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GUARDIANSHIPS vs SPECIAL NEEDS TRUSTS, AND OTHER PROTECTIVE PROCEEDINGSARRANGEMENTS: ENSURING JUDICIAL ACCOUNTABILITY AND BENEFICIARY AUTONOMY/SELF DETERMINATION

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Contents

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ABSTRACT

This article focuses on rising tensions and conflicts (perceived and actual) occurring among guardianships, special needs trusts (SNT) and other protected arrangements. The authors focus on three distinctly different applications, guiding participants through 1) Guardianship versus a special needs trust; 2) Supported decision-making versus a special needs trust; and 3) Guardianship versus other less restrictive options, including, but not limited to, an ABLE account, a representative payee, and a pooled special needs trust.

1) The first case study addresses conflicts between a guardianship and a special needs trust. It examines a situation when the person under guardianship is also the beneficiary of an SNT. The guardian and trustee are not the same person or entity and have competing interests when carrying out their respective duties and responsibilities. For this case study, there are general comments about guardianships and trusts, addressing the guardian's[2] fiscal accountability for the assets in the guardianship, and the guardian's advocacy for the quality of life and personal autonomy of the adult under guardianship. It continues with a discussion about the trustee's fiduciary duties and accountability for the corpus in the SNT[3]; the trustee's duty to make discretionary distributions to or for the benefit of the SNT beneficiary; and a duty to preserve the corpus of the SNT for distribution to contingent beneficiaries. It also gives an overview of the diversity of guardianship statutes, compared to the uniformity of trust statutes when analyzing jurisdiction.

2) In the second case study, the conflict is between the desires of a person who is in a supported decision-making arrangement and the views of the co-trustees of an SNT. The scenario takes place in a jurisdiction that does not formally recognize supported decision making (SDM) and thus there is no court overseeing the person's decision-making process. The case study addresses how to consider, among other things, the balance between the contemporary desires of the person and the co-trustees' concerns regarding preservation of SNT resources.

3) The third case study arises in the context of a guardianship proceeding involving an adult with a disability living with an elderly caregiver who has resisted government and other assistance. In the course of the proceeding, the relevant actors become aware that alternatives such

[2] See *infra* note ___. The terms "guardian" and "guardianship" in this article include the broad spectrum of words and language used across the country to describe the judicial transfer to a person or entity of legal authority over an individual's rights, liberties, placement, and finances.

[3] The authors realize that the tensions between trusts on the one hand and conservatorships and guardianships on the other go beyond those related to special needs trusts, which are created primarily to maintain eligibility for means-tested public benefits. However, the limited focus of the article only addresses supplemental and special needs trusts.

as appointment of an organizational representative payee and establishment of an ABLE Act Account can vitiate the need for appointment of a guardian.

Following the case studies are policy recommendations and practice pointers for working groups to consider in their deliberations.

I. OVERVIEW OF GUARDIANSHIPS AND TRUSTS

A. General Summary of Guardianships

The terms "guardian" and "guardianship" in this article include the broad spectrum of words and language used across the country to describe the judicial transfer to a person or entity of legal authority over an individual's rights, liberties, placement, and finances. [4] These words and language include, but are not limited to, conservatorship, interdiction, committee, curator, fiduciary, visitor, and next friend.[5] In 2017, the Uniform Law Commission developed the Uniform Guardianship Conservatorship, and Other Protective Arrangements (UGCOPAA), a model act that defines various forms of guardianship.[6] Throughout this article, we refer to the UGCOPAA to show how the expanded scope of "other protective arrangements" may be applied.

The National Guardianship Association ("NGA"), an organization solely focused on guardianship, is a pioneer in the development of guardianship ethics and standards.[7] NGA first developed national standards in 1991, and has continually expanded the standards "…to cover more of the duties and responsibilities that face court-appointed guardians…"[8]

Consider the general description of various guardians for the purpose of analysis: 1) Guardian – A person appointed by the court to make decisions with respect to the personal affairs of an individual. The term includes a co-guardian but does not include a guardian ad litem[9]; 2) Guardian of the person - a person or entity appointed solely for the purpose of performing duties related to making decisions about the care, support and wellbeing of an adult under guardianship;[10]

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[4] See *The Fundamentals of Guardianship: What Every Guardian Should Know,* American Bar Assn. and Nat'l. Guardianship Assn, 1 (2017) (Hereafter "Fundamentals of Guardianship")("For clarity, because of various terms used in the states, the term 'guardianship' …includes the appointment of a surrogate decision maker for either personal or financial matters. A reference to a guardian includes a conservator and all other types of guardians…") *id.*

[5] See Catherine A. Seal and Pamela B. Teaster, *Certification and/or Licensure of Guardians/Accountability of Guardian Professionals*, ___ Syracuse L. Rev. ___ (forthcoming 2022); see Karen E. Boxx & Terry W. Hammond, *A Call for Standards: An Overview of the Current Status and Need for Guardian Standards of Conduct and Codes of Ethics,* 2012 Utah L. Rev.1207, 1208, n. 5 (explaining the general reference to various words used in guardianship).

[6] See Uniform Guardianship, Conservatorship, and Protective Arrangements Act (UGCOPAA), (2017) https://www.uniformlaws.org/committees/community-home?CommunityKey=2eba8654-8871-4905-ad38-aabbd573911c.

[7] See National Guardianship Association, http://www.guardianship.org

[8] See NGA Standards of Practice (adopted 2000, revised 2013) (Hereafter "NGA Standards of Practice"), https://www.guardianship.org/standards/; References will be made to NGA's standards in pertinent sections of the article.

[9] See *Fundamentals of Guardianship, supra* note 4, at 1.

[10] *Id.* at 28-42; see *supra* note ___, NGA Standards of Practice, Standard 12 (I)(B) and 13 (III)(A) and (B); see Robert B. Fleming & Rebecca C. Morgan, *Standards for Financial Decision-Making: Legal, Ethical, and Practical Issues,*

3) General or plenary guardian - A guardian of both the estate and the person, also described as plenary;[11] 4) Guardian of the estate - A guardian appointed solely for the purpose of managing the property, estate, and business affairs of the adult under guardianship;[12] and 5) Limited guardian – a guardianship in which the authority of the guardian is restricted and identified rights of the person under guardianship are protected.[13]

Beyond this general description of guardianship, guardianship courts have broader power and authority to monitor and enforce accountability by guardians once they have ordered a guardianship.[14] In recent years, these broader guardianship powers and authority have expanded in scope and complexity[15] as judges have begun to focus on three principles: 1) the principle of least restrictive alternative[16]; 2) the principle of person-centered planning, which is intended to serve the interests of the person under guardianship based on his or her interests and choices; [17] and 3) the principle of supported decision-making, which proposes diversions from the judicial application of guardianship to ways by which those serving the individual are able to do so without judicial process that takes away the person's autonomy.[18]

The UGCOPAA expressly identifies these principles as hybrids of plenary or general guardianship. In its prefatory note, it states that a core value of guardianship is person-centered

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2012 Utah L. Rev. 1275-1277, n. 6.

[11] See *Fundamentals of Guardianship, supra* note 4, at 2.

[12] *Id.* at 49-55.

[13] See UGCOPAA, *supra* note 6, at __; see Nina A. Kohn and David M. English, *Limited Orders and Limited Guardianships: Legal Tools for Sidelining Plenary Guardianship,* ___ Syracuse L. Rev. ___ (to be published 2022).

[14] See Sally Balch Hurme and Diane Robinson, *What's Working in Monitoring Guardianships: Challenges and Best Practices,* ___ Syracuse L. Rev. ___ (forthcoming 2022).

[15] See *In re the Accounting of JP Morgan Chase Bank, N.A*., 38 Misc. 3d 363, 956 N.Y.S.2d 856 (2012). Kristin Booth Glen, retired judge of the New York County Surrogate Court, one of the authors in this 2021 Summit, has been one of the leaders, both on and off the bench, in subjecting guardianship statutes and practices to close scrutiny. *See* Kristin Booth Glen and Cathy E. Costanzo, *What Guardians, Persons Seeking Guardianship, and Persons for Whom Guardianship is Sought Need to Know about Supported Decision-Making and Why*, ___ Syracuse L. Rev. ___ (forthcoming 2022); see *supra* note ___, NGA Standards of Practice, Standard 7 (II) (B).

[16] UGCOPAA defines "Less restrictive alternative" in Section 102 (13) to mean "an approach to meeting an individual's needs which restricts fewer rights of the individual than would the appointment of a guardian or conservator. The term includes supported decision making, appropriate technological assistance, appointment of a representative payee, and appointment of an agent by the individual, including appointment under a [power of attorney for health care] or power of attorney for finances."

[17] See Connie Lyle O'Brien & John O'Brien, *The Origins of Person Centered Planning: A Community of Practice Perspective 8-9* (Responsive Systems Assocs. ed., 2000), http://thechp.syr.edu/PCP_History.pdf; Person-Centered Planning Process; The Centers for Medicare and Medicaid Services (CMS) requires that a person-centered planning process and assessment be used to develop a person-centered plan, 42 C.F.R. § 440.167 (2011); A. Frank Johns, *Person-Centered Planning in Guardianship: A Little Hope for the Future,* 2012 Utah L. Rev. 1541.

[18] See Robert D. Dinerstein, *Supported Decision-Making for People with Disabilities: International Origins and Influences*, 42 (3) Tash Connections 15-18 (Fall 2017); Karrie A. Shogren, Michael L. Wehmeyer, Jonathan Martinis, and Peter Blanck, *Supported Decision-Making: Theory, Research, and Practice to Enhance Self-Determination and Quality of Life* (2019); David Godfrey, *Legal Basics: Supported Decision-Making (Chapter Summary),* National Center on Law and Elder Rights and American Bar Association Commission on Law and Aging, (2017), https://ncler.acl.gov/pdf/Legal-Basics-Supported-Decision-Making1.pdf; Nina A. Kohn, Jeremy A. Blumenthal, & Amy T. Campbell, *Supported Decision-Making: A Viable Alternative to Guardianship?,* 177 Penn. St. L. Rev. 1111 (2012-2013); *Practical Tool for Lawyers: Steps in Supported Decision-Making,* (2016), https://www.americanbar.org/content/dam/aba/administrative/law_aging/PRACTICALGuide.pdf.

planning,[19] and it recognizes the role, and encourages the use, of less restrictive alternatives, including supported decision-making.[20] Adherence to lesser restrictive alternatives is recognized in UGCOPAA, Article 5, Other Protective Arrangements.

