

**PROTECTIVE ORDERS AND LIMITED GUARDIANSHIPS:
LEGAL TOOLS FOR SIDELINING PLENARY GUARDIANSHIP**

Nina Kohn* & David English**

ABSTRACT

By encouraging use of limited guardianships and protective orders instead of full guardianship, states can reduce the likelihood of unnecessarily stripping adults of their civil rights. Yet, although such less restrictive alternatives have long been available to most courts, in practice, their use remains limited and sporadic. This article argues that this lack of use suggests that it is not sufficient for the law to state a preference for these less restrictive alternatives, it must actually create systems that incentivize their use and actively discourage the use of full guardianships. This article then shows, using the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act as a guide, how states can adopt statutes that create such incentivized systems.

* David M. Levy L'48 Professor of Law, Syracuse University College of Law; Distinguished Scholar in Elder Law, Solomon Center for Health Law & Policy, Yale Law School. A.B., Princeton University; J.D., Harvard Law School.

**William Franklin Fratcher Missouri Endowed Professor of Law and Edward L. Jenkins Professor of Law, University of Missouri School of Law. BA, Duke University; JD, Northwestern University.

Table of Contents

I.	INTRODUCTION	3
II.	HISTORY OF LIMITED GUARDIANSHIP AND PROTECTIVE ORDERS IN LIEU OF GUARDIANSHIP	3
A.	History of Limited Guardianship	4
1.	<i>Origin of Limited Guardianship Statutes</i>	4
2.	<i>Role of the Uniform Law Commission</i>	5
3.	<i>The Role of National Conferences</i>	7
B.	History of Protective Orders In Lieu of Guardianship	8
C.	Prevalence of Limited Guardianships and Protective Orders in Lieu of Guardianship	10
III.	UGCOPAA’S SYSTEMS-FOCUSED APPROACH TO LIMITED GUARDIANSHIP AND PROTECTIVE ORDERS IN LIEU OF GUARDIANSHIP	12
A.	Overview of UGCOPAA	12
B.	UGCOPAA’s Limitations on Court Authority	13
C.	UGCOPAA’s Procedural Reforms	13
1.	<i>Aligning petitioners’ incentives</i>	14
2.	<i>Aligning court processes</i>	14
3.	<i>Aligning requirements for orders</i>	16
4.	<i>Aligning procedures for termination and modification of appointments</i>	17
D.	UGCOPAA’s Protective Orders in Lieu of Guardianship	17
V.	RECOMMENDATIONS	20
VI.	CONCLUSION	22

I. INTRODUCTION

In every state, courts are empowered to appoint a guardian for individuals who are at risk because they are unable to make decisions for themselves. While these appointments are designed to protect individuals in need and further their best interests, the overuse of guardianship and the imposition of overly broad guardianships can have the opposite affect: unnecessarily denying individuals their basic rights and liberties—and potentially exposing them to exploitation by misguided or unscrupulous guardians.

As this article explains, U.S. jurisdictions have responded to concerns about the overuse and overbreadth of guardianships by authorizing courts to impose limited guardianships instead of full ones, and by empowering courts to enter protective orders in lieu of guardianship. Unfortunately, best available evidence suggests that the vast majority of guardianships remain full and that the use of protective orders instead of guardianship remains sporadic.¹ As a result, those who find themselves the subject of a petition for guardianship are likely to be stripped of most of their legal rights even when this major intrusion on liberty is neither legally justified nor necessary to protect the person from harm. Recognizing this serious problem, the article explores the further reforms needed to increase the use of these less restrictive court orders and limited guardianships and discourage the use of full guardianships.

This article consists of three major sections. The first describes the evolution of guardianship law with respect to limited guardianship and court protective orders in lieu of guardianship. The second shows how innovations in the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA) can help create systems that discourage overuse of full guardianship. Specifically, it shows how the UGCOPAA discourages use of full guardianship not only by adopting rules that prohibit a full guardianship where a limited one would meet an individual's needs, but also by creating systems that incentivize both courts and petitioners to favor limited guardianships over full ones, and by expanding the availability of protective orders (referred to in the Act as “protective arrangements”). The third major section offers a series of concrete recommendations for state-based law reform.

For the sake of simplicity, the term “guardianship” includes “conservatorship” unless otherwise indicated, although many states use the term “guardian” exclusively to refer to the individual appointed by the court to make decisions about personal affairs and the term “conservator” to refer to the individual appointed by the court to manage an individual's property and financial affairs.

II. HISTORY OF LIMITED GUARDIANSHIP AND PROTECTIVE ORDERS IN LIEU OF GUARDIANSHIP

Over the past several decades, guardianship law has evolved to enable courts to enter orders that are less restrictive than full guardianship: orders imposing limited guardianships and

¹ See *infra* Section II(C).

orders for protective arrangements instead of guardianship. This Section outlines the evolution of each of these less restrictive alternatives to full guardianship.

A. History of Limited Guardianship

A limited guardianship is one in which the guardian is granted fewer than all powers available under state law. A limited guardianship can be created in one of two ways. First, the court can exercise its equitable jurisdiction to limit a guardian's powers regardless of whether the statute mentions limited guardianship.² Second, the state can enact a statute authorizing the appointment of a limited guardian. This sub-section outlines the history and development of limited guardianship, highlighting its origins, and how the concept has been advanced both by the Uniform Law Commission and by a series of national conferences.

1. Origin of Limited Guardianship Statutes

Guardianship law in the United States is controlled by state, not federal, law. All fifty states and the District of Columbia have their own separate guardianship laws. Accordingly, the first limited guardianship statutes were state statutes. The first of these appears to have been enacted in 1976 in Idaho. It was followed by a 1978 enactment in North Carolina.³ The Uniform Law Commission then joined the list of entities promulgating limited guardianship legislation in 1982 upon its approval of the Uniform Guardianship and Protective Proceedings Act.⁴ Expansion of limited guardianship statutes was rapid: by 1987, over forty states had enacted limited guardianship statutes.⁵

Adoption of these limited guardianship statutes emerged out of the movement in the 1960s and 1970s to place limits on the state's authority to involuntarily commit adults for mental health treatment. Limited guardianship—and the corresponding rejection of full guardianship—was viewed as consistent with the “least restrictive alternative” doctrine. That doctrine was first applied to civil commitment in 1966 in *Lake v. Cameron*,⁶ a holding that was soon followed by other courts.⁷ The issue reached the U.S. Supreme Court in 1975 in *O'Connor v. Donaldson*,⁸ where the court held that the state could not civilly confine an individual who was not a danger to self or to others. Concluding that similar deprivations of rights occur in guardianship proceedings, early advocates for limited guardianship, including the participants in the

² See Maureen A. Sanders & Kathryn Wissel, *Limited Guardianship for the Mentally Retarded*, 8 N.M.L. REV. 231, 236 n. 38 (1978) (listing cases recognizing this authority), Amer. Bar Assn, *Guardianship: An Agenda for Reform*, 13 MENTAL & PHYSICAL DISABILITY LAW RPTR. 271, 294 (1989) (also listing cases prior to 1980).

³ See Sanders & Wissel, *supra* note 2, at 242-45 (discussing both the North Carolina statute and a Minnesota statute which applied only if a state agency or employee was appointed as guardian).

⁴ See *infra* discussion at text accompanying notes 17-18.

⁵ Legal Counsel for the Elderly, American Association of Retired Persons, *Decision-Making, Incapacity and the Elderly: A Protective Services Manual* (1987), Table 6, cited in Amer. Bar. Assn, *Guardianship: An Agenda for Reform*, 13 MENTAL & PHYSICAL DISABILITY LAW RPTR. 271, 295n.13 (1989).

⁶ 364 F.2d 657 (D.C. Cir. 1966).

