



## NEW JERSEY LAW REVISION COMMISSION

### **Tentative Report to Modernize the New Jersey Guardianship Statutes N.J.S. 3B:1-1 et seq.**

**December 20, 2018**

The New Jersey Law Revision Commission is required to “[c]onduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it” and to propose to the Legislature revisions to the statutes to “remedy defects, reconcile conflicting provisions, clarify confusing language and eliminate redundant provisions.” *N.J.S. 1:12A-8*.

This Report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. Comments should be received by the Commission no later than **February 18, 2019**.

The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the Report, please inform the Commission so that your approval can be considered along with other comments. Please send comments concerning this Report or direct any related inquiries, to:

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## Executive Summary

In December 2017, Staff<sup>1</sup> was asked to evaluate New Jersey’s guardianship statutes to determine whether the state is employing the “best practices” in this area of law, and the Commission authorized Staff to conduct research necessary to facilitate the request.

Staff reviewed the New Jersey Guardianship Statutes<sup>2,3</sup>, the New Jersey Administrative Code<sup>4</sup>, the New Jersey Rules of Court<sup>5</sup>, and the 2017 Uniform Guardianship, Conservatorship and Other Protective Arrangements Act (“UGCOPAA”).<sup>6</sup> Staff also examined the guardianship statutes of all 50 states and compared them to the current New Jersey statutes.

In a further effort to determine whether the New Jersey statutes reflect the most current thinking regarding guardianships, Staff examined the background as well as the current state of the law. The following pages contain recommendations regarding “best practices” based on the foregoing research.

## Analysis

In New Jersey, the role of a guardian is to assist “protected persons” in navigating the world around them.<sup>7</sup> It is the responsibility of the guardian to ensure that the “protected person” handles the tasks that they are capable of handling on their own.<sup>8</sup> The primary goal of a guardianship is to allow the “protected person” to continue to exercise as much independence as is safely possible.<sup>9</sup>

The New Jersey Constitution confers upon the judiciary the power to establish “the rules governing the administration of all courts in the State, and subject to the law, the practice and

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<sup>1</sup> Legal research and the collection of the information included in this report, or used as background material, was collected by past and present students who have worked with, or currently work with the New Jersey Law Revision Commission, including: Erik Topp (J.D. cand. 2018, Seton Hall Univer. School of Law); Andrew Edmonson (B.A. cand. 2019, New Jersey Inst of Tech.); and, Timothy Bott (B.A. cand. 2019, New Jersey Inst. of Tech.);

<sup>2</sup> Guardianship may be of either the estate or of the person. Emphasis, for purposes of this Report, has been placed on the guardianships, conservatorships and protective arrangements found in Title 3B. Administration of Estates – Decedents and others, though examination of related Chapters within this title were also reviewed by Staff.

<sup>3</sup> N.J.S. 3B:1-1 *et seq.* (General Provisions); N.J.S. 3B:12-1 *et seq.* (Minors and Incapacitated Persons); N.J.S. 3B:12a-1 *et seq.* (Kinship Legal Guardianship); N.J.S. 3B:12b-1 *et seq.* (New Jersey Adult Guardianship and Protective Proceedings Jurisdiction Act); N.J.S. 3B:13-1 *et seq.* (Guardianship of Veterans); N.J.S. 3B:16-8 (Inventories); N.J.S. 3B:18-1 *et seq.*; N.J.S. 3B:21-1 (Removal of Property from the State).

<sup>4</sup> N.J.A.C. 10:45-1.1 *et seq.* (Guardianship Services).

<sup>5</sup> R. 4:86-1 *et seq.*

<sup>6</sup> Uniform Guardianship, Conservatorship and Other Protective Arrangements Act, U.L.A. (2017). <http://www.uniformlaws.org/Acts.aspx?title=guardianship> (Last visited November 04, 2018).

<sup>7</sup> Administrative Office of the Courts, Guardianship of the Person: Duties & Responsibilities 3 (2017) available at [https://www.judiciary.state.nj.us/courts/assets/guardianship/Guardianship\\_Person\\_web.pdf](https://www.judiciary.state.nj.us/courts/assets/guardianship/Guardianship_Person_web.pdf).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

procedure in all such courts.”<sup>10</sup> The breadth of this authority is set forth in *Winberry v. Salsbury*,<sup>11</sup> as well as in subsequent Supreme Court decisions such as *Ferriera v. Rancocas Orthopedic Associates*.<sup>12</sup> In New Jersey, a combination of court rules and statutory provisions govern guardianship proceedings. Generally speaking, the substance of guardianship law is set forth in the statutes and the procedural safeguards are located within the New Jersey Rules of Court.

