteer visitors whose duties include providing assistance to guardians and conservators as well as ensuring the well-being of the protected person. Maricopa County also has training programs on its website such as on basic accounting for non-professional conservators.[178]

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[172] Third National Guardianship Summit, *supra, note* 6, at Recommendation 2.4, 2012 Utah L. Rev., at 1200; Quinn & Krooks, *supra,* note 71, at 1659-1661; *See also* National Conference of the Judiciary on Guardianship Proceedings for the Elderly, Recommended *Judicial Practices*, recommendation IV(b) (Jun. 1986) (endorsed by the American Bar Association, House of Delegates, Aug. 1987).

[173] Quinn & Krooks, *supra,* note 71, at 1659; In addition, the 11 states that require a level of certification for some non-family guardians/conservators require initial training sufficient to enable the individual to pass a certification examination, in most instances, continuing professional education.

[174] *Id.*; Karp and Wood, *supra,* note 4, at 61-62 (AARP, 2007). For a list of video and on-line informational resources for guardians and conservators, *see* Guardianship Video Resources, American Bar Association Commission on Law and Aging http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011_aging_gship_video_resourc_8_10.authcheckdam.pdf; American Bar Association, Adult Guardianship Handbooks by State, http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011_aging_gship_st_hbks_2011.authcheckdam.pdf. Initial and continuing education requirements for professional guardians and conservators are set forth in licensing and certification requirements. *See, e.g.,* FL .Stat. ANN. §744.1085(3) (2006); National Guardianship Association, Standards of Practice, 23-24 (3d ed. 2007).

[175] Quinn & Krooks, *supra,* note 71, at 1637-1640.

[176] For a definition of the distinction between legal information and legal advice, *see* Iowa Judicial Branch Customer Service Advisory Committee, Guidelines and Instructions for Clerks Who Assist *Pro se* Litigants in Iowa's Courts 7 (July 2000), *available at* http://www.ajs.org/prose/pdfs/Iowa_Guidelines.pdf; *but see* Wash. St. Bar Assoc. v. Great Western Federal Savings & Loan Ass'n., 91 Wash. 2d. 49, 54-55 586 P.2d 870 (1999).

[177] FL. Prob. R. 5.030(a) (West 2012) (except when the personal representative remains the sole interested person).

[178] Establishing a mentoring program through which experienced guardians and conservators can serve as mentors of less experienced guardians and conservators is yet another approach.

Promising Practices

The **District of Columbia Superior Court** offers annual conferences for guardians and for fiduciaries managing funds such as conservators, personal representatives and trustees. It also sets training requirements for attorneys who wish to be eligible for appointment to represent respondents.

Florida requires that every guardian complete an educational course within four months of appointment. The course covers reporting requirements, duties, and responsibilities. Professional guardians are required to complete a 40-hour course.

Idaho and **Ohio** require guardians and conservators to complete an on-line training course before a court can hold any final hearing or issue a final order.

The **San Francisco CA Superior Court** requires all lay appointees to purchase a handbook published by the Administrative Office of the Courts and offers an orientation program.

Tarrant County, TX Probate Court No. 2 requires all decedents' administrators, guardians, and conservators to attend a mandatory training immediately after appointment conducted by the staff member who will be reviewing their documents and to sign an acknowledgment of understanding following the training.

STANDARD 3.3.15 BONDS FOR CONSERVATORS

Except in unusual circumstances, probate courts should require for all conservators to post a surety bond in an amount equal to the liquid assets and annual income of the estate.

COMMENTARY

Among the measures probate courts may use to protect respondents is to require newly appointed conservators to furnish a surety bond[179] conditioned upon the faithful discharge by the conservator of all assigned duties.[180] The requirement of bond should not be considered as an unnecessary expense or as punitive. It is insurance against any loss being suffered by the minor. Bonding or some equally protective alternative (*e.g.*, accounts that require a court order for all withdrawals, court-maintained accounts, etc.) protect the court from public criticism for having failed in its duty and responsibility to protect the respondent's estate from loss, misappropriation, or malfeasance on the part of the conservator.

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[179] This standard addresses surety bonds, that is, bonds with corporate surety or otherwise secured by the individual assets of the personal representative.

[180] *See* UNIF. PROB. CODE § 5-415 (2008) (unless otherwise directed, the size of the bond should equal the aggregate capital value of the estate under the conservator's control, plus one year's estimated income, minus the value of securities and land requiring a court order for their removal, sale, or conveyance); *see also* THIRD NATIONAL GUARDIANSHIP, *supra*, note 6, at Standard 4.9, 2012 UTAH L. REV., at 1195; M.J. Quinn & H. Krooks, *supra*, note 71, at 1649-1653.

In determining the amount of the bond, or whether the case is the unusual situation in which an alternative measure will provide sufficient protection, probate courts should consider such factors as:

- The value of the estate and annual gross income and other receipts.
- The extent to which the estate has been deposited under an effective arrangement requiring a court order for its removal.
- Whether a court order is required for the sale of real estate.
- Whether a restricted account has been established and proof provided to the court that the restrictions will be enforced by the bank.
- The frequency of the conservator's required reporting.
- The extent to which the income or receipts are payable to a facility responsible for the ward's care and custody.
- Whether the conservator was appointed pursuant to a nomination that requested that bond be waived.
- The information received through the background check.
- The financial responsibility of the proposed guardian/conservator.

STANDARD 3.3.16 REPORTS

A. Probate courts should require guardians to file at the hearing or within 60 days:
(1) A guardianship plan and a report on the respondent's condition, with annual updates thereafter.
(2) Advance notice of any intended absence of the respondent from the court's jurisdiction in excess of 30 calendar days.
(3) Advance notice of any major anticipated change in the respondent's physical location (*e.g.*, a change of abode).

B. Probate courts should require conservators to file within 60 days, an inventory and appraisal of the respondent's assets and an asset management plan to meet the respondent's needs and allocate resources for those needs, with annual accountings and updates thereafter. Probate courts should require conservators to submit, for approval, an amended asset management plan whenever there is any significant deviation from the approved plan or a significant change from the approved plan is anticipated.

COMMENTARY

The standard urges that guardians be required to provide a report to the court at the hearing or within two months of appointment.[181] Similarly, conservators must immediately commence making an inventory of the respondent's assets and submit the inventory and a plan within a two-month period.

- The guardian's report should contain descriptive information on the respondent's condition, the services and care being provided to the respondent, significant actions taken by the guardian, and the expenses incurred by the guardian.
- The conservator's report should include a statement of all available assets, the anticipated financial needs and expenses of the respondent, and the investment strategy and asset allocation to be pursued (if applicable). As part of this process, the conservator should consider the purposes for which these funds are to be managed, specify the services and care provided to the respondent and their costs, describe significant actions taken, and the expenses to date.

[181] Each state's respective statutory provisions may establish somewhat different time frames. *See, e.g.,* REV. CODE WASH. ANN. § 11.92.043(1) (West, Westlaw through 2011 legislation) ("It shall be the duty of the guardian . . . to file within three months after appointment a personal care plan for the incapacitated person."); WYO. STAT. § 3-2-109 (West, Westlaw through 2012 Budget Session) ("The guardian shall present to the court and file in the guardianship proceedings a signed, written, report on the physical condition, including level of disability or functional incapacity, principal residence, treatment, care and activities of the ward, as well as providing a description of those actions the guardian has taken on behalf of the ward."); OR. REV. STAT. § 125.470 (West 2012) (inventory of the estate must be filed within 90 days of conservator's appointment); S.C. CODE ANN. § 62-5-418 (West 2012) (inventory of the estate must be filed within 30 days of conservator's appointment); W. VA. CODE § 44-4-2 (2010) (inventory of the estate must be filed within 1 year of conservator's appointment).

These reporting requirements ensure that probate courts quickly receive information to enable them to better determine the condition of the respondent, the amount of assets and income available, and the initial performance of the guardian or conservator. Probate courts should also consider requiring additional information to assist in monitoring the guardianship or conservatorship such as an estimate of the fees that the guardian/conservator will charge and the basis for those charges.[182] [See Standard 3.1.4]

Probate courts should provide explicit instructions regarding the information to be contained in initial and subsequent reports. This can be accomplished either through clear forms with detailed instructions,[183] or through an on-line program such as that developed by Minnesota that poses a series of questions for the guardian or conservator to respond to and calculates totals automatically.[184] Where there is considerable overlap or interdependence, probate courts may authorize the joint preparation and filing of the plans and reports of the guardian and conservator.

In addition, the standard calls for submission of an initial plan that will help guardians and conservators perform their duties more effectively. The plans should specify goals over the next 12-24 months and how the guardian or conservator will meet those goals.[185] Development of a care or financial management plan not only offers a guide to the guardian and conservator, but also provides probate courts with a benchmark for measuring performance and assessing the appropriateness of the decisions and actions by the guardian/conservator.

The plans should be neither rote nor immutable. They should reflect the condition and situation of each individual respondent rather than provide general statements applicable to anyone. For example, the investment strategy and management objectives may be different for a relatively young respondent than for one who is older, may vary depending on the source or purpose of the assets,[186] or may be different where there is a greater need to replenish the funds for long-term support.[187] Minor changes to a guardianship plan (*e.g.*, changing doctors, replacing one social activity with another, etc.) and prudent changes in a conservatorship's investments may be implemented without consulting the court. However, probate courts should advise guardians and conservators that except in emergencies, there should be no substantial deviation from the court-approved plan without prior approval. For example, any absence of the guardian or respondent from the jurisdiction of the court that will exceed 30 calendar days should be reported as should any anticipated move of the respondent within or outside the jurisdiction so that the court can readily locate the respondent at all times.

The standard provides for annual updates of the initial guardianship and conservatorship reports and plans to enable probate courts to ensure that the guardian is providing the respondent with proper care and services and respecting the respondent's autonomy, and that the estate is being managed with the proper balance of prudence and attention to the current needs and preferences of the respondent. The Uniform Guardianship and Protective Proceedings Act, and all but

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[182] Third National Guardianship Summit, *supra*, note 6, at Standard 3.1, Utah L. Rev., at 1193-1194.

[183] *See, e.g.*, Alaska Courts, *Guardianship and Conservatorship Forms, Instructions & Publications*, www.courts.alaska.gov/forms-subj.htm#guardian (last updated May 8, 2012); California Courts, *Probate Forms*, www.courts.ca.gov/forms.htm?filter=GC (July 9, 2012); D.C. Courts, *Form Locator*, http://www.dccourts.gov/internet/formlocator.jsf (July 9, 2012); 17th Judicial Circuit Court of Florida, *Probate and Guardianship Smart Forms*, http://www.17th.flcourts.org/index.php/judges/probate/probate-and-guardianship-smart-forms (July 9, 2012); Karp & Wood, *supra*, note 4, at 37-41 & Appendix B.

[184] Minnesota Judicial Branch, *Conservator Account Monitoring Preparation and Electronic Reporting (CAMPER)*, www.mncourts.gov/conservators (July 9, 2012).

[185] *See e.g.*, National Guardianship Association, Standards of Practice, Standards 13 and 18 (3d ed. 2007); For a model plan *see* Karp & Wood, *supra*, note 4, at 87-88.

[186] For example, the management objectives may be different where funds come from a wrongful death settlement designed to replace the support capacity of a deceased parent as opposed to funds that come from a personal injury settlement designed to provide medical support for the respondent.

[187] *See generally* Edward C. Halbach Jr., *Trust Investment Law in the Third Restatement*, 27 Real Prop., Prob. & Trust J. 407 (1992) (discussing the background and applications of principles of fiduciary prudence as formulated in the Third Restatement of the Law of Trusts).

one state statutorily require reports of some type.[188] Along with the periodic reporting on what has been done during the reporting period including information on expenditures and projected future expenditures, guardians or conservators should notify the probate court about significant changes in the respondent's condition, either for the better or for the worse, and suggest what changes may be needed in the scope of the guardianship order.[189]

Additionally, guardians/conservators should immediately report if the respondent has been abused (*e.g.*, by staff at their place of residence).[190] Upon receiving a report of abuse, probate courts may take any of a number of appropriate actions including ordering an investigating by court staff, notifying the appropriate law enforcement or adult protective services agency, setting a hearing, or ordering an immediate change in placement.[191]

Promising Practices

In **Minnesota**, after inserting a user name and password, conservators can log into a special webpage on the Judicial Branch website to complete annual financial reports by inserting requested information in response to prompts. The program automatically ensures that the report balances. It will also interface with common non-technical accounting programs to permit data to be uploaded. Supporting information can be attached such as bank statements and cancelled checks.[192]

STANDARD 3.3.17 MONITORING

Probate courts should monitor the well-being of the respondent and the status of the estate on an on-going basis, including, but not limited to:

- Determining whether a less intrusive alternative may suffice.
- Ensuring that plans, reports, inventories, and accountings are filed on time.
- Reviewing promptly the contents of all plans, reports, inventories, and accountings.
- Independently investigating the well-being of the respondent and the status of the estate, as needed.
- Assuring the well-being of the respondent and the proper management of the estate, improving the performance of the guardian/conservator, and enforcing the terms of the guardianship/conservatorship order.

Investigations by the Government Accountability Office (GAO) and articles in newspapers around the country have documented failures by some probate courts to properly monitor guardianships and conservatorships they have established, resulting in harm to respondents and dissipation of their estates.[193] This standard adopts the recommendation

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[188] UGPPA §§ 317 & 420 (1997).

[189] *See* Third National Guardianship Summit, *supra*, note 6, at Standard 1.4, Utah L. Rev., at 1193.

[190] *Id.* at Standard 1.5. In some jurisdictions, guardians and conservators are mandatory reporters.

[191] *See* Quinn and Krooks, *supra*, note 71, at 1658-1659 for additional examples of actions probate courts might take.

[192] Minnesota Judicial Branch, *Conservator Account Monitoring Preparation and Electronic Reporting (CAMPER)*, www.mncourts.gov/conservators (July 9, 2012); *see also* Third National Guardianship Summit, *supra*, note 6, at Standard 2.4 Utah L. Rev., at 1194.

[193] *See e.g.*, U.S. Gov't Accountability Office, GAO-04-655, Collaboration Needed to Protect Incapacitated Elderly People, (July 13, 2004); U.S. Gov't Accountability Office, GAO-06-1086T, Little Progress in Ensuring Protection for Incapacitated Elderly People, (Sept. 7, 2006); U.S. Gov't Accountability Office, GAO-10-1046, Guardianships: Cases of Financial Exploitation, Neglect, and Abuse of Seniors, (Sept., 2010); Associated Press, *Guardians of the Elderly: An Ailing System*, Sept., 1987; Carol D. Leonnig et al., *Misplaced Trust/Guardians in the District: Under Court, Vulnerable Become Victims*, The Washington Post, June 15-16, 2003; S. Cohen et al., *Misplaced Trust: Guardians in Control*, The Washington Post, June 16, 2003; L. Hancock & K. Horner, The Dallas Morning News, Dec. 19-21, 2004; S.F. Kovalski, *Mrs. Astor's Son to Give Up Control of Her Estate*, The New York Times, Oct.14, 2006; Robin Fields, Evelyn Larrubia, Jack Leonard, *"Justice Sleeps While Seniors Suffer,"* Los Angeles Times (November 14, 2005); Kristin Stewart, *Some Adults' 'Guardians' Are No Angels*, The Salt Lake Tribune, (May 14, 2006); Cheryl Phillips, Maureen O'Hagan and Justin Mayo, *Secrecy Hides Cozy Ties in Guardianship Cases*, Seattle Times (December 4, 2006); Todd Cooper, *Ward's Assets Vulnerable*, Omaha World Herald (August 16, 2010).

of the Third National Guardianship Summit.[194] Following appointment of a guardian or conservator, probate courts have an on-going responsibility to make certain that the respondent is receiving the services and care required, the estate is being managed appropriately, and the terms of the order remain consistent with the respondent's needs and condition. The review, evaluation, and auditing of the initial plans, inventories, and report and the annual reports and accountings filed by a guardian or conservator is the initial step in fulfilling this duty. Making certain that those documents are filed is a necessary precondition. An automated case management system that tracks when reports and accounting are due and sends out reminders in advance and notices when required material is overdue can be helpful in fulfilling this responsibility. [See Standard 2.4.2] Probate courts should also have the capacity to investigate those situations in which guardian/conservators may be failing to meet their responsibilities under the order or exceeding the scope of their authority.

A principal component of the review is to ensure that the guardian/conservator included all of the information required by the court in these reports. Probate courts should not permit conservators to file accountings that group expenses into broad categories, and should require that all vouchers, invoices, receipts, and statements be attached to the accounting to enable comparison. Prompt review of the guardian's or conservator's reports enables probate courts to take early action to correct abuses and issue a show cause order if the guardian/conservator has violated a provision of the original order.
Various approaches have been developed to facilitate monitoring of guardianships and conservatorships. Some jurisdictions such as Spokane County, WA and 11th Judicial Circuit of FL (Miami-Dade) employ court staff to review reports and accountings and visit respondents. Others such as Tarrant County, TX and Trumbull County, OH rely on volunteers such as nursing or social work students. Maricopa County, AZ and Ada County, ID use a mix of staff and volunteers. Maricopa County has also implemented a "compliance calendar" process to enforce guardianship/conservatorship orders. The 17th Judicial Circuit of Florida (Broward County) has developed electronic systems to analyze expenditures and flag anomalies and possible problems. These systems also notify guardians and conservators of upcoming due dates and alert the court when reports are submitted or overdue.[195]

Some jurisdictions also require guardians and/or conservators to distribute reports and accountings to family members and other interested persons. This provides probate courts with additional informed reviews. On the other hand, given the personal information contained in reports and the financial disclosures in accountings, it may also compromise a respondent's privacy or generate family disagreements regarding the allocation of assets that have little to do with the performance of the conservator.

A number of probate courts have identified lists of actions or factors that may warrant provision of additional services or training for the guardian or conservator or further examination of a particular guardianship or conservatorship through a visitor, guardian *ad litem*, adult protective services, or more frequent reviews and hearings. These include:

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[194] Third National Guardianship Summit, *supra*, note 6, at Recommendation 2.3, 2012 Utah L. Rev., at 1200; Washington State Bar Association Elder Law Section Guardianship Task Force, Report to the WSBA Elder Law Section Executive Committee, 9 (August 2009) www.wsba.org/Legal-Community/Sections/Elder-Law-Section/Guardianship-Committee.

[195] Third National Guardianship Summit, *supra*, note 6, at Recommendation 2.5, Utah L. Rev., at 1201.

Concerns

- The person under guardianship/conservatorship has no relatives or active friendships. There is no one to ask questions or provide oversight.
- The guardian/conservator talks about being exhausted and overwhelmed.
- The estate is large and complicated with significant amounts of cash and securities.
- The guardian/conservator keeps changing attorneys or attorneys try to withdraw from representing the guardian/conservator.
- The guardian/conservator has little knowledge about caring for dependent adults or has minimal experience with financial matters.
- The guardian/conservator excessively controls all access to the person in guardianship/conservatorship and insists on being the sole provider of information to friends and family.
- The guardian/conservator does not permit the person in guardianship/conservatorship to be interviewed alone.
- The guardian/conservator wants to resign.
- The guardian/conservator changes the person's providers such as physicians, dentist, accountants and bankers to his own personal providers.
- The guardian/conservator has financial problems such as tax problems, bankruptcy, or personal problems such as illness, divorce, a family member who has a disabling accident or illness.

Possible Red Flags

- The bills are not being paid or are being paid late or irregularly.
- The person in guardianship/conservatorship lives in a nursing home or assisted living and the guardian/conservator does not furnish/pay for clothing.
- The guardian/conservator does not arrange for application for Medicaid when needed for skilled nursing home payment.
- The guardian/conservator does not cooperate with health or social service providers and is reluctant to spend money on the person in guardianship.
- The guardian/conservator is not forthcoming about the services the person in guardianship/conservator can afford or says the person cannot afford services when that is not true.
- The court has been alerted that the guardian's/conservator's lifestyle seems more affluent than before the guardianship/conservatorship.
- Court documents, including accountings are not filed on time.
- Accountings have questionable entries such as:
  - There are charges for utilities when the person is not living in the home or the home is standing empty.
  - Television sets or other items appear in the accounting but the person does not have them.
  - Numerous checks are written for cash.
  - The guardian reimburses herself repeatedly without explanation as to why.
  - An automobile is purchased but the person in guardianship cannot drive or use the car.
  - Use of an ATM without court authorization.
  - Gaps and missing entries for expected income such as pensions, Social Security, rental income.
  - No entries for expected expenses such as insurance for health or real property.
- There are concerns about the quality of care the person is receiving.
- There are repeated complaints from family members, neighbors, friends, or the person in guardianship.
- A different living situation is needed, either more protected or less protected.
- Revocation or failure to renew fiduciary bonds.

- Large expenditures in the accounting not appropriate to the person's lifestyle or setting.
- The guardian is not visiting or actively overseeing the care the person in guardianship is receiving or not receiving.[196]

Promising Practices

The Probate Division of **Florida's 17th Judicial Circuit** (Broward County) uses electronic filing and XML-based forms to create a database that enables the court to run a variety of reports such as a list of the guardianships in which expenses increased by more than specified percentage; the respondents for whom a particular guardian or conservator has been appointed; and the fees above a particular level.[197]

Maricopa County, AZ is developing a risk assessment tool to enable court staff to calibrate the level of oversight required, whether monitoring should be conducted by volunteers or full-time employees, and the frequency of reviews.[198]

Tarrant County, TX Probate Court #2 has established a program under which MSW under the supervision of a staff social worker visit respondents on behalf of the Court and report on the condition of the respondent, and the needs of the respondent and the guardian.[199]

American Bar Association Commission on Law and Aging, Volunteer Guardianship Monitoring and Assistance: Serving the Court and the Community includes handbooks for program coordinators and volunteers and a trainer's manual to help courts establish volunteer programs. It is based on the extensive experience of AARP, as well as existing court volunteer guardianship review programs.[200]

STANDARD 3.3.18 COMPLAINT PROCESS

Probate courts should establish a clear and easy-to-use process for communicating concerns about guardianships and conservatorships and the performance of guardians/conservators. The process should outline circumstances under which a court can receive *ex parte* communications. Following the appointment of a guardian or conservator, probate courts should provide a description of the process to the respondent, the guardian/conservator, and to all persons notified of the original petition.