⁷ For a list of the early cases, see N. Dudovitz, *Protective Services and Guardianship: Legal Services and the Role of the Advocate*, in REPRESENTING OLDER PERSONS: AN ADVOCATE'S MANUAL (1985), at 80, cited in Amer. Bar. Assn, *Guardianship: An Agenda for Reform*, 13 MENTAL & PHYSICAL DISABILITY LAW RPTR. 271, 295n.6 (1989).

⁸ 422 U.S. 563 (1975).

Wingspread conference discussed later in this article, agreed that the least restrictive alternative doctrine should also be applied to guardianship.⁹ This goal could best be accomplished either by avoiding the appointment of a guardian in the first instance or, where a guardianship could not be avoided, by appointing where possible a limited instead of a full guardian.¹⁰

While all states now recognize the ability of courts to impose limited guardianships, terminology varies slightly. Most state statutes use the term “limited guardian” to describe a guardian with limited powers.¹¹ Others do not employ the term but achieve the same result by providing that the court may restrict the powers of the “guardian.”¹²

2. *Role of the Uniform Law Commission*

The Uniform Law Commission (ULC), a quasi-governmental entity that develops model legislation for states’ consideration¹³, has played an instrumental role in advancing limited guardianship statutes in the U.S. The ULC’s first foray into comprehensively addressing guardianship was Article V of the Uniform Probate Code (UPC), which the ULC adopted in 1969.

The guardianship provisions of the 1969 UPC were quite innovative when compared to the guardianship statutes in force in the states at the time. First, the 1969 UPC distinguished between issues relating to property and person. This is accomplished by separating the provisions on property from the provisions relating to guardianship of the person and placing them in different parts of the article.¹⁴ To solidify this distinction, the UPC uses different terms for the fiduciary appointed by the court. Under the 1969 UPC and later versions of the Code, what would have been referred to at the time in most states as the guardian of the property is instead referred to as a “conservator” and the appointment of the conservator is made in a separate “protective proceeding.” Second, the 1969 UPC expanded the court’s authority to enter orders.

⁹ Notably, many state guardianship statutes now include explicit reference to least restrictive alternatives. See ABA Commission on Law and Aging, Least Restrictive Alternative References in State Guardianship Statutes, available at https://www.americanbar.org/content/dam/aba/administrative/law_aging/06-23-2018-lra-chart-final.pdf (providing a chart listing references to least restrictive alternatives in state guardianship laws).

¹⁰ Amer. Bar Assn, *Guardianship: An Agenda for Reform*, 13 MENTAL & PHYSICAL DISABILITY LAW RPTR. 271, 293 (1989). For an extended list of expert writings relating to limited guardianship as of 1981, see Lawrence A. Frolik, *Plenary Guardianship: An Analysis, a Critique and a Proposal for Reform*, 23 ARIZ. L. REV. 599, 600n.5 (1981).

¹¹ In addition to the many states that have enacted a version of the guardianship provisions of the Uniform Probate Code or Uniform Guardianship and Protective Proceedings Act, states that use the term “limited guardian” include Alaska Stat. §13.26.005(6) (called “partial” guardian); Ark. Code Ann. § 28-65-101; Fla. Stat. § 744.102(9)(a); Ind. Code § 29-3-1-6; Ky. Rev. Stat Ann. § 387.510(4); La. C.C.P. Art. 4551(B) (called “partial interdict”); Mo. Rev. Stat. § 475.010(7); Nev. Rev. Stat. § 159.026; Ohio Rev. Code Ann. § 2111.01(A); Okla. Stat. § 30-1-111(16)(a); Pa. Cons. Stat. § 5512.1(6); S.D. Codified Laws § 29-5-102(7); Va. Code Ann. § 64.2-2000; W. Va. Code § 44A-1-4(8). Wyo. Stat. Ann. § 3-1-101(xi).

¹² See, e.g., Del. Code Ann. tit.12 § 3921; Kan. Rev. Stat. § 59-3075(a)(2); N.H. Rev. Stat. Ann. § 464-A:11(II)(d); N.Y. Mental Hyg. Law § 81.03(d); Vt. Stat. Ann. tit. 14, § 3069(d); Wis. Stat. § 54.01(5).

¹³ The Uniform Law Commission was formed in 1892. For the history of the Uniform Law Commission (ULC), see ROBERT A. STEIN, FORMING A MORE PERFECT UNION: A HISTORY OF THE UNIFORM LAW COMMISSION (2013).

¹⁴ The guardianship provisions relating to adults are contained in Part 3 of Article V. The provisions relating to Protection of Property are contained in Part 4 of Article V. For background on the process that led to the 1969 reforms, see William F. Fratcher, *Toward Uniform Guardianship Legislation*, 64 MICH. L. REV. 983 (1968).

Prior to the 1969 UPC, guardians had limited authority to engage in transactions without prior court approval and the courts which were often specialized courts of probate with limited jurisdiction, lacked authority to authorize a guardian to engage in many transactions that today would be viewed as routine, such as to lease property.¹⁵ The 1969 UPC removed this limitation. It authorized the conservator to engage in a broad range of property-related transactions without seeking prior authorization from the court.¹⁶

While the provisions of the 1969 UPC were innovative in certain regards, they did not include limited guardianship. Instead, it was not until the ULC amended Article V in 1982—and codified it separately as the Uniform Guardianship and Protective Proceedings Act (UGPPA)—that it directly embraced limited guardianship. The 1982 UGPPA introduced limited guardianship to allow a court to remove only some, not all, personal decision-making authority from an individual.¹⁷ In addition, although the 1982 UGPPA did not expressly authorize limited conservatorship by that name, it authorized it in function. Under the 1982 UGPPA, courts appointing conservators were admonished to “make protective orders only to the extent necessitated by the protected person's mental and adaptive limitations and other conditions warranting the procedure.”¹⁸

The ULC again took up the issue of guardianship when, in 1997, it revised the UGPPA and corresponding UPC provisions. The philosophy of the 1997 revision of the UGPPA has been described as follows:

The overriding theme of the 1997 UGPPA is that a guardian or conservator should be appointed only when necessary, only for so long as necessary, and only with such powers as are necessary. The Act views guardianship and conservatorship as a last resort, emphasizes that limited guardianships or conservatorships should be used whenever possible, and requires that the guardian or conservator consult with the ward when making decisions.¹⁹

Consistent with this philosophy, the 1997 UGPPA implemented a variety of changes to encourage limited guardianship over full guardianship. Under the 1997 UGPPA, if a petition requests the appointment of a full guardian or conservator, the petition must explain why a limited guardianship or conservatorship is inappropriate.²⁰ In addition, the court may appoint a full guardian only if it finds that a respondent's identified needs cannot be met by any less restrictive means.²¹ Finally, in making decisions, the guardian must consider the expressed

¹⁵ See generally William F. Fratcher, *Powers and Duties of Guardians of Property*, 45 IOWA L. REV. 264 (1960).

¹⁶ See Unif. Prob. Code (UPC) § 5-424(c) (1969), which lists 25 transactions in which a conservator may engage without seeking prior authorization of court.

¹⁷ “The Court, at the time of appointment or later, on its own motion or on appropriate petition or motion of the incapacitated person or other interested person, may limit the powers of a guardian otherwise conferred by this [Act] and thereby create a limited guardianship.” Unif. Guardianship & Protective Proceedings Act (UGPPA) § 2-206(c) (1982).

¹⁸ UGPPA § 2-307(a) (1982).

¹⁹ David M. English & Rebecca C. Morgan, *The Uniform Guardianship and Protective Proceedings Act (1997)*, 11(2) NAELA Q. 3, 4 (1998).

²⁰ UGPPA § 304(b)(8) (1997) (guardianship); UGPPA § 403(c)(3) (1997) (conservatorship).