### • Terminology

The New Jersey statutes set forth what it means to be an “incapacitated individual.”<sup>13</sup> The term “incapacitated individual” is defined as, “... an individual who is impaired by reason of mental illness or intellectual disability to the extent that the individual lacks sufficient capacity to govern himself and manage his affairs.”<sup>14</sup> The term is not limited to individuals with cognitive deficits. The phrase “incapacitated individual” includes individuals impaired, “by reason of physical illness or disability, chronic use of drugs, chronic alcoholism, or other cause (except minority).”<sup>15</sup> An individual for whom a guardian is appointed or is under the protection of the court is statutorily referred to as a “ward.”<sup>16</sup>

New Jersey is not the only state to utilize the terms “incapacitated person” and “ward.” New Jersey, along with 31 other states, use the designation “incapacitated individual” when referring to a person who is the subject of guardianship, conservatorship, or protective arrangements.<sup>17</sup> New Jersey is joined by: Alabama, Alaska, Arizona, Arkansas, Colorado, Hawaii, Idaho, Indiana, Iowa, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Dakota, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, Virginia and Washington in the usage of the term incapacitated individual.<sup>18</sup>

In addition, there are 28 states, including New Jersey that use the term “ward”.<sup>19</sup> The 28 states are: Alabama, Alaska, Arkansas, Arizona, Colorado, Florida, Georgia, Hawaii, Idaho, Kansas, Kentucky, Maine, Minnesota, Mississippi, Missouri, Montana, Nebraska, New

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<sup>10</sup> N.J. Const. Art VI, sec. 2, para. 3.

<sup>11</sup> *Winberry v. Salsbury* 5 N.J. 240, cert. denied 340 U.S. 877 (1950) (defining procedural laws within the courts’ authority as those which regulate the means through which rights and duties are enforced).

<sup>12</sup> *Ferriera v. Rancocas Ortho. Ass’n*, 178 N.J. 144 (2003) (Justice Zazzali, dissenting).

<sup>13</sup> N.J.S. 3B:1-2.

<sup>14</sup> *Id.* Though undefined, the New Jersey statutes use the term “incapacitated person.”

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> See Figure 1.

<sup>18</sup> See Figure 2.

<sup>19</sup> See Figure 1.

Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, Texas, Utah, Wisconsin and Wyoming.<sup>20</sup>

Fig. 1

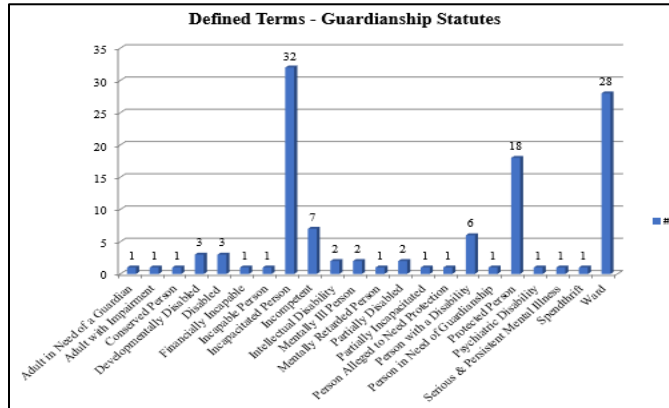


Fig. 2

GUARDIANSHIP TERM	STATE	#
Adult in Need of a Guardian	GA	1
Adult with Impairment	KS	1
Conserved Person	CT	1
Developmentally Disabled	CA, VT, WI	3
Disabled	KY, MD, MO	3
Financially Incapable	OR	1
Incapable Person	CT	1
Incapacitated Person	AL, AK, AZ, AR, CO, FL, HI, ID, IN, IA, LA, ME, MA, MI, MN, MO, MT, NE, NV, NH, NJ, NM, NY, ND, OR, PA, RI, SC, TX, UT, VA, WA	32
Incompetent	MS, NV, NC, OH, RI, WI, WY	7
Intellectual Disability	NJ, VT	2
Mentally Ill Person	KY, VA	2
Mentally Retarded Person	MA	1
Partially Disabled	KY, MO	2
Partially Incapacitated	MO	1
Person Alleged to Need Protection	SD	1
Person with a Disability	DE, IL, OK, TN, VT, VA	6
Person in Need of Guardianship	VT	1
Protected Person	ID, IN, IA, LA, ME, MA, MN, MT, NE, NM, ND, OH, OR, SC, SD, UT, VA, WV	18
Psychiatric Disability	VT	1
Serious & Persistent Mental Illness	WI	1
Spendthrift	WI	1
Ward	AL, AK, AZ, AR, CO, FL, GA, HI, ID, KS, KY, ME, MN, MS, MO, MT, NE, NH, NJ, NC, ND, OH, OK, SC, TX, UT, WI, WY	28

Although these terms are commonly used throughout the country, they are no longer considered the most appropriate choices.<sup>21</sup>

<sup>20</sup> See Figure 2.

In recent years, the terms “incapacitated person” and “ward” were each rejected by the Third National Guardianship Summit (NGS) as demeaning and offensive.<sup>22</sup> In drafting language to remove these terms from guardianship statutes, the Uniform Law Commission adopted the more precise terms of “individual subject to guardianship” and “individual subject to conservatorship” into its Uniform Guardianship, Conservatorship and Other Protective Arrangements Act (UGCOPAA).<sup>23</sup>

The retention of pejorative terms in New Jersey’s statutes runs counter to the societal shift toward the elimination of such references and the implementation of “people first” language.<sup>24</sup> The theory behind the use of “people first” language is to encourage people to focus on the person and not to define individuals by a perceived disability.<sup>25</sup> The use of “people first” or “person first” language has been recognized in New Jersey, particularly in recent years.<sup>26</sup>

There are presently 98 New Jersey statutes within Title 3B that employ a word, in one form or another, to describe a person’s capacity. In addition, the same Title utilizes the word ward in 46 separate statutes. Consistent with the recommendation of the Uniform Law Commission, Staff has isolated the statutory references to the terms “incapacitated individual” and “ward” and replaced them, where appropriate, with the terms: “individual subject to guardianship”, “individual subject to conservatorship” or “individual subject to a protective order.”<sup>27</sup>

### • Definitions

In conducting an examination of the statutes within Title 3B, Staff noted that the Title contained multiple definition sections. Within the general provisions of Title 3B, there are two definition sections that set forth the definitions of 42 terms.<sup>28</sup> These two statutory sections, however, do not contain a complete list of terms that are set forth in Title 3B.