COMMENTARY

The standard urges probate courts to establish a process for respondents, members of the respondent's family, or other interested persons to question whether the respondent is receiving appropriate care and services, the respondent's estate is being managed prudently for the benefit of the respondent, or whether the guardianship/conservatorship should be modified

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[196] Quinn & Krooks, *supra, note* 71, at 1663-1666 (citing Tarrant County Probate Court Number Two *A Systems Approach to Guardianship Management* (2002) (paper presented at the National College of Probate Judges Fall Conference, Tucson, AZ)); R. T. Vanderheiden, *How to Spot a Guardianship or Conservatorship Going Bad: Effective Damage Control and Useful Remedies* (2002) (Paper presented at the National College of Probate Judges Fall Conference, Tucson, AZ); Mary Joy Quinn, Guardianships of Adults: Achieving Justice, Autonomy, and Safety, 213 (Springer Publ'g Co., 2005).

[197] Karp & Wood, *supra,* note 4, at 55.

[198] Steelman & Davis, *supra, note 4.*

[199] Karp & Wood, *supra,* note 4, at 51.

[200] http://www.americanbar.org/content/dam/aba/uncategorized/2011/vol_gship_intro_1026.authcheckdam.pdf

or terminated.[201] In designing the process, care should be taken to ensure that that an unrepresented person is able to use it, that the court receives the necessary information, and that the process is flexible enough to accommodate emergency or urgent circumstances. The process could include designation of a specific member of the staff to receive and review complaints, a designated e-mail address, and/or an on-line form. Requiring that the request be written (whether electronically or on paper) can discourage frivolous or repetitious requests that can drain the estate as well as waste the court's time.[202]

When a complaint is received, it should be reviewed to determine how it should be addressed. Approaches include a referral to services, sending a court visitor to investigate; requesting the guardian or conservator to address the issue(s) raised; referring the matter for mediation, particularly when the complaint appears to be the result of a family dispute; conducting an evaluation of the person under guardianship or conservatorship; or setting a hearing on the matter.

STANDARD 3.3.19 ENFORCEMENT OF ORDERS; REMOVAL OF GUARDIANS AND CONSERVATORS

A. Probate courts should enforce their orders by appropriate means, including the imposition of sanctions. These may include suspension, contempt, removal, and appointment of a successor.

B. When probate courts learn of a missing, neglected, or abused respondent or that a respondent's assets are endangered, they should take timely action to ensure the safety and welfare of that respondent and/or the respondent's assets.

C. When a guardian or conservator is unable or fails to perform duties set forth in the appointment order, and the safety and welfare of that respondent and/or the respondent's assets are endangered, probate courts should remove the guardian or conservator and appoint a successor as required.

COMMENTARY

Although probate courts cannot be expected to provide daily supervision of the guardian's or conservator's actions, they should not assume a passive role, responding only upon the filing of a complaint. The safety and well-being of the respondent and the respondent's estate remain the responsibility of the court following appointment. When a guardian or conservator abandons the respondent, or fails to submit a complete and accurate report or accounting in a timely manner, or based on a review of such reports or accountings, the report of a visitor, or complaints received there is reason to believe that a respondent and/or the respondent's assets are endangered, probate courts should conduct a prompt hearing and take necessary actions. [See Standards 3.3.15 – 3.3.19]

For example, orders to show cause or contempt citations may be issued against guardians and conservators who fail to file required reports on time after receiving notice and appropriate training and assistance. [See Standard 3.3.14] If there is a question of theft or mismanagement of assets, the court may enter an order freezing the assets and suspending the powers of the conservator. If the guardian or conservator has left the court's jurisdiction, notice of a show cause hearing should be sent to the probate court in the new jurisdiction. [See Standard 3.4.1] If the guardian or conservator is an attorney, probate courts should advise the appropriate disciplinary authority that the attorney may have violated his or her fiduciary duties to the respondent. Probate courts may consider suspending the guardian or conservator and appointing a temporary guardian/conservator to immediately take responsibility for the welfare and care of the respondent. (See Standard 3.3.6, Emergency Appointment of a Temporary Guardian or Conservator.)

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[201] Quinn & Krooks, *supra,* note 71, at 1658-1659.

[202] Arizona has adopted a rule providing probate courts with remedies to limit "vexatious conduct" such as frivolous filings. Ariz. Rules of Prob. Proc. 10(G) (2012).

If a guardian or conservator becomes unable to fulfill his/her responsibilities or abandons a respondent, probate courts should make an emergency appointment of a temporary guardian/conservator and remove the original guardian/conservator. The emphasis should be on protecting the respondent's safety, welfare, and assets. After assigning a temporary guardian or conservator, probate courts should order an investigation to locate the guardian/conservator and to examine the conduct of the guardian/conservator. Probate courts should impose appropriate sanctions against a guardian or conservator who failed to fulfill his or her duties, and when the whereabouts of a guardian or conservator are unknown, check the records of state and local agencies when sharing of information is authorized by state law.

When the whereabouts of a respondent are unknown to the probate court or the guardian/conservator, an immediate investigation should be ordered to locate the respondent including checking the records of state and local agencies when state law permits the sharing of information. If the guardian or conservator has been diligent in his or her duties, and the absence of the respondent is not the fault of the guardian/conservator, the guardian/conservator should retain the appointment. If the guardian or conservator has not been diligent in his or her duties, the probate court may remove the guardian/conservator and make an emergency appointment of a temporary guardian/conservator.

In imposing sanctions such as contempt upon a guardian or conservator, the due process rights of the guardian/conservator should be protected. At a minimum, the guardian/conservator should be entitled to notice and a hearing prior to the imposition of sanctions. However, these proceedings should not preclude probate courts from taking interim steps to protect the interests of the respondent and the estate. In addition, where needed, probate courts should be able unilaterally to suspend or remove the guardian/conservator and appoint a temporary successor to provide for the welfare of the respondent with the guardian/conservator entitled to object to the action at a later date. [See Standard 3.3.6]

STANDARD 3.3.20 FINAL REPORT, ACCOUNTING, AND DISCHARGE

A. Probate courts should require guardians to file a final report regarding the respondent's status and conservators to file a final accounting of the respondent's assets.

B. Probate courts should review and approve final reports and accountings before discharging the guardian or conservator unless the filing of a final report or accounting has been waived for cause.

COMMENTARY

The authority and responsibility of a guardian or conservator terminates upon the death, resignation, or removal of the guardian/conservator, or upon the respondent's death or restoration of competency.[203] The respondent, guardian, conservator, or any interested person may petition the court for a termination of the guardianship or conservatorship. A respondent seeking termination should be afforded the same rights and procedures as in the original proceeding establishing the guardianship/conservatorship. [See Standards 3.3.8 and 3.3.16] Where the guardian or conservator stands to benefit financially from the termination of the conservatorship, the court should carefully scrutinize this proposal.

When the request for termination of the guardianship or conservatorship is contested, probate courts should direct that notice be provided to all interested persons, conduct a hearing, and issue a determination regarding the need for

[203] *See* UGPPA §§ 318 & 431 (1997).

continuation of the guardianship or conservatorship. [See Standards 3.1.1 and 3.3.8] Before terminating a guardianship or conservatorship, probate courts should require submission of a final report regarding the respondent's status and actions taken on behalf of the respondent and or a final accounting of the estate access, review these submissions, and if all is in order, approve them. Following approval the court order should provide for the guardian's/conservator's reasonable expenses associated with the termination and cancel any applicable bond.

Circumstances may exist, however, where a formal closing of the guardianship or conservatorship, including notice, hearing, a final report, or accounting, may be waived. For example, where the status of a now-deceased respondent is virtually unchanged except for the fact of death since the previous status report (*e.g.*, the respondent suffered from a long-term disabling illness), the guardianship may be closed, the guardian discharged, and a final report forgone, if the guardian shows a waiver and consent by the respondent's successors or other interested parties. Similarly, where a relatively small amount of funds remains in the respondent's account at the time of the respondent's death, the conservator may be directed to apply those funds to the respondent's funeral and burial expenses. If the conservator shows a waiver and consent by the respondent's successors, as well as a receipt from the funeral home for expenses depleting the balance of the respondent's assets, the conservatorship should be closed without a final accounting and full hearing.[204] If the respondent approves of the actions taken previously on his or her behalf by the conservator, the balance of funds on hand may be restored or delivered to the respondent without a final accounting and discharge.

3.4 INTERSTATE GUARDIANSHIPS AND CONSERVATORSHIPS

Properly administering a guardianship/conservatorship system is difficult enough when the parties— the respondent, the guardian, the family and friends—stay in one place. Today, a respondent (or alleged incapacitated person) often has ties to more than one state. Numerous factors contribute to the increase of such interstate guardianships/conservatorships.[205] The respondent, his or her guardian, family or assets may be located outside of the jurisdiction of the court that originally established the guardianship. Some incapacitated adults desire to be closer to family or may need to be placed in a different, more suitable health care or living arrangements. Family caregivers that relocate for employment reasons reasonably may wish to bring the respondent with them. The respondent's real or personal property may remain in the existing jurisdiction, however, even after the respondent has moved. interfamily conflict or attempts simply to thwart jurisdiction may occur less frequently, but still cause significant problems for probate courts. Guardians and family members, for example, may engage in forum shopping for Medicaid purposes or for state laws governing death and dying that are compatible with their views or the views of the respondent.

The frustration of courts in their attempts to monitor and enforce guardianship orders outside their jurisdiction led the Uniform Law Commission to draft the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UGAPPJA) now enacted in 31 states.[206] UGAPPJA defines what state has primary jurisdiction to determine the need for and scope of a guardianship or conservatorship and lessens the legal impediments to transferring guardianships from one state to another.

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[204] The procedure of *waiver and consent* is alternatively known as *release and discharge* or *release and approval* in various other jurisdictions.

[205] *See generally* A. Frank Johns et al., *Guardianship Jurisdiction Revisited: A Proposal for a Uniform Act*, 26 Clearinghouse Rev. 647 (1992).

[206] Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA), (2007). Some states that have not adopted the uniform act provide probate courts with the authority to transfer guardianships and conservatorships. *See e.g.*, O.C.G.A. §29-2-73 (2010); Tex. Prob. Code §891 (2007).

The five standards in this section make provisions for guardianships that cross state lines. Central to the provisions is the concept of "portability" – that is, that a guardianship established in one state should be able to be "exported" or "imported" from one state to another absent a showing of abuse of the guardianship. The intent of the provisions, consistent with the concept of portability, is to facilitate, and not to impede unnecessarily, the movement of a guardianship across state lines, and to speed decisions and case processing by the court while protecting, even furthering, the interests of the respondent and other interested persons.

The standards in this section are extensions to interstate guardianships of the provisions in Principle 1.1 and Standard 3.3.10. They require probate courts to be accommodating and responsive to the wishes of the respondent as well as convenient and accessible. A guardianship is not intended to restrict freedom unreasonably or to limit the flexibility, choices and convenience available to the respondent. It should not unnecessarily limit choices and preferences. Standards of access to justice and the principle of comity require courts to remove those barriers that impede litigants' participation in the legal system even when that participation requires the engagement

STANDARD 3.4.1 COMMUNICATION AND COOPERATION BETWEEN COURTS

Probate courts in different jurisdictions and states should communicate and cooperate to resolve guardianship and conservatorship disputes and related matters.

COMMENTARY

This standard extends the requirement of independence and comity in Principle 1.1 to a probate court's relationship with courts in other jurisdictions and recognizes that the ends of justice are more likely to be met when courts communicate and cooperate to resolve guardianship matters that cross state lines.[207] In matters pertaining to specific guardianship or conservatorship cases in which two or more probate courts have jurisdiction, the courts should communicate among themselves to resolve any problems or disputes.

When an alleged incapacitated person temporarily resides or is located in another state, for example, the court in which the petition is filed should notify the foreign jurisdiction of the respondent's presence and the relevant allegations in the petition. This notification is intended to trigger proper actions in that jurisdiction including "courtesy checks" and other investigations of the proposed respondent, and, if necessary, protective or other services.

STANDARD 3.4.2 SCREENING, REVIEW, AND EXERCISE OF JURISDICTION

A. As part of its review and screening of a petition for guardianship or conservatorship, probate courts should determine that the proposed guardianship or conservatorship is not a collateral attack on an existing or proposed guardianship in another jurisdiction or state.

B. When multiple states may have jurisdiction, a probate court should determine:

(1) The respondent's home state.

(2) If the respondent does not have a home state or if the respondent's home state has declined jurisdiction, whether the respondent has a significant connection to the state in which the probate court is located and whether it is an appropriate jurisdiction.

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[207] *See* UAGPPJA, §§ 104 & 105 (2007).

C. In determining whether it is an appropriate jurisdiction, a probate court should consider such factors as:
(1) The expressed preference of the respondent.
(2) Whether abuse, neglect, or exploitation of the respondent has occurred or is likely to occur and which state could best protect the respondent.
(3) The length of time the respondent was physically present in or was a legal resident of the probate court's state or another state.
(4) The distance of the respondent from the court in each state.
(5) The financial circumstances of the respondent's estate.
(6) The nature and location of the evidence.
(7) The ability of the probate court of each state to decide the issue expeditiously and the procedures necessary to present evidence.
(8) The familiarity of the court of each state with the facts and issues in the proceeding.
(9) If an appointment were made, the probate court's ability to monitor the conduct of the guardian or conservator.
D. In an emergency, a probate court that is not in the respondent's home state or a state with which the respondent has a significant connection may appoint a temporary guardian or conservator or issue a protective order unless requested to dismiss the proceeding by the probate court of the respondent's home state.

COMMENTARY

This standard is based on Sections 201-209 of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act. Its intent is to stop the "race to the courthouse" as determinative of jurisdiction and venue and to promote communication and cooperation between probate courts. Paragraphs (a) – (c) set out three tiers of review. Paragraph (d) addresses the authority of probate courts in an emergency situation. When there is any question regarding the appropriate venue for submission of a guardianship/conservatorship petition, probate courts should require the parties to submit information bearing on the factors listed in paragraph (c) in order to determine which state is the appropriate jurisdiction to hear the matter. In addition, when the petition is not brought in a respondent's home state, probate courts should order the petitioner to provide notice to those persons who would be entitled to notice of the petition if the proceeding had been brought in the respondent's home state.[208]

STANDARD 3.4.3 TRANSFER OF GUARDIANSHIP OR CONSERVATORSHIP

A. Probate courts may grant a petition to transfer a guardianship or conservatorship when:
(1) The respondent is physically present or is reasonably expected to move permanently to the other state or has a significant connection to the other state.
(2) An objection to the transfer has not been made or has been denied.
(3) Plans for the care of and services for the respondent and/or management of the respondent's property in the other state are reasonable and sufficient.
(4) The probate is satisfied that the guardianship/conservatorship will be accepted by the probate court in the other state.
B. The respondent and all interested persons should receive proper notice of the intended transfer and be informed of their right to file objections and to request a hearing on the petition.

[208] UAGPPJA § 208 (2007).

COMMENTARY

This standard is consistent with Section 301 of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act. Its intent is to facilitate the transfer of a guardianship and/or conservatorship to another state in cases in which the probate court is satisfied that the guardianship/conservatorship is valid and that the guardian/conservator has performed his or her duties properly in the interests of the respondent for the duration of his or her appointment. It is based on the assumption that most guardians/conservators are acting in the interest of the respondent and that the notice and reporting requirements, and the opportunity to bring objections to the transfer to the attention of the court, are sufficient checks on the appropriateness of the transfer of the guardianship.

A guardian or conservator should always provide the court, the respondent, and all interested persons advance notice of an intended transfer of the guardianship/conservatorship or movement of the respondent or property from the court's jurisdiction. The guardian/conservator should be familiar with the laws and requirements of the new jurisdiction.

Any bond or other security requirements imposed by the exporting court should be discharged only after a new bond, if required, has been imposed by the receiving court. Debtor issues may need to be dealt with in accordance with existing state laws.

STANDARD 3.4.4 RECEIPT AND ACCEPTANCE OF A TRANSFERRED GUARDIANSHIP

Probate courts should accept a guardianship or conservatorship transferred in accordance with Standard 3.4.3 unless an objection establishes that the transfer would be contrary to the interests of the respondent or the guardian/conservator is ineligible for appointment in the receiving state. Acceptance of the transferred guardianship/conservatorship can be made without a formal hearing unless one is requested by the court *sua sponte* or by motion of the respondent or by any interested person named in the transfer documents. Upon accepting a transferred guardianship/conservatorship, probate courts should notify the transferring probate court.

COMMENTARY

This standard is consistent with Section 302 of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act. Probate courts should recognize and accept the terms of a foreign guardianship or conservatorship that has been transferred with the approval of the transferring court. The receiving court should notify the transferring court and acknowledge that it has formally accepted the guardianship. Receipt of this notice can serve as the basis for the original court's termination of its guardianship.

Consistent with Standard 3.4.1, probate courts should cooperate with the foreign court to facilitate the orderly transfer of the guardianship. To coordinate the transfer, it may delay the effective date of its acceptance of the transfer, make its acceptance contingent upon the discharge of the guardian/conservator by the transferring court, recognize concurrent jurisdiction over the guardianship/conservatorship, or make other arrangements in the interests of the parties and the ends of justice.

STANDARD 3.4.5 INITIAL HEARING IN THE COURT ACCEPTING THE TRANSFERRED GUARDIANSHIP

A. No later than ninety (90) days after accepting a transfer of guardianship/conservatorship, probate courts should conduct a review hearing during which they may modify the administrative procedures or requirements of the guardianship/conservatorship in accordance with state law and procedure.

B. Probate courts should:

(1) Give effect to the determination of incapacity unless a change in the respondent's circumstances warrants otherwise.

(2) Recognize the appointment of the guardian/conservator unless the person or entity appointed does not meet the qualifications set by state law.

(3) Ratify the powers and responsibilities specified in the transferred guardianship/conservatorship except where inconsistent with state law or required by changed circumstances

COMMENTARY

Probate courts should schedule a review hearing within 90 days of receipt of a foreign guardianship. The review hearing permits the court to inform the respondent and guardian/conservator of any administrative changes in the guardianship/conservatorship (*e.g.*, bond requirements or reporting procedures) that are necessary to bring the transferred guardianship/conservatorship into compliance with state law. Unless specifically requested to do otherwise by the respondent, the guardian/conservator, or an interested person because of a change of circumstances, probate courts should give full faith and credit to the terms of the existing guardianship/conservatorship concerning the rights, powers and responsibilities of the guardian/conservator except when they are inconsistent with statutes governing guardianship and/or conservatorship in the receiving state.

3.5 PROCEEDINGS REGARDING GUARDIANSHIP AND CONSERVATORSHIP FOR MINORS

The standards in this section address non-testamentary guardianships and conservatorships of minors, i.e. persons under age 18.[209] They set forth the practices that probate courts should follow when adjudicating these cases but do not cover the complex interpretational issues that can arise, for example, in interstate cases where the Uniform Child Custody Jurisdiction Act[210] and the federal Parental Kidnapping Prevention Act[211] may apply, or when determining when the conditions have occurred to trigger a standby guardianship or terminate a temporary guardianship. The standards cover both guardianships of a minor's person and conservatorships of a minor's estate. In some states, both types of proceedings are within the jurisdiction of probate courts. In many other states, probate court jurisdiction is limited to protecting the property and financial interests of a minor with jurisdiction over custody matters vested in the family or juvenile court. Standard 3.5.12 specifically addresses the latter situation, urging that the courts communicate and coordinate with each other to ensure that the best interests of the minor are served. In most instances, the standards in this section urge probate courts to follow practices similar to those recommended in Section 3.3 for guardianships/conservatorships of adults.

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[209] Testamentary appointment of a guardian or conservatorship for a minor is effective automatically subject to later challenge; non-testamentary appointments require court approval. *See* Unif. Prob. Code 5-201, 5-202 (2008); UGPPA §§ 201 and 202 (1997).

[210] Uniform Child Custody Jurisdiction and Enforcement Act (1997) http://www.law.upenn.edu/bll/archives/ulc/uccjea/final1997act.htm

[211] 28 U.S.C. §1738A.

STANDARD 3.5.1 PETITION

A. Probate courts should adopt a clear, easy to complete form petition written in plain language for initiating proceedings regarding the non-testamentary appointment of a guardian/conservator for a minor.

B. The petition form, together with instructions, a description of the jurisdiction of the probate court and, if applicable, the jurisdiction of the juvenile or family court regarding guardianships/conservatorships of minors, and an explanation of guardianship and conservatorship and the process for obtaining one, should be readily available at the court, in the community, and on-line.