²¹ UGPPA § 311(a)(1)(B) (1997).

desires and personal values of the individual to the extent known to the guardian,²² and both a guardian and conservator must encourage the individual to participate in decisions.²³

Most recently, spurred by the Third National Guardianship Summit (discussed in the next subsection), the ULC adopted the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA), which replaced the UGPPA. UGCOPAA as finally approved makes numerous changes to the predecessor UGPPA, but this article will focus on just two areas of reform. First, as discussed at length in Section III of this Article, the UGCOPAA emphasizes limited guardianship and discourages full guardianships to a greater degree than does the 1997 UGPPA. Second, and also discussed at length in Section III, the UGCOPAA elevates the importance and scope of limited protective orders in lieu of guardianship for meeting a respondent's personal and financial needs. Instead of being buried in the middle of a much longer article as under prior uniform guardianship acts, under UGCOPAA protective orders in lieu of guardianship are covered in a new Article (Article 5) that addresses only this topic. In addition, instead of serving only as a substitute for appointment of a conservator to handle financial matters, it authorizes such orders to be used as a substitute for an appointment of a guardian to handle personal affairs.

3. *The Role of National Conferences*

Much of the energy behind guardianship reform in the United States has been generated by national conferences on guardianship at which experts convened and issued recommendations.²⁴ The first such conference was held in 1988 and is referred to as Wingspread, which was the name of the conference center where it was held. The conference was convened in response to a series of articles published by the Associated Press critical of guardianship practice.²⁵ Among the principal recommendations approved at the Wingspread conference were recommendations to: 1) emphasize limited guardianship; and 2) prioritize the choices of the individual subject to guardianship and the use of substituted judgment,²⁶ which, as discussed above, were primary objectives of the subsequently drafted 1997 UGPPA.

Another influential conference was the Third National Guardianship Summit held in 2011,²⁷ which focused on developing national guardianship standards. This Summit led directly to the decision to appoint a drafting committee to draft what later became the UGCOPAA. The Third National Guardianship Summit was organized by the National Guardianship Network (NGN), a group of national organizations dedicated to effective adult guardianship law and

²² UGPPA § 314(a) (1997).

²³ *Id.* (guardians); UGPPA § 418(b) (1997) (conservators).

²⁴ This Article is written in conjunction with the most recent of these conferences.

²⁵ Fred Bayles & Scott McCartney, *Guardians of the Elderly: An Ailing System*, AP Special Report (Sept. 1987).

²⁶ ABA Comm'n on the Mentally Disabled & ABA Comm'n on Legal Problems of the Elderly, *Guardianship: An Agenda for Reform* (1989).

²⁷ For the text of the standards and recommendations, see Third National Guardianship Summit Standards and Recommendations, 2012 UTAH L. REV. 1191.

practice.²⁸ Also participating were an array of other groups concerned with issues of aging, intellectual disability, and mental health.²⁹

Following the conclusion of the Summit, NGN appointed an implementation committee, on which co-author English served, to consider how best to implement the seventy standards and recommendations approved at the Summit. The implementation committee concluded that thirty-six of the standards and recommendations were relevant to the possible revision of the 1997 UGPPA. Based on the report of the implementation committee, the NGN recommended to the ULC that a drafting committee be appointed to revise the UGPPA. The ULC agreed, and a drafting committee was appointed in 2014, with co-author English serving as chair and co-author Kohn as the reporter.³⁰ The committee was charged with revising “selected portions of the UGPPA in order to implement some of the recommendations of the Third National Guardianship Summit and otherwise update the Act.”³¹

B. History of Protective Orders In Lieu of Guardianship

The ability of a court to enter a protective order to meet the needs of an individual who would otherwise be eligible for guardianship has its roots in the 1969 UPC. The 1969 UPC granted the court all the powers over the estate and other affairs that the individual would have had the individual not been under a disability.³²

This grant of broad authority to the court to enter protective orders is the origin of what has come to be known as the “single transaction” order. Under the 1969 UPC, if the basis for an appointment or other protective order exists, the court, without appointing a conservator, may approve a variety of transactions with respect to the individual’s property. One type relates to the protected person’s estate plan and includes the making of gifts, the creation of revocable or irrevocable trusts, and changing beneficiaries under insurance and annuity policies.³³ A second

²⁸ The NGN organizations at the time of the Summit were the AARP; ABA Commission on Law and Aging; ABA Section of Real Property, Trust and Estate Law; Alzheimer’s Association; American College of Trust and Estate Counsel; Center of Guardianship Certification; National Academy of Elder Law Attorneys; National Center for State Courts, National College of Probate Judges; and the National Guardianship Association. *See* Sally Hurme & Erica Wood, *Introduction*, 2012 UTAH L. REV. 1157, 1166 n.60.

²⁹ Among these groups were the ABA Commission on Disability Rights, The Arc, the Center for Social Gerontology, the National Adult Protective Services Association, the National Association of State Long-Term Care Ombudsman Programs, the National Association of State Mental Health Program Directors, the National Committee for the Prevention of Elder Abuse, the National Disability Rights Network, and the Bazelon Center for Mental Health. *Id.* at 1166 n.61.

³⁰ For a discussion of the process, see David English, *Amending the Uniform Guardianship and Protective Proceedings Act to Implement the Standards and Recommendations of the Third National Guardianship Summit*, 12 NAELA J. 33 (2016). The recommendations and standards deemed relevant to the revision of the UGPPA are contained in Appendix A. *See id.* at 49.

³¹ Drafting Committee Issues Memo, April 10, 2015, available at file:///C:/Users/ENGLIS~1/AppData/Local/Temp/apr2015_UGPPA_Reporter's%20Issues%20Memo-1.pdf, last visited Jan. 29, 2021.

³² UPC § 5-408(3) (1969). The only exception is that the court does not have the power to make the individual’s will. *Id.*

³³ Other specified powers that can be granted relating to the protected person’s estate plan include the powers to release marital property and rights of survivorship under joint tenancies and tenancies by the entirety, to enter into

category, contained in a section called “Protective Arrangements and Single Transactions Authorized”, allows the court, without appointing a conservator, to “authorize, direct or ratify any transaction necessary or desirable to achieve any security, service, or care arrangement meeting the foreseeable needs of the protected person.”³⁴ A wide array of specific transactions are authorized under this second category, including “payment, delivery, deposit, or retention of funds or property; sale, mortgage, lease, or other transfer of property; entry into an annuity contract, a contract for life care, a deposit contract, or a contract for training and education.”³⁵ The single transaction was the creation of the UPC drafters. It had no statutory precedent in the states or in the 1946 Model Probate Code, which was the initial starting point for the UPC drafters.³⁶ Because many of these transactions cannot be accomplished by the court without assistance, the 1969 UPC authorized the court to appoint a special conservator to assist in the accomplishment of any protective arrangement.³⁷ The result of this additional authority granted to the court by the 1969 UPC was a statutorily created and significant alternative to conservatorship. Both categories of protective orders in lieu of guardianship were carried forward into the 1982 UGPPA.³⁸

In 1997, when the Uniform Law Commission revised the UGPAA, the provisions on single transactions and protective arrangements were modified in a significant way. In approving a single transaction or other protective arrangement, the court is to apply a substituted judgment standard. The primary factor the court is to consider is “the decision that the protected person would have made, to the extent that the decision can be ascertained.”³⁹ Under the previous 1982 and 1969 enactments, the decision of the court was not guided by a standard stated in the statute, implying that the common law best interests standard was to apply.

contracts, to surrender life insurance policies for their cash value, to exercise the right to an elective share, and to renounce interests in property. *Id.*

³⁴ UPC § 5-409(a) (1969). The non-exhaustive list of possible protective arrangements is lengthy. They include “payment, delivery, deposit or retention of funds or property, sale, mortgage, lease or other transfer of property, entry into an annuity contract, a contract for life care, a deposit contract, a contract for training and education, or addition to or establishment of a suitable trust.” *Id.*

³⁵ UGPPA § 2-308(a) (1982).