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<sup>21</sup> See Prefatory Note to Uniform Guardianship, Conservatorship and Other Protective Arrangements Act, U.L.A. \*1 (2017).

<sup>22</sup> *Id.* at \*1

<sup>23</sup> *Id.* at \*1-\*2

<sup>24</sup> Also referred to as “person first” or “person centered language.” For a thoughtful treatment of person first language, see National Center on Birth Defects and Developmental Disabilities, Communicating With and About People with Disabilities (2017), [https://www.cdc.gov/ncbddd/disabilityandhealth/pdf/disabilityposter\\_photos.pdf](https://www.cdc.gov/ncbddd/disabilityandhealth/pdf/disabilityposter_photos.pdf) (last visited Nov. 4, 2018).

<sup>25</sup> *Id.*

<sup>26</sup> In 2012, New Jersey removed the terms “idiot” and “lunatic” from the state’s statutes. See Johnson, *Statutory Language - The meaning of “idiot” in New Jersey – Modernising the legal language used to describe mental disabilities*, THE ECONOMIST (2012), <https://www.economist.com/johnson/2012/12/07/the-meaning-of-idiot-in-new-jersey> (last visited Nov. 4, 2018). See also, Jayne J. Johnson & Marna Brown, Final Report Relating to Pejorative Terms Regarding Persons with Physical or Sensory Disabilities, NEW JERSEY LAW REVISION COMMISSION (2015).

<sup>27</sup> See Appendix.

<sup>28</sup> N.J.S. 3B:1-1 to 1-2.

The Title dealing with the administration of estates, decedents, and others contains 24 separate and distinct definition sections and 14 additional statutes that define terms without bearing the moniker “definition.”<sup>29</sup> Throughout the numerous statutes containing definitions, several terms are defined in more than one way. The terms: child, conservatee, heirs, personal representative, principal, process, property, protected person, protective order, security, trust and ward are each defined twice in Title 3B. The title also defines the words devisee, guardian, state and trust instrument three times. Within the context of Title 3B, the words beneficiary and person are defined four times in separate sections. The word trustee is defined five separate times and the word fiduciary is defined eight times throughout the Title.

It may be beneficial to eliminate the duplicative definitions in an effort to streamline and simplify the Title. It may also be useful to reorganize the Title and place all the definitions in a single section, such as N.J.S. 3B:1-1.

### • *The Complaint*

The New Jersey Court Rules provide a number of important procedural protections for individuals and minors who are subject to guardianship. The Rules require that a verified complaint contain information concerning the petitioner and the individual who is the subject of the complaint.<sup>30</sup> In addition, the complaint must also contain information concerning the alleged incapacitated person’s interest in real estate<sup>31</sup>, personal estate<sup>32</sup>, and any encumbrances on either.<sup>33</sup> The verified complaint must be accompanied by the affidavits, or certifications, of two professionals.<sup>34</sup> The aforementioned documents must be prepared by either two statutorily qualified physicians<sup>35</sup> or one such qualified physician and one licensed practicing psychologist.<sup>36</sup>

### • *Appointment of a Guardian*

The Court will appoint a general guardian upon finding that the person who is the subject of a complaint is without the capacity to govern themselves or manage their affairs.<sup>37</sup> The

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<sup>29</sup> N.J.S. 3B:1-1; 3B:1-2; N.J.S. 3B:9-1; N.J.S. 3B:11-9; N.J.S. 3B:11-16.1; N.J.S. 3B:11-22; N.J.S. 3B:12-69; N.J.S. 3B:12a-2; N.J.S. 3B:12b-3; N.J.S. 3B:13-2; N.J.S. 3B:13a-1; N.J.S. 3B:13a-12; N.J.S. 3B:14-8; N.J.S. 3B:14-46; N.J.S. 3B:14-53; N.J.S. 3B:14-61.2; N.J.S. 3B:17-9; N.J.S. 3B:18-8; N.J.S. 3B:18-12; N.J.S. 3B:18-23; N.J.S. 3B:19b-2; N.J.S. 3B:19b-10; N.J.S. 3B:19b-17; N.J.S. 3B:19b-18; N.J.S. 19b-22; N.J.S. 3B:19b-23; N.J.S. 3B:19b-26; N.J.S. 3B:20-1; N.J.S. 3B:20-21; N.J.S. 3B:20-27; N.J.S. 3B:21-2; N.J.S. 3B:22-39; N.J.S. 3B:24-1; N.J.S. 3B:26-1; N.J.S. 3B:30-2; N.J.S. 3B:31-3; N.J.S. 3B:31-11; N.J.S. 3B:31-37.

<sup>30</sup> R. 4:86-2(a)(1) - (7).

<sup>31</sup> R. 4:86(b)(1)(A).

<sup>32</sup> R. 4:86(b)(1)(B).

<sup>33</sup> R. 4:86(b)(1)(C).

