National Center for State Courts
3 4185 00023096 0

Commission on
National Probate Court Standards

NATIONAL PROBATE COURT STANDARDS

NCSC
KF
765
N37
1993
c. 2

NCSC
KF
765
N37
1993
c.2

Commission on
National Probate Court Standards

NATIONAL PROBATE COURT STANDARDS

recd 2/8/94

A project of the National College of Probate Judges and the National Center for State Courts, funded by the State Justice Institute (Grant No. SJI-91-12L-C-070) and the American College of Trust and Estate Counsel Foundation

Library
National Center for State Courts
300 Newport Ave.
Williamsburg, VA 23187-8798

Copyright 1993, National Center for State Courts, 300 Newport Ave. (23185), P.O. Box 8798, Williamsburg, VA 23187-8798
National Probate Court Standards Project
A project of the National College of Probate Judges and the National Center for State Courts, funded by the State Justice Institute and the American College of Trust and Estate Counsel Foundation

Library of Congress Catalog Card Number: 93-87566
ISBN: 0-89656-130-5
NCSC Publications Number: R-151

This document was developed under a grant from the State Justice Institute (SJI) (No. SJI-91-12L-C-070) and the American College of Trust and Estate Counsel Foundation (ACTEC) to the National College of Probate Judges (NCPJ) and the National Center for State Courts (NCSC). The points of view expressed are those of the authors and do not necessarily represent the official position or policies of the SJI, ACTEC, NCPJ, or NCSC. Interested persons are invited to make copies of this document.

Commission on National Probate Court Standards

Hon. Evans V. Brewster, *Chair*
Judge (Ret.), Surrogate's Court
White Plains, New York

Hon. Arthur J. Simpson, Jr., *Vice-Chair*
Judge (Ret.), Superior Court of New
Jersey, Appellate Division
Hackensack, New Jersey

Hon. Freddie G. Burton, Jr.
Chief Judge, Wayne County Probate Court,
Detroit, Michigan

Hon. Ann P. Conti
Surrogate of Union County
Elizabeth, New Jersey

Hon. George J. Demis
Judge, Tuscarawas County Court
New Philadelphia, Ohio

Hon. Nikki DeShazo
Judge, Probate Court
Dallas, Texas

Ms. Emilia DiSanto
Vice-President of Operations
Legal Services Corporation
Washington, DC

Mr. Hugh Gallagher
Deputy Court Administrator, Superior Court
of Phoenix
Phoenix, Arizona

Prof. William McGovern
University of California-Los Angeles
Law School
Los Angeles, California

Hon. John Monaghan
Judge, St. Clair County Probate Court
Port Huron, Michigan

Hon. Frederick S. Moss
Judge, Probate Court, District
of Woodbridge
Woodbridge, Connecticut

Hon. Mary Sheffield
Associate Judge,
25th Circuit Court Probate Division
Rolla, Missouri

Hon. Patsy Stone
Judge, Probate Court
Florence, South Carolina

Mr. James R. Wade, Esq.
Wade, Ash, Woods, Hill & Farley, P.C.
Denver, Colorado

Mr. Raymond H. Young, Esq.
Young & Bayle
Boston, Massachusetts

National Probate Standards Project Staff

Thomas L. Hafemeister, *Project Director*
Ingo Keilitz, *NCSC Vice-President*
Pamela Casey, *Senior Staff Associate*
Shelley Rockwell, *Staff Associate*

Hillery Efkeman, *Project Secretary*
Brenda Jones, *Project Secretary*
Thomas Diggs, *Research Assistant*
Paula Hannaford, *Research Assistant*

National Center for State Courts
300 Newport Avenue (23185)
P.O. Box 8798
Williamsburg, Virginia 23187-8798
(804) 253-2000
Fax (804) 220-0449

Review Panel
National Probate Court Standards

The following individuals contributed to the *National Probate Court Standards* by reviewing draft versions during the project. The inclusion of their names does not infer that they endorse the content of the Standards. It acknowledges the valuable service they provided to the project.

Hon. Field C. Benton
Denver Probate Court
Denver, Colorado

Mary E. Brickner, Esq.
Golden, Colorado

Melissa Burkholder, Esq.
American Association of Retired Persons
Washington, DC

Hon. R. R. Denny Clunk
Stark County Probate Court
Canton, Ohio

Hon. Arthur Coffey
Associate Justice, Ret.
Probate and Family Court
West Roxbury, Massachusetts

Nancy Coleman
American Bar Association
Commission on Legal Problems of the Elderly
Washington, DC

Wiley Dinsmore, Esq.
Dinsmore & Shohl
Cincinnati, Ohio

Charles H. Dorsey, Jr., Esq.
Executive Director
Legal Aid Bureau, Inc.
Baltimore, Maryland

David M. English, Esq.
Associate Professor of Law
The University of South Dakota School of Law
Vermillion, South Dakota

Joe C. Foster, Jr., Esq.
Fraser, Trebilcock, Davis, & Foster, P.C.
Lansing, Michigan

Vicki Gottlich, Esq.
National Senior Citizens Law Center
Washington, DC

Max Gutierrez, Jr., Esq.
Brobeck, Phleger & Harrison
San Francisco, California

Rodney N. Houghton, Esq.
McCarter & English
Newark, New Jersey

A. Frank Johns, Esq.
Booth, Harrington, Johns & Campbell
Greensboro, North Carolina

John J. Lombard, Jr., Esq.
Morgan, Lewis & Bockius
Philadelphia, Pennsylvania

Hon. Ralph D. Lukens
Probate Court Administrator
State of Connecticut
West Hartford, Connecticut

Judith W. McCue, Esq.
Keck, Mahin & Cate
Chicago, Illinois

Hon. Patrick J. McGann, Jr.
Monmouth County Courthouse
Freehold, New Jersey

Louis A. Mezzullo, Esq.
Mezzullo & McCandlish
Richmond, Virginia

Susan Miler
Legal Programs Coordinator
Legal Counsel for the Elderly
American Association of Retired Persons
Washington, DC

Malcolm A. Moore, Esq.
Davis Wright Tremaine
Seattle, Washington

Hon. Ellen A. Peters
Chief Justice
State of Connecticut
Hartford, Connecticut

Hon. Alfred L. Podolski
Chief Justice, Ret.
Massachusetts Probate and Family Court Department
Dedham, Massachusetts

Surr. C. Raymond Radigan
Surrogate's Court
County of Nassau
Mineola, New York

Hanson S. Reynolds, Esq.
Foley, Hoag & Eliot
Boston, Massachusetts

Joseph C. Steele
Court Administrator
Administrative Office of the Courts/Probation
Lincoln, Nebraska

Hon. John M. Smoot
Associate Justice
Probate and Family Court
Boston, Massachusetts

Clare H. Springs, Esq.
Springs, Rivin, Detwiler, Dudnick & Stikker
San Francisco, California

Erica Wood, Esq.
American Bar Association
Commission on Legal Problems of the Elderly
Washington, DC

Commendations

Executive Committee of the American College of Trust and Estate Counsel

The Executive Committee of the American College of Trust and Estate Counsel commends the Commission on National Probate Court Standards for its development and issuance of the *National Probate Court Standards*. The College is on record in encouraging all states to improve their guardianship and conservatorship laws and practices as a more appropriate alternative to proposed federal guardianship legislation. The Commission's report provides standards for the establishment and monitoring of guardianships and conservatorships, which can be adopted by rule, policy, or practice notwithstanding variations in underlying substantive law. The Standards in this area, as well as in the areas of decedents' estates and general court administration, should be considered by all those interested in the more efficient administration of our Probate Courts.

Executive Committee of the National College of Probate Judges

The Executive Committee of the National College of Probate Judges commends the work of the Commission on National Probate Court Standards, as represented by its aspirational report, *National Probate Court Standards.*

We recognize that some of its details may not be totally applicable in every jurisdiction or in every court; nevertheless, the general principles articulated in that report warrant thoughtful consideration by every judge sitting in probate.

Executive Committee of the Section of Real Property, Probate and Trust Law of the American Bar Association

The Executive Committee of the Section of Real Property, Probate and Trust Law of the American Bar Association commends the *National Probate Court Standards* developed by the Commission on National Probate Court Standards. The report of the Commission notes that there is room for improvement in the efficient administration of guardianship, conservatorship, and decedent's estates through improved probate court rules, policies, and practices despite variations in underlying substantive law. The report should provide a helpful agenda for future probate reform efforts by judges, court administrators, and the practicing bar.

Joint Editorial Board for the Uniform Probate Code

The Joint Editorial Board for the Uniform Probate Code commends the Commission on National Probate Court Standards for developing the *National Probate Court Standards.* The Board is pleased that Standard 3.2.1 states a preference for unsupervised administration of decedents' estates. Without signaling agreement with all other standards and commentary, the Board notes with approval that the report encourages the implementation of basic standards through court adoption of policies, procedures, and rules notwithstanding the lack of consistency in underlying state laws.

Contents

Commission on National Probate Court Standards iii

Review Panel, National Probate Court Standards iv

Commendations v

Foreword xi

Introduction 1

Section 1: Probate Court Performance 11

1.1 ACCESS TO JUSTICE 11
- Standard 1.1.1 Public Proceedings 12
- Standard 1.1.2 Safety, Accessibility, and Convenience 13
- Standard 1.1.3 Effective Participation 13
- Standard 1.1.4 Courtesy, Responsiveness, and Respect 13
- Standard 1.1.5 Affordable Costs of Access 14

1.2 EXPEDITION AND TIMELINESS 15
- Standard 1.2.1 Case Processing and Compliance with Schedules 15
- Standard 1.2.2 Prompt Implementation of Law and Procedure 16

1.3 EQUALITY, FAIRNESS, AND INTEGRITY 17
- Standard 1.3.1 Fair and Reliable Judicial Process 17
- Standard 1.3.2 Court Decisions and Actions 18
- Standard 1.3.3 Clarity 18
- Standard 1.3.4 Responsibility for Enforcement 18
- Standard 1.3.5 Production and Preservation of Records 19

1.4 INDEPENDENCE AND ACCOUNTABILITY 20
- Standard 1.4.1 Independence and Comity 21
- Standard 1.4.2 Accountability for Public Resources 21
- Standard 1.4.3 Personnel Practices and Decisions 22
- Standard 1.4.4 Public Information 22
- Standard 1.4.5 Response to Change 23

1.5 PUBLIC TRUST AND CONFIDENCE 23
- Standard 1.5.1 Accessibility 24
- Standard 1.5.2 Expeditious, Fair, and Reliable Court Functions 25
- Standard 1.5.3 Judicial Independence and Accountability 26

Section 2: Administrative Policies and Procedures 27

2.1 JURISDICTION AND RULE MAKING 27
Standard 2.1.1 Jurisdiction 28
Standard 2.1.2 Rule Making 29

2.2 CASEFLOW MANAGEMENT 30
Standard 2.2.1 Court Control 30
Standard 2.2.2 Court Supervision of Case Progress 31
Standard 2.2.3 Time Standards Governing Disposition 32
Standard 2.2.4 Scheduling Trial and Hearing Dates 33

2.3 JUDICIAL LEADERSHIP 34
Standard 2.3.1 Human Resources Management 34
Standard 2.3.2 Financial Management 35
Standard 2.3.3 Performance Goals and Strategic Plan 36

2.4 INFORMATION AND TECHNOLOGY 36
Standard 2.4.1 Management Information System 36
Standard 2.4.2 Monitoring 37
Standard 2.4.3 Technology 38
Standard 2.4.4 Collection of Caseload Information 38

2.5 ALTERNATIVE DISPUTE RESOLUTION 39
Standard 2.5.1 Mediation 40
Standard 2.5.2 Arbitration 40

Section 3: Probate Practices and Proceedings 41

3.1 COMMON PRACTICES AND PROCEEDINGS 41
Standard 3.1.1 Notice 41
Standard 3.1.2 Fiduciaries 43
Standard 3.1.3 Other Court Appointees 45
Standard 3.1.4 Virtual Representation 46
Standard 3.1.5 Attorneys' and Fiduciaries' Compensation 48
Standard 3.1.6 Accountings 48
Standard 3.1.7 Sealing Court Records 49
Standard 3.1.8 Interstate Compacts and Cooperation 49
Standard 3.1.9 Settlements 50

3.2 DECEDENTS' ESTATES 50
Standard 3.2.1 Unsupervised Administration 50
Standard 3.2.2 Determination of Heirship of an Intestate Decedent 51
Standard 3.2.3 Timely Administration 52
Standard 3.2.4 Small Estates 53

3.3 GUARDIANSHIP 53
Standard 3.3.1 Petition 54
Standard 3.3.2 Screening 55
Standard 3.3.3 Early Control and Expeditious Processing 57
Standard 3.3.4 Court Visitor 58
Standard 3.3.5 Appointment of Counsel 59

	Standard 3.3.6	Emergency Appointment of a Temporary Guardian	61
	Standard 3.3.7	Notice	63
	Standard 3.3.8	Hearing	64
	Standard 3.3.9	Determination of Incapacity	65
	Standard 3.3.10	Less Intrusive Alternatives	67
	Standard 3.3.11	Qualifications and Appointments of Guardians	68
	Standard 3.3.12	Order	70
	Standard 3.3.13	Training and Orientation	71
	Standard 3.3.14	Reports by the Guardian	72
	Standard 3.3.15	Monitoring of the Guardian	73
	Standard 3.3.16	Reevaluation of Necessity for Guardianship	74
	Standard 3.3.17	Enforcement	75
	Standard 3.3.18	Final Report and Discharge	76
3.4	CONSERVATORSHIP		77
	Standard 3.4.1	Petition	78
	Standard 3.4.2	Screening	79
	Standard 3.4.3	Early Control and Expeditious Processing	80
	Standard 3.4.4	Court Visitor	81
	Standard 3.4.5	Appointment of Counsel	83
	Standard 3.4.6	Emergency Appointment of a Temporary Conservator	85
	Standard 3.4.7	Notice	86
	Standard 3.4.8	Hearing	88
	Standard 3.4.9	Determination of Incapacity	89
	Standard 3.4.10	Less Intrusive Alternatives	90
	Standard 3.4.11	Qualifications and Appointments of Conservators	92
	Standard 3.4.12	Order	93
	Standard 3.4.13	Training and Orientation	95
	Standard 3.4.14	Bond	95
	Standard 3.4.15	Reports by the Conservator	96
	Standard 3.4.16	Monitoring of the Conservator	99
	Standard 3.4.17	Reevaluation of Necessity for Conservatorship	99
	Standard 3.4.18	Enforcement	100
	Standard 3.4.19	Final Accounting and Discharge	101

General References 105

Appendix A (Jurisdiction of Probate Courts and Divisions of Courts) 107

Appendix B (Caseload Volume and Composition) 111

Foreword

Probate practice, jurisdiction, and the structure of courts exercising probate jurisdiction (hereinafter probate courts) vary greatly from state to state. There is often a dramatic difference in the terminology used in probate courts and the type of cases included within the term, *probate.* Consequently, there is a limited degree of consistency in the practice and procedures used to resolve probate proceedings. Often, judges presiding over probate matters are provided with little guidance and few standards for resolving the issues before them. Few, if any, "pure" probate courts exist, that is, courts with jurisdiction limited solely to matters pertaining to wills, administration of estates, and matters pertaining to a decedent's estate.

The National College of Probate Judges, with membership from substantially all states, has long been aware of this diversity. After thoughtful review of a survey of state representatives, the Executive Committee of the National College concluded that National Standards for Probate Courts would not only be informative but would be a useful aid to probate judges, probate practitioners, probate court staff, and others interested in probate law and probate court practice and procedures.

The Commission on National Probate Court Standards (hereinafter Commission) was created with the support and authorization of the State Justice Institute. This report is the work product of the Commission. The National Probate Court Standards (hereinafter Standards) are intended to address the administration, operation, and performance of probate courts. The Standards do not resolve, or attempt to resolve, the many substantive legal issues rising in probate cases. These issues must be addressed by the respective State Legislative, Executive, and Judicial branches of Government.

The objective of the Commission is to promote uniformity, consistency, and continued improvement in the operation of the nation's probate courts. The Standards and associated commentary, annotations, and reference materials bridge gaps of information, provide organization and direction to the future development of the probate courts, and set forth aspirational goals for the probate courts. Although the Standards include both concrete recommendations and the rationale behind them, they are not intended to be statements of what the law is or should be, or to otherwise infringe on the decision making authority of probate court judges or state legislatures. Nor do they address every aspect of the nation's probate courts but rather set forth guiding principals to assist the future evolution of these courts. The Standards seek to capture the philosophy and spirit of an effective probate court.

No set of Standards will be adequate for all time but it is hoped that the Standards proposed by the Commission will set the course for increased responsiveness and efficiency of the probate courts. I believe the Standards provide a frame work within which greater uniform practice and procedures of probate courts can be achieved.

This document owes its existence to the contributions of several organizations and many individuals. Financial assistance was provided by the State Justice

Institute, which provides financial support to projects designed to improve the administration of justice in the state courts, with supplemental funding provided by The American College of Trust and Estate Counsel (ACTEC) Foundation. The continuous assistance and encouragement of SJI Project Monitor, Richard Van Duizend, is appreciated. The comments of invited members of the Review Panel who invested the time necessary to review and provide comments upon the various drafts of this document were analyzed and discussed by the members of the Commission. These comments were very helpful. Many of the suggestions were incorporated into this document. The project staff at the National Center for State Courts, an organization dedicated to serving the state courts of the nation, provided guidance and effective assistance throughout the project.

Finally, the individual members of the Commission each contributed their expertise, time, and devotion to the completion of this document. I am deeply grateful to each of them for their efforts and unselfish dedication to achieving the objectives of this project.

This document should be a valuable source of information to those interested in the administration of justice in probate courts.

EVANS V. BREWSTER, Surrogate (Ret.)
Surrogate's Court, Westchester County (N.Y.)

McCullough, Goldberger & Staudt (of counsel)

Chair, Commission on National Probate Court Standards
October 1993

Introduction

Evolution of Probate Courts

Although individual cases involving wills, decedents' estates, trusts, guardianships, and conservatorships—traditionally, matters within the jurisdiction of courts exercising probate jurisdiction—have garnered considerable public and professional attention, relatively little is known about the administration, operation, and performance of courts with probate jurisdiction. Unlike other types of courts (e.g., criminal courts), the evolution of such 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 broad 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 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 and the financial and personal status of their wards; guardians

who have little or no training; lack of awareness of alternatives to guardianship; and the lack of due process.[1]

Active involvement in guardianship issues provided the foundation for the sponsorship by the American Bar Association (ABA) of the 1988 Wingspread National Guardianship Symposium. Guardianship experts from across the country attended the meeting, including probate judges, attorneys, guardianship 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 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 procedures related to guardianship in courts exercising probate jurisdiction.[2]

Efforts to reform the administration of decedents' estates predate guardianship reform. A Model Probate Code was promulgated in the early 1950s 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 an editorial board consisting of members of The Real Property, Probate, and Trust Law Section of the ABA, the American College of Trust and Estate Counsel, and the Conference of Commissioners. While the UPC has met with some resistance, it has been adopted by 15 states and has been adopted in part or has influenced reform in still others. Nevertheless, although the UPC provides a useful model, there is still a need for appropriate reform in this area.

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, do not sufficiently address the concerns of probate courts. Twenty-seven (79 percent) of the 34 respondents cited the need for separate probate court standards. 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

---

[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).

[2] Recommendations for improved judicial practices included removal of barriers, use of limited guardianship and other less-restrictive alternatives, creative use of nonstatutory judicial authority, and an enhanced judicial role in providing effective legal representation. AMERICAN BAR ASSOCIATION, *supra* note 1, at 19-22.

by groups and individuals both inside and outside of these courts. National standards for probate courts are viewed as a viable means to address this need. Existing standards and guidelines, including those promulgated by the ABA and the NCSC, though clearly applicable, do not adequately address the need for standards specifically relevant to courts exercising probate jurisdiction.

To begin to redress these deficiencies, the NCPJ, in cooperation with the NCSC, undertook a two-year project 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 are intended to provide a common language to facilitate description, classification, and communication of probate court activities; and, most important, a management and planning tool for self-assessment and self-improvement of courts throughout the country exercising probate jurisdiction.

Commission on National Probate Court Standards, Project Staff, and Review Panel

The central resource and mechanism for the development of the National Probate Court (Standards) was a 15-member Commission on National Probate Court Standards (Commission).

The Hon. Evans V. Brewster, President of the NCPJ, retired judge of the Surrogate's Court of New York and Of Counsel to the firm of McCullough, Goldberger and Staudt in White Plains, New York, chaired the Commission. The Hon. Arthur J. Simpson, Jr., retired judge of the Superior Court of New Jersey, Appellate Division, chair of the NCPJ's Committee on National Standards, and Of Counsel to the firm of Winne, Banta, Rizzi, Hetherington and Basralian in Hackensack, New Jersey, served as vice-chair.

Eight other probate judges were also involved: the Hon. Freddie G. Burton, Chief Judge of the Wayne County Probate Court in Detroit, Michigan; the Hon. Ann P. Conti, Union County Surrogate's Court in Elizabeth, New Jersey; the Hon. George J. Demis, Tuscarawas County Probate/Juvenile Court in New Philadelphia, Ohio; the Hon. Nikki DeShazo, Probate Court in Dallas, Texas; the Hon. John Monaghan, St. Clair County Probate Court, in Port Huron, Michigan; the Hon. Frederick S. Moss, Probate Court, District of Woodbridge, in Woodbridge, Connecticut; the Hon. Mary W. Sheffield, Associate Circuit Judge, 25th Circuit Court, Division 1/Probate Division, Phelps County, in Rolla, Missouri; and the Hon. Patsy Stone, Florence County Probate Court in Florence, South Carolina.

The other members of the Commission represented a wide range of expertise on probate matters. They included Emilia DiSanto, Vice President of Operations, Legal Services Corporation; Hugh Gallagher, Deputy Court Administrator, Superior Court of Maricopa County in Phoenix, Arizona; William McGovern, Professor of Law, University of California-Los Angeles Law School; James R. Wade, practicing attorney and member of the firm of Wade, Ash, Woods, Hill, and Farley, P.C., in Denver, Colorado, and a former judge of the Denver Probate Court; and Raymond M. Young, practicing attorney and member of the firm of Young and Bayle in Boston, Massachusetts.

The efforts of the Commission were supported and assisted by staff of the NCSC. Project staff consisted primarily of Thomas L. Hafemeister, J.D., Ph.D., Project Director; Ingo Keilitz, Ph.D., NCSC Vice-President; Pamela Casey, Ph.D., Director of the NCSC Institute on Mental Disability and the Law; Shelley Rockwell, Staff Associate; Hillery Efkeman, Project Secretary; Brenda Jones, Project Secretary; Thomas Diggs, Research Assistant; and Paula Hannaford, Research Assistant.

The Commission and project staff held a series of meetings to generate the Standards. Project staff compiled and distilled information about or relevant to probate courts and made this information available to the Commission in a series of briefing papers. The Commission developed and revised the Standards with assistance from the project staff. In addition, 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 invited members of the Review Panel (see page iv).

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

Because relatively little is known about the structure, organization, and business of probate courts and probate departments and divisions of courts throughout the United States, project staff attempted to determine the nature of the country's probate courts. Project staff also compiled data on the volume and composition of caseloads for wills, estates, trusts, conservatorships, and guardianships throughout the United States.

Court Organization and Structure

In 1990, 44 states (including the District of Columbia) had trial court systems that included courts of limited or special jurisdiction. Variously called municipal, district, probate, juvenile, orphan's, surrogate, justice of the peace, or magistrate's courts, these courts are restricted in the range of cases that they can decide. The number of such limited or special jurisdiction courts ranges from zero in seven states with unified court systems (all trial courts at each level have identical authority to decide cases) to more than 1,000 such courts in Georgia, New York, and Texas.[3]

Twenty-one states and the District of Columbia have limited jurisdiction courts or divisions of general jurisdiction courts that use the word *probate* as part of their official name, i.e., a formal probate court organization established by state statute. New Jersey and New York use the term *surrogate* to refer to their courts with "probate" jurisdiction, but were nonetheless included in this category. These states can be divided into three general categories: (1) thirteen states have formal statewide probate courts; (2) two states and the District of Columbia have probate divisions or departments of general or special jurisdiction courts throughout that state; and (3) five states have mixed or different probate court structures and organizations depending on the region of the state (see table).

[3]National Center for State Courts, State Court Caseload Statistics: Annual Report 1990 7 (1992).

Probate Courts or Divisions of Courts with Probate Jurisdiction

Statewide Courts	Alabama, Arkansas, Connecticut, Georgia, Maine, Michigan, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, South Carolina, Vermont
Statewide Divisions	District of Columbia, Massachusetts, Missouri
Regional Courts or Divisions	Colorado, Indiana, Ohio, Tennessee, Texas

Connecticut is an example of a state with statewide probate courts, one in each of 133 probate court districts. The districts are included in nine administrative regions, each with a regional coordinator. Connecticut may be unique, however, insofar as its court is managed by a Probate Court Administrator who oversees a staff consisting of a chief counsel, a staff attorney, a manager of administrative services, a social service coordinator, a financial services supervisor, computer specialists, auditors, and administrative support staff.[4]

Missouri falls into the second category. The Missouri Circuit Courts were reorganized in 1979, eliminating the Probate Court and the Magistrate Court. The Missouri Circuit Courts are divided into 44 judicial circuits served by circuit judges, associate circuit judges, municipal court judges, and commissioners. The courts consist of five divisions including the Probate Division, which exercises jurisdiction over estates of decedents, minors, and incompetents and over mental health proceedings. Circuit judges, associate circuit judges, and commissioners preside over the Probate Division.

Finally, Colorado is a state with mixed or different probate court structures and organizations depending on regions of the state. The Colorado District Courts have original jurisdiction over all civil, criminal, juvenile, domestic relations, probate, and mental health matters, except in the City and County of Denver, where probate and mental health matters are heard by the Denver Probate Court and juvenile matters by the Denver Juvenile Court. Texas's probate court structures also vary by region. Generally, constitutional County Courts in Texas assume probate jurisdiction, except in those counties in which probate courts have been established (e.g., Dallas, Galveston, and Harris). These counties with special probate courts are almost exclusively Texas's most populous counties, where probate cases surface frequently enough to warrant a specific probate court.

Thirty states have no formal probate court structure, although local courts may be organized according to general case types. For example, the Superior Court of Maricopa County, Arizona, a state with no formal probate court structure, is organized

[4]Annual Report of the Probate Court Administrator 1991 (1992).

into civil, criminal, domestic relations, and probate departments established by local court rule.[5]

Subject matter jurisdiction of probate courts and divisions varies considerably throughout the United States (see Appendix A). Historically, wills, testamentary trusts, and decedents' estates form the essential case types of a probate court's jurisdiction. The probate courts and divisions in the 20 states and the District of Columbia with a formal probate court organization hear wills, trusts, and estate cases. In 17 of these states and the District of Columbia, guardianship cases are also heard. In 11 of these states and the District of Columbia, conservatorship cases are heard as well as guardianship cases. As used throughout these Standards, a *guardian* is a court-appointed person responsible for the care, custody, and control of the respondent, whereas a *conservator* is a person appointed by the court to manage the estate of the respondent. Beyond general powers over wills, trusts, estates, guardianships, and conservatorships, jurisdiction of probate courts and divisions of courts over civil commitment, adoptions, and other matters varies considerably (see Appendix A). Some states assign jurisdiction of involuntary civil commitment and adoption cases to their probate courts or divisions, while others do not. In some states, probate courts or divisions exercise authority over other matters, including change of name, county governmental administrative duties, election duties, appointments to vacant public offices, administration of oaths to public officers, bonds of public officers, registration of enterprises, issuance of marriage licenses, traffic cases, fish and game law violations, "criminal" commitment hearings, divorce, affirmation or annulment of marriages, disability proceedings, issuance of writs of habeas corpus, insolvency matters, determination of presumption of death, juvenile jurisdiction, new or amended birth certificates, corrections or amendment of marriage certificates, death certificates, proceedings involving cemetery lots, trusts related to community mausoleums or columbariums, petitions for license to convey homestead interests of an insane spouse, declaratory judgments, and trustee appointments for those in prison.

