



## I. Introduction

The concept of guardianship has a very early origin. The literature from Rome at the time of Cicero notes procedures to protect the property of incompetent persons; no such provisions were made for protection of the person. Under our Anglo-Norman legal tradition, the King, acting under the doctrine of *parens patriae*, was the protector of his subjects. While guardianship in England applied both to the person and the estate, the primary purpose of the power was to prevent incompetent persons from becoming public charges or squandering their resources to the detriment of their heirs.<sup>1</sup>

It is not surprising in light of this genesis that reform of the basic process by which guardianships are imposed has been a relatively recent development<sup>2</sup>. While much scholarly and judicial time has been devoted to the debate over the procedural protections to be afforded incompetent persons prior to imposition of a guardianship, insufficient work has been done to guide the actions of guardians who are charged with the enormous responsibility of substituting their judgment for that of another human being. The purpose of the Model Code is to suggest ethical and legal standards designed to simplify and improve this decision making process.

Since the Model Code is designed to address the guardian-ward relationship, we have assumed that the underlying adjudication of incompetency is accurate and made in accordance with procedural due process<sup>3</sup>. Therefore, the question of whether a guardianship should have been imposed at all is beyond the scope of this article<sup>4</sup>.

We have not, however, assumed that all guardianships are necessarily limited to those functions that the individual is incapable of actually performing, since "limited guardianship" is not the norm in all states. In a survey conducted in 1984, Casasanto, Newman and Saunders found that the forty-one states responding to their survey, thirteen had no provision for limited guardianship<sup>6</sup>. Therefore, the Model Code provides a framework for making decisions both on behalf of individuals who are deemed incompetent under a statute providing for plenary guardianship but who clearly retain the functional ability to make certain decisions, and for individuals, with a narrowly limited guardianship. This distinction is significant since the ability of the ward to participate in a decision making process will vary depending on the situation. For example, the Model Code suggests that an ethical guardian should look more closely at, and possibly defer to, the expressed wishes of a ward with an overbroad guardianship in those areas where functional competence still exists. Based on the above, the Code, in some situations, adopts what may on first blush look like an anomalous position by mandating deference to the currently expressed wishes of a legally incompetent person. We believe, however, this is mandated by the important ethical precept that the individual's rights of self-determination should be observed whenever possible.

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1. S. Brakel & R. Rock, *The Mentally Disabled and the Law* 250 (Rev. ed. 1971).
  2. See, e.d., Frolik, "Plenary Guardianship: An Analysis, A Critique and a Proposal for Reform," 23 *Ariz. L. Rev.* 599 (1981). During this session of Congress, the late Congressman Claude Pepper introduced a bill seeking to establish federal procedural protections in guardianship cases. The National Guardianship Rights Act H.R. 1702, 101st Cong., 1st Sess., 135 Cong. Rec. E 1071-01 (1989).
  3. For a thorough discussion of some of the procedural questions still presented by many current guardianship statutes, see, for example, Frolik, *supra* note 2, at 599; "Horstman, Protective Services for the Elderly: The Limits of *Parens Patriae*," 40 *Mo. L. Rev.* 215 (1975).
  4. For a guide to assessing when an individual needs a guardian, see, for example, Casasanto, Covert, Saunders & Simon, "Individual Functional Assessment: An Instruction Manual," 11 *Mental and Physical Disability L. Rep.* 670 (1987).
  5. Frolik, *supra* note 2; Casasanto, Newman, Saunders, *Limited Guardianship: A State Survey (1984)* (Copies available from the New Hampshire Office of Public Guardian, 6 White Street, Concord, NH 03301).
  6. Casasanto, Newman, Saunders, *supra* note 4.



Additionally, we have tried to keep the requirements of the Code limited to fundamental precepts so that it is applicable to family and volunteer guardians, as well as to guardianship organizations. Public guardians and similar organizations should certainly meet the requirements of this Code, but may need to adopt further standards in light of the particular dangers and issues presented in these types of arrangements.<sup>7</sup>

## A. Guardianship Models

Scholars and courts have debated at some length whether a guardian should behave like a parent and act in the ward's best interest or attempt to act as a surrogate and make the decision that most closely approximates the decision the ward would have made in the situation at hand. This debate is best put in perspective by closely evaluating the underlying cause of the disability. Only by understanding the current and past functional status of the ward can a guardian apply the proper standards to the decision. The following examples, taken from the files of the New Hampshire Office of Public Guardian, may assist the reader in understanding the methodology of decision making which applies to the major groups in need of guardianship. Individuals with impairments other than those described below can be evaluated by reference to the most closely analogous group.

**CASE 1** – Mary L. is a 49-year-old resident of a state institution for the retarded. Her current diagnosis is profound mental retardation with a convulsive disorder. Mary was considered to be developing normally until the age of four when she reportedly “struck her head falling down stairs.” Shortly thereafter she had a seizure. Seizure medications were administered; however, she failed to tolerate them. Due to the high degree of care needed, the constant monitoring of her blood levels, and subsequent adjustments in type and dosage of medication, Mary was placed in an institution at the age of five by her family. There has been no family contact since shortly after Mary's placement in the institution. At the present time, Mary can indicate certain preferences for various types of food, but has demonstrated no ability to communicate preferences relating to more complex decisions.