Beyond the over-arching objectives stated in its preface, the UGCOPAA presents eleven specific changes, the second of which focuses on supported decision-making in that it "…recognizes the role of, and encourages the use of, less restrictive alternatives, including supported decision-making.[21] While not expressly including the principle of supported decision-making, UGCOPAA, Article V, provides for protective arrangements instead of guardianship or conservatorship.[22]This is where most guardianship statutes are lacking, using generic terms such as "best interests" or "substituted judgment"[23] that pay insufficient attention to the autonomy and liberty interests of the person.

Whether in the conventional construct of guardianship, or in its more complex and expanded construct, tensions increase for judges and guardians when the adult is also the beneficiary of a trust.

B. General Summary of Trusts

1. Trusts – conventional description

A trust is a legal relationship in which legal title to property is entrusted to an individual or

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[19] See *supra* note ___, UGCOPAA, Prefatory note, at 1-2 (The act has three overarching aims. First, it aims to reflect the person-centered philosophy endorsed by the NGS... The person-centered approach is evidenced in the act's updated terminology; the act clarifies how appointees are to make decisions, including decisions about particularly fraught issues such as medical treatment and residential placement. These clarifications are consistent with the person-centered approach embraced by the act in that appointees are given specific guidance on involving the individual in decisions.)

[20] *Id.* To this end, the act provides that neither guardianship nor conservatorship is appropriate where an adult's needs can be met with technological assistance or supported decision-making)Section 101 (31) of the UGCOPAA defines supported decision making as meaning "assistance from one or more persons of an individual's choosing in understanding the nature and consequences of potential personal and financial decisions, which enables the individual to make the decisions, and in communicating a decision once made if consistent with the individual's wishes." For a further discussion of supported decision making, see *infra* Part [ ].

[21] See *supra* Note 6, UGCOPAA,, Prefatory Note, at 2 (Second, the act recognizes the role of, and encourages the use of, less restrictive alternatives, including supported decision-making and single-issue court orders instead of guardianship and conservatorship. To this end, the act provides that neither guardianship nor conservatorship is appropriate where an adult's needs can be met with technological assistance or supported decision-making. It also provides for protective arrangements instead of guardianship or conservatorship; the 1997 version, by contrast, only provided for such an arrangement as an alternative to conservatorship. These alternative arrangements have the potential to reduce the extent to which individuals in need of protection are deprived of liberties. They can also reduce the time and cost associated with meeting individuals' needs. Unlike a guardianship or conservatorship, long-term monitoring and reporting will generally be unnecessary.) *id.*

[22] See *supra* Note 6, UGCOPAA, Article V, Section 501, Comment, at 213 (Section 501, together with the subsequent sections of Article 5, create an alternative to guardianship and conservatorship for individuals whose needs can be met without the imposition of such a restrictive arrangement. Specifically, these sections allow the court to enter an order that is precisely tailored to the individual's circumstances and needs, and that is limited in scope and, potentially, duration.)

[23] [Definition of these terms—example of statutory citation]

legal entity charged with fiduciary duties to manage and administer it for the benefit of another person.[24] In 2000, the Uniform Law Commission developed the Uniform Trust Law (UTC), a model act providing continuity and uniformity in the administration of all forms of trusts.[25] Conventional trusts are identified as inter vivos,[26] testamentary,[27] revocable,[28] or irrevocable.[29] Important to the analysis of case study No. 1 in this article is the hybrid testamentary supplemental needs trust, and the UTC treatment of jurisdiction by trust courts whose states have ratified the UTC.[30]

Structurally, there are five described methods for creating a trust,[31] and there are three components or identifiable entities that create the trust.[32] For the purpose of this article, this general framework is sufficient. However, it belies the complex nature of conventional trusts and how trustees make distributions, much less the nature of unconventional and hybrid trusts.[33] The exception is when the hybrid trust is special or supplemental, intentionally created for persons with significant physical and/or mental disabilities.

2. Trusts – description of the SNT hybrid - the general What, When, Why, and How.

a. What - An SNT is a discretionary trust that shelters assets and provides for detailed administration and distribution of SNT assets and income[34] for a person with a defined disability.[35] The primary purpose of an SNT is to sustain or enhance the quality of life of a person with a

[24] *See* Restatement Third, Trusts § 2 Definition of Trust (2003) (A trust…is a fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons, at least one of whom is not the sole trustee.). *Id* at 17.
[25] see Uniform Trust Code (UTC) (last revised or amended in 2016), https://www.uniformlaws.org/viewdocument/final-act-with-comments.
[26] *Id.,* Restatement Third, Trusts, *§* 10, comment to clause (b) d. Transfer inter vivos, at p. 147; *Id.* UTC, Section ___. (A trust is inter vivos when the one creating it is living)
[27] *Id.,* Restatement Third, Trusts, *§* 10, comment to clause _____; *Id.,* UTC. Section ____ (A trust is testamentary when the one creating it is not living at the time it becomes active.)
[28] *Id.,* Restatement Third, Trusts, *§* 10, comment to clause _____; *Id.,* UTC. Section ____ (A trust is revocable…).
[29] *Id.,* Restatement Third, Trusts, *§* 10, comment to clause _____; *Id.,* UTC. Section ____ (A trust is irrevocable…).
[30] *Id.,* see *infra* note ___, and accompanying text.
[31] *See supra* note ___, Restatement Third, Trusts § 10, at 145 (1. Transfer by Will of a property owner to another person as trustee for one or more persons; 2. transfer inter vivos of a property owner to another person as trustee for one or more persons; 3. A declaration by of a property owner that he or she holds that property in trust for one or more persons; 4. An exercise of a power of appointment by appointing property to a person as trustee for one or more persons; and 5. A promise or beneficiary designation that creates enforceable rights in a person who immediately holds those rights as trustee, later receives property as trustee for one or more persons.)
[32] *See* George G. Bogert, *Law of Trusts*, § 10, at 14 (4th ed. 1952) (1) the creator, grantor or settlor of the trust; 2) the identified person or entity named the beneficiary receiving income, principal, or both from the assets in the trust; and 3) the named or identifiable person or entity to be the trustee responsible for the administration of the trust, including distributions.); see UTC, Section _____.
[33] This article does not attempt to include creation of more complex trusts, for example by a power of appointment, beneficiary designation, or an enforceable promise; s*ee supra* Note ___, Restatement Third, Trusts § 10, at 149-153.
[34] SNTs are the creation of OBRA '93, 42 U.S.C. § 1396p(d)(4). The focus of this article is only on the testamentary SNT found in 42 U.S.C. § 1396p_____ (All other d4 Medicaid qualifying SNTs are beyond the scope of this article.)
[35] 42 U.S.C. § 1382b(e)(5).

disability by gaining access to governmental programs and benefits by creating an immediate route to eligibility. [36]

b. When - When created for persons with disabilities, trusts are considered hybrids with supplemental, special needs, payback, and pooled distribution requirements.[37] There are also accounts with trust-like functions, but not named or created as trusts, such as ABLE accounts.[38]

c. Why - The SNT is needed when third party non-exempt assets would otherwise be given directly to the beneficiary, or the beneficiary owns assets that are not exempt for gaining eligibility, having failed the "means-test" for the program or service.

d. How - Once the non-exempt assets are transferred and titled in an SNT, its primary purpose is met by the creation of a source of sheltered funds that will enhance the beneficiary's quality of life while at the same time maintain eligibility for the means-tested governmental benefits. The enhancement comes from the use of the sheltered SNT income and principal to supplement the benefits that are provided to the beneficiary.

d. Why - The SNT accomplishes the task of enhancing the beneficiary's quality of life by taking countable assets of the beneficiary, or third party assets to be used for the beneficiary and sheltering or exempting them so the assets are no longer countable. [39] At the same time, the SNT assures governmental approval of the transfer of assets into the SNT so the trustee can maintain and administer them in a way that sustains the beneficiary's benefits eligibility, and distribute the assets and income in ways that supplement (never supplant) the governmental programs, products, placement, and services available to the SNT beneficiary.[40]

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[36] While the terms "special" and "supplemental" are at times considered synonyms of each other, experts in the field reference states in which the "payback" requirement dictates the use of the word "special" in self-settled SNTs, and the word "supplemental" in third party SNTs which does not have the "payback" requirement for qualification. Another analysis focuses "special" on the protection of the SNT corpus for the beneficiary while public benefits are maintained and focuses "supplemental" on the limitations on the Trustee's discretion to make distributions. See *supra Note* ___, *Fundaments of SNTs* § 1.02, at 1-3, 4, n. 3, citing Social Security Administration Program Operations Manual System (POMS), https://secure.ssa.gov/apps10/, SI 01120.200; POMS SI 01120.200.B.13; POMS SI 01120.200.H.1.a. *Cf.* Robert B. Fleming and Lisa Nachmias Davis, *The Elder Law Answer Book* Chap. 8, § 8.3, at 8-3 (Supp. 2021) (identifying those states that actually detail variations in language that include "supplemental needs trusts.") They note the importance in reviewing state law to avoid requirements or assumptions made in the state law that will apply to the SNT. *Id.* Note also that this discussion should not be confused with the term "supplemental benefits".

[37] Several Special Needs Trust resources are available for more extensive analysis. The most recent target fundamentals at the beginning of special needs trusts development and planning: Stuart D. Zimring, Rebecca C. Morgan, and Bradley J. Frigon, *Fundamentals of Special Needs Trusts* (LexisNexis 2021) (hereafter Fundaments of SNTs). A second SNT text is in handbook format. Thomas D. Begley, Jr. and Angela E. Canellos, *Special Needs Trusts Handbook* (Aspen Supp. 2021).