In general, no consensus exists on either the definition of *probate jurisdiction* or the scope of powers of a probate court. Based on the information in Appendix A, arguably, a *probate court* is a court having general powers over wills, trusts, estates, guardianships, and conservatorships. The majority of states with probate courts and divisions have assigned jurisdiction over these matters to them. However, lack of uniformity in the definitions of the subject matter of estates, guardianships, and conservatorships may mask an actual uniformity among the states in the authority of probate courts and probate divisions over these basic categories of case types that is not evident from a review of Appendix A.

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 execu-

[5]MARICOPA COUNTY [ARIZONA] SUPER. CT. R. PRAC. 5.1 (Scope) ("The presiding judge shall designate the judge or judges of the probate division who shall be charged with probate matters, guardianship and other fiduciary matters, mental health hearings and supervision of mental health cases, applications for change of name, assignments for benefit of creditors and determination of identify or parentage").

tors). 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.

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.

An examination of caseload trends over time also offers a historical perspective on the role of courts with probate jurisdiction. For example, in recent years there has been a slight increase in the number of filings of cases focusing on wills, trusts, or estates. During this same time, the number of guardianship and involuntary civil commitment filings increased steadily and significantly (see Appendix B).

Such data also show whether caseload growth or decline is consistent among the states and across types of cases. Individual states differ dramatically in the number of probate-related cases filed during a given period, even when adjusted for the population of the state (see Appendix B). Furthermore, the states show considerable fluctuation in these rates across time. These variations may be attributed to a number of factors, including local differences in terminology, court usage, and judicial jurisdiction, authority, and powers.

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 Commission crafted the Standards to promote uniformity, consistency, and continued improvement in the operations of courts exercising probate jurisdiction. The Standards and associated commentary, footnotes, and reference materials bridge gaps of information, provide organization and direction to the development of these courts, and set forth aspirational goals for them. 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.

The Standards are divided into three major sections. Section 1 deals exclusively with performance standards (i.e., standards that courts exercising probate jurisdiction can use to assess and to improve their performance) in five major areas: (1) access to justice, (2) expedition and timeliness, (3) equality, fairness, and integrity, (4) independence and accountability, and (5) public trust and confidence. Although tailored specifically for courts exercising probate jurisdiction, this section draws upon the standards and commentary of the Trial Court Performance Standards endorsed

by the Conference of Chief Justices, the Conference of State Court Administrators, and the National Association for Court Management.[6]

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) alternative dispute resolution.

Section 3 covers probate practices and proceedings relating to (1) common practices and proceedings, (2) decedents' estates, (3) guardianship, and (4) conservatorship. 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, delinquency, child abuse, child 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"—representing the guiding principle of the standard. Commentary follows each standard to explain and clarify its underlying rationale. 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 Standards do not endorse or adopt the UPC in its entirety, but the UPC has influenced the content of portions of this report and serves 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 the courts exercising probate jurisdiction, this would have been an impossible task. Finally, the reference list that follows the Standards provides materials relied upon in part to draft the Standards, but does not imply an endorsement of the cited references, nor does it exhaust potentially relevant materials.

The Commission recognizes that 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. However, all the Standards need to be read in light of the applicable law of each particular state, and not all states may 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 court does not have. In general, however, the goals set by the Standards should be obtainable by courts that are provided with reasonable levels of resources.

---

[6] COMMISSION ON TRIAL COURT PERFORMANCE STANDARDS, TRIAL COURT PERFORMANCE STANDARDS WITH COMMENTARY (National Center for State Courts, 1990).

The Commission also recognizes that some states may have taken steps to improve and update their probate provisions. 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. While the judge exercising probate jurisdiction must be guided by relevant state laws or court rules, the court, because of its inherent powers and duties, can work to improve the existing system where appropriate.

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
Probate Court Performance

Most standards, guidelines, and model procedures in the field of judicial administration have emphasized means over ends. A notable exception is the 1990 volume of the Trial Court Performance Standards. Those standards are based on the premise that courts can achieve success using different structures and procedures. While there is disagreement as to optimum structure and procedure, there can be considerable agreement on the ends to which these means should be applied. Accordingly, this section draws upon the 22 standards, and their accompanying commentary, from the Trial Court Performance Standards in establishing the appropriate criteria for probate court performance. The material presented here helps to define, communicate, and monitor the roles and standards for the performance of a court exercising probate jurisdiction (hereinafter referred to as the court).

The performance standards are organized into five categories. ACCESS TO JUSTICE, the first category, recommends that the court eliminate unnecessary barriers to its service. Some of the barriers specifically addressed are geography, economics, and procedure. EXPEDITION AND TIMELINESS, the second category, recommends that the court focus on time management and efforts to reduce delay and improve efficiency.

EQUALITY, FAIRNESS, AND INTEGRITY, the third category, recommends that the court provide due process and equal protection, ensure the overall integrity of the judicial process, and demonstrate fairness to all. The fourth category, INDEPENDENCE AND ACCOUNTABILITY, recommends that the court assert its position as a component of a distinct branch of government while being accountable for its use of public resources. The final category, PUBLIC TRUST AND CONFIDENCE, recommends that the court promote public respect for the court.

1.1 ACCESS TO JUSTICE

The court should be open and accessible. Because location, physical structure, procedures, and the responsiveness of its personnel affect accessibility, the five standards grouped under ACCESS TO JUSTICE recommend that a court eliminate unnecessary barriers to its services. Such barriers can be physical, geographic, economic, and procedural. They can be caused by deficiencies in language and lack of knowledge of individuals participating in court proceedings. Additionally, psychological barriers can be created by mysterious, remote, unduly complicated, and intimidating court procedures. The standards in ACCESS TO JUSTICE recognize the applicability of the Americans with Disabilities Act to the court and the importance of remaining sensitive to the needs of persons with a disability.

The intent of the first two standards is to bring the administration of justice into the open and make it accessible. Standard 1.1.1 recommends that the court conduct its business openly. To ensure that all persons with legitimate business before the court have access to its proceedings, Standard 1.1.2 recommends that the court make its facilities safe, accessible, and convenient. Accessibility is recommended not only for those who are represented by an attorney but for all litigants, jurors, witnesses, 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.

Because a court may be accessible to most and still hinder access to some, Standard 1.1.3 recommends that the court provide opportunities for the effective participation of all who appear before the court, including those with linguistic difficulties or physical or mental disabilities. To promote access to justice and to enhance citizens' confidence and trust in the court, Standard 1.1.4 urges that all court personnel accord respect, courtesy, and dignity to all with whom they come into contact.

Standard 1.1.5 recognizes that there are financial and procedural barriers to access to justice. It recommends that the fees imposed and procedures established by the court be fair and reasonable. Recognizing the importance of the relationship between public records and access to justice, the standard also recommends that public records be preserved and made available at reasonable cost.

Standard 1.1.1 Public Proceedings

Proceedings and other public business of the probate court should be conducted openly, except in those cases and proceedings which require confidentiality pursuant to statute or rule.

Commentary

The court 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, albeit open to the public (e.g., guardianship proceedings involving sensitive family matters; see Standard 3.3.8, Hearing). The court should specify proceedings to which the public is denied access and ensure that the closure is consistent with the law and reasonable public expectations.

Further, the court should ensure that its proceedings are accessible and understandable to all participants, including litigants, attorneys, court personnel, and other persons in the courtroom, with special attention given to responding to the needs of persons with disabilities. The court should attempt to promote the use of plain language in these proceedings.

Standard 1.1.2 Safety, Accessibility, and Convenience

Probate court facilities should be safe, accessible, and convenient to use. The location of the court should be clearly identified.

Commentary

Three distinct aspects of court performance are encompassed within this standard. The court should attend to the security of persons and property within the courthouse and its facilities, the accessibility to the courthouse and its facilities, and the reasonable convenience and accommodation of those unfamiliar with the court's facilities and proceedings. The court should be concerned about such things as the centrality of its location in the community it serves, the adequacy of parking, the availability of public transportation, the degree to which the design of the court provides a secure setting, and the internal layout of court buildings (e.g., the signs that guide visitors to important locations). Contingency plans (internal or operated in coordination with other justice system agencies) may be required to handle emergent situations, which could clog the court and disrupt daily routines.

Standard 1.1.3 Effective Participation

All interested persons who appear before the probate court should be given the opportunity to participate without undue hardship or inconvenience.

Commentary

The court should take reasonable steps to accommodate all participants in its proceedings. Language difficulties, mental impairments, or physical disabilities should not be permitted to stand in the way of complete participation or representation. Accommodations made by the court 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. The court should be sensitive to the needs of persons who may benefit from dimmed or enhanced lighting, microphones, or special seating.

Standard 1.1.4 Courtesy, Responsiveness, and Respect

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.

Commentary

The court should be accommodating, responsive, accessible, and convenient. The judge should make every effort to be as visible and involved as possible in achieving

these ends. A responsive court ensures that judicial officers and other court employees are available to meet both the routine and the exceptional needs of those they serve. Court personnel, to the extent reasonably practicable, should assist those unfamiliar with the court and its procedures. 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.

Standard 1.1.5 Affordable Costs of Access

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

To facilitate access and participation in its proceedings, the court's fees should be reasonable. In some states the fees charged in the court for the filing of petitions and for conducting various proceedings have little relationship to the time and work that the court expends in providing these services.[7] These fees have become a source of revenue either for the court or for the state. Instead, fees should be related to the time and work expended by the court. In addition, the court may consider either waiving fees for individuals who are economically disadvantaged or taking other steps to enable such individuals to participate in its proceedings.

The court should also tailor its procedures (and those of others under its 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, use of volunteer lawyers to do pro bono work, use of volunteer guardians and monitors, 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).

The court should maintain records of its 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. The court should maintain a reasonable balance between its actual cost in providing documents or information and what it charges users.

[7]For example, in New York the fee for probating a will where the assets exceed $500,000 is $1,000. An additional $1,000 is assessed for the filing of the tax return and a further $1,000 charged for filing an accounting proceeding. The filing fee is less for smaller estates. N.Y. SURR. CT. PROC. ACT LAW § 4202 (Consol. Supp. 1992). In Connecticut, percentage fees are assessed against the estate. CONN. GEN. STAT. ANN. § 45a-107 (West Supp. 1993).

1.2 EXPEDITION AND TIMELINESS

The court is entrusted with many duties and responsibilities affecting those involved with the justice system, including litigants, jurors, attorneys, witnesses, social service agencies, and members of the public. Dilatory court actions can have serious consequences for the persons directly concerned, the court, allied agencies, and the community at large.

A court should have guidelines for the timely and expeditious completion of proceedings. Unnecessary delay may cause injustice, hardship, and diminished public trust and confidence in the court.

The first standard under EXPEDITION AND TIMELINESS draws attention not only to the prompt resolution of cases but also to the expectation that all functions of a court exercising probate jurisdiction will be expeditiously performed (Standard 1.2.1). Standard 1.2.2 emphasizes the importance of expedition and timeliness in anticipating, adapting to, and implementing changes in law and procedure.

Standard 1.2.1 Case Processing and Compliance with Schedules

The probate court should establish and maintain guidelines for timely case processing. The court should provide mandated reports and requested information on time and respond to requests for information and other services on a schedule established by the court to ensure their effective use.

Commentary

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.[8] Any time beyond that necessary to prepare and to conclude a case constitutes delay.

The court should control the time from case filing to trial or other final disposition.[9] 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, the court should make decisions in a timely manner. The court 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 the court to take a relatively complex matter under advisement, the court should, nevertheless, issue its decision promptly. Ancil-

[8] The American Bar Association, the Conference of Chief Justices, and the Conference of State Court Administrators have urged the adoption of time standards for expeditious caseflow management. *See* COMMITTEE ON STANDARDS OF JUDICIAL ADMINISTRATION, AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO COURT ORGANIZATION § 1.12 (1990); *Time Standards for Case Processing,* CONFERENCE OF CHIEF JUSTICES RES. No. VIII (Aug. 2, 1984) (copy available at the National Center for State Courts, Williamsburg, Va.); *Endorsement of the Trial Court Performance Standards,* Conference of State Court Administrators Res. No. 1 (Nov. 30, 1990) (copy available at National Center for State Courts, Williamsburg, Va.).

[9] David C. Steelman, *Managing Probate Workload and Dockets,* 11 PROB. L.J. 273, 298-300 (1992).

lary and postjudgment or postdecree proceedings also need to be handled expeditiously to minimize uncertainty and inconvenience.

In addition to complying with nationally recognized guidelines for timely case processing, the court should also manage its caseload to avoid backlog. For example, the court should consider the use of caseload management systems and periodic status reports.

As a public institution, the court has a responsibility to provide information and services to those it serves. This should be done in a timely, effective, and expeditious manner. Services provided for those within the court's jurisdiction may include legal representation or mental health evaluation for persons subject to civil commitment, protective or social services for abused children, and translation services for some litigants, witnesses, or jurors.

In addition to adhering to case-processing time guidelines, an effective court exercising probate jurisdiction should establish and abide by schedules and guidelines for activities not directly related to case management. The court also should meet reasonable time schedules set by those outside the court for filing reports or providing other information stemming from court activities. Regardless of who determines the schedules, once established, these schedules should be met.

Timely disbursement of funds held by the court is particularly important. When disbursement of funds is necessary, payment should be made promptly. For some recipients, delayed receipt of funds may be an accounting inconvenience; for others, it may create personal hardships. Regardless of who the recipient is, when a court is responsible for the disbursement of funds, performance should be expeditious and timely.

Standard 1.2.2 Prompt Implementation of Law and Procedure

The probate court should promptly implement changes in law and procedure affecting court operations.

Commentary

Tradition and formality can obscure the reality that both the law and the procedures affecting court operations are subject to change. Changes in statutes, case law, and court rules affect what is done in the court, how it is done, and who conducts business in the court. The court should implement mandated changes promptly. Whether a 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.

1.3 EQUALITY, FAIRNESS, AND INTEGRITY

The court 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. Equality and fairness demand equal justice under the law for all.

Integrity should characterize the nature and substance of the court's 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 jury trial, 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.

The demand for EQUALITY, FAIRNESS, AND INTEGRITY is articulated by five performance standards. Standard 1.3.1 encompasses the all-important legal concept of due process and requires that the court adhere to relevant law, rules, and policy when acting in its judicial and administrative capacities. Standard 1.3.2 focuses on what many consider the essence of justice. It recommends that the decisions and actions of the court be based on legally relevant factors applied consistently in all cases. Furthermore, those decisions and actions should be based on individual attention to each case.

In accord with the call for integrity in a court's performance, Standard 1.3.3 urges the court to render decisions that clearly state the issues addressed and to specify how compliance with its decisions can be achieved. Clarity is a prerequisite for both compliance and enforcement. Standard 1.3.4 encourages the court to assume responsibility for the enforcement of its orders. Finally, Standard 1.3.5 recommends the prompt filing and accurate preservation of court records. The accuracy of the records and reliable access to them are fundamental to the achievement of the purposes of the court.

Standard 1.3.1 Fair and Reliable Judicial Process

The practices of the probate court should faithfully adhere to relevant laws, procedural rules, and established policies.

Commentary

Fairness should characterize the court's process. 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. The court should respect the right to legal counsel and the rights of confrontation, cross-examination, impartial hearings, and, where applicable, jury trials. The court 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 the court's ability to achieve predictability, reliability, and integrity. Because of its

centrality to the court's purpose, this standard overlaps with standards in the areas of ACCESS TO JUSTICE and PUBLIC TRUST AND CONFIDENCE, which emphasize that justice also should be "perceived to have been done" by those who directly experience the quality of the court's adjudicatory process and procedures.

Standard 1.3.2 Court Decisions and Actions

The probate court should give individual attention to cases, deciding them without undue disparity among like proceedings and upon legally relevant evidence.

Commentary

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.

Standard 1.3.3 Clarity

Decisions of the probate court should address the issues presented with clarity and specify how compliance can be achieved.

Commentary

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.

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.

Standard 1.3.4 Responsibility for Enforcement

The probate court should be responsible for the enforcement of its orders.

Commentary

It is common and proper in some matters for the court to remain passive with respect to judgment satisfaction until called on to enforce the judgment. Nevertheless,

the court should ensure that its 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 the court.

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 proceedings), the court may need to monitor enforcement and compliance. If an applicable portion of the court's 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 the party as soon as possible with a list of possible sanctions. 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.

The court should be aware of and responsive to its orders and their related enforcement. Failures to conform conduct to court orders are contrary to the purpose of the court, undermine the rule of law, and diminish the public's trust and confidence in the court. Monitoring and enforcement of proper procedures and interim orders while cases are pending are within the scope of this standard.

This standard also applies to those circumstances when a court relies upon administrative and quasi-judicial processes to screen and to divert cases by using differentiated case management strategies and alternative dispute resolution. Noncompliance remains an issue when the court sponsors such programs or is involved in ratifying the decisions that arise out of them.

Standard 1.3.5 Production and Preservation of Records

Records of all relevant probate court decisions and proceedings should be accurately maintained and securely preserved.

Commentary

The court 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 entails the full range of records management systems. Because records may affect the rights and duties of individuals for generations, their protection and preservation 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, the court retains 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 systematically and routinely can exhaust available storage space and require the court to expend funds for the retention and maintenance of these records.

A new challenge to state and court records management programs is dealing effectively with computerized or electronic records. Computers can greatly aid the work of the court and the government in general, but they are not an effective medium for the long-term storage of records. Standards and procedures are now emerging that address this subject. Generally, electronic records specified for long-term or permanent storage should have paper or microfilm backups. When maintained in an electronic format, backup, recopying, and reformatting procedures should be in place to ensure data availability and integrity.

1.4 INDEPENDENCE AND ACCOUNTABILITY

The judiciary should preserve its independence as a separate branch of government. Within the organizational structure of the judicial branch, the court with probate jurisdiction should establish its legal and organizational boundaries, monitor and control its operations, and account publicly for its performance. 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. The court should both control its proper functions and demonstrate respect for its coequal partners in government.

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 court's claim for respect. A court possessing institutional independence and accountability protects judges from unwarranted pressures. It operates in accordance with its assigned responsibilities and jurisdiction within the state judicial system. Independence is not likely to be achieved if the court is unwilling or unable to manage itself. Accordingly, the court 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 its performance accurately, and account publicly for its performance.

The five standards in the performance area of INDEPENDENCE AND ACCOUNTABILITY combine principles of separation of powers and judicial independence with the need for comity and public accountability. Standard 1.4.1 urges the court to exercise authority; to manage its overall caseload and other affairs; and to recognize the principles of separation of powers, the interdependence of the three branches of government, and comity in governmental relations. Standard 1.4.2 directs a court to seek adequate resources and to account for their use. Standard 1.4.3 extends the concept of equal treatment of litigants to the court's own employees by recommending that every court operate free from bias with regard to race, religion, ethnicity, gender, sexual orientation, marital status, color, age, disability, or political affiliation

in its personnel practices and decisions. Standard 1.4.4 recommends that the court inform the public of its programs and activities. Finally, Standard 1.4.5 recognizes that the court's organizational character and activities should allow for adjustments to emergent events, situations, or social trends.

Standard 1.4.1 Independence and Comity

A probate court should maintain its institutional integrity and observe the principle of comity in its governmental relations.

Commentary

In order for the court, as part of the judicial system, to persist both in its role as preserver of legal norms and as part of a separate branch of government, it should develop and maintain its distinct and independent status. It should be conscious of its legal and administrative boundaries.

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.[10] 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. The court exercising probate jurisdiction is necessarily dependent upon the cooperation of other components of the justice system over which it has little or no direct authority. For example, elected clerks of court are components of the justice system, but may function independent 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.

Standard 1.4.2 Accountability for Public Resources

The probate court should make efficient, effective, and economic use of its resources.

Commentary

To appropriately carry out its responsibilities, the court should have sufficient financial resources and personnel. The court should seek the resources required to meet its judicial responsibilities, use available resources prudently, and account for their use. If the legislative (or funding) branch of government does not provide the

[10]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 1986).

necessary funding, the court may, if necessary, need to resort to legal proceedings to acquire funding to accomplish its purposes.

The court should use available resources efficiently to address multiple and often conflicting demands. Information collected by the court should be used in the court's 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.

Standard 1.4.3 Personnel Practices and Decisions

The probate court should use fair employment practices.

Commentary

The court stands as an important and visible symbol of government. Equal treatment of all persons before the law is essential to the concept of justice. This concept requires the court to operate free from bias on the basis of race, religion, ethnicity, gender, sexual orientation, marital status, color, age, disability, or political affiliation in its personnel practices and decisions.

Fairness in the recruitment, compensation, supervision, and development of court personnel helps ensure judicial independence, accountability, and organizational competence. The 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. (See also Standard 2.3.1, Human Resources Management.)

Standard 1.4.4 Public Information

The probate court should develop procedures to inform the community of its proceedings.

Commentary

Most members of the public have little direct contact with the court. 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. Polls indicate that the public knows very little about courts that exercise probate jurisdiction, and what is known is often at odds with reality. The court, either independently or in conjunction with the bar and other interested groups, should take steps to inform and educate the public (i.e., provide community outreach). 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.

The court in larger jurisdictions may establish a speakers' bureau consisting of the judge and court personnel that would be available to inform the public of the court's programs. In smaller jurisdictions, such a speakers' bureau may not be feasible; nonetheless, the judge should make himself or herself available as often as possible to explain the court's programs. In particular, such presentations should describe what is being done to make probate of decedents' estates more efficient and attractive, thereby diminishing the need to pursue alternatives to probate. At the same time, a description may be provided of less intrusive alternatives to guardianship and conservatorship that may limit the need for court involvement.

The court should also develop procedures and materials to help court appointees carry out their assigned duties.

Standard 1.4.5 Response to Change

The probate court should adjust its operations to anticipate new conditions or emergent events.

Commentary

The court should remain flexible. An effective court recognizes and responds appropriately to emergent public issues. 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.

The court can support, tolerate, or resist societal pressures for change. In matters for which the court may have no direct responsibility, but nonetheless may help identify problems and shape solutions, responsiveness means that the court takes appropriate actions to inform responsible individuals, groups, or entities about the effects of these matters on the judiciary and about possible solutions. The creation of a task force consisting of, among others, bench and bar members will help identify new problems and keep the court informed about new issues. Court-sponsored training for judges, attorneys, and appointees of the court will help the court to adjust its operations to address new conditions or events.

1.5 PUBLIC TRUST AND CONFIDENCE

Compliance with the law is directly related to public respect for the court exercising probate jurisdiction. Ideally, public trust and confidence in the court stems from the contacts citizens have with the court. Unfortunately, there is no guarantee that public perceptions reflect actual court performance.

Several different constituencies are served by the court exercising probate jurisdiction. All should have trust and confidence in the court. The largest constituency is the local community, or the "general public"—the vast majority of citizens and taxpayers who seldom experience the court directly. The court also serves the community's opinion leaders (e.g., the local newspaper editor, local and state executives and legislators, researchers, and members of court watch committees). Another constituency includes those citizens who have appeared before the court as attorneys, litigants, jurors, or witnesses or who have attended proceedings as a

representative or a friend of someone before the court. This group has direct knowledge of the routine activities of a court. A final constituency consists of judicial officers and other employees of the court system, court appointees, and lawyers—within and outside of the jurisdiction of the court—who may have an inside perspective on how well the court is performing. The trust and confidence of all these constituencies are essential to the court.

The central question posed by the three standards in this final performance area is whether a court's performance—in accordance with standards in the areas of ACCESS TO JUSTICE; EXPEDITION AND TIMELINESS; EQUALITY, FAIRNESS, AND INTEGRITY; and INDEPENDENCE AND ACCOUNTABILITY—actually instills public trust and confidence. Standard 1.5.1 emphasizes that the court should be perceived by the public as accessible. Under Standard 1.5.2, the court should take steps to ensure that the public believes the court conducts its business in a timely, fair, and equitable manner and that its procedures and decisions have integrity. Finally, Standard 1.5.3 urges that the court be seen as independent and distinct from other branches of government at the state and local level and that the court be seen as accountable for its public resources.

Ideally, a court that meets or exceeds these performance standards is recognized as doing so by the public. Of course, in fulfilling its fundamental goal to resolve disputes justly, expeditiously, and economically, the court's decisions will not always reflect public opinion. Nevertheless, where performance is good and public communications are effective, trust and confidence are likely to be present. Where public perception is distorted and understanding unclear, good performance may need to be buttressed with educational programs and more effective public information. A court may even be viewed as better than it actually is. Because of this, it is important for the court to rely on objective data as well as public perceptions in assessing court performance.

On their face, the standards in this section may appear simply to repeat positions espoused in earlier standards. However, the focus of this section is on the *perceptions* held by the public regarding the court and its services. Public perceptions of the court's performance may be as important as the court's actual performance. To the extent that the court suffers from a lack of public trust and confidence, i.e., is perceived as not fulfilling its mandated duties and responsibilities, the court may find its ability to fulfill its role hampered and the willingness of the public to use its services limited.

Standard 1.5.1 Accessibility

The probate court and its justice should be perceived as accessible to the public.

Commentary

Barriers should be removed that interfere with access to the court's services. The perceptions of the court's accessibility held by different constituencies is an important reflection of how well this is being accomplished. The court not only should be accessible to those who need its services, but it also should be so perceived by those who may need its services in the future. A perception of accessibility will increase the

likelihood that those persons who need or can benefit from the court's services will take advantage of those services.

For example, a perception of accessibility may encourage, where appropriate, the filing of guardianship or conservatorship petitions to protect the person or property of respondents. Similarly, this perception may enhance public opinion of the court's processing of decedents' estates and discourage the use of less appropriate alternatives.

Standard 1.5.2 Expeditious, Fair, and Reliable Court Functions

The probate court should inspire trust and confidence that its functions are conducted expeditiously and fairly and that the court's decisions have integrity.

Commentary

The court should instill trust and confidence in the public that its basic functions are being properly conducted. For the court to appropriately carry out its role, it is essential that the public have trust and confidence that the court operates in a timely and expeditious manner, acts with integrity, and upholds the principles of equality and fairness.

The need for public trust and confidence in the court's functions is driven in part by the vulnerable nature of many of the individuals affected by or dependent upon the court's services. For example, the respondents in guardianship or conservatorship proceedings may be persons with a mental or physical disability. Similarly, the processing of decedents' estates may occur at a time of emotional vulnerability for various family members or may directly affect individuals of limited fiscal insight, including minors. Public respect for the court will be enhanced by perceptions that such individuals are treated fairly and their matters are handled efficiently and expeditiously.

In addition, the court's proceedings may involve matters of a personal and private nature for the litigants. Public trust and confidence in the court will be promoted by a public perception that litigants are afforded respect and treated in a dignified manner.

Like all litigation, matters brought to the court require an investment, potentially sizable, of time and money by the litigants. Furthermore, various court appointees may be involved, perhaps on a pro bono or public service basis. The court's ability to handle the matters before it in a timely, efficient, and expeditious manner will further enhance public trust and confidence in the court.

Finally, the court's orders may have a significant impact on the litigants. To the extent that these orders and their rationale are perceived as representing a process that was fair, where litigants received individual attention without variation due to judge assignment or legally irrelevant factors, and where the decision was based appropriately upon the matters before the court, public trust and confidence in the court will be promoted. In turn, this public perception will enhance compliance with the court's orders, minimize future litigation, and increase respect for the rights and interests of all concerned parties.

Standard 1.5.3 Judicial Independence and Accountability

The probate court should be perceived to be independent, accountable, and free from influence by other components of government.

Commentary

The court's policies and procedures, as well as the nature and consequences of interactions of the court with other components of government, affect the perception of the court as an independent and distinct branch of government. A favorable public image is created when a court establishes and respects its own role as part of an independent branch of government and diligently works to define its relationships with the other branches of government. Similarly, public regard will be enhanced when the public perceives that the court is responsibly handling the funds placed in its trust and efficiently and effectively processing the matters placed before it. Respect for the independence and accountability of the court enhances the likelihood that the court's services will be used where appropriate and when needed, will promote reliance on and participation in the court's proceedings, and increase respect for and compliance with the court's judgments and orders.