C. A petition to establish a guardianship or conservatorship should be verified and require at least the following information:

(1) The full name, physical and mailing address of the petitioner(s)

(2) The relationship, if any, between the petitioner(s) and the minor

(3) The full name, age, and physical address or location of the minor

(4) Whether the minor may be a member of a federally recognized tribe or a citizen of another country

(5) If the petitioner(s) is/are not the parent(s) or sole legal guardian(s) of the minor, the full name, physical and mailing address of each parent of the child whose parental rights have not been legally terminated by a court of proper jurisdiction

(6) The reasons why a guardianship and/or conservatorship is being sought

(7) The guardianship/conservatorship powers being requested and the duration of those powers

(8) Whether other related proceedings are pending

(9) In conservatorship cases:

(a) The nature and estimated value of assets

(b) The real and personal property included in the estate

(c) The estimated annual income and annual estimated living expenses for the minor during the ensuing twelve (12) months

(d) That the petitioner(s) is/are qualified for and capable of posting a surety bond in the total of the present value of all real property assets included in the estate plus the annual income expected during the ensuing twelve (12) months

D. If the petition is for appointment of a standby guardian or conservator it should be accompanied by documentation of the parent's debilitating illness or lack of capacity.[212]

E. The petition should be reviewed by the probate court or its designee to ensure that all of the information required to initiate the guardianship/conservatorship proceeding is complete.

COMMENTARY

The standard lists the minimum information that probate courts and all parties to a guardianship or conservatorship proceeding for a minor need in order to proceed. It attempts to strike a balance between making guardianship/conservator proceedings available to parents or others concerned about the well-being of a child, while providing the court with the fundamental information necessary to proceed. Paragraph C(4) of the standard is included to enable probate courts to comply more easily with the requirements of the Indian Child Welfare Act[213] and the Vienna Convention on Consular Relations.[214] The

[212] At least 24 states and the District of Columbia permit parents with a degenerative, incurable disease to seek appointment of a person who will serve as guardian/conservator of their children upon their death or incapacity. *See* J.S. Rubenstein, *Standby Guardianship Legislation: At the Midway Point*, 2 ACTEC Journal 33 (2007); UGPPA §202 (1997).

[213] 25 USC §§1901 *et seq.*

[214] Vienna Convention on Consular Relations, Art. 37 21 U.S.T. 77 (1963) http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf, which requires notification of the local consulate whenever a guardian may be appointed for a foreign national.

standard urges courts to use forms that minimize "legalese" and are as easy to complete as possible but requires that petitioners verify the statements made in order to protect against frivolous filings.

While the standard sets forth the minimum information that should be required, good practice suggests that the following information will often be needed and should be included as part of the petition itself or as attachments to it, including:

- **The name and address of any person responsible for the care or custody of the minor including an existing guardian/conservator.**
- **The name and address of any current guardian, conservator, legal representative or representative payee for the minor.**
- **Existing powers of attorney applicable to the minor.**
- **The name, address, and interest of the petitioner.**[215]

In addition, if the petition is for appointment of a stand-by guardian or conservator, a doctor's certificate or other documentation that the parent is suffering from a progressively chronic or irreversible illness that is fatal or will result in the parent's inability to protect the well-being and property of the minor.

Probate courts should develop and distribute forms that will assist the petitioner to meet these requirements. Whenever possible, petitions, instructions, and explanations of guardianship/conservatorship for minors, and the process for seeking them should be available on the court website as well as at libraries. Probate courts should be able to provide a list of community resources for free or low-cost legal services, such as bar referral services, legal aid offices, and law school clinics. To the extent permissible under state law and court rules, petitioners should be able to complete and submit petitions electronically. Informational brochures should be available on the court website and distributed to all persons upon request or to those who file guardianship/conservatorship petitions.

Promising Practices

Several court systems and individual courts provide information regarding guardianship/conservatorship for minors proceedings on their websites including the forms necessary to initiate a conservatorship or guardianship. For example:

California Judicial Branch
http://www.courts.ca.gov/documents/gc210.pdf

District of Columbia Superior Court
http://www.dccourts.gov/internet/legal/aud_probate/gdnlegal.jsf

Maricopa County, AZ Superior Court
http://www.superiorcourt.maricopa.gov/SuperiorCourt/Self-ServiceCenter/Forms/ProbateCases/prob_group_4.asp

Philadelphia County, PA Court of Common Pleas
http://www.pacourts.us/NR/rdonlyres/11E9588C-4158-4962-8ACA-BC95A7EA1B1E/0/OCRFormOC04.%20target=

In addition, the Denver, CO Probate Court employs *pro se* facilitators to assist persons seeking to file a petition for guardianship. http://www.denverprobatecourt.org/

[215] *See Model Statute on Guardianship and Conservatorship*, §19(b) in Bruce D. Sales, D. Matthew Powell, & Richard Van Duizend, Disabled Persons and the Law, 573-574 (Plenum Press, 1982).

STANDARD 3.5.2 NOTICE

A. Probate courts should ensure that timely notice of the guardianship/conservator proceedings is provided to:
(1) The minor if the minor has attained a sufficient age to understand the nature of the proceeding.
(2) Any person who has had primary care and custody of the minor during the 60 days prior to the filing of the petition.
(3) The minor's parents, step-parents, siblings, and other close kin.
(4) Any person nominated as guardian/conservator.
(5) Any current guardian, conservator, legal representative or representative payee for the minor.
(6) Notice to a representative of the minor's tribe if the minor is Native American.

B. Any written notice should be in plain language and in easily readable type. At the minimum, it should set forth the time and place of judicial hearings, the nature and possible consequences of the proceedings, and the rights of the minors and of persons entitled to object to the appointment of a guardian/conservator of the minor. A copy of the petition should be attached to the written notice.

C. Probate courts should implement a procedure whereby any interested person can file a request for notice and/or a request to intervene in the proceedings.

D. Probate courts should require that proof that all required notices be filed.

COMMENTARY

This standard underscores the general notice requirements of Standard 3.1.1 (Notice) by requiring specific timely notice of guardianship and conservatorship proceedings to the minor and others entitled to notice. It generally follows the notice provision in the Uniform Guardianship and Protective Proceedings Act.[216] Consistent with the trend in other types of proceedings involving minors, it does not specify a minimum age at which the minor is entitled to receive notice and participate in the hearing.[217] The notice should be written and personally delivered. When the officers serving the notice are under court control, it may be appropriate to provide them with special training to facilitate interactions with minors. In addition to providing notice to the minor, notice should ordinarily also be given to those who are most likely to have interest in the minor's well-being and safety, as well as the proposed guardian/conservator and any previously appointed legal representatives. This may include a tribal representative if the minor may be a member of a recognized Indian tribe.[218]

Probate courts should establish a procedure permitting interested persons who desire notification before a final decision is made in a guardianship/conservatorship proceeding to file a request with the court for notice or to intervene in the proceedings.[219] This procedure allows persons interested in the establishment or monitoring of a guardianship or conservatorship to remain abreast of developments and to bring relevant information to the court's attention. The request for notice should contain a statement showing the interest of the person making the request. Intervention in the proceedings by an interested party, including the nomination of someone else as guardian or conservator, should be permitted. A fee may be attached to the filing of the request and a copy of the request should be provided to the minor's guardian/conservator (if any). Unless the probate court makes a contrary finding, notice should be provided to any person who has properly filed this request.

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[216] UGPPA §205(a) (1997).

[217] *See e.g.,* AZ Juv. Ct. R. Pro., Rule 41 (2010); 42 U.S.C.A. § 675(5)(c) (2010).

[218] Indian Child Welfare Act, 25 USC §§1901 *et seq.*

[219] *See, e.g.,* UGPPA § 116 (1997); Unif. Pprob. Code § 5-116 (2008).

STANDARD 3.5.3 EMERGENCY APPOINTMENT OF A TEMPORARY GUARDIAN/CONSERVATOR FOR A MINOR

A. When permitted, probate courts should only appoint a temporary guardian or conservator for a minor *ex parte*:
(1) Upon the showing that unless granted temporary appointment is made, the minor will suffer immediate or irreparable harm and there is no one with authority or who is willing to act.
(2) In connection with the filing of a petition for a permanent guardianship or conservatorship for the minor.
(3) Where the petition is set for hearing on the proposed permanent guardianship or conservatorship on an expedited basis.
(4) When notice of the temporary appointment is promptly provided in accordance with Standard 3.5.2.
B. The minor or the person with custody of the minor should be entitled to an expeditious hearing upon a motion seeking to revoke the temporary guardianship or conservatorship.
C. Where appropriate, probate courts should consider issuing a protective order (or orders) in lieu of appointing a temporary guardian or conservator for a minor.
D. The powers of a temporary guardian or conservator should be carefully limited and delineated in the order of appointment.
E. Appointments of temporary guardians or conservators should be of limited and finite duration.

COMMENTARY

Emergency petitions seeking a temporary guardianship/conservatorship for a minor require the court's immediate attention. Ordinarily such petitions would arise when both parents are deceased, or when there is written consent from the custodial parent, but there is not time to serve the non-custodial parent before significant decisions must be made for the minor such as enrollment in school or medical treatment), or when for some other reason the safety of the minor is threatened and there is no one including the relevant child protection agency willing or authorized to act.

Because not only the minor's safety but also parental and other important rights are involved, emergencies, and the expedited procedures they may invoke require probate courts to remain closely vigilant for any potential due process violation and any attempt to use the emergency proceedings to interfere with an investigation or proceeding initiated by the relevant child protection agency. Thus, the standard calls for the request for an emergency petition to submitted in conjunction with a petition for appointment of a permanent guardian/conservator for the minor [See Standard 3.5.1], notice to all parties or potential parties listed in Standard 3.5.2, an expedited hearing,[220] and use of protective orders as a substitute for appointment of a guardian or conservator when appropriate. By requiring the showing of an emergency and the simultaneous filing of a petition for a permanent guardianship/conservatorship for the minor, probate courts will confirm the necessity for the temporary guardianship/conservatorship and ensure that it will not extend indefinitely. When the temporary guardianship or conservatorship is established for the minor, the date for the hearing on the proposed permanent guardianship/conservatorship should be scheduled. The order establishing the temporary guardianship/conservatorship should limit the powers of the temporary guardian or conservatorship to only those required by the emergency at hand and provide that it will lapse automatically upon that hearing date. The temporary guardianship/conservatorship order may be accompanied by

[220] *See e.g.*, NH REV. STAT. ANN. §463:7 (2011); UGGPA §204(e).

support, visitation, restraining, or other relevant orders when appropriate.[221] Full bonding of liquid assets should be required in temporary conservatorship cases. The length of temporary guardianships/conservatorships for minors should be in accord with state law, but should not extend for more than 30 days.[222]

When establishing the powers of the temporary guardian or conservator, the court should be cognizant of the fact that certain decisions by a temporary guardian or conservator may be irreversible or result in irreparable damage or harm (*e.g.*, the liquidation of the respondent's estate). Therefore, it may be appropriate for the court to limit the ability of the temporary guardian or conservator or a minor to make certain decisions without prior court approval (*e.g.*, sensitive personal or medical decisions such as abortion, organ donation, sterilization, civil commitment, withdrawal of life-sustaining medical treatment, termination of parental rights).

While the appointment of a temporary guardian or conservator for a minor provides a useful mechanism for making needed decisions during an emergency, it also can offer an option to a probate court that receives information that a currently appointed guardian or conservator is not effectively performing his or her duties and the welfare of the minor requires that a substitute decision maker be immediately appointed. Under such circumstances, the authority of the permanent guardian or conservator can be suspended and a temporary guardian appointed for the minor with the powers of the permanent guardian or conservator. The probate court should, however, ensure that this temporary guardianship/conservatorship also does not extend indefinitely by including a maximum duration for it in its order.

STANDARD 3.5.4 REPRESENTATION FOR THE MINOR

A. Probate courts should appoint a guardian *ad litem* for the minor if the guardianship results from a child neglect or abuse proceeding, there are grounds to believe that a conflict of interest may exist between the petitioner or proposed guardian and the minor, or if the minor is not able to comprehend the nature of the proceedings.

B. Probate courts should appoint an attorney to represent a minor if the court determines legal representation is needed or if otherwise required by law.

COMMENTARY

Most proceedings for appointment of a guardian/conservator for a minor are uncontested and the best interests of the minor will be served by the appointment of the proposed guardian/conservator. However, with greater use of other kinship guardianship as a means for providing a permanent placement for children who have been abused or neglected,[223] there will be greater need for probate courts to obtain more in-depth information regarding a minor's best interests when making determinations whether to appoint a guardian or conservator for a minor and whom to appoint.[224]

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[221] NH Rev. Stat. Ann. §463:7 (II) (2011).

[222] NH Rev. Stat. Ann. §463:7 (2011); UGGPA §204(e).

[223] Fostering Connections To Success And Increasing Adoptions Act, 42 U.S.C. 671(a) (2008).

[224] The Pew Commission on Children in Foster Care, Fostering the Future: Safety, Permanence and Well-Being for Children in Foster Care, 43 (2004), http://pewfostercare.org/research/docs/FinalReport.pdf.

Guardians *ad litem* are persons appointed to represent the best interests of a minor. They are responsible for conducting an independent investigation in order to provide the court with information and recommendations regarding what outcome will best serve the child's needs.[225] Some courts use CASAs (Court Appointed Special Advocates) who are specially screened and trained volunteer(s) to serve in this role in cases involving child abuse and neglect.[226] Both guardians *ad litem* and CASAs take the views and wishes of the minor into account but make their own determination of what are the child's or youth's best interests. Attorneys appointed to serve as legal counsel, on the other hand, must advocate for the outcome sought by their client. When appointing a guardian *ad litem*, CASA, or attorney for a minor, it is good practice for probate court judges to state their duties on the record and the reasons for the appointment.[227] Especially in jurisdictions with a significant Native American population, guardians *ad litem*, CASAs, and attorneys appointed for a minor should be familiar with the requirements of and reasons underlying ICWA.

STANDARD 3.5.5 PARTICIPATION OF THE MINOR IN THE PROCEEDINGS

Probate courts should encourage participation of minors who have sufficient capacity to understand and express a reasoned preference in guardianship/conservatorship proceedings and to consider their views in determining whether to appoint a guardian/conservator and whom to appoint.

COMMENTARY

From the time of the Romans, children age 14 or older had a voice in selecting a guardian.[228] This legal tradition is reflected in the Uniform Guardianship and Protective Proceedings Act and many state statutes.[229] There is growing recognition that presence and participation of a child in a proceeding determining residence and custody is important for both the child and the court both in the literature regarding dependency proceedings and in both family court and probate court statutes.[230] This has led some states to provide that minors of any age may not just formally object to a guardian but may also nominate a guardian if they are "of sufficient maturity to form an intelligent preference."[231] While a judge is not required to follow the preferences of a minor regarding the appointment of a guardian or conservator, it is good practice to at least ask the children or youth for their views.

Promising Practices

Resources to assist judges in meaningfully and appropriately involving minors in court proceedings are available from the American Bar Association Center on Children and the Law.
http://www.americanbar.org/groups/child_law/what_we_do/projects/empowerment/youthincourt.html

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[225] *See* National Council of Juvenile and Family Court Judges (NCJFCJ), Adoption and Permanency Guidelines: Improving Court Practice in Child Abuse and Neglect Cases, 83-84 (NCJFCJ, 2000).

[226] *See* www.casaforchildren.org

[227] UGGPA, §115 (2007).

[228] David M. English, *Minor's Guardianship in an Age of Multiple Marriage*, 1995 Institute on Estate Planning, 5-15 (1995).

[229] *Id.* at 5-16 – 5-18; UGPPA §203 (1997).

[230] NCJFCJ, *supra*, note 225, at 20; Andrea. Khoury, *With Me, Not Without Me: How to Involve Children in Court*, 26 Child L. Prac. 129 (2007); Miriam A. Krinsky, *The Effect of Youth Presence in Dependency Court Proceedings*, Juv. & Fam. Just. Today, Fall 2006, at 16; Pew Commission, *supra*, note 224, at 41; FL. Stat. Ann. §39.701(6)(a) (2012); NH Rev. Stat. Ann. §463-8 (II) (2012).

[231] *E.g.*, Cal. Prob. Code §1514(e)(2) (2012); Conn. Gen. Stat. Ann. §45a-617 (2012); NH Rev. Stat. Ann. §463.8 (IV) (2012).

STANDARD 3.5.6 BACKGROUND CHECKS

A. Probate courts should request a national background check on all prospective guardians and conservators of minors, other than those specified in paragraph B., before an appointment is made to determine whether the individual has been: convicted of a relevant crime; determined to have committed abuse, abandonment, neglect, or financial or sexual exploitation of a child, or a spouse or other adult; has been suspended or disbarred from law, accounting, or other professional license for misconduct involving financial or other fiduciary matters; or has a poor credit history.

B. Background checks should not be conducted for prospective guardians and conservators who have been the subject of such a check as part of a certification or licensing procedure, or banks, trust companies, credit unions, savings and loan associations, or other financial institutions duly licensed or authorized to conduct business under applicable state or federal laws.

COMMENTARY

Given the vulnerability of children who have lost their parents through death, illness, or through action of a court, the authority of guardians and conservators, the opportunities for misuse of that authority, and the incidence of abuse and exploitation around the country, requiring prospective guardians and conservators to undergo a thorough criminal history and credit check is an appropriate safeguard. Currently the federal Fostering Connections to Success and Increasing Adoption Act requires at least a criminal records check,[232] and many states require both a criminal records check and a check of child abuse registries.[233]

The background information is intended to provide probate courts with information on which to base a decision whether the nominee should be appointed. Upon receiving such potentially disqualifying information, probate courts should weigh the seriousness of the offense or misconduct, its relevance to the responsibilities of a guardian or conservator, how recently the offense or misconduct occurred, the nominee's record since the offense or misconduct occurred, and the vulnerability of the minor. If there is some concern but not enough to disqualify a potential guardian or conservator, probate courts may require periodic post-appointment criminal history and/or credit checks of a guardian or conservator, a larger bond, more frequent reports or accountings, and/or more intensive monitoring.[234] [See Standards 3.5.9 through 3.5.11].

STANDARD 3.5.7 ORDER

A. Probate courts should tailor the order appointing a guardian or conservator for a minor to the facts and circumstances of the specific case.

B. In an order appointing a conservator or limited guardian for a minor, probate courts should specify the duties and powers of the conservator or limited guardian, including limitations to the duties and powers, requirements to establish restrictive accounts or follow other protective measures, and any rights retained by the minor.

C. If the order is for a temporary, limited, or emergency guardianship or conservatorship for a minor, probate courts should specify the duration of the order.

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[232] 42 U.S.C. §471(a)(2)(D); *see e.g.*, NH Rev. Stat. Ann. §463.5(V).

[233] *See e.g.*, NH Rev. Stat. Ann. §463.5(V).

[234] In light of the abuses that have occurred, some probate courts may wish to require periodic updates of background checks in all cases in order to ensure that the person appointed continues to be fit to serve.

D. Probate courts should inform newly appointed guardians about their responsibilities to the minor, the requirements to be applied in making decisions and caring for the minor, and their responsibilities to the court including the filing of plans and reports.

E. Probate courts should inform newly appointed conservators of minors about their responsibilities to the minor, the requirements to be applied in managing the minor's estate, and their responsibilities to the court including the filing of inventories, asset management plans, and accountings.

F. Following appointment, probate courts should require a guardian, or conservator for a minor to:

(1) Provide a copy of and explain to the minor the terms of the order of appointment including the rights retained

(2) Serve a copy of the order to the persons who received notice of the petition initiating the guardianship/conservatorship proceeding and those persons whose request for notice and/or to intervene has been granted by the court and file proof of service with the court

(3) Record the order in the appropriate property record if the minor's estate includes real estate

COMMENTARY

Most individuals appointed as a guardian or conservator know little about what is expected of them and the scope of their responsibilities and authority. Thus, including a clear, complete statement of duties and powers in the appointment order (and/or the letters of authority) is an important first step in ensuring that minors will receive the protection and services needed. Generally, a guardian of a minor has the powers and responsibilities of a parent regarding the minor's well-being, care, education, and support.[235] Conservators of minors should have duties and authorities similar to those of a conservator of an incapacitated adult. By listing the powers and duties of the guardian/conservator, the probate court's order can serve as an educational roadmap to which the guardian/conservator can refer to help answer questions about what the guardian/conservator can or cannot do in carrying out the assigned responsibilities. This will also as serve as notice to third parties with whom the guardian/conservator may have dealings regarding the limitations on the powers and authority.

The Uniform Guardianship and Protective Proceedings Act provides that a probate court may establish a temporary, emergency, or limited guardianship for a minor in certain circumstances.[236] [See Standard 3.5.3] When such a guardianship or conservatorship is established, it is all the more important for probate courts to specify the guardian's/conservator's duties and authority, limitations on that authority, the responsibilities and rights retained by the minor or the minor's parents, and the duration of the appointment, in order to limit uncertainty within the family and by health providers, school officials, and creditors. Probate courts may also require use of protective measures such as establishment of restricted accounts, deposit of funds with the court, or transfers of property pursuant to the Uniform Transfer to Minors Act if applicable.[237]

Guardians of minors should also be required to obtain prior court approval before a minor is permanently removed from the court's jurisdiction. Prior court approval, however, should not be required where the removal is temporary in nature (*e.g.*, when the minor is being taken on a vacation or is sent to a school out of state).

Requiring the guardian/conservator to serve a copy of the order of appointment to those persons who received notice of the petition for guardianship or conservatorship and those persons whose request for notice and/or to intervene have been granted by the court will promote their continued involvement in monitoring the minor's situation. Explaining the

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[235] UGPPA, §§207 – 208 (1997).

[236] UGPPA, §§204(d) & (e), and 206(b) (1997).

[237] Uniform Transfers to Minors Act (1986), http://www.law.upenn.edu/bll/archives/ulc/fnact99/1980s/utma86.htm.

order of appointment to minors in terms they can understand facilitates the minor's awareness of what is happening and encourages communication between the minor and the guardian/conservator. Recording a guardianship/conservatorship order provides notice to others regarding who has the authority to engage in significant financial transactions including the sale of real property.