[38] See *infra* note 46, and accompanying text at III. Overview of Guardianships and ABLE Accounts.

[39] In this article, sheltering and exempting has little to do with taxes and everything to do with benefits. While there are tax consequences, they are beyond the scope of this article.

[40] See *supra* note ___, and accompanying text.

II. OVERVIEW OF SUPPORTED DECISION-MAKING AND SPECIAL NEEDS TRUSTS AND THE ROLE OF *OLMSTEAD V. L.C.* AND THE INTEGRATION MANDATE

A. Guardianship versus Supported Decision-Making

As described above, guardianship involves court appointment of a person or entity to make decisions on behalf of an individual. Although, as noted, many statutes direct guardians to use substituted judgment in their decision-making—that is, to make the decision the person could make if he or she could make and communicate the choice(s) to be made—as well as operate within the concepts of person-centered planning and the least restrictive alternative—the essence of guardianship is that the guardian stands in the shoes of the person and makes the decisions. In contrast, in supported decision making, the person remains the decision-maker, aided by one or more supporters (of his or her choosing) but not displaced by them. [41]

One of the authors has defined supported decision making for people with disabilities as "a series of relationships, practices, arrangements, and agreements, of more or less formality and intensity, developed to assist an individual with a disability to make and communicate to others decisions about the individual's life."[42] Supported decision making is a concept that originated over twenty-five years ago in British Columbia (which uses the term "representation agreements") and gained traction in such countries as Sweden, Germany, and Australia. Crucially, the adoption in 2006 of the UN Convention on the Rights of Persons with Disabilities ("CRPD") gave supported decision making an important impetus in its adoption of Article 12, Equal recognition before the law, which explicitly calls for the states to provide individuals with the support they may require in exercising their legal capacity.[43] Although by its terms Article 12 does not use the term "supported decision making," consistent interpretations of the article have seen supported decision making as the kind of support that Article 12(3) contemplates.

The United States has signed but not ratified the CRPD, so Article 12 does not have the force of law. However, an increasing number of states have adopted supported decision-making agreement laws.[44] In addition, several courts have adopted supported decision-making arrangements in lieu of guardianship,[45] the American Bar Association has adopted a resolution advocating supported decision making as a less restrictive alternative to guardianship,[46] and

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[41] For a general, plain-language discussion of supported decision making for people with disabilities and older adults, *see* National Resource Center for Supported Decision-Making, Everyone has the right to make choices, available at http://supporteddecisionmaking.org/choices_brochure

[42] Robert D. Dinerstein, *Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road From Guardianship to Supported Decision-Making,* 19 HUM. RTS. BRIEF 8, 10 (2011-12). *See also* UN Committee on Persons with Disabilities, General Comment No. 1 [full citation needed].

[43] *Id.* UN Convention on the Rights of Persons with Disabilities, Art. 12 (3).

[44] *See* Zachary Allen and Dari Pogach, *More States Pass Supported Decision-Making Agreement Laws,* 41 BIFOCAL 159, 160, 160 n.1 (October 2019)(listing Texas, Delaware, District of Columbia, Alaska, Wisconsin, Indiana, North Dakota, Nevada, and Rhode Island as having such laws as of October 2019).

[45] *See, e.g.,* In re Dameris L. [cite], Sup. Ct. NY Cty., December 28, 2012 (Judge Kristin Booth Glen); Ross v. Hatch [Va].

[46] American Bar Association Resolution 113 adopted by the House of Delegates on August 14, 2017 urges state, territorial, and tribal legislatures to (1) amend their guardianship statutes to require that supported decision making be

several jurisdictions have undertaken pilot projects to assess supported decision making.[47]

B. Applying Olmstead and the Integration Mandate

The above discussion is heavily informed by state law, which is the principal source of law for understanding the relationship among guardianship, supported decision making, and special needs trusts. But federal disability rights law also potentially has a role to play in analyzing the complex issues involved in these intersections.

Specifically, the integration mandate of the Americans with Disabilities Act,[48] as explicated in the Supreme Court case of *Olmstead v. L.C.*,[49] serves as a backdrop to the issues at hand. In *Olmstead*, the Supreme Court held that "unjustified institutional isolation of persons with disabilities is a form of discrimination."[50] Although *Olmstead* itself dealt with unnecessary institutionalization of two women in a facility for people with intellectual disabilities, courts and commentators have extended or urged extension of its reasoning to other settings, such as sheltered workshops, voting, and penal incarceration, among other areas.[51] An influential article by law professor Leslie Salzman argues specifically that the integration mandate should be applied to guardianship proceedings.[52] As she notes, "[B]y limiting an individual's right to make his or her own decisions, guardianship marginalizes the individual and often imposes a form of segregation that is not only bad policy, but violates the Act's mandate to provide services in the most integrated and least restrictive manner."[53]

Even if one does not take the argument that far,[54] however, the requirement that people

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identified and fully considered as a less restrictive alternative, before guardianship is imposed, and (2) require that decision-making supports that would meet the individual's needs be identified and fully considered in proceedings for termination of guardianship and restoration of rights, The Resolution further urges courts to consider (1) supported decision making as a less-restrictive alternative to guardianship and (2) decision making supports that would meet the individual's needs as grounds for termination of a guardianship and restoration of rights.
https://www.americanbar.org/groups/law_aging/publications/bifocal/vol_38/issue-6--august-2017-/

[47] Kris Glen's NY project; Center for Public Representation Project in MA; projects supported by National Resource Center for Supported Decision Making.

[48] *Americans* with Disabilities Act ("ADA"), 42 U.S.C. § 12101, Pub. L. 101-3306, 104 Stat. 328 (1990). The integration mandate is found in 28 C.F.R. §35.130(d).

[49] 527 U.S. 581 (1999).

[50] *Id.*, 527 U.S. at 600.

[51] For a discussion of extending the ADA's integration mandate to address mass incarceration, and noting other areas where Olmstead has been extended beyond civil institutionalization, *see* Robert D. Dinerstein & Shira Wakschlag, *Using the ADA's "Integration Mandate," to Disrupt Mass Incarceration,* 96 DENVER L. REV. 917, 929-31 (2019). A comprehensive listing of the Department of Justice's *Olmstead* litigation can be found at https://www.ada.gov/olmstead/

[52] Leslie Salzman, *Rethinking Guardianship (Again): Substitute Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act,* 81 U. COLO. L. REV. 157 (2010).

[53] *Id.*

[54] Note, however, that the Committee on the Rights of Persons with Disabilities, which interprets the UN Convention on the Rights of Persons with Disabilities, has taken the position that Article 12 of the Convention, Equal recognition before the law, requires use of supported decision making in lieu of guardianship. *See,* Robert D. Dinerstein, Esme

with disabilities receive needed services in the most integrated (and least restrictive) setting should inform the court proceedings that we deploy to manage their person and financial arrangements.

III. OVERVIEW OF GUARDIANSHIPS AND ABLE ACCOUNTS

The Achieving a Better Life Experience (ABLE) Act of 2014 provides for state created savings programs for eligible persons with disabilities.[55] When properly created as 529A ABLE accounts, qualified distributions from the accounts are not taxed if the distributions are for qualified designated beneficiaries. Under the 2017 Tax Cuts and Jobs Act, ABLE accounts were expanded.[56]

However, note that there is a required payback not taxed if from ABLE accounts whether or not they are funded with first-party funds (the Medicaid beneficiary's funds) or third-party funds. The individual with a disability can create and fund them with the assistance of the person's guardian, trustee, or supporter(s). An ABLE account may be an ideal way to give the person more say over use of the funds in the account, as the SSA has stated clearly that the trustee of a SNT or any third-party discretionary trust can add funds to an ABLE account.[57]

IV. CASE STUDIES

The case studies described in the abstract, for which there has been provided a summary foundation of law and application, begin with guardianship versus special needs trust, followed by supported decision-making versus special needs trust, and ending with guardianship versus ABLE account.

A. Case Study No. 1

Guardianship versus Special Needs Trust

1. Assumptions and Practical Application of Guardianship and Trust Laws applied to this case study.

Critical to the focus of this case study is whether judges have jurisdiction. The jurisdictional analysis is two-fold: 1) whether judges of guardianship also have jurisdiction and authority over trusts, trustees, trust assets, and trust beneficiaries; and 2) Conversely, whether judges of trusts

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Grant Grewal, & Jonathan Martinis*, Emerging International Practices in Guardianship Law for People with Disabilities*, 22 (2) ILSA J. OF INT'L & COMPARATIVE LAW 435 (Winter 2016).

[55] See the Stephen Beck Jr. Achieving a Better Life Experience (ABLE) Act of 2014, Public Law 113-295, Division B, Section 101 *et seq*., 26 CFR parts 1, 25, 26 and 301; For a complete orientation on ABLE accounts, see the ABLE National Resource Center website, https://www.ablenrc.org/what-is-able/what-are-able-acounts/.

[56] See Tax Cuts and Jobs Act, Public Law 115-97, 131 Stat. 2054 (2017).

[57] Cite POMS

have jurisdiction over guardianships, guardians, guardianship assets, and persons under guardianship.[58]

a) Guardianship Jurisdiction

With only two states ratifying the UGCOPAA, there is little continuity and similarity in the guardianship statues across the country.[59] This hampers a thorough guardianship jurisdictional examination. However, it is helpful to be aware of how jurisdiction is expressly conferred under the UGCOPAA. The UGCOPAA expressly defines jurisdiction in Article I, Section 104, applying it to adult guardianships in Article 3and other protective arrangements in Article 5.[60]

Generally, guardianship courts have jurisdiction over all forms of guardianship (and protective arrangements in some states). Virtually all states have statutory requirements for accountings and status reviews in plenary or general guardianship. In guardianships of the person, there are status reviews of the guardians' affirmative duty to act in the adults' best interests, enhancing their quality of life.[61] However, implementation of status reviews in many states is less than ideal.[62]

The complexity regarding guardianship jurisdiction occurs because there are different judicial structures having jurisdiction over guardianship, with different names, and controlling different areas of law.[63] One example is how states organize what are called "probate courts."[64] Some states with the name "probate' for their courts, include jurisdiction over guardianship with

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[58] This is similar to how assets in trust are not part of a decedent's estate.