The opinions of community leaders and representatives of other components of government are important when evaluating perceptions of the court's institutional independence and integrity. Other constituencies' perceptions of the court's relationships with other government agencies, its accountability, and its role within the community are important contributions to the image of the court as both an independent and accountable institution.

Section 2
Administrative Policies 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 a court exercising probate jurisdiction (hereinafter referred to as the court) to accomplish its assigned duties. Because the process can dictate the product, it is important that the court not overlook this aspect of its function. In addition, the court often will be able to exercise direct control over the administrative policies and procedures it employs, 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 the court exert control over matters set before it by ensuring that its jurisdictional requirements are met, that its judgments are carried out in other jurisdictions, and that it has shaped, to the extent permitted, the rules that govern its functions. CASEFLOW MANAGEMENT, the second category, recommends that the court exert control over its caseflow by actively managing its caseload, by actively supervising the progress of its cases, by establishing timelines that govern the disposition of its cases, and by scheduling trial and hearing dates that ensure that cases move forward without unnecessary delay.

JUDICIAL LEADERSHIP, the third category, recommends that the court assume leadership in implementing an appropriate human resources management program; in obtaining, allocating, and managing its financial resources; and in instituting performance goals and a strategic plan that will allow it to determine whether it is meeting its responsibilities. INFORMATION AND TECHNOLOGY, the fourth category, recommends that the court take active steps to ensure that it carries out its 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 the court encourage the use of mediation and arbitration as a means to resolve cases.

2.1 JURISDICTION AND RULE MAKING

The standards in this category recognize the special nature of the court with probate jurisdiction (hereinafter the court) and the importance of the court being able to exert control over the cases brought before it, to hear those matters that fall within its expertise, and to ensure that its judgments are properly carried out.

Standard 2.1.1 Jurisdiction

(a) The jurisdiction of a probate court should be unlimited within those areas conferred upon it by common law, by statute, or by constitutional principles. Its jurisdiction should be established as a preliminary requirement in all proceedings before the court.

(b) Where a probate court in one jurisdiction properly issues a final judgment, even if not entitled to full faith and credit, that judgment should nonetheless 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 technical 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, 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 the probate court.

As a result, the probate court should fully exercise its jurisdiction over cases within its statutory, common law, or constitutional authorization. It should have exclusive jurisdiction over trusts, decedents' estates, guardianships, and conservatorships. For example, a court with jurisdiction over the administration of a decedent's estate should be able to quiet title to property in which the decedent had an interest and to partition real estate so as to effect distribution. Additional jurisdiction may be conferred by state law.[11]

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 court exercising probate jurisdiction 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.

For example, although an order of guardianship or conservatorship is issued in one jurisdiction, the relocation of the respondent to another state may result in the full relitigation of the guardianship or conservatorship, including the question of the

---

[11]For example, the court may have jurisdiction over pre-mortem probate proceedings where provided by statute. *See* ARK. CODE ANN. §§ 28-40-201 to -203 (Michie 1987); N.D. CENT. CODE §§ 30.1-08.1-01 to -04 (Supp. 1993); Gerry W. Beyer, *Pre-Mortem Probate,* 7(4) PROB. AND PROP. 6 (1993); Aloysins A. Leopold & Gerry W. Beyer, *Ante-mortem Probate: A Viable Alternative,* 43 ARK. L. REV. 131 (1990).

respondent's capacity, even though there has been no other change in the original circumstances leading to the establishment of the guardianship or conservatorship. This makes poor use of the time and resources of the court and the parties. Similarly, a court may learn that a conservator has fled with the funds of a respondent to another jurisdiction. If a court in the jurisdiction where the funds are located or where the conservator resides refuses to enforce an order by the original court or otherwise assist the investigation (e.g., by issuing either an order to return the funds or a subpoena for relevant bank records), the original court will be unable to ensure that the respondent's interests are protected.

As a result, a court presented with probate matters that have been previously adjudicated by another court should refuse to exercise jurisdiction over these matters, absent a substantial change in circumstances, other than to enforce that prior judgment or order, unless there is a statutory or constitutional reason for doing so. In addition, a court should assist the efforts of another court to obtain relevant information within its jurisdiction (e.g., access to bank accounts; testimony, depositions, or affidavits from witnesses; investigation of controverted facts).

Standard 2.1.2 Rule Making

The probate court should recommend changes in the general probate rules of court 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 a court exercising probate jurisdiction may suffer from various basic deficiencies. First, if each court institutes its own set of idiosyncratic rules, the practice of law within that jurisdiction 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 courts within a given jurisdiction are governed by one universal set of rules, those rules may fail to take into account the unique nature and responsibilities of courts exercising probate jurisdiction 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 the probate court. 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 high court or legislature is responsible for articulating the general procedural and administrative rules applicable to a given court.[12] Such an approach promotes uniformity in the rules governing the various probate courts.

[12]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.

Where possible, a separate section of these general rules should be devoted to the courts of that state exercising probate jurisdiction and their special needs and responsibilities, based upon recommendations provided by the probate courts.[13] Where permitted and where appropriate, however, the 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. 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 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 legislature or the state's high court, 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 recognize that the court with probate jurisdiction (hereinafter the court), like almost all state courts, faces a heavy caseload that it must process expeditiously, yet fairly. These standards suggest several steps that the court can take to ensure that its caseload moves swiftly and meets the needs of the court and the parties appearing before the court.

Standard 2.2.1 Court Control

The probate court should actively manage its cases.

Commentary

To ensure prompt and fair justice to the parties appearing before it, the court should recognize the importance of controlling the progress of the cases over which it presides.[14] To this end, the court should have in place written policies and procedures establishing and governing an appropriate caseflow management system. Scheduling

[13] *See, e.g.*, MICH. COMP. LAWS ANN. §§ 700.1-700.993 (West 1980 & Supp. 1993).

[14] "[A]ctive management of the cases is the single technique responsible for the success in reducing delay of a number of the jurisdictions reviewed for this paper, including the states of Kansas, Ohio, and Vermont, and Hennepin County (Minneapolis), Minnesota." DIVISION FOR JUDICIAL SERVICES AND LAWYERS CONFERENCE TASK FORCE ON REDUCTION OF LITIGATION COST AND DELAY, AMERICAN BAR ASSOCIATION, DEFEATING DELAY 24 (1986).

of cases should, in general, reflect a realistic balance of the competing demands for a swift 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. Where possible, the court should use an automated case management system.

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.[15] 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.

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.[16] To achieve this standard, the court should establish time limits for intermediate events for each type of case. (See Standard 2.2.2., Court Supervision of Case Progress.)

Standard 2.2.2 Court Supervision of Case Progress

The probate court should establish timetables to govern all proceedings.

Commentary

To promote public access to the court, and confidence in the court and its ability to dispose in a timely manner of contested cases, the court should actively supervise the progress of each of its cases from filing to disposition. The court should exercise active control over its docket and not merely accede to the schedule proposed by counsel. Furthermore, a continuance should not ordinarily be granted unless the client is present, thereby ensuring that the client understands the reason for the delay. 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 bar and bench that will build upon their different perspectives in establishing appropriate case-processing timelines.

The use of standardized timelines to manage the flow of cases should be generally

[15]Steelman, *supra* note 9, at 300-02.

[16]Some probate cases, such as those involving the appointment of a guardian or conservator or a decedent's 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).

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.

In contested cases, an initial conference should ordinarily be held between the judge and the attorneys to establish appropriate deadlines, such as for pretrial discovery and to identify special or complex cases. For example, many courts have established rules with respect to pretrial conferences and discovery timetables, which 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. (Standard 3.2.3, Timely Administration, is closely related to this standard.)

Standard 2.2.3 Time Standards Governing Disposition

(a) The probate court should design and implement a caseflow management system.

(b) The court 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.[17] The standards should reflect the goals of delay reduction and prevention of case backlogs. For example, the system may be designed to track the administration of decedents' estates where such estates are subject to court supervision. (See Standard 3.2.3, Timely Administration.)

A judge should consult with court administrators and attorneys to develop overall standards for case disposition for each major classification of cases. Within each classification, the judge, with such consultation as deemed appropriate, should also create 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. Each intermediate step should be monitored to assure compliance with the timelines, thereby ensuring orderly case development and prompt disposition.

While not all cases will require the maximum time recommended by these timelines, others will demand additional time. The court should hold one or more status conferences early in the case to adjust, if needed, the scheduling of intermediate

[17] "The three types of time standards used today are (1) a specified acceptable median age of cases at disposition (measured from filing); (2) a maximum time interval between filing and disposition; and (3) a specified percentage of cases concluded within a stated interval after filing." MAUREEN SOLOMON & DOUGLAS K. SOMERLOT, AMERICAN BAR ASSOCIATION, CASEFLOW MANAGEMENT IN THE TRIAL COURT: NOW AND FOR THE FUTURE 18 (1987).

events and disposition to the individual needs of each case. In cases involving especially complex substantive or procedural issues, the court should closely supervise the progress of the cases to ensure that they follow the formulated plan. As part of a caseflow system, status reports should be periodically generated to maintain a record of what has occurred and to determine whether prescribed deadlines have been met. Adherence to timelines is an essential component of judicial management.

Standard 2.2.4 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, and all other meetings before the court. This will prevent over- and underscheduling of the court's time and ensure the efficient use of judicial resources. To achieve accurate scheduling, among the factors the court should consider are:

- the likelihood that a case will proceed to trial;
- 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); and
- priorities or time limits imposed by statute.[18]

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

[18]*See generally* SOLOMON & SOMERLOT, *supra* note 17.

trial and hearing dates and to restrict the availability of continuances.[19] Counsel should be expected to prepare for the 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.

2.3 JUDICIAL LEADERSHIP

The standards in this category reflect the responsibility the court with probate jurisdiction (hereinafter the court) has to ensure that the court, like any other organization, is managed in a responsible and appropriate manner. The probate judge should assume a leadership role in helping the court meet this responsibility.

Standard 2.3.1 Human Resources Management

The probate court should be responsible for implementing an effective human resources management program.

Commentary

The court should be administered in such a fashion that its employees are treated with dignity and respect. (See Standard 1.4.3, Personnel Practices and Decisions.) To meet this goal, the court 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, regularly conducted performance evaluations, and written policies and guidelines to follow.

The court should actively support and improve the quality of the work of its personnel. The court should require the annual development of goals 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.

The court's staff-training program should prepare all court employees for all elements of their work. Training should include components on the Americans with Disabilities Act; 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, and ethnic bias and sexual harassment.

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.

---

[19]*See* Steelman, *supra* note 9, at 302-03.

Standard 2.3.2 Financial Management

(a) The probate court should receive financial support sufficient to enable it to perform its responsibilities effectively.

(b) The court should institute standardized procedures for monitoring fiscal expenditures.

Commentary

To carry out its duties adequately and effectively, the court must receive sufficient funding. Considerable variation in the sources of funding exist 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 of financial support among courts. Whatever the source of funds, adequate funding is needed for the court to attract and retain competent judges and court personnel, in part by providing adequate salaries; to provide adequate supplies, equipment, and library materials; to purchase specialized services such as those provided by court visitors, physicians, psychologists, expert witnesses, examiners, and consultants; and to obtain, renovate, and replace, where needed, capital items and physical facilities such as courthouses, courtrooms, offices, and courtroom and office furnishings

In generating a budget for the 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 the probate court. The probate court should have the opportunity to present its resource needs as part of the budget preparation process, and should fully exercise this opportunity.

The overall level of financial support required by the probate court is likely to change from year to year, as may the specific levels of support needed for the various activities of the court. The court should regularly review and evaluate its funding requirements and requests. Within the funds provided, the court should allocate expenditures according to the needs and priorities established by the court itself. To ensure that the court's request is representative of the needs of the court and receives appropriate attention from the funding source, the budget request should be prepared under the direction of the judge and be presented by the judge or other members of the court staff to the funding source. It may be appropriate for the judge and other members of the probate court to participate in this presentation.

In addition to generating requests for financial resources for the upcoming fiscal year, the long-term needs of the 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 the future needs of the court, the court will be able to anticipate better those needs and to build them into its 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 the 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 its role as a guardian of the public trust, the court should carefully account for its resources. The court should institute procedures that will ensure that its fiscal expenditures are adequately monitored.[20] So far as practicable, the court should use an automated fiscal management and information system. Similarly, monthly reviews of expenditures should be conducted. In addition, the court should be subject to regular audits of its accounts following the 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 court. In general, the fees charged in the court should be reasonably related to the time and work expended by the court. (See Standard 1.1.5, Affordable Costs of Access.)

Standard 2.3.3 Performance Goals and Strategic Plan

The probate court should adopt quantifiable performance goals and establish multi-year strategic plans to meet its goals.

Commentary

The court should adopt performance goals to fulfill its responsibilities and to achieve efficiency in its operations and in meeting these National Probate Court Standards. This will enable the court to periodically assess its performance. By simultaneously establishing a strategic plan, and updating it in conjunction with periodic evaluations, the court can promptly take steps to redress any deficiencies in its performance.

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.

Standard 2.4.1 Management Information System

The probate court's record system should be easily accessible and understandable for all persons who are entitled to the information within

[20]*See, e.g.,* COMMITTEE ON STANDARDS OF JUDICIAL ADMINISTRATION, AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO COURT ORGANIZATION § 1.52 (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").

those records. The records should be comprehensive, indexed, and cross-referenced.

Commentary

The records and files of the court 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 nonlitigants as they conduct various research permitted under public records laws. The court's information system should provide for integration of printed and computerized records and be updated regularly to allow complete and easy access to all needed information.[21] The system should be sufficiently flexible to permit the court to use new technology as it becomes available.

The court's information system should be able to timely produce all information and records in understandable formats and to make them available for both case-processing and management purposes. The court should ensure that computerized 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 the court's records should be user friendly. Court staff and volunteers should be trained to explain information access and answer questions about it. The court should develop written, electronic, and audiovisual materials that clearly explain the court's information system, its purpose, and means of accessing it. The materials provided should explain that some records and files are confidential either by reason of state law or by court order. 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.

Standard 2.4.2 Monitoring

The probate court should regularly monitor and evaluate its management information system.

Commentary

The court should periodically determine whether its management information system, including its system of filing and recordkeeping, 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. This monitoring system may be expanded to include caseflow management (see Standards 2.2.2, Court Supervision of Case Progress, and 2.2.3, Standardized Time Standards Governing Disposition); human resource management (see Standard

[21] "[An] essential part of the planning process is to develop a procedure for collecting information needed. At least four options exist: case-by-case reporting, regular monthly summary reports, periodic on-site audits, and on-site sampling." NATIONAL CENTER FOR STATE COURTS, ASSESSING THE NEED FOR JUDICIAL RESOURCES 49 (1983).

2.3.1, Human Resources Management); and financial management (see Standard 2.3.2, Financial Management).

Such evaluations can provide a useful assessment of the court's procedures, how cases are handled, the amount of time it takes to process a case from filing to disposition, and how court appointees are selected.

Standard 2.4.3 Technology

The probate court should acquire and utilize new technologies and equipment to assist the court in performing its work effectively, efficiently, and economically.

Commentary

The court should engage in periodic studies to determine if new technologies will be useful to its work. The first and most important step in deciding whether to implement a technological innovation is to consider the needs of the court and its constituents, including an analysis of court operations and processes that might benefit from the introduction of new technology. The court's second step should be to assess the usefulness of the technological innovation with a cost-benefit analysis. Where appropriate, the court should rely on its own employees for the evaluation. If 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, the court should 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. (See Standard 1.3.5, Production and Preservation of Records.) Computer terminals and computer training should be available to all court personnel. Judges should have computer terminals in chambers with portable terminals available for use while away from chambers.

Standard 2.4.4 Collection of Caseload Information

(a) The probate court should collect and review caseload statistics including the volume, nature, and disposition of proceedings.

(b) The court should establish procedures to maintain the confidentiality of sensitive personal information or information required to be kept confidential as a matter of law.

Commentary

The functioning of the court can be enhanced by accumulating information about the court's caseload and dispositions. This data can be useful to the court or the court administrator's office for evaluating court activity, court programs, and court development; ensuring quality control; assessing job performance (including that of court appointees); and conducting needs assessment. This information will assist the court in comparing its performance to other courts with probate jurisdiction, to identify needed areas of change, and to monitor its activities. In addition, this information may assist the court 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.

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, and the general impact of the court's decisions. The court may collect and analyze this data of its own volition, or it may collect the data in response to a statewide effort to provide such data to the state court administrator's office, which in turn will analyze these data. In the latter case, steps should be taken to inform the court of the purpose of the data collection and the results of the analysis. 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.

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.

It may also be advisable to collect information regarding demographic characteristics (age, sex, financial status) of petitioners and respondents, and, where available, the consequences of the court's decisions.[22] Such data can be useful for needs assessment and research on the functioning and job performance of the probate court, as well as to determine whether litigants before the court are being treated fairly and whether their needs are being met. (See Standard 1.3.2, Court Decisions and Actions.)

When participating in a data collection project, the court should remain cognizant that sensitive and private matters may be contained in the information gathered, requiring that the court take special steps to maintain its confidentiality.

2.5 ALTERNATIVE DISPUTE RESOLUTION

Another ramification of the increased caseload faced by courts in general is the increased use of alternative dispute resolution (ADR). The standards in this category recognize the increased use and proposed use of ADR for probate matters and address the response of the court with probate jurisdiction (hereinafter the court) to ADR. These standards address the two principal means of ADR used in conjunction with probate court proceedings: mediation and arbitration.[23]

---

[22]For example, the 1987 National Guardianship Study by the Associated Press on guardianship and conservatorship proceedings charged that the courts fail to monitor the consequences of their decisions irrespective of the fact that they have significant impact on respondents' lives (e.g., the effect of the appointment of a guardian or conservator on the ward, the length of the appointment, the supervision of the guardian or conservator, the resources needed to manage supervision of the guardian or conservator).

[23]Other ADR (e.g., neutral factfinding, private adjudication, negotiation, and moderated settlement conferences) may be available in probate proceedings. The court should be amenable to such proposals and should exercise its authority to ensure that the interests affected by these alternatives are respected and protected.

Standard 2.5.1 Mediation

The probate court should refer appropriate cases for mediation and should encourage the parties to seek mediation.

Commentary

In many situations mediation may be a highly desirable method of dispute resolution. In addition to both providing relief from crowded court dockets and dispensing justice swiftly, 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. To facilitate resolution, the court should be prepared to appoint mediators.

The court should be open to mediation as an alternative to trial in all situations, but especially when the parties have requested outside help in settling their dispute. Mediation may be beneficial for resolving disputes such as will contests and contested creditor claims. Mediated solutions also often work well for disputes involving individual treatment or habitation 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.

Mediation, however, may not be appropriate in connection with the threshold determination of incapacity in protective proceedings. Similarly, mediation 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.

Standard 2.5.2 Arbitration

(a) The probate court should encourage arbitration of disputed issues.

(b) The court should enforce arbitration provisions in instruments such as wills and trusts.

Commentary

Arbitration provides another means for resolving probate matters with minimal involvement by the court. For example, a will submitted for probate may direct that questions regarding will construction and estate administration be subject to arbitration by a given entity. Such an arbitration clause may have the advantage of resolving an issue quickly and economically. Where the interests of those persons affected by the matter are fully respected and protected, the court should respect such arbitration provisions.

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 the court with probate jurisdiction (hereinafter referred to as the court) to resolve the issues placed before it. Because many of the issues faced by the court are relatively unique, specialized practices and proceedings evolved that are directly relevant to the caseload of the court. 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 matters brought before the court have in common. DECEDENTS' ESTATES, GUARDIANSHIP, and CONSERVATORSHIP are three areas of the law that almost all courts with probate jurisdiction must address, each of which pose their own special issues for the court responsible for processing related cases.

3.1 COMMON PRACTICES AND PROCEEDINGS

The standards in this category recognize the importance of the court with probate jurisdiction (hereinafter the court) adopting procedures that respond to both the special needs of the parties appearing before it and the unique nature of the issues that the court is asked to resolve.

Standard 3.1.1 Notice

The probate court 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.

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.[24] Due process standards do not depend on whether an action is characterized as one in rem or in personam.[25]

[24]Tulsa Professional Collection Services v. Pope, 108 S. Ct. 1340 (1988) (notice by publication insufficient to bar reasonably ascertainable creditors of an estate).

[25]Mullane v. Central 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.[26]

The "interested persons" to whom notice should be given in the context of decedents' estates include persons with a potential property interest in the estate. When a will is offered for probate, this includes 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 who 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, Virtual Representation.) Similarly, provided no conflict of interest exists, a testamentary trustee may represent 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 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, Unsupervised Administration.) 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.[27] Similarly, some states allow an estate to be closed without a court proceeding 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.[28]

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, Notice [in Guardianships], and 3.4.7, Notice [in Conservatorships].)

---

[26]*See* Tulsa Professional Collection Services v. Pope, 108 S. Ct. 1340 (1988); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

[27]*See, e.g.,* CAL. PROB. CODE § 10451 (West 1991); UNIF. PROB. CODE § 3-705 (1991).

[28]*See* UNIF. PROB. CODE § 3-1003 (1991).

Standard 3.1.2 Fiduciaries

(a) The probate court should appoint as fiduciaries only those persons who are (1) competent to serve, (2) aware of and understand the duties of the office, and (3) capable of performing adequately. A fiduciary nominated by a decedent should be appointed by the court absent disqualifying circumstances.

(b) The court 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 unprotected assets of the estate.

Commentary

The court should appoint qualified fiduciaries and may require the posting of a surety bond in conjunction with their appointments. A *fiduciary* is "a person or institution who manages money or property for another and who must exercise a standard of care in such management activity imposed by law or contract."[29] 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, the court should examine the credentials of potential fiduciaries with care. Experience, honesty, conflict of interest, reputation and ability, and any prior service as a fiduciary are some factors that the court may consider in reviewing a person's ability to perform the duties of the office. The court should determine if anything would disqualify the person being considered (e.g., statutory disqualifications[30]) or make the appointment unsuitable. Although a person does not need prior experience as a fiduciary, the person should have an appropriate understanding of the tasks to be performed, be prepared to expend the time necessary to perform the duties, and be able to complete the tasks assigned.

These prerequisite qualifications also apply to a prospective guardian, conservator, executor, or trustee pursuant to a choice made by a person while competent. (See also Standard 3.3.11, Qualifications and Appointments of Guardians, and Standard 3.4.11, Qualifications and Appointments of Conservators.) However, the court should recognize that a difference exists between a person named as a fiduciary in an advance directive (e.g., a person named as an executor by will or a designation of guardian in advance of need) and a fiduciary appointed by the court without the benefit of the express wishes of the relevant person (e.g., a person appointed as an administrator). Because the former represents an appointment that specifically reflects the person's wishes, qualifications to serve as a fiduciary need not be so closely scrutinized.

---

[29] BLACK'S LAW DICTIONARY 625 (6th ed. 1990).

[30] *See, e.g.*, TEX. PROB. CODE ANN. § 78 (West 1980).

In all situations, the court should limit appointments as required by statute, assuming the statute does not require unconstitutional distinctions.[31]

Some states have enacted mandatory statutory preference lists, thereby limiting the discretion of the court in selecting the best qualified person. Other states have a statutory priority list but allow the court to disregard the list if in the best interest of the estate or respondent. If a statutory preference is granted to certain persons, the court should have authority to deny that appointment if the person is unsuitable under the evidence presented.

Inherent in the process of appointment is the court's responsibility to ensure that the fiduciary understands his or her duties under controlling state law. (See Standard 3.3.13, Training and Orientation [of Guardians], and Standard 3.4.13, Training and Orientation [of Conservators].) The court should develop or use available materials to assure that those appointed know what they must do to properly discharge their responsibilities.

The occasions when a surety bond is required should be limited.[32] When the fiduciary serving under a will or trust is routinely required to post bond, the cost and burden on the estate increases unnecessarily. Some threshold monetary interest should be required of one who seeks to require posting of a bond.[33] 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. When a court has carefully screened the qualifications of the fiduciary and determined that the qualifications are credible, reliable, and warrant the appointment, the need for a bond may not exist. Finally, the court should examine alternatives that protect assets without adding to the cost of administration of estates. Restricted bank accounts, safekeeping agreements, and collateral for performance (e.g., a mortgage of land) are examples of alternatives that could be used in fashioning an asset protection plan.

In the event a surety bond is required, it should be set 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.[34]

Beneficiaries will generally be competent and able to protect their own interests and can make a motion for the posting of a surety bond by the fiduciary if they find it necessary. However, different considerations may govern the requirement of bonds for conservators and other situations where the beneficiary (i.e., the respondent) is incapable of protecting his or her own interests. (See Standard 3.4.14, Bond [for Conservatorships].)

---

[31]*See* Reed v. Reed, 404 U.S. 71 (1971) (statute preferring males to females in selecting administrators violates equal protection).

[32]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.

[33]*See, e.g.,* UNIF. PROB. CODE § 3-605 (1991) (a person making a demand that a personal representative give bond must have an interest in the estate worth in excess of $1,000).

[34]*See, e.g.,* CAL. PROB. CODE § 8482 (West 1991); UNIF. PROB. CODE § 3-604 (1991).

Standard 3.1.3 Other Court Appointees

(a) The probate court should appoint a person to serve in a special position only when it determines that the appointment is required by law, or is necessary to protect the interests of persons needing protection or to decide or manage a case in a fair and expeditious fashion.

(b) The court should determine that the appointee has the necessary experience and skills to carry out the relevant roles, duties, and responsibilities.

Commentary

Appointments in a probate proceeding should be made only when necessary. The court should be convinced that the interests of the person needing protection may not be represented adequately or that such an appointment will assist in the management or determination of a case in a fair and timely manner. In all situations not controlled by statute, the court should have discretion to make necessary appointments. The objective should be to protect the person without unnecessarily increasing the costs of the proceeding. For example, an appraiser is not necessary for every decedent's estate.

If a proposed guardian or conservator has a potential conflict of interest with the respondent, the court should make an appropriate appointment to protect the interests of the respondent. (See Standard 3.3.11, Qualifications and Appointments of Guardians; Standard 3.4.11, Qualifications and Appointments of Conservators.) However, the court should avoid unnecessary duplication of duties in its appointments. Thus, it normally would be inappropriate for both an attorney and a guardian ad litem to serve simultaneously.[35]

It may be necessary or expeditious to appoint an expert (medical or other) to provide the court with information to assist it in reaching a decision.[36]

The court should take responsibility for establishing and explaining the roles, duties, and responsibilities of any court appointee. The court should ensure that its appointee has either the necessary skills to carry out his or her duties or is provided with assistance to develop those skills.

Standard 3.1.4 Virtual Representation

The probate court should allow virtual representation where appropriate.

Commentary

Under the concept of virtual representation, if some beneficiaries are competent adults who have identical interests with minors or unascertained beneficiaries, the competent adults may bind the others. Often, in probate proceedings, interested

[35]There may be instances where it is appropriate for two or more appointees to serve simultaneously. For example, it may be appropriate to appoint a guardian ad litem where a conservator is already serving when determining whether to approve the conservator's accounts.

[36]*See, e.g.,* TEX. PROB. CODE ANN. § 130F (West Supp. 1993) (the court may appoint a physician to examine an alleged incapacitated person). *See* Standard 3.3.9, Determination of Incapacity (Guardianship); Standard 3.4.9, Determination of Incapacity (Conservatorship).

persons are minors or incapacitated adults, unborn, unascertained, or persons whose addresses are unknown. In order that the court will have jurisdiction to enter a fully binding order, their interests must be represented by others. In some cases the only way to do this is to appoint a guardian ad litem. Consistent with the preceding standard (Standard 3.1.3, Other Court Appointees), however, the expense of a guardian ad litem should be avoided where possible by using virtual representation. For example, if a will leaving property to the testator's issue is challenged, and some of those issue are competent adults whose interests are identical to that of the minors and unborn issue, appointment of a guardian ad litem may be unnecessary. The concept of virtual representation is reflected in some statutes,[37] but it has also been recognized without explicit statutory support.[38]

The court should ensure that virtual representation is not used inappropriately. For example, a trustee of a testamentary trust may represent the beneficiaries in dealings with the executor (e.g., when examining or approving the executor's accounts). However, when the trustee and the executor 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 arise in connection with the decision to appoint a guardian ad litem, or when an earlier judgment is challenged by someone who was not formally represented. In the latter situation, the court may decide that the challenge is barred because the challenger was virtually represented by another at the time of the prior decree.