STANDARD 3.5.8 ORIENTATION, EDUCATION, AND ASSISTANCE

Probate courts should develop and implement programs for the orientation, education, and assistance of guardians and conservators for minors.

As noted previously, most newly appointed guardians and conservators are not fully aware of their responsibilities and how to meet them. A number of states currently provide at least some materials that explain the duties of guardians and conservators for minors (*e.g.*, printed guidelines CT; a video, GA; on-line instructions, AZ).[238] Where appropriate, the materials should be in a language other than English to supplement the English version (*e.g.*, GA). In addition, as with guardians and conservators for disabled adults, probate courts should have some program or process for assisting guardians or conservators for minors who are uncertain about how best to meet their responsibilities or whether they have the authority to take the actions necessary. [See Standard 3.3.14]

STANDARD 3.5.9 BONDS FOR CONSERVATORS OF MINORS

Except in unusual circumstances, probate courts should require all conservators to post a surety bond in an amount equal to the value of the liquid assets and annual income of the estate.

COMMENTARY

Among the measures probate courts may use to protect minors is to require newly appointed conservators to furnish a surety bond[239] conditioned upon the faithful discharge by the conservator of all assigned duties.[240] The requirement of bond should not be considered as an unnecessary expense or as punitive. It is insurance against any loss being suffered by the minor. Bonding or some equally protective alternative (*e.g.*, accounts that require a court order for all withdrawals, court-maintained accounts, etc.) protect the court from public criticism for having failed in its duty and responsibility to protect the minor's estate from loss, misappropriation, or malfeasance on the part of the conservator.

In determining the amount of the bond, or whether the case is one in which an alternative measure will provide sufficient protection, probate court should consider such factors as:

- The value of the estate and annual gross income and other receipts.
- The extent to which the estate has been deposited under an effective arrangement requiring a court order for its removal.
- Whether a court order is required for the sale of real estate.
- Whether a restricted account has been establish and proof provided to the court that the restrictions will be enforced by the bank.
- The frequency of the conservator's required reporting.

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[238] http://www.jud.state.ct.us/probate/Guardian-KID.pdf; http://www.gaprobate.org/guardianship.php; https://www.azcourts.gov/Portals/34/Forms/Probate/gardinst.pdf.

[239] As noted in Standard 3.1.2 (Fiduciaries), a personal bond adds little to a personal representative's oath or acceptance of appointment. This standard addresses surety bonds, that is, bonds with corporate surety or otherwise secured by the individual assets of the personal representative.

[240] *See* UNIF. PROB. CODE § 5-415 (2008) (unless otherwise directed, the size of the bond should equal the aggregate capital value of the estate under the conservator's control, plus one year's estimated income, minus the value of securities and land requiring a court order for their removal, sale, or conveyance).

- The extent to which the income or receipts are payable to a facility responsible for the minor's care and custody.
- Whether the conservator was appointed pursuant to a nomination that requested that bond be waived.
- The information received through the background check.
- The financial responsibility of the proposed conservator.

STANDARD 3.5.10 REPORTS

A. Probate courts should require guardians of minors to file at the hearing or within 60 days:
(1) A guardianship plan, with annual updates thereafter.
(2) Advance notice of any intended absence of the minor from the court's jurisdiction in excess of 30 calendar days.
(3) Advance notice of any major anticipated change in the minor's physical location (*e.g.*, a change of abode).

B. Probate courts should require conservators for minors to file within 60 days, an inventory of the minor's assets and an asset management plan to meet the minor's needs and allocate resources for those needs, with annual accountings and updates thereafter. Probate courts should require conservators to submit, for approval, an amended asset management plan whenever there is any significant deviation from the approved plan or a significant change from the approved plan is anticipated.

COMMENTARY

The standard urges that guardians for minors be required to provide a report to the probate court at the hearing or within 60 days of appointment and annually thereafter until discharged. Similarly, conservators for minors must immediately commence making an inventory of the minor's assets and submit the inventory and an asset management plan for the first twelve (12) months within 60 days of appointment.

- The guardian's report should contain descriptive information on the services and care being provided to the minor, significant actions taken by the guardian, and the expenses incurred by the guardian.
- The conservator's report should include a statement of all available assets, the anticipated income for the ensuing twelve (12) months, the anticipated financial needs and expenses of the minor, and the investment strategy and asset allocation to be pursued (if applicable). As part of this process, the conservator should consider the purposes for which these funds are to be managed, specify the services and care to be provided to the minor and their costs, describe significant actions taken, and the expenses to date.

These reporting requirements ensure that probate courts quickly receive information to enable them to better determine the condition of the minor, the amount of assets and income available, and the initial performance of the guardian or conservator. The Uniform Guardianship and Protective Proceedings Act authorizes courts to require guardians and conservators of minors to "report on the condition of the ward and account for money and other assets in the guardian's possession or subject to the guardian's control" as required by rule or at the request of an interested person.[241] Several states require guardians and conservators of minors to file reports periodically as well.[242]

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[241] UGPPA, §207(b)(5) (1997).

[242] *See e.g.*, FL. STAT. ANN. §744.367 (2012); N.H. STAT. REV. §463.17 (2012).

Probate courts should provide explicit instructions regarding the information to be contained in initial and subsequent reports. This can be accomplished either through clear forms with detailed instructions or through an on-line program such as that developed by Minnesota for conservators of incapacitated adults.[243] Where there is considerable overlap or interdependence, probate courts may authorize the joint preparation and filing of the plans and reports of the guardian and conservator.

The plans should be neither rote nor immutable. They should reflect the condition and situation of each individual minor rather than provide general statements applicable to anyone. For example, the investment strategy and management objectives may be different for a relatively young minor than for one who is older, may vary depending on the source or purpose of the assets, or may be different where there is a greater need to replenish the funds for long-term support.[244] Minor changes to a guardianship plan (*e.g.*, changing doctors, replacing one social activity with another, etc.) and prudent changes in a conservatorship's investments may be implemented without consulting the court. However, probate courts should advise guardians and conservators that except in emergencies, there should be no substantial deviation from the court-approved plan without prior approval. For example, any absence of the guardian or minor from the jurisdiction of the court that will exceed 30 calendar days should be reported as should any anticipated move of the minor within or outside the jurisdiction so that the court can readily locate the minor at all times. In addition, if at any time there is any change in circumstances that might give rise to a conflict of interest or the appearance of such a conflict, it should be reported to the probate court as quickly as possible.

Finally, the standard provides for annual updates of the initial guardianship plan and conservatorship asset management plan to enable probate courts to ensure that the guardian is providing the minor with proper care and services and respecting the minor's autonomy, and that the estate is being managed with the proper balance of prudence and attention to the current needs and preferences of the minor. Along with reporting on what has been done during the reporting period, it is essential that the guardian inform the court about changes in the minor's condition, either for the better or for the worse, and suggest what changes may be needed in the scope of the guardianship order. [See Standard 3.3.16]

STANDARD 3.5.11 MONITORING, MODIFYING, TERMINATING A GUARDIANSHIP OR CONSERVATORSHIP OF A MINOR

A. Probate courts should monitor the well-being of the minor and the status of the minor's estate on an on-going basis, including, but not limited to:
- **(1) Ensuring that plans, reports, inventories, and accountings are filed on time.**
- **(2) Reviewing promptly the contents of all plans, reports, inventories, and accountings.**
- **(3) Ascertaining the well-being of the minor and the status of the estate, as needed.**
- **(4) Assuring the well-being of the minor and the proper management of the estate, improving the performance of the guardian/conservator, and enforcing the terms of the guardianship/conservatorship order.**

B. When required for the well-being of the minor or the minor's estate, probate courts should modify the guardianship/conservatorship order, impose appropriate sanctions, or remove and replace the guardian/conservator, or take other actions that are necessary and appropriate.

C. Before terminating a guardianship or conservatorship of a minor, probate courts should require that notice of the proposed termination be provided to all interested parties.

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[243] www.mncourts.gov/conservators.

[244] *See generally* Edward C. Halbach Jr., *Trust Investment Law in the Third Restatement*, 27 Real Prop., Prob. & Trust J. 407 (1992) (discussing the background and applications of principles of fiduciary prudence as formulated in the Third Restatement of the Law of Trusts).

COMMENTARY

This standard parallels that regarding monitoring of guardianships and conservatorships for incapacitated adults. [See Standard 3.3.17] As in the case of minors found to have been neglected or abused, probate courts have an on-going responsibility to make certain that the minor for whom they have appointed a guardian or conservator is receiving the services and care required, the estate is being managed appropriately, and the terms of the order remain consistent with the minor's needs and condition. The review, evaluation, and auditing of the initial and annual plans, inventories, and reports and accountings by a guardian or conservator are essential steps in fulfilling this duty. Making certain that those documents are filed is a necessary precondition. Probate courts should also have the capacity to investigate those situations in which guardian/conservators may be failing to meet their responsibilities under the order or exceeding the scope of their authority.

A principal component of the review is to ensure that the guardian/conservator included all of the information required by the court in these reports. Probate courts should not permit conservators to file accountings that group expenses into broad categories, absent inclusion of all vouchers, invoices, receipts, and statements to permit comparison against the returns. Prompt review of the guardian's or conservator's reports enables probate courts to take early action to correct abuses and issue a show cause order if the guardian/conservator has or appears to have violated a provision of the original order. Many of the red flags and concerns listed in the commentary to Standard 3.3.17 apply to guardianships/conservatorships of minors as well as those for incapacitated adults.

Some jurisdictions also require guardians and/or conservators to distribute reports and accountings to family members and other interested persons. This provides probate courts with additional opportunities for independent reviews by others having an interest in the welfare of the minor. On the other hand, given the personal information contained in reports and the financial disclosures in accountings, it may also compromise a minor's privacy or generate family disagreements regarding the allocation of assets that have little to do with the performance of the conservator.

If a probate court finds that a guardian/conservator for a minor is not performing the required duties or is performing them so inadequately that the well-being of the minor and/or the minor's is being threatened, it should take all necessary remedial actions including removing and the guardian/conservator and appointing a temporary or full replacement. If the minor has been abused or neglected or possible criminal conduct has occurred regarding the minor or the minor's state, the probate court should report the matter to local child protection or law enforcement agency.

A guardianship of a minor generally may be terminated upon the minor's adoption, attainment of majority, emancipation, or death, or upon a determination that termination will be in the best interest of the minor (*e.g.*, at the request of a parent who has recovered from a debilitating illness or addiction).[245] Some states, reflecting the provisions of the federal Fostering Connections to Success and Increasing Adoption Act,[246] permit courts to delay termination until age 21 in certain circumstances.[247] Because family members, care givers, educational institutions, and creditors may have an interest in the termination, notice of the proposed termination and an opportunity to be heard should be provided before issuance of the termination order.

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[245] *See e.g.*, UGPPA §210(b).

[246] 42 USC §§ 673(a)(4)(A)(i) & 675 (8)(B)(iii).

[247] *See e.g.*, NH Rev. Stat. Ann. §463:15 (II) (2011).

STANDARD 3.5.12 COMPLAINT PROCESS

Probate courts should establish a clear and easy-to-use process for communicating concerns about guardianships and conservatorships for minors and the performance of guardians/conservators. The process should outline circumstances under which a court can receive *ex parte* communications. Following the appointment of a guardian or conservator, probate courts should provide a description of the process to the minor, the guardian/conservator, and to all persons notified of the original petition.

COMMENTARY

The standard urges probate courts to establish a process for minors, members of the minor's family, or other interested persons to question whether the minor is receiving appropriate care and services, the minor's estate is being managed prudently for the benefit of the minor, or whether the guardianship/conservatorship should be modified or terminated. In designing the process, care should be taken to ensure that that an unrepresented person is able to use it, that the court receives the necessary information, and that the process is flexible enough to accommodate emergency or urgent circumstances. The process could include designation of a specific member of the staff to receive and review complaints, a designated e-mail address, and/or an on-line form. Requiring that the request be written (whether electronically or on paper) can discourage frivolous or repetitious requests.

When a complaint is received, it should be reviewed to determine how it should be addressed. Approaches include a referral to services, sending a court visitor to investigate, requesting the guardian or conservator to address the issue(s) raised, conducting an evaluation of the minor under guardianship or conservatorship, or setting a hearing on the matter.

STANDARD 3.5.13 COORDINATION WITH OTHER COURTS

When there is concurrent or divided jurisdiction over a minor or a minor's estate, probate courts should communicate and coordinate with the other court or courts having jurisdiction to ensure that the best interests of the minor are served and that orders are as consistent as possible.

COMMENTARY

In many states, guardianships of minors are matters within the jurisdiction of the juvenile or family court, and conservatorships of the estate of a minor are within the jurisdiction of the probate court.

> Guardianship of the person and the awarding of custody are essentially equivalent. . . . Family courts have the authority to decide custody between competing parents, but they may also have the authority to award custody to third persons. Family courts also frequently appoint guardians as a prelude to adoption. Finally, guardians may be appointed by the juvenile courts for children who have been abused, neglected, or adjudicated delinquent. . . . Unless otherwise ordered by the court, a guardian of a minor's person has custody of the child and the authority of a parent, *but without the financial responsibility*.[248] [emphasis added]

Protection of the minor's best interests and well-being are best served when the judges of the respective courts talk and cooperate with each other in making appointments, fashioning orders, and mitigating attempts to use the procedures of one court to undercut the process in another.[249]

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[248] English, *supra*, note 228, at 5-4.

[249] *Id.* at 5-5.

300 Newport Ave.
Williamsburg, VA 23185-4147
Phone (800) 616-6164

DENVER, CO
707 17th St., Ste. 2900
Denver, CO 80202-3429

ARLINGTON, VA
2425 Wilson Blvd., Ste. 350
Arlington, VA 22201-3320

WASHINGTON, DC
111 Second St., NE
Washington, DC 20002-7303

www.ncsc.org

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Orphans' Court Proceedings Transcript Options as of September 2021

Jurisdiction	Audio Recording v. Written Transcript	Court reporter in courtroom during proceedings
Alleghany County	Audio recording on cd	No court reporter; electronic recording
Anne Arundel County	Audio recording on cd or written transcript	No court reporter; electronic recording
Baltimore City	Audio recording on cd or written transcript;	No court reporter; electronic recording
Baltimore County	audio recording on cd or written transcript;	No court reporter; electronic recording
Calvert County	Audio recording on cd or written transcript;	No; electronic recording
Caroline County	Audio recording on cd or written transcript;	No; electronic recording
Carroll County	Audio recording on cd	No clear response; said a "court reporter listens in"
Cecil County	Audio recording through Circuit Court	No court reporter; electronic recordings
Charles County	Audio recording	Yes, court reporter
Dorchester County	Audio recording;	No, court reporter; electronic recording
Frederick County	Audio recording	No, court reporter; electronic recording
Garrett County	Audio recording	No, court reporter; Electronic recording
Harford County	*Waiting to hear back regarding the process*	*Waiting to hear back regarding the process*

Orphans' Court Proceedings Transcript Options as of September 2021

Howard County	Audio cd;	No court reporter; electronic recording;
Kent County	Audio cd	No court reporter; electronic recording
Montgomery County	Audio cd or written transcript through the Court Technical Services Office	No court reporter; electronic recording
Prince George's County	Audio cd	No court reporter; electronic recording
Queen Anne's County	Audio cd	No court reporter; electronic recording
St. Mary's County	Audio cd	No court reporter; electronic recording
Somerset County	Audio cd	No, court reporter; Electronic recording
Talbot County	Audio cd	No, court reporter; Electronic recording
Washington County	*Waiting to hear back regarding their process*	*Waiting to hear back regarding their process*
Wicomico County	Audio cd	No, court reporter; electronic recording
Worcester County	Written transcript (the head of court provides this)	No, court reporter; Electronic recording

State	Cases heard by
Alabama	Alabama Probate Courts (specialized probate courts)
Alaska	Superior Court (general jurisdiction trial court)
Arizona	Superior Court (general jurisdiction trial court)
Arkansas	Circuit Courts (general jurisdiction trial court)
California	Superior Court (general jurisdiction trial court)
Colorado	District Court (general jurisdiction trial court) and Denver Probate Court
Connecticut	CT Probate Courts (specialized probate court)
Delaware	Court of Chancery (general jurisdiction trial court)
D.C.	Superior Court (general jurisdiction trial court)
Florida	Circuit Courts (general trial jurisdiction)
Georgia	Probate Court (specialized probate court)

Hawaii	Circuit Courts Family Courts (for guardianship of adults) (general jurisdiction trial court)
Idaho	District Court (general jurisdiction trial court)
Illinois	Circuit Courts (general jurisdiction trial court)
Indiana	Circuit Court and Superior Court (general jurisdiction trial court) St. Joseph's County Probate Court (specialized probate court)
Iowa	District Court (general jurisdiction trial court)
Kansas	District Court (general jurisdiction trial court)
Kentucky	Circuit Court (general jurisdiction trial court)
Louisiana	District Courts (general jurisdiction trial court)
Maine	Probate Court (specialized probate court) Superior Court (general jurisdiction trial court)
Maryland	Orphans' Court (specialized probate court) Circuit Court (Harford & Montgomery Counties) (general jurisdiction trial court)

Massachusetts	Probate & Family Court (specialized probate court) District Court & Juvenile Court (concurrent jurisdiction)
Michigan	Probate Court (specialized probate court)
Minnesota	District Court (general jurisdiction trial court)
Mississippi	Chancery Court (general jurisdiction trial court)
Missouri	Circuit Court (general jurisdiction trial court)
Montana	District Court (general jurisdiction trial court)
Nebraska	County Courts (general jurisdiction trial court)
Nevada	District Court (general jurisdiction trial court)
New Hampshire	Circuit Court (specialized probate court)
New Jersey	Superior Court (general jurisdiction trial court)
New Mexico	Probate Court (specialized probate court)
New York	Surrogate's Court (specialized probate court)
North Carolina	Superior Court (general jurisdiction trial court)
North Dakota	District Court (general Jurisdiction trial court)
Ohio	Common Pleas Probate Division (specialized probate court)

Oklahoma	District Court (general jurisdiction trial court)
Oregon	County Court (general jurisdiction trial court)
Pennsylvania	Common Pleas (general jurisdiction trial court)
Rhode Island	Probate Court (specialized probate court)
South Carolina	Probate Court (specialized probate court)
South Dakota	Circuit Court (general jurisdiction trial court)
Tennessee	Probate Courts (County or Chancery) (general jurisdiction trial court)
Texas	County, District, or statutory Court (specialized probate courts in urban areas only)
Utah	District Court (general jurisdiction trial court)
Vermont	Superior Court Probate Division (specialized probate court)
Virginia	Circuit Court (general jurisdiction trial court)
Washington	Superior Court (general jurisdiction trial court)
West Virginia	Circuit Courts (general jurisdiction trial court)
Wisconsin	Circuit Courts (general jurisdiction trial court)
Wyoming	District Courts (general jurisdiction trial court)

“The History of the Orphans' Court in Maryland

Like much of the legal structure in Maryland, the Orphans’ Court's existence had its origins in England. The Orphans' Court owes its name, confusing to the 21st century mind, to the fact that the children of deceased male landowners were considered orphans when the father died. They were the persons for whom the "orphans' court" legal system was developed, to protect their inheritance interests.

Orphans' Courts were unknown in provincial Maryland and were first created in Maryland under the Acts of 1777. They were to be established in each county and served by a Register of Wills. The initial act established that in contested cases, the parties were entitled to file their actions in courts of general jurisdiction–the then general court, the chancery court, or the county court. In 1851, the judges of the Orphans' Court became constitutional judges. Present constitutional recognition of the Orphan's Court can be found in Maryland Constitution Article IV, §§ 1 and 40.

Judges of the Orphans' Courts exercise limited jurisdiction. The Court is charged by Estates and Trusts Article § 2-102 with conducting judicial probate, directing the conduct of personal representatives, and passing orders necessary for the administration of a decedent's estate. At the request of an interested person, an issue of fact arising in the Orphan's Court may be transferred to the Circuit Court for trial.

In 1964 and 1972, Montgomery County and Harford County, respectively, became exempted from Section 40 of Article IV of the Constitution, which otherwise requires that there be an Orphans' Court in every county and Baltimore City. Section 20(b) of Article IV provides that the judges of those two counties "shall each, alternately and in rotation...sit as an Orphans' Court for their county..."

No history of the Orphans' Court in Maryland would be complete without mention of the frequent attempts to abolish it or curtail it. The Constitution convention of 1867 considered the abolition of the Orphans' Court, ultimately choosing instead a substitute which provided for three elected judges. That substitute now resides in the Constitution.

Sources:

Address by Judge Ogle Marbury, Proceedings of the Maryland State Bar Association (52nd Annual Meeting 1947)

Decedents Estates in Maryland, Hon. A. Northrop and R. Schmuhl (1994)”

Source: https://mdcourts.gov/orphanscourt/history (as of September 2021)

DATA NOTES

A. In Montgomery and Harford counties, Circuit court judges sit as Orphan's Court judges. Data was received via the Office of The Register of Wills of both counties.

B. Harford County Office of The Register of Wills provided information on hearings within a calendar year, even when no appeal was issued.

C. Montgomery County's *Caveat Proceedings* are petitions to contest a will that were appealed to the Circuit Court from the Orphan's Court.

