Issue Brief for Working Group #3:
Limited Guardianship, Protective Arrangements, and Guardianship Pipelines

Commissioned Papers:

- Protective Orders And Limited Guardianships: Legal Tools for Sidelining Plenary Guardianship, by Kohn & English
- Use and Misuse of Guardianship by Hospitals and Nursing Homes, by Hirschel & Smetanka

Statement of Issue:

What can we do to encourage the use of limited guardianships and protective arrangements instead of guardianship? What can be done to promote alternatives and less restrictive options to reduce guardianship pipelines of school to guardianship or health care to guardianship?

Background:

All states have statutory provisions for limited guardianships, but they appear to be rarely used. Limited guardianships reduce intrusion into the rights of the protected person and reduce government intervention. The protected person retains rights not specifically covered in a limited guardianship order.

Emergency appointments may differ from limited orders in that evidence of an imminent danger is needed to justify an emergency appointment, there are often fewer due process protections, and the orders are limited in duration and scope.

Protective arrangements are limited court orders authorizing someone to act in a very limited scope. Limited protective arrangements stop short of the appointment of a guardian or conservator. Article 5 of the Uniform Guardianship, Conservatorship and Other Protective Arrangements Act (UGCOPAA) describes protective arrangements as viable alternatives when the help that is needed is limited in scope. For example, limited protective orders may authorize someone to gather financial records and file for public benefits, or sign an admissions agreement for a residential placement, or approve the sale of real estate with the proceeds placed in trust to pay for the person's care, or consent to health care.

With younger adults with disabilities the concept of a school to guardianship pipeline involves school staff routinely advising families to seek guardianship when their loved one turns 18, without exploring whether adult guardianship is needed. A similar pipeline occurs for adults who experience a debilitating injury or illness and become unable to provide legal consent for treatment or placement in a care facility, with health care providers defaulting to filing for guardianship -- without exhausting less restrictive alternatives such as protective

arrangements, limited guardianship, or use of other possible options such as state health care consent statutes.

Existing Statutes:
Virtually all states have statutory provisions that encourage least restrictive alternatives, require maximizing autonomy, or specifically define limited guardianship. The UGCOPAA provides an explicit model to encourage use of limited guardianships and conservatorship. The Act requires a finding on the record that the needs of the person cannot be met by a protective arrangement instead of guardianship, a limited order, or another less restrictive option before a plenary appointment can be made.

The UGCOPAA specifically provides for protective arrangements in Article 5. Under the Act, the petition may ask for a protective arrangement, or the court may order a protective arrangement on its own initiative. Before ordering a protective arrangement the court must find that the person lacks the ability to meet their needs, that less restrictive options such as an agent under a power of attorney or a default health care consent surrogate are unable to meet the need, and that a limited order authorizing transactions will appropriately meet the respondent's needs for health, safety, care, or visitation. As referenced in the Kohn-English paper, some state statutes have authorized specific forms of limited protective arrangements, and some courts have found that they are able to create these orders, based on case-law or existing statutory provisions.

The pipeline to plenary guardianship is a result of guardianship all too frequently being the default answer when a person has limited capacity -- clearly more a failure of practice than a lack of laws affording alternatives. Existing guardianship statutes provide for using the least restrictive intervention. Other provisions for powers of attorney, default health care consent decision-making laws, representative payeeship and the use of protective arrangements are available to fill many of the needs for surrogate decision-making, with UGCOPAA offering a model for expanded use of protective arrangements.

Where We Stand in Practice:
The sparce available data shows that the vast majority of guardianships or conservatorships are plenary, despite limited orders being statutorily available in all states. It is common to hear the justification that a plenary guardianship may be needed in the future, so we might as well do it at the beginning. The assumption is often that a person in need of protection will always be a person in need of protection, and that the need for help will progressively increase. Existing practice makes it easier to file for a plenary appointment than a limited appointment, a practice that UGCOPAA strives to address. To lessen the burden of crafting a limited order, a paper for

the second National Guardianship Summit in 2002 suggested the creation of "templates" for limited orders that could then be fine-tuned if needed – but there may be pros and cons to such template forms.

Limited protective arrangements, orders that are less than a guardianship, are little used. A handful of innovative states use limited orders authorizing access to financial records to allow for the completion of a Medicaid application or other public benefits application. Courts use limited orders for settlement of damages and establishing supplemental or special needs trusts. Only two states have enacted the UGCOPAA in its entirety, including the provisions of Article 5, but it is currently under review in additional jurisdictions. States are starting to address disputes on visitation through elder abuse codes, without the need to file for guardianship. Some states have amended family violence laws to allow for restraining orders when contact places a vulnerable family member at risk. Yet in many states, courts are left with limited law or precedent other than guardianship or conservatorship when faced with these questions.

Guardianship pipelines are a result of failure to use existing alternatives and less restrictive options. The practice of defaulting to guardianship is often based on flawed assumptions, limited screening, limited assessment, and without a careful examination of alternatives. There are several approaches to change. Among the first is education and training for school staff, as well as hospital discharge planners. Second is creating more statutory predicates for and awareness of the utility of protective arrangements. The third approach is requiring a finding with clear and convincing evidence, on the record, that nothing short of guardianship will protect a person truly in need of protection, as required by UGCOPAA. A greater burden needs to be placed on seeking a plenary guardianship than the burden of seeking a limited guardianship or protective arrangement.

Discussion Prompts:

1. What are the options for increasing use of limited guardianships? Are changes needed in assessment and evaluation? How can we allay fears of petitioners, attorneys, and judges that a limited guardianship requires repeated, expensive returns to the court seeking more authority?

2. ? What changes are needed in culture, practice, or laws to promote use of existing laws that allow for protective arrangements? What is needed to spread awareness, understanding and application of alternatives to guardianship?

3. The pipeline issue ties in tightly with a perceived lack of alternatives and underutilization of the available alternatives to guardianship. Why do educational

institutions and health care providers seek or urge the seeking of guardianship as a first rather than a last resort? What can replace the assumptions of need for guardianship?

4. Do solutions lie in changing practices, changing laws, changing attitudes and a blend of all of these?

5. What can be done to better protect against the egregious abuses by health care providers seeking guardianship, as described in the Hirschel-Smetanka paper?

6. Is one of these issues / solutions more critical than others?