³⁶ For the history of the drafting process, see Fratcher, *supra* note 14. The single transaction was absent from the earliest drafts of the UPC, the drafting of which began in the early 1960s. The concept makes its first appearance on June 29, 1967 in a memo from the Subcommittee on Conservator-Trustees: “The concept of ‘other protective order’ is useful. This makes it possible to obtain a specific order to deal with the property of an alleged disabled person without the necessity of the appointment of a conservator-trustee.” Papers of William F. Fratcher, University of Missouri Archives, Box 73677, File 4.

³⁷ UPC § 5-409(c) (1969).

³⁸ UGPPA § 2-307(b) (1982) (estate planning changes), § 2-308(a) (single transactions).

³⁹ UGPPA § 411(c) (1997). The single transaction section is § 412 but § 412(b) provides that the court is to apply the factors listed in § 411(c). In addition to considering “primarily the decision the individual would have made,” other factors the court is to take into account (1) the financial needs of the protected person and the needs of individuals who are in fact dependent on the protected person for support and the interest of creditors; (2) possible reduction of tax liabilities; (3) eligibility for governmental assistance; (4) the individual’s previous pattern of giving or level of support; (5) the existing estate plan; and (6) the protected person’s life expectancy and the probability that the conservatorship will terminate before the protected person’s death.

The 1969, 1982, and 1997 versions of the provision on single transactions have been widely enacted in the states, both in states that have otherwise enacted the guardianship provisions of the UPC or UGPAA,⁴⁰ as well as in others.⁴¹

Most recently, the Uniform Law Commission took a major step to promoting the use of protective orders in lieu of guardianship by adopting Article V of the UGCOPAA. Article V, which is discussed at length in Section III, expands the court's ability to use these less restrictive alternatives to guardianship.

C. Prevalence of Limited Guardianships and Protective Orders in Lieu of Guardianship

The extent to which courts employ either limited guardianships or protective orders in lieu of guardianship is unknown. Lack of reliable empirical data on guardianship and conservatorship is a decades old problem. Indeed, as the U.S. Senate Special Committee for Aging lamented in a 2018 report:

Few states appear able to track the total number of individuals subject to guardianship, let alone record demographic information, the types of guardianship being utilized, or the extent of a guardian's authority. The lack of broad state and national data makes it very difficult to identify trends in guardianship, leaving advocates and policymakers in the dark when trying to enact reform.⁴²

Thus, data on the scope of guardianship orders is even more limited than data on the incidence of guardianship orders—which is also woefully inadequate for those trying to identify the impact of guardianship reform efforts.

Nevertheless, indications are that full guardianship is far more common in practice than limited guardianship. For example, a study of guardianship for individuals with intellectual and developmental disability in the District of Columbia found that limited guardianships were the exception to the rule. In 2015 through 2017, a minimum of 84% of guardianships granted were full and permanent.⁴³ The remaining guardianships were either limited or emergency.⁴⁴

A 2014 survey of 4,000 guardianship files in ten Iowa counties found that limited guardianship comprised only 1% of adult guardianship cases and 2% of adult conservatorship

⁴⁰ Ala. Code § 26-2a-137; Alaska Stat. § 13.26.440; Ariz. Rev. Stat. § 14-5409; Colo Rev. Stat. Ann. § 15-14-412; D.C. Code § 21-2056; Haw. Rev. Stat. § 560:5-412; Mich. Comp. Law Ann. § 700.5408; Minn. Stat. Ann. § 524.5-412; Mont. Code Ann. § 72-5-422; Neb. Stat. § 30-2638; N.M. Stat. Ann. § 45-5-405.1; N.D. Cent. Code § 30.1-29-09; S.C. Code Ann. § 62-5-405; Utah Code Ann. § 75-5-409.

⁴¹ Ind. Code § 29-3-4-2; Mo. Rev. Stat. § 475.092; N.J. S.A. §-§ 3B:12-1 to -4; N.Y. Ment. Hyg. § 81.16(b)

⁴² U.S. States Special Committee on Aging, Ensuring Trust: Strengthening State Efforts to Overhaul the Guardianship Process and Protect Older Americans 25 (Nov. 2018), *available at* https://www.aging.senate.gov/imo/media/doc/Guardianship_Report_2018_gloss_compress.pdf.

⁴³ National Council on Disability, Turning Rights Into Reality: How Guardianship and Alternatives Impact the Autonomy of People with Intellectual and Developmental Disabilities 57 (June 10, 2019), *available at* https://ncd.gov/sites/default/files/NCD_Turning-Rights-into-Reality_508_0.pdf.

⁴⁴ *Id.*

cases.⁴⁵ Contrary to the general perception that a majority of guardianship appointments are for elderly individuals, the Iowa survey found that 62% of appointments were on account of intellectual disabilities and only 10% on account of Alzheimer's disease or dementia,⁴⁶ which are cognitive impairments ordinarily associated with the elderly. Notably, the disproportionate use of guardianship for those with developmental or intellectual disabilities strongly suggests that full guardianship was being used where inappropriate. Those with significant intellectual and developmental disabilities generally have the ability to make at least some decisions for themselves when provided with support.⁴⁷

There is even less data on the use of protective orders in lieu of guardianship (*e.g.*, single transaction orders) than there is on guardianship itself. Despite being part of the UPC since 1969 and part of the UGPPA since 1982, there is a paucity of reported case law on the use of single transactions. Perhaps this is because if the petition for a single transaction is denied it is easier to petition for the appointment of a conservator instead of appealing the denial.

Co-author English's conversations with practicing attorneys over the years and a review of the literature on single transaction orders, however, suggest that single transactions are used primarily in three overlapping contexts. First, they are used as a device for handling litigation settlements, typically through the creation of special needs trusts to avoid disqualification for Medicaid or the Supplemental Security Income (SSI) program. Second, they are used as a device for funding special needs trusts in other contexts such as on account of receipt of an inheritance. Third, they are used as a tool in crisis Medicaid planning when other planning tools, such as a durable power of attorney, are inadequate.⁴⁸

⁴⁵ IOWA GUARDIANSHIP & CONSERVATORSHIP REFORM TASK FORCE, REFORMING IOWA'S GUARDIANSHIP AND CONSERVATORSHIP SYSTEM 2 (2017), app. A:15.

⁴⁶ *Id.* Other categories were mental illness (6%), brain injury (4%), and other (3%). Fifteen per cent of the files did not list a condition. *Id.*

⁴⁷ One factor that could account for this overuse is that to the consternation of many advocates for individuals with developmental or intellectual disabilities, it appears that many requests for guardianship are made at the behest or suggestion of school systems, with the goal of obtaining consent for such individuals to remain in school past age 18. Even if a guardian is needed in such situations—which should not be assumed as a matter of course—instead of appointing a full guardian for potentially the child's complete lifetime, the needs of the school system could be met by appointing a limited guardian with authority to make decisions only with respect to school-related activities and whose appointment would terminate when the child is no longer eligible for the specified educational services.