<sup>34</sup> R. 4:86-2(b)(2).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> N.J.S. 3B:12-24.1(a).

guardian is thereafter responsible for exercising all of the rights and powers of the individual subject to guardianship.<sup>38</sup> Such an arrangement is commonly referred to as a general guardianship. Alternatively, the Court may find that a person lacks the capacity to do some, but not all, of the tasks necessary to care of him or herself.<sup>39</sup> In such a case, the Court, in its discretion, may appoint a limited guardian of the person.<sup>40</sup> An individual may retain sufficient capacity to manage certain aspects of his life.<sup>41</sup> The judgment of limited guardianship may, therefore, specify limitations upon the authority of the guardian or areas of decision-making retained by the protected person.<sup>42</sup> Before ordering either arrangement, the Court must make specific findings regarding the individual's capacity.<sup>43</sup>

Twelve years before the enactment of the limited guardian statute, the New Jersey Supreme Court recognized that general guardianships should not be applied to every proceeding. In *In the matter of M.R.*<sup>44</sup>, the Court noted that an individual's liberty may be drastically restrained upon a finding of incapacity and the imposition of a general guardianship.<sup>45</sup> The Court had the foresight to suggest that, under the appropriate circumstances, courts should consider appointing limited, rather than general guardians.<sup>46</sup> By 2005, New Jersey's Legislature had added provisions to the New Jersey statutes to provide for general guardianships<sup>47</sup>, limited guardianships,<sup>48</sup> and temporary guardianships.<sup>49</sup> The New Jersey statutes also provide for an alternative method of managing the business and activities of an individual in need of assistance.

In New Jersey, a court may order a protective arrangement as a less restrictive alternative to guardianship.<sup>50</sup> Under a court-ordered protective arrangement, a judge may protect an individual's assets from dissipation, authorize or ratify any transaction in that person's best interest.<sup>51</sup> Arizona, Arkansas, and Tennessee are the only other three states that afford an individual with a disability a mechanism to receive assistance from another in a relationship that does not constitute a guardianship.<sup>52</sup>

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<sup>38</sup> *Id.*

<sup>39</sup> N.J.S. 3B:12-24.1(b).

<sup>40</sup> *Id.* Under this statute, the court may elect to appoint a limited guardian of the estate, or a limited guardian of both the person and the estate.

<sup>41</sup> *Id.* The individual may possess sufficient capacity to make decisions concerning residential, educational, medical, legal and/or vocational or financial aspects of their life.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *In the matter of M.R.*, 135 N.J. 155 (1994).

<sup>45</sup> *Id.* at 171.

<sup>46</sup> *Id.*

<sup>47</sup> N.J.S. 3B:12-24.1(a).

<sup>48</sup> N.J.S. 3B:12-24.1(b).

<sup>49</sup> N.J.S. 3B:12-24.1(c).

<sup>50</sup> N.J.S. 3B:12-1 to 3B:12-5.

<sup>51</sup> *Id.*

<sup>52</sup> See Appendix.

New Jersey's adoption of protective arrangements in lieu of guardianship is very progressive. A comparison of New Jersey's protective arrangement statute with the language contained in the UGCOPAA, however, reveals that the statute may benefit from the addition of some language drawn from the uniform law. Consistent with the concept of placing the person first is the idea of preserving an individual's autonomy by extending assistance only to the extent necessary to foster that person's well-being. Modifications to N.J.S. 3B:12-1 *et seq.* could include language to clarify who may seek a protective arrangement; to restrict access to the individual subject of the protective order, and permit other arrangements that the court considers appropriate under the facts of each case.<sup>53</sup> In addition, New Jersey's current statutory scheme might benefit from the addition of language that explicitly states that a protective arrangement may also be used in lieu of a conservatorship.<sup>54</sup>

N.J.S. 3B:12-1 established New Jersey's commitment to the well-being of persons with either temporary or permanent disabilities. The use of a least restrictive alternative to either general or limited guardianship has recently been endorsed by several stakeholders involved in this area of law and is consistent with New Jersey's approach to guardianships.<sup>55</sup>

#### • *Guardianship Training*

Once the nature of the proceeding has been determined, if the Court is satisfied with the sufficiency of the complaint and supporting documents, it will enter an order fixing a date for a hearing.<sup>56</sup> Neither the Court Rules, nor the statutes, set forth specific qualifications to become a guardian.

The Court Rules require that a proposed guardian complete guardianship training.<sup>57</sup> A statewide adult guardianship training program does not exist in the State of New Jersey.<sup>58</sup> Rather, a potential guardian is only required to review the guardianship training guide<sup>59</sup> and view a video entitled, "Guardian Tutorial" before undertaking his or her fiduciary responsibilities as a guardian.<sup>60</sup> Unless "good cause exists," the potential guardian must complete their review of the training materials prior to the commencement of the first guardianship hearing.<sup>61</sup>

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<sup>53</sup> See Appendix.

<sup>54</sup> See Appendix.

<sup>55</sup> *ABA Urges Supported Decision Making as Less-Restrictive Alternative to Guardianship*, BIFOCAL, Vol. 38, Issue 6 (2017); *see discussion infra*.

<sup>56</sup> R. 4:86-4(a).

<sup>57</sup> R. 4:86-4(a)(6).

<sup>58</sup> SHARON RIVENSON MARK, ESQ., 45 N.J. PRACTICE, ELDER LAW, GUARD. & CONSERV. §14:10 (2017).

