

Table of Contents

INTRODUCTION

General Demographic Information

- I. **The Purpose of Guardianship and the Appointment of a Guardian**
 - A. **Historical Analysis**
 - B. **Guardianship Process**
 - C. **Lack of Continuity in State Statutes**
- II. **May a Felon Still be a Guardian?**
 - A. **Reducing the Effect of a Prior Felony Conviction: Annulments, Dismissals, Expunctions and Pardons**
 - 1. Dismissal/annulment of the felon's record:
 - 2. Expungement and the Sealing of the Felon's Record
 - a. The Process of Obtaining Expunction or Sealing of Record of Conviction
 - b. The Effect of Expunction or Sealing upon Requirement to Report Conviction or Qualification for Guardian Status
 - 3. Obtaining a Pardon from the Felony Conviction
 - a. The Process of obtaining a Pardon
 - b. The Legal Effect of a Pardon
 - 4. Summary for the Mitigation of the Conviction
 - B. **Seeking Alternatives to Guardianship: The Durable Power of Attorney**
 - 1. Advantages of a Durable Power of Attorney over a Guardianship Appointment
 - 2. The Risks Inherent in a Durable Power of Attorney
 - 3. Distinguishing Characteristics
- III. **Should Legislation be Uniform Among the States?**
 - A. **Generally**
 - 1. Uniform Standards
 - 2. Full Faith and Credit
 - a. Full Credit
 - b. Partial Credit
 - c. Comity
 - 3. Best Interest/Judicial Discretion:
 - B. **Preservation of Checks and Balances**
 - C. **Considerations of Policy-Makers**
 - 1. Rational Basis Challenges
 - 2. Should Adoption of Uniform Models and Standards be Mandatory?
 - a. Uniform Probate Code and the Uniform Guardianship and Protective Placement Act
 - i. Interstate Guardianships
 - b. National Probate Court Standards:
 - c. National Guardianship Association Standards
 - d. The American Bar Association

CONCLUSION

APPENDIX A

APPENDIX B

TABLE ONE

TABLE TWO

TABLE THREE

APPENDIX THREE

ABSTRACT

Courts require discretion in appointing guardians. Oftentimes, the legislature prevents the courts from exercising discretion when statutes are enacted that prohibit felons from serving as guardians under any circumstances. Yet, the need for guardians is increasing and will continue to do so due to the exponential growth in the aging elder population.

At the same time, however, the pool of potential guardians is shrinking in size. Additionally, the same reducing pool of eligible guardians is being attenuated further by having a disproportionate amount of felonies.

The groups most impacted by these trends are the indigent and the minorities. The indigent do not have the resources to hire guardians and often, the only persons eligible and available to serve as guardians are family members. The minorities may be impacted if they are of a race that has historically possessed a disproportionate amount of felons. If poverty and race are considered, along with an increasing number convicted felonies, a significant problem develops in finding eligible guardians.

Persons convicted of felonies should be scrutinized closely to determine whether it is in the ward's best interest to have said person appointed as a guardian, but certain statutes completely prevent the court from making such a consideration.

The alternatives available to the convicted felon to mitigate against the complete restraint are woefully inadequate. The remedies of dismissal, annulment, expungement, and pardon are not feasible for most felons. The signing of a durable power of attorney is not available to many indigent and elderly persons, or to children who have been developmentally challenged since birth.

Other considerations, such as extending full faith and credit, comity or the best interest standard are equally inadequate to resolve the needs for guardians. Finally, the uniform codes and proposed standards do not address the issue sufficiently.

This article promotes allowing the judiciary discretion to appoint felons in certain situations where it would be in the best interest of the ward. The article further discusses the inadequacies of the uniform codes and proposed standards in this area of concern.

The Convicted Felon as a Guardian: Considering the Alternatives of Potential Guardians with Less-Than-Perfect Records

By

Mike E. Jorgensen¹

INTRODUCTION

The pool of potential guardians is shrinking and the demand for guardians is increasing.² Considering that the proportionate number of felonies in the United States is increasing, along with the demand for additional guardians, more and more often convicted felons may be placed in situations where they will be the only persons feasible to act as guardians. This is especially true in situations where the ward is indigent or is in a minority race that has a disproportionate amount of convicted felons.³

The problem of disqualifying all felons from serving as guardians will most likely negatively impair the indigent and minority groups in comparison to those wards who

¹ Associate Professor of Law, Florida Coastal School of Law. Special thanks to my brother, Kenneth K. Jorgensen, and to R. Carter Burgess, Bradley C. Shriver and Rebecca L. Zoeller for their assistance in writing this article.

²Symposium, *Creating the "Portable" Guardianship: Legal and Practical Implications of Probate Court Cooperation in Interstate Guardianship Cases*, 13 QUINNIPIAC PROB. L. J. 351, 352-53 (1999) (“The increase in the proportion of elderly relative to the total population and corresponding increases in the life expectancy of the elderly and their assistance needs suggest that the volume of probate caseloads is likely to expand accordingly--and, in fact, may already have begun to do so.”).

³CHRISTOPHER UGGEN & JEFF MANZA, THE POLITICAL CONSEQUENCES OF FELON DISFRANCHISEMENT LAWS IN THE UNITED STATES 6 (2001). The impoverished are the most in need of guardians as the economic incentives to serve as their guardians are absent where the incapacitated lacks assets. Felons are proportionately more likely to be living in poverty.

possess estates with significant assets.⁴ In situations where the estates are small or non-existent, it is difficult to find people willing to serve as guardians, especially since the guardian's responsibilities are significant and the estates are not sufficient to provide adequate compensation.⁵ Such cases present special legal challenges to both courts and practitioners. This article will address the special legal challenges of felons as guardians, discuss different approaches or solutions that jurists may wish to consider when selecting possible guardians that may have less-than-perfect records, and expose deficiencies in the uniform codes, statutes and standards concerning felons seeking appointments as guardians.⁶

The first section of this article briefly discusses the basics of guardianship law and describes the issue in more detail. The second section addresses certain legal implications of past felony convictions on the appointment of a guardian, and (1) how to reduce the effects of a prior felony conviction through annulment, expunction and pardon, and (2) alternatives to guardianship, such as the durable power of attorney, if available. The third section

⁴Hetherington v. State Pers. Bd., 82 Cal. App.3d 582 (Ct. App. 1978); Wesley v. Collins, 605 F. Supp. 802 (D.Tenn.1985) (the case discusses the disenfranchising of voting blacks due to the disproportionate number of felons within the group, and the court finds that the voting rights statute did not unlawfully dilute their vote under the Fourteenth or Fifteenth Amendments, notwithstanding statute's disproportionate impact on blacks, i.e., it did not deprive blacks of equal protection). See also Taja-Nia Y. Henderson, *New Frontiers in Fair Lending: Confronting Lending Discrimination Against Ex-Offenders*, 80 N.Y.U. L. REV. 1237, 1270 (Oct. 2005).

⁵Alison Patrucco Barnes, *Beyond Guardianship Reform: A Reevaluation of Autonomy and Beneficence for a System of Principled Decision-Making in Long Term Care*, 41 EMORY L. J. 633, 713 (Summer 1992) ("Similarly, a proxy decision-maker who is not serving the ward's interests should be replaced. With unpaid proxies, however, there is seldom anyone willing to undertake the task. There is, therefore, a need for a public guardian who can serve as a guardian of last resort. In England, the Court of Protection, under the Public Trustee, provides such a service. A number of states in the United States have public guardians to serve the indigent, although Florida, for example, has public guardians in only two court circuits.").

⁶It is beyond the scope of any such article to address in detail all of the issues and possible solutions in all jurisdictions in the United States. Such issues can only be addressed in general; adapting the suggestions for local law and practice will be necessary.

discusses decisions that policy makers may have to consider, including: (1) whether a forum state court must provide full faith and credit to a foreign judgment or decree of guardianship, (2) whether legislation that deprives a court of discretion of whether to appoint a guardian violates separation of powers or equal protection, and (3) whether there are needs of having standardized uniform legislation regarding the appointment of felons as guardians.

Furthermore, this article will explore the idea of the "best interest standard" for the ward, specifically whether the modern guardianship system truly utilizes a best interest standard, and whether there is a need for reform. For example, the increase in interstate travel raises jurisdictional, venue, and conflict of laws issues inherent in the present guardianship system.⁷ This paper will address two of the resulting dilemmas from the present structure, which includes the possibility of encouraging forum shopping, and the extent full faith and credit pertains to guardianship eligibility in interstate guardianships.

General Demographic Information

In the past century, the United States' population has significantly increased in the median age.⁸ In the 1860s, the median age was nineteen years of age and in 2050, the median age is projected to be forty-five years.⁹ In 1900, the life expectancy for males was forty-six and roughly forty-eight for females.¹⁰ Today, the life expectancy for males and

⁷See Symposium, *Creating the "Portable" Guardianship: Legal and Practical Implications of Probate Court Cooperation in Interstate Guardianship Cases*, 13 QUINNIPIAC. PROB. L. J. 351 (1999).

⁸See http://www.aoa.dhhs.gov/press/fact/pdf/ss_stat_profile.doc; See also, <http://www.cdc.gov/nchs/search/search.htm>

⁹*Id.*

¹⁰*Id.*

females ranges between 73.8 (males 1998) and 79.5 (females 1998).¹¹

At the same time the elder population rapidly ages, every year in the United States, over one million people are convicted of felonies, a statistic that continues to increase.¹² Not all felonies are for dishonesty, theft or exploitation. Currently about a third of felony convictions are for drug offenses,¹³ while theft and burglary offenses constitute about a third of felony convictions, with approximately one third of these being fraud related.¹⁴ The remaining convictions are for violent offenses, weapon offenses and nonviolent crimes.¹⁵

These statistics have remained relatively constant since 1998.¹⁶ As of 2001, one in thirty-seven adults in the United States had served time in prison.¹⁷ Six and a half percent of persons born in 2001 will go to prison in their lifetime if current rates of incarceration remain unchanged.¹⁸ This statistic has increased from a little over five percent of persons born in

¹¹<http://www.cdc.gov/nchs/fastats/lifexpec.htm>.

¹² Mathew R. Durose & Patrick A. Langan, Ph.D., *Felony Sentences in State Court, 2002*, BUREAU OF JUST. STATS. BULL. (U.S. Dept. of Just., Washington, D.C.), Dec. 2004 (estimated 1.1 million felony convictions in 2002); *See also*, Mathew R. Durose & Patrick A. Langan, Ph.D., *Felony Sentences in State Court, 2000*, BUREAU OF JUST. STATS. BULL. (U.S. Dept. of Just., Washington, D.C.), June 2003 (estimated 983, 823 felony convictions in 2000).

¹³ Mathew R. Durose & Patrick A. Langan, Ph.D., *Felony Sentences in State Court, 2002*, BUREAU OF JUST. STATS. BULL. (U.S. Dept. of Just., Washington, D.C.), Dec. 2004, at 2.

¹⁴*Id.*

¹⁵*Id.*

¹⁶*See* Matthew R. Durose & Patrick A. Langan, Ph.D., *Felony Sentences in State Courts, 2000*, BUR. OF JUST. STATS. BULL. (U.S. Dept. of Just., Washington, D.C.) June 2003; Matthew R. Durose, David J. Levin & Patrick A. Langan, Ph.D., *Felony Sentences in State Courts, 1998*, BUR. OF JUST. STATS. BULL. (U.S. Dept. of Just., Washington, D.C.) Oct. 2001.

¹⁷ Thomas P. Bonczar, *Prevalence of Imprisonment in the U.S. Population, 1974-2001*, BUR. OF JUST. STATS. SPECIAL REP. (U.S. Dept. of Just., Washington, D.C.) Aug. 2003, at 1.

¹⁸*Id.*

1991 and almost two percent of persons born in 1974.¹⁹

The rate of increasing felons requires contemplation when we consider the pool of persons available to serve as guardians over those who are incapacitated due to infirmity, dementia or physical ailments.²⁰ The differences in how the states define eligibility for potential guardian applicants ranges from states that exercise little restraint in the appointment of guardians to those that completely prohibit felons as guardians.

The birth rate has declined dramatically since the 1950's.²¹ As a result, incapacitated people may have fewer, or perhaps no, children who would be eligible to act as their guardians. Further limiting the potential pool of eligible guardians by precluding felons from serving in that capacity acts as a major disadvantage to the incapacitated with few or no children.

These statistics indicate an increasing likelihood that persons with felony convictions in their history may seek the appointment, or have already received an appointment, as guardians²² of incapacitated spouses, parents or children. Furthermore, as our society

¹⁹*Id.* Please note that this is rate of *incarceration*, and may not reflect the rate of *conviction*.

²⁰Symposium, *Creating the "Portable" Guardianship: Legal and Practical Implications of Probate Court Cooperation in Interstate Guardianship Cases*, 13 QUINNIPIAC PROB. L. J. 351, 652-53 (1999) (“More critically, probate courts are likely to face significant problems . . . with legal considerations of jurisdiction, venue, full faith and credit, comity, and conflicts of laws.” For example, . . . “If a court of competent jurisdiction in another state appointed a guardian for an incapacitated person, should a probate court give full faith and credit to the guardianship order if the incapacitated person moves to the new jurisdiction? What if the existing guardianship order grants rights or powers to the guardian that, as a matter of public policy, would not be granted in the new state?”).

²¹[Http://www.cdc.gov/nchs/data/statab/t991x01.pdf](http://www.cdc.gov/nchs/data/statab/t991x01.pdf).

²² The words “Guardian” and “Guardianship” as used in this article include all types of guardianships of the person or estate of an incapacitated person, even though defined differently in state law, unless otherwise indicated in the article. “Guardianships” as used in the article are considered the same as conservatorships and tutorships of the person or estate, whether limited or plenary. Additionally, although the Uniform Probate Code and various state statutes distinguish between the definitions of conservator and guardian, i.e., a conservator means a person appointed by the court to manage the estate of the ward, whereas a guardian is a court-appointed person responsible for the care, custody, and control of the ward. This article will use the term “guardian” in a generic manner as the person responsible under court order for both the person and the property of the ward. The issue raised herein does not uniformly distinguish between guardianships established for adults versus

becomes more mobile, with a guardian possibly seeking to move or relocate the ward to a different jurisdiction that may possess different eligibility requirements, questions develop around the deference the state accepting the transitioning ward ("the forum state") must give to the prior state's guardianship orders and decrees ("the foreign state").

Two primary classes of persons affected by the reduced guardian pool are the incapacitated in minority races and the indigent elderly. Consider the situation where a child is born developmentally disabled or becomes developmentally challenged prior to turning eighteen years of age.²³ While the child is under the age of majority, the natural parent may make both personal and health care decisions for the child.²⁴ Once the child's disability is

guardianships established for minors in age. Oftentimes, states have different requirements for the different guardianship categories.

²³Florida Coastal School of Law's Elder Law Clinic represented the mother of a developmentally disabled child in 1999. The mother, as natural guardian in Florida, had the right to make decisions for her son and to obtain medical and dental care. When the son turned eighteen years of age, however, under Florida law he was presumed competent and his legal disability was removed as a matter of law. The mother sought assistance from the Clinic to obtain a guardianship over her son whom she had been taking care of for eighteen years so that she could continue to make decisions for her son's welfare. The mother was disqualified since Florida statutes prevent a felon from serving as a guardian regardless of the circumstances. Nineteen years earlier, the mother had a felony conviction for accessory to robbery. It was her only conviction or trouble with the law. The court felt compelled under the statute to disqualify the mother from acting as her son's guardian. The court interpreted the statute as a total disqualification for eligibility. The court further denied eligibility despite arguments that the conviction may be eligible for expungement, or that the mother may be eligible of a pardon, or that her rights might be restored. No alternative would have persuaded the court to allow the mother to act as guardian since the statute was unambiguous that felons are not eligible to serve as guardians in Florida.