**CASE 2** – John L. is a highly intelligent 29-year-old man diagnosed as having bipolar disorder. The preferred course of treatment for John is the drug Lithium Carbonate. When John is taking his prescribed medication, he is a highly functional member of society. He is employed by a computer firm and earns a high salary; he also has an excellent relationship with his family and carries on an active social life. He maintains close contact with his psychiatrist and is reported to have excellent insight into his illness. However, two to three times per year, John discontinues taking his medication. While the reasons for this are unclear, this non-compliance leads to extremely bizarre and erratic behaviors and often concludes with a period of involuntary hospitalization. Examples of such behaviors include John's belief that he is an “operative” in the Central Intelligence Agency who must “clean up” the drug trafficking in New York City. At times John carries firearms and dresses in army fatigues in an attempt to “hunt down” drug dealers. To maintain his “investigative” efforts, John spends money at exorbitant rates, oftentimes writing bad checks and using personal and employer credit cards well beyond credit limits. These behaviors typically bring him to the attention of the police and result in involuntary institutionalization and treatment. Once John receives sufficient medication, he expresses remorse for his behavior and asks that he not be allowed to cease taking his medication in the future. These manic phases have taken a serious toll on John's professional, social and financial life. Nevertheless during the beginning phases of medication noncompliance, John will not heed anyone's requests to continue taking his medication as prescribed.

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7. *Surrogate Decision Making for Adults: Model Standards to Ensure Quality Guardianship and Representative Payeeship Services*, Subcomm. on Housing and Consumer Interests of the House Select Comm. on Aging, 100th Cong., 1st Sess. (Comm. Print 1988).

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**CASE 3** – Alice H. is a 94-year-old resident of a county nursing home. She raised a family of four children and was an active and vocal participant in community projects. Four years ago, prior to being admitted to the nursing home, Alice fell and suffered a broken hip. She refused all treatment for her condition and consequently became bedridden. Friends and various social service providers ensured Alice’s well-being until the combination of her physical and mental condition made this task overwhelming. In 1980 she was admitted to a county nursing home despite her protests. Soon after her admission, she began to suffer memory loss and seemed to lose her sense of humor. The staff attributed this to the stress caused by her transfer. However, the deficits became worse and after a thorough examination, Alice was diagnosed as having Alzheimer’s Disease. She is now in the third stage of the disease and has virtually no ability to make decisions for herself.

## 1. Best Interest Standard

The Best Interest Standard mirrors the view that the guardian’s duties are akin to those imposed on a parent. Under this standard, the charge of the guardian is to make an independent decision on behalf the ward which will be in the ward’s best interest as defined by more objective, societally shared criteria<sup>8</sup>. This type of decision making is most appropriate for individuals without previous competency. The profoundly retarded individual described in Case 1, above, seems to meet this standard.

In developing the Model Code, we have been guided by our belief that the use of the Best Interest Standard is a last resort, to be utilized only in cases where there is no previous competency or where the ward gave no indication of preference which could guide the guardian in making the decision. The position finds support in the report of the President’s Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research (hereinafter referred to as “Report of the President’s Commission”)<sup>9</sup>. The Commission stated that:

[When] possible, decision making for incapacitated patients should be guided by the principle of substitute judgment, which promotes the underlying values of self-determination and well-being better than the Best Interest Standard does. When a patient’s likely decision is unknown, however, a surrogate decision maker should use the Best Interest Standard and choose a course that will promote the patient’s well-being as it would probably be conceived by a reasonable person in the patient’s circumstances.<sup>10</sup>

It is important to understand that even in the situation described in Case 1, we do not believe it is ethical to simply use the Best Interest Standard to authorize custodial care and protection. The last decade has reflected a growing belief that all individuals are entitled to assistance in developing their abilities and capabilities.<sup>11</sup> We have tried to incorporate this belief in the Model Code by reflecting an ethical requirement for a guardian to apply the Best Interest Standard in accord with the goal of providing individualized habilitation and education.

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8. Compare Dussult, “Guardianship and Limited Guardianship in Washington State: Application for Mentally Retarded Citizens,” 13 *Conz. L. Rev.* 585 (1978) with Gauvey, Leviton, Shuger & Sykes, “Informed and Substitute Consent to Health Care Procedures; a Proposal for State Legislation,” 15 *Harv. J. Legis.* 431 (1978); See also Matter of Conroy, 98 N.J. 321, 486 A.2d 1209 (1985).

9. President’s Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Deciding to Forego Life-Sustaining Treatment*, at 1341 (1983) (hereinafter referred to as Report of the President’s Commission).

10. *Id.* at 136.

11. See Pennsylvania Assn. for Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971); Frolik, *supra* note 2.



It is now likely in many states that an individual like the one described in Case 1 will be able to live in the community, with the support from various agencies and programs and with the aid of a guardian who, in the absence of family, will be responsible for making best interest decisions for the individual. Such a disabled person is likely to have changing needs as the years go by, and may have expanding capabilities, based on the level of habilitative services available in the community. A guardian in this situation would need to monitor services being provided, develop an on-going relationship with service providers and attempt to maximize opportunities for the ward's personal growth. Such a ward may benefit from a series of placements, depending upon the success of habilitation efforts, each less restrictive than the last, and each allowing more independent functioning than the last. It is incumbent on the guardian for such a developmentally disabled person to encourage personal growth, rather than simply allow the ward to remain static.<sup>12</sup>

## 2. Substituted Judgement

The principal of substituted judgement requires the surrogate to attempt to reach the decision the incompetent person would make if that person were able to choose<sup>13</sup>. Use of this model for decision making allows the guardian to make decisions in accord with the incompetent person's own definition of well-being. It is critical to note that this model can only be used if the guardian, through available sources of information, is able to determine the prior preferences of the ward<sup>14</sup>. The Model Code, based as it is on the belief that this type of decision making should be utilized if possible, imposes a duty on guardians to attempt to find this information.