<sup>59</sup> Administrative Office of the Courts, *Guardianship of the Person: Duties & Responsibilities 3* (2017) available at [https://www.judiciary.state.nj.us/courts/assets/guardianship/Guardianship\\_Person\\_web.pdf](https://www.judiciary.state.nj.us/courts/assets/guardianship/Guardianship_Person_web.pdf).

<sup>60</sup> Administrative Office of the Courts, *Guardianship of an Adult Incapacitated Person: Court-Appointed Guardian Tutorial* (2016) available at <https://www.youtube.com/watch?v=S9AowILqHAY&feature=youtu.be>.

<sup>61</sup> R. 4:86-5; *see also* R. 4:86-6(e)(1).



New Jersey is currently one of nine states that require a guardian to undertake some form of training before acting as the guardian of a person or the estate of an individual in need of assistance.<sup>62</sup> New Jersey may benefit from a statute that mandates something more in the way of guardianship training before a person undertakes the fiduciary role of a guardian.

Once the need for a guardianship is established, there are bases on which an individual may be disqualified from acting as a guardian under certain circumstances. In New Jersey, one may be disqualified from becoming a guardian of a veteran if he or she has more than five wards who are not all members of the same family.<sup>63</sup> The results of a criminal history record background check and domestic violence check may influence a court's decision in appointing a caregiver as a kinship legal guardian.<sup>64</sup> These disqualification, however, do not exist for general guardianships, limited guardianships, or protective arrangements. Although a "professional guardian" may be disqualified from serving in such a capacity for numerous reasons.<sup>65</sup> Staff recommends outreach to various stakeholders regarding the collateral consequences of a criminal conviction or bankruptcy on guardianship proceedings.<sup>66</sup>

Upon a finding the individual who is the subject of the complaint is incapacitated, and the guardian qualified, the Court Rules impose specific reporting requirements on a guardian.<sup>67</sup>

- ***Guardianship Monitoring Program***

On January 13, 2013, in an attempt to curtail the abuse of New Jersey's most vulnerable population, the Supreme Court announced the creation of the "Guardianship Monitoring Program" (GMP).<sup>68</sup> The program was, and is, predicated on the underlying policy suggesting that, "[g]overnment is responsible for ensuring that guardians understand the significant authority and responsibility of guardianship, and for monitoring the health and well-being along with the finances of every incapacitated person under the care of a legal guardian."<sup>69</sup> The program was designed to protect individuals with disabilities throughout the State.

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<sup>62</sup> The States that address the issue of guardianship training include: One-hour program (Alaska); video training program (Arizona, Washington); curricula approved by the Public Guardian (Nebraska); written guide and training video (New Jersey); program approved by administrator (New York); course designed by commission (Texas); discretionary programs (Nevada, Pennsylvania).

<sup>63</sup> N.J.S. 3B:13-8.

<sup>64</sup> N.J.S. 3B:12A-6(a)(12).

<sup>65</sup> See N.J.S. 52:27G-34 which sets forth 13 reasons that an individual would be ineligible to become a professional guardian.

<sup>66</sup> See Guardianship Monitoring and Reporting, *infra*, as a means to eliminate opportunities for exploitation of individuals subject to guardianship, conservatorship or protective arrangements.

<sup>67</sup> R. 4:86-6(e)(4); see discussion *infra*.

<sup>68</sup> SHARON RIVENSON MARK, ESQ., 45 N.J. PRACTICE, ELDER LAW, GUARD. & CONSERV. §14:17 (2017).

<sup>69</sup> *Id.* quoting from

The New Jersey Rules of Court mandate that each vicinage operate a “Guardianship Monitoring Program” (GMP).<sup>70</sup> This program functions with the collaboration of the Superior Court, Chancery Division, and Probate Part; the County Surrogates; and the Administrative Office of the Courts, Civil Practice Division.<sup>71</sup> The functions of guardianship support and monitoring are established by the Administrative Director of the Courts.<sup>72</sup> The training of potential guardians, a review of inventories, and periodic reports of financial accounting submitted by guardians are among the responsibilities of the GMP.<sup>73</sup>

The GMP is a comprehensive, statewide, rule-based, volunteer-based court program that identifies issues with either a pre-adjudicated<sup>74</sup> or post-adjudicated guardianship cases.<sup>75</sup> It is the responsibility of the GMP to forward these matters to the Superior Court, Chancery Division, Probate Part for review by the Superior Court.<sup>76</sup> Once received, the Probate part is required to promptly review the monitoring issues.<sup>77</sup> Thereafter, the Court has the discretion to take such further action as it deems appropriate.<sup>78</sup> The monitoring of a guardian and the individual subject to guardianship should be examined in conjunction with the reporting requirements of the guardian.

#### • *Reporting Requirements of Guardians*

The guardian of a person is required to file reports of the well-being of the incapacitated person, unless expressly exempted from this requirement by the Court.<sup>79</sup> A guardian’s report must be filed annually with the Surrogate’s Office.<sup>80</sup> A report prepared by the guardian of a person is required to contain specific information.<sup>81</sup> The guardian must convey: the current mental, physical and social condition of the ward<sup>82</sup>; the living arrangements for all addresses of the ward during the reporting period<sup>83</sup>; the medical, educational, vocational and other services provided to the ward and the guardian’s opinions as to the adequacy of the ward’s care<sup>84</sup>; a

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<sup>70</sup> R. 4:86-1(c).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> R. 4:86-1(c)(1).