D. The Court of Special Appeals ("COSA") data set are cases wherein appeals originated from an Orphan's Court case.

COURT OF SPECIAL APPEALS

Location	LocationType	CaseID	CaseNumber	Style	FileDate	CaseTypeDesc	CaseStatusDate	CaseStatusDesc
Court of Special Appeals	COSA	29536172	CSA-REG-0302-2019	In the Matter of the Estate of Dinesh O. Parikh	4/25/2019 12:00:00 AM	Appeal of Civil Case	4/29/2020 12:00:00 AM	Closed
Court of Special Appeals	COSA	29724139	CSA-REG-0703-2019	In the Matter of the Estate of Diane Z. Kirsch	6/21/2019 12:00:00 AM	Appeal of Civil Case	7/2/2019 12:00:00 AM	Closed
Court of Special Appeals	COSA	30656417	CSA-REG-0253-2020	The Estate of Reginald Snowden, Jr. v. Terri Snowden	5/14/2020 12:00:00 AM	Appeal of Civil Case	1/20/2021 12:00:00 AM	Closed
Court of Special Appeals	COSA	31732731	CSA-REG-0497-2021	In Re: The Estate of Nadya V. Elis	6/10/2021 12:00:00 AM	Appeal of Civil Case	10/7/2021 12:00:00 AM	Pending Close
Court of Special Appeals	COSA	30181474	CSA-REG-1718-2019	Edgar C. Bradford v. Helen Smith, Personal Representative of the Estate of Christine Bradford, et al.	11/5/2019 12:00:00 AM	Appeal of Civil Case	2/19/2021 12:00:00 AM	Closed
Court of Special Appeals	COSA	31488913	CSA-REG-1488-2020	In Re: Estate of Raymond Lee McLaughlin	3/15/2021 12:00:00 AM	Appeal of Civil Case	3/15/2021 12:00:00 AM	Open
Court of Special Appeals	COSA	31313833	CSA-REG-1264-2020	In Re: Estate of Fredrick William Herold	1/13/2021 12:00:00 AM	Appeal of Civil Case	3/5/2021 12:00:00 AM	Closed
Court of Special Appeals	COSA	31584050	CSA-REG-0224-2021	In Re: Estate of Betty D. Alperstein	4/16/2021 12:00:00 AM	Appeal of Civil Case	4/16/2021 12:00:00 AM	Open
Court of Special Appeals	COSA	30714299	CSA-REG-0324-2020	In Re: The Estate of Adam Brandon	6/10/2020 12:00:00 AM	Appeal of Civil Case	5/13/2021 12:00:00 AM	Closed
Court of Special Appeals	COSA	31677443	CSA-REG-0388-2021	In Re: Estate of Fred F. Mirmiran	5/21/2021 12:00:00 AM	Appeal of Civil Case	5/21/2021 12:00:00 AM	Open
Court of Special Appeals	COSA	30774407	CSA-REG-0398-2020	In Re: The Estate of Myrtle Rollins	7/1/2020 12:00:00 AM	Appeal of Civil Case	5/3/2021 12:00:00 AM	Open
Court of Special Appeals	COSA	30774516	CSA-REG-0399-2020	In Re: The Estate of Leroy Rollins, Sr.	7/1/2020 12:00:00 AM	Appeal of Civil Case	5/3/2021 12:00:00 AM	Open

MDEC - CIRCUIT COURTS

Location	CaseID	CaseNumber	Style	FileDate	CaseTypeCode	CaseTypeDesc	CaseStatusDate	CaseStatusDesc
Allegany Circuit Court	21901906	C-01-CV-18-000348	The Estate of Wayne Arlynn Coughenour	7/25/2018 12:00:00 AM	APOC	Appeal - Orphans Court	4/29/2019 12:00:00 AM	Closed / Inactive
Allegany Circuit Court	30233402	C-01-CV-19-000482	In Re Estate of Donna Appel	11/22/2019 12:00:00	APOC	Appeal - Orphans Court	8/27/2020 12:00:00 AM	Closed / Inactive
Allegany Circuit Court	30056194	C-01-CV-19-000422	In Re Estate of Wayne Coughenour	9/26/2019 12:00:00 AM	APOC	Appeal - Orphans Court	5/7/2021 12:00:00 AM	Appealed
Allegany Circuit Court	30095448	C-01-CV-19-000431	In Re Estate of Edward Metz	10/8/2019 12:00:00 AM	APOC	Appeal - Orphans Court	2/5/2021 12:00:00 AM	Closed / Inactive
Anne Arundel Circuit Court	16697812	C-02-CV-17-003850	In Re Estate of Peter Adalbert Castruccio Estate #	12/28/2017 12:00:00	APOC	Appeal - Orphans Court	9/18/2019 12:00:00 AM	Closed
Anne Arundel Circuit Court	29397610	C-02-CV-19-000842	In RE: Estate of Joseph William Abbott. # 94647	3/15/2019 12:00:00 AM	APOC	Appeal - Orphans Court	8/16/2019 12:00:00 AM	Closed
Anne Arundel Circuit Court	29527692	C-02-CV-19-001251	In The Estate Of: Jeffrey Mason Goode Estate No.	4/23/2019 12:00:00 AM	APOC	Appeal - Orphans Court	8/15/2019 12:00:00 AM	Closed
Anne Arundel Circuit Court	22278882	C-02-CV-18-003371	In Re Estate Maria L Ortiz #73914	10/31/2018 12:00:00	APOC	Appeal - Orphans Court	7/25/2019 12:00:00 AM	Closed
Anne Arundel Circuit Court	29819438	C-02-CV-19-002283	In Re Estate of Corrine S Boyd #96637	7/19/2019 12:00:00 AM	APOC	Appeal - Orphans Court	7/19/2019 12:00:00 AM	Open
Anne Arundel Circuit Court	21849223	C-02-CV-18-001938	In Re: Joann P. Vignola Estate #91425	7/5/2018 12:00:00 AM	APOC	Appeal - Orphans Court	6/24/2019 12:00:00 AM	Closed
Anne Arundel Circuit Court	22253522	C-02-CV-18-003233	In Re Estate of Arthur L Prell #94710	10/29/2018 12:00:00	APOC	Appeal - Orphans Court	5/24/2019 12:00:00 AM	Closed
Anne Arundel Circuit Court	21964588	C-02-CV-18-002439	In Re Estate of John Gilkeson Guthrie # 92888	8/17/2018 12:00:00 AM	APOC	Appeal - Orphans Court	4/22/2019 12:00:00 AM	Closed
Anne Arundel Circuit Court	22429551	C-02-CV-19-000082	In Estate of Katharine R. Dempsey, Estate # 94461	1/11/2019 12:00:00 AM	APOC	Appeal - Orphans Court	2/27/2019 12:00:00 AM	Closed
Anne Arundel Circuit Court	30186462	C-02-CV-19-003592	In the Matter of the Estate of Roland Lee Catterton Sr	11/6/2019 12:00:00 AM	APOC	Appeal - Orphans Court	12/12/2019 12:00:00 AM	Closed
Anne Arundel Circuit Court	7010560	C-02-CV-16-003274	In Re Estate of Robert Fisher	10/26/2016 12:00:00	APOC	Appeal - Orphans Court	11/6/2019 12:00:00 AM	Closed
Anne Arundel Circuit Court	29397591	C-02-CV-19-000841	In Re: Estate of Katherine A Howard # 90899	3/15/2019 12:00:00 AM	APOC	Appeal - Orphans Court	11/27/2019 12:00:00 AM	Closed
Anne Arundel Circuit Court	21908052	C-02-CV-18-002174	In the Matter of the Estate of W. Byron Sorrell	7/27/2018 12:00:00 AM	APOC	Appeal - Orphans Court	1/25/2019 12:00:00 AM	Closed
Anne Arundel Circuit Court	30314334	C-02-CV-19-004077	In Re Estate of William Ferris # 96692	12/20/2019 12:00:00	APOC	Appeal - Orphans Court	6/1/2020 12:00:00 AM	Closed
Anne Arundel Circuit Court	29437188	C-02-CV-19-000965	In Re Estate of Florence Barbara Ridout # 94865	3/27/2019 12:00:00 AM	APOC	Appeal - Orphans Court	5/4/2020 12:00:00 AM	Closed
Anne Arundel Circuit Court	30234080	C-02-CV-19-003758	In Re Estate of Daniel Courtney Estate #97803	11/22/2019 12:00:00	APOC	Appeal - Orphans Court	5/13/2020 12:00:00 AM	Closed
Anne Arundel Circuit Court	29585708	C-02-CV-19-001471	In Re Estate of Jerome S Poore #96828	5/10/2019 12:00:00 AM	APOC	Appeal - Orphans Court	2/6/2020 12:00:00 AM	Closed
Anne Arundel Circuit Court	31151351	C-02-CV-20-002072	In Re Estate of Warren Prins	11/5/2020 12:00:00 AM	APOC	Appeal - Orphans Court	11/18/2020 12:00:00 AM	Open
Anne Arundel Circuit Court	29988054	C-02-CV-19-002868	In Re Estate of Jay Barron Magner Estate #89343	9/6/2019 12:00:00 AM	APOC	Appeal - Orphans Court	1/8/2020 12:00:00 AM	Closed
Anne Arundel Circuit Court	31977729	C-02-CV-21-001209	In Re Estate of John Prann	9/7/2021 12:00:00 AM	APOC	Appeal - Orphans Court	9/7/2021 12:00:00 AM	Open
Anne Arundel Circuit Court	32006679	C-02-CV-21-001251	In Re Estate of David Elworth Pickford #96925	9/16/2021 12:00:00 AM	APOC	Appeal - Orphans Court	9/16/2021 12:00:00 AM	Open
Anne Arundel Circuit Court	30439188	C-02-CV-20-000334	In Re Estate of Sandra Lee Fadeley Estate #94705	1/31/2020 12:00:00 AM	APOC	Appeal - Orphans Court	8/3/2021 12:00:00 AM	Closed
Anne Arundel Circuit Court	31378366	C-02-CV-21-000182	In Re Estate of Betty Leister Couture #99324	2/5/2021 12:00:00 AM	APOC	Appeal - Orphans Court	6/24/2021 12:00:00 AM	Closed
Anne Arundel Circuit Court	31709453	C-02-CV-21-000730	In Re Estate of Billy Adams #101143	6/2/2021 12:00:00 AM	APOC	Appeal - Orphans Court	6/2/2021 12:00:00 AM	Open
Anne Arundel Circuit Court	135166	02-C-14-190282	Estate Of Peter Adalbert Castruccio	8/28/2014 12:00:00 AM	APOC	Appeal - Orphans Court	6/10/2021 12:00:00 AM	Closed
Anne Arundel Circuit Court	4112585	C-02-CV-16-000278	In Re Estate of Peter Castruccio	1/29/2016 12:00:00 AM	APOC	Appeal - Orphans Court	3/10/2021 12:00:00 AM	Closed
Anne Arundel Circuit Court	32053394	C-02-CV-21-001353	In Re Estate of Fred Earl Witmer #93660	10/1/2021 12:00:00 AM	APOC	Appeal - Orphans Court	10/1/2021 12:00:00 AM	Open
Anne Arundel Circuit Court	30842158	C-02-CV-20-001504	In Re Estate of Kevin Falls #96490	7/23/2020 12:00:00 AM	APOC	Appeal - Orphans Court	1/5/2021 12:00:00 AM	Closed
Anne Arundel Circuit Court	30393327	C-02-CV-20-000156	In Re Estate of Joseph Abbott Estate 94647	1/17/2020 12:00:00 AM	APOC	Appeal - Orphans Court	1/29/2021 12:00:00 AM	Closed
Baltimore County Circuit Court	22785017	03-C-18-010529	The Estate of Elbert Davis Sr	10/22/2018 12:00:00	APOC	Appeal - Orphans Court	9/23/2019 12:00:00 AM	Closed
Baltimore County Circuit Court	22787616	03-C-19-000008	The Estate of Keelty Joseph S	1/2/2019 12:00:00 AM	APOC	Appeal - Orphans Court	7/22/2019 12:00:00 AM	Closed
Baltimore County Circuit Court	22777189	03-C-18-002701	The Estate of Fewster Philip J Sr Estate Of	3/14/2018 12:00:00 AM	APOC	Appeal - Orphans Court	4/5/2019 12:00:00 AM	Closed
Baltimore County Circuit Court	29939025	C-03-CV-19-003043	In Re Estate of Gladys Palmer-Butler	8/22/2019 12:00:00 AM	APOC	Appeal - Orphans Court	11/7/2019 12:00:00 AM	Closed / Inactive
Baltimore County Circuit Court	22785016	03-C-18-010528	The Estate of Phosa Cain	10/22/2018 12:00:00	APOC	Appeal - Orphans Court	10/31/2019 12:00:00 AM	Closed
Baltimore County Circuit Court	29638770	C-03-CV-19-001627	In Re Estate of Louis Valentine, Jr	5/28/2019 12:00:00 AM	APOC	Appeal - Orphans Court	7/16/2020 12:00:00 AM	Closed
Baltimore County Circuit Court	30756711	C-03-CV-20-002592	In Re Estate of Allen Bull, Jr.	6/25/2020 12:00:00 AM	APOC	Appeal - Orphans Court	6/25/2020 12:00:00 AM	Open
Baltimore County Circuit Court	31827949	C-03-CV-21-002259	In Re Estate of Blanche Bull	7/14/2021 12:00:00 AM	APOC	Appeal - Orphans Court	7/14/2021 12:00:00 AM	Open
Baltimore County Circuit Court	31471847	C-03-CV-21-000749	In Re Estate of Mary Barnabae	3/10/2021 12:00:00 AM	APOC	Appeal - Orphans Court	6/29/2021 12:00:00 AM	Closed
Baltimore County Circuit Court	31437315	C-03-CV-21-000621	In Re Estate of Raymond Nardone	2/26/2021 12:00:00 AM	APOC	Appeal - Orphans Court	5/25/2021 12:00:00 AM	Closed
Baltimore County Circuit Court	31558425	C-03-CV-21-001021	In Re Estate of Dorothy Hipkins	4/7/2021 12:00:00 AM	APOC	Appeal - Orphans Court	4/7/2021 12:00:00 AM	Open
Baltimore County Circuit Court	22775817	03-C-18-001329	The Estate of Metz Virgini Lee Estate Of	2/8/2018 12:00:00 AM	APOC	Appeal - Orphans Court	10/13/2021 12:00:00 AM	Closed
Baltimore County Circuit Court	30101430	C-03-CV-19-003736	In Re Estate of Ernest Roane, Sr	10/10/2019 12:00:00	APOC	Appeal - Orphans Court	1/8/2021 12:00:00 AM	Closed
Baltimore County Circuit Court	30996858	C-03-CV-20-003404	In Re Estate of George Kelley	9/16/2020 12:00:00 AM	APOC	Appeal - Orphans Court	1/15/2021 12:00:00 AM	Closed
Calvert Circuit Court	22482179	C-04-CV-19-000046	The Estate Of Thomas W Halterman	1/31/2019 12:00:00 AM	APOC	Appeal - Orphans Court	7/8/2019 12:00:00 AM	Closed / Inactive
Calvert Circuit Court	22429687	C-04-CV-19-000016	In the Matter of the Estate of Edna Guethlein	1/11/2019 12:00:00 AM	APOC	Appeal - Orphans Court	5/7/2019 12:00:00 AM	Closed / Inactive
Calvert Circuit Court	30617094	C-04-CV-20-000237	In The Matter of the Estate of Joyce Ann Fontana Avery	4/14/2020 12:00:00 AM	APOC	Appeal - Orphans Court	10/7/2020 12:00:00 AM	Closed / Inactive
Calvert Circuit Court	30383136	C-04-CV-20-000048	The Estate Of James Bradley Curtin, Jr.	1/15/2020 12:00:00 AM	APOC	Appeal - Orphans Court	10/21/2020 12:00:00 AM	Closed / Inactive
Calvert Circuit Court	31699292	C-04-CV-21-000127	In the Matter of the Estate of John D. Ray	5/28/2021 12:00:00 AM	APOC	Appeal - Orphans Court	5/28/2021 12:00:00 AM	Open
Calvert Circuit Court	31699400	C-04-CV-21-000128	In The Matter Of The Estate Of John D. Ray	5/28/2021 12:00:00 AM	APOC	Appeal - Orphans Court	5/28/2021 12:00:00 AM	Open
Calvert Circuit Court	31182097	C-04-CV-20-000378	In Re Estate of Estate of Sewell S. Griffith	11/20/2020 12:00:00	APOC	Appeal - Orphans Court	3/11/2021 12:00:00 AM	Closed / Inactive
Caroline Circuit Court	10005016	C-05-CV-17-000032	In Re Estate of Herbert Boone	2/21/2017 12:00:00 AM	APOC	Appeal - Orphans Court	6/12/2019 12:00:00 AM	Closed
Caroline Circuit Court	29958404	C-05-CV-19-000134	In Re Estate of George Wilkinson, Jr	8/28/2019 12:00:00 AM	APOC	Appeal - Orphans Court	1/13/2020 12:00:00 AM	Closed
Carroll Circuit Court	16961430	06-C-18-074910	The Estate of Marvel R Freund	1/17/2018 12:00:00 AM	APOC	Appeal - Orphans Court	1/22/2019 12:00:00 AM	Closed / Inactive
Carroll Circuit Court	30361637	C-06-CV-20-000010	In Re Estate of Brooke Gentner	1/8/2020 12:00:00 AM	APOC	Appeal - Orphans Court	8/24/2020 12:00:00 AM	Closed
Carroll Circuit Court	30905151	C-06-CV-20-000285	In Re Estate of Larry Smiley	8/13/2020 12:00:00 AM	APOC	Appeal - Orphans Court	8/13/2020 12:00:00 AM	Open
Carroll Circuit Court	29893938	C-06-CV-19-000376	In Re Estate of John Turner, Sr.	8/9/2019 12:00:00 AM	APOC	Appeal - Orphans Court	2/19/2020 12:00:00 AM	Closed
Carroll Circuit Court	30233274	C-06-CV-19-000558	In Re Estate of John Kaier, Jr	11/22/2019 12:00:00	APOC	Appeal - Orphans Court	10/23/2020 12:00:00 AM	Closed
Carroll Circuit Court	29660636	C-06-CV-19-000264	In Re Estate of Forrest Taylor	6/3/2019 12:00:00 AM	APOC	Appeal - Orphans Court	1/30/2020 12:00:00 AM	Closed

MDEC - CIRCUIT COURTS cont'd.