[59] See *supra* note 6, UGCOPAA, Section _____, https://www.uniformlaws.org/committees/community-home?CommunityKey=2eba8654-8871-4905-ad38-aabbd573911c; See also a summary of the UGCOPPA attached to the website, and located at https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile

[60] See *supra* ___ UGCOPAA, Article I, Section 104 (b) through (d):

> (b) The [designate appropriate court] has jurisdiction over a guardianship, conservatorship, or protective arrangement under [Article] 5 for an adult as provided in the [insert citation to Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act].
>
> (c) After notice is given in a proceeding for a guardianship, conservatorship, or protective arrangement under [Article] 5 and until termination of the proceeding, the court in which the petition is filed has: (1) exclusive jurisdiction to determine the need for the guardianship, conservatorship, or protective arrangement; (2) exclusive jurisdiction to determine how property of the respondent must be managed, expended, or distributed to or for the use of the respondent, an individual who is 11 dependent in fact on the respondent, or other claimant; (3) nonexclusive jurisdiction to determine the validity of a claim against the respondent or property of the respondent or a question of title concerning the property; and (4) if a guardian or conservator is appointed, exclusive jurisdiction over issues related to administration of the guardianship or conservatorship.
>
> (d) A court that appoints a guardian or conservator, or authorizes a protective arrangement under [Article] 5, has exclusive and continuing jurisdiction over the proceeding until the court terminates the proceeding or the appointment or protective arrangement expires by its terms.

[61]

[62] See Sally B. Hurme and Diane Robinson, *What's Working in Monitoring Guardianships: Challenges and Best Practices,* __Syracuse L. Rev. ___ (to be published 2022); see *supra* note 6, UGCOPAA, Section _____. (Comprehensive status review developed).[63]

[63]

[64]

decedent estate administration and trusts,[65] Other states under the same rubric of "probate court" for their courts, limit jurisdiction to decedent estate administration and trusts, relegating guardianship jurisdiction to other courts.[66]

The complexity and confusion over guardianship jurisdiction does not end with different probate court jurisdiction applications. When the word "probate" is not used, a state may bind guardianship and trust jurisdiction under the same court.[67]

Generally, the assets in trusts are not considered guardianship assets.[68] When assets are transferred and held in trust, title is vested in the trust(ee).[69] If the assets had been owned by the person under guardianship but transferred into the SNT prior to adjudication and appointment, title would no longer be held by the person under guardianship and not considered assets in the guardianship estate.[70]

While there are states that provide guardianship judges concomitant jurisdiction and authority over trusts,[71] the greater difficulty is when the guardianship and trust statutes grant no statutory jurisdiction and authority over guardianship and trusts in the same court.[72] In these states, guardianship judges, lacking jurisdiction, are precluded from ordering the trustee of a trust to pay out of trust corpus any of the costs or expenses of the beneficiary of the trust that would promote the best interests of that beneficiary who is also the person under guardianship.

It is also problematic that when there are guardianships of the person (with no assets and therefore no guardianship estate), the guardians have no funds with which to advocate and litigate the adults' interests in trust assets of which they are beneficiaries.

b) Trust Jurisdiction

There is greater continuity and similarity in trust statutes across the country. This is evident as shown in the 35 states and the District of Columbia that have ratified the UTC.[73] A general over-view of the UTC is found in its General Provisions and Definitions, general comments.[74]

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67 If guardianship jurisdiction is statutorily granted, it often confers limited authority, such as only allowing review of a trustee's duties in the administration of the trust, for example see _____. Although limited, this language could give guardianship judges authority to hear issues related to the trustee's duty to make trust distributions to the trust beneficiary who is also the person under guardianship.

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70 See

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73 See *supra* note ___, UTC, and accompanying text.

74 *Id.,* UTC, General Provisions and Definitions, general comments:

> The Uniform Trust Code is primarily a default statute. Most of the Code's provisions can be overridden in the terms of the trust. The provisions not subject to override are scheduled in Section 105(b). These include the duty of a trustee to act in good faith and with regard to the purposes of the trust, public policy exceptions to enforcement of spendthrift provisions, the requirements for creating a trust, and the authority of the court

Specifically, under the UTC, subject matter jurisdiction and personal jurisdiction are expressly determined.[75] Other specific sections of which delegates and participants should be aware, include: Section 106 acknowledging that the UTC is supplemented by the common law of trusts;[76] Section 107, addressing the governing law;[77] and Sections 410 and 411, addressing proceedings to determine modification or termination of trusts, and modification of non-charitable irrevocable trusts by consent.[78]

"Governing law of the trust" requires clarification. This means that if in the trust document it declares "This trust shall be governed by the laws of [insert state name]", the named state's laws govern the trust, and the trustee carrying out administration and operation. However, when the beneficiary of the trust is on Medicaid, the laws of the state where the beneficiary is resident or domiciled determines eligibility. Assume for an example the trust was created in New York, with an expressed declaration that the laws of New York apply. Assume too that the beneficiary is a resident and domiciled in North Carolina. While the trustee must adhere to New York law for trust administration and operation, the trustee must understand what North Carolina Medicaid guidelines apply to distributions out of the trust.

Many states ratifying the UTC, have placed jurisdiction over trusts in what is called "probate courts,"[79] As discussed above regarding guardianship jurisdiction,[80] many of those

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to modify or terminate a trust on specified grounds. The remainder of the article specifies the scope of the Code (Section 102), provides definitions (Section 103), and collects provisions of importance not amenable to codification elsewhere in the Uniform Trust Code. Sections 106 and 107 focus on the sources of law that will govern a trust. Section 106 clarifies that despite the Code's comprehensive scope, not all aspects of the law of trusts have been codified. The Uniform Trust Code is supplemented by the common law of trusts and principles of equity. Section 107 addresses selection of the jurisdiction or jurisdictions whose laws will govern the trust. A settlor, absent overriding public policy concerns, is free to select the law that will determine the meaning and effect of a trust's terms.

[75] *Id.*, UTC, Section 202 Jurisdiction over trustee and beneficiary:

(a) By accepting the trusteeship of a trust having its principal place of administration in this State or by moving the principal place of administration to this State, the trustee submits personally to the jurisdiction of the courts of this State regarding any matter involving the trust.

(b) With respect to their interests in the trust, the beneficiaries of a trust having its principal place of administration in this State are subject to the jurisdiction of the courts of this State regarding any matter involving the trust. By accepting a distribution from such a trust, the recipient submits personally to the jurisdiction of the courts of this State regarding any matter involving the trust. *Id.*

[76] *Id.,* UTC, Section 106 (The Uniform Trust Code codifies those portions of the law of express trusts that are most amenable to codification. The Code is supplemented by the common law of trusts, including principles of equity. To determine the common law and principles of equity in a particular state, a court should look first to prior case law in the state and then to more general sources, such as the Restatement of Trusts, Restatement (Third) of Property: Wills and Other Donative Transfers, and the Restatement of Restitution).

[77] *Id.,* UTC, Section 107 Governing Law (The meaning and effect of the terms of a trust are determined by: (1) the law of the jurisdiction designated in the terms unless the designation of that jurisdiction's law is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue; or (2) in the absence of a controlling designation in the terms of the trust, the law of the jurisdiction having the most significant relationship to the matter at issue).

[78] *Id.,* UTC, Sections 410 and 411, at 66-71.

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probate courts are given dual statutory authority by joining jurisdiction over guardianships and trusts.[81] To complicate the analysis, some UTC states grant jurisdiction over both guardianships and trusts without denominating them as "probate courts."[82] However, regardless of whether or not the UTC is ratified, all states declare in their statutes that there is subject matter and personal jurisdiction over trust beneficiaries. [83]

As of the writing of this article, thirty percent (30%) of all states had not ratified the UTC.[84] These non-UTC states[85] have a variety of judicial courts with different names and divisions.[86] The analysis is more complicated in that some of these non-UTC states name their state judicial entity "probate courts" but do not expand jurisdiction to include guardianship. Other non-UTC states not naming their state court "probate court" expand jurisdiction over guardianships and trusts.[87]

For the purpose of this case study no. 1, the state's statutes have guardianships and trusts in the same court with original and exclusive jurisdiction guardianships and trusts.

c. Case Study 1.

Joe D., Sr., and Jane D. were the parents of Joe D. Jr., Cindy J., and Tom D. Jane D. died 10 years ago; Joe D., Sr. died 2 year ago. They live in a UTC state with its court named "probate court" in which dual jurisdiction over, guardianships and trusts is maintained. Joe D., Sr. funded a Testamentary Special Needs Trust (SNT) for Tom D., age 58, and a person diagnosed in the mid-range of the Autism spectrum. Joe D., Sr. did so because he wanted to protect the public benefits Tom D. was receiving: SSDI (disabled dependent of a deceased parent, often referred to as disabled adult child benefits) and Medicaid benefits, by and through the Home and Community Based Services waiver. Tom D. lives with two roommates in a townhouse that allows greater independence than he would have in a congregate setting.

Joe D., Sr. had been Tom D.'s guardian of the person. Tom D. is highly intelligent but struggles functionally with social and behavioral maturity. Tom D. lives in a group home for higher-functioning adults in which they have greater independence with case managers and life coaches. Tom D. is a part-time employee, working as an assistant trainer on the high school football team that Joe D., Jr. coaches.

Knowing his children as well as he did is the reason Joe D., Sr. nominated Joe D., Jr. to be appointed successor guardian for Tom D., and named sister Cindy J. as trustee of Tom D.'s testamentary SNT. Of the $3,000,000 in his estate, Joe D. Sr. left a total of 20% to Joe D., Jr., and

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83 Therein lies one of the tools for persons under guardianship. See *infra* note ___, Recommended Policy and Practice Tools.