Since this model of decision making is ethically preferred, and since a guardian may not have had a prior relationship with the ward, the guardian will often need to look to others for assistance in learning about the ward's preferences. Relatives, friends, caretakers, and other interested persons may provide some insight as to how the ward would feel or behave in a certain set of circumstances. The ward's own behavior and choices prior to the onset of the incapacity may provide some clues, if known or discoverable. The ward, even if unable to participate fully, may indicate certain preferences by verbal or nonverbal communications. To the greatest extent possible, the guardian must exercise substituted decision making in light of all that he or she can learn about the ward's prior feelings and preferences, and should decide based on how the ward would decide if able. It is essential, though, to recognize that the guardian is the only one who makes the decision, and the guardian is the one who bears the ultimate responsibility for the decision made on behalf of the ward. Substituted judgments made after consideration of all available information about the ward are more likely to be decisions which the ward would make if able.

This situation is best understood by reference to Case 3 described above. In this case, the ward was certainly competent prior to the progression of her Alzheimer's Disease and provided much available information on her thought process. Guardians should ethically defer to this in most situations.

## B. Intermittent Incompetence

Case 2 presents one of the most difficult dilemmas a guardian may face, that of the individual who has a cyclical impairment such as severe depression. The problem is that neither model of guardianship offers a satisfactory set of principals to guide the guardian.

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12. See *Guardianship of the Mentally Impaired: A Critical Analysis*, National Center for Law and the Handicapped (May, 1977).

13. Report of the President's Comm., supra note 8, at 132.

14. Id. at 133.



Certainly, in this type of case the best interest model does not apply; the individual described in Case 2 has expressed his wishes on numerous occasions. Similarly, the substituted judgment model is not wholly applicable, since the individual is at times functionally, though not legally, competent. Therefore, the ethical principles favoring self-determination seem to dictate that the wishes expressed by the person be adhered to if a person is in a lucid state, despite the judicial determination that he is incompetent.<sup>15</sup>

The Model Code recognizes these situations and reflects the conclusion that a guardian is obligated, in limited situations, to respect the wishes of the ward even if contrary to the guardian's notion of best interest. One could argue that this principle is really just an application of the principle of substituted judgment, with the judgment being based on present competent statements, rather than past expressions. It matters not which concepts are used; the key point is to understand that the Model Code is based in part on the belief that self-determination and encouragement of growth of the ward through increased participation in decision making whenever possible are ethically required.

The above view may create some thorny problems for the guardian. For example, in a state that grants only plenary guardianships, the court would seem to be justified in holding the guardian responsible for the consequences of any decision within the guardian's power. If the guardian defers to the wishes of a ward, resulting in a decision contrary to that thought by the guardian to be the ward's best interest, the guardian may face potential liability. We believe, however, this is not a problem, since even in states with plenary guardianship statutes, there seems to be little dispute that the actual decision is informed by the concept of substituted judgment.<sup>16</sup>

## II. The Model Code

### Preamble

In its purest form, guardianship represents an exercise of the state's *parens patriae* authority to protect individuals who are incapable of making decisions for themselves. In theory, the concept of guardianship is rooted in the moral duty of beneficence. Under this theory, individuals subject to guardianship are entitled to enhanced protection from the state. That is, since the imposition of guardianship involves the removal of fundamental rights from the individual ward, the guardian is required to exercise the highest degree of trust, loyalty and fidelity in making decisions on behalf of the ward. Indeed, these requirements can be viewed as a kind of *quid pro quo* due the ward for such a fundamental imposition on his or her liberty and autonomy. This obligation for enhanced protection has been increasingly recognized in recent years by the on-going revisions to state guardianship statutes which require additional procedural protections for the proposed ward in guardianship hearings and also by the growing trend toward limited guardianship. Such changes are also the result of reported, wide spread abuses in the guardianship process as well as the increased use of guardianship—especially public guardianship—for elderly citizens who, due to advances in medical technology, are living longer lives, but are increasingly subject to chronic illnesses or conditions that oftentimes result in periods of incapacity prior to death.

In its' widest application, the imposition of guardianship bestows grave and far-reaching authority upon the person appointed as guardian. The authority of the guardian may encompass the control of

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15. This same analysis may apply to individuals whose guardianships are overbroad due to the lack of a "limited" guardianship statute. See *supra* notes 5 and 6. On issues in which the ward is functionally able to make an informed decision, the same ethical principles seem to require deference to the ward despite the adjudication of incompetency. *Id.*

16. See *supra* notes 7 and 8.



the ward's bodily integrity, place of residence and personal finances. The potential scope of this authority is vast and requires the guardian to act with the greatest degree of care and circumspection. The potential for abuse of this power, whether deliberate or well-meaning, must be appreciated, acknowledged and guarded against. The guardian is in all cases a representative of the interests of the ward and shall represent only the interests of the ward.

The purpose of this Code of Ethics is to provide principles and guidelines for guardians. Since the primary duty of a guardian is to make decisions on behalf of a ward, the first section of this Code addresses general guidelines for decision making. In subsequent sections, specific subject areas are examined. Inasmuch as the areas in which a guardian may be required to make decisions are so broad, it is not possible to address all possible situations in this Code. Rather, the reader should refer to Rule 1 for guidance in situations not specifically addressed in the Code.

### Rule 1 - Decision-Making: General Principles:

A GUARDIAN SHALL EXERCISE EXTREME CARE AND DILIGENCE WHEN MAKING DECISIONS ON BEHALF OF A WARD. ALL DECISIONS SHALL BE MADE IN A MANNER WHICH PROTECTS THE CIVIL RIGHTS AND LIBERTIES OF THE WARD AND MAXIMIZES INDEPENDENCE AND SELF-RELIANCE.