²⁴*See In re Guardianship of MEO*, 2006 WL 2022472 (Wyo. 2006); *See also*, TENN. CODE ANN. § 34-1-102(a) (2005) ("Parents are the joint natural guardians of their minor children, . . ."); *Lacy v. Arvin*, 780 A.2d 1180 (2001); *Cruickshank-Wallace v. County Banking & Trust Co.*, 885 A.2d 403 (Md.Ct. Spec. App. 2005); ARK.CODE ANN. § 28-65-501 (2006); DEL. CODE ANN. 10 § 1009 (2006); DEL. CODE ANN. 13 § 701 (2006); FLA. STAT. ANN. § 744.301 (West 2006); *In re: Standards and Procedures for the Prot. of Minors in the Settlement of Pers. Injury, Wrongful Death and Med. Malpractice Lawsuits and Claims*, FL ST 11 J CIR 03-12 (West 2006); GA. CODE ANN. § 29-2-3 (2006); ME. REV. STAT. ANN. tit. 19-A, § 1651 (2006); *McConnell v. McConnell*, 177 N.E. 692 (1931); MD. CODE ANN., FAM. LAW § 5-203 (2006); MO. ANN. STAT. § 104.140 (West 2006); 4B NJPRAC § 95.3(R. 4:72-2) (West 2006); N.C. GEN. STAT. ANN. § 35A-1201 West 2006); OHIO REV. CODE ANN. § 1339.69 (West 2006); OKLA. STAT. ANN. tit. 30, § 1-112 (West 2006); TENN. CODE ANN. § 34-1-102 (West 2006); TEX. PROB. CODE ANN. § 676 (Vernon 2006); UTAH CODE ANN. § 75-5-204 (West 2006); VA. CODE ANN. § 31-1 (West 2006); 3A COPRAC § 101.4 (West 2006).

removed due to the prescription expiring by operation of law, the child will be presumed competent.²⁵ Only upon a showing of incapacity will the court appoint a guardian or guardian advocate. In the case where the natural parent is the only feasible person to act as the child's guardian, and the parent has been convicted of a felony, even if it is from an event that happened two decades earlier, courts in some states lack discretion to appoint the parent-guardian regardless of the circumstances, the nature of the felony, the age of the felony, the severity of the felony, and the ward's best interest.²⁶

Likewise, in addition to incapacitated children, the elderly are also at risk²⁷ For instance, assume that an elderly husband becomes incapacitated after years of marriage, there are no children able to serve as guardians, and the only feasible person able to serve is the wife, who has a prior felony conviction.²⁸ In certain states, the wife is completely precluded

²⁵81 AM. JUR. 2D *Witnesses* § 209 (2006) (presumption of competence to testify as a witness at age 14). Richard A. Lord, *Capacity of Parties--Infants*, in 5 WILLISTON ON CONTRACTS § 9:3 (4th ed. 2006).

²⁶FLA. STAT. ANN. § 744.309(3) (West 2006).

²⁷Caroline W. Jacobus, *Legislative Responses to Discrimination in Women's Health Care: A Report Prepared for the Commission to Study Sex Discrimination in the Statutes*, 16 WOMEN'S RTS. L. REP. 153 (Spring 1995)("New Jersey has the second oldest population of all 50 states, after Florida. . . .By the year 2000, one in every five [citizens] will be 65 years or older. The over-60s group will double in the early decades of the 21st century. The very old population (over 85) more than doubled between 1970 and 1990, and will nearly double again by 2010. Demographic and related income factors have a significant impact on women's access to health services and their consequent health. Two-thirds of women aged 65 and over are widowed, divorced or single, compared to only a third of men aged 65 and over. Poverty is a major issue for elderly women. Nationally, the median income for women over 65 is \$9,400. Median incomes for elderly women of color are even lower. One in four New Jersey women aged 65 or older lives at or near the poverty level. The incidence of poverty among men aged 65 and over is half that for women. The incidence of poverty is highest for women of color and those who live alone. The incidence of poverty increases with age."(referring to Peter M. Cicchino, *The Problem Child: an Empirical Survey and Rhetorical Analysis of Child Poverty in the United States*, 5 J.L. & POL. 5 (1996)).

²⁸*In re Estate of Roy v. Roy*, 265 Ill.App.3d 99 (Ill.App. Ct. 3rd Dist. 1994)(noting that the Illinois statute that prohibited convicted felons from serving as guardians was not a bill of attainder, ex post facto law, or violation of equal protection clause on its face, and holding that the statutory minimum criteria for guardian was not inconsistent with statute that allowed the ward to express a choice of guardian, and the statute could violate fourteenth amendment as applied, but a hearing would be necessary to determine whether rational basis for a statutory

due to a prior felony conviction from serving as her husband's decision-maker. The indigent population is greatly affected since they do not have estates sufficient to hire professional guardians, and their likely pool of potential guardians will be family members that volunteer to assist in an unpaid and uncompensated capacity.²⁹ Even if a professional guardian is retained, the guardian may not be appointed to make health care decisions, as would a spouse. However, if the felon spouse is unable to make temporal decisions, they would also be precluded under guardianship statutes from serving over the person's healthcare as well.

Under guardianship principles, should a court have autonomy to make a decision in appointing a guardian for the best interest of the ward, on a case by case basis, or should legislation that prohibits the felon from serving as guardian take priority over court discretion?

I. The Purpose of Guardianship and the Appointment of a Guardian

A. Historical Analysis

Before delving into the deficiencies present in the modern guardianship system, it is important to understand the historical blueprint of the system. The modern guardianship system is derived from early English common law, and founded on the doctrine of *parens patriae*.³⁰ Originating in medieval England, this doctrine focused on the incapacitated and empowered the Crown to protect and care for individuals who could not do so for

distinction existed as applied to the case). *See also*, W. W. Allen, *Mental Incompetency of one Spouse as Affecting Transfer or Encumbrance of Community Property, Homestead Property, or Estate by the Entireties*, 155 A.L.R. 306 (1945).

²⁹DEBBIE FIELD, GUARDIANSHIP AND CONSERVATORSHIP INTERIM COMMITTEE MINUTES (Aug. 10, 2004), <http://www.legislature.idaho.gov/sessioninfo/2004/interim/guardian0810min.pd>. *See also*, ASHLEY COLVIN, JOINT LEGISLATIVE AUDIT AND REVIEW COMMISSION OF THE VIRGINIA GENERAL ASSEMBLY, IMPACT OF AN AGING POPULATION ON STATE AGENCIES (Nov. 14, 2005), <http://jlarc.state.va.us/Meetings/November05/agingclr.pdf>.

³⁰“Parens patriae” is interpreted as “Parent of his or her Country.” BLACK’S LAW DICTIONARY 1144 (8th ed. 2004); Daniel Griffith, *The Best Interests Standard: A Comparison of the State’s Parens Patriae Authority and Judicial Oversight in Best Interests Determinations for Children and Incompetent Adults*, 7 ISSUES L. & MED. 283 (1991).

themselves.³¹ *Parens patriae* was first introduced to America during the colonial period and has since been fully adopted in the states.³²

In the United States, the doctrine of *parens patriae* has been transferred to each individual state and codified in state-specific guardianship statutes delineating its primary purpose of protecting the best interest of the ward.³³ This power was first recognized by the Supreme Court in *Late Corp. of the Church of Jesus Chris of Latter-Day Saints v. United States*, where the Court held “that it is indispensable that there should be a power in the legislature to authorize a sale of the estates of infants, idiots, insane persons and persons not known, or not in being, who cannot act for themselves.”³⁴ Since this recognition by the Supreme Court, all fifty states and the District of Columbia have adopted the doctrine of *parens patriae* and implemented guardianship statutes.³⁵ Although its benevolent purpose of the ward’s best interest is undeniable, it is questionable whether the guardianship system, in its present non-uniform stature, is succeeding in the appointment of persons to serve as guardians.³⁶

B. Guardianship Process

³¹ *Parens patriae* is a power inherited from English law where the Crown assumed the "care of those who, by reason of their imbecility and want of understanding, are incapable of taking care of themselves." Phillip Tor, *Finding Incompetency in Guardianship: Standardizing the Process*, 35 ARIZ. L. REV. 739, 749 (1993) (quoting NICHOLAS N. KITTRIE, *THE RIGHT TO BE DIFFERENT* 59 (1971) (quoting L. SHELFORD, *A PRACTICAL TREATISE ON THE LAW CONCERNING LUNATICS, IDIOTS, AND PERSONS OF UNSOUND MIND* 6 (1833)).

³²See Paula L. Hannaford & Thomas L. Hafameister, *The National Probate Court Standards: The Role of the Courts in Guardianship and Conservatorship Proceedings*, 2 ELDER L.J. 147 (1994).

³³ See Phillip Tor, *Finding Incompetency in Guardianship: Standardizing the Process*, 35 ARIZ. L. REV. 739 (1993).

³⁴*Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 57 (1890).

³⁵See Peter Mosanyi II, *A Survey of State Guardianship Statutes: One Concept, Many Applications*, 18 J. AM. ACAD. MATRIMONIAL L. 253 (2002).

³⁶ See Roger W. Andersen, *The Influence of the Uniform Probate Code in Nonadopting States*, 8 U. PUGET SOUND L. REV. 599 (1985).

The term “guardianship” refers to the legal relationship established when a person (the “guardian”) is given legal responsibility for another person (the “ward”), and/or the property of the person, when the person is incapable of handling his or her affairs due to minority or incapacity.³⁷ Procedurally, the court operates in a protective manner, similar to that of a parent, monitoring and managing the ward’s personal and property affairs.³⁸ Although the best interest of the ward is the fundamental principle of the guardianship system, the appointment of a guardian can be rather intrusive, as it generally results in the ward losing most, if not all, basic civil rights.³⁹

Although the probate courts have jurisdiction over guardianship proceedings, the courts’ judicial discretion in the selection of guardians is often limited by statutes.⁴⁰ As will be illustrated later, the selection of the guardian can be problematic as the courts struggle to balance the best interests of the ward with the statutory requirements enacted by the state legislators.⁴¹ The competing tension between the probate courts and the legislature can result in injustice throughout the system.⁴²

C. Lack of Continuity in State Statutes

Although all fifty states and the District of Columbia have enacted guardianship

³⁷ See Paula L. Hannaford & Thomas L. Hafameister, *The National Probate Court Standards: The Role of the Courts in Guardianship and Conservatorship Proceedings*, 2 ELDER L.J. 147 (1994).

³⁸ Norman Fell, *Guardianship and the Elderly: Oversight Not Overlooked*, 25 TOL. L. REV. 189, 190 (1994).

³⁹ *Id.* See Daniel Griffith, *The Best Interests Standard: A Comparison of the State’s Parens Patriae Authority and Judicial Oversight in Best Interests Determinations for Children and Incompetent Patients*, 7 ISSUES L. & MED. 283 (1991); UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, GUARDIANSHIPS: COLLABORATION NEEDED TO PROTECT INCAPACITATED ELDERLY PEOPLE (2004), [http:// www.gao.gov](http://www.gao.gov).

⁴⁰ 57 C.J.S. MENTAL HEALTH § 124(VIII)(B)(1) (2006).

⁴¹ *In re Estate of Roy*, 265 Ill. App. 3d at 104 (holding that the selection of a guardian is subject to the statutory criteria, and where such criteria is clear and unambiguous, the courts must act accordingly).

⁴² *In re Lagrange*, 274 N.Y.S. 702 (Surr. Ct. 1934).

statutes,⁴³ the lack of continuity between the states has created many problems in the guardianship arena, most notably in relation to felons' guardianship eligibility.⁴⁴ For instance, there are at least three distinct categories of State laws concerning the eligibility of individuals with past felony convictions to serve as guardians, i.e., the (1) complete disqualification of the felon⁴⁵, (2) requirement of the disclosure of the prior felony with consideration given to the ward's best interest⁴⁶, and (3) silence on the restraint on a felon's eligibility not addressed in the state's statute.⁴⁷ As a result of these legal variations and society's increase in mobility, the guardianship system is plagued with troubles concerning forum shopping and deference under full faith and credit. More specifically, to what extent should a forum court give full faith and credit to a foreign court's guardianship order and/or

⁴³See Table in Appendix A, and <http://www.law.cornell.edu/uniform/probate.html>.

⁴⁴See Symposium, *Creating the "Portable" Guardianship: Legal and Practical Implications of Probate Court Cooperation in Interstate Guardianship Cases*, 13 QUINNIPIAC PROB. L. J. 351 (1999).

⁴⁵ARK. CODE ANN. § 28-65-203 (West 2006); FLA. STAT. ANN. § 744.309(3) (West 2006); R.I. GEN. LAWS. §§ 33-15-6(b), 33-15-44 (2006); WASH. REV. CODE ANN. § 11.88.020 (West 2006).

⁴⁶ARIZ. REV. STAT. ANN. § 14-5311 (2006); IDAHO CODE ANN. § 15-5-311(d) (2006); 755 ILL. COMP. STAT. 5/11a-5 (West 2006); NEV. REV. STAT. ANN. § 159.059 (West 2006); N.H. REV. STAT. ANN. § 464-A: 4 (2006); OHIO REV. CODE ANN. § 2111.03 (West 2006); OKLA. STAT. ANN. tit 30, § 4-105 (West 2006); OR. REV. STAT. ANN. § 125.210(1) (West 2006); TEX. PROB. CODE ANN. § 678(Vernon 2006); W. VA. CODE ANN. § 44A-1-8(a) (West 2006).

⁴⁷ALA. CODE § 26-2A-104(a) (LexisNexis 2006); ALASKA STAT. § 13.26.145 (2005); CAL. PROB. CODE § 2650 (West 2006); COLO. REV. STAT. § 15-14-311 (2005); CONN. GEN. STAT. ANN. § 45a-676(f) (West 2006); DEL. CODE ANN., tit. 12, § 3901 (2006); GA.. CODE ANN. § 29-5-2 (2006); HAW. REV. STAT. ANN. § 560: 5-310 (LexisNexis 2006); IND. CODE ANN. § 29-3-5-4 (West 2006); IOWA CODE ANN. § 633.559 (West 2006); KAN. PROB. CODE ANN. § 59-3067(e)(1) (West 2005); KY. REV. STAT. ANN. § 387.600 (West 2005); ME. REV. STAT. ANN. tit. 18 § 5 (2006); MD. CODE ANN. EST. & TRUSTS § 13-206 (West 2006); MASS. GEN. LAWS ANN. ch. 201, § 6 (West 2006); MICH. COMP. LAWS ANN. § 330.1628 (West 2006); MINN. STAT. ANN. § 524.5-309 (West 2006); MISS. CODE ANN. § 93-13-121 (2006); MO. ANN. STAT. § 475.050 (West 2006); MONT. CODE ANN. § 72-5-312 (2005); NEB. REV. STAT. ANN. § 30-2627 (LexisNexis 2005); N.J. STAT. ANN. § 3B:12-25 (West 2006); N.Y. MENTAL HYG. LAW § 81.19 (McKinney 2006); N.C. GEN. STAT. § 35A-1290 (2005); N.D. CENT. CODE § 30.1-28-11 (2005); 20 PA. STAT. ANN. § 5511(f) (West 2006); S.C. CODE ANN. § 62-5-410 (2005); S.D. CODIFIED LAWS § 29A-5-110 (2006); TENN. CODE ANN. § 34-3-103 (2005); UTAH CODE ANN. § 75-5-311 (2006); VT. STAT. ANN. tit. 14 § 3072 (2005); VA. CODE ANN. § 37.1-134.13 (2006).

decree.⁴⁸

II. May a Felon Still be a Guardian?

Because there are three categories of state law concerning the eligibility of persons with past felony convictions to become guardians, the lack of judicial discretion begs the question of whether total legislative prohibition of a felon serving as a guardian will withstand constitutional scrutiny, and whether there are alternatives to such a strict prohibition.⁴⁹

The second category includes states that require either divulgence upon the application to become a guardian or require the court to inquire into any past convictions of the proposed guardian.⁵⁰ The states may require the court to consider such convictions when appointing a guardian, or the states may require automatic disqualification absent proof that appointment is in the best interests of the incapacitated person.⁵¹ Finally, the third category includes the states whose statutes are silent on this issue.⁵² Presumably, the silent states

⁴⁸Symposium, *Creating the “Portable” Guardianship: Legal and Practical Implications of Probate Court Cooperation in Interstate Guardianship Cases*, 13 QUINNIPIAC. PROB. L. J. 351 (1999).