Location	CaseID	CaseNumber	Style	FileDate	CaseTypeCode	CaseTypeDesc	CaseStatusDate	CaseStatusDesc
Carroll Circuit Court	32016887	C-06-CV-21-000250	In Re Estate of Patsy Brown	9/20/2021 12:00:00 AM	APOC	Appeal - Orphans Court	9/20/2021 12:00:00 AM	Open
Carroll Circuit Court	31391703	C-06-CV-21-000029	In Re Estate of Robert Letmate	2/9/2021 12:00:00 AM	APOC	Appeal - Orphans Court	8/13/2021 12:00:00 AM	Closed
Carroll Circuit Court	31910160	C-06-CV-21-000218	In Re Estate of John Kellam	8/13/2021 12:00:00 AM	APOC	Appeal - Orphans Court	8/13/2021 12:00:00 AM	Open
Carroll Circuit Court	30901165	C-06-CV-20-000283	In Re Estate of Ruth Andes	8/12/2020 12:00:00 AM	APOC	Appeal - Orphans Court	7/19/2021 12:00:00 AM	Closed
Carroll Circuit Court	31237825	C-06-CV-20-000409	In Re Estate of Stanley Christensen, Jr	12/10/2020 12:00:00	APOC	Appeal - Orphans Court	6/2/2021 12:00:00 AM	Closed
Carroll Circuit Court	31429008	C-06-CV-21-000047	In Re Estate of Stanley Christensen, Jr	2/23/2021 12:00:00 AM	APOC	Appeal - Orphans Court	6/2/2021 12:00:00 AM	Closed
Cecil Circuit Court	30283687	C-07-CV-19-000597	In Re Estate of Elaine Hamlet	12/9/2019 12:00:00 AM	APOC	Appeal - Orphans Court	2/25/2020 12:00:00 AM	Closed
Cecil Circuit Court	32005172	C-07-CV-21-000262	In Re Estate of Christopher Donahoo	9/15/2021 12:00:00 AM	APOC	Appeal - Orphans Court	9/15/2021 12:00:00 AM	Open
Cecil Circuit Court	31330825	C-07-CV-21-000019	In Re Estate of MaryAnn Reece	1/21/2021 12:00:00 AM	APOC	Appeal - Orphans Court	4/13/2021 12:00:00 AM	Closed
Cecil Circuit Court	30615492	C-07-CV-20-000159	In Re Estate of Heather Richmond	4/13/2020 12:00:00 AM	APOC	Appeal - Orphans Court	1/8/2021 12:00:00 AM	Closed
Charles Circuit Court	16732227	C-08-CV-18-000066	In the Matter of the Estate of Charles Stanley Burch	1/18/2018 12:00:00 AM	APOC	Appeal - Orphans Court	8/23/2019 12:00:00 AM	Closed / Inactive
Charles Circuit Court	22092524	C-08-CV-18-000848	In the Matter of the Estate of Charles Rodney Taylor	8/30/2018 12:00:00 AM	APOC	Appeal - Orphans Court	5/8/2019 12:00:00 AM	Appealed
Charles Circuit Court	29870511	C-08-CV-19-000676	In Re Estate of Estate of Shirley Ann Kellar	8/2/2019 12:00:00 AM	APOC	Appeal - Orphans Court	10/18/2019 12:00:00 AM	Closed
Charles Circuit Court	30077257	C-08-CV-19-000863	In Re Estate of Adam Brandon	10/2/2019 12:00:00 AM	APOC	Appeal - Orphans Court	5/26/2020 12:00:00 AM	Appealed
Charles Circuit Court	22130671	C-08-CV-18-000889	IN THE MATTER OF THE ESTATE OF ANTHONY	9/14/2018 12:00:00 AM	APOC	Appeal - Orphans Court	5/13/2020 12:00:00 AM	Closed
Charles Circuit Court	30439109	C-08-CV-20-000091	In Re Estate of Robert Williams	1/31/2020 12:00:00 AM	APOC	Appeal - Orphans Court	11/16/2020 12:00:00 AM	Closed
Charles Circuit Court	31570776	C-08-CV-21-000182	In Re Estate of Florence Green	4/12/2021 12:00:00 AM	APOC	Appeal - Orphans Court	8/6/2021 12:00:00 AM	Closed
Charles Circuit Court	31842768	C-08-CV-21-000325	In Re Estate of William Helwig	7/16/2021 12:00:00 AM	APOC	Appeal - Orphans Court	7/16/2021 12:00:00 AM	Open
Charles Circuit Court	31217223	C-08-CV-20-000682	In Re Estate of Barbara Baldus	12/3/2020 12:00:00 AM	APOC	Appeal - Orphans Court	6/21/2021 12:00:00 AM	Closed
Charles Circuit Court	31217797	C-08-CV-20-000683	In Re Estate of Carl Baldus, Jr.	12/3/2020 12:00:00 AM	APOC	Appeal - Orphans Court	6/21/2021 12:00:00 AM	Closed
Charles Circuit Court	31376767	C-08-CV-21-000061	In Re Estate of Mary Green	2/5/2021 12:00:00 AM	APOC	Appeal - Orphans Court	2/5/2021 12:00:00 AM	Open
Dorchester Circuit Court	31674727	C-09-CV-21-000065	In Re Estate of Bonnie Arlene Long	5/20/2021 12:00:00 AM	APOC	Appeal - Orphans Court	5/20/2021 12:00:00 AM	Open
Dorchester Circuit Court	31602496	C-09-CV-21-000051	In Re Estate of Gloria Bowers Tibbs	4/23/2021 12:00:00 AM	APOC	Appeal - Orphans Court	4/23/2021 12:00:00 AM	Open
Frederick Circuit Court	29425148	C-10-CV-19-000257	The Estate of Paul Henry Przygocki	3/25/2019 12:00:00 AM	APOC	Appeal - Orphans Court	7/8/2019 12:00:00 AM	Closed
Frederick Circuit Court	16848209	C-10-CV-18-000198	The Estate of James Herbert Brown	3/13/2018 12:00:00 AM	APOC	Appeal - Orphans Court	2/7/2019 12:00:00 AM	Closed
Frederick Circuit Court	29670215	C-10-CV-19-000461	In Re Estate of Williet Ann Gardner	6/5/2019 12:00:00 AM	APOC	Appeal - Orphans Court	11/19/2019 12:00:00 AM	Closed
Frederick Circuit Court	21815912	C-10-CV-18-000525	Estate of Carol Diana Miller	6/22/2018 12:00:00 AM	APOC	Appeal - Orphans Court	11/9/2020 12:00:00 AM	Closed
Frederick Circuit Court	31805210	C-10-CV-21-000285	In Re Estate of Vernon Holsinger, Sr.	7/7/2021 12:00:00 AM	APOC	Appeal - Orphans Court	7/7/2021 12:00:00 AM	Open
Frederick Circuit Court	29308821	C-10-CV-19-000152	In the Matter of the Estate of Peggy S Keyser	2/19/2019 12:00:00 AM	APOC	Appeal - Orphans Court	3/8/2021 12:00:00 AM	Closed
Frederick Circuit Court	30429042	C-10-CV-20-000083	In Re Estate of Shirley Moser	1/29/2020 12:00:00 AM	APOC	Appeal - Orphans Court	3/31/2021 12:00:00 AM	Closed
Frederick Circuit Court	29902108	C-10-CV-19-000620	In Re Estate of Reginald Snowden, Jr.	8/14/2019 12:00:00 AM	APOC	Appeal - Orphans Court	1/20/2021 12:00:00 AM	Closed
Garrett Circuit Court	29393915	C-11-CV-19-000034	In the Estate of Barbara Garnell Bolger	3/13/2019 12:00:00 AM	APOC	Appeal - Orphans Court	6/14/2019 12:00:00 AM	Closed / Inactive
Garrett Circuit Court	29860277	C-11-CV-19-000078	In Re Estate of William Williams	3/6/2020 12:00:00 AM	APOC	Appeal - Orphans Court	3/6/2020 12:00:00 AM	Closed / Inactive
Garrett Circuit Court	30491105	C-11-CV-20-000021	In the Estate of Bernard Francis Kaczorowski	2/18/2020 12:00:00 AM	APOC	Appeal - Orphans Court	3/17/2020 12:00:00 AM	Closed
Garrett Circuit Court	31319921	C-11-CV-21-000007	In The Estate of Theresa Ruth Steiner	1/15/2021 12:00:00 AM	APOC	Appeal - Orphans Court	7/26/2021 12:00:00 AM	Appealed
Howard Circuit Court	29812770	C-13-CV-19-000696	In Re Estate of David Hedlesky	7/17/2019 12:00:00 AM	APOC	Appeal - Orphans Court	11/15/2019 12:00:00 AM	Closed / Inactive
Howard Circuit Court	30242472	C-13-CV-19-001148	In Re Estate of Mary Chang	11/25/2019 12:00:00	APOC	Appeal - Orphans Court	9/18/2020 12:00:00 AM	Closed / Inactive
Howard Circuit Court	29742395	C-13-CV-19-000640	In Re Estate of Estate of Patricia J. Kolpack	7/3/2019 12:00:00 AM	APOC	Appeal - Orphans Court	8/13/2020 12:00:00 AM	Closed / Inactive
Howard Circuit Court	31311349	C-13-CV-21-000028	In Re Estate of Margaret Dymond	1/12/2021 12:00:00 AM	APOC	Appeal - Orphans Court	9/15/2021 12:00:00 AM	Closed / Inactive
Howard Circuit Court	31196413	C-13-CV-20-000899	In Re Estate of Gayle Hassid	11/24/2020 12:00:00	APOC	Appeal - Orphans Court	7/8/2021 12:00:00 AM	Closed / Inactive
Howard Circuit Court	31418688	C-13-CV-21-000137	In Re Estate of Robert J Falk	2/19/2021 12:00:00 AM	APOC	Appeal - Orphans Court	7/23/2021 12:00:00 AM	Closed / Inactive
Howard Circuit Court	31682911	C-13-CV-21-000369	In Re Estate of Patricia Tate Taylor	5/24/2021 12:00:00 AM	APOC	Appeal - Orphans Court	5/24/2021 12:00:00 AM	Open
Howard Circuit Court	31682923	C-13-CV-21-000370	In Re Estate of Raymond Stokely	5/24/2021 12:00:00 AM	APOC	Appeal - Orphans Court	5/24/2021 12:00:00 AM	Open
Howard Circuit Court	31661172	C-13-CV-21-000351	In Re Estate of Harry Weiskittel, III	5/17/2021 12:00:00 AM	APOC	Appeal - Orphans Court	5/17/2021 12:00:00 AM	Open
Howard Circuit Court	31602684	C-13-CV-21-000295	In Re Estate of Jerome Williams	4/23/2021 12:00:00 AM	APOC	Appeal - Orphans Court	4/23/2021 12:00:00 AM	Open
Howard Circuit Court	30254104	C-13-CV-19-001158	In Re Estate of Emma Jean Russell	11/27/2019 12:00:00	APOC	Appeal - Orphans Court	2/23/2021 12:00:00 AM	Closed / Inactive
Howard Circuit Court	31818159	C-13-CV-21-000471	In Re Estate of Margaret Dymond	7/12/2021 12:00:00 AM	APOC	Appeal - Orphans Court	10/19/2021 12:00:00 AM	Closed / Inactive
Kent Circuit Court	31330331	C-14-CV-21-000004	In Re Estate of Estate of Constance F. Ferris	1/21/2021 12:00:00 AM	APOC	Appeal - Orphans Court	5/21/2021 12:00:00 AM	Closed
Queen Annes Circuit Court	30088835	C-17-CV-19-000302	In Re Estate of Sherri Jackson	10/7/2019 12:00:00 AM	APOC	Appeal - Orphans Court	2/3/2020 12:00:00 AM	Closed
Queen Annes Circuit Court	30967608	C-17-CV-20-000157	In Re Estate of Michael McCann, Jr.	9/3/2020 12:00:00 AM	APOC	Appeal - Orphans Court	6/16/2021 12:00:00 AM	Closed
Queen Annes Circuit Court	31678154	C-17-CV-21-000079	In the Matter of Kiser, William E Estate of	5/21/2021 12:00:00 AM	APOC	Appeal - Orphans Court	5/21/2021 12:00:00 AM	Open
Saint Marys Circuit Court	22395031	C-18-CV-18-000540	Charles Wolf vs Jeffrey R Frye ex rel. the Estate of	12/27/2018 12:00:00	APOC	Appeal - Orphans Court	3/19/2019 12:00:00 AM	Closed
Saint Marys Circuit Court	32011861	C-18-CV-21-000248	In the Matter of the Estate of John Stephen Lacey	9/17/2021 12:00:00 AM	APOC	Appeal - Orphans Court	9/17/2021 12:00:00 AM	Open
Saint Marys Circuit Court	31232084	C-18-CV-20-000270	In Re Estate of Estate of Nancy L Lee	12/8/2020 12:00:00 AM	APOC	Appeal - Orphans Court	3/30/2021 12:00:00 AM	Closed
Somerset Circuit Court	31196631	C-19-CV-20-000144	In Re Estate of Paul Tomko	11/24/2020 12:00:00	APOC	Appeal - Orphans Court	3/17/2021 12:00:00 AM	Closed
Talbot Circuit Court	29311570	C-20-CV-19-000030	APPEAL OF STEVEN ANTHONY FRED IN RE ESTATE OF	2/20/2019 12:00:00 AM	APOC	Appeal - Orphans Court	5/6/2019 12:00:00 AM	Closed
Talbot Circuit Court	10093201	C-20-CV-17-000068	In Re Estate of Helen Witt	4/28/2017 12:00:00 AM	APOC	Appeal - Orphans Court	11/14/2019 12:00:00 AM	Closed
Talbot Circuit Court	29836461	C-20-CV-19-000112	Appeal of Thomas F Haugh In Re Estate of Harriett H	7/23/2019 12:00:00 AM	APOC	Appeal - Orphans Court	5/8/2020 12:00:00 AM	Closed
Talbot Circuit Court	30042580	C-20-CV-19-000146	In Re Estate of Donna Harrison	9/23/2019 12:00:00 AM	APOC	Appeal - Orphans Court	2/12/2020 12:00:00 AM	Closed
Washington Circuit Court	30149375	C-21-CV-19-000632	In Re Estate of Michael Gallagher	10/25/2019 12:00:00	APOC	Appeal - Orphans Court	10/25/2019 12:00:00 AM	Open
Washington Circuit Court	30335801	C-21-CV-19-000758	In Re Estate of Betty Goldizen	12/30/2019 12:00:00	APOC	Appeal - Orphans Court	2/26/2020 12:00:00 AM	Closed / Inactive
Washington Circuit Court	31188107	C-21-CV-20-000438	In Re Estate of Agnes Edwards	11/23/2020 12:00:00	APOC	Appeal - Orphans Court	1/28/2021 12:00:00 AM	Closed

MDEC - CIRCUIT COURTS cont'd.

Location	CaseID	CaseNumber	Style	FileDate	CaseTypeCode	CaseTypeDesc	CaseStatusDate	CaseStatusDesc
Wicomico Circuit Court	22222406	C-22-CV-18-000455	Keisha Hearn vs. Estate of Diana C. Mason	10/17/2018 12:00:00	APOC	Appeal - Orphans Court	3/27/2019 12:00:00 AM	Closed / Inactive
Wicomico Circuit Court	29678594	C-22-CV-19-000228	Maurice Donoway vs. The Estate of Darlene Elizabeth	6/7/2019 12:00:00 AM	APOC	Appeal - Orphans Court	12/30/2019 12:00:00 AM	Closed / Inactive
Wicomico Circuit Court	31102437	C-22-CV-20-000357	In Re Estate of Barbara Maner	10/21/2020 12:00:00	APOC	Appeal - Orphans Court	9/30/2021 12:00:00 AM	Closed
Wicomico Circuit Court	31790529	C-22-CV-21-000178	In Re Estate of Barbara Maner	7/1/2021 12:00:00 AM	APOC	Appeal - Orphans Court	9/30/2021 12:00:00 AM	Closed
Wicomico Circuit Court	31957530	C-22-CV-21-000219	In Re Estate of Samuel Chaffey, Jr.	8/30/2021 12:00:00 AM	APOC	Appeal - Orphans Court	8/30/2021 12:00:00 AM	Open
Wicomico Circuit Court	29942922	C-22-CV-19-000325	In Re Estate of Estate of Ulysses S A Polk Jr	8/23/2019 12:00:00 AM	APOC	Appeal - Orphans Court	8/17/2021 12:00:00 AM	Closed
Worcester Circuit Court	22325187	C-23-CV-18-000366	In Re Estate of Jack Hubberman	11/27/2018 12:00:00	APOC	Appeal - Orphans Court	7/19/2019 12:00:00 AM	Closed
Worcester Circuit Court	29626186	C-23-CV-19-000150	In Re Estate of Addie Jones	5/22/2019 12:00:00 AM	APOC	Appeal - Orphans Court	7/12/2019 12:00:00 AM	Closed
Worcester Circuit Court	16720323	C-23-CV-18-000019	In Re Estate of Andrea Straka	1/12/2018 12:00:00 AM	APOC	Appeal - Orphans Court	6/27/2019 12:00:00 AM	Closed
Worcester Circuit Court	22180077	C-23-CV-18-000313	In Re Estate of Janet Cherrix	10/3/2018 12:00:00 AM	APOC	Appeal - Orphans Court	2/25/2019 12:00:00 AM	Closed
Worcester Circuit Court	29309211	C-23-CV-19-000052	In Re Estate of Mark Fritschle	2/19/2019 12:00:00 AM	APOC	Appeal - Orphans Court	12/30/2019 12:00:00 AM	Closed
Worcester Circuit Court	30809924	C-23-CV-20-000196	In Re Estate of Benjamin Wiley	7/14/2020 12:00:00 AM	APOC	Appeal - Orphans Court	12/3/2020 12:00:00 AM	Closed

Baltimore City - Orphan's Court, Disposed

Case Number	Case Type	Case Type Description	Disp Code		Disposition Dt
24C19001044	OA	Appeal/Issues From Orphan's Court	SE	Settlement Order	05/14/2019
24C19003058	OA	Appeal/Issues From Orphan's Court	SS	Stipulation of Dismissal	06/10/2019
24C19003059	OA	Appeal/Issues From Orphan's Court	DC	Dismissed by Court	09/03/2019
24C19000071	OA	Appeal/Issues From Orphan's Court	JV	Judgment / Verdict	10/25/2019
24C19003057	OA	Appeal/Issues From Orphan's Court	DC	Dismissed by Court	11/06/2019
24C19005370	OA	Appeal/Issues From Orphan's Court	DC	Dismissed by Court	12/22/2020
24C19004307	OA	Appeal/Issues From Orphan's Court	JV	Judgment / Verdict	04/23/2021
24C20005038	OA	Appeal/Issues From Orphan's Court	JV	Judgment / Verdict	05/03/2021
24C21000001	OA	Appeal/Issues From Orphan's Court	JV	Judgment / Verdict	05/04/2021
24C20005220	OA	Appeal/Issues From Orphan's Court	JV	Judgment / Verdict	05/04/2021
24C21000006	OA	Appeal/Issues From Orphan's Court	JV	Judgment / Verdict	06/16/2021

Baltimore City - Orphan's Court Motions

Case Number	Motion	Motion Filed	Motion Description
24C19003057	DRAS	02/14/2020	Record on Appeal Forwarded to COSA
24C19003057	DACA	11/21/2019	Appeal Order to COSA
24C21000001	DRAS	08/20/2021	Record on Appeal Forwarded to COSA
24C21000001	DACA	05/14/2021	Appeal Order to COSA
24C20005220	DRAS	08/17/2021	Record on Appeal Forwarded to COSA
24C20005220	DACA	05/14/2021	Appeal Order to COSA

Harford Co Orphan's Court Appeals: July 1, 2018 - July 30, 2021

Date Range	Hearings	Appeals	Estate Number	Appeal Proceeding
Jan 1, 2018 - Dec 31, 2018	187	0		
Jan 1, 2019 - Dec 31, 2019	164	3	52689	(3.11.19) The first of 3 Pro Se appeals filed in this estate. Denied by our court due to failure to pay required fees associated with appeal. (7.1.19) The 2nd of 3 Pro Se appeals filed in this estate. Dismissed by COSA for failure to provide brief and record extract.
			50791	(11.15.19) Judgment of Orphans' Court vacated. Case remanded for further proceedings. Still pending.
Jan 1, 2020 - Dec 31, 2020	110	0		
Jan 1, 2021 - Jul 30, 2021	104	2	52689	(5.12.21) The 3rd of 3 Pro Se appeals filed in this estate. It was stricken by our court for failure to pay required fees associated with appeal.
			53122	(7.12.21) COSA issued a Show Cause Order to Appellant on Sept 27, 2021 for failure to provide transcript.

MONTGOMERY COUNTY ORPHANS' COURT APPEALS TO COURT OF SPECIAL APPEALS JAN 1, 2019 – JUNE 30, 2021

APPEAL DATE	ESTATE NAME	ESTATE NUMBER	DISPOSITION
01/03/2019	Kevin Sayer Bushell	W94656	Judgment Reversed
02/19/2019	John Thurman Bell	W91740	Affirmed-in-Part; Reversed-in-Part
04/16/2019	Dinesh O Parikh	W87973	Judgment Affirmed
04/25/2019	Mehru Abbasi	1996-1358	Appeal Dismissed by Court
05/03/2019	Gerassimos George Roussos	W93667	Appeal Dismissed by Court
05/24/2019	Diane Z Kirsch	W72691	Appeal Dismissed by Party
07/01/2019	Kunjunjamma Kuriakose	W93367	Appeal Dismissed by Party
07/15/2019	Edith Finn Cohen	W94837	Appeal Dismissed by Court
07/25/2019	Nadya V Elis	W91223	Judgment Affirmed
09/18/2019	Christine H Bradford	W81613	Judgment Affirmed
11/13/2019	Charles Giles, Jr.	W95698	Judgment Affirmed
11/21/2019	Robert Karlen	W70029	Judgment Affirmed
11/22/2019	Christine H Bradford	W81613	Judgment Affirmed
12/04/2019	Joseph A Cohen	W77533	Judgment Affirmed
01/06/2020	Lewis Benjamin Burley, III	W93983	Appeal Dismissed by Court
07/27/2020	Dorothy F. Saba	W80127	No Ruling to Date
10/22/2020	Dinesh O Parikh	W87973	Judgment Affirmed
12/28/2020	Theophile E. Saba	W83573	Appeal Dismissed by Party
03/04/2021	Dinesh O Parikh	W87973	Judgment Affirmed
03/12/2021	Dinesh O Parikh	W87973	Judgment Affirmed
05/19/2021	Nadya V. Elis	W91223	Appeal Dismissed by Court

Montgomery County Civil Caveat Cases Appealed to CC from ORC

Case Number	Case Desc
463868V	Case was dismissed on June 12, 2020
474481V	Case is still pending
480931V	Order to Approve Settlement was entered December 16, 2020
484643V	Case was dismissed on June 2, 2021

Prince George's Orphans Court Appeal Data

CASENUMBER	CASETYPE	DISPOSITION
CAL19-02279	Orphans Court Appeal	Dismissed
CAL19-03312	Orphans Court Appeal	Dismissed
CAL19-04895	Orphans Court Appeal	Dismissed
CAL19-07162	Orphans Court Appeal	Dismissed
CAL19-11907	Orphans Court Appeal	For Plaintiff
CAL19-11908	Orphans Court Appeal	Dismissed
CAL19-14017	Orphans Court Appeal	Case Completed
CAL19-16821	Orphans Court Appeal	Relief Granted
CAL19-18126	Orphans Court Appeal	Dismissed
CAL19-18127	Orphans Court Appeal	Dismissed
CAL19-18596	Orphans Court Appeal	Dismissed
CAL19-24152	Orphans Court Appeal	Active Status
CAL19-24153	Orphans Court Appeal	Active Status
CAL20-07073	Orphans Court Appeal	Dismissed
CAL20-12291	Orphans Court Appeal	Dismissed
CAL20-12292	Orphans Court Appeal	Affirmed
CAL20-16153	Orphans Court Appeal	Dismissed
CAL21-06049	Orphans Court Appeal	Active Status
CAL21-06050	Orphans Court Appeal	Active Status
CAL21-07250	Orphans Court Appeal	Active Status

THE DEBATE OVER NONLAWYER PROBATE JUDGES: A HISTORICAL PERSPECTIVE

I. INTRODUCTION

> Gentlemen, you have heard what has been said in this case by the lawyers, the rascals! . . . They talk of law. Why gentlemen, it is not the law we want, but justice. They would govern us by the common law of England. Common sense is a much safer guide. . . . A clear head and an honest heart are worth more than all the law of the lawyers.[1]

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1. DORIS MARIE PROVINE, JUDGING CREDENTIALS: NONLAWYER JUDGES AND THE POLITICS OF PROFESSIONALISM 11–12 (1986) (quoting ANTON-HERMANN CHROUST, 2 THE RISE OF THE LEGAL PROFESSION IN AMERICA 42–43 (1965)). *See also A New Hampshire Judge of Olden Time*, 1 ALB. L.J. 283, 283 (1870) [hereinafter *New Hampshire Judge*]; King v. Hopkins, 57 N.H. 334, 1876 WL

These instructions were given to an early-American jury by the strong-minded Judge John Dudley, who served the state of New Hampshire from 1785 to 1806.[2] Dudley had no legal training. In fact, he had very little education at all. Still, Dudley had a reputation of possessing "a discriminating mind, a retentive memory, a patience which no labor could tire, and integrity proof alike against threats and flattery."[3] By fervently pursuing justice in each particular case, probably the judge's most lasting legacy was his common "indifferen[ce] to the forms and requirements of law."[4] Such was the case with most lay judges of the day.