- 1.1 The guardian shall make all reasonable efforts to ascertain the preferences of the ward, both past and current, regarding all decisions which the guardian is empowered to make.
- 1.2 The guardian shall make decisions in accordance with the ascertainable preferences of the ward, past or current, in all instances except those in which a guardian is reasonably certain that substantial harm will result from such a decision.
- 1.3 When the preferences of the ward cannot be ascertained, a guardian is responsible for making decisions which are in the best interests of the ward.
- 1.4 The guardian shall be cognizant of his or her own limitations of knowledge, shall carefully consider the views and opinions of those involved in the treatment and care of the ward, and shall also seek independent opinions when necessary.
- 1.5 The guardian must recognize that his or her decisions are open to the scrutiny of other interested parties and, consequently, to criticism and challenge. Nonetheless, the guardian alone is ultimately responsible for decisions made on behalf of the ward.
- 1.6 A guardian shall refrain from decision making in areas outside the scope of the guardianship order and, when necessary, assist the ward by ensuring such decisions are made in an autonomous fashion.

**Comment:** Decision making is the fundamental responsibility of a guardian. At the inception of, and for the duration of the guardianship, the guardian is empowered to make legally binding decisions on behalf of the ward. While statutes governing guardianship vary from state to state, the obligation of a guardian to make reasoned and principled decisions remains constant. The primary component of such decisions is contained in the duty of the guardian to ascertain the preferences, opinions, and beliefs (hereinafter referred to solely as "preferences") of the ward and to have these preferences reflected in the decision that is made. The ability of a guardian to ascertain the preferences of the ward may vary according to both the type and nature of the ward's disability. Indeed, it is sometimes not possible to

obtain a reliable indication of the past or present position of the ward concerning the decision at hand. Nevertheless, the guardian has an affirmative obligation to make a diligent effort to involve the ward in the decision making process. This process begins with a thorough investigation of the historical preferences of the ward. Clear statements of choice regarding, for example, medical care are highly desirable but are, in point of fact, rarely available. More often the guardian must go beyond this and extrapolate from information obtained concerning the values and lifestyle of the ward.

When making a decision on behalf of a ward, the guardian also has an obligation to thoroughly investigate the current preferences of the ward. A prerequisite to accomplishing this is the ability to conduct a careful interview of the ward. This requires the guardian to be educated and trained in the field of disabilities as well as in interview techniques, whenever possible. Family members, friends or other non-professional guardians who do not have detailed knowledge of interview techniques should attempt to utilize people with such expertise to acquire the necessary information. The ethical obligations involved in the guardian/ward relationship are discussed in the next section of this Code. However, a fundamental principle of this relationship is that the guardian make every effort to familiarize him/herself with the ward and develop a personal relationship in the event one does not already exist. Limitations on the involvement of the ward in decisions are ethically justifiable only in limited circumstances as discussed herein.

The obligation to inform and involve the ward in decision making increased in direct proportion to the significance of the decision. The determination of the relative significance of the decision must be made from both an objective and subjective point of view. That is, a guardian must recognize that the obligation to inform and involve the ward in decisions does not only increase when the decision is factually significant (e.g., consent to major surgery); the guardian must also view the decision from the ward's standpoint. For example, a request by a nursing home for permission to relocate a ward to a different room may appear minor to the guardian but may, in fact, be critical to the ward. This underscores the importance of the guardian forming as close a personal relationship with the ward and his or her caregivers as is possible under the circumstances.

There are occasions when it may be justifiable for the guardian to override the preferences of the ward. This justification is limited to decisions in which the guardian is reasonably certain that substantial harm will result if a decision is made in accordance with the preference of the ward. The discretion allowed the guardian pursuant to this standard is further limited by the relative capacity of the ward when the preference was voiced.

In situations where the ward is unable to provide any indication of prior or current preferences and reliable or relevant background information does not exist or is not forthcoming, the guardian is responsible for making a decision which is in the best interest of the ward. The guardian should consider what choice or decision a reasonable person in similar circumstances would make. Decisions of this nature should not be made in a vacuum, and the guardian has an affirmative obligation to seek insight from all available sources. The guardian must work closely with the ward's caregivers to obtain information about the decision and its potential impact upon the ward. Also, whenever possible the guardian should look to others who may have expertise about the decision at hand. Furthermore, depending upon the relative significance of the decision, the guardian may be required to request the court with jurisdiction over the guardianship to review the matter. An example of this type of situation might be the decision to withhold food and hydration in a state without settled law on this issue. The guardian may also inform either the ward's attorney or any other representative of the decision so that those persons may have the opportunity to review the guardian's actions. Although this may not be legally required, this type of "third-party" informal review may be ethically required in certain significant decisions. If the ward is not represented by counsel the guardian may want to retain counsel or request that counsel be appointed on behalf of the ward. The guardian shall recognize, however, that unless otherwise addressed by statute, it is the

guardian's responsibility to make the decision and to be accountable for it.

The guardian must be aware of the constraints imposed by the guardianship order and must be careful not to make decisions that are beyond the scope of authority granted by the court. Furthermore, the guardian must recognize that the ward may remain entitled to make legally binding decisions independent of the guardian. Indeed, upon request of the ward, the guardian has an obligation to assist the ward in making such decisions by ensuring that the ward is free from undue influence and has access to as much information as possible concerning the alternatives and likely outcome of his or her decision.

## Rule 2 - Relationship Between Guardian and Ward:

THE GUARDIAN SHALL EXHIBIT THE HIGHEST DEGREE OF TRUST, LOYALTY, AND FIDELITY IN RELATION TO THE WARD.