⁴⁹ARK. CODE ANN. § 28-65-203 (West 2006); FLA. STAT. ANN. § 744.309(3) (West 2006); R.I. GEN. LAWS §§ 33-15-6(b), 33-15-44 (2006); WASH. REV. CODE ANN. § 11.88.020 (West 2006).

⁵⁰That is, Arizona, Idaho, Nevada, New Hampshire, Ohio, Oklahoma, Oregon, Texas, and West Virginia.

⁵¹ARIZ. REV. STAT. ANN. § 14-5311 (2006); IDAHO CODE ANN. § 15-5-311(d) (2006); 755 ILL. COMP. STAT. 5/11a-5 (West 2006); NEV. REV. STAT. ANN. § 159.059 (West 2006); N.H. REV. STAT. ANN. § 464-A: 4 (2006); OHIO REV. CODE ANN. § 2111.03 (West 2006); OKLA. STAT. ANN. tit 30, § 4-105 (West 2006); OR. REV. STAT. ANN. § 125.210(1) (West 2006); TEX. PROB. CODE ANN. § 678(Vernon 2006); W. VA. CODE ANN. § 44A-1-8(a) (West 2006).

⁵²That is, Alabama, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Indiana, Iowa, Kansas, Kentucky, Michigan, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, New York, North Carolina, North Dakota, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, and Virginia.

would allow the court to consider past convictions in relation to the fitness of the guardian or the best interests of the incapacitated person.

Thus, the effect of a potential guardian's prior felony conviction ranges from an outright disqualification of the felon, to a mere legal inconvenience. This lack of uniformity may create legal quagmires for those guardians appointed in foreign jurisdictions who relocate the wards to forum jurisdictions that strictly prohibit felons from serving as guardians. It may also impair those groups where indigency may impact the available guardianship eligibility pool.

As the demand for eligible guardians increases, and society becoming more mobile, there will likely be an increase in the factual situation where a potential guardian will not be appointed in one state, but will be eligible to be appointed in a different state, or vice versa. There may also be the situation where the guardian has been appointed in a foreign state, and upon relocating finds himself ineligible to continue to serve as the guardian in the new forum state. This scenario may create possible forum shopping in situations where the supply of available guardians is limited. As discussed below, without a uniform guardianship scheme that considers court discretion, the application of full faith and credit may be inadequate to overcome the problem.

The prohibition of a felon from serving as a guardian may also impact guardians when the ward turns the age of majority. What happens in the situation when the only available guardian is a parent and the parent has a past felony conviction? Is the ward protected? Typically the public guardianship states have failed to provide adequate resources for implementation of sufficient guardians to protect the indigent and minority classes.⁵³

⁵³Alison Patrucco Barnes, *Beyond Guardianship Reform: A Reevaluation of Autonomy and Beneficence for a System of Principled Decision-Making in Long Term Care*, EMORY L. J. (Summer 1992)(noting that unpaid proxies are difficult to find as there is seldom anyone willing

Once an existing guardian is prohibited by statute from continuing to act as guardian, or the felon is the only available guardian, the practitioner must consider whether alternatives to the appointment of the felon as a guardian are available. Some of the alternatives to be discussed include minimizing the felony conviction through annulment, dismissal, pardon and expungement. Other alternatives may include the utilization of durable powers of attorney.

Outside of forums such as Arkansas, Florida, Rhode Island and Washington that prohibit felons from serving as guardians, certain steps, taken both inside and outside the guardianship proceedings may reduce the impact of a prior felony conviction on the appointment of a guardian.

A. Reducing the Effect of a Prior Felony Conviction: Annulments, Dismissals, Expunctions and Pardons

Most states have procedures whereby a person may, if certain conditions are met, have a felony conviction dismissed or annulled,⁵⁴ or have the records of the conviction expunged or sealed.⁵⁵ In addition, the executive branches of the various states have the power to “pardon” and/or restore convicted felons to their civil rights.⁵⁶

1. Dismissal/annulment of the felon’s record:

to undertake the task. "A number of states in the United States have public guardians to serve the indigent, although Florida, for example, has public guardians in only two court circuits.").

⁵⁴ See generally Margaret Colgate Love, *Starting over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URB. L.J. 1705 (2003).

⁵⁵ See Vitauts M. Gulbis, *Judicial Expunction of Criminal Record of Convicted Adult*, 11 A.L.R. 4th 956 (1982 & Supp.).

⁵⁶ Stuart P. Green, Note, *Private Challenges to Prosecutorial Inaction: A Model Declaratory Judgment Statute*, 97 Yale L.J. 488, 502 n.84 (1988). See also *Huntington v. Attrill*, 146 U.S. 657, 669 (1892).

If the felon can “un-do” the felony, may he then be appointed as a guardian?⁵⁷ It is uncertain what effect a dismissal or annulment of felonies may have for the proposed guardian.⁵⁸ Since the remedies of dismissal, expunction or pardon must generally be applied for in the state or jurisdiction where the conviction was entered,⁵⁹ there is no guarantee that once obtained, they will be given deference in that, or other, jurisdictions to make the felon eligible to serve as a guardian.⁶⁰

If relief from a felony through dismissal or annulment is obtained, however, it is at least arguable under the state statutes that are silent as to the effect of the pardon or annulment, that the relief may qualify a previously ineligible petitioner for guardianship.⁶¹ In

⁵⁷FED. R. EVID. 609(c) states that the effect of a pardon, annulment, or certificate of rehabilitation is not admissible "if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence." Even though the conviction may not be admissible, does it have to be disclosed to the court upon filing an application of guardianship? Candor is very important in guardianship proceedings. If disclosed on the application, is this "evidence" that is not admissible to the court to consider in its decision whether to appoint the person as a guardian?

⁵⁸State *ex rel.* Gains v. Rossi, 716 N.E.2d 204 (Ohio 1999)(finding that the expungement of a felony conviction under R.C. 2953.32 and 2953.33 restores a person's competency to hold an office of honor, trust, or profit).. See also LA. CODE CRIM. PROC. ANN. art. 893 D(1)(b)(2) (2006)("Upon motion of the defendant, if the court finds at the conclusion of the probationary period that the probation of the defendant has been satisfactory, the court may set the conviction aside and dismiss the prosecution. The dismissal of the prosecution shall have the same effect as acquittal, except that the conviction may be considered as a first offense and provide the basis for subsequent prosecution of the party as a multiple offender, and further shall be considered as a first offense for purposes of any other law or laws relating to cumulation of offenses. Dismissal under this Paragraph shall occur only once with respect to any person.").

⁵⁹ A notable exception to this is Ohio, which allows a petitioner to obtain expunction of Ohio's records of a conviction in another state or federal court. OHIO REV. CODE ANN. § 2953.32 (West 2006); Barker v. State, 402 N.E.2d 550 (Ohio 1980).

⁶⁰Barker v. State, 402 N.E.2d 550 (1980)..

⁶¹Allan H. Knickerbocker, *Effect of Pardon or of Probation and Dismissal*, 31A CAL. JUR. 3D Evidence §§ 760 (2006).

the four states who disqualify those with felony convictions from serving as guardians, the felon who obtained a pardon or an annulment may be eligible to serve as a guardian in three of the four states.⁶²

For example, Arkansas allows a person to be a guardian who is “not a convicted and unpardoned felon . . .”⁶³ The use of the current tense, “not a convicted and unpardoned felon,” suggests that only currently extant felony convictions would disqualify the potential guardian.⁶⁴ The type of felony is not limited in Arkansas, and arguably, the law would apply to any “pardoned” felony, regardless of its nature.

Likewise, Washington law disqualifies a potential guardianship, “who is . . . convicted of a felony or a misdemeanor involving moral turpitude.”⁶⁵ Again, it is not the fact of past conviction but the state of current conviction that disqualifies. Thus, in jurisdictions where a dismissal is effective to treat the felony as if it never occurred,⁶⁶ a petitioner who has had a conviction dismissed upon completion of a successful probation⁶⁷ or who obtains a pardon⁶⁸

⁶² The four states are Arkansas, Florida, Rhode Island and Washington.

⁶³ARK. CODE ANN. § 28-65-203(a) (West 2006). *See also* Bailey v. Maxwell, No. CA 05-700, 2006 WL 476982 (Ark. Ct. App. 2006)(finding that appellant had failed to establish that she was qualified to serve as guardian because she had presented no testimony that she was not a convicted and *unpardoned* felon(emphasis added)).

⁶⁴Bailey v. Maxwell, No. CA 05-700, 2006 WL 476982 (Ark. Ct. App. March 1, 2006).

⁶⁵WASH. REV. CODE ANN. § 11.88.020(1)(c) (West 2006).

⁶⁶U.S. v. Rowlands, 451 F.3d 173 (3rd Cir. 2006); U.S. v. Crowell, 374 F.3d 790 (9th Cir. 2004). ARIZ. REV. STAT. ANN. § 13-907 (2006). The general rule appears to be that when a defendant moves to “expunge” records, she asks that the court destroy or seal the records of the fact of the defendant’s conviction, but she is not removing or vacating the conviction itself. *See also* LA. REV. STAT. ANN. § 44:9 (2006).

⁶⁷ *See* LA. CODE CRIM. PROC. ANN. art. 893 D(1)(b)(2) (2006).

⁶⁸ *See* Allan H. Knickerbocker, *Effect of Pardon or of Probation and Dismissal*, 31A CAL. JUR. 3D *Evidence* §§ 760 (2006).

would arguably not be disqualified from serving as a guardian in these states.⁶⁹

In comparison, the language of the Florida statute disqualifies anyone who “has been convicted of a felony.”⁷⁰ Under Florida law, a subsequent dismissal of the conviction upon completion of probation, expunction or sealing of records, or pardon would not eliminate the fact that the person “has been convicted of a felony.” In fact, similar reasoning has been employed by the Florida Supreme Court to disqualify the felon from serving, regardless of the pardon, the annulment or restoration of rights.⁷¹

Between these extreme positions lies Rhode Island, which requires a court, before appointing a guardian, to “find that the individual ... [h]as no criminal background which bears on suitability to serve as guardian,”⁷² and disqualifies any person convicted of theft related offenses from serving as a conservator.⁷³ As previously implied, a person who has successfully achieved a dismissal may not have a “criminal background which bears on suitability to serve as guardian” since he could argue that he is no longer “convicted of” a theft-related offense.⁷⁴

In many situations, the attorney can not forget that there are several possible impediments to the feasibility of the felon obtaining the remedy of dismissal, expungement

⁶⁹LA. CODE CRIM. PROC. ANN. art. 893 D(1)(b)(2) (2006).

⁷⁰FLA. STAT. ANN. § 744.309(3) (West 2006).

⁷¹R.J.L. v. State, 887 So.2d 1268 (Fla. 2004) (“A pardon does not eliminate the adjudication of guilt, creating a fiction that the crime never occurred.”).

⁷²R.I. GEN. LAWS § 33-15-6(b)(1) (2005).

⁷³R.I. GEN LAWS § 33-15-44 (2005).

⁷⁴*Id.* See also, Dag Ytreberg, *What Constitutes Requisite Conviction--Effect of Expungement of Conviction*, 3A C.J.S. *Aliens* §§ 1276 (2006).

or annulment.⁷⁵ Several states impede the dismissal of a felony conviction by requiring the felon to complete certain rehabilitative prerequisites.⁷⁶ This includes that the dismissal is limited to first time offenses.⁷⁷ Even if the felon may be eligible for a dismissal or annulment, the state statutes may still prevent certain felons, even if first time offenders, from serving as guardians. For example, in several states, the type of felony conviction is important and such offenses are excluded from the framework eligible for dismissals or

⁷⁵U.S. v. Vertel, No. 1:91-CR-162, 2006 WL 250672 (W.D. Mich. Jan. 31, 2006)(quoting United States v. Smith, No. 87-3837, 1988 WL 19174, at *1 (6th Cir. Mar. 8, 1988) (no expunction of valid conviction for which defendant was subsequently pardoned)); United States v. Janik, 10 F.3d 470, 472 (7th Cir. 1993) (no expunction for soldier concerned about effects on future career of conviction overturned on Speedy Trial Act grounds, where appellate court held that there existed constitutionally sufficient evidence to support the conviction); Schwab v. Gallas, 724 F.Supp. 509, 510-11 (N.D. Ohio 1989) (expunction of valid felony conviction not warranted by the fact that movant had fulfilled the requirements of the sentence and since led a law-abiding life)). *See also* United States v. Crowell, 374 F.3d 790, 796 (9th Cir. 2004) (holding that court has no authority to expunge a record of a valid conviction absent a legal ground for setting aside that conviction); United States v. Wiley, 89 F.Supp.2d 909, 911 (S.D. Ohio 1999) (denying expungement of valid conviction despite the fact that defendant was depressed at the time of the offense, had been law-abiding since, and was experiencing significant hardship because of past conviction); United States v. Gallas, 771 F.Supp. 904, 909-10 (W.D. Tenn. 1991) (denying request for expungement of valid conviction and finding no extraordinary circumstances in argument that defendant had been law-abiding since the conviction and that his professional opportunities continued to be hurt by his past conviction)). *See also Ex parte* Gray, 109 S.W.3d 917 (Tex.Crim. App. 2003).

⁷⁶ Included in this analysis are only states that either disqualify as guardians persons with felony convictions or require consideration of such convictions in appointing guardians, and that also have a statutory framework for annulling or dismissing a felony conviction upon demonstrating rehabilitation. This limitation is important, because these frameworks for dismissal or annulment of a felony conviction apply only in the state in which the conviction occurred.