Standard 3.1.5 Attorneys' and Fiduciaries' Compensation

(a) Attorneys and fiduciaries should receive reasonable compensation for the services performed.

(b) The probate court should determine the reasonableness of fees when a dispute arises that cannot be settled by the parties directly or by means of alternate dispute resolution. When appropriate, the court should review and determine the reasonableness of attorneys' and fiduciaries' compensation on its own motion.

Commentary

When an application for or an objection to compensation for services rendered to an estate is filed, the court should carefully review and determine fees and commissions for attorneys and fiduciaries. Generally, the standard for determining the appropriateness of such fees should be whether they are "reasonable."[39] Factors that should be considered in determining reasonable compensation include:

---

[37]*See, e.g.*, N.Y. SURR. COURT PROC. ACT § 315 (McKinney Supp. 1991); UNIF. PROB. CODE § 1-403 (1991).

[38]*See* WILLIAM M. MCGOVERN, SHELDON F. KURTZ, & JAN E. REIN, WILLS, TRUSTS AND ESTATES 703 (1988).

[39]Some states still have fee schedules, which predetermine the compensation of fiduciaries and attorneys. *See, e.g.*, CAL. PROB. CODE §§ 10800-10805 (personal representative); §§ 10810-10814 (attorneys) (West 1991).

- 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 experience, reputation, and ability of the person providing the services; and
- the benefit of the services provided.[40]

Time expended should not be the exclusive criterion for determining fees. The court 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.

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.[41] The court 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.[42]

The attorney or fiduciary has the burden of proving the reasonableness of the fees requested. The court 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.[43]

Generally, the court is 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, the court may review

---

[40]*See generally* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(a) (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(B) (as amended 1981).

[41]*See, e.g.,* CAL. PROB. CODE § 10811 (West 1991).

[42]Such savings will not accrue to the estate, however, if both the executor and the attorney are compensated under a statutory fee schedule.

[43]*See* WILLIAM M. MCGOVERN, SHELDON F. KURTZ, & JAN ELLEN REIN, WILLS, TRUSTS AND ESTATES 626-27 (1988).

compensation on its own motion. For example, the court may review fees to be awarded to the personal representative where the personal representative is the drafting attorney and the will contains an unusually generous fee provision. Similarly, the court 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 court sufficient evidence to allow it to make a determination concerning compensation. (See Standard 3.2.1, Unsupervised Administration, for a discussion of the distinction between these two types of estate administration.)

Determination of fees is a sensitive matter. Adequate compensation is important to attract and enable competent lawyers, law firms, and fiduciaries to work in the probate field.[44] At the same time, the public must be satisfied that fees are rationally determined and represent fair value for the services performed.

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. The court should identify, encourage, and provide opportunities for early settlement or disposition of these disputes through settlement conferences and alternate dispute resolution procedures.

Standard 3.1.6 Accountings

Fiduciary accountings in the probate court should be complete, accurate, and understandable.

Commentary

The form of accounting should be established by the court. 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. 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. The same accounting format should be used in both cases.

A proper accounting should enable an interested person to understand the process of the administration of the assets. Unless waived, the fiduciary should distribute copies of status reports and accountings to persons interested in the estate. The accounting entity, not the court, should have the responsibility for distributing the accountings to interested persons, and should incur the cost as an expense of administration.

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 estates' resources. A waiver of an

---

[44]The levels of compensation may be established by statute and may differ depending on the nature of the appointment. For example, there may be a statutory distinction in the compensation to be awarded guardians and conservators. *See* CAL. PROB. CODE § 2640 (guardian or conservator of estate); § 2641 (guardian and conservator of person) (West 1991 & Supp. 1993).

accounting should be executed by all potential distributees and beneficiaries or their representatives. (See Standard 3.1.4, Virtual Representation.)

The degree of formality attending the preparation and presentation of an accounting will vary. The court should promote uniform accounting practices, although standardized accounting guidelines may be too elaborate for some estates.[45] It is important that the court make efforts to both conserve resources within the estate and also to make the accountings understandable to the persons involved.

Standard 3.1.7 Sealing Court Records

The probate court should not seal probate records, or any parts thereof, without a full explanation of the reasons for its order.

Commentary

As a matter of policy, public access to governmental records has been increasingly recognized. 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.[46]

The court should not seal a record without providing a reason for its action. In some cases, the court may not be required to provide such a reason because the records associated with these proceedings are sealed routinely as a matter of state law. For example, confidentiality and restricted access to records may ordinarily attach to adoption records or records associated with guardianship or conservatorship proceedings. However, 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.

Standard 3.1.8 Interstate Compacts and Cooperation

The probate court should encourage and utilize interstate compacts to exchange relevant information among courts to ensure that when parties leave the original jurisdiction, probate matters are properly handled.

Commentary

After a court establishes jurisdiction over a probate matter (see Standard 2.1.1, Jurisdiction), that court should generally retain jurisdiction. However, in situations in which a court should relinquish jurisdiction over the matter, an interstate compact provides a method for transferring information between courts in different jurisdictions, thus ensuring that the new court has a full and early opportunity to oversee relevant probate matters. In circumstances such as the temporary absence of a respondent from the jurisdiction where a guardianship or conservatorship was ordered, a transfer of information about the case to the temporary jurisdiction will

---

[45]*See, e.g.,* COMMITTEE ON NATIONAL FIDUCIARY ACCOUNTING STANDARDS, AMERICAN BAR ASSOCIATION, UNIFORM FIDUCIARY ACCOUNTING PRINCIPLES AND MODEL ACCOUNT FORMATS (1979).

[46]*See, e.g., In re* Estate of Hearst, 136 Cal. Rptr. 821, 824 (1977).

permit more effective supervision of the guardianship or conservatorship and better provide for the welfare of the respondent. (See Standard 3.3.17, Enforcement [of Guardianships]; Standard 3.4.18, Enforcement [of Conservatorships].)

Standard 3.1.9 Settlements

When required, the probate court should carefully review settlements before authorizing a personal representative or conservator to bind the estate.

Commentary

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, the court may be called upon to allocate the proceeds of the settlement between predeath pain and suffering and wrongful death. The court, in reviewing such settlements, should be alert to potential conflicts of interest, premature settlements, improper attorneys' fee arrangements, or inappropriate allocation of the award between injured parties.[47] 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.

3.2 DECEDENTS' ESTATES

Recent reforms in probate law make it simpler and less expensive to process a decedent's estate. The standards in this category recognize the value of this trend and attempt to facilitate the ability of the court with probate jurisdiction (hereinafter the court) to act accordingly. Much property already transfers without court supervision by mechanisms such as joint tenancy and 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,[48]

---

[47]*See* James R. Wade, *Minors' Personal Injury Settlements*, 8(4) COLO. LAW. 632 (1979).

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

or if "it would not be in the best interest of the estate to do so."[49] Other states allow it if the will so directs, or if the distributees agree and the court, in its discretion, allows it.[50] Unless mandated by state law, the court should not require supervised estate administration. Even if the will calls for supervision of estate administration, the court should waive this provision if "circumstances bearing on the need for supervised administration have changed since the execution of the will."[51]

Unsupervised or independent administration means different things in different states. In some states an unsupervised estate may be finally distributed without any court review of an accounting,[52] whereas in other states court review of the accounts is required even in an independent administration.[53] 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 informed of this and advised that the 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. In addition, the court on its own motion may intervene when the circumstances warrant. However, the need for court determination of a particular issue does not require court supervision of the rest of the administration.

This standard differs from Standard 3.4.16, Monitoring of the Conservator, 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.

Standard 3.2.2 Determination of Heirship of an Intestate Decedent

The probate court should determine heirship in an intestate estate only after proper notice has been given to all potential heirs and reliable evidence has been presented.

Commentary

The court should require the personal representative or applicant to provide personal notice to all heirs whose addresses can be found after a good faith effort. (See Standard 3.1.1, Notice.) Notice by publication to unlocated and unascertained beneficiaries and the appointment of a guardian ad litem to represent them may be required.

In determining heirship in an intestate estate, because the testimony of inter-

---

[49]TEX. PROB. CODE ANN. § 145 (West 1980 & Supp. 1993). *See also* CAL. PROB. CODE § 10452 (West 1991) (no independent administration where objector shows good cause).

[50]*See, e.g.,* TEX. PROB. CODE ANN. § 145 (West 1980 & Supp. 1993).

[51]UNIF. PROB. CODE § 3-502 (1991).

[52]*See, e.g.,* UNIF. PROB. CODE § 3-704 (1991).

[53]*See, e.g.,* CAL. PROB. CODE § 10501 (West 1991).

ested persons may be suspect, the court should require reliable evidence, including testimony by persons who do not inherit and documentary evidence.

Standard 3.2.3 Timely Administration

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

Commentary

The court should establish rules setting forth a schedule as to when certain filings associated with supervised estates should be submitted to the court. The court may, by rule or otherwise, give a schedule to the fiduciary indicating when the filings are required. Some states provide an estimate of adequate time to close an estate.[54] The court 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 thirty 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.[55]

No set formula exists to determine when an estate should be closed. However, the court should establish a system to monitor the progress of estates in probate. In supervised estates, the court 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, the court 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. When a federal estate tax is required, the 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 under this arrangement.

Unsupervised administration of an estate generally permits closing without a formal accounting to the court. However, even where an order of the court is not required to close out an estate, some document (e.g., an affidavit, a release and discharge) should be filed with the court to inform the court that the estate has been closed.[56]

---

[54]*See, e.g.,* CAL. PROB. CODE § 12200 (West 1991) (a personal representative shall either petition for an order for final distribution of the estate or provide a report on the status of the administration of the estate within one year or 18 months after the date of issuance of letters depending on whether a federal estate tax return is required).

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

[56]*See, e.g.,* N.Y. SURR. CT. PROC. ACT § 2203 (Consol. 1980 & Supp. 1992); UNIF. PROB. CODE § 3-1003 (1991).

Standard 3.2.4 Small Estates

The probate court should encourage the simplified administration of small estates.

Commentary

Many states have provisions for the expedited processing of "small estates."[57] These small estate laws rest upon statutory policies to eliminate the need for full probate proceedings when the size of the estate and its interested parties fit within statutory guidelines. National attention has been focused upon inter-vivos trusts, survivorship, payable-upon-death designations, and other common means by which property may be transmitted at death without incurring the costs and delays of probate administration. Where these various means have not been used, it is important that processes be available for persons to collect expeditiously the assets of small estates and to enable them to represent themselves. Such summary procedures may 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. Title under these types of non- or limited administration vests in the beneficiaries as effectively as it does under full probate administration.

Adopting procedures to expedite the administration of small estates is beneficial to all parties concerned. Such procedures permit quick access by heirs and creditors who may need money, eliminate lengthy and unnecessary procedures required to probate decedents' estates, and reduce the time required by the court to handle these items.

3.3 GUARDIANSHIP

Separate categories have been created for guardianship and conservatorship proceedings to facilitate presentation and to make it easier to locate relevant material. Although the terminology varies considerably across the country, this report will use the definitions of *conservator* and *guardian* found in the Uniform Probate Code. Namely, a *conservator* means a person appointed by the court to manage the estate of the respondent,[58] whereas a *guardian* is a court-appointed person responsible for the

---

[57]The definition of a small estate is generally established as a matter of state law. *See, e.g.,* CAL. PROB. CODE § 13100 (West 1991) (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 $60,000); MICH. COMP. LAWS ANN. §§ 700.101, 700.102 (1980 and Supp. 1992) (Michigan has two small estate statutes: one deals with estates of $5,000 or less; the other 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).

[58]UNIF. PROB. CODE § 1-201(8) (1991).

care, custody, and control of the respondent.[59] The term *respondent* designates the individual who is the subject of the guardianship or conservatorship proceeding, rather than ward, protected person, etc., because it is not pejorative or indicative of the final outcome of the proceeding.

The creation of separate categories for guardianship and conservatorship is not meant to imply that it is inappropriate to simultaneously file petitions for guardianship and conservatorship, nor that it is necessary to file separate petitions for the two. 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, the standards in the two categories here frequently directly parallel each other. Furthermore, it may be more efficient and effective to appoint the same person to serve as both guardian and conservator.

The guardianship and conservatorship standards that follow generally apply both to cases where the respondent is an adult or a minor. The standards and commentary are written largely in terms of adult respondents. There are, however, issues and requirements unique to protective proceedings for minors. (For a more detailed treatment of the proceedings for minors, see the Uniform Guardianship and Protective Proceedings Act.[60])

The standards in this category recognize the important liberty interests at stake in a guardianship proceeding and the due process protections appropriately afforded a respondent in conjunction with such a proceeding. However, these standards also recognize that the great majority of guardianships 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 proceedings, the outcome serves the best interests of the respondent and an appointed guardian acts in the respondent's best interests. 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 the court with probate jurisdiction (hereinafter the court).

Standard 3.3.1 Petition

(a) A petition for guardianship should be as simple as possible to obtain, complete, and process. It should be verified and require at least the following information:

(1) a description of the nature and extent of the functional limitations in the respondent's ability to care for him- or herself;
(2) representations that less intrusive alternatives to guardianship have been examined; and
(3) the guardianship powers being requested.

---

[59]UNIF. PROB. CODE § 5-309 (1991).

[60]UNIF. GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT §§ 2-101 to-112 (Guardians of Minors) and §§ 2-301 to -335 (Protection of Property of Persons Under Disability and Minors), 8A U.L.A. 437 (1982 & Supp. 1993).

(b) The petition should be reviewed by the probate court or its designee to ensure that all of the information required to initiate the guardianship is complete.

Commentary

The court and all parties to a guardianship proceeding need complete and accurate information on which to act. The petitioner should assert that the petition is not frivolous by verifying the statements made. The details required in the petition should include the name, age, and address of the respondent;[61] the nature and extent of the respondent's disability; the type and duration of protection sought; whether other related proceedings are pending in this or other jurisdictions; the specific reasons why guardianship is being requested; specific examples of behavior that demonstrate the need for the appointment of a guardian; the powers of guardianship requested; representations that less intrusive alternatives have been considered; the proposed guardian's qualifications; the relationship between the proposed guardian and the respondent; and the name, address, and relationship of those persons required to be given notice and those persons closely related to the respondent. However, these details may be superseded by requirements established as a matter of state law.

The court should develop and distribute forms that will assist the petitioner to meet these requirements. The court should not accept any incomplete petition but should provide assistance to petitioners in completing their petitions. Informational brochures should be distributed to all persons upon request or to those who file guardianship petitions.

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

Standard 3.3.2 Screening

(a) The probate court should establish a process for screening all guardianship petitions and diverting inappropriate petitions.

(b) The screening process should encourage the appropriate use of less intrusive alternatives to formal guardianship proceedings.

Commentary

Guardianship matters can reach the court by petition of either an interested party or a person who is unable to care for him- or herself.[62] The court should design or establish, within each locale, a procedure for screening potential guardianship cases prior to a formal judicial proceeding. This procedure may be no more complex than instructing the court official who routinely receives guardianship petitions to provide an initial screening, although where resources permit, a more formal, separate screening unit may be appropriate. However, this screening should be used only for

[61]Where a minor is the subject of a guardianship proceeding, the mandates of the Uniform Child Custody Jurisdiction Act may shape the nature of the information that should be included in the petition. *See* UNIF. CHILD CUSTODY JURISDICTION ACT § 3(a)(1), 9 Pt. I U.L.A. 143 (1968) (jurisdiction is established by where the minor is located during the six months prior to the filing of the petition).

[62]The term *interested party* may be defined by statute and is not limited to a relative or a person with an interest in the property of the respondent. *See, e.g.,* CAL. PROB. CODE § 48 (West 1991); UNIF. PROB. CODE § 1-201(24) (1991).

direct petitions by an interested third party. Where the respondent is the petitioner, there is less reason to question the validity of the petition, and the respondent should be provided direct access to the court.

The screening process provides at the earliest point in time a means for promoting equitable and uniform decision making about the need for the treatment or services associated with a guardianship. Screening should be used to divert inappropriate cases and to promote consideration of less intrusive alternatives.

Although initial contact with the screening agent may be an inquiry about whether a guardianship is needed, the aim of the screening is to facilitate efforts to provide the respondent with help where needed, although not necessarily by establishing a guardianship. The aim is to find the most appropriate treatment, care, or social services consistent with the respondent's needs, an aim that may be accomplished by less intrusive means than requested in the initiating petition.

By providing an early screening of petitions, the court can minimize the expense, inconvenience, and possible indignity incurred by interested parties for whom a guardianship is inappropriate, or for whom less intrusive alternatives exist, and conserve the resources of the court. In addition, in most jurisdictions many petitions for a guardianship are filed by persons who are not represented by attorneys and who will need instruction regarding when a guardianship is appropriate and assistance in meeting the initial requirements for filing a petition. 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.

Preferably, this screening will not be conducted solely upon the filing of the petition, when the only information available may be that provided on the face of the petition. After the court visitor has had an opportunity to make an investigation and report, a better factual basis exists for the screening. (See Standard 3.3.4, Court Visitor.) However, if the court lacks the resources for this more extensive screening or is concerned that an additional delay may result, the court may instead provide training for those members of its staff who initially review petitions for guardianships so that they can properly screen and divert inappropriate petitions.

A petitioner should not, however, be precluded from filing a petition even though the screening process suggests that a guardianship is not necessary.

Guardianship is often used to address problems that could be solved by less intrusive means. People may petition for guardianships to provide persons with mental or physical functional limitations a wide variety of services focusing on the care and custody of the respondent. However, the screening process may identify, and can encourage, other ways to address the respondent's needs that are less intrusive, expensive, and burdensome. Indeed, in some cases the respondent may have taken prior steps to establish or implement them. 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; health care powers of attorney; representative payees; and intervention techniques, including adult protective services, respite support services, counseling, and mediation. In addition to protecting the interests of the respondent, such alternative arrangements avoid court action, publicity, delay, and expense. Additionally, petitioners may be able to use social service agencies and volunteer organizations to help persons requiring assistance.

In general, the court should find that no less intrusive alternative, including a limited guardianship, is appropriate before selecting and appointing a plenary guardian. No restriction should be placed on the ability of a person to act on his or her own behalf unless alternatives to guardianship will not provide sufficient care for and management of that person. The court should encourage maximum autonomy for the respondent while protecting the interests of the respondent and act only to the extent necessitated by the limitations of the respondent. (For a discussion of the responsibility of the court to consider less intrusive alternatives when making its determination and issuing its order, see Standard 3.3.10, Less Intrusive Alternatives.)

Standard 3.3.3 Early Control and Expeditious Processing

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

(1) identify guardianship cases immediately upon their filing with the court;
(2) supervise and control the flow of guardianship cases on the docket from filing through final disposition; and
(3) when appropriate, make available to guardianship cases pretrial 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. The court should meet its responsibilities to everyone affected by its activities in a timely and expeditious manner. 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 case is presented, the court should be prepared to respond quickly by having procedures in place that allow for an expedited resolution of the case.

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

As part of its pretrial[63] procedures, the court should have investigatory services available to it to facilitate expeditious, efficient, and effective performance of its adjudicative, supervisory, and administrative duties in guardianship cases. Where such services are unavailable to the court, the court should attempt to obtain such services by contract, recruitment, and training of volunteers, or similar options. The results of these services should be presented promptly to the court and made available to all parties.

[63]Some states use the term *prehearing* instead of *pretrial*.

Standard 3.3.4 Court Visitor

The probate court should require a court appointee to visit with the respondent in a guardianship petition to (1) explain the rights of the respondent; (2) investigate the facts of the petition; and (3) explain the circumstances and consequences of the action. The visitor should investigate the need for additional court appointments and should file a written report with the court promptly after the visit.

Commentary

Persons placed under a guardianship may incur a significant reduction in their personal activities and liberties. When a guardianship is proposed, the court should ensure that the respondent is provided with information on the procedures that will follow. The respondent also needs to be informed of the possible consequences of the court's action.

The court should appoint a person to provide the respondent with this information. Several different designations have been used to identify this appointee, including court visitor,[64] court investigator,[65] court evaluator,[66] and guardian ad litem[67] (collectively referred to as a court visitor in these standards). Their role is generally addressed by this standard, although their duties will also be typically established by statute.[68] Their role stands in contrast to that of court-appointed counsel (see Standard 3.3.5, Appointment of Counsel), although in some states counsel may be assigned some of the duties delineated here. A court visitor may be better equipped to address the psychological, social, and medical problems raised in guardianship proceedings than a court-appointed counsel. Although the court visitor may be a lawyer by training, it is not necessary that the visitor be a lawyer. In certain cases, such a background may not be appropriate. Regardless of his or her background, the court visitor should have the requisite language and communication skills to adequately provide necessary information to the respondent.

The court appointees addressed by this standard all have the same general responsibility, namely, to inform the respondent about the proceedings being conducted. Even though the respondent may not fully understand the proceedings because of a lack of capacity, this information should still be provided. A visit with the respondent to explain the nature and purposes of a guardianship, however, should be

---

[64]*See* UNIF. PROB. CODE § 5-103(21)(1991)("'Visitor' means a person appointed in a guardianship or protective proceeding who is trained in law, nursing, or social work, is an officer, employee, or special appointee of the Court, and has no personal interest in the proceeding.").

[65]*See, e.g.,* CAL. PROB. CODE §§ 1454, 1513 (West 1991 & Supp. 1993).

[66]*See, e.g.,* N.Y. MENTAL HYG. LAW § 81.09 (Consol. Supp. 1992).

[67]*See, e.g.,* MICH. COMP. LAWS ANN. § 700.467 (West Supp. 1993).

[68]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.

only one of the required duties of this court appointee. The court visitor should also interview the petitioner and the proposed guardian; should visit the current or proposed residence/placement of the respondent; should consult, where appropriate, with professionals who have prepared an evaluation of the respondent; and should ascertain whether the respondent desires and is able to attend the hearing. The court 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; contain a recommendation concerning the appropriateness of a guardianship, including whether less intrusive alternatives are available; and provide a recommendation as to the specific powers requested in the petition.[69] State law may mandate the use of such court visitors in guardianship proceedings and delineate their responsibilities.[70]

In general, the court visitor serves as the eyes and ears of the court, making an independent assessment of the need for a guardianship. If the appointment of counsel is not mandatory, the duties of the court visitor should be increased to ensure that the interests of the respondent are represented in the proceeding. Alternatively, the court visitor might be used to make a recommendation on whether counsel should be appointed. In some cases, it may be appropriate to have both a court visitor and a court-appointed counsel. (See Standard 3.3.5, Appointment of Counsel.)

As the court determines, the court visitor may be a part of the court's screening process or independent of it. (See Standard 3.3.2, Screening.) The expenses incurred by the court visitor should be charged to the respondent's estate where such funds are available. To diminish the costs associated with the use of a court visitor, the court should seek and encourage the use of qualified volunteers to fill this role (e.g., the local chapters of the Association for Retarded Citizens [ARC] and the American Association of Retired Persons [AARP] may be able to provide such volunteers).[71] The court should use the court visitor in a manner that provides the greatest benefit to both respondents and the court. The court visitor's report should be provided promptly to the petitioner and the respondent so that they know in advance of the hearing the contents of this report.

In conservatorship proceedings for minors, the need for a court visitor is diminished. (See Standard 3.4.4, Court Visitor.) In a guardianship proceeding for a minor, the guardian of a minor will assume direct day-to-day authority for the care and upbringing of the respondent. As a result, there is a greater need for the appointment of a court visitor in a guardianship proceeding and the visitor's assigned duties should be correspondingly increased (e.g., the conditions of the home should be examined, the qualifications of the proposed guardian closely scrutinized).

Standard 3.3.5 Appointment of Counsel

(a) Counsel should be appointed by the probate court to represent the respondent when:

---

[69]*See* CAL. PROB. CODE § 1513 (West Supp. 1993).

[70]*See, e.g.*, N.Y. MENTAL HYG. LAW § 81.09 (Consol. Supp. 1992); UNIF. PROB. CODE § 5-303 (1991).

[71]A pilot program ("The National Guardianship Monitoring Project") to provide and train such volunteers is being conducted by the Legal Counsel for the Elderly, a component of the AARP. With funding from the State Justice Institute, the program is being used to assist courts exercising probate jurisdiction in Denver, Houston, Atlanta, Pennsylvania, and New Jersey.

(1) requested by an unrepresented respondent;
(2) recommended by a court visitor;
(3) the court, in the exercise of its discretion, determines that the respondent is in need of representation; or
(4) otherwise required by law.

(b) The role of counsel should be that of an advocate for the respondent.

Commentary

Respondents in guardianship proceedings are often vulnerable. They may have an incomplete or inadequate understanding of proceedings that may have a significant effect upon their lives. 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.

It may not be necessary to appoint counsel for the respondent in every case. This standard provides for the appointment of counsel where desired by the respondent, where there is a recognized need for the appointment, or where required by state law. Where counsel is not appointed or representation otherwise provided, the court should independently determine that the interests of the respondent are adequately represented. This standard avoids the anomaly of making an appointment that serves no apparent purpose (e.g., where the family members, including the respondent, are working together in good faith), and may indeed be resisted or resented by the respondent, limiting counsel's effectiveness in the case.

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. The respondent may also choose to waive his or her right to counsel. This may raise 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 the court should have independent information confirming the competency of the respondent to make such a waiver (e.g., a report from the court visitor).

In some states, counsel for the respondent is not appointed upon the filing of a petition but only subsequent to the setting of a date for the hearing. During this interim, however, the respondent may need information and assistance. Where counsel for the respondent is not appointed upon the filing of the petition, the court should immediately appoint a court visitor to inform the respondent of the existence and nature of this proceeding and provide the court with relevant information, including whether there is a need for court-appointed counsel. (See Standard 3.3.4, Court Visitor.)

In cases where the respondent is unable to assist counsel (e.g., where the respondent is comatose or otherwise incapacitated), counsel should consider the wishes of the respondent when a position was previously made known. This position may be derived from prior statements made by the respondent or from advance

directives executed by the respondent while competent. Where the position of the respondent is not known, counsel should represent the respondent's best interest. In general, however, the role of counsel should be that of an advocate for the respondent.

Appointment of counsel will incur additional expense, but because of the valuable services provided, it is typically a necessary expense. If the petition was not brought in good faith, these fees may be charged to the petitioner.[72] Good faith should be determined based on the circumstances prevailing at the time the petition was filed.

Standard 3.3.6 Emergency Appointment of a Temporary Guardian

(a) Ex parte appointment of a temporary guardian by the probate court should occur only:

(1) upon the showing of an emergency;
(2) in connection with the filing of a petition for a permanent guardianship;
(3) where the petition is set for hearing on the proposed permanent guardianship on an expedited basis; and
(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.

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

(d) The powers of a temporary guardian should be carefully limited and delineated in the order of appointment.

Commentary

Emergency petitions seeking a temporary guardianship require the court's immediate attention. (See also Standard 3.4.6, Emergency Appointment of a Temporary Conservator.) Such appointments have the virtue of addressing a pressing need either to provide immediate needed assistance to a respondent or to supplant a previously appointed guardian 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. While the court must always protect the respondent's due process rights, emergencies and the expedited procedures they may invoke require the court to remain closely vigilant for any potential due process violation. In such cases, while providing for an immediate hearing, the court should also require immediate service of written notice on the respondent and allow the respondent an appropriate opportunity to be heard. Because interested persons may also have an interest in the proceedings, the court, when appropriate, may require that they be served notice and allow them an opportunity to be heard as well.

---

[72]*See, e.g.,* N.Y. MENTAL HYG. LAW § 81.10(f) (Consol. Supp. 1992).