- 2.1 The guardian shall protect the personal and pecuniary interests of the ward and foster the ward's growth, independence and self reliance to the maximum degree.
- 2.2 The guardian shall scrupulously avoid conflict of interest and self-dealing in relations with the ward.
- 2.3 The guardian shall vigorously protect the rights of the ward against infringement by third parties.
- 2.4 The guardian shall, whenever possible, provide all pertinent information to the ward unless the guardian is reasonably certain that substantial harm will result from providing such information.

**Comment:** The relationship between a guardian and ward is fiduciary in nature. It is based upon trust and is characterized by the high degree of dependency of the ward and authority of the guardian. With the imposition of guardianship, the ward's legal status is reduced to that of a child. The law places a special trust and confidence in a guardian and requires that his or her actions and motives be beyond reproach. The fiduciary obligation embodied in the guardian/ward relationship has a wide penumbra of meaning and is, of necessity, proportioned to the occasion. A guardian is required to constantly achieve a balance between the seemingly contradictory duties to protect the ward and to respect and encourage the ward's independence. There is no clear formula for achieving or maintaining this balance. Nevertheless, the guardian must always be mindful of the trust inherent in the relationship and always should act in equity and good conscience.

The protection of the personal and pecuniary interests of the ward is the foremost obligation of the guardian and must always guide his or her motivations and actions. Acting within the scope of the guardianship order, the guardian has the authority to make legally binding decisions on behalf of the ward. These decisions are broad in scope and may involve the ability to control fundamental aspects of the life of another human being. The authority of a guardian may encompass the ability to make decisions concerning the treatment and care of the ward, where the ward shall live, care and management of the ward's estate, and the exercise of the legal rights of the ward. In short, a guardian is entrusted with the custody and control of the ward's person and estate. In light of these broad and far-reaching powers (which, outside of the context of the authority of government to intervene pursuant to its police powers, are unheard of in the western world), the guardian has an obligation to make well-reasoned decisions and ensure no undue harm befalls the ward.

In addition, the guardian must always act within the limitations and scope of the guardianship order. The guardian must exercise care to avoid intentional or unintentional waiver, surrender, impairment or alteration of the ward's rights outside of the guardianship order.





The guardian must subordinate his or her public or private interests to his or her fiduciary obligation to the ward whenever there is the potential for conflict of interest between guardian and ward. Where the guardian appears to have interests which are adverse to those of the ward, the guardian shall take all necessary measures to remedy the conflict immediately. Also, depending on the nature of the actual or potential harm to the ward resulting from the conflict, the guardian shall take whatever action is necessary to ensure third-party review of the situation. This may involve notifying the court, retaining legal counsel on behalf of the ward, resigning the guardianship, or any other remedy which is just and equitable for the ward.

The guardian is also responsible for protecting the rights of the ward's person and estate from infringement by third parties. When necessary, an attorney or other agent shall be retained by the guardian to represent and advocate on behalf of the ward in negotiations or litigation. In such cases it is the guardian, acting in the interest of the ward, who is the client. Nevertheless, it is the responsibility of the guardian to use due diligence in determining and utilizing the preferences of the ward in accordance with this Code. It is recognized that often a guardian will be a professional person and will have specialized knowledge of the law or of some other substantive area concerning the person or estate of the ward, and may therefore be held to a higher standard of diligence than the lay person guardian. Notwithstanding specialized knowledge, a guardian shall not provide direct services to the ward for a fee without the express knowledge and permission of the court having jurisdiction over the guardianship. Since the guardian, in the eyes of the law, stands in the shoes of the ward for the purpose of making legally binding decisions, this would result in the guardian becoming his or her own client and thus violate the prohibition against conflict of interest.


Inherent in the guardian's obligation to exhibit the highest degree of trust, loyalty and fidelity in relation to the ward is the requirement that the guardian share pertinent information with the ward about his or her condition and financial status as well as any decisions the guardian is contemplating or may have actually made. To the extent the ward is able to participate, there exists an informative duty on the part of the guardian to share relevant information with the ward and thus aim toward the goal of joint decision making. The guardian shall use common sense and tact in sharing information, and shall be mindful of the fact that certain information may be upsetting to the ward. The guardian shall attempt to minimize the negative impact of sensitive information by his or her manner of presentation, and shall anticipate the potential need for support and counseling for the ward who reacts adversely to such information. Maintaining a close working relationship with caregivers and other service providers may be helpful in this regard.

To the extent that the interested ward remains uninformed about the facts of his or her condition and the limitations imposed by that condition, and to the extent that the ward lacks information regarding the various options available, the ward will be unable to participate in even a minimally meaningful way in decisions which affect his or her personal affairs and quality of life. Similarly, to the extent that the guardian remains uninformed about the ward's capabilities, wishes, goals, ideas, and needs, the guardian will be limited in his or her own ability to exercise substituted judgment when this shall be necessary, or even to advocate for the ward's best interest in decision making.

Where advice from experts, input from caregivers, and insight from friends and relatives combine with common sense to dictate that the ward is likely to suffer substantial harm from learning facts relative to his or her condition, the guardian may appropriately withhold such potentially damaging information.

