

NATIONAL ACADEMY OF ELDER LAW ATTORNEYS, INC.

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PUBLIC POLICY GUIDELINES

II. GUARDIANSHIP RECOMMENDATIONS

Resolutions Adopted by the NAELA Board of Directors July 12, 2002; Revised June 29, 2007 and November 1, 2007

NAELA supports the following principles concerning adult guardianship:

A. Procedural Due Process.

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

B. Determination of Diminished Capacity.

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

C. Less Restrictive Alternatives; Limited Guardianship.

Guardianship should be a last resort; and less restrictive alternatives such as appropriate durable powers of attorney, advance directives, trusts, representative payment arrangements, and other legal and social mechanisms should be explored and exhausted prior to judicial intervention. Judges should aim to limit the scope of and tailor the guardianship order to the particular

needs of the individual, granting the guardian powers only in those areas in which the individual lacks decision-making capacity. The court order should require the guardian to maximize the person's autonomy and independence, use the substituted judgment standard of decision-making, and involve the individual in decisions to the extent possible.

D. Guardianship Monitoring.

Courts should develop monitoring systems including at least annual reports and accountings, court assistance to guardians in filing of timely reports, tracking of reports filed or overdue, appropriate sanctions for failure to file and for guardian malfeasance, regular court review of reports and accountings, and use of investigatory and auditing resources to verify information in reports and accountings. States should provide adequate funding for guardianship monitoring.

E. Public and Professional Guardianship.

1. States should support high quality public guardianship through adequate funding and staffing, avoidance of the conflict of interest inherent in designating a social services agency as public guardian, use of a multidisciplinary screening committee to review potential cases, regular visits to clients, and development of policies and procedures as well as minimum standards.
2. States should support high quality professional guardianship services by adopting minimum standards of practice, using the NGA Standards and Code of Ethics as a model; and should require guardians who receive fees for serving two or more unrelated incapacitated individuals to be certified through a state certification program.

F. Education of the Judiciary.

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

alternatives to the appointment of a guardian. The Elder Law Bar should be directly involved in this process

G. Interjurisdictional Issues

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

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

The Uniform Act targets three distinct but related areas:

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

H. Overview Recommendations.

States should seek to ensure a strong adult guardianship system through: (a) development of multidisciplinary committees on guardianship and alternatives, including all community stakeholders (judges, court staff, attorneys, adult protective services, long-term care ombudsman, medical community, aging and disability networks, mental health agencies and advocates); (b) development and regular implementation of education and training for all stakeholders; (c) development and funding of a uniform system of data collection; and (d) research and evaluation to measure successful practices.

I. Wingspan.

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