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85 Rhode Island, New York, Delaware, Indiana, Georgia, Louisiana, Texas, Oklahoma, Iowa, South Dakota, Idaho, Washington, Nebraska, California, Alaska, and Hawaii. Note that in February 2021, Hawaii filed legislation to ratify the UTC.

86 See *supra* note ___, and accompanying text; see UTC map of the US with ratifying states, https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.

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Cindy ($600,000.00 - $300,000.00 each), and the net remaining estate of $2.4 Million to fund the testamentary SNT for Tom D., as the *primary* beneficiary, with Joe D., Jr., and Cindy J. as contingent beneficiaries, to share equally, per stirpes beyond Tom D.'s life.

Joe D., Jr., aged 61, with no disability, is divorced with no children. He became the successor guardian of the person of Tom D., with whom he has always been close. He is a former athlete and coaches the high school football team. Joe D., Jr., was successful in advocating for Tom D. to be hired as a part-time assistant trainer to the team. Joe D., Jr. is intuitive and sensitive, and has always done things for others. He is comfortably, but modestly, situated, with little regard for wealth, finances, and taxes.

Cindy J., age 51, with no disability, is married, with two children. She has always been resentful of how Joe D., Sr. and Jane D. doted over Tom D., often leaving her to fend for herself, while Joe D., Jr. had Tom D., his younger brother and best friend. While Cindy, a CPA, has always been careful and prudent with finances (which is why Joe D., Sr. appointed her the trustee of the testamentary SNT for Tom D.), in the last year she has divorced her husband, who lost almost all of their assets in risky investments during the COVID-19 economic recession, including all of Cindy J.'s inheritance from Joe D., Sr. Long story short, Cindy J. would not provide any distributions out of the SNT for Tom D. that would enhance his quality of life. Although it was never said, Cindy J. was intent on having as much of the corpus as possible remaining in the SNT at the time of Tom D.'s death.[88]

Joe D., Jr., on behalf of Tom D, has made many requests to Cindy J., as trustee of Tom D's SNT, to purchase various things that would enhance Tom D.'s quality of life, including a computer, additional training and services from an occupational therapist, and expenses for Joe D., Jr. to chaperone Tom D. on a trip to Washington, DC. Joe D., Jr has insisted to no avail that Cindy J. convene the trust advisory committee (written into the trust document) to consider Joe D., Jr.'s many requests.

Additionally, Joe D., Jr., had on several occasions requested Cindy J. to produce a full accounting of the SNT since the SNT became active right after Joe D., Sr. died. He specifically requested that Cindy J. produce all receipts and disbursements, including any payments for fees and commissions paid to Cindy J., personally, and any other disbursements that would be for the benefit of Cindy J. or her children. Cindy J. never responded. Joe D., Jr., also sent the requests in writing and referenced a letter of intent their parents drafted. The letter outlines what their parents' intentions were in creating the SNT for Tom D. and listed some of the requested items in their actual letter of intent. [89]

Out of utter frustration with Cindy J., and believing he had no alternative, Joe D., Jr. filed a motion with the guardianship court requesting the judge to order Cindy J. to make distributions

[88] We believe that this fact pattern is all too common, and thus many legal advocates suggest using an impartial trustee, or a trust protector, for this very reason.

[89] For a discussion of letters of intent, *see* http://www.bytheirside.org/Images/PDFs/NextStepsR.pdf; https://www.fletchertilton.com/1C2194/assets/files/Documents/Home%20Control%20Booklet.pdf

from Tom D.'s SNT to cover the many items requested.[90]

Additionally, Joe D., Jr. filed a separate petition under the state trust code for the probate judge to remove Cindy as trustee of Tom D.'s SNT, in part because Cindy J. was and is now in a material conflict of interest due to the financial strain on her, and her self-interest in benefitting from the remaining assets in the SNT at the time of Tom's death.

In her filed response to the guardianship motion, Cindy J. argued that Tom's SNT has express language declaring that upon Joe D., Sr.'s death two years earlier, the SNT became irrevocable, and that as trustee of the SNT, she has complete authority and discretion over any distributions from the corpus of Tom's SNT and therefore the motion should be denied.

Cindy also filed her response to the petition under the trust code, declaring that the terms of the SNT exempt her, as trustee, from any judicial process related to accountings, bonding, or disclosures regarding distributions made out of the SNT, or any allegations of fiduciary breach of duty or self-dealing by the trustee.

d. Analysis

Consider the two competing tensions developed in this case study 1: First, the tension to frame the analysis so that it includes guardianship and trust laws applicable in as many states as possible;[91] and second, the tension to show how the guardian and trustee find remedies to address their conflicting interests when serving the same person under the guardianship and the trust.[92]

Applying the first tension of competing and potentially contradictory state laws to this case study, compare UGCOPPA, Article 3 Adult Guardianship, and Article 5 Other Protective Arrangements, with the Uniform Trust Code (UTC), Section 2-203(a), specifically declaring the court's personal and subject matter jurisdiction over irrevocable trusts when disputes arise regarding the trustee's powers and administrative duties.[93] Unlike this case study, there are many

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[90] See Rebecca C. Morgan and Edwin M. Boyer, *Rights and Relationships between the Guardian, Person under Guardianship, and the Court,* ___ Syracuse L. Rev. ___ (to be published 2022).

[91] Hence the reference to the UGCOPPA with its visionary and proactive approach to guardianship, conservatorships, and other protective arrangements. The problem is based on statutory and case law authority in North Carolina.

[92] See Gerard G. Brew, *Trusts in Guardianship: Using "Family Freeze" Agreements to Resolve Disputes,* 46 ACTEC Law Journal, 9 (Fall 2020) (Although the article uses New Jersey Guardianship law as its reference, the anecdotal illustrations are applicable to the general tensions found when families confront the parent's decline in mental function and the competing interests of the children, suggesting the guardianship litigation is more akin to "will contests in disguise". *Id.* Brew offers the "high profile Doris Duke will contest" when suggesting that "the decedent's estate planning was like musical chairs". *Id.* At 13, n. 15, citing *In re Duke,* 663 N.E.2d 602 (N.Y. 1996), Don van Natta Jr., *Deal Reached Over the Estate of Doris Duke,* N.Y. Times (Apr.11, 1996).

[93] See UTC, 2-203 (a) expressly declaring the following causes of action that may bring a trust into court [which court?? Is there any issue as to who can bring the actions?]: "1) to appoint or remove a trustee, including the appointment or removal of a trustee pursuant to 4-414(b) [and the appointment of a special fiduciary pursuant to complimenting statutory authority (in North Carolina see N. C. Gen. Stat. §36C-8B.9); 2) to approve the resignation of a trustee; 3) to review trustees' fees and review and settle interim and final accountings; 4) converting income trusts to a different calculation; 5) to transfer a trust's principal place of administration; 6) to require a bond; 7) to enter orders with respect to a trust for the care of animals; and 8) to make orders with respect to a noncharitable trust without

state statutes that do not grant duel jurisdiction and authority to one judge over guardianships and trusts.[94]

Applying the second tension of guardians and trustees finding remedies for their competing and potentially conflicting interests to this case study, Joe D., Jr. could seek the court's order for mediation between him as Tom D.'s guardian, and Cindy J. as his trustee.[95] If mediation were successful, this resolution could lead to a settlement that would be in the form of a "care-plan" for Tom, in which Cindy would agree to make distributions from the SNT on a monthly basis for categorical items directly associated with Tom's activities of daily living. She would also agree to consider periodic requests made by Joe, Jr. that would further enhance Tom's quality of life, and allowing Joe, Jr., to accompany Tom on outings and trips. The court, in accepting the settlement, should require periodic status reports[96] and hearings in which Joe, Jr., Tom, and Cindy would give testimony under oath regarding compliance with the settlement. It would also require Tom to tell the court in his own words how he has benefitted from these expenditures, thereby enhancing his autonomy and empowering him.

If mediation fails, Joe, Jr. should consider filing a motion in the guardianship case, calling for the trustee to answer the allegation that Cindy J.is in a material conflict of interest since she has expressly declared her intent to protect the corpus of the trust from being distributed solely for her own self-interest and ignoring the clear and convincing intent of the grantors as evidenced by the letter of intent, to which the trust document specifically referred. In most states, Joe, Jr. could also file an action for declaratory relief.[97] Regardless of the statutory vehicle used, and regardless of the express language in the testamentary trust, Cindy would have to answer the allegations for which she probably has no defense. This is where Joe, Jr. may prevail, and successfully obtain the payment of his attorney's fees and costs out of the trust.[98]

Once before the court, and under the UGCOPPA, the judge should enter an order appointing a Guardian ad Litem (GAL), or court visitor,[99] to investigate the facts and circumstances surrounding the guardianship and the SNT, and to file reports with

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an ascertainable beneficiary…" *see also Keith v. Wallerich,* 687 S.E.2d 299 (2009), in which the North Carolina Court of Appeals broadly defined the word "administration" in connection with a trust to mean "a judicial action in which the court undertakes the management and distribution of property". *Id.* at 302.

[94] Since the focus of the article and this case study address conflicts between guardians and trustees, it is impossible to reach a broader and more extensive assessment of state guardianship and trust statutes to determine how many have joint jurisdiction over guardianships and trusts, or to determine the opposite where jurisdiction is in separate courts.

[95] See *supra* note ___, NGA Standard of Practice 5 (VI), 12 (I)(B), 13 (VI); Morgan and Boyer, *supra* note ___; compare UGCOPAA Section _____, with N. C. Gen. Stat. § 35A-1108 (a) and (b), and in N. C. Gen. Stat. § 7A-38.3B, in which the Clerk of Superior Court, as the judge of guardianship, has the discretionary authority to order mediation by a board-certified mediator.

[96] An important issue is whether the court could require reports from the guardian only, or also from the trustee. It is unclear whether the guardianship court would have jurisdiction over the trustee. It is possible that as part of the agreement the trustee could agree to the guardianship court's jurisdiction.

[97] See N. C. Gen. Stat. §1-253-267, North Carolina Declaratory Judgements.