⁴⁸ See Patricia Animo, *Special Needs Trusts*, 22 MASS. PRAC., PROBATE LAW AND PRACTICE § 37:11 (3d ed. with 2020 update) (noting that the three ways to create a special needs trust are (1) court using its inherent equity power; (2) single transaction; and (3) petition by conservator); Fred Rogers, *The Basics of Juveniles in Probate Court for Protective Proceedings*, 36 COLO. LAWYER, 15 (Feb. 2007) (noting use of single transactions in settlement of personal injury actions); Stinson, Mag & Fizzell, *Proceedings and Transaction Without Appointment of Guardian or Conservator, Including Establishment of Medicaid Trusts*, 1A MO. PRAC., METHODS OF PRAC.: TRANSACT. GUIDE § 36.6.30 (4th ed. with 2020 update); Stephen A. Hess, *Protective Arrangements, Special Conservators, Single Transactions and Transfers of Property to Income Trusts, Disability Trusts and Pooled Trusts* § 100:7 (6th ed. with 2020 update); Spencer J. Crona & Byron K. Hammond, *Personal Injury and Workers' Compensation Settlements for Incapacitated Persons: Part I*, 30 COLO. LAWYER 43 (Jan. 2001); George D. Gaskin III, *Drafting Powers of Attorney for Elder Planning—Going Beyond the Form*, k 328 (Sept. 2019) (noting use of single transaction for crisis Medicaid planning when the durable power of attorney fails to grant the agent sufficient authority); M. Dee Biesterfeld, *Personal Injury Settlements for Minors: Conservatorships, Suitable Trusts, or UTMA Accounts*, 36 COLO. LAWYER 69 (Mar. 2007); David K. Johns et al., *Single Transactions and Personal Injury Settlements*, COLO. EST. PLANNING HANDBOOK § 9.3.12 (7th ed. with 2020 update).

III. UGCOPAA’S SYSTEMS-FOCUSED APPROACH TO LIMITED GUARDIANSHIP AND PROTECTIVE ORDERS IN LIEU OF GUARDIANSHIP

As the preceding history suggests, prior statutory reforms authorizing limited guardianships, as well as those prohibiting the use of full guardianships where limited ones would suffice, have been insufficient to curtail routine use of full guardianship. This suggests that reforming practice, and not merely the law, will require more than simply directing courts to “do the right thing.” It will necessitate the creation of systems that incentivize alternatives to guardianship and discourage full guardianships.

The Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA) is designed to do just that. The Act, for which the authors served as Reporter and Chair, goes beyond merely stating rules. In addition to prohibiting a court from establishing a full guardianship or conservatorship if a limited guardianship or conservatorship would meet the respondent’s needs, it creates systems to incentivize those involved in the guardianship system—courts and petitioners alike—to favor limited guardianship and alternatives to guardianship over full guardianships. This Section first provides an overview of the UGCOPAA and then continues by outlining this systems-focused approach.

A. Overview of UGCOPAA

The Uniform Law Commission adopted UGCOPAA in 2017. The Act was a product of a multi-year collaborative process that engaged a broad range of stakeholders in the guardianship process. During the drafting process, the drafting committee received extensive input from numerous elder law experts and experts on developmental and intellectual disabilities as well as input from family caregivers and appointed guardians. Among the groups represented at the drafting table were AARP, the American Bar Association, including the Commission on the Law and Aging, Section of Real Property Trust & Estate Law and Senior Lawyers Division, The ARC, the American College of Trust and Estate Council, the National Association to Stop Guardianship Abuse, the National Guardianship Association, the National College of Probate Judges, the National Center for State Courts, the National Disability Rights Network, and the National Academy of Elder Law Attorneys, among others.⁴⁹

UGCOPAA consists of five articles. Article 1 consists of definitions and general provisions. Article 2 addresses guardianship of minors. Article 3 covers guardianship of adults, and Article 4 covers conservatorship of both minors and adults. Article 5 deals with other protective arrangements and grants the court authority to order a protective arrangement not only for property but also personal issues. This article does not address issues concerning minors. Consistent with prior uniform acts on guardianship, under UGCOPAA a “guardian” makes

⁴⁹ As of January 2021, the Act had been adopted in Maine and Washington, with selected provisions enacted in other states, including in Minnesota, Missouri and New Mexico. *See* 2018 Me. L.D. 123; 2020 Minn. S.F. 3357; 2019 Wash. S.B. 5604; 2018 Mo. S.B. 806; 2019 N.M. S.B. 395.

decisions regarding an individual’s personal affairs,⁵⁰ and a “conservator” makes decisions regarding an individual’s property and financial affairs.⁵¹

As set forth in its prefatory note, UGCOPAA has three overarching goals. First, it aims to advance a person-centered approach to guardianship. Second, the act is designed to incorporate specific reforms that had been identified as necessary to advance the rights and interests of individuals subject to guardianship, including provisions related to guardianship monitoring, less restrictive alternatives, and clearer duties for guardians. Third and most relevant for this article, it adopts rules designed to incentivize systems to make it easier for all involved in the guardianship system process—whether they be petitioners, individuals subject to guardianship or conservatorship, guardians or conservators, or judges—to achieve these objectives.

B. UGCOPAA’s Limitations on Court Authority

Recognizing that imposition of guardianship should always be a last resort, the Act bars courts from imposing full guardianships for adults where less restrictive approaches could meet the adult’s needs.⁵² The result is that courts lack authority to appoint either a full or limited guardian if the adult’s needs could be met by providing the individual with support for decision making, adaptive devices, caregiving services, or any number of other interventions that would meet the individual’s needs without removing rights. In addition, the Act prohibits courts from establishing a full guardianship where a limited one would meet the respondent’s needs.⁵³

Thus, even if the court tasked with considering the petition finds there is a good reason to appoint a guardian, the court may not do so unless no less restrictive alternatives could meet the individual’s needs at the time of appointment. The fact that a court might anticipate a future need for broader powers (as may be the case when the respondent has been diagnosed with a progressive condition such as Alzheimer’s) or in good faith believe that broader powers would be in the best interest of the respondent does not give the court authority to order broader powers.

In addition, the Act recognizes limitations on courts’ authority by recognizing that there are certain rights that a court may never remove from an individual, including those to challenge the existence or terms of the guardianship, or seek legal counsel to do so.⁵⁴ Thus, the Act recognizes that the guardianship system is not capable of removing an individual’s legal personhood, but only capable of removing specific types of rights from an individual.

C. UGCOPAA’s Procedural Reforms

While UGCOPAA’s limitations on court’s authority to impose guardianships and especially full guardianships are important for protecting the rights of respondent’s, the Act does

⁵⁰ Defined at UGCOPAA § 102(9).

⁵¹ Defined at UGCOPAA § 102(5).

⁵² UGCOPAA § 301 (guardianship); § 401 (conservatorship).

⁵³ See UGCOPAA § 301(b)(guardianship); § 401(c)(conservatorship). For similar state statutes, see Mo Rev. Stat. § 475.075(13); Neb. Rev. Stat. Ann § 30-2620(a).

⁵⁴ See UGCOPAA § 318, 319, 430, 431.

not rely solely on such prohibitions to discourage overbroad and unnecessary guardianships. To achieve these goals, it also creates a series of processes designed to better align the interests and approaches used by courts and petitioners.

1. *Aligning petitioners' incentives*

In most states, it is typically far easier for a petitioner to request a full guardianship than a limited one. A petitioner seeking a full guardianship need simply make a request for all powers available under state law; a petitioner seeking a limited guardianship must set forth exactly which powers they are requesting the court to confer upon the guardian. This results in a de facto incentive to request broad powers.

UGCOPAA attempts to reverse, or at least reduce, this counterproductive incentive by making it easier to petition for a limited guardianship than a full one. One way it does this is to require additional information and work from petitioners seeking full powers. The petition must state whether a limited guardianship, full guardianship, or protective arrangement instead of guardianship is sought. If the petitioner requests a full guardianship, the petition must include a statement as to why neither a limited guardianship nor a protective arrangement instead of guardianship would meet the respondent's needs.⁵⁵ Thus, the petitioner who is requesting greater powers has an additional burden relative to one who seeks more limited powers.

In addition, the Act nudges petitioners to consider less restrictive alternatives by requiring petitions to state that less restrictive alternatives for meeting the respondent's alleged needs have been considered or implemented, to justify any failure to pursue less restrictive alternatives in advance of the petition, and to explain why less restrictive alternatives would not meet the respondent's alleged needs.⁵⁶ Notably, the inclusion of such information also can provide the court with information that will help the court in determining whether guardianship is appropriate.