⁷⁷ *See* ARK. CODE ANN. §16-93-303 (West 2006)(allowing court to not enter judgment or pronounce sentence upon first time offender).

annulments, e.g., felonies of sexual offenses,⁷⁸ crimes of violence,⁷⁹ or other categories of criminal conduct.⁸⁰

Additionally, the time to apply for an annulment may be very restrictive. Generally, the person convicted must qualify for annulment or dismissal at the time of sentencing by convincing the court to withhold judgment or sentence, i.e., a lack of proof.⁸¹ Furthermore, time is of concern when the eligibility requires that the convicted person successfully complete probation or other rehabilitative programs, and he remain crime-free for a period of time thereafter.⁸²

Although dismissal of the conviction has the highest likelihood of removing barriers to guardianship,⁸³ the procedures are very limited in application. The states that allow the dismissal or annulment restrict the remedy in application both as to the types of crimes and

⁷⁸ See ARIZ. REV. STAT. ANN. § 13-907(B)(3 & 4) (2006) (excluding convictions for which sex offense registration is required or in which “sexual motivation” is an element of the crime); ARK. CODE ANN. §5-4-311 (excluding sex offenses against minors); IDAHO CODE ANN. § 19-2604(3) (2006) (excluding sex crimes against minors).

⁷⁹ See ARIZ. REV. STAT. ANN. § 13-907(B)(1 & 2) (2006) (excluding convictions involving the infliction of serious physical injury or use of a deadly or dangerous weapon); N.H. REV. STAT. ANN. §651:5 (2006) (denying annulment for crimes of violence).

⁸⁰ See ARIZ. REV. STAT. ANN. § 13-907(B)(5) (2006)(excluding convictions where the victim is under 15 years of age); N.H. REV. STAT. ANN. §651:5 (2006) (denying annulment for obstruction of justice or where extended terms of imprisonment apply).

⁸¹ See ARK. CODE ANN. §5-4-311 (West 2006); IDAHO CODE ANN. § 19-2604(3) (2006).

⁸² See ARK. CODE ANN. § 5-4-311 (West 2006) (applicant must have successfully completed probation); IDAHO CODE ANN. § 19-2604(3) (2006) (same).

⁸³LA. CODE CRIM. PROC. ANN. art. 893 D(1)(b)(2) (2006) ("Upon motion of the defendant, if the court finds at the conclusion of the probationary period that the probation of the defendant has been satisfactory, the court may set the conviction aside and dismiss the prosecution. The dismissal of the prosecution shall have the same effect as acquittal, . . .").

as to the procedural qualifications.⁸⁴ Of course, these procedures will not benefit a potential guardian outside of the rather small minority of persons with criminal convictions entitled to dismissal.⁸⁵

Assuming that the felon qualifies in the rare instance for an annulment or dismissal of the felony conviction, under a portion of state statutes, the dismissal of the conviction will be automatic.⁸⁶ The question in the subject states that forbid the appointment of felons as guardians is whether the dismissal or annulment “automatically” lifts a restraint against being appointed as a guardian.⁸⁷ Some statutes explicitly indicate that the dismissal of the conviction will result in removal of all legal disabilities that arose out of the felony conviction.⁸⁸ In other states, the legal effect of dismissal is to make the conviction “as if it never happened.”⁸⁹ Will that be sufficient to remove the disqualifications of being appointed

⁸⁴*See, e.g.*, *Baker v. State*, 884 S.W.2d 603 (Ark. 1994) (defendant who otherwise qualified for dismissal who failed to object to entry of judgment at time judgment was entered was not entitled to dismissal of conviction).

⁸⁵*R.J.L. v. State*, 887 So.2d 1268, 1280 (Fla. 2004). Even though a pardon does not eliminate the adjudication of guilt, creating a fiction that the crime never occurred for guardianship purposes, the question is unanswered whether a dismissal or annulment may allow the applicant to become eligible.

⁸⁶ARK. CODE ANN. § 16-93-303(b) (West 2006); ARIZ. REV. STAT. ANN. § 13-907(A) (2006); ARK. CODE ANN. § 5-4-311; IDAHO CODE ANN. § 19-2604(3) (2006); N.H. REV. STAT. ANN. §651:5 (2006).

⁸⁷Each state will make its own independent decision without the adoption of a uniform standard that applies to this situation.

⁸⁸ARIZ. REV. STAT. ANN. § 13-907(A) (2006); TEX. CODE CRIM. PROC. ANN. art. 42.12, § 5(c) (Vernon 2006); WASH. REV. CODE ANN. § 9.94A.640(3) (West 2006).

⁸⁹N.H. REV. STAT. ANN § 651:5(X) (2006). See also *Tembruell v. City of Seattle*, 392 P.2d 453 (Wash. 1964)(the defendant argued that a deferred sentence coupled with dismissal of the charge did not constitute conviction of a felony, and the court held there being neither an adjudication of guilt nor a sentence, that the defendant was not convicted of any felony within the meaning of that phrase in the police pension statute).

as a guardian?

2. Expungement and the Sealing of the Felon's Record

Another option,⁹⁰ different than dismissal, is to have the record of the conviction expunged⁹¹ or sealed.⁹² Unlike the argument that dismissal or annulment makes the conviction as if it never happened, the effect under most state statutory schemes of an expungement is that it does not remove the conviction.⁹³ An expungement is simply a request by the defendant seeking the court destroy or seal the records of the conviction; it does not absolve the conviction itself.⁹⁴

a. The Process of Obtaining Expunction or Sealing of Record of Conviction

If the felon is otherwise qualified to apply for an expungement of record, he may be

⁹⁰ The scope of this Article is limited to expunction or sealing of records of felony convictions; it does not address expunction or sealing of related records, such as arrest records.

⁹¹ "Expunge" means to erase or destroy, and to expunge a criminal conviction is to remove it from the record. *See* BLACK'S LAW DICTIONARY 621 (8th ed. 2004).

⁹² Some statutes use expunction and sealing interchangeably. *See, e.g.*, R.I. GEN. LAWS § 12-1.3-1(2) (2005).

⁹³ Most state guardianship statutes are silent about felony convictions, and say very little about annulled, dismissed, expunged or pardoned felonies or the effects of the mitigated conviction. What little reference is made in state statutes is inferred, *i.e.*, "a guardian who is not a convicted and unpardoned felon (emphasis added). . ." ARK. CODE ANN. § 28-65-203(a) (West 2006); This seems to imply that a "pardoned" felon will be eligible to seek the appointment as a guardian. On the other hand, in the case of *U.S. v. Rowlands*, 451 F.3d 173 (3rd Cir. 2006), the general rule appears to be that when a defendant moves to "expunge" records, she asks that the court destroy or seal the records of the fact of the defendant's conviction, but she is not removing or vacating the conviction itself. *See also* *U.S. v. Crowell*, 374 F.3d 790 (9th Cir. 2004); ARIZ. REV. STAT. ANN. § 13-907 (2006); LeRoy L. Kondo, *Advocacy of the Establishment of Mental Health Specialty Courts in the Provision of Therapeutic Justice for Mentally Ill Offenders*, 28 AM. J. CRIM. L. 255 (2001).

⁹⁴ LeRoy L. Kondo, *Advocacy of the Establishment of Mental Health Specialty Courts in the Provision of Therapeutic Justice for Mentally Ill Offenders*, 28 AM. J. CRIM. L. 255 (2001).

required before requesting expunction from a court, to notify appropriate law enforcement or prosecutorial agencies.⁹⁵ Similar to the requirements for dismissal and annulment of the felony conviction, expungement may have significant impediments to the feasibility of receiving relief from the conviction.⁹⁶ For example, as in Minnesota,⁹⁷ if the defendant pleads guilty, he may not receive an expungement of records due to the guilty plea.⁹⁸

Additionally, expungement is typically a legislative prerogative, rather than a judicial decision.⁹⁹ The expungement in most states is limited to a single incident of criminal

⁹⁵ See NEV. REV. STAT. ANN. § 179.245(2)(b) and (3) (West 2005) (requiring notice to court, which notifies law enforcement agencies); OHIO REV. CODE ANN. § 2953.32(B) (West 2006) (court must notify prosecutor); R.I. GEN LAWS § 12-1.3-3(a) (2005) (applicant must notify attorney general and police department).

⁹⁶U.S. v. Rowlands, 451 F.3d 173 (3rd Cir.2006)(finding that a federal court has jurisdiction over petitions for expungement of criminal records in narrow circumstances: where the validity of the underlying criminal proceeding is challenged). See also *Ex parte* M.R.R., No. 07-05-0294-CV, 2006 WL 1547764 (Tex. Crim. App. June 7, 2006) (where the court was found to have no inherent or equitable power to expunge criminal records, but any authority was dependent upon expunction statutes); TEX. CODE CRIM. PROC. ANN. art. 55.01 (Vernon 2006). *But* see *State v. A.C.H.*, 710 N.W.2d 587 (Minn. Ct. App. 2006) (finding that the district court has the authority to grant expungement of criminal records statutorily and through its inherent power); MINN. STAT. ANN. § 609A.02 (West 2006).

⁹⁷ See MINN. STAT. ANN. §§ 609A.02 (3) (West 2006).

⁹⁸*State v. L.W.J.*, No. A05-207, 2006 WL 1985491 (Minn. Ct. App. 2006). See also *State v. H.A.*, 716 N.W.2d 360 (Minn. Ct. App. 2006)(noting that a district court's authority to issue expungement orders affecting court records is limited to: (1) when the petitioner's constitutional rights may be seriously infringed by retention of petitioner's records; and (2) when a petitioner's constitutional rights are not involved, but the court determines that expungement will yield a benefit to the petitioner commensurate with the disadvantages to the public from the elimination of the record and the burden on the court in issuing, enforcing and monitoring an expungement order); *Jones v. St. Louis County Police Dep't*, 133 S.W.3d 524 (Mo. Ct. App. 2004) (finding that courts have limited power to equitably expunge records to cases involving illegal prosecution, acquittal, or extraordinary circumstances).

⁹⁹*Toia v. People*, 776 N.E.2d 599 (Ill. App. Ct. 2002) (stating an individual is eligible for expungement only where the legislature has authorized expungement). See also *People v. Thon*, 746 N.E.2d 1225 (Ill. App. Ct. 2001) (finding the Governor is constitutionally empowered to grant pardon, but the power to expunge is controlled by statute; an individual is eligible for expungement only where the legislature has authorized expungement); 20 ILL. COMP. STAT.

conduct or a first time offense.¹⁰⁰ As in dismissals of felony convictions, certain convictions related to crimes, including sex offenses, domestic violence and other crimes of violence, are not eligible for expunction of the conviction record.¹⁰¹

Another impediment on the ability of the proposed guardian to obtain an expungement is that the applicant for expunction may have to wait a certain period of time after final discharge related to the conviction before he is eligible to apply for an expungement,¹⁰² the logic being that the existence of pending criminal matters will also disqualify an applicant for expunction under some expunction statutes, as the felon would not be able to enjoy the expungement of the first felony, to in turn only be convicted of a subsequent felony.¹⁰³

Finally, a common sense restraint, if not expressed, at least implied, is that the expunction statutes also require a balancing approach and the weighing of the interests of the state against the interests of the applicant.¹⁰⁴ Hence, like the dismissal of felony convictions,

ANN. 2630/5 (West 2006); *Compare* Camfield v. City of Oklahoma City, 248 F.3d 1214 (10th Cir. 2001)(noting that courts have inherent equitable authority to order the expungement of an arrest record or a conviction in rare or extreme instances.).

¹⁰⁰ See OHIO REV. CODE ANN. § 2953.32(C)(1)(a) (West 2006); R.I. GEN. LAWS § 12-1.3-2(a) (2005).

¹⁰¹ See NEV. REV. STAT. ANN. § 179.245(5) (West 2005) (preventing sealing of records related to crimes against children and sexual crimes); R.I. GEN. LAWS § 12-1.3-1(1) (defining “crime of violence” to include several violent and sexual crimes); R.I. GEN. LAWS § 12-1.3-2(a) (disqualifying convictions for “crime of violence”).

¹⁰² See NEV. REV. STAT. ANN. § 179.245(1) (West 2005); OHIO REV. CODE ANN. § 2953.32(A)(1) (West 2006)(must wait three years); R.I. GEN. LAWS § 12-1.3-2(c) (2005) (ten years).

¹⁰³ See NEV. REV. STAT. ANN. § 179.245(4) (West 2005); OHIO REV. CODE ANN. § 2953.32(C)(1)(b) (West 2006); R.I. GEN. LAWS § 12-1.3-3(b)(1) (2005).

¹⁰⁴ OHIO REV. CODE ANN. § 2953.32(C)(2) (West 2006); R.I. GEN. LAWS § 12-1.3-3(b) (2005).

expungement is not easily obtained, and there are many impediments to achieving the expungement.

b. The Effect of Expunction or Sealing upon Requirement to Report Conviction or Qualification for Guardian Status

Once the felon obtains the expungement, is he automatically eligible to serve as a judicially appointed guardian? The effects of an expunction may vary from state to state.¹⁰⁵ In some states, the expunction of the felony means that the conviction must legally be treated as never having occurred.¹⁰⁶ Other state statutes do not specify what effect expunction or sealing of the conviction has on the person's ability to seek appointment as a guardian.¹⁰⁷ If the felony is treated as having never happened, do the state's guardianship statutes automatically allow the person to serve as a guardian if that is the only impediment to eligibility?

In the jurisdictions that treat expungements as procedures for sealing records only, arguably, an expungement will not make an otherwise disqualified guardian qualified since the expungement is only the sealing of the record, and not the erasing of the conviction.¹⁰⁸ In certain jurisdictions, the felons conviction must not only be expunged in order to make him

¹⁰⁵Vitauts M. Gulbis, *Judicial Expunction of Criminal Record of Convicted Adult*, 11 A.L.R.4TH 956 (1982).

¹⁰⁶OHIO REV. CODE ANN. § 2953.32(C)(2) (West 2006) (treat as if conviction never occurred), OHIO REV. CODE ANN. § 2953.33(B) (West 2006) (person restored to all rights and may generally not be questioned about conviction); R.I. GEN. LAWS § 12-1.3-4(b) (2005) (person may state that they have never been convicted); *State v. Davisson*, 624 N.W.2d 292 (Minn. Ct. App. 2001) (finding of guilty is equivalent to a plea of guilty for purposes of expungement); MINN. STAT. ANN. § 609.02, subd. 5, 609A.02 et seq (West 2006).

¹⁰⁷NEV. REV. STAT. ANN. § 179.245 (West 2005).

¹⁰⁸U.S. v. Crowell, 374 F.3d 790 (9th Cir. 2004).

eligible to act as guardian, but he will need to have his "citizenship" rights restored too.¹⁰⁹

The more difficult question is whether the guardian applicant has to disclose the "expunged" conviction on his guardianship application in order to show good faith and candor before the court?

3. Obtaining a Pardon from the Felony Conviction

The governors or panels within the executive branches of the various states have the power to fully or partially pardon those convicted of felonies.¹¹⁰ Pardon is an executive act reserved for the governor or some other agency in the executive branch.¹¹¹ Application must usually be made to the governor, a board, or a commission.¹¹² Many states grant the pardoning power through statutes, while other states argue it's a decision that may be made in conjunction with the courts after balancing the interests of society and law enforcement's

¹⁰⁹State v. Hanes, 137 Idaho 40, 44 P.3d 295 (Idaho Ct. App. 2002)(defendant's conviction resulted in the loss of the defendant's civil rights because of the operation of Article VI, Section 3 of the Idaho Constitution. A defendant who has been convicted must seek the expungement of his conviction, which is an extraordinary remedy, and is denied to probationers who have been adjudicated to be in violation of the terms of their probation. Section 3 disqualifies persons from acting as guardians who been convicted of a felony, and have not been restored to the rights of citizenship. When the court withholds the imposition of judgment and places the defendant on probation, the defendant has not *lost* his rights of citizenship under Article VI, Section 3 because the defendant has not been *convicted* of a felony. It is clear that upon completion of probation the suspension of the defendant's civil rights is lifted and the defendant is *automatically* "restored to the full rights of citizenship" upon satisfactory completion of probation).