By requiring the showing of an emergency and the simultaneous filing of a petition for a permanent guardianship, the court will confirm the necessity for the temporary guardianship and ensure that it will not extend indefinitely. When the temporary guardianship is established, the date for the hearing on the proposed permanent guardianship should be scheduled. The order establishing the temporary guardianship should provide that it will lapse automatically upon that hearing date. By establishing a single filing fee that encompasses a petition for both a temporary and a permanent guardianship, the court can remove a financial disincentive that might discourage petitioners from going forward with a petition for a permanent guardianship at a later date.

Only under the most extraordinary circumstances should the temporary guardianship extend for more than thirty days.[73] Requiring a prompt notice of the temporary guardianship to be given to the respondent, and providing the respondent with the right to an expeditious hearing on a motion to revoke the temporary guardianship, provides a means for the respondent to quickly challenge and reverse an inappropriate guardianship.

Because the imposition of a temporary guardianship has the potential to infringe significantly upon the interests of the respondent with minimal due process protections, the court should also consider whether issuing a protective order might adequately meet the needs of the situation. (See Standard 3.3.2, Screening.) For example, 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. 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. 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, the court should be cognizant of the fact that certain decisions by a temporary guardian may be irreversible or result in irreparable damage or harm. Therefore, it may be appropriate for the court to limit the ability of the temporary guardian 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).

---

[73]The Uniform Guardianship and Protective Proceedings Act suggests that a temporary guardianship should not exceed 15 days or the period of effectiveness of ex parte restraining orders in duration. UNIF. GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT § 2-208(a), 8A U.L.A. 437 (1982 & Supp. 1993). *See also* Grant v. Johnson, 757 F. Supp. 1127 (D. Or. 1991) (Oregon temporary guardianship provisions unconstitutional for lack of minimum due process protections).

While the appointment of a temporary guardian provides a useful mechanism for making needed decisions for a respondent during an emergency, it also can provide a useful option for a court that is provided information that a currently appointed guardian 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 can be suspended and a temporary guardian appointed for the respondent with the powers of the permanent guardian. The court should, however, ensure that this temporary guardianship also does not extend indefinitely by including a maximum duration for it in the court's order.[74] (See Standard 3.3.17, Enforcement.)

Standard 3.3.7 Notice

(a) The respondent should receive timely written notice of the guardianship proceedings before a scheduled hearing. Any written notice should be in plain language and in large type. At the minimum, it should indicate the time and place of judicial hearings, state 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 proceedings also should be given to family members, persons having care and custody of the respondent, and others entitled to notice regarding the proceedings.

(c) The probate court should implement a procedure whereby any interested person can file a request for notice.

Commentary

Almost all states have at least some statutory requirement that the respondent in a guardianship proceeding receive notice within a stated number of days before a hearing (e.g., fourteen days). This standard underscores the general notice requirements of Standard 3.1.1 (Notice) by requiring specific timely notice of guardianship proceedings to the respondent and others entitled to notice.[75] The notice should be written and personally delivered, if possible, by a court officer dressed in plain clothes who is trained and instructed how to communicate and interact with respondents. It may be appropriate to provide this officer with special training to facilitate interactions with elderly and disabled persons who are respondents. 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, Notice, and Standard 3.3.4, Court Visitor.)

If the respondent is unable to understand or receive notice, provision may be made for substitute or supplemental service. However, the respondent may still benefit 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 of the

---

[74]*See* UNIF. PROB. CODE § 5-308 (such temporary guardianships should not exceed six months for the temporary guardians acting in lieu of a suspended permanent guardian).

[75]*See, e.g.,* N.Y. MENTAL HYG. LAW § 81.07(d) (Consol. Supp. 1992); UNIF. PROB. CODE §§ 1-401, 5-304 (1991).

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 the setting aside of a prior order establishing a guardianship.

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.[76] Notice should also be given to any persons having responsibility for the management of the estate of the respondent, including any previously appointed conservator. It may also be appropriate to provide notice to an individual 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.

The court should establish a procedure permitting interested persons who desire notification before an order is made in a protective proceeding to file a request for notice with the court.[77] This procedure allows persons interested in the establishment or monitoring of a guardianship 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. 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 (if any). Notice should be provided to any person who has properly filed this request.[78]

Standard 3.3.8 Hearing

(a) The probate court should promptly set a hearing for the earliest date possible.

(b) The respondent should have the right to be present at the hearing and all other stages of the proceeding. The hearing should be conducted in a manner that respects and preserves all of the respondent's rights.

(c) The court should require the proposed guardian to attend the hearing except upon a showing of good cause.

(d) The court should make a complete record of the hearing.

Commentary

It is critical that the court promptly hear a petition for guardianship. After the filing of the petition, the court 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 or the imposition of a less intrusive alternative. With a prompt dismissal, the respondent

---

[76]*See, e.g.,* N.Y. MENTAL HYG. LAW § 81.07(d) (Consol. Supp. 1992); UNIF. PROB. CODE § 5-304(a) (1991).

[77]*See, e.g.,* UNIF. GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT § 1-404, 8A U.L.A. 437 (1982 & Supp. 1993); UNIF. PROB. CODE § 5-104 (1991).

[78]*See, e.g.,* UNIF. GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT § 2-204, 8A U.L.A. 437 (1982 & Supp. 1993); UNIF. PROB. CODE § 5-304 (1991).

will not have to endure unnecessary emotional stress. With a prompt order establishing a guardianship or a less intrusive alternative, the respondent will receive needed supervision or services in a timely fashion.

A guardianship 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 have the right to be present at the hearing and at all other stages of the proceeding, with reasonable accommodations made to assure the respondent's attendance and participation.[79] This may necessitate moving the hearing to a location readily accessible to the respondent (e.g., a hospital conference room). The proposed guardian 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. The proposed guardian 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, however, 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.[80]

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 present evidence, call witnesses, cross-examine witnesses including any court-appointed examiner or visitor, and have the right to be represented by counsel. (See Standard 3.3.5, Appointment of Counsel.) In some states the respondent may be entitled to a jury trial.[81]

Standard 3.3.9 Determination of Incapacity

(a) The imposition of a guardianship by the probate court should be based on competent evidence of the incapacity of the respondent.

(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.

(c) No determination of incapacity should be required in voluntary guardianship cases.

Commentary

The appointment of a guardian should be based on adequate evidence. Evidentiary rules and requirements are needed to ensure that due process is afforded and that

---

[79]*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).

[80]*See* UNIF. PROB. CODE § 5-303(d).

[81]*See, e.g.,* N.Y. MENTAL HYG. LAW § 81.11(f) (Consol. Supp. 1992); UNIF. PROB. CODE § 5-303(c) (1991).

competent evidence is used to determine incapacity.[82] To obtain competent evidence, the court should allow evidence from professionals and experts whose training qualifies them to assess the physical and mental condition of the respondent.

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), the court should avail itself of the assistance of professionals and experts when their knowledge will assist the court in making a decision on whether a guardianship is necessary. These professionals and experts include, but are not limited to, physicians, nurses, psychologists, social workers, developmental disability professionals, physical and occupational therapists, educators, habitation workers, and community mental health workers. The determination of the need for the appointment of a guardian is frequently made by a physician after conducting an examination of the respondent.[83] 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. 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 may provide the court with a fuller and more accurate understanding of the alleged incapacity of the respondent, although associated costs may preclude its use on a routine basis.[84]

The written reports of professionals should be presented promptly to the court and should be made available to all interested persons. The court need not base its 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 fact finder to rely on the written report. The court should be able to obtain as much helpful information as it needs 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. Among the factors to be addressed in the report are: the respondent's diagnosis; the respondent's 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; 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

---

[82]The various states differ on what is the appropriate evidentiary standard to apply in determining incapacity, from a preponderance of the evidence standard to a clear and convincing evidence standard.

[83]*See* UNIF. PROB. CODE § 5-303(b) (1991) (respondent "must be examined by a physician or other qualified person").

[84]*See* Thomas L. Hafemeister & Bruce D. Sales, *Interdisciplinary Evaluations for Guardianships and Conservatorships,* 8 LAW & HUMAN BEHAV. 335 (1985).

content avoids the unfortunate practice of professionals and expert examiners providing cursory, conclusory evaluations to the court.

Standard 3.3.10 Less Intrusive Alternatives

(a) The probate court should find that no less intrusive alternatives exist before the appointment of a guardian.

(b) The court should always consider, and utilize, where appropriate, limited guardianships.

(c) In the absence of governing statutes, the court, taking into account the wishes of the respondent, should use its inherent or equity powers to limit the scope of and tailor the guardianship order to the particular needs, functional capabilities, and limitations of the respondent.

(d) The court should maximize coordination and cooperation with social service agencies in order to find alternatives to guardianships or to support limited guardianships.

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.[85] Allowing persons potentially subject to guardianships to retain as much autonomy as possible may be vital for their mental health.

Therefore, the court should encourage the exploration and appropriate use of alternatives to guardianship. (See Standard 3.3.2, Screening.) Furthermore, in cases where limited powers are requested, there will be less need for delay and expense.

To avoid unwanted intrusion, divisiveness, and expense, the court should consider less intrusive alternatives that will meet the needs of the respondent before establishing a guardianship. When attempting to determine what constitutes a less intrusive alternative, the court should defer to any alternatives previously established or proposed by the respondent (e.g., a durable health care power of attorney).

In general, the court should be guided by the express wishes of the respondent where available, and, where not available, by a substituted judgment standard to determine what the respondent would have chosen if he or she had the current capacity to choose. Even if the respondent lacks current capacity to make decisions regarding his or her personal care, the court should solicit the respondent's opinions and preferences and should give these appropriate consideration where they are not unreasonable. The use of an initial screening process can facilitate the consideration of less intrusive alternatives. (See Standard 3.3.2, Screening.)

If the court determines that a guardianship is necessary, the respondent's self-reliance, autonomy, and independence should be promoted by restricting the authority of the guardian to the minimum required for the situation, rather than routinely granting full powers of guardianship 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. The court should also require the guardian to

---

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

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, the court has the power to create such limited guardianships because of their equitable nature. The court can similarly invoke (either with or without further court supervision) other less intrusive alternatives.[86] (See Standard 3.3.2, Screening.)

When determining less intrusive alternatives for respondents who are minors, the court should recognize that the level of care and custody required for a minor may be different from that required for an adult. The court also should recognize that the care and custody needs of a minor vary with the age of the minor and that an older or mature minor is more capable of making decisions on his or her own behalf.[87]

For a discussion of the appropriate contents of the initiating guardianship petition, see Standard 3.3.1, Petition. For a discussion of the appropriate contents of the court's order, see Standard 3.3.12, Order. Both should include consideration of relevant, less intrusive alternatives. (See also Standard 3.3.2, Screening.)

Standard 3.3.11 Qualifications and Appointments of Guardians

The probate court should appoint a guardian suitable and willing to serve as a guardian. Where possible, the court 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. The court should consider the training, education, and experience of a potential guardian 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 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, the court should consider such factors as familiarity with health care decision making, residential placements, and social service benefits. Further, the guardian should act only within the bounds of the court order and should not expand the scope of the guardianship, except when authorized to do so by the court.

The court should attempt, when possible, to appoint as guardian 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 will obtain the trust and cooperation of the respondent. However, it may also be appropriate for the court to appoint as guardian a public administrator, a public guardian, a professional firm, or a corporation having special qualifications or expertise that will be beneficial to the respondent. Volunteer associations may also take an interest in and assist with

---

[86]*See, e.g.,* UNIF. PROB. CODE § 5-306 (1991).

[87]For purposes of decision making, it should be recognized that an emancipated minor has virtually the same decision-making authority as an adult. *See, e.g.,* ARIZ. REV. STAT. ANN. § 44-1362 (1967); ARK. STAT. ANN. § 82-363 (Supp. 1981); CONN. GEN. STAT. ANN. § 46b-150d (West Supp. 1991); IND. CODE § 16-8-3-1 (1976); MISS. CODE ANN. § 41-41-3(g) (1981); N.C. GEN. STAT. § 90-21-5(b) (1981).

guardianship services.[88] Although the court should not appoint any agency, public or private, that financially benefits from directly providing housing, medical, or social services as a guardian, the court should use the services of such organizations, where appropriate.

The court should appoint only suitable persons as guardians. Particular care may be required in making a reappointment where a guardian has left the jurisdiction where the original order of guardianship was issued. If the guardian has failed to carry out the original order and is subject to a contempt charge, that person should not be reappointed as a guardian for the original respondent or appointed as a guardian for any other respondent.

In selecting the guardian, preference should be given to any written designation of a prospective guardian made by the respondent while competent (e.g., as provided in a durable health care power of attorney) unless there are compelling reasons to appoint another.[89] In many situations, the respondent has had ample opportunity to anticipate the need for a guardian and to identify a nominee with whom he or she is comfortable. In such cases, the court 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). Even though the respondent may be legally incompetent for purposes of the guardianship proceeding, the court may solicit the respondent's current opinions and preferences and take these into account when selecting a guardian. Alternatively, the respondent may have indicated in a nonguardianship 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 is not stipulated, or a person designated is not suitable or willing to serve, the court should appoint a guardian who is capable and willing to develop a rapport with the respondent.

In general, the court should seek a guardian with the least potential for a conflict of interest with the respondent. In many cases this may disqualify individuals such as the respondent's physician, attorney, landlord, current care giver (particularly where there is a pecuniary interest), or creditor from serving as the respondent's guardian. However, the court should not decline to appoint the respondent's parent, spouse, or child when the appointment would be the most beneficial to the respondent. Generally, state law will provide a list of categories of persons the court is obligated to consider in deciding who to appoint, although ultimate discretion in making this appointment remains with the court.[90] The court 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.

A minor who is at least fourteen years old may have sufficiently developed reasoning skills to participate in selecting a guardian. The court should appoint the

---

[88]*See, e.g.,* LEGAL COUNSEL FOR THE ELDERLY, AMERICAN ASSOCIATION OF RETIRED PERSONS, VOLUNTEER USE IN COURTS (1990); LEGAL COUNSEL FOR THE ELDERLY, AMERICAN ASSOCIATION OF RETIRED PERSONS, AARP VOLUNTEERS: A RESOURCE FOR STRENGTHENING GUARDIANSHIPS (Final Report March 1993).

[89]*See, e.g.,* N.Y. MENTAL HYG. LAW §§ 81.17, 81.19(b) (Consol. Supp. 1992); UNIF. PROB. CODE § 5-305(b) (1991).

[90]*See, e.g.,* N.Y. MENTAL HYG. LAW § 81.19 (Consol. Supp. 1992); UNIF. PROB. CODE § 5-305(c),(d) (1991).

individual nominated by the minor unless there is a compelling reason to the contrary. In addition, the court should carefully consider the objection of the minor to the appointment of a particular person as guardian. The court also may recognize a parent's testamentary appointment of a guardian for a minor.

Standard 3.3.12 Order

(a) The order issued by the probate court should detail the duties and powers of the guardian, including limitations to the duties and powers, and the rights retained by the respondent.

(b) The court should make known to the guardian what the guardian's responsibilities are, what requirements are to be applied in making decisions and caring for the respondent, and that the guardian must file with the court periodic reports on the respondent's personal status.

(c) Following appointment, a guardian should be ordered to mail a copy of the order of appointment to the respondent and to others who received notice of the petition for guardianship. Proof of service should be filed with the court.

Commentary

The court should be as specific as possible in actions relating to guardianships. Specificity helps prevent any unnecessary intrusions into the life and affairs of the respondent. Specifically enumerated duties and powers serve as a guide for the court and other interested parties in evaluating and monitoring the guardian. Because the preferred practice is to limit the powers and duties of the guardian to those necessary to meet the needs of the respondent (see Standard 3.3.10, Less Intrusive Alternatives), the court should specifically enumerate in its order the assigned duties and powers of the guardian, as well as limitations on them, with all other rights reserved to the respondent.[91] By listing the powers and duties of the guardian, the court's order can serve as an educational roadmap to which the guardian can refer and use to help answer questions about what the guardian can or cannot do in carrying out the guardian's assigned responsibilities. (See Standard 3.3.14, Reports by the Guardian; Standard 3.3.15, Monitoring of the Guardian.)

When establishing the powers of the guardian, the court should be aware that certain decisions by a guardian may be irreversible or cause irreparable damage or harm. As a result, unless otherwise provided by statute, the court may specifically limit the ability of the guardian 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). 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.

The guardian should also be required to obtain prior court approval before the respondent is permanently removed from the court's jurisdiction. Prior court ap-

[91] *See, e.g.,* N.Y. MENTAL HYG. LAW §§ 81.20, 81.22, 81.29(a) (Consol. Supp. 1992); UNIF. PROB. CODE § 5-306(a),(c) (1991).

proval, 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, Less Intrusive Alternatives.) The court's order should also include a statement of the need for the guardian 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.

The duties and powers of a guardian may differ where the respondent is a minor rather than an adult. In addition to statutory distinctions in the duties and powers that are available, the court may want to consider differences in the level of care and custody required for minors and adults. (See Standard 3.3.10, Less Intrusive Alternatives.)

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

The guardian, when accepting appointment, should acknowledge that he or she consents to the court's jurisdiction in any subsequent proceedings concerning the respondent.[92]

Standard 3.3.13 Training and Orientation

The probate court should develop and implement programs for the orientation and training of guardians.

Commentary

The 1986 *Statement of Recommended Judicial Practices* endorsed by the American Bar Association recommends that courts "encourage orientation, training and ongoing technical assistance for guardians, including an outline of a guardian's duties and information concerning the availability of community resources."[93] To assist their orientation and training, the court should develop or make available model handbooks and videotapes for guardians. A number of groups and organizations, including the National Guardianship Association[94] and the Michigan Center for Social Gerontology,[95] have developed model standards for guardians that can be adopted or adapted

---

[92]*See* UNIF. PROB. CODE § 5-307 (1991).

[93]NATIONAL CONFERENCE OF THE JUDICIARY ON GUARDIANSHIP PROCEEDINGS FOR THE ELDERLY, RECOMMENDED JUDICIAL PRACTICES, JUNE 1986 (endorsed by the American Bar Association, House of Delegates, August 1987, recommendation IV(b)).

[94]NATIONAL GUARDIANSHIP ASSOCIATION, ETHICS AND STANDARDS FOR GUARDIANS (1991).

[95]Penelope A. Hommel, & Lauren B. Lisi, *Model Standards for Guardianship: Insuring Quality Surrogate Decisionmaking Services*, CLEARINGHOUSE REVIEW 433-43 (Special Issue, Summer 1989) ("The standards are intended to serve as a blueprint for states, courts, and advocates for the elderly and disabled who wish to insure that surrogate decisionmaking services are provided in a uniform, high quality manner that maximizes the potential of every individual for self-reliance and independence.")

by the court. The office of the state court administrator may assist the court in developing materials for guardians.[96]

The court should make its programs for orientation to guardianship available through recognized continuing legal education courses and community adult continuing education. In addition, there should be self-study materials available in the court's library or from the clerk. The materials should be in both print and videotaped formats. Where appropriate, the materials should be in a language other than English to supplement the English version. The court should distribute informational brochures describing the responsibilities of guardians to all guardians upon appointment.

The court should require that, at a minimum, the guardian has read any written materials and viewed any videotape the court has prepared or endorsed. An acknowledgment that such information has been distributed to or received by the proposed guardian should be placed in the court's file (e.g., a signed receipt for these materials). A competent proposed guardian who has previously received and is familiar with the information may simply sign a statement to that effect. Alternatively, the guardian's "Oath of Acceptance of Appointment" may be modified so that the guardian in taking that oath thereby certifies that he or she has reviewed this information and understands the nature of his or her duties.

Standard 3.3.14 Reports by the Guardian

A guardian should be required to file with the probate court a guardianship plan and a report on the respondent's condition, with annual updates provided by the guardian thereafter. A guardian should also provide the court with advance notice of any intended absence of the respondent from the court's jurisdiction in excess of thirty calendar days, or any major anticipated change in the respondent's physical presence (e.g., a change in residence, place of abode).

Commentary

The guardian should provide a report on the respondent's condition and a plan for the care and abode of the respondent to the court within the first sixty calendar days of the establishment of the guardianship and then file follow-up reports at least annually.[97] These reporting requirements ensure that the court receives prompt, timely, and periodic information to enable it to determine whether the guardian is appropriately carrying out the guardian's assigned duties and responsibilities.

The court should be explicit in providing a statement of the information required in each report from a guardian. In general, the reports should be simple, yet comprehensive. Clear, direct reporting guidelines should be provided to the guardian

---

[96]*See, e.g.,* INSTRUCTIONS FOR GUARDIANS AND CONSERVATORS (Video Imagination Television 1990) (training video produced for the Pima County [Arizona] Superior Court); SERVING AS GUARDIAN AND CONSERVATOR (Lang Telecommunications 1989) (training video produced for the Michigan Judicial Council); LORI A. STEIGEL, ALTERNATIVES TO GUARDIANSHIP: SUBSTANTIVE TRAINING MATERIALS AND MODULE FOR PROFESSIONALS WORKING WITH THE ELDERLY AND PERSONS WITH DISABILITIES (1992).

[97]Each state's respective statutory provisions may establish somewhat different time frames. *See, e.g.,* WASH. REV. CODE ANN. § 11.92.043(1) (West Supp. 1993) ("[i]t 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 (1985) ("[i]mmediately after appointment, the guardian shall report to the court the physical condition and principal residence of the ward").

so that the guardian can report to the court with or without the routine assistance of an attorney.

The report should contain descriptive information on the personal status of the respondent. In addition, the report should include such items as the services and care provided to the respondent, significant actions taken by the guardian, and the expenses incurred by the guardian.

Where there is considerable overlap or interdependence, the court may authorize the joint preparation and filing of the plans and reports of the guardian and conservator. (See Standard 3.4.15, Reports by the Conservator.)

Requiring an initial plan for personal management will help guardians perform their duties more effectively. The court should inform guardians that its approval of their plan does not relieve them of their duty to monitor the situation and make adjustments when necessary. Minor changes to a guardianship plan (e.g., changing doctors, replacing one social activity with another, etc.) may be implemented without consulting the court. The court should inform guardians, however, that except in emergencies or when directed by medical order there should be no substantial deviation from the court-approved plan without prior approval.

A guardian should make timely and complete annual reports to the court about the respondent. The guardian should also comply with any specific order of the court and report any absence of the guardian or respondent from the jurisdiction of the court that will exceed thirty calendar days. Similarly, the guardian should report to the court any anticipated move of the respondent within the jurisdiction so that the court can readily locate the respondent at all times. The report should also indicate any change in the respondent's condition, thereby allowing the court to determine whether any modification in the original or subsequent orders establishing the guardianship is warranted. (See Standard 3.1.8, Interstate Compacts and Compensation; Standard 3.3.16, Reevaluation of Necessity for Guardianship; Standard 3.3.17, Enforcement.)

Standard 3.3.15 Monitoring of the Guardian

The probate court should have written policies and procedures to ensure the prompt review of reports and requests filed by guardians.

Commentary

Respondents should be provided with the maximum protection of the court. The primary method of court monitoring should be the review and evaluation of the initial and annual reports filed by a guardian. The court should be prepared to investigate those situations where a guardian fails to submit any report required by the original order. The court should also be especially attentive to complaints of abuse and be prepared to investigate their validity immediately. A principal component of the review is to ensure that the guardian included all of the information required by the court in these reports. Prompt review of the guardian's reports enables the court to take early action to correct abuses made apparent by the reports. The court also will be in a position to take early action in issuing a show cause order if the guardian has violated a provision of the original order.

The court should have a system that permits it to know when reports are due. When a guardian fails to meet a deadline, the court should promptly provide notice to

the guardian of the delinquency. If the guardian does not respond, the court should immediately investigate the situation to determine the appropriate course of action.

The court should examine all reports that it requires the guardian to file. This examination should include a determination of compliance with court orders. Relevant reports may be distributed to interested persons. The guardian is responsible for distributing these reports and must file proof of service with the court. Giving family members and other interested persons the opportunity to review and respond to the guardian's reports may aid the court in evaluating and monitoring the guardian's actions.

The reports of a guardian of a minor may be different in content but should be treated with the same care and diligence afforded to all accountings and reports.

Standard 3.3.16 Reevaluation of Necessity for Guardianship

The probate court should adopt procedures for the periodic review of the necessity for continuing a guardianship. A request by the respondent for a review of the necessity for continuing a guardianship should be addressed promptly.

Commentary

A periodic review should be conducted of the circumstances that required the court to order a guardianship for a respondent. Further, the court should have procedures in place to protect the respondent's right to petition for a termination of guardianship. Where a respondent requests termination or a change in status of the guardianship, the court should respond promptly.

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 to reestablish the basic grounds for the guardianship. 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. Local case law or statute should be consulted with regard to such issues.

The court should consider placing a limitation on the frequency with which the need for a guardianship can be readjudicated without special leave of the court (e.g., not more than every six months).[98] Active monitoring of the guardianships in the court's caseload (see Standard 3.3.15, Monitoring of the Guardian) will assist in determining the continuing necessity for guardianships.

In any hearing reevaluating the necessity for guardianship, the court may consider all previously submitted reports from the guardian and make them a part of the record. The court 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.

The court visitor should personally visit the respondent and check on the need to continue the guardianship after the first year of the guardianship, and periodically

[98] *See* UNIF. PROB. CODE § 5-311(b) (1991) ("An order adjudicating incapacity may specify a minimum period, not exceeding six months, during which a petition for an adjudication that the ward is no longer incapacitated may not be filed without special leave.").

thereafter.[99] The court visitor should also consider whether a less intrusive alternative might be more appropriate. However, the court's review of the continuing need for a guardianship should not be limited by its established review date. The court may review the necessity for continuing a guardianship upon review of any report submitted by the guardian or at any other time at its own discretion. (See Standard 3.3.15, Monitoring of the Guardian.)

Standard 3.3.17 Enforcement

(a) The probate court should enforce its orders by appropriate means, including the imposition of sanctions. These may include suspension, contempt, removal, and appointment of a successor.

(b) Where the court learns of a missing, neglected, or abused respondent, it should take immediate action to ensure the safety and welfare of that respondent.

Commentary

The court should monitor the actions of those whom it appoints as guardians (e.g., by reviewing the reports filed by the guardian on a regular basis and following up on any deficiencies that may be noted). Although it cannot be expected to provide detailed or daily supervision of the guardian's actions, the court should not assume a passive role, responding only upon the filing of a complaint. The court should actively monitor the guardian and any failures by the guardian to meet his or her duties. (See Standard 3.3.15, Monitoring of the Guardian.)

While most guardians will act appropriately, the court should take actions at the earliest time possible against those who are or who may be acting inappropriately. As soon as there is an actual or perceived violation of the court's order, the court should take appropriate action. If the guardian has left the court's jurisdiction, notice of a show cause order should be sent to the court in the new jurisdiction pursuant to the appropriate interstate compact or agreement. (See Standard 3.1.8, Interstate Compacts and Cooperation.) If the guardian is an attorney, the court should advise the appropriate disciplinary authority that the attorney may have violated his or her fiduciary duties to the respondent. The court may consider suspending the guardian and appointing a temporary guardian to immediately take responsibility for the welfare and care of the respondent. (See Standard 3.3.6, Emergency Appointment of a Temporary Guardian.)

The court should consider imposing sanctions on the guardian where it learns that the guardian has abused the guardian's powers or otherwise failed to adhere to the order establishing the guardianship. This may include, for example, failure to provide for the care or treatment of the respondent, failure to file required reports, and any other breach of the guardian's duty that can be identified.

---

[99]In Michigan, for example, the court may send a visitor to observe conditions and report in writing to the court before removing a guardian, appointing a successor guardian, modifying the terms of the guardianship, or terminating a guardianship. *See* MICH. COMP. LAWS ANN. § 700.447(3) (West Supp. 1993).

When a guardian abandons a respondent, the court should make an emergency appointment of a temporary guardian and remove the original guardian. The court's emphasis should be on protecting the respondent's safety and welfare. After assigning a temporary guardian, the court should order an investigation to locate the guardian and to examine the conduct of the guardian. The court should impose appropriate sanctions against a guardian who failed to fulfill his or her duties as a guardian.