Finally, the UGOPAA makes it easier to petition for a limited guardianship by providing, in Section 603, a sample petition form that petitioners may use.

2. *Aligning court processes*

If courts are to avoid imposing unnecessary and overbroad guardianships, they must have access to full information about the respondent's abilities.⁵⁷ The Act therefore creates a hearing process that will substantially increase the likelihood that the court will have access to and consider such information. It does this in several ways.

⁵⁵ UGCOPAA § 302(b)(6) (guardianship); § 402(b)(7) (conservatorship). This provision is similar in part to UGPPA § 304(b)(8) (1997), which required a petition requesting a full guardianship to explain why a limited guardianship was inappropriate.

⁵⁶ UGCOPAA § 302(b)(4) (guardianship); § 402(b)(5) (conservatorship).

⁵⁷ *Accord*, Lawrence A. Frolik, *Promoting Judicial Acceptance and Use of Limited Guardianship*, 31 STETSON L. REV. 735, 753-54 (2002) (arguing that to move away from overuse of full guardianships, “judges need court investigators to alert them to instances in which the alleged incapacitated person might be a candidate for limited guardianship”).

First, the Act requires the court to appoint a visitor who has training and experience in the types of abilities, limitations, and needs alleged in the underlying petition⁵⁸ and that the visitor provide the court with comprehensive information about the respondents' needs, abilities, and limitations. Of particular importance, the visitor must provide the court with an assessment identifying tasks that the respondent could "manage without assistance or with existing supports, could manage with the assistance of appropriate supportive services, technological assistance, or supported decision making, and cannot manage".⁵⁹ Thus, the visitor must bring the respondent's abilities—and not merely the respondent's deficits—to the court's attention. This can provide the court with information it needs to determine whether the individual has a functional need that warrants imposition of guardianship or conservatorship, and the information it needs to tailor an order to the respondent's actual situation.⁶⁰

Second, recognizing that a respondent's presence at—and ability to participate in—a hearing is key to ensuring that the court has full information, the Act prohibits the court from holding a hearing on a petition without the respondent being present except in extraordinarily limited circumstances. Thus, the court must arrange for the respondent to be able to attend even if that means holding court in an alternative location (*e.g.*, the respondent's residence or care facility) to enable the respondent's presence.⁶¹ This could also include situations where the court does not move but the respondent appears by Zoom or other electronic means. Remote guardianship hearings, a necessity during the COVID-19 pandemic, may be appropriate to facilitate respondents' presence and participation. In addition, under the Act, a respondent is entitled to be assisted at the hearing by any person of their choosing, and a court must make reasonable efforts to provide assistance to facilitate the respondent's participation if that assistance would not otherwise be available to the respondent.⁶²

Third, the Act reduces the risk that a court will mistake respondents' communication barriers with a lack of ability to make decisions. To alert the court of communication barriers, it requires petitioners to disclose whether the respondent needs an interpreter, translator, or other support to communicate effectively with the court or understand court proceedings.⁶³ It also authorizes a respondent to use supports, including decision-making supporters, as part of the hearing. Furthermore, it requires the court to make reasonable efforts to provide the respondent

⁵⁸ UGCOPAA § 304(a). For conservatorships, the enacting state is given the option to require an appointment in all cases or only in cases where the respondent is not represented by counsel. *See* UGCOPAA § 405(b). The appointment of a visitor has been a feature of uniform guardianship acts since the original 1969 UPC but the role and specific responsibilities have changed over the years. *Compare* UPC § 5-303(b) (1969).

⁵⁹ UGCOPAA § 304(d)(2). In a conservatorship proceeding, the visitor must investigate whether the respondent's needs could be met by a protective arrangement instead of a conservatorship or other less restrictive alternative and, if so, identify the arrangement or other less restrictive alternative.

⁶⁰ Eleanor M. Crosby & Rose Nathan, *Adult Guardianship in Georgia: Are the Rights of Proposed Wards Being Protected? Can We Tell?*, 16 QUINNIPIAC PROBATE L. J. 249, 280 (2003) (discussing how "meaningful" functional assessments are needed to tailor limited orders).

⁶¹ UGCOPAA § 307(a) & (b) (guardianship); § 408(a) & (b) (conservatorship). Requiring that the respondent be present at the hearing has long been required in some states. *See e.g.*, Ill. Stat. ch. 755 § 5/11a-11(a), which was enacted in 1979, "Unless excused by the court upon a showing that the respondent refuses to be present or will suffer harm if required to attend, the respondent shall be present at the hearing."

⁶² UGCOPAA § 307(c) (guardianship); 407(c) (conservatorship).

⁶³ UGCOPAA § 302(b)(10) (guardianship); § 402(b)(10).

assistance that will facilitate the respondent’s participation at the hearing if that assistance would not otherwise be available.⁶⁴

A fourth major way that the Act helps ensure that courts have full information in front of them is by ensuring that those in a position to provide the court with information are aware of the proceeding and can participate in it. Thus, the Act has broad notice requirements—which require notice not merely to kin but to others involved in the respondent’s life. For example, a petitioner must identify any “person known to have routinely assisted the respondent with decision making during the six months immediately before the filing of the petition”.⁶⁵ In addition, such persons are entitled to notice of hearing on a petition.⁶⁶

3. *Aligning requirements for orders*

Just as it has traditionally been easier to petition for a full guardianship than to petition for a limited one, it has traditionally been easier for courts to appoint a full guardian than a limited one. To appoint a full guardian, the court traditionally has needed to state simply that the guardian is granted all powers available under law. By contrast, to appoint a limited guardian, the court has had to spell out the powers to be granted. The Act changes this imbalance by requiring a court to make additional findings when granting a full guardianship that the court is not required to make when granting a limited one. Specifically, an order establishing a full guardianship must not only state the basis for doing so but must “include specific findings that support the conclusion that a limited guardianship would not meet the functional needs of the adult subject to guardianship.”⁶⁷

The court also creates a barrier to, and disincentive for, removing certain fundamental rights. Before the court can remove certain the right to vote or marry, the court must make a specific finding that those rights are to be removed.⁶⁸

Of course, merely increasing the requirements that must be met before the court may order a full guardianship is unlikely to fully remove the court’s inclination to order a full guardianship. Especially where the respondent has a progressive, degenerative condition, the

⁶⁴ UGCOPAA § 307(c) (guardianship); § 408(c) (conservatorship).

⁶⁵ UGCOPPA § 302(b)(3)(L) (guardianship); § 402(b)(3)(K) (conservatorship). Other non-relatives who must be listed in the petition include a person responsible for the patient’s care, a representative payee, a trustee or custodian of a trust or custodianship of which the respondent is a beneficiary, a VA fiduciary, an agent designated under a power of attorney for health care or finances, a person nominated by respondent as guardian in the case of a guardianship petition, or a person nominated as conservator in the case of a conservatorship proceeding. UGCOPPA § 302(b)(3) (guardianship); § 402(b)(3) (conservatorship).

⁶⁶ UGCOPPA § 303(c) (guardianship); § 403(c) (conservatorship).

⁶⁷ UGCOPPA § 310(c) (guardianship); § 410(c) (conservatorship).