¹¹⁰Stuart P. Green, Note, *Private Challenges to Prosecutorial Inaction: A Model Declaratory Judgment Statute*, 97 YALE L.J. 488, 502 n.84 (1988). *See also* Huntington v. Attrill, 146 U.S. 657, 669 (1892).

¹¹¹Stuart P. Green, Note, *Private Challenges to Prosecutorial Inaction: A Model Declaratory Judgment Statute*, 97 YALE L.J. 488, 502 n.84 (1988). *See also* Huntington v. Attrill, 146 U.S. 657, 669 (1892).

¹¹² *See, e.g.*, ARK. CODE ANN. § 5-4-607(b)(1) (West 2006); FLA. STAT. ANN. § 940.03 (West 2006); R.I. GEN. LAWS § 13-10-1 (2005); WASH. REV. CODE ANN. § 9.94A.885(1) (West 2006).

need for the information.¹¹³ The typical statutory scheme that allows for the consideration of a pardon requires the felon's rehabilitation,¹¹⁴ a waiting period,¹¹⁵ and the pardon to be in harmony with Constitutional law.¹¹⁶

a. The Process of obtaining a Pardon

The process generally used in obtaining a pardon requires the felon to provide notice to the victims and the prosecuting and law enforcement agencies that obtained the conviction.¹¹⁷ Because pardons are usually exclusively executive decisions, the executive

¹¹³U.S. v. Sutton, 521 F.2d 1385 (7th Cir. 1975)(holding that "...Congress has the power to accord a state pardon differing in effects that are in differing contexts, depending on its objectives in creating the disqualification. Neither the inherent nature of a pardon nor full faith and credit require that a state pardon automatically relieve federal disabilities." *in* Thrall v. Wolfe, 503 F.2d 313, 316 (7th Cir. 1974), *cert. denied*, 95 S.Ct. 1392, 1(975)).

¹¹⁴Alan Ellis & Peter J. Scherr, *Federal Felony Conviction, Collateral Civil Disabilities*, 11 CRIM. JUST. 42 (Fall 1996). *See also* People v. Ansell, 108 Cal. Rptr.2d 145 (2001); Dixon v. McMullen, 527 F.Supp. 711 (N.D. Tex. 1981)(noting that a pardon implies guilt, Texas courts may forgive, but they do not forget, the fact is not obliterated and there is no "wash").

¹¹⁵People v. Ansell, 108 Cal. Rptr.2d 145 (Cal. 2001) (referencing Raymond C. Brown, *Requirement for Rehabilitation Certificate*, 65 OPS.CAL.ATTY.GEN. 232, 233-234 (1982) and Mosk, *Certificates of Rehabilitation and the New Pardon Procedure* 18 STATE BAR J. 172, 173-5 (1943)).

¹¹⁶Barbour v. Democratic Executive Comm.of Crawford County, 269 S.E.2d 433 (Ga. 1980). *See also* People v. Ansell, 108 Cal.Rptr.2d 145 (2001) (rejecting the suggestion that absent section 4852.01(d), a certificate of rehabilitation was *necessarily* available to any convicted felon who claimed to meet the minimum statutory requirements and was otherwise eligible to apply, and stating that under the California procedure, the superior court conducts a thorough inquiry into the applicant's conduct and character from the time of the underlying crimes through the time of the certificate of rehabilitation proceeding and affirms that the standards for determining whether rehabilitation has occurred are high. The decision whether to grant relief based on the evidence is discretionary in nature.); William J. Violet, *Presidential [sic] Pardo Relief and its Relationship to Federal Firearm Disability*, 77 N.D. L. REV. 419, 420 (2001).

¹¹⁷ *See, e.g.*, ARK. CODE ANN. § 5-4-607(b)(1) (West 2006); WASH. REV. CODE ANN. §9.94A.885(1) (West 2006).

branch may be vested with the complete discretion of granting or denying the request.¹¹⁸ If the decision is purely under the control of the executive branch, the determination may turn on political considerations rather than on the merits.¹¹⁹

b. The Legal Effect of a Pardon

Because a pardon does not consummate in a finding of absence of guilt, a pardon does not necessarily erase a conviction.¹²⁰ Hence, in some jurisdictions, a pardon alone, like an expungement, may not assist a proposed guardian, since the conviction is not reversed.¹²¹ A pardon may, however, make an individual eligible for expunction of records of convictions¹²² or restore that person to the same rights as if the conviction had not

¹¹⁸J. C. W., *Pardon as Affecting Previous Offenses or Punishment Therefor*, 57 A.L.R. 443 (1928).

¹¹⁹ See Plemmons, “*Lobbying Activities*” and *Presidential Pardons: Will Legislators’ Efforts to Amend the LDA Lead to Increasingly Hard-Lined Jurisprudence?*, 18 BYU J. PUB. L. 131, 148-49 (2003) (discussing President Clinton’s pardon of Marc Rich after extensive lobbying by Rich’s wife).

¹²⁰ See generally Gary L. Hall, *Pardon as Restoring Public Office or License or Eligibility Therefor*, 58 A.L.R.3d 1191 (1974 and Supp.). See also, *U.S. v. Matassini*, 565 F.2d 1297 (5th Cir. 1978). In *Fields v. State*, 85 So.2d 609, 610-11 (Fla. 1956), the court squarely held that a felony conviction for which the offender has received a full and unconditional pardon cannot be counted as a prior felony conviction under the provisions of our habitual offender laws. . . The court was careful to note, however, that its opinion did not preclude the legislature from making pardoned convictions the basis for punishment under habitual offender statutes. Rather, the court stated that inasmuch as the Legislature did not expressly include pardoned convictions in the Act, it is taken as evidencing an intention on the part of the Legislature of this State that pardoned convictions not be counted as prior “live” felony convictions.

¹²¹ See *R.J.L. v. State*, 887 So.2d 1268, 1281 (Fla.. 2004) (“While a pardon removes the legal consequences of a crime, it does not remove the historical fact that the conviction occurred; a pardon does not mean that the conviction is gone.”). See also Laura Dietz, et al., *Effect of Pardon, Commutation, or Probation*, 81 AM. JUR. 2D *Witnesses* § 882 (2006).

¹²² See, e.g., ARK. CODE ANN. § 5-4-605(a) (West 2006).

occurred.¹²³ Such remedies, however, may not be available in all cases.¹²⁴ If they are available, as in the discussion above under expungement of records, certain states may find the pardoned felon eligible to serve as a guardian, while others will not.¹²⁵

4. Summary for the Mitigation of the Conviction

Although the above remedies are options that may be explored in jurisdictions where a past felony conviction will either disqualify a person from serving as a guardian or must be considered by the appointing court, review of the authority allowing these procedures shows the potential mitigations to be of limited application and utility.

Pursuing a dismissal, expunction or pardon may not be a feasible option to many.¹²⁶ The possibility of actually obtaining the dismissal, expunction or pardon is questionable, as these are extraordinary remedies in most states.¹²⁷ The remedy may require legislative

¹²³ See, e.g., FLA. STAT. ANN. § 940.05 (West 2006). See also *People v. Ansell*, 108 Cal.Rptr.2d 145 (2001) (California Section 4853 states, in pertinent part, "In all cases in which a full pardon has been granted by the Governor of this state . . . shall operate to restore to the convicted person, all the rights, privileges, and franchises of which he or she has been deprived in consequence of that conviction or by reason of any matter involved therein." Note, however, that CAL. PENAL CODE § 4852.15 (West 2006) provides that a certificate of rehabilitation does not compel reinstatement of any license, permit, or certificate needed "to practice or carry on any profession or occupation," including the practice of medicine or law).

¹²⁴ See, e.g., ARK. CODE ANN. § 5-4-605(c) (West 2006) (no expunction of records of conviction where victim under age 18, for sex offenses, or for offenses resulting in death or serious injury).

¹²⁵ *Supra. generally.*

¹²⁶ *State v. Tumblin*, 868 So.2d 902 (5th Cir. 2004) (holding the trial court was not authorized to expunge defendant's felony conviction since his sentence was "imposed," not deferred, and thus, he was not eligible to have his sentence dismissed, which was a prerequisite to expungement); LA. REV. STAT. ANN. § 44:9(E)(1)(b) (2006)..

¹²⁷ See, e.g., *State v. Schumacher*, 959 P.2d 465, 468 (Idaho Ct. App. 1998) (dismissal and expunction of records is "extraordinary remedy").

approval under statutory authority,¹²⁸ and may be required to be pursued in the state where the conviction was entered, which may be different than the current residence of the potential guardian and the state where the guardianship is sought.¹²⁹ Finally, even if relief is obtained through one of the remedies, it is not a guarantee that the probate court will view the dismissed, expunged or pardoned felony as removing the barriers to appointment, since the act of expungement or pardoning does not remove the conviction; rather, the defendant is seeking that the court destroy or seal the records of the conviction and not the conviction itself.¹³⁰

Despite the potential remedies a felon may attempt to pursue, taking into consideration whether the felon possesses the resources to pay the legal costs of seeking said remedies, to become an eligible guardian, the feasibility of using the alternatives of dismissal, annulment, expungement, sealing, or pardon are not realistic to the general

¹²⁸United States v Salleh, 863 F Supp. 283 (E.D. Va. 1994) (finding that Virginia did not have a statutory basis for allowing the expungement of the felony records and it did not find other circumstances warranting such relief).

¹²⁹See generally Vitauts M. Gulbis, *Judicial Expunction of Criminal Record of Convicted Adult*, 11 A.L.R.4TH 956 (1982). See also United States v Noonan, 906 F2d 952 (3rd Cir. 1990)(Even though the defendant had received a presidential pardon, he was not entitled to expunction of his court records relating to his conviction, since the court found that any attempt by the President to pardon the defendant and to compel expunction of the judicial records would violate the separation of powers doctrine. The court also found that the presidential pardon would not eradicate a defendant's guilt so as to justify expunction of his criminal record.).

¹³⁰Most state guardianship statutes are silent about felony convictions, and say very little about annulled, dismissed, expunged or pardoned felonies or the effects of the mitigated conviction. What little reference is made in state statutes is inferred, i.e., "a guardian who is not a convicted and unpardoned felon (emphasis added) . . ." ARK. CODE ANN. § 28-65-203(a)(West 2006). This seems to imply that a "pardoned" felon will be eligible to seek the appointment as a guardian. On the other hand, in the case of U.S. v. Rowlands, 451 F.3d 173 (3rd Cir. 2006), the general rule is that "expunged" records, do not remove or vacate the conviction itself; U.S. v. Crowell, 374 F.3d 790 (9th Cir. 2004); ARIZ REV. STAT. ANN. § 13-907 (2006); LeRoy L. Kondo, *Advocacy of the Establishment of Mental Health Specialty Courts in the Provision of Therapeutic Justice for Mentally Ill Offenders*, 28 AM. J. CRIM. L. 255 (2001).

population. This is especially significant to the indigent and vulnerable groups. Hence, groups, such as those with a higher percentage of felonies, and/or the impoverished, may need to seek other, more affordable alternatives. What other alternatives may be available? Hopefully, if the ward was competent at some point of his or her life, he or she executed a “durable” power of attorney.

B. Seeking Alternatives to Guardianship: The Durable Power of Attorney

Many states, under statute, allow a person who possesses capacity (“the prospective ward” or “the principal”) the ability to choose a person to make temporal decisions for them under a power of attorney (“the attorney-in-fact”).¹³¹ Generally, the attorney-in-fact, as an agent, acts on behalf of the principal to accomplish the principal’s purposes.¹³² The agent’s authority and ability to act is limited to what the principal may undertake.¹³³ If the principal is unable to act due to incapacity, under a “general power of attorney,” the agent’s ability to act is likewise restrained.¹³⁴

Many states, however, have expanded the ability of the agent to act, and therefore, not only allow a general power of attorney, but provide for a specialized power of attorney that is “durable.” The “durability” of a durable power of attorney enhances a general power of attorney and allows the agent of the principal to continue acting in the principal’s name,

¹³¹See *infra* Table in Appendix A.

¹³²Karen E. Boxx, *The Durable Power of Attorney’s Place in the Family of Fiduciary Relationships*, 36 GA. L. REV. 1, 4-6 (Fall 2001); Anne E. Melley, *Powers of Attorney*, 3 AM. JUR. 2D Agency § 21 (May 2006); Judith C. Ensor, Awilda R. Marquez & Kathryn A. Turner, *Development in Maryland Law, 1985-86: IX. Property*, 46 MD. L. REV. 801, 818-20 (Spring 1987).

¹³³Anne E. Melley, *Powers of Attorney*, 3 AM. JUR. 2D Agency § 21 (May 2006).

¹³⁴Anne E. Melley, *Duration and Termination of Agency*, 3 Am Jur 2d Agency § 55 (May 2006).

even in the situation where the principal has subsequently become incapacitated and unable to make important decisions.¹³⁵

Since a validly executed durable power of attorney allows the agent to continue acting on the principal's behalf after the principal becomes incapacitated, the written grant of authority is a substitute for appointing a guardian under guardianship statutes.¹³⁶ The durable power of attorney, if valid, is an exceptional alternative to a guardianship in most situations. As discussed below, however, there is an increased ability by dishonest attorney-in-facts to exploit the agency authorization given under a durable power of attorney.

1. Advantages of a Durable Power of Attorney over a Guardianship Appointment

The durable power of attorney has many advantages over a guardianship, including the ability of the agent to act quickly and without pre-judicial scrutiny.¹³⁷ The significant impediments to the utilization of the durable powers of attorney tend to originate from the financial and brokerage institutions' reluctance to honor the agency, and not due to limitations on its use through statutes, common law or inadequate drafting.¹³⁸ Due to the

¹³⁵Anne E. Meley, *Powers of Attorney* 3 AM JUR 2D Agency § 26 (May 2006); 20 PA. CONS. STAT. ANN. § 5604(b) (West 2006).

¹³⁶Robert Craig Waters, *Florida Durable Power of Attorney Law: The Need For Reform*, 17 FLA. ST. U.L. REV. 519, 522-24 (Spring 1990); Carolyn L. Dessin, *Financial Abuse of the Elderly: Is the Solution a Problem?*, 34 MCGEORGE L. REV. 267, 282-88 (Winter 2003); Sean W. Scott, *Incapacity Plan*, <http://www.virtuallawoffice.com/incapacity.html> (last visited Aug. 17, 2006). Note that the filing of a guardianship may suspend the use of the durable power of attorney.

¹³⁷Robert Craig Waters, *Florida Durable Power of Attorney Law: The Need For Reform*, 17 FLA. ST. U.L. REV. 519, 522-23 (Spring 1990).

¹³⁸Michael Palermo, *Powers of Attorney*, <http://elder-law.lawyers.com/Powers-of-Attorney.html> (last visited Aug. 17, 2006); Milton Berry Scott, *General Durable Power of Attorney*, <http://www.mbscott.com/powatt.htm> (last visited Aug. 17, 2006).

advantages of expediency, the use of the durable power of attorney is also subject to a greater risk of abuse and exploitation by the agent than in a traditional guardianship that is supervised by the court.¹³⁹

One advantage of a written power of attorney is that the principal or ward decides, while having capacity, who will be the principal's surrogate decision-maker rather than said decision being made after incapacity by a statute or a court.¹⁴⁰ In contrast, a petition for the appointment of a guardian places the duty to make the decision of appointing an agent on the judicial body pursuant to a petition and statutory requirements rather than at the principal's discretion.¹⁴¹ The court accepts evidence and makes a determination of who should be the guardian based on statutory prerequisites. Furthermore, state statutes may establish the priority of surrogate decision makers, and such a person appointed under a statutory priority may not be the principal's first choice.¹⁴² Another advantage of a durable power of attorney is that it is not subject to the regular and statutorily required judicial review that a court

¹³⁹Christy Holmes, Comment, *Surrogate Decisionmaking in the 90s: Learning to Respect Our Elders*, 28 U. TOL. L. REV. 605, 607-12 (Spring 1997); Carolyn L. Dessin, *Acting as Agent Under a Financial Durable Power of Attorney: An Unscripted Role*, 75 NEB. L. REV. 574, 588-95 (1996).