When a respondent cannot be located, the court should order an immediate investigation to locate the respondent. If the guardian has been diligent in his or her duties, and the absence of the respondent is not the fault of the guardian, the guardian should retain the appointment. If the guardian has not been diligent in his or her duties, the court may remove the guardian and make an emergency appointment of a temporary guardian.

In imposing sanctions such as contempt upon a guardian, the due process rights of the guardian should be protected. At a minimum, the guardian should be entitled to notice and a hearing prior to the imposition of sanctions. However, these proceedings should not preclude the court from taking interim steps to protect the interests of the respondent. In addition, where needed, the court should be able unilaterally to suspend or remove the guardian and appoint a temporary successor to provide for the welfare of the respondent with the guardian entitled to object to the action at a later date. (See Standard 3.3.6, Emergency Appointment of a Temporary Guardian.)

Standard 3.3.18 Final Report and Discharge

Unless waived, a final report regarding the respondent's status should be promptly submitted to the probate court by the guardian. This report should be approved before the guardian is discharged.

Commentary

The authority and responsibility of a guardian terminates upon the death, resignation, or removal of the guardian, or upon the respondent's death, restoration of competency, reaching the age of majority, or becoming legally emancipated. The respondent, guardian, or any interested person may petition the court for a termination of the guardianship. A respondent seeking termination should be afforded the same rights and procedures as in the original proceeding establishing the guardianship. (See Standard 3.3.8, Hearing; Standard 3.3.16, Reevaluation of Necessity for Guardianship.)

Where the request for termination of the guardianship is contested, the court should direct that notice be provided to interested persons (see Standard 3.1.1, Notice), conduct a hearing (see Standard 3.3.8, Hearing), and issue a determination regarding the need for continuation of the guardianship. If termination is ordered, the court should order the guardian to provide a final report regarding the respondent's status and actions taken on behalf of the respondent. The court generally should not discharge the guardian until it accepts this report. The court order should also provide for the guardian's reasonable expenses associated with this termination.

Circumstances may exist, however, where a formal closing of the guardianship, including notice, hearing, and a final report, 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. Alternatively, if a respondent regains competency, reaches the age of majority, or is legally emancipated, the need for a continuation of the guardianship is negated, and limitations on the respondent's rights may be restored without a final report and full hearing.

In general, where the matter is uncontested, in lieu of a final report, the guardian may close the guardianship and be discharged without a formal hearing upon filing with the court a waiver of the interested persons regarding a final report, and the consent of the interested persons regarding this discharge. Giving guardians the ability to close the guardianship upon waiver and consent of the interested persons is desirable because it frees up the court's resources without sacrificing the rights of the affected individuals.

Typically, a guardianship for a minor terminates automatically when the respondent attains the age of majority or is legally emancipated. The court should consider installing a procedure to monitor the events that will result in this termination.

3.4 CONSERVATORSHIP

Separate categories have been created for conservatorship and guardianship proceedings to facilitate presentation and to make it easier to locate relevant material. Although the terminology varies considerably across the country, this report will use the definitions of conservator and guardian used by the Uniform Probate Code.[100] Namely, a *conservator* means a person appointed by the court to manage the estate of the respondent,[101] whereas a *guardian* is a court-appointed person responsible for the care, custody, and control of the respondent.[102] The term *respondent* designates the individual who is the subject of the conservatorship or guardianship proceeding rather than ward, protected person, etc., because it is not pejorative or indicative of the final outcome of the proceeding.

The creation of separate categories for conservatorship and guardianship is not meant to imply that it is inappropriate to simultaneously file petitions for conservatorship and guardianship, nor that it is necessary to file separate petitions for the two. 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, the standards in the two categories here frequently directly parallel each other. Furthermore, it may be more efficient and effective to appoint the same person to serve as both conservator and guardian. Finally, the standards on

[100]In some states, a *conservator* is alternately referred to as a "guardian of the estate," a "guardian for the estate," or a "Committee."

[101]UNIF. PROB. CODE § 1-201(8)(1991).

[102]UNIF. PROB. CODE § 5-309 (1991).

conservatorship and guardianship apply to respondents who are minors as well as adults, with the same procedures generally applicable.

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 the court with probate jurisdiction (hereinafter the court) while yet responding appropriately to the needs of the parties appearing before the court.

Standard 3.4.1 Petition

(a) A petition for conservatorship should be as simple as possible to obtain, complete, and process. It should be verified and require at least the following information:

(1) a description of the nature and extent of the functional limitations of the respondent regarding asset management or other needs for protection;
(2) representations that less intrusive alternatives to conservatorship have been examined;
(3) the conservatorship powers being requested; and
(4) the nature and estimated value of assets, distinguishing real and personal property, and estimated annual income.

(b) The petition should be reviewed by the probate court or its designee to ensure that all of the information required to initiate the conservatorship is complete.

Commentary

The court and all parties to a conservatorship proceeding need complete and accurate information on which to act. The petitioner should assert that the petition is not frivolous by verifying the statements made. The details required in the petition should include the name, age, and address of the respondent;[103] the nature and extent of the respondent's disability; the type and duration of protection sought; whether other related proceedings are pending in this or other jurisdictions; the specific reasons why conservatorship is being requested; specific examples of behavior that demonstrate the need for the appointment of a conservator; the powers of conservatorship requested; representations that less intrusive alternatives have been considered; the proposed conservator's qualifications; the relationship between the proposed conservator and the respondent; information on the respondent's assets, property, and income; and the name, address, and relationship of those persons required to be given

[103]Where a minor is the subject of a conservatorship proceeding, the mandates of the Uniform Child Custody Jurisdiction Act may shape the nature of the information that should be included in the petition. *See* UNIF. CHILD CUSTODY JURISDICTION ACT § 3(a)(1), 9 Pt. 1 U.L.A. 143 (1968) (jurisdiction is established by where the minor is located during the six months prior to the filing of the petition).

notice and those persons closely related to the respondent.[104] However, these details may be superseded by requirements established as a matter of state law.

The court should develop and distribute forms that will assist the petitioner to meet these requirements. The court should not accept any incomplete petition but should provide assistance to petitioners in completing their petitions. Informational brochures should be distributed to all persons upon request or to those who file conservatorship petitions.

When a petitioner seeks conservatorship for two or more respondents, separate petitions should be filed for each respondent and separate accountings should be required regarding the assets, receipts, and disbursements for each of the respondents.

Standard 3.4.2 Screening

(a) The probate court should establish a process for screening all conservatorship petitions and diverting inappropriate petitions.

(b) The screening process should encourage the appropriate use of less intrusive alternatives to formal conservatorship proceedings.

Commentary

Conservatorship matters can reach the court by petition of either an interested party or a person who is unable to manage his or her property.[105] The court should design or establish, within each locale, a procedure for screening potential conservatorship cases prior to a formal judicial proceeding. This procedure may be no more complex than instructing the court official who routinely receives conservatorship petitions to provide an initial screening, although where resources permit, a more formal, separate screening unit may be appropriate. However, this screening should be used only for direct petitions by an interested third party. Where the respondent is the petitioner, there is less reason to question the validity of the petition, and the respondent should be provided direct access to the court.

The screening process provides at the earliest point in time a means for promoting equitable and uniform decision making about the need for the services associated with a conservatorship. Screening should be used to divert inappropriate cases and to promote consideration of less intrusive alternatives.

Although initial contact with the screening agent may be an inquiry about whether a conservatorship is needed, the aim of the screening is to facilitate efforts to provide the respondent with help where needed, although not necessarily by establishing a conservatorship. The aim is to find the most appropriate method of protection consistent with the respondent's needs, an aim that may be accomplished by less intrusive means than that requested in the initiating petition.

By providing an early screening of petitions, the court can minimize the expense, inconvenience, and possible indignity incurred by interested parties for whom a conservatorship is inappropriate or for whom less intrusive alternatives exist, and

---

[104] Although more comprehensive, this list is similar to that provided in the Uniform Guardianship and Protective Proceedings Act. UNIF. GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT § 2-304(b), 8A U.L.A. 437 (1982 & Supp. 1993).

[105] The term *interested party* may be defined by statute and is not limited to a relative or a person with an interest in the property of the respondent. *See, e.g.*, CAL. PROB. CODE § 48 (West 1991); UNIF. PROB. CODE §1-201(24) (1991).

conserve the resources of the court. In addition, in most jurisdictions many petitions for a conservatorship are filed by persons who are not represented by attorneys and who will need instruction regarding when a conservatorship is appropriate and assistance in meeting the initial requirements for filing a petition. 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.

Preferably, this screening will not be conducted solely upon the filing of the petition, when the only information available may be that provided on the face of the petition. After the court visitor has had an opportunity to make an investigation and report, a better factual basis exists for the screening. (See Standard 3.4.4, Court Visitor.) However, if the court lacks the resources for this more extensive screening or is concerned that an additional delay may result, the court may instead provide training for those members of its staff who initially review petitions for conservatorships so that they can properly screen and divert inappropriate petitions.

A petitioner should not, however, be precluded from filing a petition even though the screening process suggests that a conservatorship is not necessary.

Conservatorship is often used to address problems that could be solved by less intrusive means. People may petition for conservatorships to provide an unprotected person with a wide variety of services primarily focusing on financial management. However, the screening process may identify and can encourage other ways to address these needs that are less intrusive, expensive, and burdensome. Indeed, in some cases, the respondent may have taken prior steps to establish or implement them. Possible alternatives to a full conservatorship include, but are not limited to: protective proceedings/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, publicity, delay, and expense. Additionally, the 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.

In general, the court should find that no less intrusive alternative, including a limited conservatorship, is appropriate before selecting and appointing a plenary conservator. No restriction should be placed on the ability of a person to act on his or her own behalf unless alternatives to conservatorship will not provide sufficient management of the resources of that person. The court should encourage maximum autonomy for the respondent while protecting the interests of the respondent and act only to the extent necessitated by the limitations of the respondent. (For a discussion of the responsibility of the court to consider less intrusive alternatives when making its determination and issuing its order, see Standard 3.4.10, Less Intrusive Alternatives.)

Standard 3.4.3 Early Control and Expeditious Processing

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

(1) identify conservatorship cases immediately upon their filing with the court;

(2) supervise and control the flow of conservatorship cases on the docket from filing through final disposition; and
(3) when appropriate, make available to conservatorship cases pretrial 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. The court should meet its responsibilities to everyone affected by its activities in a timely and expeditious manner. Delay in court action may be devastating, for example, to a respondent who is experiencing considerable pain and suffering and needs authorization for funds for a medical procedure. Once a conservatorship case is presented, the court should be prepared to respond quickly by having procedures in place that allow for an expedited resolution of the case.

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

As part of its pretrial[106] procedures, the court should have investigatory services available to it to facilitate expeditious, efficient, and effective performance of its adjudicative, supervisory, and administrative duties in conservatorship cases. Where such services are unavailable to the court, the court should attempt to obtain such services by contract, recruitment and training of volunteers, or similar options. The results of these services should be presented promptly to the court and made available to all parties.

Standard 3.4.4 Court Visitor

The probate court should require a court appointee to visit with the respondent in a conservatorship petition to (1) explain the rights of the respondent; (2) investigate the facts of the petition; and (3) explain the circumstances and consequences of the action. The visitor should investigate the need for additional court appointments and should file a written report with the court promptly after the visit.

Commentary

Persons placed under a conservatorship may incur a significant reduction in their personal activities and liberties. When a conservatorship is proposed, the court should ensure that the respondent is provided with information on the procedures that will follow. The respondent also needs to be informed of the possible consequences of the court's action.

The court should appoint a person to provide the respondent with this informa-

[106]Some states use the term *prehearing* instead of *pretrial*.

tion. Several different designations have been used to identify this appointee, including court visitor,[107] court investigator,[108] court evaluator,[109] and guardian ad litem[110] (collectively referred to as a court visitor in these standards). Their role is generally addressed by this standard, although their duties will also be typically established by statute.[111] Their role stands in contrast to that of court-appointed counsel (see Standard 3.4.5, Appointment of Counsel), although in some states counsel may be assigned some of the duties delineated here. A court visitor may be better equipped to address the psychological, social, and medical problems raised in conservatorship proceedings than a court-appointed counsel. Although the court visitor may be a lawyer by training, it is not necessary that the visitor be a lawyer. In certain cases, such a background may not be appropriate. Regardless of his or her background, the court visitor should have the requisite language and communication skills to adequately provide necessary information to the respondent.

The court appointees addressed by this standard all have the same general responsibility; namely, to inform the respondent about the proceedings being conducted. Even though the respondent may not fully understand the proceedings because of a lack of capacity, this information should still be provided. A visit with the respondent to explain the nature and purposes of a conservatorship, however, should be only one of the required duties of this court appointee. The court visitor should also interview the petitioner and the proposed conservator; should consult, where appropriate, with professionals who have prepared an evaluation of the respondent; and should ascertain whether the respondent desires and is able to attend the hearing. The court visitor's report should state the respondent's views; provide an assessment of the capacity of the respondent; evaluate the fitness of the proposed conservator; contain a recommendation concerning the appropriateness of a conservatorship, including whether less intrusive alternatives are available; and provide a recommendation as to the specific powers requested in the petition.[112] State law may mandate the use of such court visitors in conservatorship proceedings and delineate their responsibilities.[113]

Under the Uniform Probate Code, the use of such court visitors is discretionary in conservatorship proceedings, but mandatory in guardianship proceedings.[114] Nevertheless, the use of a court visitor is generally appropriate in a conservatorship

---

[107]*See* UNIF. PROB. CODE § 5-103(21) (1991) ("'Visitor' means a person appointed in a guardianship or protective proceeding who is trained in law, nursing, or social work, is an officer, employee, or special appointee of the Court, and has no personal interest in the proceeding.").

[108]*See, e.g.,* CAL. PROB. CODE §§ 1454, 1826, 1894 (West 1991).

[109]*See, e.g.,* N.Y. MENTAL HYG. LAW § 81.09 (Consol. Supp. 1992).

[110]*See, e.g.,* MICH. COMP. LAWS ANN. § 700.467 (West Supp. 1993).

[111]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 conservatorship 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.

[112]*See* CAL. PROB. CODE §§ 1826, 1894 (West 1991).

[113]*See, e.g.,* N.Y. MENTAL HYG. LAW § 81.09 (Consol. Supp. 1992).

[114]*See* UNIF. PROB. CODE § 5-406(b) (1991) ("The Court may send a visitor to interview the person to be protected.").

proceeding because the respondent is just as likely as in a guardianship proceeding to need and benefit from the information and investigation the court visitor can provide and is similarly subject to a potentially significant loss of control over his or her life (e.g., access denied to a bank account, removal of a driver's license).

In general, the court visitor serves as the "eyes and ears" of the court, making an independent assessment of the need for a conservatorship. If the appointment of counsel is not mandatory, the duties of the court visitor should be increased to ensure that the interests of the respondent are represented in the proceeding. Alternatively, the court visitor might be used to make a recommendation on whether counsel should be appointed. In some cases, it may be appropriate to have both a court visitor and a court-appointed counsel. (See Standard 3.4.5, Appointment of Counsel.)

As the court determines, the court visitor may be a part of the court's screening process or independent of it. (See Standard 3.4.2, Screening.) The expenses incurred by the court visitor should be charged to the respondent's estate where such funds are available. To diminish the costs associated with the use of a court visitor, the court should seek and encourage the use of qualified volunteers to fill this role (e.g., the local chapters of the Association for Retarded Citizens [ARC] and the American Association of Retired Persons [AARP] may be able to provide such volunteers).[115] The court should use the court visitor in a manner that provides the greatest benefit to both respondents and the court. The court visitor's report should be provided promptly to the petitioner and the respondent so that they know in advance of the hearing the contents of this report.

Where the respondent is a minor, there may be less need for the appointment of a court visitor. Where there is no dispute and a family member is the proposed conservator, many of the duties described above for the court visitor are superfluous. In a conservatorship for a minor, the proceeding generally reflects a relatively straightforward change in the person with responsibility for the financial well-being of the minor. Where there is no dispute over who should have this responsibility or where there is no indication of potential bad faith in the performance of these duties, the need for the appointment of a court visitor is diminished.

Standard 3.4.5 Appointment of Counsel

(a) Counsel should be appointed by the probate court to represent the respondent when:

(1) requested by an unrepresented respondent;
(2) recommended by a court visitor;
(3) the court, in the exercise of its discretion, determines that the respondent is in need of representation; or
(4) otherwise required by law.

(b) The role of counsel should be that of an advocate for the respondent.

[115] A pilot program ("The National Guardianship Monitoring Project") to provide and train such volunteers is being conducted by the Legal Counsel for the Elderly, a component of the American Association of Retired Persons (AARP). With funding from the State Justice Institute, the program is being used to assist courts exercising probate jurisdiction in Denver, Houston, Atlanta, Pennsylvania, and New Jersey.

Commentary

Respondents in conservatorship proceedings are often vulnerable. They may have an incomplete or inadequate understanding of proceedings that may have a significant effect upon their lives. 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.

It may not be necessary to appoint counsel for the respondent in every case. This standard provides for the appointment of counsel where desired by the respondent, where there is a recognized need for the appointment, or where required by state law. Where counsel is not appointed or representation otherwise provided, the court should independently determine that the interests of the respondent are adequately represented. This standard avoids the anomaly of making an appointment that serves no apparent purpose (e.g., where the family members, including the respondent, are working together in good faith), and may indeed be resisted or resented by respondent, limiting counsel's effectiveness in the case.

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. The respondent may also choose to waive his or her right to counsel. This may raise 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 the court should have independent information confirming the competency of the respondent to make such a waiver (e.g., a report from the court visitor).

In some states, counsel for the respondent is not appointed upon the filing of a petition but only subsequent to the setting of a date for the hearing. During this interim, however, the respondent may need information and assistance. Where counsel for the respondent is not appointed upon the filing of the petition, the court should immediately appoint a court visitor to inform the respondent of the existence and nature of this proceeding and provide the court with relevant information, including whether there is a need for court-appointed counsel. (See Standard 3.4.4, Court Visitor.)

In cases where the respondent is unable to assist counsel (e.g., where the respondent is comatose or otherwise incapacitated), counsel should consider the wishes of the respondent when a position was previously made known. This position may be derived from prior statements made by the respondent or from advance directives executed by the respondent while competent. Where the position of the respondent is not known, counsel should represent the respondent's best interests. In general, however, the role of counsel should be that of an advocate for the respondent.

Appointment of counsel will incur additional expense, but because of the valuable services provided, it is typically a necessary expense. If the petition was not brought in good faith, these fees may be charged to the petitioner.[116] Good faith should be determined based on the circumstances prevailing at the time the petition was filed.

---

[116]*See, e.g.,* N.Y. MENTAL HYG. LAW § 81.10(f) (Consol. Supp. 1992).

Standard 3.4.6 Emergency Appointment of a Temporary Conservator

(a) Ex parte appointment of a temporary conservator by the probate court should occur only:

(1) upon the showing of an emergency;
(2) in connection with the filing of a petition for a permanent conservatorship;
(3) where the petition is set for hearing on the proposed permanent conservatorship on an expedited basis; and
(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 conservatorship.

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

(d) The powers of a temporary conservator should be carefully limited and delineated in the order of appointment.

Commentary

Emergency petitions seeking a temporary conservatorship require the court's immediate attention. (See also Standard 3.3.6, Emergency Appointment of a Temporary Guardian.) Such appointments have the virtue of addressing a pressing need, either to provide immediate needed assistance to a respondent or to supplant a previously appointed 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. While the court must always protect the respondent's due process rights, emergencies and the expedited procedures they may invoke require the court to remain closely vigilant for any potential due process violation. In such cases, while providing for an immediate hearing, the court should also require the immediate service of written notice on the respondent and allow the respondent an appropriate opportunity to be heard. Because interested persons may also have an interest in the proceedings, the court, when appropriate, may require that they be served notice and allow them an opportunity to be heard as well.

By requiring the showing of an emergency and the simultaneous filing of a petition for a permanent conservatorship, the court will confirm the necessity for the temporary conservatorship and ensure that it will not extend indefinitely. When the temporary conservatorship is established, the date for the hearing on the proposed permanent conservatorship should be scheduled. The order establishing the temporary conservatorship should provide that it will lapse automatically upon that hearing date. By establishing a single filing fee that encompasses a petition for both a temporary and a permanent conservatorship, the court can remove a financial disincentive that might discourage petitioners from going forward with a petition for a permanent conservatorship at a later date.

Only under the most extraordinary circumstances should the temporary conservatorship extend for more than thirty days.[117] Requiring a prompt notice of the temporary conservatorship to be given to the respondent, and providing the respondent with the right to an expeditious hearing on a motion to revoke the temporary conservatorship, provides a means for the respondent to quickly challenge and reverse an inappropriate conservatorship.

Because the imposition of a temporary conservatorship has the potential to infringe significantly upon the interests of the respondent with minimal due process protections, the court should also consider whether issuing a protective order might adequately meet the needs of the situation. (See Standard 3.4.2, Screening.) For example, the court might issue a protective order that allows for the payment of medical bills, but that 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.

When establishing the powers of the temporary conservator, the court should be cognizant of the fact that certain decisions by a temporary 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 conservator to make certain decisions without prior court approval.

While the appointment of a temporary conservator provides a useful mechanism for making needed decisions for a respondent during an emergency, it also can provide a useful option for a court that is provided information that a currently appointed 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 conservator can be suspended and a temporary conservator appointed for the respondent with the powers of the permanent conservator. The court should, however, ensure that this temporary conservatorship also does not extend indefinitely by including a maximum duration for it in the court's order. (See Standard 3.4.18, Enforcement.)

Standard 3.4.7 Notice

(a) The respondent should receive timely written notice of the conservatorship proceedings before a scheduled hearing. Any written notice should be in plain language and in large type. At the minimum, it should indicate the time and place of judicial hearings, state 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 conservatorship proceedings also should be given to family members and others entitled to notice regarding the proceedings.

---

[117]The Uniform Guardianship and Protective Proceedings Act suggests that a temporary guardianship should not exceed 15 days or the period of effectiveness of ex parte restraining orders in duration. UNIF. GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT § 2-208(a), 8A U.L.A. 437 (1982 & Supp. 1993). *See also* Grant v. Johnson, 757 F. Supp. 1127 (D. Or. 1991) (Oregon temporary guardianship provisions unconstitutional for lack of minimum due process protections).

(c) The probate court should implement a procedure whereby any interested person can file a request for notice.

Commentary

Almost all states have at least some statutory requirement that the respondent in a conservatorship proceeding receive notice within a stated number of days before a hearing (e.g., fourteen days). This standard underscores the general notice requirements of Standard 3.1.1 (Notice) by requiring specific timely notice of conservatorship proceedings to the respondent and others entitled to notice.[118] The notice should be written and personally delivered, if possible, by a court officer dressed in plain clothes who is trained and instructed how to communicate and interact with respondents. It may be appropriate to provide this officer with special training to facilitate interactions with elderly and disabled persons who are respondents. 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, Notice, and Standard 3.4.4, Court Visitor.)

If the respondent is unable to understand or receive notice, provision may be made for substitute or supplemental service. However, the respondent may still benefit 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 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 the setting aside of a prior order establishing a 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.[119] Notice should also be given to any persons having care and custody of the respondent, including any previously appointed guardian. It may also be appropriate to provide notice to an individual nominated by the respondent to serve as his or her conservator, agents appointed by the respondent under a durable power of attorney, a close friend providing routine financial management to the respondent, and the administrator of a facility where the respondent currently resides.

The court should establish a procedure permitting interested persons who desire notification before an order is made in a protective proceeding to file a request for notice with the court.[120] This procedure allows persons interested in the establishment or monitoring of a 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. A fee may be

---

[118]*See, e.g.,* N.Y. MENTAL HYG. LAW § 81.07(d) (Consol. Supp. 1992); UNIF. PROB. CODE §§ 1-401, 5-304, 5-405 (1991).

[119]*See, e.g.,* N.Y. MENTAL HYG. LAW § 81.07(d) (Consol. Supp. 1992).

[120]*See, e.g.,* UNIF. GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT § 1-404, 8A U.L.A. 437 (1982 & Supp. 1993); UNIF. PROB. CODE § 5-104 (1991).

attached to the filing of the request and a copy of the request should be provided to the respondent's conservator (if any). Notice should be provided to any person who has properly filed this request.[121]

Standard 3.4.8 Hearing

(a) The probate court should promptly set a hearing for the earliest date possible.

(b) The respondent should have the right to be present at the hearing and all other stages of the proceeding. The hearing should be conducted in a manner that respects and preserves all of the respondent's rights.

(c) The court should require the proposed conservator to attend the hearing except upon a showing of good cause.

(d) The court should make a complete record of the hearing.

Commentary

It is critical that the court promptly hear a petition for conservatorship. After the filing of the petition, the court 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 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 conservatorship or a less intrusive alternative, the respondent will receive needed supervision or services in a timely fashion.

A 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 have the right to be present at the hearing and all other stages of the proceeding with reasonable accommodations made to assure the respondent's attendance and participation.[122] This may necessitate moving the hearing to a location readily accessible to the respondent (e.g., a hospital conference room). The proposed 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 conservatorship. The proposed 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, however, 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.[123]

---

[121] *See, e.g.,* UNIF. GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT § 2-305(b), 8A U.L.A. 437 (1982 & Supp. 1993); UNIF. PROB. CODE § 5-405(b) (1991).

[122] *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).

[123] *See* UNIF. PROB. CODE § 5-407(e).

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 present evidence, call witnesses, cross-examine witnesses, including any court-appointed examiner or visitor, and have the right to be represented by counsel. (See Standard 3.4.5, Appointment of Counsel.) In some states the respondent may be entitled to a jury trial.[124]

Standard 3.4.9 Determination of Incapacity

(a) The imposition of a conservatorship by the probate court should be based on competent evidence of the incapacity of the respondent.

(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.

(c) No determination of incapacity should be required in voluntary conservatorship cases.

Commentary

The appointment of a conservator should be based on adequate evidence. Evidentiary rules and requirements are needed to ensure that due process is afforded and that competent evidence is used to determine incapacity.[125] To obtain competent evidence, the court should allow evidence from professionals and experts whose training qualifies them to assess the physical and mental condition of the respondent.

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), the court should avail itself of the assistance of professionals and experts when their knowledge will assist the court in making a decision on whether a conservatorship is necessary. These professionals and experts include, but are not limited to, physicians, nurses, psychologists, social workers, developmental disability professionals, physical and occupational therapists, educators, habilitation workers, and community mental health workers. The determination of the need for the appointment of a conservator is frequently made by a physician after conducting an examination of the respondent.[126] 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. 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 may provide the court with a

[124]*See, e.g.,* N.Y. MENTAL HYG. LAW § 81.11(f) (Consol. Supp. 1992); UNIF. PROB. CODE § 5-406(d) (1991).

[125]The various states differ on what is the appropriate evidentiary standard to apply in determining incapacity, from a preponderance of the evidence standard to a clear and convincing evidence standard.

[126]*See* UNIF. PROB. CODE § 5-406(b) (1991) (respondent may be examined "by a physician designated by the Court").

fuller and more accurate understanding of the alleged incapacity of the respondent, although its costs may preclude its use on a routine basis.[127]

The written reports of professionals should be presented promptly to the court and should be made available to all interested persons. The court need not base its 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 fact finder to rely on the written report. The court should be able to obtain as much helpful information as it needs 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. Among the factors to be addressed in the report are the respondent's diagnosis; the respondent's limitations and prognoses, current condition, and level of functioning; recommendations regarding the degree of financial management the respondent can manage alone or manage alone with some assistance and financial decisions requiring supervision of a conservator; the respondent's current incapacity and how it affects his or her ability to provide for financial 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.

Standard 3.4.10 Less Intrusive Alternatives

(a) The probate court should find that no less intrusive alternatives exist before the appointment of a conservator.

(b) The court should always consider, and utilize, where appropriate, limited conservatorships, or custodial or revocable trusts.

(c) In the absence of governing statutes, the court, taking into account the wishes of the respondent, should use its inherent or equity powers to limit the scope of and tailor the conservatorship order to the particular needs, functional capabilities, and limitations of the respondent.