⁶⁸ UGCOPPA § 310(b). Likewise, a guardian is not permitted to restrict the individual’s ability to communicate, visit, or interact with others for an extended period without specific court authorization. *See* UGCOPPA § 311(b)(6). This focus of UGCOPAA on civil rights issues is consistent with a trend in the states to add “bills of rights” to guardianship statutes. *See*, Mich. Comp. Law Ann. 700.5306(a), added by 2012 S.B. 461; Minn. Stat. § 524.5-120, added by Minn. 2009 H.F. 804; Mo. Rev. Stat. § 475.361, added by Mo. S.B. 806 in 2018; Nev. Rev. Stat. § 159.328, added by 2017 S.B. 360; S.C. Code § 62-5-304A, added by 2017 S.C.S. 415; Tex Est. Code § 1151.351, added by 2015 Tex. S.B. 1882. The grandparent in this area is Fla. Stat. § 744.3215, originally enacted by Fla. Laws 1989, c. 89-96, § 34.

court may be concerned that the matter will rapidly end up back in court as additional power are needed.⁶⁹ The requirement that the court provide additional findings, however, creates a “speed bump” on the road to full guardianship and encourages the court to consider less restrictive approaches.

4. *Aligning procedures for termination and modification of appointments*

A key aspect of requiring that guardianships and conservatorships comply with the principal of the least restrictive alternative is to ensure that individuals placed into these relationships can have their rights restored if the guardianship or conservatorship ceases to be necessary (or, in the case of an initial mistake, never was necessary).

Under the Act, termination is required if the basis for appointing a guardian does not exist. Moreover, upon a presentation of prima facie evidence of termination, the court must order termination unless it is proven that the basis for an appointment still exists.⁷⁰

In addition to creating a standard for restoration of rights that favors restoration, the Act supports restoration by reducing the barriers to using the termination or modification options. One initial barrier is a lack of awareness that it is possible to terminate or modify the guardianship. To increase awareness, the Act requires the court, upon the appointment, to provide notice regarding termination and modification rights to the individual subject to guardianship or conservatorship and to other specified persons.⁷¹ Another way the Act facilitates requests for modification or termination is by allowing the individual and others to notify the court of the need for termination or modification through informal means--without following a traditional court process that may be beyond their abilities. Just as importantly, the Act recognizes that an adult who seeks to terminate or modify their guardianship has a right to choose an attorney to represent the adult in the matter and directs the court to award reasonable attorney’ fees to the attorney who provides such representation.⁷²

D. UGCOPAA’s Protective Orders in Lieu of Guardianship

As a practical matter, Article 5 of UGCOPAA may be the Act’s single greatest contribution to efforts to reduce unnecessary guardianships. Article 5 creates a new alternative to guardianship, and greatly expands an already existing alternative to conservatorship. Under Article 5, a court may enter an order that is limited in scope in lieu of guardianship or conservatorship where the limited order would meet the needs of an individual for whom guardianship or conservatorship would otherwise be warranted. Specifically, a court may grant authority for a particular transaction or treatment, or to deny a third-party abuser access to an individual, without imposing a conservatorship or a guardianship that would deprive the

⁶⁹ For a discussion of judges preferring full guardianships on the grounds that they appear “efficient” in terms of use of legal resources, see Frolik, *supra* note 58.

⁷⁰ UGCOPAA § 319(d) (guardianship); UGCOPAA § 431(f) (conservatorship). This provision was carried forward from the 1997 UGPPA. See UGPPA § 318(c) (guardianship); § 431(d) (conservatorship) (1997).

⁷¹ UGCOPAA § 311(b) (guardianship); § 412(b) (conservatorship).

⁷² The Act creates a best practices option for states to require courts to appoint an attorney if the adult is not represented by one. UGCOPAA § 319(g) (guardianship); § 431(i) (conservatorship).

individual of more rights and require ongoing monitoring. Thus, Article 5 allows courts to enter orders of limited scope (and potentially, of limited duration) that are precisely tailored to the individual's circumstances and needs.⁷³

Before entering a protective order, the court must find that the basis for the appointment of a guardian or conservator otherwise exists. This includes a required finding by the court that the respondent meets the incapacity threshold for the appointment of a guardian⁷⁴ or conservator.⁷⁵ The other procedural requirements on a petition for the appointment of a guardian or conservator must also be satisfied. This includes the appointment of a visitor,⁷⁶ the appointment of an attorney to represent the respondent,⁷⁷ a professional evaluation,⁷⁸ and a requirement that the respondent attend the hearing.⁷⁹

Article 5 provides an illustrative but not exhaustive list of transactions for which a protective order in lieu of guardianship may be used. Transactions related to personal matters include consent to medical treatment or refusal of a medical treatment, a move to a specified place of dwelling, visitation or supervised visitation between the respondent and another person, and restricting others from access to the respondent.⁸⁰ Transactions related to property include establishing eligibility for benefits, entering into contracts, selling property, and adding to or establishing a trust.⁸¹ The court may also restrict access to the respondent's property by persons whose access to the property place the respondent at serious risk of financial harm.⁸²

Unlike a guardianship or conservatorship, a protective order in lieu of guardianship does not necessarily involve the removal of the right to make future decisions. These orders are therefore less restrictive alternatives to guardianship and conservatorship, whether full or limited.

Article 5 also does not require the appointment of an ongoing surrogate decision-maker although it is recognized that a fiduciary will sometimes be needed to implement the transaction. Article 5 therefore authorizes the court to appoint a master to implement a transaction.⁸³

⁷³ Article 5 is directly responsive to the Third National Guardianship Summit's call for courts to embrace less restrictive alternatives. *See generally Third National Guardianship Summit Standards & Recommendations*, 2012 UTAH L. REV. 1191 (2012).

⁷⁴ UGCOPAA § 502(a)(1).

⁷⁵ UGCOPAA § 503(a)(1).

⁷⁶ UGCOPAA § 506.

⁷⁷ UGCOPAA § 507.

⁷⁸ UGCOPAA § 508.

⁷⁹ UGCOPAA § 509.

⁸⁰ UGCOPAA § 502(b).

⁸¹ UGCOPAA § 503(c). The list of authorized transactions is quite lengthy. The court may "authorize or direct a transaction necessary to protect the financial interest or property of the respondent, including: (A) an action to establish eligibility for benefits; (B) payment, delivery, deposit, or retention of funds or property; (C) sale, mortgage, lease, or other transfer of property; (D) purchase of an annuity; (E) entry into a contractual relationship, including a contract to provide for personal care, supportive services, education, training, or employment; (F) addition to or establishment of a trust; (G) ratification or invalidation of a contract, trust, will, or other transaction, including a transaction related to the property or business affairs of the respondent; or (H) settlement of a claim". *Id.*

⁸² *Id.*

⁸³ UGCOPAA § 512.

Article 5 orders are thus not only alternatives to ongoing appointments but may also be useful in situations in which an emergency guardianship or conservatorship might otherwise be pursued to obtain consent to a particular medical treatment or legal authority for a particular transaction. Unlike an emergency appointment, obtaining a protective order in lieu of guardianship does require a showing that the respondent has needs that cannot be met with a less restrictive alternative, but does not require a showing of that substantial harm will likely otherwise occur. Also, should a master be appointed to implement a transaction, the term of the appointment is not limited to 60 days as is the case with emergency appointments.⁸⁴ This is helpful because some of the more complicated property transactions, such as the establishment and funding of a suitable trust, sometimes take more than 60 days.

To avoid unnecessary burdens on courts and petitioners, and to encourage courts to take full advantage of this less restrictive alternative, the Act allows courts to proceed with the process for ordering a protective arrangement instead of guardianship for an adult not only where the petitioner requested such an arrangement, but also where the petition originally requested a guardianship or conservatorship.⁸⁵

These provisions, while novel in their scope, are not without precedent. “Single transactions” orders were recommended by the Second National Guardianship Conference⁸⁶ and are included in the prior uniform acts governing guardianship.⁸⁷ Moreover, protective orders in lieu of guardianship can be ordered by the court in a number of states for the making of a health-care decision.⁸⁸ However, Article 5 protective orders extend well beyond court orders granting authority for a single financial transaction, and the Article encompasses a broad array of protective arrangements in lieu of guardianship.⁸⁹ Thus, Article 5 allows courts to address a wider range of needs without appointing a guardian or conservator than did prior uniform acts. This breadth not only creates a more viable alternative to guardianship in a broad range of situations, but by allowing courts to better tailor orders to needs, may make courts more confident that they can efficiently address a respondent’s needs without appointing a guardian or conservator.