[98] See *supra* note ___, UGCOPAA, Section _____; in North Carolina, consider the coupling of N. C. Gen. Stat. §36C-10-1004 with N. C. Gen. stat. §6-21(2) for the awarding of attorney's fees and costs.

[99] See *supra* note ___, UGCOPAA, Section _____.

recommendations regarding the "best interests" of Tom, and the accountability for Joe, Jr. to provide for Tom when he is only the successor guardian of the person.[100] The GAL might also address supported decision-making options for Tom to achieve greater independence and self-determination. The resulting report might provide the court with evidence that Joe, Jr. in fact was acting on behalf of his brother Tom and not just suggesting outings, trips and other expenditures that he desired for himself. [101]

Turning to the trust, the judge should consider the underlying intent of the creator of the trust, and how administration and distributions would fulfill Joe, Sr.'s legacy, and his intended priority of sustaining Tom's quality of life, with only secondary consideration for the contingent beneficiaries, especially Cindy, to whom he had already provided an ample inheritance.

B. Case Study No. 2

Juan G. is a person with moderate intellectual disability. He is 45 years old. He is the son of Carlos and Maria G. He has two siblings, Joaquin G. and Teresa L., who are 48 and 50 years old, respectively. Juan G. lived at home with his parents and siblings until he was 25, whereupon his parents arranged for him to live in a group home run by a reputable nonprofit agency. The group home was in the same state but some five hours away. Juan was very close to his parents. Among other things they shared a love for light pop and rock and roll music.

Juan's parents remained actively involved in his life after he went to the group home, visiting him frequently and having him home for periodic visits. Joaquin and Teresa each stayed in contact with Juan, but their visits were less frequent because they had both moved relatively far away, had demanding jobs, and were raising their own families. Most of their contact with Juan was by phone.

Juan works in supported employment in the community where he lives. He opened his own bank account and makes decisions about what personal and other items he wishes to purchase. He has been fortunate in not having had significant health needs, and has never confronted a medical decision that has required a sophisticated discussion of informed consent. (He has been able to consent for his annual flu shots, for example.) Juan's parents had thought about petitioning for guardianship for him but never got around to it. Moreover, they thought that Juan seemed to be able to function making his own decisions, and he was very good about consulting with them regarding decisions that were more complicated or difficult.

Juan's parents did learn about special needs trusts and, although they were not well off, decided to set one up for him. They funded the trust with a payment of $20,000. They made Joaquin and Teresa co-trustees. The trust instrument is vague about its purposes, reciting only that the funds in the trust should be used to "supplement but not replace" any governmental benefits to which Juan is entitled, and that the funds should be used for "necessary expenses not otherwise reimbursable" by the government. The trust instrument does not identify any specific kinds of activities that the SNT should fund. Joaquin and Teresa would receive any monies remaining in the trust should Juan pre-decease them.

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[100] See *supra* note ___, English and Kohn at ___

[101] See Case No. 2 for a situation where this distinction may be more problematic.

Juan's parents Carlos and Maria G. died within two months of each other five years ago. Joaquin and Teresa took over as co-trustees of the special needs trust. Juan missed his parents dearly and sought more frequent contact with Joaquin and Teresa. They obliged, though contact still was mostly by phone or FaceTime and Zoom. The group home staff thought that Juan would benefit from having a few people help Juan with decision making. They suggested that he consider entering into a supported decision-making arrangement with two people with whom he had become close. One was someone with whom he worked at his supported employment position. (This person was not his supervisor.) The second was someone who used to work at the group home but, though he no longer did so, had remained in contact with Juan as a friend. These two men—Larry L. and Stan R.—agreed to serve as supporters for Juan, and Juan agreed to have them serve in that capacity. This arrangement was informal, as Juan did not live in a state that formally recognized supported decision making.[102]

Juan is an avid fan of the musician Billy Joel and for a number of years has talked about wanting to see him in concert. (Assume all events occur pre-pandemic.) He has discussed at length his plans with his supporters, Larry and Stan, and, well aware of Juan's taste in music, they agree with Juan's choice, although they emphasize that it is Juan's, and not their, decision to make. Billy Joel plays his concerts at Madison Square Garden, New York, which is several hundred miles away from Juan's home. Working with Larry and Stan, Juan has planned a trip to New York City, where he would stay for a few days, take in the concert, and see other sights in New York. A staff member from his group home would accompany him, but would have to pay the staff member's expenses and salary for this special trip.

With the assistance of Larry and Stan, Juan approaches his siblings, the co-trustees of the SNT, to authorize a distribution to him that would enable him to attend the concert and spend time in New York City. With their help, he has estimated that the total cost for him and his staff would be $3,000. Joaquin and Teresa balk at the expenditure. They tell Juan that "he only *thinks* he wants to see Billy Joel," and point out to him that he tends to obsess about seeing certain performers (e.g., Neil Diamond, Barry Manilow) only to lose interest after a while. They believe that Juan will do so with Billy Joel as well, and that the expenditure therefore would be a waste of money. They also are suspicious that the staff member who would accompany Juan on the trip may simply want to attend the concert and visit New York City without having to pay for it out of pocket. They tell Juan that they will not approve the expenditure.

Juan is disappointed and angry, and his supporters Larry and Stan are as well. With Juan's permission (and with Juan also on the phone), Larry speaks directly with Joaquin and Teresa, emphasizing that he and Stan have talked with Juan at great length and that they believe he really is interested in going to the concert. The trustees respond that they have a fiduciary obligation to preserve Juan's assets for what they deem to be more important expenditures and they believe this proposal to be frivolous. When Larry and Juan object to this characterization, Joaquin and Teresa

[102] *See supra* n. [ ].

respond that "Neither Larry nor Stan is Juan's guardian," and therefore cannot force them to authorize the expenditure.

What recourse does Juan have?

a. Analysis

The first thing to observe about the above problem is that even if Juan were under guardianship the court in the guardianship matter (assuming the court agreed with Juan's guardian about the wisdom of the expenditure) might not be able to require the SNT trustees to authorize the expenditure for the trip to see Billy Joel. Even if guardianship were helpful, however, it would be a high price for Juan to pay to give up his autonomy over important life decisions (even if the guardianship were limited) just to be able to attend a concert.

Of course, the co-trustees have a potential conflict of interest here, since any expenditure on Juan's behalf potentially reduces the trust remainder that would be distributed to them if Juan pre-deceases them. But even if the co-trustees were acting in good faith, their decision is inconsistent with the basic concepts of person-centered planning, least restrictive intervention, and *Olmstead*-related integration that we have discussed in this article. Juan's request is not likely to be harmful to himself or others; it is consistent with his values (his love for this form of popular music); and it is the result of conversations he has had with his supporters, who know Juan well and support him in his desire to attend the concert. Indeed, one can make the case that the supporters Larry and Stan know Juan's preferences much better than Joaquin and Teresa, who are not in close contact with him.

Juan, perhaps with his supporters' assistance, could contact the local protection and advocacy office to see whether its lawyers might be willing to work with him and his supporters to try to persuade the co-trustees to reconsider. Perhaps the P&A lawyers have examples of the kinds of expenditures SNTs regularly authorize, and if Juan's proposed expenditure is not unusual, the co-trustees might be willing to authorize Juan's request.

At this point, unless Juan can persuade Joaquin and Teresa to reconsider, it would appear his only recourse would be to hire a lawyer (or get the P&A to represent him without a fee) to file an action against the co-trustees. A court that values Juan's autonomy and the strength of his supported decision-making arrangements (and perhaps that liked Billy Joel's music) might well agree to require the co-trustees to approve the payment. It might seem that the dispute would be more easily resolved in Juan's favor if the SNT had specific language in it that indicated what Juan's preferences were (including his taste in music) but the presence of such language in the trust document could lead a court or relevant government agency to invalidate the trust. A better alternative would be for the trust settlors (in this case Juan's parents) to have issued a letter of intent at the time the trust was created that would guide the actions of the trustees.[103] Juan's lawyers might be able to argue in court that the co-trustees have a conflict of interest and should be ordered either to approve the expenditure or possibly be replaced as trustees, but the latter could also be a tough argument given that Juan's parents, as the settlors of the trust, specifically designated Juan's

[103] See n. [ ] [discussion of letters of intent].

siblings as the co-trustees.

The clash of informal and formal decision-making arrangements is common in the lives of people with disabilities. Here, the formal modality—the SNT—ironically may present the worst of both worlds for the person with a disability, as there is no probate court to supervise a court-appointed person such as a guardian. Rather, unless challenged, the co-trustees are left to exercise their own judgment about how the trust funds should be expended. As indicated, SNTs with a letter of intent would be one potential solution to the problem. So too might be a requirement that SNT trustees receive training that would emphasize the role of SNTs as supporting autonomy and integration rather than impeding it.

C. Case Study No. 3

Adult Protective Services filed a petition for guardianship for Zoe W., who is 95 years old. Zoe lives in her own home, which she owns outright. She is the primary caregiver for her grandson Harry W., who has cerebral palsy and mild intellectual disability, and was orphaned when his parents perished in a motorcycle accident a number of years ago. He is 50 years old. There are no other family members involved in looking out for either Harry or Zoe. None of their arrangements is formal or official. Zoe is very distrusting of "lawyers and the court system," and has never been to court on any type of matter. Zoe's physical health is deteriorating rather rapidly, and the isolation she and Harry experienced during the pandemic has made things worse. Zoe admitted that she started to get rather "blue." She can no longer take care of herself let alone Harry. Although their neighbors have been trying to help them, out of the goodness of their hearts, Zoe distrusts this assistance and thinks, "All they want is my money."

Harry is sad because his grandmother is blue and cannot do all the things she used to do, and he is nervous because it feels like no matter what he does, "Grandma Zoe is unhappy." The neighbors contacted adult protective services because they were concerned about the condition of the home and worried that both Zoe and Harry might be suffering neglect and be at risk of becoming homeless. There have been many notices left on the door at the home, and one of the notices is for a property tax foreclosure. Zoe asserts that she cannot afford to pay her property taxes, does not want to pay them because they do nothing for her, and believes she has paid enough in income taxes already. She does not want the "government" to take her grandson away from her, or from her home. The court-appointed guardian ad litem ("GAL") reported to the guardianship court that she is at imminent risk of having both happen.