(d) The court should maximize coordination and cooperation with social service agencies in order to find alternatives to conservatorships or to support limited conservatorships.

Commentary

Scientific studies show that the loss—or perceived loss—of a person's ability to control events can lead to physical and emotional illness. Indeed, complete loss of status as an adult member of society can act as a self-fulfilling prophecy and exacerbate

[127]*See* Thomas L. Hafemeister & Bruce D. Sales, *Interdisciplinary Evaluations for Guardianship and Conservatorship*, 8 LAW & HUMAN BEHAV. 335 (1984).

any existing disability.[128] Allowing persons potentially subject to conservatorships to retain as much autonomy as possible may be vital for their mental health.

Therefore, the court should encourage the exploration and appropriate use of alternatives to conservatorship. (See Standard 3.4.2, Screening.) Furthermore, in cases where limited powers are requested, there will be less need for delay and expense.

To avoid unwanted intrusion, divisiveness, and expense, the court should consider less intrusive alternatives that will meet the needs of the respondent before establishing a conservatorship. Where attempting to determine what constitutes a less intrusive alternative, the court should defer to any alternatives previously established or proposed by the respondent (e.g., a durable power of attorney).

In general, the court should be guided by the express wishes of the respondent where available, and, where not available, by a substituted judgment standard to determine what the respondent would have chosen if he or she had the current capacity to choose. Even if the respondent lacks current capacity to make decisions regarding his or her personal care, the court should solicit the respondent's opinions and preferences and should give these appropriate consideration where they are not unreasonable. The use of an initial screening process can facilitate the consideration of less intrusive alternatives. (See Standard 3.4.2, Screening.)

If the court determines that a conservatorship is necessary, the respondent's self-reliance, autonomy, and independence should be promoted by restricting the authority of the conservator to the minimum required for the situation, rather than routinely granting full powers of a 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. The court also should require the 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 conservatorship, the court has the power to create such limited conservatorships because of their equitable nature. The court can similarly invoke (either with or without further court supervision) other less intrusive alternatives.[129] (See Standard 3.4.2, Screening.)

When determining less intrusive alternatives for respondents who are minors, the court should recognize that the level of financial management required for a minor may be different from that required for an adult. The court also should recognize that the financial management needs of a minor vary with the age of the minor, and that an older or mature minor is more capable of making decisions on his or her own behalf.[130]

For a discussion of the appropriate contents of the initiating conservatorship petition, see Standard 3.4.1, Petition. For a discussion of the appropriate contents of

---

[128]COMMISSION ON THE MENTALLY DISABLED & COMMISSION ON LEGAL PROBLEMS OF THE ELDERLY, AMERICAN BAR ASSOCIATION, GUARDIANSHIP: AN AGENDA FOR REFORM 20 (1989).

[129]*See, e.g.,* UNIF. PROB. CODE § 5-407(b) (1991).

[130]For purposes of decision making, it should be recognized that an emancipated minor has virtually the same decision-making authority as an adult. *See, e.g.,* ARIZ. REV. STAT. ANN. § 44-1362 (1967); ARK. STAT. ANN. § 82-363 (Supp. 1981); CONN. GEN. STAT. ANN. § 46b-150d (West Supp. 1991); IND. CODE § 16-8-3-1 (1976); MISS. CODE ANN. § 41-41-3(g) (1981); N.C. GEN. STAT. § 90-21-5(b) (1981).

the court's order, see Standard 3.4.12, Order. Both should include consideration of relevant, less intrusive alternatives. (See also Standard 3.4.2, Screening.)

Standard 3.4.11 Qualifications and Appointments of Conservators

The probate court should appoint a conservator suitable and willing to manage the respondent's property and finances to the degree required by the respondent's incapacity and nature of assets. Where possible, the court should appoint a person requested by the respondent or related to or known by the respondent.

Commentary

Different degrees of financial management will be required in conservatorships. The court should consider the training, education, and experience of a potential 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 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 conservator, the court 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 conservator should act only within the bounds of the court order and should not expand the scope of the conservatorship, except where authorized to do so by the court.

The court should attempt, when possible, to appoint as 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 conservator will obtain the trust and cooperation of the respondent. However, it may also be appropriate for the court to appoint as conservator a public administrator, a public guardian or public conservator, a professional firm, or a corporation having special qualifications or expertise that will be beneficial to the respondent. Volunteer associations may also take an interest in and assist with conservatorship services.[131] Although the court should not appoint any agency, public or private, that financially benefits from the transactions carried out on behalf of the respondent, the court should use the services of such organizations where appropriate.

The court should appoint only suitable persons as conservators. Particular care may be required in making a reappointment where a conservator has left the jurisdiction where the original order of conservatorship was issued. If the conservator has failed to carry out the original order and is subject to a contempt charge, that person should not be reappointed as a conservator for the original respondent or appointed as a conservator for any other respondent.

In selecting the conservator, preference should be given to any written designation of a prospective conservator made by the respondent while competent (e.g., as provided in a durable power of attorney) unless there are compelling reasons to appoint

---

[131] *See, e.g.*, LEGAL COUNSEL FOR THE ELDERLY, AMERICAN ASSOCIATION OF RETIRED PERSONS, VOLUNTEER USE IN COURTS (1990); LEGAL COUNSEL FOR THE ELDERLY, AMERICAN ASSOCIATION OF RETIRED PERSONS, AARP VOLUNTEERS: A RESOURCE FOR STRENGTHENING GUARDIANSHIPS (2d Final Report March 1993).

another.[132] In many situations, the respondent has had ample opportunity to anticipate the need for a conservator and to identify a nominee with whom he or she is comfortable. In such cases, the court 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). Even though the respondent may be legally incompetent for purposes of the conservatorship proceeding, the court may solicit the respondent's current opinions and preferences and take these into account when selecting a conservator. Alternatively, the respondent may have indicated in a nonconservatorship 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 conservator is not stipulated, or a person designated is not suitable or willing to serve, the court should appoint a conservator who is capable and willing to develop a rapport with the respondent.

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).[133] To the extent permitted, the court should supplement this list by making its own determination regarding the qualifications of individuals being considered for appointment as a conservator. For example, the court should not normally appoint a nonfamily care provider or any person associated with a facility where the respondent is a resident. The court should not appoint 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. For example, the adult offspring of the respondent may stand to inherit from the respondent's estate and may technically be subject to a potential conflict of interest, yet that offspring 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. The court 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.

A minor who is at least fourteen years old may have sufficiently developed reasoning skills to participate in selecting a conservator. The court should appoint the individual nominated by the minor unless there is a compelling reason to the contrary. In addition, the court should carefully consider the objection of the minor to the appointment of a particular person as conservator. The court also may recognize a parent's testamentary appointment of a conservator for a minor.

Standard 3.4.12 Order

(a) The order issued by the probate court should detail the duties and powers of the conservator, including any limitations on the duties and powers, and the rights retained by the respondent.

---

[132] *See, e.g.*, N.Y. MENTAL HYG. LAW § 81.17, 81.19(b) (Consol. Supp. 1992).

[133] *See, e.g.*, N.Y. MENTAL HYG. LAW § 81.19 (Consol. Supp. 1992); UNIF. PROB. CODE § 5-409(a) (1991).

(b) The court should make known to the conservator what the conservator's responsibilities are, what requirements are to be applied in managing the respondent's estate, and that the conservator must file a plan with the court that addresses how the assets of the respondent will be protected and how investments and expenditures made on behalf of the respondent will be carried out.

(c) Following appointment, a conservator should be ordered to mail a copy of the order of appointment to the respondent and to others who received notice of the petition for conservatorship. Proof of service should be filed with the court.

Commentary

The court should be as specific as possible in actions relating to conservatorships. Specificity helps prevent any unnecessary intrusions into the life and affairs of the respondent. Specifically enumerated duties and powers serve as a guide for the court and other interested parties in evaluating and monitoring the conservator. Because the preferred practice is to limit the powers and duties of the conservator to those necessary to meet the needs of the respondent (see Standard 3.4.10, Less Intrusive Alternatives), the court should specifically enumerate in its order the assigned duties and powers of the conservator, as well as limitations on them, with all other rights reserved to the respondent.[134] By listing the powers and duties of the conservator, the court's order can serve as an educational roadmap to which the conservator can refer and use to help answer questions about what the conservator can or cannot do in carrying out the conservator's assigned responsibilities. (See Standard 3.4.15, Reports by the Conservator; Standard 3.4.16, Monitoring of the Conservator.)

In general, the court's order should only be as intrusive of the respondent's liberties as necessary. (See Standard 3.4.10, Less Intrusive Alternatives.) The court's order should also include a statement of the need for the conservator to involve the respondent to the maximum extent possible in all decisions affecting the respondent. The conservator should consider the preference and values of the respondent in making decisions and attempt to help the respondent regain legal capacity.

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

The conservator, when accepting appointment, should acknowledge that he or she consents to the court's jurisdiction in any subsequent proceedings concerning the respondent.[135]

---

[134]*See, e.g.,* N.Y. MENTAL HYG. LAW §§ 81.20, 81.21, 81.29(a) (Consol. Supp. 1992).

[135]*See* UNIF. PROB. CODE § 5-412 (1991).

Standard 3.4.13 Training and Orientation

The probate court should develop and implement programs for the orientation and training of conservators.

Commentary

The 1986 *Statement of Recommended Judicial Practices* endorsed by the American Bar Association recommends that courts "encourage orientation, training and ongoing technical assistance for guardians, including an outline of a guardian's duties and information concerning the availability of community resources."[136] To assist their orientation and training, the court should develop or make available model handbooks and videotapes for conservators. A number of groups and organizations, including the National Guardianship Association[137] and the Michigan Center for Social Gerontology,[138] have developed model standards for conservators that can be adopted or adapted by the court. The office of the state court administrator may assist the court in developing materials for conservators.[139]

The court should make its programs for orientation to conservatorship available through recognized continuing legal education courses and community adult continuing education. In addition, there should be self-study materials available in the court's library or from the clerk. The materials should be in both print and videotaped formats. Where appropriate the materials should be in a language other than English to supplement the English version. The court should distribute informational brochures describing the responsibilities of conservators to all conservators upon appointment.

The court should require that, at a minimum, the conservator has read any written materials and viewed any videotape the court has prepared or endorsed. An acknowledgment that such information has been distributed to or received by the proposed conservator should be placed in the court's file (e.g., a signed receipt for these materials). A competent proposed conservator who has previously received and is familiar with the information may simply sign a statement to that effect. Alternatively, the conservator's "Oath of Acceptance of Appointment" may be modified so that the conservator in taking that oath thereby certifies that he or she has reviewed this information and understands the nature of his or her duties.

Standard 3.4.14 Bond

The requirement of a bond should be discretionary with the probate

---

[136] NATIONAL CONFERENCE OF THE JUDICIARY ON GUARDIANSHIP PROCEEDINGS FOR THE ELDERLY, RECOMMENDED JUDICIAL PRACTICES, JUNE 1986 (endorsed by the American Bar Association, House of Delegates, August 1987, recommendation IV(b)).

[137] NATIONAL GUARDIANSHIP ASSOCIATION, ETHICS AND STANDARDS FOR GUARDIANS (1991).

[138] Penelope A. Hommel, & Lauren B. Lisi, *Model Standards for Guardianship: Insuring Quality Surrogate Decisionmaking Services*, CLEARINGHOUSE REVIEW 433-43 (Special Issue, Summer 1989) ("The standards are intended to serve as a blueprint for states, courts, and advocates for the elderly and disabled who wish to insure that surrogate decisionmaking services are provided in a uniform, high quality manner that maximizes the potential of every individual for self-reliance and independence.")

[139] *See, e.g.*, INSTRUCTIONS FOR GUARDIANS AND CONSERVATORS (Video Imagination Television 1990) (training video produced for the Pima County [Arizona] Superior Court); SERVING AS GUARDIAN AND CONSERVATOR (Lang Telecommunications 1989) (training video produced for the Michigan Judicial Council).

court. Should a bond be required, unless the amount of bond is prescribed by statute, the court should establish written guidelines for setting the size of such bonds.

Commentary

The court should take measures to protect the respondent at the onset of a conservatorship. Among these measures, the court may require the conservator to furnish a surety bond[140] conditioned upon the faithful discharge by the conservator of all assigned duties.[141]

In deciding whether to require a bond or to adopt an alternative measure, the court should consider such factors as the size of the estate, the expected length of the conservatorship, and the experience of the conservator. The court may also consider that the burden on the estate and its income from a bond may be unnecessary, particularly since much of the expense associated with posting a bond does not accrue to the benefit of the estate. In addition, in deciding whether to require a bond, the court may also consider the following factors:

(1) the value of the estate and annual gross income and other receipts;
(2) the extent to which the estate has been deposited under an arrangement requiring a court order for its removal;
(3) whether a court order is required for the sale of real estate;
(4) the frequency of the conservator's required reporting;
(5) the extent to which the income or receipts are payable to a facility responsible for the ward's care and custody;
(6) the extent to which the income and receipts are derived from state or federal programs that impose their own accounting requirements;
(7) whether the conservator was appointed pursuant to a nomination that requested that bond be waived; and
(8) the financial responsibility of the proposed conservator.

Standard 3.4.15 Reports by the Conservator

(a) A conservator should be required to file with the probate court an inventory of the respondent's assets and a statement setting forth a plan to meet the respondent's needs and to allocate resources for those needs, with annual accountings or updates provided by the conservator thereafter.

(b) A conservator should seek initial approval from the court for any significant distributions for the respondent's maintenance and support, and obtain the court's permission before making any significant deviations from the initially approved plan. When considering such applications, the court

---

[140]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.

[141]*See* UNIF. PROB. CODE § 5-410 (1991) (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).

should balance the immediate benefit of permitting the requested disbursement against the prudence of conserving the respondent's assets for future use.

Commentary

The conservator should provide a report to the court within the first 60 calendar days of the establishment of the conservatorship and then file follow-up reports at least annually.[142] These reporting requirements ensure that the court receives prompt, timely, and periodic information to enable it to determine whether the conservator is appropriately carrying out the conservator's assigned duties and responsibilities.

The court should be explicit in providing a statement of the information required in each report from a conservator. In general, the reports should be simple, yet comprehensive. Clear, direct reporting guidelines should be provided to the conservator so that the conservator can report to the court with or without the routine assistance of an attorney. (See Standard 3.1.6, Accountings.)

The report should contain descriptive information on the financial status of the respondent. In addition, the report should include such items as the services and care provided to the respondent, significant actions taken by the conservator, and the expenses incurred by the conservator.

Where there is considerable overlap or interdependency, the court may authorize the joint preparation and filing of the plans and reports of the guardian and conservator. (See Standard 3.3.14, Reports by the Guardian.)

The initial report should set forth plans for the management of the respondent's estate. This plan 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, prepare it in writing, and submit it to the court to minimize the risk that at a subsequent time the conservator might file an accounting that is not responsive to the needs of the respondent or that fails to comply with the law.

Standards for spending and investing the respondent's assets should be tailored to the specific situation of the respondent and be clear and understandable to the average person. For example, maximizing potential income may not be appropriate if it entails unacceptable risks to the respondent's assets. Similarly, 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,[143] or may be different where there is a greater need to replenish the funds for long-term support.[144] In some states, statutory provisions will dictate which invest-

---

[142]Each state's respective statutory provisions may establish somewhat different time frames. *See, e.g.,* OR. REV. STAT. ANN. §§ 126.277, .283 (1990) (inventory of the estate must be filed within 90 days of conservator's appointment); S.C. CODE ANN. §§ 62-5-418, -419 (Law. Co-op. 1987) (inventory of the estate must be filed within 30 days of conservator's appointment); W. VA. CODE § 44-4-2 (Supp. 1992) (inventory of the estate must be filed within 1 year of conservator's appointment).

[143]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.

[144]*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).

ments can be made. However, where not addressed by statute or where a given investment represents a sizable expenditure or entails substantial risk, the court should require the conservator to obtain prior court approval of the investment. If the court is concerned that it lacks sufficient expertise to evaluate the wisdom of a given investment, it may require the conservator to obtain professional assistance or bonding to protect the respondent's assets. Subsequent reports should detail any deviations from the plans given in the initial report.

The required degree of financial planning associated with a conservatorship will vary with the individual needs of the respondent. The court should ensure that the conservator will work to balance the autonomy and independence of the respondent with the obligation to help and protect the respondent.

Requiring an initial plan for administration will help the conservator perform more effectively. It will emphasize the conservator's responsibility to guard and protect the respondent's assets and income and handle them in a prudent and fiscally responsible manner. The court should inform the conservator that its approval of a plan does not relieve the conservator of the duty to monitor the situation and make adjustments when necessary. Although not every change in the conservatorship's investments will require court approval, the court should inform the conservator that there should be no significant deviation from the plan without approval.

By requiring court approval of significant changes in the plan, the court ensures that the respondent's funds are used in the most efficient manner possible and minimizes the possibility that the conservator may inadvertently make a decision that is not in the respondent's best long-term interests. It also avoids the difficulty associated with attempts to reverse or recoup expenditures that have already been made. By initially establishing a comprehensive and workable plan (see Standard 3.4.12, Order) and requiring the conservator to report any significant changes, the court can minimize the necessity of engaging in detailed scrutiny of each individual report or accounting that is provided by the conservator (e.g., by reviewing each itemized expenditure) and yet be made aware of important deviations from the original plan. Furthermore, by encouraging advance planning by the conservator, the court can minimize the likelihood that the conservator will need to approach the court seeking adjustments. Where a significant adjustment is needed to the initial plan, the conservator should file a petition with the court to adjust the plan. In general, any significant funds expended beyond the approved plan or deviations from the approved plan that require significant additional expenditures must receive the prior approval of the court. The court should have in place procedures to respond expeditiously to such requests with a full hearing required only under exceptional circumstances.

A conservator should make timely and complete annual reports to the court about the respondent's funds and property. The conservator must report any plans to move the respondent's assets outside the jurisdiction of the court.[145] The report should also indicate any change in the respondent's condition, thereby allowing the court to determine whether any modification in the original or subsequent orders establishing the conservatorship is warranted. (See Standard 3.1.8, Interstate Compacts and Cooperation; Standard 3.4.17, Reevaluation of the Necessity for Conservatorships; Standard 3.4.18, Enforcement.)

---

[145]It should be noted that where an account is established with a local financial institution, virtually all banks and brokers use a depository trust company in New York to actually hold the paper stock or bond certificates, and this is an acceptable practice.

Standard 3.4.16 Monitoring of the Conservator

The probate court should have written policies and procedures to ensure the prompt review of reports and requests filed by conservators.

Commentary

Respondents should be provided with the maximum protection of the court. The primary method of monitoring should be the review and evaluation of the initial and annual reports filed by a conservator. The court should be prepared to investigate those situations where a conservator fails to submit any report required by the original order. The court should also be especially attentive to complaints of abuse and be prepared to investigate their validity immediately. A principal component of the review is to ensure that the conservator included all of the information required by the court in these reports. Prompt review of the conservator's reports enables the court to take early action to correct abuses made apparent by the reports. The court also will be in a position to take early action in issuing a show cause order if the conservator has violated a provision of the original order.

The court should have a system that permits it to know when reports are due. When a conservator fails to meet a deadline, the court should promptly provide notice to the conservator of the delinquency. If the conservator does not respond, the court should immediately investigate the situation to determine the appropriate course of action.

The court should examine all reports that it requires the conservator to file. The examination should include a determination of compliance with court orders. Relevant reports may be distributed to interested persons. The conservator is responsible for distributing these reports and must file proof of service with the court. Giving family members and other interested persons the opportunity to review and respond to the conservator's reports may aid the court in evaluating and monitoring the conservator's actions.

The accountings of a conservator of a minor may be different in content but should be treated with the same care and diligence afforded to all accountings and reports.

Standard 3.4.17 Reevaluation of Necessity for Conservatorship

The probate court should adopt procedures for the periodic review of the necessity for continuing a conservatorship. A request by the respondent for a review of the necessity for continuing a conservatorship should be addressed promptly.

Commentary

A periodic review should be conducted of the circumstances that required the court to order a conservatorship for a respondent. Further, the court should have procedures in place to protect the respondent's right to petition for a termination of conservatorship. Where a respondent requests termination or a change in status of the conservatorship, the court should respond promptly.

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 conservator to reestablish the basic grounds for the 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. Local case law or statute should be consulted with regard to such issues.

The court should consider placing a limitation on the frequency with which the need for a conservatorship can be readjudicated without special leave of the court (e.g., not more than every six months).[146] Active monitoring of the conservatorships in the court caseload, including the filing of periodic reports and accountings (see Standard 3.4.16, Monitoring of the Conservator), will assist in determining the continuing necessity for conservatorships.

In any hearing reevaluating the necessity for a conservatorship, the court may consider all previously submitted reports from the conservator and make them a part of the record. The court should establish flexible written guidelines for the submission of a pro se petition or other request for review of the continuing need for a conservatorship.

The court visitor should personally visit the respondent and check on the need to continue the conservatorship after the first year of the conservatorship, and periodically thereafter.[147] The court visitor should also consider whether a less intrusive alternative might be more appropriate. However, the court's review of the continuing need for a conservatorship should not be limited by its established review date. The court may review the necessity for continuing a conservatorship upon review of any accounting or report submitted by the conservator or at any other time at its own discretion. (See Standard 3.4.16, Monitoring of the Conservator.)

Standard 3.4.18 Enforcement

(a) The probate court should enforce its orders by appropriate means, including the imposition of sanctions. These may include suspension, contempt, surcharge, removal, and appointment of a successor.

(b) Where the respondent's assets are endangered, the court should consider suspending the conservator and appointing a special fiduciary to immediately take control over the respondent's assets.

Commentary

The court should monitor the actions of those whom it appoints as conservators (e.g., by reviewing the accountings or reports filed by the conservator on a regular basis and following up on any deficiencies that may be noted). Although it cannot be expected to provide detailed or daily supervision of the conservator's actions, the court should not assume a passive role, responding only upon the filing of a complaint. The court should actively monitor the conservator and any failures by the conservator to meet his or her duties. (See Standard 3.4.16, Monitoring of the Conservator.)

---

[146] *See* UNIF. PROB. CODE § 5-311(b) (1991) ("An order adjudicating incapacity may specify a minimum period, not exceeding six months, during which a petition for an adjudication that the ward is no longer incapacitated may not be filed without special leave.") (no equivalent provision for conservatorships).

[147] In Michigan, for example, the court may send a visitor to observe conditions and report in writing to the court before removing a guardian, appointing a successor guardian, modifying the terms of the guardianship, or terminating a guardianship. *See* MICH. COMP. LAWS ANN. § 700.447(3) (West Supp. 1993).

While most conservators will act appropriately, the court should take actions at the earliest time possible against those who are or who may be acting inappropriately. As soon as there is an actual or perceived violation of the court's order, the court should take appropriate action. For example, 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 conservator has left the court's jurisdiction, notice of a show cause order should be sent to the court in the new jurisdiction pursuant to the appropriate interstate compact or agreement. (See Standard 3.1.8, Interstate Compacts and Cooperation.) If the conservator is an attorney, the court should advise the appropriate disciplinary authority that he or she may have violated his or her fiduciary duties to the respondent. The court may consider suspending the conservator and appointing a temporary conservator to immediately take responsibility for the welfare and care of the respondent. (See Standard 3.4.6, Emergency Appointment of Temporary Conservator.)

The court should consider imposing sanctions on the conservator where it learns that the conservator has abused the conservator's powers or otherwise failed to adhere to the order establishing the conservatorship. This may include, for example, mismanagement of the respondent's assets, failure to account for missing assets, nonpayment of respondent's expenses, failure to file required accountings or reports, and any other breach of the conservator's duty that can be identified.

When a conservator abandons a respondent, the court should make an emergency appointment of a temporary conservator and remove the original conservator. The court's emphasis should be on protecting the respondent's assets. After assigning a temporary conservator, the court should order an investigation to locate the conservator and to examine the conduct of the conservator. The court should impose appropriate sanctions against a conservator who failed to fulfill his or her duties as a conservator.

When a respondent cannot be located, the court should order an immediate investigation to locate the respondent. If the conservator has been diligent in his or her duties, and the absence of the respondent is not the fault of the conservator, the conservator should retain the appointment. If the conservator has not been diligent in his or her duties, the court may remove the conservator and make an emergency appointment of a temporary conservator.

In imposing sanctions such as contempt and surcharge upon a conservator, the due process rights of the conservator should be protected. At a minimum, the conservator should be entitled to notice and a hearing prior to the imposition of sanctions. However, these proceedings should not preclude the court from taking interim steps to protect the interests of the respondent. In addition, the court should be able unilaterally to suspend or remove the conservator and appoint a temporary successor to provide for the financial well-being of the respondent with the conservator entitled to object to the action at a later date. (See Standard 3.4.6, Emergency Appointment of a Temporary Conservator.)

Standard 3.4.19 Final Accounting and Discharge

Unless waived, a final accounting of the respondent's assets should be promptly submitted to the probate court by the conservator. This accounting should be approved before the conservator is discharged. In lieu of a

final accounting, a conservator may close the conservatorship and be discharged upon filing a receipt for unexpended funds and a waiver and consent of interested persons.

Commentary

The authority and responsibility of a conservator terminates upon the death, resignation, or removal of the conservator, or upon the respondent's death, restoration of competency, return, reaching the age of majority, or becoming legally emancipated. The respondent, conservator, or any interested person may petition the court for a termination of the conservatorship. A respondent seeking termination should be afforded the same rights and procedures as in the original proceeding establishing the conservatorship. (See Standard 3.4.8, Hearing; Standard 3.4.17, Reevaluation of Necessity for Conservatorship.) Where the conservator stands to benefit financially from the termination of the conservatorship, the court should carefully scrutinize this proposal.

Where the request for termination of the conservatorship is contested, the court should direct that notice be provided to interested persons (see Standard 3.1.1, Notice), conduct a hearing (see Standard 3.4.8, Hearing), and issue a determination regarding the need for continuation of the conservatorship. If termination is ordered, title to the assets of the estate will pass to the respondent or the respondent's successors. The court order should require the conservator to provide a final accounting and execute appropriate instruments to evidence the transfer of the assets of the estate. The court generally should not terminate the conservatorship, discharge the conservator, and cancel any applicable bond until it accepts this final accounting. The court order should also provide for the conservator's reasonable expenses associated with this termination.

Circumstances may exist, however, where a formal closing of the conservatorship, including notice, hearing, and final accounting, may be waived. For example, 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.[148] Alternatively, if a respondent regains competency, returns, reaches the age of majority, or becomes legally emancipated, the need for a continuation of the conservatorship is negated. 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.

In general, where the matter is uncontested, in lieu of a final accounting, the conservator may close the conservatorship and be discharged without a formal hearing upon filing with the court a receipt for unexpended funds and expenses incurred since the last accounting, a waiver of the interested persons regarding a final accounting, and the consent of the interested persons regarding this discharge. The court should

[148]The procedure of *waiver and consent* is alternatively known as *release and discharge* or *release and approval* in various other jurisdictions.

carefully scrutinize such waivers and consents where the interested persons stand to financially benefit from the termination of the conservatorship.

The court should ensure that the respondent promptly receives a complete status report of all of his or her assets upon reaching the age of majority or any other appropriate termination of a conservatorship. Where the respondent is a minor, that respondent is entitled to complete information regarding his or her assets upon attaining the age of majority or becoming legally emancipated. The court should enforce that right as appropriate.

Typically, a conservatorship for a minor terminates automatically when the respondent attains the age of majority or is legally emancipated. The court should consider installing a procedure to monitor the events that will result in this termination.

General References

COMMISSION ON LEGAL PROBLEMS OF THE ELDERLY AND COMMISSION ON THE MENTALLY DISABLED, AMERICAN BAR ASSOCIATION, AND NATIONAL JUDICIAL COLLEGE, Court-related Needs of the Elderly and Persons with Disabilities (1991).

COMMISSION ON THE MENTALLY DISABLED, AMERICAN BAR ASSOCIATION, Guardianship and Conservatorship (discussion ed. 1979).