<sup>74</sup> *Id.*

<sup>75</sup> R. 4:86-1(c)(2).

<sup>76</sup> R. 4:86-1(c)(3).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> R. 4:86-6(e)(4).

<sup>80</sup> *Id.* See also N.J.S. 3B:12-42 (a guardian shall report at time intervals ordered by the court, unless otherwise waived by the court).

<sup>81</sup> N.J.S. 3B:12-42 *et seq.* See also N.J.S. 3B:16-8 requiring the guardian of an estate of a minor or individual subject to guardianship to file an inventory of all real and personal property with the Court ninety (90) days receiving the grant of letters.

<sup>82</sup> N.J.S. 3B:12-42(a)(1).

<sup>83</sup> N.J.S. 3B:12-42(a)(2).

<sup>84</sup> N.J.S. 3B:12-42(a)(3).

summary of the guardian's visits with the ward and the activities on the ward's behalf and the extent to which the ward has participating in decision-making<sup>85</sup>; if the ward is institutionalized, whether or not the guardian considers the current plan for care, treatment or habilitation to be in the ward's best interest<sup>86</sup>; plans for future care<sup>87</sup>; a recommendation as to the need for continued guardianship, and any recommended changes in the scope of the guardianship.<sup>88</sup>

In addition to the statutory reporting requirements, the Court Rules also impose a reporting requirement on guardians. Pursuant to the Rules, a guardian is required to keep the Surrogate reasonably advised of the whereabouts and telephone number of the guardian and the incapacitated person.<sup>89</sup> If there is a significant change in the ward's status, or health, the guardian must report this change to the Surrogate.<sup>90</sup> Also, in the event of the incapacitated person's death, the guardian must notify the Surrogate of the passing within seven (7) days from the date s/he receives the death certificate.<sup>91</sup> A court may appoint an individual to review a report, interview the parties, and undertake any other investigation that the court directs.<sup>92</sup> The guardian, therefore, should meet with and listen to the incapacitated person and ensure that his or her preferences are being met as long as doing so does not cause harm.<sup>93</sup>

• ***Standard for guardian decision-making***

A guardian will frequently be called upon to make decisions on behalf of the protected person. The decision-making process is often a complicated one and the standard by which decisions are to be made is less than clear. Historically, courts viewed guardianships as primarily a protective arrangement.<sup>94</sup> Whether serving as a guardian of an incapacitated adult, or child, the guardian was expected to do what was "best" for the protected person as if the guardian were a parent.<sup>95</sup>

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<sup>85</sup> N.J.S. 3B:12-42(a)(4).

<sup>86</sup> N.J.S. 3B:12-42(a)(5).

<sup>87</sup> N.J.S. 3B:12-42(a)(6).

<sup>88</sup> N.J.S. 3B:12-42(a)(7).

<sup>89</sup> R. 4:86-6(e)(5).

<sup>90</sup> *Id.* (such major change includes the death of the individual subject to guardianship).

<sup>91</sup> *Id.*

<sup>92</sup> N.J.S. 3B:12-42

<sup>93</sup> Administrative Office of the Courts, Guardianship of the Person: Duties & Responsibilities 4 (2017) available at [https://www.judiciary.state.nj.us/courts/assets/guardianship/Guardianship\\_Person\\_web.pdf](https://www.judiciary.state.nj.us/courts/assets/guardianship/Guardianship_Person_web.pdf).

<sup>94</sup> Lawrence A. Frolik and Linda S. Whitton, *The UPC Substituted Judgment/Best Interest Standard for Guardian Decisions: A Proposal for Reform*, 45 U. MICH. J.L. REFORM 739 (2012).

<sup>95</sup> *Id.*

Just before the end of the twentieth century, new theories of decision-making began to reflect a growing emphasis on the rights of individuals who were the subject of guardianship proceedings.<sup>96</sup>

Under the Uniform Guardianship and Protective Proceedings Act (“UGPPA”) the concept of “substituted judgment” was introduced into the Uniform Probate Code (“UPC”). This concept encapsulated a growing recognition of an adult’s self-determination interests.<sup>97</sup> Under this theory, “[a] guardian, in making decisions, shall consider the expressed desires and personal values of the ward to the extent known to the guardian.”<sup>98</sup> Guardians, under this schema, would make the decision that the protected person would have made if they had the capacity to do so.<sup>99</sup> No longer would the focus of guardianships be restricted to what is best for the protected person.<sup>100</sup> A guardian in a state employing this decision-making paradigm would have a dual mandate – to consider the protected individual’s expressed desires and personal values **and** to act at all times in that person’s best interest.<sup>101</sup> The New Jersey statutes recognize this modality of guardianship decision-making.

In New Jersey a guardian is called upon to utilize both the “substituted judgment” of the protected person and consider their “best interests.”<sup>102</sup> N.J.S. 3B:12-57(f) provides that “a guardian of the person of a ward shall exercise authority of matters relating to the rights and best interest of the ward’s personal needs, only to the extent adjudicated by a court of competent jurisdiction.”