¹⁴⁰Elaine Hightower Gagliardi, *Estate Planning Goals*, 3-36 MODERN ESTATE PLANNING § 36.15 (Matthew Bender & Co. 2006).

¹⁴¹Christy Holmes, Comment, *Surrogate Decisionmaking in the 90s: Learning to Respect Our Elders*, 28 U. TOL. L. REV. 605, 608-10 (Spring 1997); Christina Walsh, Comment, *A Costly Application of Strict Statutory Construction: The Ohio Supreme Court's Interpretation of Ohio's Nonademption Statute, Revised Code Section 2107.501(B)*, 28 U. TOL. L. REV. 631, 646 (Spring 1997); Mark Fowler, Note, *Appointing an Agent to Make Medical Treatment Choices*, 84 COLUM. L. REV. 985, 1025-27 (May 1984).

¹⁴²Amy L. Brown, Note, *Broadening Anachronistic Notions of "Family" in Proxy Decisionmaking for Unmarried Adults*, 41 HASTINGS L.J. 1029, 1054-55 (Apr. 1990).

appointed guardian is subject to.¹⁴³ Most state statutes require the guardian to prepare an inventory and to make an appearance or an accounting on an annual basis.¹⁴⁴

Additionally, the agent under a power of attorney is typically not required to provide accountings or reporting of the disposition of the principal's assets. In contrast, a guardian is under a statutory duty to make such reportings, obtain prior court approval before dissipating assets, and to possibly post a bond.¹⁴⁵ Furthermore, the attorney-in-fact has more discretion to make decisions quickly, and also on matters that a guardian may not be allowed to make, due to court supervision and statutory restraints.¹⁴⁶ Typically, guardianships are more restricted and receive more scrutiny from the courts as compared to an attorney-in-fact acting independently of the judiciary's observations.¹⁴⁷

2. The Risks Inherent in a Durable Power of Attorney

Perhaps at the risk of stating the obvious, the disadvantage of a durable power of attorney is that the agent may more easily abuse or exploit the principal since the agent under a power of attorney may act quickly, with less statutory restraints, and without judicial review.¹⁴⁸ As a result, the temptation and opportunity to exploit and abuse the principal and

¹⁴³Michael A. Kirtland, *Estate Planning For Protected Persons*, 65 ALA. LAW. 404, 407 (Nov. 2004).

¹⁴⁴REBECCA BERG & KAREN CAMPBELL, FLORIDA GUARDIANSHIP: A RESOURCE FOR FAMILIES DEALING WITH ALZHEIMER'S DISEASE, 5-6 <http://alzone.phhp.ufl.edu/en/reading/guardian.pdf> (last visited Aug. 17, 2006).

¹⁴⁵*Id.*

¹⁴⁶FLA STAT. ANN. § 744.3215(4), 744.3725 (West 2006).

¹⁴⁷Adrienne Noble Nacev & Jeremy Rettig, *A Survey of Key Issues in Kentucky Elder Law*, 29 N. KY. L. REV. 139, 159-60 (2002).

¹⁴⁸Karen E. BOXX, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 GA. L. REV. 1, 12-13 (Fall 2001).

the principal's assets are more accessible.

3. Distinguishing Characteristics

In most, if not all jurisdictions in the United States, the guardianship is commenced when the proposed guardian initiates the proceedings with a petition.¹⁴⁹ The potential guardian provides personal information with the petition for the court to consider before appointing the applicant as the guardian.¹⁵⁰ The petition may inquire as to the guardian's fitness, including whether the guardian has been convicted of a felony.¹⁵¹

One of the most significant differences between a court appointed guardian and an attorney in fact selected by the principal is that when choosing a surrogate decision maker, the principal will generally not do a "background" check, or require an application prerequisite for the selection of the attorney-in-fact.¹⁵² Anyone who qualifies under the power of attorney statutes may serve as an attorney-in-fact, regardless of their criminal history.¹⁵³ Such process is not typical for a guardianship appointment.¹⁵⁴

¹⁴⁹*See generally infra*. Appendix A.

¹⁵⁰Anne M. H. Foley, *Judicial Appointment of Guardian*, 39 AM. JUR. 2D *Guardian and Ward* § 65 (2006). *See also*, MINN. STAT. ANN. § 525.542 (West 2006).

¹⁵¹*See infra* Appendix A.

¹⁵²*Id.*

¹⁵³The statutes are generally silent on whether a criminal may be an attorney-in-fact, but have instead adopted a "best interest of the principal requirement" as consistent with the fiduciary duties that courts have historically imposed on attorneys-in-fact. "[A] power of attorney ... is clearly given with the intent that the attorney-in-fact will utilize that power for the benefit of the principal." *Mantella v. Mantella*, 268 A.D.2d 852 (N.Y. App. Div. 2000). Because "[t]he relationship of an attorney-in-fact to his principal is that of agent and principal, ... the attorney-in-fact must act in the utmost good faith and undivided loyalty toward the principal, and must act in accordance with the highest principles of morality, fidelity, loyalty and fair dealing." *Semmler v. Naples*, 166 A.D.2d 751 (N.Y. App. Div. 1990).

¹⁵⁴*Bailey v. Maxwell*, No. CA 05-700, 2006 WL 476982 (Ark. Ct. App. 2006) (finding that the appellant had not shown that she was qualified to serve as guardian because she offered

The durable power of attorney is also problematic in many situations since it may not be feasible for the ward to have prepared the document. In certain instances, it is not available, like when the ward has not enjoyed capacity,¹⁵⁵ or when the power of attorney was not timely executed before incapacity. Again, the classes most affected and impacted are the indigent, because of their lack of financial resources to have such instruments prepared, and those who do not have capacity to prepare the document, i.e., those with marginal capacity.¹⁵⁶

In such cases where powers of attorney are not executed, and the ward does not have an estate, it may be difficult to exercise the the guardianship alternative.¹⁵⁷ If the proposed guardian, frequently a family member, has a felony conviction, in certain states, the ward may be denied adequate choices of substitute decision-makers.¹⁵⁸

When the power of attorney is not a feasible alternative, and assuming that being

no testimony stating that she was not a convicted and unpardoned felon); ARK.CODE ANN. §§ 28-65-210(3) & 28-65-203(a) (West 2006).

¹⁵⁵VALERIE J. BRADLEY & NANCY SULLIVAN, THE FORGOTTEN GENERATION-1999 REPORT TO THE PRESIDENT, THE PRESIDENT'S COMMITTEE ON MENTAL RETARDATION 4 (1999)("The fact that access to specialized mental retardation/developmental disabilities services remain so very inadequate for individuals with lifelong disabilities who live in lower socioeconomic households--which includes disproportionately people from racial and ethnic minorities--can be traced to assumption in the 1960s about conquering the social ills of poverty.")

¹⁵⁶*Id.* at 15. "However, this older generation remains vulnerable to poverty, often not being able to afford adequate health care just when health needs increase dramatically. . . .With the current anti-welfare mentality, people with mild developmental disabilities are most vulnerable to being abandoned by governmental agencies that search for less inclusive definitions of what constitutes need. How many people fall into this hidden population? the truth is that we have no idea. . . without action, the situation will continue."

¹⁵⁷Alison Patrucco Barnes, *Beyond Guardianship Reform: A reevaluation of Autonomy and Beneficence for a System of Principled Decision-Making in Long Term Care*, 41 EMORY L. J. (Summer 1992)("With unpaid proxies, however, there is seldom anyone willing to undertake the task.")

¹⁵⁸Florida has an absolute ban for appointing a felon as a guardian, regardless of the circumstances.

appointed the guardian was accomplishable, if the guardian relocates the ward, and transfers the guardianship matter, it is questionable whether the courts in the forum jurisdiction will exercise full faith and credit of prior adjudications of incapacity and the appointment of a guardian. Certain states, some of which contain high concentrations of our elderly population, may choose the alternative that denies felons the right to be guardians under any circumstances. Which alternative is best suited for an aging population or the indigent ward?

III. Should Legislation be Uniform Among the States?

A. Generally

In response to the lack of consistency in the implementation of statutory guardianship schemes among the states, federal legislators and independent organizations have created and promoted various uniform guardianship models and standards in an attempt to bring consistency among the different guardianship statutes.¹⁵⁹ Although not binding or mandatory, they serve as guides for state legislatures and encourage uniform application among the states.¹⁶⁰ In all cases, the uniform schemes that have been presented are insufficient as they do not provide for judicial discretion when determining whether the appointment of the guardian is in the ward's best interest. The states' statutory regiments are inconsistently applied and each state ranges from little or no consideration of the felony to complete restraints against the felon's eligibility to serve as a guardian.

1. Uniform Standards

Although all fifty states and the District of Columbia have enacted guardianship

¹⁵⁹<http://www.guardianship.org/> See also Symposium, *Creating the "Portable" Guardianship: Legal and Practical Implications of Probate Court Cooperation in Interstate Guardianship Cases*, 13 QUINNIPIAC. PROB. L. J. 351 (1999).

¹⁶⁰ Legal Encyclopedia, Uniform Probate Code, <http://www.answers.com/topic/uniform-probate-code> (last visited Aug. 17, 2006).

statutes, most states have been reluctant in adopting a national uniform standard.¹⁶¹ For example, currently only eighteen of the fifty states have adopted the Uniform Probate Code ("UPC"), while the majority have adopted statutes inconsistent with other states' statutory schemes.¹⁶²

This article does not discuss the tensions that inherently exist between the federal system and its interaction with the states' sovereignty, but it is not unusual for states to adopt uniform laws and adapt them to the state's individual needs.¹⁶³ If a uniform statutory scheme has not been adopted, or if the "uniformity" fails to address particular issues, such as whether felons may be eligible guardians, will forum states give deference to a foreign state's judgments and decrees under the United States Constitution or other legislative provisions?

2. Full Faith and Credit

The question remains, to what extent must the forum state honor a prior guardianship order where a guardianship has already been established in one state and the ward moves to a different jurisdiction?¹⁶⁴ Jurisdictions appear to provide different levels of full faith and credit¹⁶⁵ when honoring and giving deference to the enforcement of the foreign jurisdiction's

¹⁶¹See *infra* Table in Appendix A.

¹⁶²Law by Source: Uniform Laws, Uniform Probate Code Locator (2003)
<http://www.law.cornell.edu/uniform/probate.html>.

¹⁶³For example, the Uniform Child Custody Jurisdiction Act, Uniform Probate Code and the Uniform Guardianship and Protective Placement Act. See *infra* Table in Appendix A.

¹⁶⁴Anne M. H. Foley, *Collateral Attack*, 39 AM. JUR. 2D *Guardian and Ward* § 74 (2006) ("...the appointment of a guardian cannot be questioned in a collateral proceeding, (cites omitted) unless the proceedings show upon their face that the court was without jurisdiction to make the order of appointment. (cites omitted)). Thus, the title of the guardian cannot be collaterally attacked because of mere irregularities in the appointment or in the underlying proceedings. Board of Children's Guardians of Marion County v. Shutter, 34 N.E. 665 (Ind. 1893).

¹⁶⁵ Symposium, *Creating the "Portable" Guardianship: Legal and Practical Implications of Probate Court Cooperation in Interstate Guardianship Cases*, 13 QUINNIPIAC. PROB. L. J. 351,

order. Some states appear to honor the foreign judgment *carte blanc*, while other jurisdictions enforce the foreign judgment with conditions and considerations of the forum state's guardianship requirements.

a. Full Credit

In the case of *Pulley v. Sandgren*,¹⁶⁶ Bryan Pulley had been living with his father, Mr. Pulley in Boonville, Missouri when, in November 1993, at age seventeen, Bryan was involved in a serious automobile accident and suffered a permanent brain injury.¹⁶⁷ A few weeks after the accident, Bryan moved to Michigan with his mother, Mrs. Sandgren, to allow Bryan to be eligible for medical rehabilitation treatments in Michigan.¹⁶⁸ In 1994, the Michigan probate court appointed Mrs. Sandgren as Bryan's guardian following his eighteenth birthday. Bryan continued to live with his mother for several years and she served as the payee for Bryan's social security benefits.¹⁶⁹

In 1998, Mrs. Sandgren and Bryan moved to Virginia. In Virginia, Mrs. Sandgren was unhappy with Bryan's rehabilitative progress, and thereafter, Bryan returned to live with Mr. Pulley in Missouri. In October 2003, Mr. Pulley petitioned the Missouri court to register the foreign Michigan guardianship order, and the guardianship case was transferred to Missouri on August 24, 2004.¹⁷⁰ On December 9, 2004, the Missouri court entered a

fn12 (1999).

¹⁶⁶*Pulley v. Sandgren*, No. WD 64966, 2006 WL 1222734 (Mo. Ct. App. 2006).

¹⁶⁷*Id.* at *1.

¹⁶⁸*Id.* at *1.

¹⁶⁹*Id.*

¹⁷⁰*Id.*

judgment that removed Mrs. Sandgren as Bryan's guardian and the court appointed Mr. Pulley as Bryan's successor guardian. Mrs. Sandgren appealed Mr. Pulley's appointment in the Missouri court.¹⁷¹

The Missouri Court of Appeals held that the trial court was obligated to give full faith and credit to the Michigan order that had appointed Mrs. Sandgren as Bryan's guardian.¹⁷² Generally, in Missouri, and similar jurisdictions, the states interpret the United States Constitution, Article 4, § 1, as making it mandatory for the forum jurisdiction to give full faith and credit to a foreign state's guardianship orders, absent allegations of fraud or the foreign jurisdiction's lack of personal or subject-matter jurisdiction.¹⁷³

The Missouri court not only gave the Michigan order deference, but held that with respect to a foreign order or judgment, the courts in Missouri must presume that the foreign court had jurisdiction and that it rendered a valid judgment in accordance with its laws.¹⁷⁴

In such jurisdictions, as Missouri, that provide complete deference to the foreign jurisdiction's orders and decrees, the forum state is precluded from making any inquiry into the merits of the underlying case, but is instead, required to accept the order "free from questioning the logic or consistency of the decision, or the validity of the legal principles

¹⁷¹*Id.*

¹⁷²FLA. STAT. ANN. §§744.306, 744.308 (West 2006); N.H. REV. STAT. ANN. §764-A:44 (2006); TEX. PROB. CODE ANN. §881 (Vernon 2006); TENN. CODE ANN. § 34-11-117(b)(1) (West 2006); W. VA. CODE ANN. § 44A-1-12(a) (West 2006); S.D. CODIFIED LAWS, §29A-5-114 (2006); MO. ANN. STAT. §475.055(3) (West 2006).

¹⁷³*Pulley v. Sandgren*, No. WD 64966, 2006 WL 1222734 (Mo. Ct. App. 2006). *See also* 4 U.S.C.A. § 1 (West 2006) (Missouri courts are obligated to give full faith and credit to a foreign state's judicial proceedings unless the order or judgment was obtained by fraud or was void for lack of jurisdiction.).