Today, lay judges are a dying breed, often relegated to serving only in courts of probate; only four states allow nonlawyers to become probate judges.[5] In their adjudication of testamentary instruments, these nonlawyer judges oversee a diverse docket often containing sensitive family disputes.[6] However, other than some practical instruction usually administered by the local bar, no formal legal education is required. Consequently, this arrangement is continually under attack.[7]

Despite what the controversy of today might suggest, laymen chosen from the general community have presided over the administration of wills and estates for thousands of years. Proponents of judicial legal education requirements usually stress various benefits of completely wiping out the old system. However, if the remaining lay judge systems are counterintuitive, one wonders why they exist at all. From where did the system of lay judges come, and why has it been partly preserved? This Note will not advocate the abolition of nonlawyer probate judges but rather investigate why this system exists. Those individuals in the unique position of handling testamentary dispositions will be traced throughout history—from antiquity to modern America. The Note will attempt to extract the momen-

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5320, at *2 (N.H. June, 1876).

2. *New Hampshire Judge*, *supra* note 1 at 283.

3. *Id.*

4. *Id.*

5. Brief of the American Judicature Society as Amicus Curiae Supporting Appellant, North v. Russell, 427 U.S. 328 (1976) (No. 74-1409), 1975 WL 173574. The states are Alabama, Connecticut, Maryland, and New Jersey. *Id.* *See also* Richard J. Lussier, *Integration of Family Matters into the Jurisdiction of the Connecticut Probate Courts: Feasible or Fantasy?*, 8 CONN. PROB. L. J. 305, 319 (1994) (concerning Connecticut). Of course, nonlawyers are allowed to serve as judges outside the probate context. Most states permit "some form of nonlawyer judge" to serve in limited jurisdiction courts that typically "deal with misdemeanors, traffic offenses, or minor civil cases; more rarely they specialize in . . . juvenile[] or domestic matters." Julia Lamber & Mary Lee Luskin, *City and Town Courts: Mapping Their Dimensions*, 67 IND. L.J. 59, 59 (1991).

6. 20 AM. JUR. 2D *Courts* § 70 (2008).

7. *See, e.g.*, *The Scandal of Connecticut's Probate Courts*, Statement of Prof. John H. Langbein to Conn. Legislature Committee on Program Review and Investigations, in Hartford, Conn. (Oct. 7, 2005), *available at* http://www.law.yale.edu/faculty/1766.htm [hereinafter *Scandal*]; Verner F. Chaffin, *Suggestions For Improving Probate Court Organization and Procedure in Alabama*, 10 ALA. L. REV. 18 (1957); Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 14 AM. LAW. 445, 446–47 (1906).

tum, what has changed, and what has worked.[8] The Note will then consider the applicability of this momentum to the modern-day argument for the abolition of nonlawyer probate judges.

II. PROBATE JUDGES IN ANTIQUITY

A. Ancient Greece

The Athenians trusted the judgment of property-holding males in directing public affairs great and small.[9] Specialist-experts were distrusted, and there was no permanent judicial class.[10] Instead, the judicial system consisted of "popular courts" staffed by citizens chosen by lot.[11] These popular courts were made of panels called *dikasteria* usually consisting of about 500 citizens, although at times the panels were much larger.[12] The *dikasteria* acted as trial courts (of first instance) and dealt with a huge volume of judicial business.[13] Each day there could have been "several hundred to more than a thousand citizens engaged in judicial duties."[14] To be clear, these courts were not the equivalent of modern-day juries "giving verdicts on disputed issues of fact. They rendered judgment on the whole case presented, including both facts and law."[15] Notably, there was no equivalent of the modern lawyer in the fourth and fifth century Athens.[16]

By the fifth century B.C., these panels were well established,[17] and their lay nature had a significant impact on the struggle between the classes. The purpose of the popular courts, after all, was to "promote direct participation by all Athenian citizens in the judicial function . . . ."[18] The popular courts effectually transferred power from the Athenian middle class to the proletariat.[19] Once citizens in judicial duties got regular pay, the power shift was complete, and once the demos controlled the courts, their predominance over the state was secure.[20]

The popular courts did not, however, preside over matters of testamentary disposition of assets; such mechanisms did not exist. Although

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8. Since modern probate judges handle such diverse matters, in the interest of continuity, this paper will focus on those individuals responsible for handling testamentary disputes.
9. JOHN P. DAWSON, A HISTORY OF LAY JUDGES 13 (1960).
10. *See id.*
11. *See id.* at 10–11. Regarding the filling of these positions by lot, see Kevin O'Leary, *The Citizen Assembly: An Alternative to the Initiative*, 78 U. COLO. L. REV. 1489, 1531–32 (2007).
12. *See* DAWSON, *supra* note 9, at 11.
13. *See id.*
14. *Id.* at 11–12.
15. *Id.* at 12.
16. *See id.* at 13.
17. *See id.* at 11.
18. *Id.*
19. *See id.*
20. *See id.* at 12.

persons could alienate individual items of personal property in their possession, "most wealth—especially ancestral property (*patrôia*)—belonged to the various *oikoi*," or households, through which property was exclusively transferred.[21] The heads of households only served as stewards of the family property and could not themselves "make testamentary disposition of assets by will."[22] Although successor arrangements existed, they only dealt with securing new heads of household for the *oikoi*.[23] Indeed, "[t]here is no Athenian example of a testamentary disposition of *oikos* assets permanently outside the household."[24]

B. Rome

1. The Republican Period

Like the Athenians, the Romans believed that a citizen's duties included the responsibility to take "his share of the burdens of the law."[25] Citizens would act as judges, arbitrators, or jurors, and would "com[e] forward as witness, surety and so on" for their friends.[26] During the first 500 years of recorded Roman law, there were no professional judges—only part-time amateurs.[27] Civil matters, including testamentary dispositions, were handled by a *praetor*,[28] an "elected judicial magistrate who seldom had any special competence in law."[29] The *praetor* would hold a preliminary hearing with the parties (and possibly their counsel)[30] and then appoint one Roman citizen as *iudex* to serve, with the parties' consent, as a judge-arbitrator for the case.[31] The *praetor* would define for the *iudex* the legal issues to be considered and "authorize[] him to render judgment

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21. Edward E. Cohen, *An Unprofitable Masculinity*, *in* MONEY, LABOUR AND LAND: APPROACHES TO THE ECONOMIES OF ANCIENT GREECE 100, 104 (Paul Cartledge, Edward E. Cohen, & Lin Foxhall eds., 2001).

22. *Id.*

23. *See id.*

24. *Id.*

25. Michael Frost, *Ethos, Pathos and Legal Audience*, 99 DICK. L. REV. 85, 88 (1994) (citing JOHN ANTHONY CROOK, LAW AND LIFE OF ROME 33 (1967)).

26. *Id.*

27. DAWSON, *supra* note 9, at 14. Unspecialized laymen performed "all decision-making in every form of state-sponsored court . . . [d]own to the end of the Republic. . . . [T]he last known evidence of private citizens chosen as *iudices* from lists of eligibles comes from the early third century A.D." *Id.* at 29–30.

28. George M. Bush, *The Primitive Character and Origin of the Bonorum Possessio*, 25 MICH. L. REV. 508, *passim* (1927). Four categories of people could inherit under Roman law: "[t]hose persons who had been specially designated in a will" (or *testamentum*), the *heredes legitimi* (either the *heredes sui* and the *agnati*), and the *gentiles*. *Id.* at 508.

29. Bruce W. Frier, *Why Law Changes*, 86 COLUM. L. REV. 888, 895 (1986) (reviewing ALAN WATSON, THE EVOLUTION OF LAW (1985)).

30. *See* DAWSON, *supra* note 9, at 22.

31. *Id.*

according to his findings."[32] Eventually, the procedure concluded with a *litis contestatio*, which was in essence a contract between the parties.[33] The *iudex*'s judgment was, in effect, a final and unappealable arbitration award backed by the state.[34]

Unlike the influence of class on Athens's court system, the use of private Roman citizens as judges was not a democratic reform.[35] First, both substantive and procedural law was rigid and formal.[36] Consequently, the judge had little room to influence the trial. Second, the use of only one judge (rather than the large assemblies used in criminal trials)[37] suggests no effort to obtain a "cross section of opinion."[38] The citizen-judge "deriv[ed] his powers both from litigants' consent and praetor's appointment."[39] There was no Athenian style of "direct democracy."[40] Third, "the public office of judge was clearly reserved for lay persons of rank and high social standing."[41] Judges were "members of the Roman upper class" and acted "out of a sense of noblesse oblige . . . ."[42]

2. The Empire

The administrative officers of the early principate quickly established a system of administrative courts that oversaw "hearings, findings, and adjudication."[43] The courts were described as *extra ordinem*, operating outside the praetorian system.[44] The system grew until the entire judicial system became "a hierarchy of public officials, surmounted by the emperor himself as highest appellate judge and deriving its powers by delegation

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32. *Id.* The *praetor* appointed the *iudex* and defined the issues by preparing what was called a formula. *See id.* This "two-stage court of praetor and *iudex* . . . provided great freedom for invention and flexibility in detail." *Id.* at 21–22. *Praetors* could create new doctrines by varying the issues to be considered, and useful experiments "could be incorporated as standard provisions" in the future. *Id.* at 22.

33. *See id.*

34. *See id.* (quoting LEOPOLD WENGER, PRAETOR UND FORMEL 30 (1926)).

35. Still, the role of judge was honored and represented civic duty. DAWSON, *supra* note 9, at 28.

36. *See id.* at 25–26.

37. By contrast, *criminal* trials used law assembly courts. A Roman citizen accused of a criminal act was first tried before a single magistrate. If the citizen was found guilty of a major crime, and if prosecution had commenced within the city, the citizen could "appeal to the whole Roman people, meeting in a general assembly" through a process called *provocatio*. *See id.* at 15.

38. *Id.* at 27.

39. *Id.*

40. *Id.* at 28.

41. *Id.* at 28–29.

42. Frost, *supra* note 25, at 88. Indeed, political judgeships were "only incidents in lives of leisure, and it was therefore an amateur activity just as much as being a historian or an agricultural expert." *Id.* (quoting JOHN ANTHONY CROOK, LAW AND LIFE OF ROME 89 (1967)).

43. DAWSON, *supra* note 9, at 31.

44. *See id.*

from him."[45] By A.D. 342 the system of *praetor* and *iudex* was expressly forbidden.[46]

So came the end of lay judges in Rome. The judicial function had been transferred to permanent officials, and the role's power and influence greatly increased.[47] Judging became a steady job, "captured and administered by the state as one of the essential functions of autocratic government."[48]

III. ENGLAND AND AMERICA

A. England

Roman law was passed on to medieval Europe through Justinian's *Corpus Juris*.[49] Canon lawyers—or church lawyers—accepted the late empire's version because they sought a "system of courts and procedure that would promote the organization of a universal church under strong papal control,"[50] and secular jurists readily followed their lead.[51]

1. Early Testamentary Dispositions

As early as the eighth century, the dying man would hand over a portion of his chattels to another who was "to distribute them for the good of his soul,"[52] and his "last words . . . [were] to be respected."[53] Combined with his last confession, this oral act was called his *verba novissima*, or deathbed confession.[54] In the ninth through eleventh centuries, the Anglo-Saxon will appeared in the form of the *cwiðe*, a written memorial of the dying man's oral instructions.[55] This instrument could be used to give land, provide for kinsfolk, free slaves, bestow assets upon a church, or make gifts of chattel.[56] Though the *cwiðe* was "not the Roman testa-

45. *Id.* at 32.
46. *See id.*
47. *See id.* Indeed, party consent was no longer required. *See id.* at 31.
48. *Id.* at 33. Because the administrative judges were not highly trained lawyers and persons trained in the law were in short supply, the state employed lawyers to act as legal advisers. *Id.*
49. *Id.*
50. *Id.* at 34.
51. *Id.*
52. FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, 2 THE HISTORY OF ENGLISH LAW 319 (Cambridge Univ. Press 1968 (1898)). This process marked the birth of executorships. *Id.*
53. *Id.* at 318.
54. Gerry W. Beyer & Claire G. Hargrove, *Digital Wills: Has the Time Come for Wills to Join the Digital Revolution?*, 33 OHIO N.U. L. REV. 865, 868 (2007); *see* C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism*, 43 FLA. L. REV. 167, 189 (1991).
55. Breyer & Hargrove, *supra* note 54, at 868; *see* POLLOCK & MAITLAND, *supra* note 52, at 319.
56. *See* POLLOCK & MAITLAND, *supra* note 52, at 320.

ment,"[57] there were some similarities. The *cwiðe* employed both a writing and the "vague idea that in some way or another a man can by written or spoken words determine what shall be done after his death with the goods that he leaves behind."[58]

The term "testament" was used loosely at the time, meaning anything that "witnessed a conveyance by one living man to another."[59] Truly testamentary instruments had not yet been firmly established in Anglo-Saxon folk-law; such wills were only used by the most distinguished individuals.[60] In fact, the king's consent was required for a will to be valid, for the *cwiðe* to stand.[61] A testator appealed "to ecclesiastical sanctions," and "a bishop set[] his cross to the will."[62]

2. The Rise of the Land/Chattel Dichotomy

Gradually, a definite testamentary law was established by a "complicated set of interdependent changes" during the twelfth and thirteenth centuries.[63] First, the king's court denounced all testamentary transfers of land. Such transfers were criticized as "deathbed gifts" wrung from men in their agony and subject to duress and coercion by "ecclesiastical greed."[64] Instead, the primogeniture system was firmly established, which gave "all the land to the eldest son" as heir.[65]

Chattels, by contrast, did not pass through primogeniture to the heir, who had "nothing to do with the chattels of the dead man."[66] Consequently, chattels became "prey for the ecclesiastical tribunals," or Courts Christian, and the church asserted a right to administer last wills.[67] The move was not unnatural; for centuries the church had overseen legacies given

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57. *Id.* at 316. The Roman *heres* was the person who possessed "the right of heredity" from a will, see Bush, *supra* note 28, at 511–12, and he bore the dead man's whole persona, POLLOCK & MAITLAND, *supra* note 52, at 317. The English did not institute the Roman *heres*, *id.* at 316, even though English clerks used the term for (what are today known as) devisees, *id.* at 316–17. English "heirs" were those who succeeded to land *ab intestato*. *Id.* at 316. By the end of the middle ages, "the *heres* of Roman law" had been termed "in England the executor." POLLOCK & MAITLAND, *supra* note 52, at 337.

58. POLLOCK & MAITLAND, *supra* note 52, at 316.

59. *Id.* at 317 (explaining that "almost any instrument might be called a testament"); *see* Miller, *supra* note 54, at 190–93.

60. *See* POLLOCK & MAITLAND, *supra* note 52 at 320.

61. *Id.* at 320; *see* Miller, *supra* note 54, at 195.

62. POLLOCK & MAITLAND, *supra* note 52, at 321; *see* Miller, *supra* note 54, at 189.

63. POLLOCK & MAITLAND, *supra* note 52, at 325.

64. *See id.* at 325, 328.

65. *See id.* at 331–32; *see also* Barbara R. Hauser, *Born a Eunuch? Harmful Inheritance Practices and Human Rights*, 21 LAW & INEQ. 1, 13 (2003). "Glanville, writing in about 1188, state[d] that 'only God, not man, can make an heir.'" Miller, *supra* note 54, at 196 (quoting THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL 71 (G. Hall ed., 1965)).

66. POLLOCK & MAITLAND, *supra* note 54, at 325, 331.

67. *Id.* "Court Christian" is another name for ecclesiastical court. *See id.* at 343.

over for pious uses, and in their last hour testators wished "to do some good and to save [their] soul[s]."[68] Somewhat more alarmingly to the people, the church preached that intestacy was a sin, "tantamount to dying unconfessed."[69] Accordingly, the church asserted a right to oversee the goods of men who died without wills "for the repose of [their] soul[s]."[70]

3. The Introduction of Ecclesiastical Probate

Last wills, then, gradually assumed "a truly testamentary character."[71] The instruments appointed executors as personal representatives of the decedent.[72] A will was "a religious instrument made in the name of the Father, Son and Holy Ghost"[73] and "was sanctioned only by spiritual censures."[74] Most commonly a will was written and was sealed "in the presence of several witnesses."[75] If in Latin, the will called itself a testament; in French or English, a testament, devise, or last will.[76] Once the will was established, bishops would swear "that they would duly administer the estate of the dead man[,] and they became bound to exhibit an inventory of his goods and to account for their dealings."[77]

Probate—the procedure of proving a will—probably did not appear in England until the church courts obtained this exclusive jurisdiction over testamentary instruments.[78] By the thirteenth century, it was settled that executors should probate wills in the proper ecclesiastical court, which was normally the court of the bishop of the diocese where "the goods of the dead man [lay]."[79] Legatees wanting their legacies filed action there; indeed, "it was for the spiritual judge to pronounce for or against a will . . . ."[80]

The ecclesiastical courts were difficult to classify, having "an ancient history, a moral authority which they believed to transcend the state, and a

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68. *Id.* at 332.
69. Miller, *supra* note 54, at 198.
70. POLLOCK & MAITLAND, *supra* note 52, at 326.
71. *Id.*
72. Miller, *supra* note 54, at 199; POLLOCK & MAITLAND, *supra* note 52, at 326.
73. POLLOCK & MAITLAND, *supra* note 52, at 338.
74. *Id.* at 334. Though there was, of course, "imprisonment in the background." *Id.*
75. *Id.* at 337; *see* Miller, *supra* note 54, at 189.
76. POLLOCK & MAITLAND, *supra* note 52, at 338.
77. *Id.* at 343.
78. *See id.* at 341. "The early history of probate lies outside England, and . . . [it is unknown] whether some slender thread of texts traversing the dark ages connects it directly with the Roman process of insinuation, aperture and publication." *Id.* However, one scholar has asserted that "[t]he concept of the testament of personal property may have been an innovation derived from Roman law introduced in Britain through the medium of the Roman Catholic Church, although the form which these dispositions assumed were clearly not imported from Rome." Miller, *supra* note 54, at 188.
79. POLLOCK & MAITLAND, *supra* note 52, at 342–43; Miller, *supra* note 54, at 197.
80. POLLOCK & MAITLAND, *supra* note 52, at 348.

large jurisdiction long before acquired."[81] They were "not 'private' and not quite 'public.'"[82] The courts were "probably staffed with civilian-trained persons,"[83] though from their beginning judges were required "to be at least somewhat trained for [their] task[s], to devote substantial time to [them], and to retain full command and responsibility so long as the case [was] before [them]."[84] By the fifteenth century the courts had "trained personnel, working within a quite well organized career service and using for contested cases a written procedure with court-directed examination of witnesses."[85]

4. Statutory Changes

After the devising of real property had been suspended, landowners greatly exploited a "device known as the 'use,'" an equitable device that allowed them to circumvent the primogenitary scheme.[86] Eventually, the use became "the most common form of ownership."[87] But, because the king lost revenue with every use employed, Parliament abolished them by enacting the Statute of Uses of 1535.[88] As "a direct result of the resentment of land owners at the loss of the power to determine succession to their land," the Statute of Wills of 1540 was enacted, at last allowing landholders to devise real estate.[89] The law did not yet require that such wills be signed or witnessed, only that they be in writing.[90] However, the Statute of Frauds of 1677 enacted signature, attestation, and subscription requirements for such wills.[91] The same statute also required wills conveying chattels to be in writing, but they did not have to be signed or attested.[92]

Even after such extensive reforms, another change lay ahead. In the years following the Statute of Frauds of 1677, judges—especially in the

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81. DAWSON, *supra* note 9, at 175.

82. *Id.* at 175. For a description of "[t]he ecclesiastical courts and the scope of their jurisdiction in general," see WILLIAM SEARLE HOLDSWORTH, 1 A HISTORY OF ENGLISH LAW 598–632. DAWSON, *supra* note 9, at 175 n.144.

83. *Id.* at 175.

84. *Id.* at 175–76.

85. *Id.* at 176 n.145.

86. *See* Miller, *supra* note 54, at 197. The "use" allowed a property owner to convey his property to the eldest son for the use of a younger son, "whom the property owner wished to benefit. The equity courts would enforce such a conveyance against all but a bona fide purchaser on the theory that [the eldest son] had a moral and enforceable obligation to [the younger son] in accordance with the provisions of the gift." *Id.*

87. *Id.*

88. *See id.*

89. *See id.* at 197, 199; James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. REV. 541, 547 (1990).

90. Lindgren, *supra* note 89, at 547.

91. *See id.* at 547–48; *see also* Miller, *supra* note 54, at 200.