In addition,

...[t]he guardian shall encourage the ward to participate with the guardian in the decision-making process to the maximum extent of the ward’s ability in order to encourage the ward to act on his own behalf whenever he is able to do so, and to develop or retain higher capacity to make decisions in those areas in which he is in need of guardianship services, to the maximum extent possible.<sup>103</sup>

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> Administrative Office of the Courts, Guardianship of the Person: Duties & Responsibilities 4 (2017) available at [https://www.judiciary.state.nj.us/courts/assets/guardianship/Guardianship\\_Person\\_web.pdf](https://www.judiciary.state.nj.us/courts/assets/guardianship/Guardianship_Person_web.pdf).

<sup>100</sup> Lawrence A. Frolik and Linda S. Whitton, *The UPC Substituted Judgment/Best Interest Standard for Guardian Decisions: A Proposal for Reform*, 45 U. MICH. J.L. REFORM 739 (2012).

<sup>101</sup> *Id.* See also N.J.S. 3B:12-50 (setting forth additional powers which may be exercised by the court) and *In re Keri*, 181 N.J. 50 (2004) (the statutory provisions on managing the estates of incompetent persons incorporate and reconcile the best interest standard with the common law equitable doctrine of substituted judgment).

<sup>102</sup> N.J.S. 3B:12-57.

<sup>103</sup> N.J.S. 3B:12-57(g).

In an attempt to assist guardians in reaching a decision, the statute provides that “[i]n taking or forbearing from any action affecting the personal needs of a ward, a guardian shall give due regard to the preferences of the ward, if known to the guardian or otherwise ascertainable upon reasonable inquiry...”<sup>104</sup>

The phrase “due regard” as set forth in the statute, however, does not indicate what relative weight guardians are to give to substituted judgment and best interest in an attempt to reach a final decision.<sup>105</sup>

*In the Matter of M.R.*<sup>106</sup>, the New Jersey Supreme Court addressed the issue of decision-making in the context of a guardianship action. The issue presented to the Supreme Court in that case was whether a woman with a developmental disability bears the burden of proof that she has the specific capacity to choose with which of her divorced parents she will live.<sup>107</sup> The Court expressed concern when it came to “balancing the right of self-determination of developmentally-disabled people with traditional concerns for their best interest.”<sup>108</sup> The Court acknowledged that its decision implicated “policy choices about the rights of developmentally disabled people to make decisions for themselves and the role of courts in the decision-making process.”<sup>109</sup>

The Court, *In the Matter of M.R.*, was forced to reconcile both theories of decision-making, and it held that “[t]he substituted-judgment and the best-interest tests are not dichotomous, but represent points on a continuum of subjective and objective information leading to a reliable decision that gives as much weight as possible to the right of self-determination.”<sup>110</sup> The difficulty that the Court faced in addressing this issue is illustrative of the difficulty that guardians must face on a daily basis when they are forced to extrapolate decision-making guidance from vague statutory language.<sup>111</sup>

• ***The “supported decision-making” option***

Rather than relying on a surrogate, people with disabilities are, pursuant to the “supported decision-making” model, able to make their own decisions with the appropriate support structure

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<sup>104</sup> N.J.S. 3B:12-57(f).

<sup>105</sup> Lawrence A. Frolik and Linda S. Whitton, *The UPC Substituted Judgment/Best Interest Standard for Guardian Decisions: A Proposal for Reform*, 45 U. MICH. J.L. REFORM 739 (2012).

<sup>106</sup> *In the matter of M.R.*, 135 N.J. 155 (1994).

<sup>107</sup> *Id.* at 159.

<sup>108</sup> *Id.* at 165.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 166-167.

<sup>111</sup> Lawrence A. Frolik and Linda S. Whitton, *The UPC Substituted Judgment/Best Interest Standard for Guardian Decisions: A Proposal for Reform*, 45 U. MICH. J.L. REFORM 739 (2012).

in place.<sup>112</sup> Pursuant to this process, individuals with disabilities may choose a trusted person to support them in making their own decisions and exercising their legal capacity.<sup>113</sup> A supporter may be a friend, a family member, a professional, an advocate, a peer, or any other trusted person.<sup>114</sup> This individual, or individuals, would collect and present relevant information to the individual with the disability, and convey this information to others such as health care professionals.<sup>115</sup> The “support” may assist the protected person in implementing his or her decision.<sup>116</sup>

On August 14, 2017, the American Bar Association’s (ABA) House of Delegates adopted Resolution 113.<sup>117</sup> The ABA urged legislatures to, “(1) amend their guardianship statutes to require that supported decision-making be identified and full considered as a less-restrictive alternative, before guardianship is imposed, and (2) require that decision-making support that would meet the individual’s needs be identified and fully considered in proceedings for termination of guardianship and restoration of rights.”<sup>118</sup> The concept of “supported decision-making” recognizes that an individual’s right to make decisions about his or her life is one of the cornerstones of American jurisprudence.<sup>119</sup>

It is the clear public policy of this State to respect the right of self-determination of all people.<sup>120</sup> The New Jersey Constitution states that “[a]ll persons are by nature free and independent, and have certain natural and inalienable rights, among which are those of enjoying and defending life and liberty... and of pursuing and obtaining safety and happiness.”<sup>121</sup> In furtherance of this Constitutional imperative, the Legislature has declared,

... the developmentally disabled are entitled to certain fundamental rights as citizens and that these rights shall not be abrogated solely by reason of admission to any facility or receipt of any service for developmentally disabled persons; that services which are offered to the developmentally disabled shall be provided in a manner which respects the dignity, individuality and constitutional, civil and legal rights of each developmentally disabled person....<sup>122</sup>

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<sup>112</sup> *ABA Urges Supported Decision Making as Less-Restrictive Alternative to Guardianship*, BIFOCAL, Vol. 38, Issue 6 (2017).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *In the matter of M.R.*, 135 N.J. at 166.