The GAL reported that Zoe was going to object to any guardianship being imposed upon her. She also was going to object to anyone assisting her with the management of her money, paying her bills, or coordinating care for Harry in her home. Upon receiving this information from the GAL, the court appointed a temporary guardian for Zoe, and ordered the guardian to attempt to get a handle on the financial situation to determine if a guardian of the estate or conservator needed to be appointed for Zoe and/or Harry. After an investigation, which Zoe fought every step of the way, the court was able to confirm the following: Harry has no guardian, never has had a guardian and he is a delightful guy! He does receive Social Security Disability Insurance ("SSDI") on his parents' record as a DAC ("Disabled Adult Child") beneficiary. He also gets Medicaid and services from a Habilitation Supports waiver, including skill building assistance and supportive

employment. Those services stopped when the COVID-19 shut down started. There is an immediate concern because Zoe is his Representative Payee and has allowed over $5,000 to accumulate in that account.

The GAL worked closely with United Cerebral Palsy association in determining what needed to be done to protect Harry, and make sure the fact that his grandmother's decline does not necessitate a move to a more restrictive setting and more long-term court involvement. This was really an important goal because the court is required to inquire into these facts before ordering a protective measure for Harry or Zoe, to assure that they are living in the least restrictive setting. As noted below, consider as a "tool in the toolbox" working with the United Cerebral Palsy Association, which has a grant whereby it can act as representative payee for the individual.[104]

a. Analysis

In this matter, UCP assisted Harry in requesting the Social Security Administration ("SSA") to change his representative payee from Zoe to UCP. This change would allow UCP to work with Zoe to transfer the money to which she was entitled from Harry's benefits to cover his expenses for food and shelter. That brought his account balance lower, but not low enough to be under the $2,000 maximum permissible for continued Medicaid eligibility. UCP and the GAL then jointly requested an attorney be appointed for Harry, and paying the retainer with the funds from his SSA overage. The new attorney drafted a letter to SSA informing the agency of the uses for the funds, thereby hoping to avoid a penalty. Then the court-appointed attorney drafted a power of attorney and appointment of a patient advocate for Harry. The attorney agreed with the GAL that although Harry had a developmental disability he had the capacity to execute these documents (and the court agreed). Harry named his grandmother and UCP jointly as power of attorney and UCP only as his patient advocate for end- of-life and mental health treatment. Any additional advocates involved in his life will need to work with UCP and Zoe. This arrangement—essentially one of supported decision making--will assist Harry in avoiding the need to have his rights removed to maintain him in the same community setting in which he has lived for decades.

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[104] Some people with developmental disabilities or dementia might need help managing their money. The goal is to ensure that benefit payments from the Social Security Administration (SSA) and/or the Supplemental Security Income (SSI) are managed properly. The good news is that, in Michigan, MI-UCP can be appointed by the SSA to be the representative payee for people with disabilities who cannot manage or get someone else to manage their money. MI-UCP's responsibilities include money management, providing protection from financial abuse and victimization, and establishing a productive, long-term relationship with their clients.

The core responsibilities of money management are to pay for the person's present and foreseeable needs and to properly save any excess funds. MI-UCP's definition of the term "needs" includes everything the person would otherwise manage for themselves. As the payee, MI-UCP keeps detailed records of the person's expenses and savings and, upon request, provides an accounting to SSA. For more information, please email reppayee@mi-ucp.org or click here to download their pdf. Also, please note the following online information A Guide For Representative Payees: www.socialsecurity.gov/payee.

Organizations in other jurisdictions also can serve as organizational representative payees. For example, in Washington, D.C., the non-profit agency Bread for the City is authorized to serve as organizational representative payee for clients receiving services from the Department of Behavioral Health. *See* https://breadforthecity.org/wp-content/uploads/2015/08/2017-CSW-Handout.pdf

As Zoe was contesting the proposed guardianship, the court ordered a neuro-psychological examination and a complete physical for her. The psychologist and physician conducted these examinations and determined that although her capacity has diminished, most of what was happening with her related to her depression and an untreated urinary tract infection ("UTI"). After Zoe agreed to treatment for the UTI, motivated by her belief it would help her avoid guardianship, she bounced right back. She was able to hire her own attorney to draft a power of attorney and patient advocate designation for her. She was able to secure the assistance of her local pastor for this role. He was also able to secure a property tax abatement for her real estate taxes, thereby allowing her to stay in her home. The attorney and pastor also worked with Zoe to help secure a provider agency to provide services to Harry. This was done in lieu of removing him from Zoe's home. It also helped her stay healthy as she was concentrating on her needs and allowing the agency to provide services to Harry to concentrate on his needs. This was also done, so that Harry would be familiar with staff coming and going from the home in case Zoe's health declined again, or, worse, she would need to leave the home.

Notwithstanding all of these developments, Harry was still over the asset limit in the representative payee account. Therefore, UCP assisted him in establishing an ABLE account, and transferring money each month into that account to keep him under the $2,000 limit. These funds were also used to make some repairs to the home so that Harry could live there, potentially with a housemate when Zoe passed away. UCP worked with the Habilitation Supports waiver to make sure that services were in place so that staff knew how to keep both him and Zoe safe. The pastor who was assisting Zoe had a very sincere heart to heart talk with Zoe, and they agreed that when she passed away she wanted all her funds to go to keep Harry safe from the "government." Because Harry had a disability and was under the age of 65, her attorney advised Zoe that she could transfer her home and other assets to a pooled trust for the sole benefit of Harry. This is an exempt transfer for Medicaid purposes and, as a result, Zoe now qualified for a different home and community-based waiver that covers senior citizens. The organization that established and managed the trust agreed to accept her home through a life estate deed, so that Harry and not the government would get the home. The agency providing Harry services was able to contract with the new waiver agent and now also provides services to Zoe.

Due to the use of all the tools mentioned above, the Court, the GAL, the advocates, and the agency staff were able to maintain Zoe and Harry in their community setting, which was clearly the least restrictive setting. They were also able to avoid the need for a court-appointed Guardian/Conservator for both Harry and Zoe, while assuring there were adequate less restrictive options available to achieve the goals a guardianship or conservatorship would have accomplished. All too often guardianship or a protective trust is the first thing folks look to rather than the more supportive and less restrictive tools mentioned in this case study.

III. RECOMMENDED POLICY AND PRACTICE TOOLS

A. Case Study No. 1

1) Recommended Policy: Revise the UGCOPPA, the UTC, and where necessary, state guardianship and trust statutes, to address the gap in jurisdiction between guardianship courts and trust courts.

2) Recommended Practice Tools:

a) Retaining jurisdiction. One tool available to the judge is to order the retention of jurisdiction over the administration of the guardianship and the trust, calendaring periodic status reviews of Cindy's distributions out of the SNT for Tom's benefit.[105] In some states, the judge must assure that the person is living in the least restrictive setting, in which case the court should ask the GAL to address this issue in the GAL report. If not statutorily required in guardianship, but required in the trust terms, the court could instruct the GAL to address the issue in the GAL report.[106]

b) Care-Plan. Another tool would be for the court to order that a "care-plan" be developed between Joe, Jr., and Cindy to be audited by the GAL and presented to the court at the time of the periodic review.[107] This plan should incorporate the specific intention of the grantor in the letter of intent.[108] For example, if they had season tickets purchased so Tom could attend local college basketball games while they were alive and they wanted the tradition to continue, they could so indicate in the plan. Furthermore, if Tom always lived in an unlicensed setting and wants to continue to do so, the plan could include expenses to facilitate his choice and maintain his residence as his least restrictive setting.[109]

c) Financial audit of Trust Corpus. Another tool available to the court would be ordering a certified professional to perform an audit of all corpus in the trust, advising the court regarding Cindy's investment strategy, assuring diversification, and examining all fees and commissions Cindy has paid to the investment advisors, and for the fees and commission she paid to herself. This audit would include an income and principal analysis mandated under the state's statute.[110]

d) Order Restricting Accounts. An order restricting accounts would place the majority of the trust corpus in separate accounts, specifically naming all participating investment and banking institutions.[111] The named entities would be prohibited from making any change in where funds are held or making any distributions out of the restricted accounts without Cindy, as trustee, filing a motion with the court for approval.[112]

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[105] See *supra* note ___, and accompanying text addressing jurisdiction.

[106] See *infra* note ___.

[107] See NGA Standards of Practice, Standard 12 (I) (F); see Morgan and Boyer, *supra* note ___.

[108] See NGA Standards of Practice, Standard 13 (III).

[109] *Id.,* Standard 12 (I) (A)(1) and (B).

[110] As of the time of this article, the Fiduciary Uniform Principal and Income Act (approved for enactment in all states in 1997, and last amended or revised in 2008) has been enacted in one state (Utah 2019) and has been introduced in five states (Arkansas., Tennessee., Kansas., Colorado, and Washington State 2021). However, many other states have enacted similar principal and income statutes, for example, see North Carolina's Uniform Principal and Income Act, N. C. Gen. Stat. §37A-1-101, et seq. (enacted 2010).

[111] See NGA Standards of Practice, Standard 17 (XIII) and (XIV); see *supra* note ___, UTC, section 313, Representation by Fiduciaries and Parents: To the extent there is no conflict of interest between the representative and the person represented or among those being represented with respect to a particular question or dispute…"(2) a [guardian] may represent and bind the ward if a [conservator] of the ward's estate has not been appointed."