¹⁷⁴*Pulley v. Sandgren*, No. WD 64966, 2006 WL 1222734 (Mo. Ct. App. 2006).

upon which it is based.”¹⁷⁵

Arguably, if a foreign jurisdiction allowed a felon to be appointed as a guardian, and the guardian then relocated to the State of Missouri, the Missouri courts would not question the guardian’s eligibility or appointment under Missouri’s standards, absent allegations of fraud or lack of jurisdiction. One may question whether without an uniform application of guardianship laws, such a policy is always in the best interest of the ward or whether such a policy encourages forum shopping.

b. Partial Credit

Yet, how much deference must the forum court allow? In the case of *In re Guardianship of Replogle*, Elizabeth Replogle, the ward, a 41-year-old developmentally challenged adult, resided in Indiana for most of her life. Elizabeth's mother, Ms. Zierer, had been appointed Elizabeth's guardian under an Indiana guardianship order.¹⁷⁶ After the appointment as guardian, Ms. Zierer moved Elizabeth to Ohio. Several years later, in January 2004, Elizabeth’s sister, Nancy Smith, filed a petition in the Indiana court seeking to have Zierer removed as Elizabeth's guardian.¹⁷⁷ Ms. Smith’s petition alleged that Ms. Zierer abused Elizabeth, and Elizabeth was moved to a nursing home facility in Ohio without notice to, or approval of, the Indiana court.¹⁷⁸

Following Elizabeth Replogle's removal to Ohio, proceedings were initiated in Indiana seeking her return to that state. On May 25, 2004, the Indiana court, after holding a

¹⁷⁵*Id.*

¹⁷⁶*In re Guardianship of Replogle*, 841 N.E.2d 330, 332 (Ohio Ct. App. 2005).

¹⁷⁷*Id.*

¹⁷⁸*Id.*

hearing, entered an order requiring Ms. Zierer to return Elizabeth to Indiana. Immediately thereafter, Jennie Lee Clark filed the guardianship action in Ohio. Clark asked the court to appoint her as Elizabeth's guardian.¹⁷⁹ The court appointed Clark as the emergency guardian of Elizabeth for a limited time. Ms. Smith then filed a motion with the Ohio court, seeking to have the court give full faith and credit to the Indiana guardianship and seeking the termination of the Ohio guardianship. The Ohio trial court, pursuant to Ms. Smith's request, entered an order terminating the Ohio guardianship.¹⁸⁰

On appeal, the Ohio Court of Appeals held that under the full faith and credit clause of the Constitution, despite the fact that the Indiana guardianship order could be modified in Indiana, Ohio was not required to give the foreign judgment more preclusive effect than would be consistent under Ohio law.¹⁸¹ Hence, in Ohio, the full faith and credit clause did not require the Ohio court to give the Indiana order *carte blanc* deference and enforcement, but the Ohio court required the full faith and credit deference in enforcing the Indiana order with no more preclusive effect than the order would have had in Ohio.¹⁸²

Consider further the case of *Teresa L. v. Sauk County*,¹⁸³ where the Wisconsin court

¹⁷⁹*Id.* at 332-333.

¹⁸⁰*Id.* at 333.

¹⁸¹*Id.* at 334 (Smith argued that the trial court was required to give preclusive effect to the Indiana judgment under the Full Faith and Credit Clause, Section 1, Article IV of the United States Constitution. The court found that the forum state was not required under the Clause to give the foreign judgment more preclusive effect than it would have in the rendering state.); *Kovacs v. Brewer* (1958), 356 U.S. 604 (1958) (because a guardianship order is obviously modifiable in the rendering state, it is necessarily modifiable in the forum state).

¹⁸²*In re Guardianship of Replogle*, 841 N.E.2d 330 (Ohio Ct. App. 2005); *In re Prye*, 169 S.W.3d 116 (Mo. Ct. App. 2005); *In re Guardianship of Jane E.P.*, 700 N.W.2d 863 (Wis. 2005).

¹⁸³*Teresa L. v. Sauk County*, 514 N.W.2d 424 (Wis. Ct. App. 1993).

found that the judiciary may modify a foreign order appointing a guardian despite the full faith and credit clause.¹⁸⁴ Teresa and Jimmie were divorced in the summer of 1992, and in January 1993, Jimmie was hospitalized in Miami after an accident. The Guardianship Program for Dade County, Florida, was appointed as Jimmie's guardian.¹⁸⁵ On October 6, 1993, Teresa petitioned the Wisconsin Circuit Court to appoint her guardian of Jimmie's person and estate. Sauk County gave notice that it would move to dismiss Teresa's petitions for lack of venue in that Jimmie was not a resident of or physically present in Sauk County, Wisconsin. However, before the hearing was held Teresa transported Jimmie to Wisconsin.

On October 20, 1993, the Wisconsin circuit court directed Teresa to transport Jimmie back to Florida. It dismissed Teresa's petitions after finding that Jimmie was not a resident of Wisconsin, and held that the Wisconsin circuit court was required give full faith and credit to the factual findings of the Florida court. The next day, Teresa moved the Wisconsin circuit court to grant her petition for guardianship on the alternative statutory ground that Jimmie was in Wisconsin under extraordinary circumstances requiring medical aid or the prevention of harm to his person.¹⁸⁶

The Wisconsin court found that Teresa was legally capable of discharging her duties as established by the court in Florida. The court held that the Wisconsin circuit court erred in its application of the full faith and credit clause when it treated as binding the Florida court's finding that Jimmie resided in Miami. The court found that the error was one of law and resulted in the erroneous exercise of the Wisconsin circuit court's discretion. The Wisconsin appellate court found that the trial court was not required to extend full faith and

¹⁸⁴FLORIDA STAT. ANN. §§ 744.467 and 744.474 (West 2006).

¹⁸⁵Teresa L. v. Sauk County, 514 N.W.2d. at 425.

¹⁸⁶*Id.*

credit to the Florida order since a "judgment has no constitutional claim to a more conclusive effect in the state of the forum than it has in the state where rendered." Hence, the Wisconsin court was not required to give the Florida order full faith and credit without scrutiny from the forum court. Under scrutiny, the Wisconsin court found that "the State of the forum has at least as much leeway to disregard the judgment, to qualify it, or to depart from it as does the State where it was rendered."¹⁸⁷

Since a Florida court could modify an order appointing a guardian (in that the guardian may resign or be removed), the Wisconsin court did not have to honor the Florida guardianship order with full faith and credit in this situation. Consequently, the court held that the state may ignore the residency findings in the Florida order without offending the full faith and credit clause.¹⁸⁸

By limiting the deference given to foreign judgments, arguably, if felons could serve as guardians in Indiana, the Ohio court may not be required to give the foreign decree *carte*

¹⁸⁷*Consider also In re Kassler*, 19 N.Y.S.2d 266 (1940). New York does not require recognition of the foreign guardianship under full faith and credit, in that foreign guardians can not assert authority outside of the jurisdiction governing the appointment of the foreign state. Note, that in New York, the guardian may apply for authority through an ancillary proceeding to act as a guardian within the State of New York pursuant to a foreign decree or order.

¹⁸⁸*State ex rel. Kern v. Kern*, 116 N.W.2d 337, 340 (Wis. 1962). *See also, In re Erhardt*, 27 A.D.2d 836, (N.Y.App. Div. 1967) (children were in the custody of both the paternal grandparents and the paternal aunt. The New York court found that the paternal grandmother maintained lawful custody of the children under New York law and that while the paternal aunt argued that the Federal Constitution required that full faith and credit be given to a Florida custody and guardianship order, the New York court found that at the time of the entry of the Florida order, that the children's aunt did not have lawful custody and that she had not been appointed their guardian by the New York court. Hence, the trial court held that the Constitution did not require the extension of full faith and credit to either the Florida guardianship or custody order since the aunt was not in legal custody of the children when the Florida court entered the order); Albert A. Ehrenzweig, *Interstate Recognition of Custody Decrees: Law and Reason v. the Restatement*, 51 MICH.L.REV. 345, 346 (1953); *Morgan v. Potter*, 157 U.S. 195 (1895); *Bachman v. Mejias*, 136 N.E.2d 866 (N.Y., 1956); *New York ex rel. Halvey v. Halvey*, 330 U.S. 610 (1947).

blanc deference in the guardian's appointment. On the other hand, could the felon-guardian arguably serve in Ohio, even if Ohio otherwise objected to felons serving as guardians since it would be more "preclusive" than the Indiana eligibility requirements for the appointment of a guardian? The question that still remains is, "how much deference must a forum state give to a foreign jurisdiction's orders and decrees?"

c. Comity

As noted in the *Replegle* case, not all jurisdictions provide full faith and credit automatically without a level of review in the forum jurisdiction. If the court limits full faith and credit, or if full faith and credit is not applicable, will the forum court give deference to the foreign jurisdiction's orders under principles of comity? The decision of whether to extend comity may be discretionary, with the ward's "best interest," being considered.¹⁸⁹

In the *Hilkmann v. Hilkmann* case, the court explored the concept of "comity" in deciding whether to extend deference to a foreign court's guardianship order.¹⁹⁰ On July 14, 1999, Leila Hilkmann filed a guardianship petition with the Israeli family court to become

¹⁸⁹Guardianship of Enos, 670 N.E.2d 967 (Mass. App. Ct. 1996) (the Massachusetts court enforced a Florida guardianship order after daughter removed her 90 year old incapacitated mother to Massachusetts in violation of the Florida decree. The court acknowledged that some states have declined to give full faith and credit to guardianship decisions issued by other states, but noted that "Massachusetts courts have declined to give another jurisdiction's valid guardianship order full faith and credit only when the best interest of the ward required otherwise). *Woodworth v. Spring*, 4 Allen 321, 325 (Mass. 1862) (Hence, the Massachusetts court declined to grant habeas corpus writ to the daughter, which allowed Florida to continue with enforcing criminal charges against the daughter in Florida, when the guardian failed to proffer a reason not to accord the Florida orders full faith and credit. The court considered the ward's best interest, and despite the fact that Florida had both personal and subject matter jurisdiction, that it was the more convenient forum, that all of the potential witnesses resided in Florida, and that the guardian had submitted herself to that jurisdiction, the paramount consideration was the well-being of the ward, and whether travel would be an unacceptable risk to her).

¹⁹⁰*Hilkmann v. Hilkmann*, 858 A.2d 58,60 (Pa. 2003).

the guardian of her son, Daniel. The mother attached a medical opinion by the son's pediatrician to the guardianship petition that gave an opinion of Daniel's mental incapacity. On October 27, 1999, the Israeli family court temporarily appointed Ms. Hilkmann the guardian for six months. The father, Dirk H. Hilkmann, received the mother's petition but failed to immediately respond. The Israeli court, after noting Mr. Hilkmann's failure to respond, found Daniel incapacitated and recommended that Mrs. Hilkmann be appointed Daniel's permanent legal guardian.¹⁹¹ Subsequently, Mr. Hilkmann responded on February 8, 2000, protesting the Israeli court's grant of permanent guardianship.

In July 2000, the Hilkmann children flew to the United States to see their father for a previously scheduled visit. While Daniel's sister returned to Israel, Daniel remained with his father. In August, Mr. Hilkmann enrolled Daniel in a local community college program for persons with special needs and on September 5, 2000, Mrs. Hilkmann registered the Israeli guardianship order in a Pennsylvania court. Additionally, she filed a petition requesting that Pennsylvania enforce the Israeli guardianship order by forcing Daniel to return with her to Israel.

The Pennsylvania appellate court considered whether the trial court satisfied due process rights by enforcing the Israeli foreign guardianship order without making an independent evaluation of the subject of the order or receiving evidence to support the Israeli order. The Pennsylvania court found the full faith and credit clause of the United States Constitution was inapplicable to a foreign country's decree.¹⁹² Despite not apply full faith and credit, the Pennsylvania court considered whether the principle of comity supported its enforcement of a foreign guardianship when the court did not have statutory (or other

¹⁹¹*Id.* at 60-62.

¹⁹²*Id.* at 64-65.

authority) to give deference to the Israeli order. The court noted that the Israeli order was not tainted by fraud, that it would not outrage the court's sense of justice, and it was not obtained for the purpose of contravening the state's laws or public policy, when it considered its enforcement.¹⁹³

Mr. Hilkmann disputed that the Israeli court correctly found his son to be "incompetent." He argued that the Israeli court's reliance upon the common law principle of mental competency was limited to that local jurisdiction, and should not to be extended by full faith and credit. Mrs. Hilkmann, on the other hand, argued that the court should give deference to the Israeli order under the principle of comity.¹⁹⁴

The court considered that comity had been extended to non-guardianship matters when domesticating foreign money judgments, enforcing sentences imposed by other sovereigns, and accepting foreign adoptions. Nonetheless, the appellate court found that the trial court abused its discretion when it violated Pennsylvania's public policy and the court's sense of justice in this case. The Pennsylvania court was concerned that the trial court's "decision would establish a precedent whereby any foreign citizen could enforce any guardianship decree and commensurate finding of incompetency, regardless of the manner in which it was issued."¹⁹⁵ The Pennsylvania court did not extend *carte blanc* deference under principles of comity, but it looked behind the foreign judgment and exercised its "sideline quarter-backing" and discretion. The Pennsylvania court was concerned that the Israeli court failed to hear sufficient evidence of Daniel's competency and that Daniel's interests were not

¹⁹³*Id.*

¹⁹⁴*Id.*

¹⁹⁵*Id.* at 247.

represented at the Israeli proceeding by a guardian ad litem. Therefore, deference was not given under principles of comity.

Had the circumstances been different in the foreign jurisdiction, would a sister state enforce the foreign order under principles of comity? Arguably, the courts may extend comity; however, generally the courts more closely scrutinize a foreign order under principles of comity than they might under full faith and credit.¹⁹⁶

Likewise, in the case of *Kulekowskis v. DiLeonardi*,¹⁹⁷ the court found that there was an element of discretion when determining whether to grant comity to a foreign judgment. Anthony DeSilva and Tammy Lynn Wright ("Tammy") were married in October 1986, and bought a home together in Winnipeg, Canada.¹⁹⁸ In December 1987, DeSilva and Tammy were involved in a serious automobile accident in Illinois, and although Tammy survived, she was left a quadriplegic with permanent and extensive brain damage. On March 24, 1988, despite Tammy's parent's (Mr. and Mrs. Wright) objections, the Illinois court appointed Mr. DeSilva as sole guardian of his wife's estate and person with no restrictions.¹⁹⁹

In July 1989, Mr. DeSilva transferred Tammy back to their home in Winnipeg, Canada so she could receive the socialized health care services for which she was eligible.²⁰⁰ After the move, and without Mrs. Wright's approval, Mr. DeSilva took Tammy to Chicago for further testing. After Mrs. Wright's failed attempt to keep Tammy in the United States,

¹⁹⁶State v. Nath, 52 P.3d 857 (Idaho 2002).

¹⁹⁷*Kulekowskis v. DiLeonardi*, 941 F.Supp. 741 (N.D. Ill. 1996).

¹⁹⁸*Id.*

¹⁹⁹*Kulekowskis*, 941 F.Supp. at 743.

²⁰⁰*Id.* at 743-44.

her attorney represented to the Winnipeg Police Department that Tammy's husband had kidnaped Tammy from her home in Winnipeg. The attorney did not inform the Winnipeg Police Department of Mr. DeSilva's legal guardianship over Tammy. The Winnipeg Police Department arranged for Mr. DeSilva and his companions to be stopped at the border by the Royal Canadian Mounted Police, and the Ontario Provincial Police, on Mr. DeSilva's way back to the United States.