### **Rule 3 - Custody of the Person; Establishing a Place of Abode:**

**THE GUARDIAN SHALL ASSUME LEGAL CUSTODY OF THE WARD AND SHALL ENSURE THE WARD RESIDES IN THE LEAST RESTRICTIVE ENVIRONMENT AVAILABLE.**

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- 3.1 The guardian shall be informed and aware of the options and alternatives available for establishing the ward's place of abode.
  - 3.2 The guardian shall make decisions in conformity with the preferences of the ward in establishing the ward's place of abode unless the guardian is reasonably certain that such a decision will result in substantial harm.
  - 3.3 When the preferences of the ward cannot be ascertained or where they will result in substantial harm, the guardian shall make decisions with respect to the ward's place of abode which are in conformity with the best interests of the ward.
  - 3.4 The guardian shall not remove the ward from his or her home or separate the ward from family and friends unless such removal is necessary to prevent substantial harm. The guardian shall make every reasonable effort to ensure the ward resides at home or in a community setting.
  - 3.5 The guardian shall seek professional evaluations and assessments wherever necessary to determine whether the current or proposed placement of the ward represents the least restrictive environment available to the ward. The guardian shall work cooperatively with community based organizations which may be available to assist in ensuring that the ward resides in a non-institutional environment.
  - 3.6 The guardian shall have a strong preference against placement of the ward in an institution or other setting which provides only custodial care.
  - 3.7 The guardian shall monitor the placement of the ward on an on-going basis to ensure its continued appropriateness, and shall consent to changes as they become necessary or advantageous for the ward.
  - 3.8 In the event that the only available placement is not the most appropriate and least restrictive, the guardian shall advocate for the ward's rights and negotiate a more desirable placement with a minimum of delay, retaining legal counsel to assist if necessary.

**Comment:** In establishing the place of abode for the ward, the guardian has an obligation to become as familiar as possible with the available options and alternatives for placement of the ward. The guardian must have a thorough knowledge of community services in order to ensure that the ward's right to live in the least restrictive environment available is upheld. For purposes of this code, the least restrictive environment is considered to be the placement that least inhibits the ward's freedom of movement, informed decision making and participation in the community, while achieving the purposes of habilitation and normalization. The guardian, in establishing the place of abode for the ward, undertakes the difficult task of ensuring the protection of the ward while at the same time maximizing the ward's freedom and independence.

There are many factors to be considered by the guardian in making decisions concerning placement. Foremost, the guardian must determine the preferences of the ward whenever possible. The guardian should bear in mind that, while a decision to change residence is critical for any individual, it is especially so for a disabled person. It is not unusual for a ward to be anxious and upset about a potential change. He or she may be used to the dependency fostered in an institutional setting and react negatively to even the thought of moving. In some instances the ward may be so unhappy in his or her current environment as to be unrealistic about what the move portends. The guardian is therefore cautioned to use care and circumspection in attempting to ascertain the preferences of the ward. Treatment staff, family, friends and others familiar to the ward may prove invaluable in assisting to discern the

ward's position by providing the ward with a sense of the conditions surrounding the placement in terms he or she will understand, and by evaluating his or her reaction to this information. Such individuals may arrange for the ward to visit the proposed placement location to reassure the ward about the transition process. Once the preferences of the ward can be determined, the guardian must make decisions in conformity with such preferences unless the guardian is reasonably certain that substantial harm will result. When preferences of the ward cannot be ascertained, the guardian is required to make decisions which are in conformity with the best interests of the ward. Please see the Comment to Rule 1 for guidance in making such decisions.

In considering a choice of placement location for a ward, the guardian shall also consider the needs of the ward as determined by professionals. This may include assessment of the ward's functional ability, his or her health status, and treatment and habilitation needs. The guardian should not hesitate to request clarification of the assessment or evaluation and should always reserve the right to seek additional and/or independent assessment or evaluation whenever necessary.

The guardian shall not act to remove the ward from his or her home or separate the ward from family and friends unless the guardian is reasonably certain that substantial harm will result unless such action is taken. Whenever such drastic measures become necessary, the guardian shall seek to have his or her actions reviewed by a third-party, even though this may not be required by law. This review shall take place prior to the removal or separation or, if the decision is made pursuant to an emergency, immediately thereafter. The nature of third-party review will vary depending on the particular circumstances. For example, third-party review may be made by the court having jurisdiction over the guardianship or the ward's attorney or other representative. Should none of the above individuals be available or appropriate in a specific case, the review may then be informal, such as an in-depth discussion with an individual knowledgeable about the ward's condition and desires.


Similarly, if not already required by statute or rule, the guardian shall not place the ward in an institution or any other setting which provides only custodial care, without third-party review. A third-party review is required even if the ward consents to the actions of the guardian.

The guardian shall do his or her utmost in ensuring that the ward resides in an optimal setting and shall work closely with community based organizations in achieving this goal. The guardian shall advocate for the ward's right to receive services in the least restrictive environment available and shall not hesitate to retain legal counsel to assist in this effort.

#### **Rule 4 - Custody of the Person: Consent to Care, Treatment and Services**

**THE GUARDIAN SHALL ASSUME RESPONSIBILITY TO PROVIDE INFORMED CONSENT ON BEHALF OF THE WARD FOR THE PROVISION OF CARE, TREATMENT AND SERVICES AND SHALL ENSURE THAT SUCH CARE, TREATMENT AND SERVICES REPRESENTS THE LEAST RESTRICTIVE FORM OF INTERVENTION AVAILABLE.**

- 4.1 The guardian shall make decisions in conformity with the preferences of the ward when providing consent for the provision of care, treatment and services, unless the guardian is reasonably certain that such decisions will result in substantial harm to the ward.
- 4.2 When the preferences of the ward cannot be ascertained or will result in substantial harm, the guardian shall make decisions with respect to care, treatment and services which are in conformity with the best interests of the ward.