COMMISSION ON THE MENTALLY DISABLED AND COMMISSION ON LEGAL PROBLEMS OF THE ELDERLY, AMERICAN BAR ASSOCIATION, Guardianship: An Agenda for Reform (1989).

COMMITTEE ON NATIONAL FIDUCIARY ACCOUNTING STANDARDS, AMERICAN BAR ASSOCIATION, Uniform Fiduciary Accounting Principles and Model Account Formats (1979).

COMMITTEE ON STANDARDS OF JUDICIAL ADMINISTRATION, AMERICAN BAR ASSOCIATION, Standards Relating to Court Organization (1990).

COMMITTEE ON STANDARDS OF JUDICIAL ADMINISTRATION, AMERICAN BAR ASSOCIATION, Standards Relating to Trial Courts (1992).

COORDINATING COUNCIL ON LIFE-SUSTAINING MEDICAL TREATMENT DECISION MAKING BY THE COURTS, Guidelines for State Court Decision Making in Life-Sustaining Medical Treatment Cases (1992).

DIVISION FOR JUDICIAL SERVICE AND LAWYERS CONFERENCE TASK FORCE ON REDUCTION OF LITIGATION COST AND DELAY, AMERICAN BAR ASSOCIATION, Defeating Delay (1986).

EDWARD C. HALBACH JR., *Trust Investment Law in the Third Restatement,* 27(3) REAL PROP., PROB. & TRUST J. 407 (1992).

CHARLES P. HENDERSON, *Probate Accounting and Delay Avoidance,* 1979 ANNUAL CONFERENCE OF THE NATIONAL COUNCIL OF PROBATE JUDGES.

SALLY B. HURME, AMERICAN BAR ASSOCIATION, Steps to Enhance Guardianship Monitoring (1991).

RICHARD Z. KABAKER, JOSEPH F. MAIER, & FRANK G. WARE, *The Use of Arbitration in Wills and Trusts,* 17 ACTEC NOTES 177 (1991).

JOHN H. LANGBEIN, *The Nonprobate Revolution and the Future of the Law of Succession,* 97 HARV. L. REV. 1108 (1984).

WILLIAM M. MCGOVERN, SHELDON F. KURTZ, & JAN E. REIN, Wills, Trusts and Estates (1988).

NATIONAL CENTER FOR STATE COURTS, Courts that Succeed: Six Profiles of Successful Courts (1990).

NATIONAL CENTER FOR STATE COURTS, State Courts: Options for the Future (1979).

NATIONAL CENTER FOR STATE COURTS AND BUREAU OF JUSTICE ASSISTANCE, U.S. DEPARTMENT OF JUSTICE, Trial Court Performance Standards (1990).

NATIONAL CONFERENCE OF PROBATE JUDGES, Mediation: A Common Sense Approach For Resolving Conflict (April 1992) [from NCPJ CONFERENCE NOTEBOOK, SEATTLE CONFERENCE].

NATIONAL CONFERENCE OF STATE TRIAL JUDGES, AMERICAN BAR ASSOCIATION, Court Delay Reduction Standards (1985).

NATIONAL CONFERENCE OF THE JUDICIARY ON GUARDIANSHIP PROCEEDINGS FOR THE ELDERLY, Statement of Recommended Judicial Practices (1986).

NATIONAL GUARDIANSHIP ASSOCIATION, Ethics and Standards for Guardians (1991).

BURTON T. RYAN, *Attorney's Fees and Other Matters,* 16 REAL PROP., PROB. & TRUST J. 795, 795 (1981).

LARRY L. SIPES ET AL., Managing to Reduce Delay (1980).

MAUREEN SOLOMON & DOUGLAS K. SOMERLOT, AMERICAN BAR ASSOCIATION, Caseflow Management in the Trial Court: Now and for the Future (1987).

DAVID STEELMAN, *Managing Probate Workload and Dockets,* 11 PROB. L.J. 273 (1992).

Uniform Guardianship and Protective Proceedings Act, 8A U.L.A. 437 (1983).

Uniform Probate Code (1991).

GEORGE H. ZIMNY, BARBARA J. GILCHRIST, & JUDITH A. DIAMOND, A National Model for Judicial Review of Guardians' Performance (1991).

Appendix A

Jurisdiction of Probate Courts and Divisions of Courts

Appendix A

Jurisdiction of Probate Courts and Divisions of Courts

State	Wills, Trusts, and Estates	Guardianship	Conservatorship	Civil Commitment[1]	Adoptions	Other
AL[2]	X	X	X	X	X	X
AR[3]	X	X	X	X	X	X
CO[4]	X	X	X	X		X
CT[5]	X	X	X	X	X	X
DC[6]	X	X	X			
GA[7]	X	X	X	X		X
IN[8]	X	X	X	X	X	X
ME[9]	X	X	X		X	X
MA[10]	X	X	X		X	X
MI[11]	X	X	X	X	X	X
MO[12]	X	X	X	X		X
NH[13]	X	X	X		X	X
NJ[14]	X	X	X			
NM[15]	X					
NY[16]	X	X	X		X[17]	
OH[18]	X	X	X	X	X	X
RI[19]	X	X	X			X
SC[20]	X	X	X	X		X
TN[21]	X	X	X	X	X	X
TX[22]	X	X		X		
VT[23]	X	X	X		X	X

[1]Includes mental illness, mental retardation, developmental disabilities, and substance abuse.

[2]ALA. CODE §§ 12-13-1, 22-52-1, 26-10A-3 (1975). Other includes allotment of dower, executorship or administration, partition of land within respective counties, change of name, other as prescribed by law. ALA. CODE § 12-13-1(b)(8)-(b)(11) (1975).

[3] ARK. CODE ANN. § 28-1-104 (Michie 1987). Other as prescribed by law. ARK. CODE ANN. § 28-1-104(a)(7) (Michie 1987).

[4]COLO. REV. STAT. ANN. § 13-9-103 (West 1987). Denver Probate Court has jurisdiction in City and County of Denver only. Other includes all other probate matters. COLO. REV. STAT. § 13-9-103(1)(l) (1987).

[5]CONN. GEN. STAT. ANN. §§ 17a-497, 45a-98, 45a-99 (West 1992 & Supp. 1993). Other includes change of name. CONN. GEN. STAT. ANN. § 45a-99 (West Supp. 1993).

[6]D.C. CODE ANN. § 11-921(a)(5) (1981).

[7]GA. CODE ANN. § 15-9-30 (1990). Other includes government administration, elections, appointments to vacancies in public office, administer oaths, accept bonds from public officials, register and permit enterprises, issue marriage licenses, hear traffic cases, receive guilty pleas and issue sentences for violations of fish and game laws, hold criminal commitment proceedings, and other as provided by law. GA. CODE ANN. § 15-9-30(b) (1990). Probate court jurisdiction varies among counties according to local statutes. *Fifteenth Annual Report on the Work of the Georgia Courts: FY 1988* (July 1, 1987-June 30, 1988). Atlanta: Judicial Council of Georgia, Administrative Office of the Courts, February 1989.

[8] IND. CODE ANN. §§ 12-26-1-2, 33-8-2-9, 33-8-2-10 (Burns 1992). The St. Joseph County Probate Court has jurisdiction in St. Joseph County only. Other includes exclusive juvenile jurisdiction in St. Joseph County. IND. CODE ANN. § 33-8-2-10 (Burns 1992).

[9]ME. REV. STAT. ANN. tit.4, § 251 (West 1989). Other includes change of name.

[10]MASS. GEN. LAWS ANN. ch. 215 § 3 (West 1989). Other includes change of name, divorce, and affirmation and annulment of marriage.

[11]MICH. COMP. LAWS ANN. §§ 700.21, 710.25 (West 1992).

[12]MO. ANN. STAT. § 472.020, 632.410 (Vernon 1992).

[13]N. H. REV. STAT. ANN. § 547:3 (Supp. 1992). Other includes partition and quiet title to real estate, and change of name.

[14]N.J. STAT. ANN. §§ 2A:5-1 to 5-25 (West 1987 & West Supp. 1993); N.J. STAT. ANN. § 3B:12-12 (West 1987).

[15]N. M. STAT. ANN. §§ 45-1-302 to 45-1-302.1, 45-3-301 to 45-3-311 (Michie Supp. 1993). New Mexico Probate Courts have concurrent jurisdiction with New Mexico District Courts for informal probate only.

[16]N.Y. SURR. CT. PROC. ACT LAW § 201 (Consol. 1987).

[17]N.Y. FAMILY CT. LAW § 641 (Consol. 1987). In New York, the Surrogate's Court has concurrent jurisdiction with the Family Court over adoption proceedings.

[18]OHIO REV. CODE ANN. §§ 2101.24, 2101.25, (Baldwin 1987), 3107.04, 3107.41, (Baldwin 1992), 5122.11 to 5122.19 (Baldwin 1989). Other includes grant marriage licenses, issue writs of habeas corpus, and authorize the release of identity of biological parents to adopted persons.

[19]R. I. GEN. LAWS § 8-9-9 (1985). Other include change of names, assignment of dower.

[20]S.C. CODE ANN. §§ 14-23-1150 (Supp. 1992), 62-1-301, 62-1-302 (1987).

[21]TENN. CODE ANN. § 1-3-105 (1985) (wills, trusts, and estates); TENN. CODE ANN. § 29-8-101 (1980) (change of name, correction of errors on birth certificates); TENN. CODE ANN. § 34-4-204 (1991) (mental illness, conservators for estates of incompetents); TENN. CODE ANN. § 37-1-104 (1991) (concurrent jurisdiction with juvenile courts, treat or commit mentally ill child, guardianship, custody, consent to marriage).

[22]TEX. PROB. CODE ANN. §§ 4, 5 (West 1980 & West Supp. 1993).

[23]VT. STAT. ANN. tit.4, § 311a (1988). Other includes uniform gifts to minors, change of name, new or amended birth certificate, corrected or amended marriage certificate, corrected or amended death certificate, emergency waiver of premarital medical certificate, cemetery lots proceedings, trusts related to community mausoleums or columbariums, petition for license to convey homestead interest of an insane spouse, declaratory judgments, marriage certificates for those under 16 years of age, trustee appointments for those confined under imprisonment.

Appendix B

Caseload Volume and Composition

Appendix B
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 empirical fact. The absence of a national database on the volume and composition of cases handled by courts exercising probate jurisdiction hinders attempts to answer critical, broad-based questions about the scope and nature of the problem or its possible solutions.

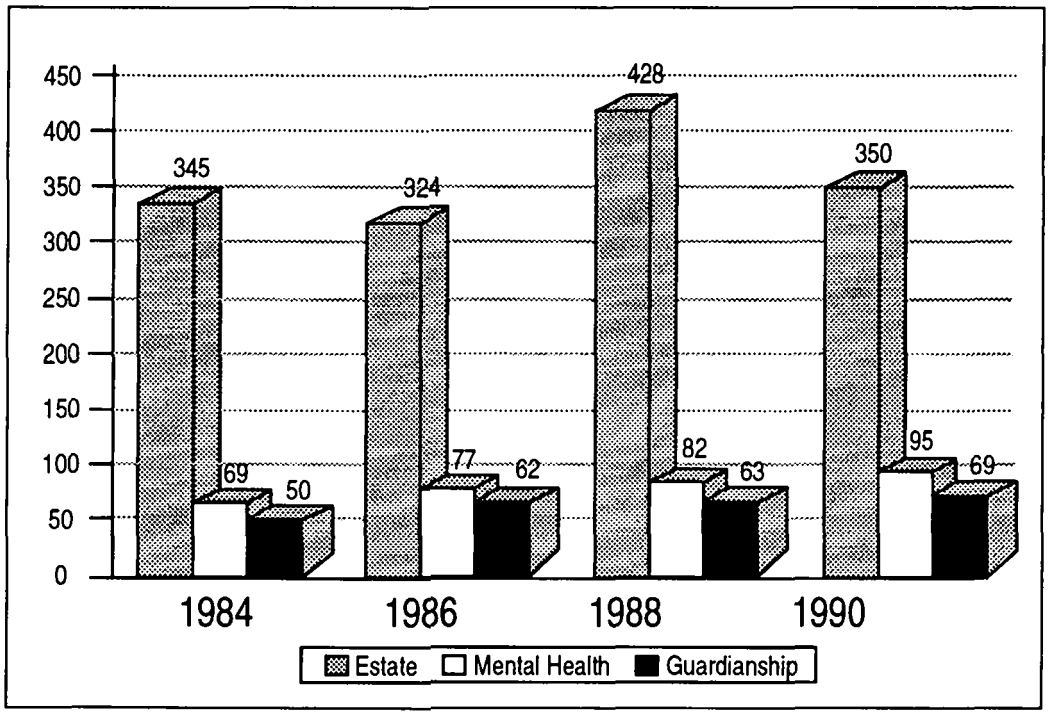
The pragmatic justification for caseload statistics on wills, decedents' estates, trusts, conservatorships, and guardianships is compelling. Caseload statistics are the single best way to describe the courts' current activities as well as to predict what they will be likely to face. Caseload statistics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

An examination of caseload trends over time also offers a historical perspective on the role of courts with probate jurisdiction. It provides information about whether caseload growth or decline is consistent among states and across types of cases. The national trend data in Figure 1 is illustrative.[1] From 1984 through 1990, measured in two-year periods, for those states providing filing data over this entire period of time, filings of cases involving wills, trusts, or estates increased slightly, while guardianship and involuntary civil commitment cases increased steadily and significantly.

Trusts, Wills, and Estates. Most states now provide the total number of estate filings annually, though this categorization may include filings under such diverse headings as "probate," "decedent," "small," "intestate," and "administration." Thirty-nine states plus the District of Columbia reported estate filings in 1990, and forty-three plus the District of Columbia reported them in 1991 (Table 1).

[1]Caseload data reported here were taken from data compiled by the National Center for State Courts' Court Statistics Project, a joint effort of the Conference of State Court Administrators, the SJI, and the NCSC. These data come from published and unpublished sources supplied by state court administrators and appellate court clerks. Such data are typically contained in official state court annual reports, which assume a variety of forms and vary widely in detail. Data from published sources are supplemented by unpublished data received in a wide range of forms, including internal management memoranda and computer-generated data. *See* NATIONAL CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1990 xiii (1992); Brian J. Ostrom, *Changing Caseloads: The View from the State Courts,* 16(2) STATE COURT JOURNAL 11 (Spring 1992).

Figure 1
Filings of Trusts, Wills, Estates, Guardianship, and Mental Health Cases, 1984-1990



Filings range from a low of 1,152 and 1,222 in Alaska for 1990 and 1991, respectively, to a high of 106,877 and 103,592 in New York for the same period. The states in Table 1 reported a total of 743,780 estate filings in 1990 and 783,900 in 1991 (with data available from four additional states in 1991). Generalized to the entire country, this total corresponds to 869,315 estate filings in the United States in 1990. The five states with the largest number of filings (California, Florida, New York, Ohio, and Texas) comprise 46 percent of the total 1990 filings and 42 percent of the total 1991 filings.

In relation to population, the number of estate filings per 100,000 individuals in 1990 ranged from a low of 16.5 in New Jersey to a high of 1,011.9 in Connecticut. In 1991 these figures ranged from a low of 29.2 to a high of 1,038.4. The relatively low New Jersey statistics may be attributed to that state's low participation rate in the NCSC Court Statistics Project. Less than 75 percent of the New Jersey courts responded to the NCSC request for statistics on probate cases, thus distorting the statistics reported for that state. Connecticut's estate filings of 1990 were more than double those reported by all but six states.[2]

[2]It should be noted that in Connecticut, cases involving decedents' estates are initially filed in limited jurisdiction probate courts, but are subject to a hearing de novo on appeal in that state's general jurisdiction superior courts. CONN. GEN. STAT. ANN. §45a-186 (West 1993). This may account for the relatively large number of estate filings in Connecticut.

Table 1
1990 - 1991 Estate Filings*

State	Total Number of Estate Filings (1990)	Number of Filings per 100,000 (1990)[a]	Total Number of Estate Filings (1991)	Number of Filings per 100,000 (1991)	Percent Change 1990 to 1991
Alaska	1,152	209.4	1,222	214.4	6.08
Arizona	7,074	193.0	6,741	179.8	-4.71
Arkansas	5,813	247.5	5,782	243.8	-0.53
California	65,659	220.6	62,685	206.3	-4.53
Colorado	6,302	191.3	5,978	177.0	-5.14
Connecticut	33,263	1,011.9	34,172	1,038.4	2.73
Delaware	2,148	322.4	2,196	322.9	2.23
District of Columbia	2,586	426.1	2,525	422.2	-2.36
Florida	49,200	380.3	47,780	359.9	-2.89
Georgia	16,575	255.9	18,081	273.0	9.09
Hawaii	1,673	151.0	1,583	139.5	-5.38
Idaho	4,134	410.6	4,194	403.7	1.45
Illinois	33,144	290.0	32,896	285.0	-0.75
Indiana	18,064	325.8	18,170	323.9	0.59
Iowa	17,956	646.7	17,293	618.7	-3.69
Kansas	7,849	316.8	7,437	298.1	-5.25
Kentucky[b]	29,380	797.2	29,551	795.9	0.58
Louisiana	15,615	370.0	17,032	400.6	9.07
Maine			10,194	825.4	
Massachusetts	26,930	447.6	24,898	415.2	-7.55
Michigan	22,358	240.5	23,511	251.0	5.16
Minnesota	9,699	221.7	10,490	236.7	8.16
Missouri	8,408	164.3	7,647	148.3	-9.05
Montana	2,765	344.9	2,616	323.8	-5.39
Nebraska	6,580	416.9	6,232	391.2	-5.29
Nevada	1,248	103.8	1,326	103.3	6.25
New Hampshire	5,378	484.8	4,950	448.0	-7.96
New Jersey	1,274	16.5	2,265	29.2	
New York	106,877	594.1	103,592	573.7	-3.07
North Carolina	46,382	706.5	46,735	693.7	0.76
North Dakota	3,029	474.2	2,808	442.2	-7.30
Ohio	64,866	598.0	63,032	576.2	-2.83
Oklahoma			10,283	323.9	
Oregon			6,702	229.4	
Pennsylvania	11,244	94.6	11,004	92.0	-2.13
South Carolina	20,334	583.2	20,872	586.3	2.65
South Dakota	4,000	574.7	4,125	586.8	3.13
Tennessee	7,457	152.9	6,867	138.6	-7.91
Texas[c]	55,385	326.1	53,521	308.5	-3.37
Utah[d]	4,280	248.4	4,395	248.3	2.69
Vermont	2,190	389.2	2,386	420.8	8.95
Washington	13,655	280.6	13,900	277.0	1.79
Wisconsin			22,384	451.8	
Wyoming	1,854	408.7	1,847	401.5	-0.38

* These figures are based on statistics reported by the state courts in conjunction with the National Center for State Courts' Court Statistics Project. The Commission on National Probate Court Standards makes no representations as to the accuracy or reliability of the data reported by the state courts.

[a]Calculations based on population figures from the 1990 census, which were taken from 1992 COUNTY AND CITY EXTRA: ANNUAL METRO, CITY AND COUNTY DATE BOOK (Courtnay M. Slater & George E. Hall eds.) (1992).

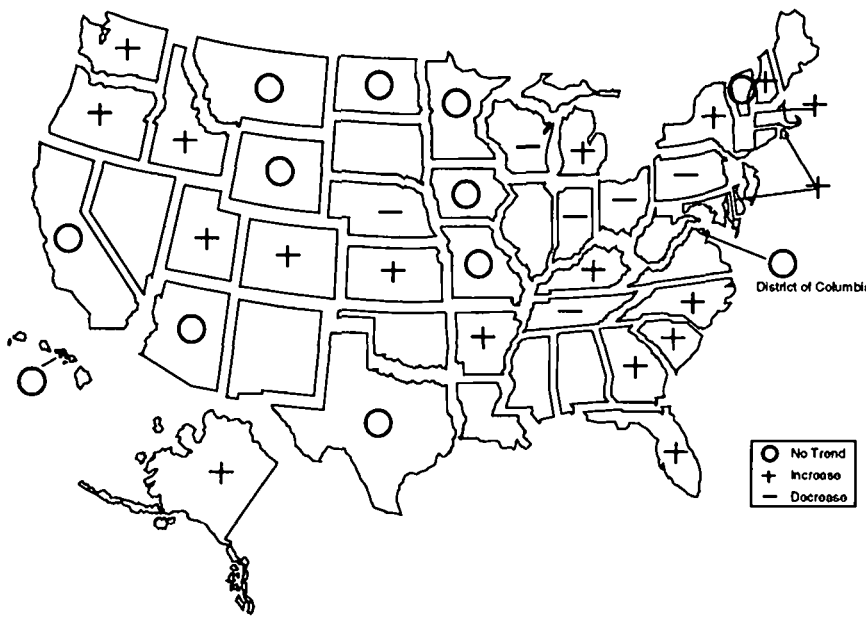
[b]Kentucky 1990 and 1991 data include guardianship/conservatorship cases.

[c]Texas 1990 and 1991 data include guardianship/conservatorship cases.

[d]Utah 1990 and 1991 data include guardianship/conservatorship cases.

Complete estate filing data from 1984 to 1990 were reported by 36 states and the District of Columbia (Figure 2).[3] Of these, 19 recorded an increase in the number of filings and 6 states recorded decreases. The remaining 11 states and the District of Columbia had no discernible trend (i.e., the reported data either fluctuated inconsistently or remained relatively constant over the reporting period).

Figure 2
Trends in Trusts, Wills, and Estates Filings, 1984-1990



Guardianship. Just as the jurisdiction of probate courts differs from state to state, the definition of *guardianship* and the duties and powers that it carries differs accordingly. For the purpose of Table 2, however, *guardianship* refers to the appointment by the court of a person to be responsible for the care, custody, and control of the respondent, and not of the respondent's property. In its nationwide study conducted in 1987, the Associated Press noted that no statewide records existed documenting the number of individuals subject to guardianship proceedings.[4] The lack of a reliable database greatly hinders fruitful public debate about guardianship proceedings. Such information is central to advancing effective solutions to identified problems.

The total number of reported guardianship filings and the corresponding rates per 100,000 population in 32 states and the District of Columbia are shown in Table

[3]States that had incomplete data for this six-year period and states that dramatically altered their estate classifications were excluded from the data in Figure 2.

[4]ASSOCIATED PRESS, GUARDIANS OF THE ELDERLY: AN AILING SYSTEM (Special Report, September 1987).

Table 2
1990 - 1991 Guardianship Filings*

State	Total Number of Guardian Filings	Number of Filings per 100,000 (1990)[a]	Total Number of Guardian Filings (1991)	Number of Filings per 100,000 (1991)	Percent Change
Alaska	284	51.6	324	56.8	14.08
Arkansas	2,871	122.1	2,726	114.9	-5.05
Colorado	1,169	35.5	1,149	34.0	-1.71
Connecticut	4,313	131.2	4,808	146.1	11.48
Delaware	376	74.3	395	76.3	5.05
District of Columbia	106	17.5	97	16.2	4.85
Florida	7,641	59.1	8,125	61.2	6.33
Georgia	5,762	88.9	6,816	102.9	18.29
Hawaii	474	40.2	521	45.9	9.92
Idaho	810	80.5	847	81.5	4.57
Indiana	6,090	109.8	6,655	118.6	9.28
Iowa			4,199	150.2	
Kansas			2,410	96.6	
Maine			882	71.4	
Massachusetts	5,098	84.7	4,736	79.0	-7.10
Michigan	18,870	203.0	20,499	218.8	8.63
Minnesota			2,861	64.6	
Missouri	2,841	55.5			
Montana			705	87.3	
Nebraska			2,033	127.6	
Nevada	837	69.6	820	63.9	-2.03
New Hampshire	916	82.6	1,123	101.6	22.60
New York	15,430	85.8	17,876	99.0	15.85
North Dakota	504	78.9	593	93.4	17.66
Ohio	7,271	67.0	9,096	83.2	25.10
Oklahoma			2,338	73.6	
Oregon			2,529	86.6	
South Carolina			2,800	78.7	
South Dakota	708	101.7	755	107.4	6.64
Tennessee			2,074	41.9	
Vermont	968	172.0	1,005	177.3	3.82
Virginia	651	10.5	762	12.1	17.05
Washington	2,632	54.1	2,323	46.3	-11.74

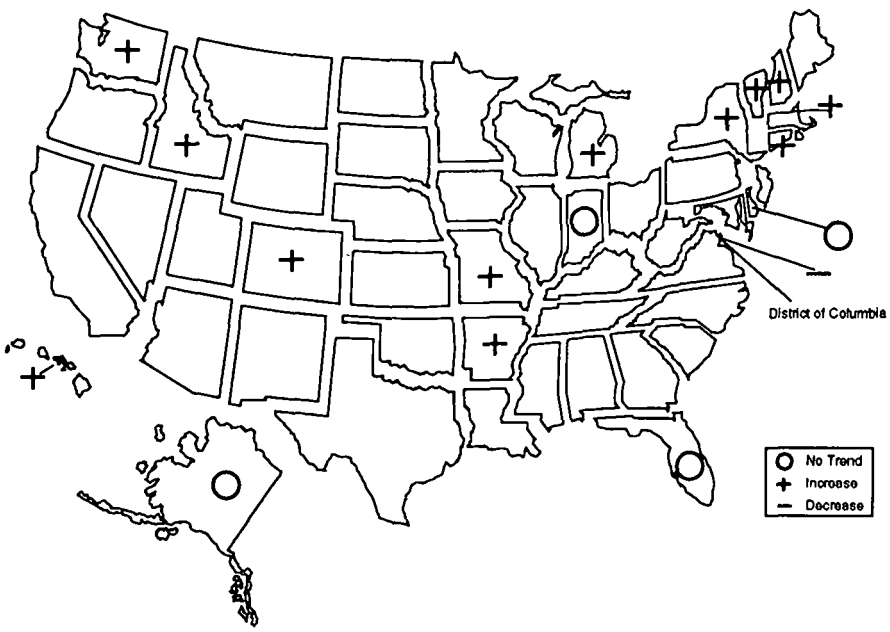
* These figures are based on statistics reported by the state courts in conjunction with the National Center for State Courts' Court Statistics Project. The Commission on National Probate Court Standards makes no representations as to the accuracy or reliability of the data reported by the state courts.

*Calculations based on population figures from the 1990 census, taken from the 1992 COUNTY AND CITY EXTRA: ANNUAL METRO, CITY AND COUNTY DATE BOOK (Courtnay M. Slater & George E. Hall eds.) (1992).

2. The total number of filings for 21 states and the District of Columbia in 1990 is 86,662 and for 31 states and the District of Columbia in 1991 is 114,882.[5] The range of filings for 1990 and 1991 is wide, from lows of 106 and 97, respectively, in the District of Columbia to highs of 18,870 and 20,499, respectively, in Michigan. Total guardianship filings per 100,000 population ranged from a low of 10.5 and 12.1 filings in 1990 and 1991, respectively, in Virginia, to a high of 203.0 and 218.8, respectively, in Michigan.

Guardianship cases appear to be highly concentrated in particular states. The filings in Florida, Indiana, Michigan, New York, and Ohio—the five states with the largest caseloads—account for 64 percent of the total for 1990 and 54 percent in 1991. All five are among the ten most populous states, underscoring a relationship between population and filing rates. Adjusting for population demonstrates more clearly differences between states.

Figure 3
Trends in Guardianship Filings, 1984-1990



A total of 16 states and the District of Columbia reported complete 1984-1990 data on guardianship filings, from which general trends can be discerned. A total of 12 states (Arkansas, Colorado, Connecticut, Hawaii, Idaho, Massachusetts, Michigan, Missouri, New Hampshire, New York, Vermont, and Washington) had increases in guardianship filings; Alaska, Delaware, Florida, and Indiana had no discernible trend; and only the District of Columbia showed a decline (Figure 3). Michigan, the state with the largest number of overall and population-relative filings, also had the most dramatic increases in filings from 1984 through 1990.

[5]Twenty-nine states did not report guardianship cases separately from other types of probate cases for 1990, and 19 states did not report them separately in 1991. In most cases the state court's automated system is not set up to distinguish estate and guardianship cases from other types of probate cases.