92. *See* Lindgren, *supra* note 89, at 547.

ecclesiastical courts—created a confusing and distorted body of decisions by manipulating formalities so as to overcome noncompliant yet well-intentioned decedents.[93] In response, the Statute of Wills of 1837 "merged the formal requirements for devising real and personal property," mandating that all wills be signed, subscribed, and attested.[94] Even though the act was enacted well past the American Revolution, it had an enormous influence on American law.[95]

B. The United States

1. Seventeenth Century New England

The American Seventeenth Century has been called "the miraculous era of law without lawyers."[96] Juries were powerful, deciding matters of both law and fact, in both trials and appeals.[97] Judicial offices were made up of secular and religious lay leadership who formulated laws and adjudicated cases as necessary.[98] In fact, legislatures often took up private bills for petitioners who had been unsuccessful in the courts.[99] Although the judges had no technical training, they recognized the superiority of civil legislation and precedent, and they incorporated many of the English procedures used to achieve fair adjudication.[100] Testamentary jurisdiction was scattered and held by a various array of colonial bodies: the General Courts, county courts, orphans' courts, superior courts, inferior courts, and even governors (who usually commissioned surrogates to handle such matters).[101]

Early American lay judges were much more knowledgeable of law than modern American laypersons.[102] Still, judges had no problem deviat-

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93. *See* Miller, *supra* note 54, at 201–02.

94. Lindgren, *supra* note 89, at 548. Later, the Probate Act of 1857 removed jurisdiction of all probate matters from the ecclesiastical courts to the Court of Probate; the Act also established identical procedures for land and personal property. In re Estate of Bleeker, 168 P.3d 774, 781 n.22 (Okla. 2007).

95. Lindgren, *supra* note 89, at *id.* "Until promulgation of the 1969 UPC, the formalitites required in all United States jurisdictions for a formal will were those derived from an English model, either the Statute of Frauds of 1677 or the 1837 amendment of the Statute of Wills." Miller, *supra* note 54, at 204.

96. PROVINE, *supra* note 1, at 2 (quoting Everett C. Hughes, *Professions*, *in* THE PROFESSIONS IN AMERICA 1, 1–14 (Kenneth Lynn ed., Houghton Mifflin 1965)).

97. *See id.* at 3.

98. *See id.*

99. *See id.*

100. *See id.* To be clear, a distinction should be recognized between the borrowing of English court procedures and the incorporation of English law in the American British colonies. The English common law was incorporated through a process of selective reception. *See* BH MCPHERSON CBE, THE RECEPTION OF ENGLISH LAW ABROAD (2007).

101. *See* Lewis M. Simes & Paul E. Basye, *The Organization of the Probate Court in America: I*, 42 MICH. L. REV. 965, 977–78 (1944).

102. *See* PROVINE, *supra* note 1, at 3.

ing from English court procedures if necessary to prevent technicalities from leading to improper outcomes.[103] Lay judges would "become quite impatient with any attempts on the part of counsel to use such procedural methods as a means to an end."[104]

As the American economy gradually expanded, a true lawyer class formed.[105] With their new economic power and social and political influence, lawyers began to argue for the requirement that judges be lawyers.[106] These efforts largely failed, and judicial appointments remained influenced most heavily by political concerns.[107] The American back country looked down on professionals intensely.[108] The following description by Hector St. John de Crevecoeur is typical of the villainization of lawyers:

> They are plants that will grow in any soil that is cultivated by the hands of others; and when once they have taken root they will extinguish every other vegetable that grows around them . . . . The most ignorant, the most bungling member of that profession, will if placed in the most obscure part of the country, promote its litigiousness and amass more wealth without labour, than the most opulent farmer. . . .[109]

2. Post-Revolution America

After the American Revolution, lawyers grew more powerful and gained in their efforts to professionalize the bench.[110] Massachusetts and Virginia enacted legal "education requirements" for judges.[111] However, the bar in other states was not yet politically prominent enough to accomplish the same.[112] Most judgeships continued to be staffed by laymen, such as Chief Justice John Dudley of New Hampshire, who embodied the continued tradition of common-sense adjudication. Judge Dudley once instructed his jury that their pious duty was to follow common sense instead of legal technicalities:

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103. *See id.* at 3–4.
104. *Id.* at 4 (quoting FRANCIS R. AUMANN, THE CHANGING AMERICAN LEGAL SYSTEM: SOME SELECTED PHASES 36 (1940)).
105. *Id.* at 5–6.
106. *See id.* at 6–7.
107. *Id.* at 7.
108. *See id.* at 8–9.
109. RICHARD E. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 112–13 (1971).
110. *See* PROVINE, *supra* note 1, at 9.
111. *See id.* at 10–11. Virginia created district courts and staffed them with lawyer judges. The district courts heard appeals from county courts, which were still open to nonlawyers. *Id.*
112. *See id.* at 11.

> It is our business to do justice between the parties, not by any quirks of the law out of Coke or Blackstone—books that I have never read, and never will; but by common sense and common honesty, as between man and man. That is our business, and the curse of God is upon us if we neglect or evade, or turn aside from it.[113]

As the country grew, so did its court system. The first United States probate court was established in Massachusetts in 1784.[114] There being no ecclesiastical tribunals in America, probate courts were thought to adjudicate using the unwritten law of equity.[115] At first, the powers of the probate courts mimicked those of the ecclesiastical courts, consisting merely of probating wills and granting letters, but gradually expanded to include supervising "executors and administrators in their administration of estates."[116] In some states, guardianship and conservatorship of minors were added to the scope of probate courts, but in others, however, the evolution was the reverse. Orphans' courts had been created very early in five colonies and then evolved to include the administration of decedents' estates.[117] A Pennsylvania judge described how the orphans' courts grew to include testamentary responsibility:

> The idea was taken from the Court of Orphans of the city of London, which had the care and guardianship of children of deceased citizens of London in their minority, and could compel executors and guardians to file inventories, and give securities for their estates. . . . The Court of Orphans was one of the privileges of that free city; and that the people of Pennsylvania might enjoy the same protection, it was transplanted into our law . . . . The begin-

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113. *New Hampshire Judge*, *supra* note 1, at 283; *see also* PROVINE, *supra* note 1, at 11–12 (quoting ANTON-HERMANN CHROUST, 2 THE RISE OF THE LEGAL PROFESSION IN AMERICA 42–43 (1965)).

114. Richard W. Pingel, *Should Social Security Retire? A Study of Personal Retirement Accounts in the American Probate System*, 20 QUINNIPIAC PROB. L.J. 99, 117 (2006) (citing Summit County Court of Common Pleas - Probate Division, History of the Probate Court, *available at* http:// summitohio-probate.com/ CaseTypes.htm).

115. In re Estate of Bleeker, 168 P.3d 774, 780 n. 22 (Okla. 2007). Integrating probate into equity jurisdiction was not seen as a constitutional problem because there was no right of trial by jury in the ecclesiastical courts. *Id.* "[T]hat right governs solely those common-law actions to which it stood attached in England." *Id.* For criticism denouncing the validity of this so-called "probate exception," see *Dragan v. Miller*, 679 F.2d 712, 713 (7th Cir. 1982).

116. Simes, *supra* note 101, at 978–79. Despite the continued evolution of the probate system, courts continued to advocate the use of ecclesiastical law well into the future:

> If, as between the rule of the old common-law courts and the rule of the English ecclesiastical courts, we are not required by statute to follow the former, we think the latter, on principle, greatly to be preferred; and it has the support of the weight of recent authority in America. . . . But the strong tendency in the United States is to follow the rule of the English ecclesiastical courts . . . .

Williams v. Miles, 94 N.W. 705, 708 (Neb. 1903).

117. *See* Simes, *supra* note 101, at 979.

> nings of this court were feeble. But it grew in importance with the increase of wealth and population, was recognised in our Constitution of 1776, and in each of our subsequent constitutions, and has been the subject of innumerable Acts of Assembly.[118]

3. The Jacksonian Era (c. 1828 to 1850)

With the Jacksonian Era came reformers advocating Egalitarianism and attacking the rise of the lawyers' prominence.[119] The reformers campaigned for the removal of the bar associations' strict requirements and to "open up the legal profession," and their efforts were in part a success.[120] By 1840, every New England state except Connecticut had stripped away control of professional law examinations from the bar.[121]

Surprisingly, practicing lawyers offered little resistance.[122] Increased numbers "made the bar more competitive, flamboyant, and resourceful: 'It pruned away deadwood; it rewarded the adaptive and the cunning. Jacksonian democracy did not make everyman a lawyer. It did encourage a scrambling bar of shrewd entrepreneurs.'"[123] In the end, the reformers' efforts had done little to discourage the use of lawyers on the bench. President Jackson—and accordingly the states—continued to fill important judicial posts with lawyers.[124]

And so, the convergence of lawyers and judgeships had begun, which can be attributed to two interdependent forces. The bar itself promoted the use of lawyers as judges, and lawyers seeking judicial posts had "certain advantages over other would-be politicians."[125] Once lawyers were in politics and the judiciary was restricted to lawyers, the relationship was "mutually reinforcing."[126] Moreover, the law was becoming more complicated, and the American people began to believe that a lawyer's expertise was necessary for adjudication.[127]

> By 1820 the legal landscape in America bears only the faintest resemblance to what existed forty years earlier. While the words are often the same, the structure of thought has dramatically changed and with it the theory of law. Law is no longer conceived of as an

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118. *Id.* at 979–80 (quoting Horner v. Hasbrouck, 41 Pa. 169, 178 (1861)).
119. *See* PROVINE, *supra* note 1, at 15–16.
120. *Id.* at 16.
121. *Id.*
122. *Id.*
123. *Id.* at 16–17 (quoting LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 278 (1973)).
124. *Id.* at 17.
125. *Id.* at 18.
126. *Id.*
127. *Id.* at 17.

> external set of principles expressed in custom and derived from natural law. Nor is it regarded primarily as a body of rules designed to achieve justice only in the individual case. Instead, judges have come to think of the common law as equally responsible with legislation for governing society and promoting socially desirable conduct.[128]

IV. THE LAWYER/LAYMAN DEBATE

A. Nonlawyer Probate Judges Today

Today, only Alabama, Connecticut, Maryland, and New Jersey allow nonlawyers to become judges handling matters of probate, and in some states, existing nonlawyer probate judges continue to serve under grandfather clauses.[129] In Alabama, probate judges are chosen by the public through partisan elections.[130] Maryland handles probate through its Orphans' Court and fills those judicial posts by public election as well.[131] Likewise, Connecticut's probate judges are elected, despite all other judicial offices being filled by appointment.[132] Judicial officials handling probate matters in New Jersey, however, are appointed.[133]

B. Merits of Nonlawyer Judges

As has been shown, nonlawyer judges have adjudicated testamentary dispositions throughout history. Such a long-established tradition over different cultures did not happen without good reasons. Proponents, especially the ancient Greeks, often point to the importance of having democratic influences on the judiciary. Regarding the people's role in judging private suits, the philosopher Plato once said, "[A]ll citizens should take their part . . . , since a man who has no share in the right to sit in judg-

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128. *Id.* at 20 (quoting Morton J. Horwitz, *The Emergence of an Instrumental Conception of American Law, 1780–1820*, *in* PERSPECTIVES IN AMERICAN HISTORY 287, 326 (Donald Fleming & Bernard Bailyn eds., 1971)).

129. Brief of the American Judicature Society as Amicus Curiae Supporting Appellant at 19, North v. Russell, 427 U.S. 328 (1976) (No. 74-1409), 1975 WL 173574. In Alabama, Mobile and Jefferson Counties require that "the Judge of Probate be licensed to practice law." History of the Court, Mobile County Probate Court, http://probate.mobilecountyal.gov/ (follow "General Info" hyperlink) (last visited Apr. 2, 2009).

130. Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 GEO. L.J. 1077, 1085 (2007); Alexander Tabarrok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 J.L. & ECON. 157, 167 (1999).

131. *See* Schotland, *supra* note 130; *see also* Cecil County Orphans' Court, http://cecilcounty.us/orphanscourt/ (last visited Mar. 23, 2009).

132. Schotland, *supra* note 130, at n.29.

133. *Id.* at 1085.

ment on others feels himself to be no real part of the community."[134] In fact, Aristotle defined the term *citizen* as a man who "shares in the administration of justice, and in [holding] offices,"[135] and he included the following "[a]mong the essential elements of a constitution[:] . . . 'the system of popular courts, composed of all citizens or of persons selected from all, and competent to decide all cases—or, at any rate, most of them, and those the greatest and most important.'"[136]

Proponents of lay judges also point to the merits of having decision-makers rely on common sense and life experience. Although critics describe this side effect as creating unreasonable uncertainty in the courts, one proponent who conceded this point went as far as suggesting that such unpredictability is healthy for the family unit, encouraging families to settle disputes among themselves instead of pursuing the often-estranging process of public litigation.[137] That is to say, this supposed slant of nonlawyer judges toward common sense rather than the exact letter of the law is quite arguably a positive consequence. Pre-trial settlement is encouraged, possibly even strengthening the autonomy and vigor of the family unit by preventing permanent post-litigation familial fallout.

C. Criticisms of Nonlawyer Judges

Modern studies have been unanimous in their call for the requirement that judges be lawyers,[138] and these critics of nonlawyer probate judges have formulated many arguments. Before the common criticisms are explored, however, it is important to note that the argument is for professionalizing judges as lawyers rather than creating a self-standing profession of the judiciary. "America never made the judiciary into a true specialist's domain, requiring technical training geared to the responsibilities of office. Practitioners whose education is for law practice, not adjudication, are our 'professional' judges."[139] So when scholars criticize nonlawyer judges as being "nonprofessional," they are really criticizing them for not being lawyers.

Most commonly, critics stress the complicated and critical nature of probate adjudication, concluding that professional legal training is essential. For example, Roscoe Pound strongly felt that the administration of justice was a difficult task, and that not just "anyone is competent to adju-

134. THE LAWS OF PLATO 150 (A.E. Taylor trans., J. M. Dent & Sons Ltd. 1934).
135. ARISTOTLE, THE POLITICS 52 (III, 1275a, 21–22) (Stephen Everson ed., Cambridge Univ. Press 1988).
136. Dawson, *supra* note 9, at 10 (quoting ARISTOTLE, THE POLITICS, 1317b (Barker ed. & trans., New York, Oxford Univ. Press 1899)).
137. *See* Robert Foster, *An Era Ends*, 76 MICH. B.J. 964, 965 (1997).
138. North v. Russell, 427 U.S. 328, 340 n.2 (1976) (Stewart, J., dissenting).
139. PROVINE, *supra* note 1, at 22–23.

dicate the intricate controversies of a modern community . . . ."[140] Mr. Pound sensed that the public held that misconception stating that the notion

> contributes to the unsatisfactory administration of justice in many parts of the United States. The older states have generally outgrown it. But it is felt in . . . lay judges of probate . . . in most of the commonwealths of the South and West. The public seldom realizes how much it is interested in maintaining the highest scientific standard in the administration of justice. There is no more certain protection against corruption, prejudice, class-feeling or incompetence. Publicity will avail something. But the daily criticism of trained minds, the knowledge that nothing which does not conform to the principles and received doctrines of scientific jurisprudence will escape notice, does more than any other agency for the everyday purity and efficiency of courts of justice.[141]

These academics usually emphasize that a system of lay judges allows people not thoroughly trained in the law to make decisions with enormous impact on families. Professor Langbein has argued that probate judges "should have a strong command of the complex substantive and procedural rules that are meant to govern" decisions regarding property ownership, liberty, and incompetency, and that such persons should possess legal training.[142] Interestingly, Langbein called into question the constitutionality of such a system:

> Indeed, it is far from clear that Connecticut probate could withstand constitutional scrutiny on this ground under the Due Process clause of the U.S. Constitution. When liberty and property are at stake, the state has an obligation to operate under procedures commensurate with the seriousness of the affected interests.[143]

Another common argument is that, although they are said to have been needed at one time in rural areas with almost no trained lawyers, modern America is dramatically more equipped in this regard, so lay judges are no longer necessary. However, one study of Indiana judges found "only a mild correlation between the size of the place and whether the judge [was] trained as a lawyer . . . , and no relationship between a court's being located in the county seat and having a lawyer judge."[144]

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140. Pound, *supra* note 7, at 446.
141. *Id.* at 446–47.
142. *Scandal*, *supra* note 7.
143. *Id.* (citing Mathews v. Eldridge, 424 U.S. 319 (1976)).
144. Lamber, *supra* note 5, at 67.

Others propose that having a lay system fosters an unhealthy simplicity in the law. John Langbein has suggested that the inferiority of the probate courts in some states has resulted in continued adherence to "the rule of literal compliance with the Wills Act[,]" saying that "[s]uch courts cannot be trusted with anything more complicated than a wholly mechanical rule."[145]

Still other critics have even suggested that nonlawyer judges are "especially susceptible to local economic, social, and political pressure and to personal prejudice, resulting in questionable decisions."[146] The underlying implication is that legal training would allow judges to more ably resist improper pressure. However, at least one academian has credibly painted this theory as myth.[147]

Finally, one may also point to the advantages arising from judges possessing a working knowledge of the vast body of legal principles *outside* the probate world. A legally-trained mind that knows areas of the law outside testamentary matters might lead to increased consistency and predictability. In the same way a student of American literature must know British literature to put forth informed critiques, probate judges with general legal educations likely benefit by having a working knowledge of general law peripheral to probate.

V. CONCLUSION

The debate between lawyer and nonlawyer judges of probate has burned for centuries. The arguments have often been passionate, and positions obstinate, as shown by Justice Stewart's dissenting language in *North v. Russell*: "At Runnymede in 1215 King John pledged to his barons that he would 'not make any Justiciaries, Constables, Sheriffs, or Bailiffs, excepting of such as knows the laws of land . . . .' Today, more than 750 years later, the Court leaves that promise unkept."[148]

As history progressed, cultures placed decreasing emphasis on the importance of the common sense and tailored justice administered by lay judges. Even though the Ancient Greeks did not use wills, they did employ laymen from the general citizenry in judicial offices as a democratic device. Greeks, as well as Romans, distrusted professionals and felt that the citizenry had a *duty* to participate in government. Unlike Greece, Rome did have a system of adjudicating wills in which they applied these virtues by employing the system of *praetor/iudex*. England continued this

145. John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 503 (1975). Langbein then went on to criticize this theory.

146. Lamber, *supra* note 5, at 60.

147. *See id.* (referring to Doris Marie Provine's study of New York municipal judges).

148. North v. Russell, 427 U.S. 328, 346 (1976) (Stewart, J., dissenting) (quoting MAGNA CARTA 45).

trend of lay judges, although the reasons shifted from lay insight to canonical control. Training increased as well in the ecclesiastical court system; judges were both civilian-trained and focused on their profession. In America, judges overseeing wills and estates began as laymen because of a common distaste for professionals. Even the early layman American judges, however, adjudicated in a professional manner, recognizing precedent and fair procedures. As America matured, the bar influenced many of the states to restrict judgeships to lawyers only. American law grew more complicated, both in actuality and in public perception.

This trend is usually attributed to an increase in the complexity of the law. For example, the Statute of Wills of 1837 was enacted when the English ecclesiastical judges of the late Seventeenth Century created a convoluted scheme of law. The lay judges had fashioned many exceptions seeking ways of honoring the intents of decedents who had not complied with will formalities. Parliament was apparently unpleased with the resulting complexity and felt a need for unification and rigidity rather than "tailored justice" for the people. A second example is the increasing complexity of American law throughout its history. Public sentiment for lawyer judges grew during the Nineteenth Century only because people came to believe they were necessary.

Today, the overwhelming common sentiment is that lawyer judges are necessary, and any shortcomings of rigidly following the law may be remedied by altering the law, further increasing its complexity. The process is mutually-reinforcing.

However, neither the Greeks, Romans, English, nor early Americans required probate judges to be formally trained as legal advocates. Though the English ecclesiastical judges were civilian trained, and the Roman Empire administrative judges were professionalized, the lawyer-judge is a relatively modern concept. Is this because the modern law is more complex? According to this Note's foregoing analysis, the answer is no. Rather, the American people gradually accepted the lawyer requirement because they *perceived* the law to be growing in complexity. Though nuanced, whether the belief *accurately reflected* the status of the law is a separate matter. The dynamic at issue is one of perception.

The impetus for the lawyer requirement has always come from the lawyer class, which has historically preached the law's complexity as a threshold barrier to entrance. However, as this Note has shown, there is much merit in maintaining amateur minds in at least some strategic judicial posts, and those offices overseeing matters of testamentary dispositions are among the most appropriate. The law governing this discipline need not remain simplistic and enforcement rigid. With proper training, persons of intelligence from the community may nobly serve the people. Such training might need to be intensive and substantial, perhaps on the level of an actual post-secondary degree in probate adjudication. Requiring three

years of lawyer training, however, is probably heavy-handed on the part of today's lawyer class and further segregates the American proletariat from a perceived judicial aristocracy.

Indeed, a legal profession colluding for mutual gain is a real concern of the public. Perhaps Charles Dickens represented that criticism best in *Bleak House*:

> The one great principle of the English law is, to make business for itself. There is no other principle distinctly, certainly, and consistently maintained through all its narrow turnings. Viewed by this light it becomes a coherent scheme, and not the monstrous maze the laity are apt to think it. Let them but once clearly perceive that its grand principle is to make business for itself at their expense, and surely they will cease to grumble.[149]

This "egalitarian rhetoric" was rampant during the time of the American Revolution as well, when most citizens openly believed that "in the United States faith should be placed in the ordinary citizen's ability to recognize and administer justice. 'Any person of common abilities can easily distinguish between right and wrong.'"[150]

American lawyers today would do well to heed history and be reminded that its citizens often pride themselves on their heritage of independence and the pursuit of freedom from controlling classes. Despite the increased complexity of the law, the debate over lawyer requirements for probate judges is not such a clearly-sided issue.

James Findley[*]

149. CHARLES DICKENS, BLEAK HOUSE 467 (Wordsworth Editions Ltd. 1993) (1853).

150. ROBERT E. SHALHOPE, THE ROOTS OF DEMOCRACY 140–41 (2004).

* J.D. 2010, University of Alabama School of Law; B.S.I.E. 2003 and M.B.A. 2007, Mississippi State University. I would like to thank my wife, Melissa, for her faith, love and suffering through law school and beyond.