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- 4.3 In the event the only available treatment, care or services is not the most appropriate and least restrictive, the guardian shall advocate for the ward's right to a more desirable form of treatment, care or services, retaining legal counsel to assist if necessary.
  - 4.4 The guardian shall seek professional evaluations and assessments whenever necessary to determine whether the current or proposed care, treatment and services represent the least restrictive form of intervention available.
  - 4.5 The guardian shall work cooperatively with individuals and organizations which may be available to assist in ensuring the ward receives care, treatment and services which represent the least restrictive form of intervention available and are consistent with the wishes or best interests of the ward.
  - 4.6 The guardian shall not consent to sterilization, electro-convulsive therapy, experimental treatment or service without seeking review by the court or the ward's attorney or other representative.
  - 4.7 The guardian shall be familiar with the law of the state regarding the withholding or withdrawal of life-sustaining treatment.
  - 4.8 The guardian shall monitor the care, treatment and services the ward is receiving to ensure its continued appropriateness, and shall consent to changes as they become necessary or advantageous to the ward.

**Comment:** The ethical precepts contained in rules 4. 1-4. 5 are simply another application of the decisional factors discussed in the previous sections. A guardian when making treatment decisions, as when making decisions concerning where the ward should live, must gather all available information and must attempt to abide by the preferences of the ward if ascertainable and not likely to cause substantial harm. See Comments to Rules 1-3.


Beyond the basic standards for decision making, this set of rules also recognizes the controversial nature of certain forms of care and singles them out for third-party review. For example, debate has raged in the courts and community concerning whether a woman with developmental disabilities has her "rights" protected or infringed by sterilization. Does sterilization violate her right to procreate? Does it permit a woman who has been unable to properly utilize contraceptives to pursue a full sex life without unwanted pregnancy? This type of treatment also presents an often difficult dilemma for the guardian: is this irrevocable decision truly in the ward's best interest or a device to simplify the guardian's responsibilities to the ward?

Regardless of how these questions are answered, the Model Code requires the ethical guardian to seek some form of appropriate third-party review. The form of this review will vary depending on the particular requirements of state law—for example, the requirement or lack thereof of court approval. If there is no court requirement, an ethical guardian will still seek informal consultation with an appropriate individual, such as the ward's attorney, doctor or family member.

The issue of withholding and withdrawing life support is governed predominantly by state law. Since a guardian who complies with ethical standards which violate state law can still be held liable for his or her actions, we have not attempted to address this issue in the Code. Rather, an ethical guardian in an area such as this, where ethical precepts have been pre-empted by state law, will look to that law for guidance.

## **Rule 5 - Management of the Estate:**

**THE GUARDIAN OF THE ESTATE SHALL PROVIDE COMPETENT MANAGEMENT OF THE PROPERTY AND INCOME OF THE ESTATE. IN THE DISCHARGE OF THIS DUTY, THE GUARDIAN SHALL EXERCISE INTELLIGENCE, PRUDENCE AND DILIGENCE AND AVOID ANY SELF-INTEREST.**

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- 5.1 Upon appointment, the guardian shall take steps to inform himself or herself of the statutory requirements for managing a ward's estate.
  - 5.2 The guardian shall manage the income of the estate with the primary goal of providing for the needs of the ward, and in certain cases, the needs of the ward's dependents for support and maintenance.
  - 5.3 The guardian has a duty to exercise prudence in the investment of surplus funds of the estate.
  - 5.4 Where the liquid estate of the ward is sufficient, the guardian may make such gifts as are consistent with the wishes or past behavior of the ward, bearing in mind both the foreseeable requirements of the ward and the tax advantages of such gifts.
  - 5.5 There shall be no self-interest in the management of the estate by the guardian; the guardian shall exercise caution to avoid even the appearance of self-interest.

**Comment:** The requirements imposed on a guardian vary according to the state of appointment. Therefore, a guardian must, at the outset, discover the particular legal requirements governing the guardian's actions. The guardian functions as the arm of the court, and as such, is accountable to the court for his or her actions. Certain obligations exist by virtue of statute and others may be granted or assigned by the court. These rules and comments do not reflect the specific law of any state. Rather, they address some of the broad ethical questions implicit in the role of guardian. A guardian must be sure to check the law of his or her state before relying on the principles contained herein.

The guardian must seek to obtain all available income for the ward. If the ward's own funds are inadequate to provide for the needs of the ward, the guardian will find it both prudent and necessary to seek income supplementation via various income maintenance and insurance programs available through federal, state and local resources. Public benefits may not only be helpful, but essential to the guardian in providing for the needs of the ward. The guardian is, therefore, under a positive obligation to investigate their availability and seek such assistance on behalf of the ward.

Collection of the ward's debts is the responsibility of the guardian. Receipt of funds on the ward's behalf discharges the debtor of his or her obligation. To the extent necessary or appropriate to the individual case, the guardian may employ an attorney to handle the debt collection function on the ward's behalf. In all such cases, transactions are negotiated and carried out in the name of the ward.

The guardian must use the ward's income to provide for his or her needs. The guardian undertakes the responsibility to settle the ward's outstanding accounts, first from the income of the estate, and then via sale of personal property, with license from the court. Only to the extent that debts cannot be covered through these avenues may the guardian seek permission to encumber or sell real estate.

Although possession of the real estate of the ward is in the hands of the guardian, title resides with the ward. Any plan to convey the ward's real estate must be contemplated only as necessary to provide for the care and maintenance of the ward, or in cases where the sale is demonstrably in the ward's best interest.

Exchange or partition of the ward's real estate must be considered only for the purpose of securing the funds necessary for the support of the ward, or for purposes otherwise in the ward's best interests. Since "license" of the court is often needed to dispose of real estate, the guardian should carefully check local requirements prior to selling or encumbering real property.