What makes Article 5 so powerful, in part, is that it creates an option that is well-aligned with courts’ administrative interests. A court that makes an Article 5 order cannot only avoid

⁸⁴ See UGCOPAA §§ 312, 413.

⁸⁵ UGCOPAA §§ 301(a)(2), 502(a) (protective order in lieu of guardianship); § 503(a) (protective order in lieu of conservatorship).

⁸⁶ See Wingspan—The Second National Guardianship Conference, *Recommendations*, 31 STETSON L. REV. 595, 602 (2002).

⁸⁷ See discussion text accompanying *supra* notes 32-41.

⁸⁸ Among the statutes authorizing a court to direct a health-care decision without necessarily appointing a guardian is Section 14 of the Uniform Health-Care Decisions Act. Representative state statutes include Cal. Prob. Code § 3208; Mo. Rev. Stat. § 475.123.3; and Va. Code Ann. § 37.2-1101.

⁸⁹ The court may “authorize or direct a transaction necessary to meet the respondent’s need for health, safety, or care, including: (A) a particular medical treatment or refusal of a particular medical treatment; (B) a move to a specified place of dwelling; or (C) visitation or supervised visitation between the respondent and another person.” UGCOPAA § 502(b)(1). The court may also “restrict access to the respondent by a specified person whose access places the respondent at serious risk of physical, psychological, or financial harm.” UGCOPAA § 502(b)(2). Finally, the court is empowered to “order other arrangements on a limited basis that are appropriate.”

unduly restricting an individual's liberty—it can reduce its own administrative burden by avoiding the need for ongoing court monitoring. Given the limited resources courts have for such monitoring, this incentive may be particularly effective.

Article 5 thus creates an important and viable less restrictive alternative to guardianship and conservatorship. This thereby increases the likelihood that the court will in fact decline to impose unnecessary guardianships and conservatorships and unnecessarily deprive individuals of their liberty.

V. RECOMMENDATIONS

Reducing the incidence of unnecessary and overbroad guardianships will require changing incentives, not merely directing courts to do so. Accordingly, reforms must prioritize approaches that increase the burdens associated with granting full guardianships relative to limited ones and work to expand the menu—and perceived desirability—of alternatives to guardianship.

A key first step for all states is to therefore adopt the UGCOPAA in whole or in part. As this article has explained, UGCOPAA is designed not merely to require but to incentivize limited guardianships over full ones, and protective orders over long-term court appointments.⁹⁰

States that lack the appetite or political environment for wholesale adoption of the Act, but nevertheless want to create systems to reduce the overuse and overbreadth of guardianships should, at a minimum, adopt the following statutory provisions:

- (1) An explicit prohibition on courts appointing a guardian where less restrictive mechanisms would meet the individual's needs; such provisions should list specific less restrictive alternatives, including decision-making support, to ensure that courts and petitioners recognize that guardianship is inappropriate when these alternatives would satisfy the respondents' identified needs.
- (2) Requirements that petitions for guardianship specifically state whether less restrictive alternatives were attempted prior to the filing of the petition, or to justify the failure to do so.
- (3) Requirements that ensure that courts have the information necessary to understand fully the respondents' abilities, including:
 - (a) That courts appoint visitors with the skills and training needed to evaluate respondents' abilities as well as their challenges, and that those visitors inform the court of the respondent's abilities in addition to reporting on deficits.

⁹⁰ There are many other good reasons to adopt UGCOPAA as well, as the U.S. Senate Committee for Aging recognized in its 2018 report, *Ensuring Trust: Strengthening State Efforts to Overhaul the Guardianship Process and Protect Older Americans*. That report recommended that that every state legislature adopt the UGCOPAA. *See supra* note 42.

(b) Hearing and notice procedures that ensure that the respondents' supportive network is aware of the petition, that hearings be conducted with the respondent present and able to participate to the maximum extent possible (*e.g.*, by permitting the respondent to use supports at the hearing and requiring courts to facilitate supports for the respondent to participate in the hearing).

(4) Procedural requirements that increase the administrative time and cost associated with ordering full guardianships relative to ordering limited ones.

(5) Statutory provisions that enable courts to order a broad range of protective arrangements in lieu of guardianship or conservatorships, even if the underlying petition requested an appointment of a guardian or conservator.

In addition, states should promulgate model forms for petitioners to make it easier for both pro se petitioners and those represented by counsel to request protective orders in lieu of guardianship, as well as limited guardianships in lieu of full ones. The optional form in UGCOPAA is one such approach. Such forms could also include or be supplemented by materials to help petitioners understand the nature of guardianship and the law's preference for limited guardianships over full ones, and to identify possible alternatives to meeting an individual's needs. To assist in this effort, further development of educational materials and templates for determining the appropriateness of less restrictive alternatives should also be a priority.⁹¹ Because almost everyone has some abilities, ideally nearly every guardianship, where ordered, should be limited, and materials accompanying petition forms could help provide this perspective.

States and court systems should also consider promulgating model court orders for limited guardianships and protective orders in lieu of guardianship. Such standardized, or "fill-in-the-blank" orders, can incentivize these less restrictive arrangements by making it more efficient and straightforward for courts to grant limited powers.⁹² Such forms can also provide powerful nudges to courts. For example, courts imposing conservatorship because an individual is at substantial risk due to the individual's inability to manage finances typically strip individuals of the right to manage all of their finances even though it is likely that in many such cases allowing the individual to retain the right to manage a small amount of money would not pose significant risk. The default should therefore be that when a conservatorship is imposed a portion of the income or assets (even if only a very small amount) remain under the control of the individual subject to conservatorship. If courts must explicitly fill out a form indicating how much the individual retains the ability to control (*e.g.*, put either a zero or another number in the proper space), it would nudge courts to not fully remove money management rights.

⁹¹ Existing tools include PRACTICAL Tool for Lawyers: Steps in Supporting Decision-Making, American Bar Association 2016, available at https://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice/practical_tool/; and Identifying Alternatives to Guardianship: Stoplight Tool, UMKC Institute for Human Development, available at <http://moguardianship.com/Alternatives%20to%20Guardianship%20Tool%20Revised%2011-2015.pdf>.

⁹² Indeed, Larry Frolik made a similar suggestion in 2002 when he recommended standardized types of limited orders. *See* Frolik, *supra* note 58. This recommendation is slightly different because we are recommending individualized orders.

Where state actors are not able or willing to promulgate such forms, advocacy organizations could and should take the initiative.

Finally, the gap between the law and limited guardianship and the practice on limited guardianship strongly suggests the need for expanded education on the role and propriety of limited guardianship. There are two critical audiences for such training. The first is the courts. The second is those who interact with guardians and conservators. Specifically, states, court systems, and other entities could advance the use of limited guardianship by working to educate financial institutions, medical providers, and others with whom limited guardians might interact. There is anecdotal evidence that guardians having only limited powers find that third parties sometimes question their authority because those third parties do not understand the concept of limited guardianship.

VI. CONCLUSION

The persistence of full guardianships represents a major disappointment to those who dedicated their lives and careers to reforming guardianship. As the history of reform efforts suggest, states cannot simply correct the problem by creating better rules for courts. States must create better systems—systems that discourage the use of full guardianships. Fortunately, UGCOPAA provides a roadmap for creating such systems. Only time will tell whether its enactment will substantially reduce the current powerful incentives and inertia in favor of full guardianship. But even if only partially successful, the enactment of the UGCOPAA in the states would go a long way toward creating the rules, systems, and change in culture needed to substantially reduce the use of unnecessary and overbroad guardianships.