<sup>121</sup> *Id. citing* N.J.Const. art. I, ¶1.

<sup>122</sup> N.J.S. 30:6D-2

In construing the Developmentally Disabled Rights Act<sup>123</sup> the New Jersey Supreme Court has held that, "...the Act require[s] the State to provide services to mentally-retarded persons in a setting and manner which is least restrictive of each person's personal liberty."<sup>124</sup> The Court further noted that, "[t]he paradox with incompetent people is to preserve as much as possible their right to self-determination while discharging the judicial responsibility to protect their best interests."<sup>125</sup> To that end, the incorporation of the language suggested in the UGCOPAA, and implementation of statutory language to assist a guardian in gathering the information necessary to work within the "supported decision-making" paradigm, may offer an opportunity to continue to work toward achieving this worthy goal.<sup>126</sup>

• ***Uniform Guardianship, Conservatorship and Other Protective Arrangements Act***

The Uniform Law Commission has revised the uniform law relating to guardianship. The Uniform Guardianship, Conservatorship and Other Protective Arrangements Act (UGCOPAA) addresses issues that arise in the context of both guardianships and conservatorships proceedings for both minors and adults.<sup>127</sup> In addition, the UGCOPAA sets forth protective arrangement instead of guardianship for adults and protective arrangements instead of conservatorship for both adults and minors.<sup>128</sup>

The Act has three overarching aims. First, the Act is designed to reflect a "person-centered" philosophy.<sup>129</sup> In an attempt to effectuate this goal, the Act has sought to eliminate pejorative terms from guardianship statutes. The terms "incapacitated person" and "ward" would be replaced with more precise terms such as "adult subject to guardianship" or "minor subject to guardianship."<sup>130</sup> Terms that are deemed demeaning or offensive would be stricken from the statutes. Next, the UGCOPAA has been written in order to ensure that the least restrictive means are used to protect an individual.<sup>131</sup> This would include the use of supported decision-making.<sup>132</sup> Finally, the Act seeks to make it easier for each actor involved in the process to achieve these goals.<sup>133</sup>

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<sup>123</sup> N.J.S. 30:6D-1 to -22.

<sup>124</sup> *In the matter of M.R.*, 135 N.J. at 166-167.

<sup>125</sup> *Id.*

<sup>126</sup> *See infra.* discussion of Guardianship, Conservatorship and Other Protective Arrangements Act.

<sup>127</sup> *See* Prefatory Note to Uniform Guardianship, Conservatorship and Other Protective Arrangements Act \* U.L.A. 1 (2017).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *See* Prefatory Note to Uniform Guardianship, Conservatorship and Other Protective Arrangements Act \* U.L.A. at 2.

<sup>132</sup> *Id.* and *see* discussion of supported decision making, *supra.*

<sup>133</sup> *Id.* at 2.

In order to effectuate these goals, the Act envisions a number of changes to existing statutory schemes. Among the changes contemplated by the Act are: clarification regarding how appointees are to make decision<sup>134</sup>; implementation of supported decision-making<sup>135</sup>; and the elimination of obstacles in communicating with individuals subject to guardianship. A detailed review of New Jersey's statutes in conjunction with the Act has been completed by Staff. Numerous recommendations and proposed language changes contained in the UGCOPAA's may enhance New Jersey's present guardianship statutes.

#### • *Prior Outreach*

On February 21, 2018, Staff had the opportunity to speak with Benjamin Orzeske, the staff liaison from the Uniform Law Commission regarding the Act. According to Mr. Orzeske, New Mexico has passed a partial version of the UGCOPAA during its abbreviated session. The New Mexico Legislature issued a commitment to review the rest of the Act when it returns to its full session. In addition, Mr. Orzeske noted that Maine is presently revising its probate code. In Maine, guardianship will be one Act in the state's probate code. Six other states are expected, according to Mr. Orzeske, to introduce legislation based upon the Act.

The UGCOPAA contains provisions for monitoring guardianships. This issue arose in New Mexico in conjunction with questions about how the legislature was going to fund this portion of the Act. Unlike New Mexico, New Jersey presently has a "Guardianship Monitoring Program" (GMP) in place.<sup>136</sup> Thus, it is possible that the monitoring requirement may pose no impediment to a New Jersey review of this Act.

### **Conclusion**

A review of the UGCOPAA in connection with New Jersey's guardianship statutes suggests that these statutes may benefit from revision to provide for: the use of person-first language, clear definitions of each term used in the statute, the elimination of duplicative definitions, more in-depth guardianship training and reporting, clearer standards for appointee decision-making, and clarification of the standards to be used in the guardianships, conservatorships and protective arrangements.

The Appendix on the following pages proposes modifications to the New Jersey guardianship statutes that are consistent with the State's goal of assisting "protected persons" in navigating the world around them. The proposed modifications are based, in large part, on the language and principles contained in the UGCOPAA.

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<sup>134</sup> *Id.* at 2.

<sup>135</sup> *See discussion of supported decision making, supra.*

<sup>136</sup> *See discussion of Guardianship Monitoring Program, supra. See also R. 4:86-1(c).*