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The guardian may mortgage the property of the ward only in accord with state law and only when necessary, based on insufficiency of the income of the estate to maintain and support the ward; to discharge other obligations, liens and mortgages; to extend the length or reduce the rate of interest of the existing mortgage; or to finance improvement to the property with an eye toward increasing the value of the real estate as an asset of the estate. On the other hand, in most states, the guardian does possess the power and right to lease the property with the goal of maximizing the income of the estate. Such a lease may be made in the name of the guardian and enforced by the guardian. Any warranties, therefore, are made by the guardian, and not by the ward or on his behalf. Any covenants or easements are likewise made by the guardian in his or her own name, and with the expectation that they will terminate upon the termination of the guardianship relationship.

Should there be surplus funds in the estate; the guardian must invest such funds prudently. While caution is essential in choosing non-speculative opportunities for investment, diligent attention should be paid to opportunities which may result in a high rate of return. The prudent guardian will seek such opportunities to maximize the estate. The deposit of funds in interest bearing accounts is a safe investment, but one which may be less likely than others to maximize the return to the estate. Such deposits and all other investments as well, must be made in good faith and in the name of the ward. Disclosure by the guardian of his fiduciary role is essential evidence of such good faith. In no case should the ward's funds be mingled with those of the guardian, and they must be clearly identifiable at all times.

Funds loaned for investment purposes must be secured by sufficient collateral. Purchase of stock in private corporations, particularly when the guardian is also a stockholder, should be avoided, due to both the risky nature of such investments and the possible appearance of impropriety and self-interest on the part of the guardian. The guardian must exercise absolute good faith, reasonable judgment, discretion, and diligence. He or she must also reject speculative or risky investments as well as those which imply favoritism in favor of opportunities, which are likely to produce an income as large as possible while still being reasonably safe.

Charitable contributions may be made, with court approval in some jurisdictions, in such a manner as to perpetuate the former practices of the ward, or consistent with a substituted judgment as to their benefit to the ward's current or future situation. Non-charitable gifts, such as those gifts which might be made to family members or close friends, may be made from the surplus income of the estate if the guardian is in possession of demonstrable evidence that the ward would make such gifts. Where the guardian himself or herself, is among the potential donees of such gifts, consideration should be given to seeking independent representation for the ward from an attorney or a guardian ad litem, depending on local practice. In any case, court authorization of such a gift should be sought by the prudent guardian to avoid the appearance of any impropriety. In all cases, court authorization of such a gift should be sought by the prudent guardian to avoid the appearance of any impropriety. In all cases, the guardian may be held to a thorough knowledge of the principles and practices of estate planning, including the tax consequences, in the carrying out of planned giving. If the guardian does not have such expertise, he or she must seek professional advice before deciding to make any gifts.

The application of surplus income of the estate to the support and maintenance of the ward's dependents may be an issue of importance in certain cases where the ward is bound by custom, duty, or law to provide for his or her dependents. In such a case, the guardian shall first see to the current and future needs of the ward, and then may apply the surplus to the support of others to discharge the obligations of the ward. A substituted judgment in this regard must be supported by sufficient evidence to demonstrate to the court its propriety. In no case shall a guardian approve or allow support to himself or herself from the income of the ward's estate. Only to the extent that the expenses of the guardianship itself are met by the guardian shall he or she seek reimbursement or approval from the court for such expenses.

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While it is understood that the guardian must take responsibility and bear liability for his or her own negligent acts, the prudent guardian will scrupulously avoid even the appearance of self dealing in the decisions he or she makes concerning the financial affairs of the ward. This warning bears special significance for the guardian who is also a relative and future heir of the ward. Efforts to maximize the estate in this situation may be interpreted as an attempt to protect a future inheritance. For this reason, once assuring himself or herself of an absence of self-interest in decisions affecting the financial affairs of the ward, the guardian is well advised to seek court approval or license to avoid any appearance of impropriety.

## Rule 6 - Termination and Limitation of the Guardianship:

THE GUARDIAN HAS AN AFFIRMATIVE OBLIGATION TO SEEK TERMINATION OR LIMITATION OF THE GUARDIANSHIP WHENEVER INDICATED.

- 6.1 The guardian shall diligently seek out information which will provide a basis for termination or limitation of the guardianship.
- 6.2 Upon indication that termination or limitation of the guardianship order is warranted, the guardian shall promptly request court action, retaining legal counsel if necessary.
- 6.3 The guardian shall assist the ward in terminating or limiting the guardianship and arrange for independent representation for the ward whenever necessary.

**Comment:** The guardian shall seek evidence of any change in the capabilities of the ward and shall immediately seek complete or partial restoration of the legal capacity of the ward whenever the situation so dictates. Standards and evidence for restoration to capacity vary from state to state and the guardian is obligated to understand these matters as well as the procedure required for termination or limitation. Whenever necessary, the guardian shall not hesitate to consult with legal counsel and obtain the opinions of other professionals and care providers in making this determination.

In the even the ward expresses the desire to challenge the necessity of all or part of the guardianship, including the individual or agency acting as the guardian; it is the affirmative obligation of the guardian to assist the ward wherever necessary. This may include filing a petition on behalf of the ward, or, where the guardian does not agree with the ward, arranging for representation of the ward by independent legal counsel. The right to retain counsel for the purpose of challenging the guardianship or the actions of the guardian is fundamental and may not be waived or contracted away. Interference by the guardian with the ward's efforts to obtain full or partial restoration of capacity, or to challenge the guardianship in any way, shall constitute a breach of the guardian's fiduciary obligation to the ward.

## VII. Conclusion

Individuals acting as guardian for disabled individuals are vested with enormous responsibility. The need to balance the goal of protection of the ward with the goal of minimizing the deprivation of the ward's rights, presents a complex matrix of decisional factors. The Model Code is an attempt to provide some general principles and commentary designed to improve the process of decision making so that individuals will be willing to serve as guardians, for persons in need, and so that the decisions actually made are based upon a set of agreed upon precepts.