[112] It is noteworthy that this procedure is common when the person under guardianship (or conservatorship) is a

e) Bond on Unrestricted Corpus. The court might require Cindy to bond all corpus of the SNT that has not been otherwise placed under an order restricting accounts.[113]

f) Expanded Limitations on the Guardianship. As a function of the court's examination of Tom's quality of life, Tom should be invited to appear before the judge to describe his goals, needs, and preferences[114]. Just as any adult might not tell his siblings everything about his life, Tom might discuss with the court matters he would never raise with Joe, Jr. or Cindy. For example, Tom might have a partner or best friend with whom he wants to live and be less dependent on his siblings. If the GAL concludes that Tom might have concerns he would rather discuss directly with the judge, the GAL could recommend that Tom meet with the judge privately in chambers. [115]

Tom may express to the GAL these desires for his autonomy to be increased, and for Cindy to pay for the increased expenses for him to live on his own.[116] It may actually raise an issue for the GAL to present to the court that there should be a limited guardianship for medical or some other sub-set of life decisions,[117] or an appropriate protective arrangement under UGCOPPA, Article 5.[118]

g) Separate Action for Restoration. Following this course of facts, the GAL may support Tom in seeking the appointment of an attorney to represent him in a petition to restore, fully or partially, his capacity.[119] This raises a fundamental issue as to the constitutionality of Tom's right to counsel.[120]

h) Letter of Intent. Instead of the court entering an order as mentioned in recommended practice (b) above, Joe, Jr. and Cindy could agree to abide by Joe, Sr's. letter of intent;[121]

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minor; see *supra* note ___, UGCOPAA, Article 2 Guardianship of a Minor.

[113] See NGA Standards of Practice, Standard 18 (IV).

[114] See NGA Standards of Practice, Standard 12 (I) and (H); see English and Kohn, *supra* note ___; see *supra* note ___, Glen and Costanzo, at ___; see *supra* note ___, NGA Standards of Practice, Standard 7 (II) (B).

[115] The legal term is "in camera" (in chambers and private), where the judge would only meet with Tom, the attorneys, and the GAL. It would be wise for the judge to ask that all parties stipulate to the in camera meeting so the judge is not exposed to challenges of bias and interference. See (AFJ - Colorado case cite.)

[116] See *supra note* ___, NGA Standards of Practice, Standard 13 (VI); see *supra* note ___, UGCOPAA, Section ____, least restrictive alternative.

[117] See *supra note* ___, UGCOPAA, Section ____, Limited Guardianship.; see *supra* note ___, English and Kohn, ____.

[118] See *supra note* ___, UGCOPAA, Article 5, Other Protective Arrangements; Kristin Booth Glen and Cathy E. Costanzo, *What Guardians, Persons Seeking Guardianship, and Persons for Whom Guardianship is Sought Need to Know about Supported Decision-Making and Why*, ___ Syracuse L. Rev. ___ (to be published 2022); Jonathan G. Martinis and Peter Blanck, *Supported Decision-Making: From Justice for Jenny to Justice for All* (2019), https://www.amazon.com/Supported-Decision-Making-Justice-Jenny-ebook/dp/B07YQCK2VX); *Ross & Talbert v Hatch*, Case No. CWF120000426P-03 (2013) (Final order of the court).

[119] Restoration can be extremely difficult to obtain, however, restoration actions are increasing where advocates are looking to courts to restore the capacity of the person under guardianship; See NGA Standards of Practice, Standard 21 (III) (A) (C) and (E); see Morgan and Boyer, *supra* note ___; see Glenn and Costanzo, *supra* note ___.

[120] See *Rud v. Dahl,* 578 F.2d 674 (7th Cir. 1978); see UGCOPAA, Article 5, *supra* note ___; see *supra* note ___, and accompanying text; see Kohn, Blumenthal, and Campbell, *supra* note ___.

[121] See Appendix ___, sample trust settlor's Letter of Intent addressed to trustee.

i) Pre-litigation Mediation. Joe, Jr. and Cindy could agree to have pre-litigation mediation;
j) Voluntary Consent Order for Mediation. Depending on where litigation is initiated, the parties could voluntarily agree for the court to order mediation under certain criteria with the court naming the certified mediator;
k) Guardianship Court Litigation;[122]
l) Trust Court Litigation;[123]
m) General Civil Trial Court Litigation. In those states where guardianship judges have no statutory authority over SNTs, guardians may have available other advocacy and litigation options in higher level courts of general jurisdiction. Once in the higher-level courts, guardians may also be awarded attorneys' fees[124] and costs paid out of the assets of the trusts.[125]

B. Case Study No. 2

1. Recommended Policy. States should consider adopting specific statutes authorizing supported decision-making arrangements. These statutes should consider addressing supported decision-making (SDM) both as an alternative to guardianship and as a freestanding modality. As statutory development in this area is still relatively new, legislators and advocates need to think carefully about such issues as the need to adopt safeguards to make sure supporters do not take advantage of the supported person, the fiduciary responsibility (if any) of the supporter for decisions by the individual being supported, and the need to hold harmless those who reasonably rely upon decisions (or giving of consent) that the person being supported makes.

2. In addition, SNTs should take account of the existence of SDM if those arrangements are in place when the SNT is created. If SDM comes into existence at a later time, SNT trustees should be urged to seek authority to interact with supporters so long as the person being supported agrees.

3. Recommended practice tools:

    a. Draft a letter of intent when creating the SNT to specify the preferences and values of the person with a disability who is the beneficiary of the trust to clarify whether the trustee should authorize future expenditures.
    b. Suggest that before appointment SNT trustees be required to attend one or

[122] As explained earlier in the article, this may not be a problem in those states that house jurisdiction of both guardianships and trusts in the same court. In those states where the guardianship

[123] Note – under most trust statutes with a separate trust court, the statute may expressly direct the judge to follow the terms of the trust and give effect to the intent of the grantor, the potential conflict between guardian and trustee in theory may be resolved.

[124] See *supra* note ___, UGCOPAA, Section 119 (a) and (b).

[125] Note- as mentioned earlier, once in a court that has jurisdiction over trusts, the judge should give weight and credence to the terms of the trust and give effect to the intent of the grantor, quickly bringing an end to conflict between Joe, Jr. as guardian, and Cindy, as trustee.

more training sessions designed to explain (in operational terms) such concepts as person-centered planning, least restrictive alternatives, SDM, and, in general, the importance of autonomy for people with disabilities.

c. Take advantage of resources such as the National Resource Center for Supported Decision-Making[126] to keep updated on developments, including statutory developments, within SDM.
d. Consult with your state protection and advocacy organization for assistance in advocating for the rights of people with disabilities to receive services in the most integrated, least restrictive setting, and to make sure that arrangements such as SNTs or other instruments do not infringe on those rights.

C. Case Study No. 3

1) Recommended Policy: States should consider amending their guardianship statutes to require consideration of less restrictive alternatives, including but not limited to supported decision making, prior to appointment of a guardian. The statutes should also require the court-appointed Guardian Ad Litem to address such alternatives in the GAL's recommendation/report to the court. Before any guardian is appointed, the court must assess, on the record, whether there are any less restrictive alternatives to guardianship that can prevent the risk of abuse, exploitation, and or neglect of the individual. Such less restrictive options should be attempted (or there should be an on-the-record justification why to do so would be inappropriate) before any guardian is appointed.

If an individual can execute a power of attorney, a guardianship would not be appropriate. A court need not order a plenary guardianship even if it decides it must retain jurisdiction over the attorney in fact to assure that he or she is performing his or her duties adequately.

For example, Michigan now requires that the court inquire into the existence of a patient advocate designation, and if there is one, that the preference of the person with a disability be honored. This happens sometimes, even if a guardian is subsequently appointed.

Finally, even if the court orders the appointment of a guardian, it can direct the guardian to use supported decision-making practices in the guardianship.[127]

3) Recommend Practice Tools:

a. Rep payee—Check to see if an adequate amount of support could be achieved by adding a professional representative payee (such as the UCPA chapter discussed in the Case

[126] http://supporteddecisionmaking.org/

[127] *See* Robert D. Dinerstein, *Tales from a Supportive Guardianship*, 53(2) COURT REVIEW: THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION 74 (2017); *Ross v. Hatch*, *supra*.

Study) to handle disability cash benefits. If such a service available, it should be used to avoid the need to appoint a conservator or guardian of the estate. SSA oversight, which requires the rep payee to submit periodic reports, provides protection for the individual.

b. ABLE Act Account- An ABLE Act account that can protect the person's accumulated benefits (or a combination of wages and benefits) and allow for them to supplement their long term services and supports in an effort to remain in the least restrictive supportive housing setting should be used. Also, if the person has a validly executed power of attorney the agent (or attorney in fact) appointed in that document can assist with the use of this account. Furthermore, SSA has access to most ABLE Act accounts and can provide another line of oversight into its use. The Internal Revenue Service can always inquire as well.

c. Pooled SNT— Court intervention in Case Study No. 3 could have been avoided altogether if a pooled special needs trust had been established, either as part of a supported decision-making process or independently. The pooled SNT could allow for maintaining the person in the least restrictive setting, taking advantage of the long-term services and supports system. Such an approach gives effect to the *Olmstead* decision and the ADA integration mandate.

d. Guardians, other surrogates, or anyone purporting to act to protect the individual should not be able to interfere with the person's legal rights, including the right to live in the community and to make one's own decisions (with or without support) without determining if their decisions can be accommodated reasonably with other tools in a less restrictive manner. Thirty years after the passage of the American with Disabilities Act is long enough for those with disabilities of any age to see their rights vindicated.

IV. CONCLUSION

An individual's decisions regarding his or her person or estate can be complex under the best of circumstances. When the individual in question has a disability or is an older person (with or without cognitive limitations), those complexities multiply. Add in the complicated interrelationships among formal vehicles such as guardianship and trusts, not to mention new "other protective arrangements" such as supported decision making, and mix in special needs trusts and ABLE accounts, and one could be forgiven for throwing up one's hands and crying uncle.

In this article, we have attempted to demystify some of these options and give examples, through case studies, of how in even the most fraught conflicts it is possible to wend one's way through the thicket and come up with a plan that can serve the range of interests involved. Although much of this material is highly technical, at bottom the goal is very simple: how to provide as much support as is necessary, but *no more support than is necessary*, to enable the individuals in question to thrive and enjoy as much autonomy as they desire. In that way, important principles such as the least restrictive alternative, person-centered planning, and services in the most integrated setting can be given their true effect.