The Canadian police stopped Mr. DeSilva and his companions at the border and charged Mr. DeSilva with kidnaping. At Canada's request, the United States Attorney sought the extradition of Mr. DeSilva and the other participants. Faced with imminent removal to Canada, Mr. DeSilva brought before the Illinois court a writ of habeas corpus seeking relief from the outstanding extradition order.²⁰¹ In support of their habeas petition, Mr. DeSilva and the other participants claimed among other things, that the dual criminality element mandated by the Treaty of Extradition between the United States and Canada (the "Treaty") was lacking.

The Illinois court granted Mr. DeSilva's habeas relief since the dual criminality requirement of the Treaty had not been complied with. The court reasoned that it would be necessary to examine Mr. DeSilva's conduct under the reverse fact scenario required by the dual criminality element of the United States - Canada extradition treaty. If the facts were reversed, the court found that Illinois would be unable to successfully prosecute Mr. DeSilva for kidnaping because it would not require DeSilva to register his Canadian guardianship in Illinois. Because Illinois would recognize a valid Canadian guardianship under principles of comity, a Canadian guardian, like an Illinois guardian, would not be capable of kidnaping his ward from Illinois. Thus, since the guardians' conduct would not be criminal in Illinois, the

²⁰¹ *Id.* at 744.

dual criminality requirement of the Treaty was not satisfied.²⁰²

In reaching its ruling, the court confirmed that recognizing a foreign decree under comity is more relaxed and subject to closer judicial scrutiny than under full faith and credit. The court stated, “[i]t is not a rule of law, [and] more than mere courtesy and accommodation, [but it] does not achieve the force of an imperative or obligation.” Comity is extended by the United State’s courts as an “expression of understanding [with regard] to *international* duty and convenience and the rights of persons protected by its own laws [as opposed to those of other nations].”²⁰³ The court found that in order to extend comity, that the moving party must establish a *prima facie* case that the judgment was entitled to recognition.

The Illinois court required four criteria for the recognition of a foreign judgment: (1) that the rendering court had jurisdiction over the person and subject matter; (2) that there was timely notice and an opportunity to present the defense; (3) that there was no fraud involved; and (4) that the proceedings were according to a civilized jurisprudence.²⁰⁴ The court held that giving the tribunal discretion, that such an interpretation of comity was “fallacious insofar as it casts the decision of whether to accord recognition to a foreign judgment in an arbitrary and whimsical light.”²⁰⁵ Comity, the court found, required not an arbitrary decision, but a decision based on the recognition that the court’s authority is conditioned on the

²⁰²Kulekowskis, 941 F.Supp. at 744.

²⁰³*Id.* at 744-45.

²⁰⁴*Id.*

²⁰⁵Kulekowskis, 941 F.Supp. at 747.

application of the four-part test.²⁰⁶ In this case, the court found that under the federal test for comity, that the guardian met the necessary threshold criteria to invoke the doctrine of comity.²⁰⁷

If full faith and credit is recognized, how much comity or credit should or must be given?²⁰⁸ Arguably, under full faith and credit, and furthermore, under principles of comity, the court may conditionally accept the foreign order and make inquiries and modifications.²⁰⁹

3. Best Interest/Judicial Discretion:

Rather than extend comity or full faith and credit, may a court provide deference to a foreign decree based on a balancing test performed under judicial discretion, rather than pursuant to a statute or a constitution? For example, Texas requires that the courts of that jurisdiction grant applications to accept foreign guardianships if the transfer of the guardianship from the foreign jurisdiction is in the best interest of the ward.²¹⁰ Under

²⁰⁶Hilton v. Guyot, 159 U.S. 113, 166-68 (1895) (establishing the original four-part federal comity test).

²⁰⁷Kulekowskis, 941 F.Supp. at 748. Guardianship decisions have occasionally been denied full faith and credit in some jurisdictions, *e.g.*, Mack v. Mack, 618 A.2d 744, 749-751 (Md. 1993) (and cases cited therein). Massachusetts courts give a foreign jurisdiction's guardianship orders full faith and credit only when it would be in the best interest of the ward. Woodworth v. Spring, 4 Allen 321, 325 (Mass. 1862).

²⁰⁸Hoyt v. Sprague, 103 U.S. 613 (1880) (quoting Justice Story, "The rights and powers of guardians are considered as strictly local; and not as entitling them to exercise any authority over the person or personal property of their wards in other states, upon the same general reasoning and policy which have circumscribed the rights and authorities of executors and administrators."); Barnett v. Equitable Trust Co. of New York, 34 F.2d 916 (2d Cir. 1929) (upholding Hoyt v. Sprague); Mack v. Mack, 618 A.2d 744, 749-51 (Md. 1993) (holding that full faith and credit does not apply to foreign guardianship orders).

²⁰⁹See *infra* Appendix C.

²¹⁰Holliday, Kimpflen, and Necheles, 42A Tex. Jur. 3d Guardianship and Conservatorship §§ 483, Receipt and Acceptance of Foreign Guardianship (2006).

judicial discretion, will the state court be able to take this approach when considering whether a felon may be appointed as a guardian in the forum jurisdiction?

In the jurisdictions that allow judicial discretion in extending full faith and credit, the court may consider the ward's best interest, which would allow the court the ability to redetermine the ward's capacity and the rights, powers, and duties of the guardian.²¹¹ This policy could be argued to allow the foreign jurisdiction's guardianship appointment, regardless of whether the Texas court would have appointed the guardian under its laws.²¹² It may be read to restrain the Texas court from giving deference if the court may "go behind the foreign jurisdiction's appointment" and set its own eligibility standards. Under either argument, the matter has not been decided and therefore, creates ambiguity.

B. Preservation of Checks and Balances

Borne from the United States Constitution, the doctrines of "separation of powers" and "checks and balances" were designed to separate the branches of government and ensure each branch is free from the control and coercion of the others.²¹³ Accordingly, these doctrines encompass two fundamental prohibitions: (1) no branch may encroach upon the powers of another, and (2) no branch may delegate to another its constitutionally assigned power.²¹⁴ Precisely at issue is whether the first fundamental prohibition delineated by the

²¹¹Robert H. Weber, Estate Planning for the Aging or Incapacitated Client in Massachusetts: Protecting Legal Rights, Preserving Resources, and Providing Health Care Options, Sections 3.6 and 3.7, Massachusetts Continuing Legal Education, Inc., Substitute Personal Decision-Making (2005).

²¹²Symposium, *Creating the "Portable" Guardianship: Legal and Practical Implications of Probate Court Cooperation in Interstate Guardianship Cases*, 13 QUINNIPIAC PROB. L. J. 351, 366 (1999).

²¹³ *Humphrey's Ex'r v. United States*, 295 US 602 (1935).

²¹⁴ Fla .Stat. Ann. Const. Art. 2, § 3; *Bush v. Schiavo*, 885 So. 2d 321 (Fla. 2004), *reh'g denied*, (Oct. 21, 2004) *and related reference*, 2004 WL 2726107 (Fla. Dist. Ct. App. 2d Dist. 2004) *and petition*

Constitution is violated where statutes enacted by the legislature deprive the court of its discretionary powers to make case-by-case decisions for the ward's best interest.

Although Article III of the Constitution is silent on the judiciary's power, the Supreme Court in *Marbury v. Madison* established the judiciary's fundamental power of judicial review.²¹⁵ Judicial review is the judiciary's separate and independent power, and serves as the judiciary's checks and balances on the other two branches of government. While the Constitution is clear that no branch may encroach upon the power of another, the separation of powers has continuously been challenged by statutes attempting to remove the court's discretionary powers. For example, in *State v. Curtin*, a Florida court found the Sexual Predator Act violated the separation of powers doctrine because it eliminated the court's discretionary function.²¹⁶

Four states' guardianship statutes, as well as the majority of uniform models and standards, explicitly prohibit the appointment of felons as guardians, which effectively removes the judiciary's decision making ability concerning felons' guardianship eligibility. Although it has resulted in injustices, many courts have been unable to redress the situation simply because of the construction of their states' guardianship statutes. For instance, the court in *The Matter of the Petition of Frances Lagrange* held, "[i]n the face of this absolute disqualification by statutory enactment, the court possesses no discretion whatsoever. . . The remedy is, however, a legislative and not a judicial function, and until it has been supplied, the courts at times [become] the unwitting instruments of hardship and even downright

for cert. filed (U.S. Dec. 1, 2004).

²¹⁵*Marbury v. Madison*, 5 U.S. 137 (1803).

²¹⁶ *State v. Curtin*, 764 So.2d 645 (Fla. 1st Dist. Ct. App. 2000).

injustice.”²¹⁷ Rather than infringing on or effectively eliminating the judiciary’s discretionary power by an outright prohibition against certain individuals serving as guardians, the legislature should create statutes that allow for judicial discretionary interpretation and the consideration of the ward’s best interest in determining the eligibility of the guardian.

When the legislature removes the court discretion to determine whether a felon may be an eligible guardian, the balance of powers established as early as *Marbury v. Madison*²¹⁸ are again challenged and the judiciary’s “checks and balances” are again eroded. The separation of the powers of government encompasses both the state and federal constitutions.²¹⁹ Arguably, when a statute removes judiciary discretion, the statute violates the separation of powers between the branches of the government.²²⁰

Compare however, in the case of *Reyes v. State*,²²¹ the Florida Fourth District Court

²¹⁷*In re Lagrange*, 274 N.Y.S. 702 (N.Y. Surr. 1934).

²¹⁸The fundamental role of the judiciary as articulated in *Marbury v. Madison* “. . . is emphatically the province and duty of the judicial department to say what the law is.” *Marbury v. Madison*, 5 U.S. 137, 177, (1803). See also, *King v. Finch*, 428 F.2d 709 (5th Cir. 1970); *Bandy v. Mickelson*, 44 N.W.2d 341 (S.D. 1950); *In re Mann*, 154 S.E.2d 860 (W. Va. 1967). Under the separation of powers provision of the Massachusetts Constitution, the legislature may modify, enlarge, diminish, or abolish the jurisdiction of all courts subordinate to the Supreme Judicial Court but, having established statutory courts, the legislature has no authority to abrogate the inherent powers of the courts or to render them inoperative. *Gray v. Comm’r of Revenue*, 665 N.E.2d 17 (Mass. 1996).

²¹⁹The constitution of the State of Florida provides that the powers of the government of the state are divided into three branches--legislative, executive, and judicial--and prohibits any person properly belonging to one of the departments from exercising any powers appertaining to either of the others except as expressly provided for in the constitution. *Dade County Classroom Teachers Ass'n, Inc. v. Legislature*, 269 So.2d 684, 686 (Fla. 1972).

²²⁰*State v. Curtin*, 764 So.2d 645 (Fla. 1st Dist. Ct. App. 2000).

²²¹*Reyes v. State*, 854 So.2d 816 (Fla. 4th Dist. Ct. App. 2003). Reyes also argued that the Act violated the separation of powers clause of Article II, section 3 of the Florida Constitution because it made the sexual predator designation mandatory for all defendants who meet the

of Appeal held that the Sexual Predator Act, which effectively removed any discretion from the trial court, did not violate separation of powers clause of the Florida state constitution, even though it made the designation of offenders as sexual predators mandatory for all offenders who met the statutory criteria.²²² But not all Florida courts agreed. In *State v. Curtin*,²²³ Florida's First District Court of Appeals held that the Sexual Predator Act, which required the sentencing court to impose sexual predator designation on a defendant that met the statutory criteria, violated the separation of powers because it removed court discretion.²²⁴ The court noted that by removing the court's discretion, the Sexual Predator Act appeared to violate the separation of powers clause.²²⁵

Recognizing the limitations imposed on the judiciary by restraining its case-by-case decision making, the policy makers may consider further the removal of court discretion, especially in this area where the demand for eligible guardians may outstrip the supply of

statutory criteria, thus, removing from the trial court any discretion in making this determination. In *Kelly v. State*, 795 So.2d 135, 137 (Fla. 5th Dist. Ct. App. 2001), the Fifth District rejected this argument as did the Second District in *Milks v. State*, 848 So.2d 1167, 1169. *Cf. State v. Cotton*, 769 So.2d 345 (Fla. 2000)(holding that Prison Releasee Reoffender Punishment Act, although removing all discretion from trial court and transferring to state attorney, did not violate separation of powers clause).

²²²FLA. STAT. ANN. Const. Art. 2, § 3 (West 2006); FLA. STAT. ANN. § 775.21(4)(a)1, (5)(a)1 (West 2006).

²²³ *State v. Curtin*, 764 So.2d 645 (Fla. Dist. Ct. App. 2000).

²²⁴*Id.*

²²⁵*Whatley v. District of Columbia*, 447 F.3d 814 (D.C. Cir. 2006). On November 27, 2002, appellants filed a motion asserting that they were entitled to recover their entire fees despite the statutory cap because if the court construed § 140 to apply indefinitely, the application would be an unconstitutional violation of the separation of powers. Appellants claimed that § 140 raised separation of powers concerns, because it effectively removed from the courts' discretion to award reasonable attorneys' fees under IDEA, that Congress encroached on the judiciary's exclusive domain.

available guardians.²²⁶ If the legislatures adopt a “best interest of the ward test,” even though it may be more subjective and not as judicially efficient, the significant role of judicial interpretation is preserved, and the ward’s best interest preserves the balance that is required for a rational basis.

C. Considerations of Policy-Makers

Two growing demographic trends, the increasing age of society and the increase in numbers of felony convictions,²²⁷ are currently on a collision course. Although the increasing number of felony convictions will disqualify only a small percentage of the pool of potential guardians, it will do so at a time when more guardians will be needed. It is easy to conceive of situations where a loving and otherwise qualified spouse or child will be disqualified from serving as a guardian due to a past indiscretion. Policy-makers may wish to re-think the policies that absolutely exclude persons with past felony convictions before it becomes more common for wards to be denied assistance.

Other uniform statutes balance the interests of affected categories of individual rights versus the states' interests. The legislatures may wish to borrow from other statutes with similar interstate concerns, i.e., the Uniform Child Custody Jurisdiction Act, or the prototype Uniform Adult Guardianship Jurisdiction Act. For example, Maryland’s proposed Section

²²⁶In October 2003, the Florida Legislature passed a law that gave Gov. Jeb Bush the authority to order that Terri Schiavo's feeding tube be reinserted. However, in the fall of 2004, the Florida Supreme Court ruled that this law was an unconstitutional violation of the separation of powers because it permitted the executive branch to "interfere with the final judicial determination in a case." *Bush v. Schiavo*, 885 So. 2d 321 (Fla. 2004) The court also held that the law constituted an unconstitutional delegation of legislative power to the governor, in that it gave the governor "unbridled discretion" to make a decision about a citizen's constitutional rights

²²⁷Symposium, *Creating the "Portable" Guardianship: Legal and Practical Implications of Probate Court Cooperation in Interstate Guardianship Cases*, 13 QUINNIPIAC PROB. L. J. 351, 352-53 (1999).

13-105(b)(3)²²⁸ provides for full faith and credit of foreign guardianship orders if the foreign orders were issued in compliance with that state's guardianship procedures.²²⁹ How does the court determine if the foreign order was entered in compliance with its own procedures without an independent review of the foreign state's guardianship procedures? Perhaps the forum state would give deference to the foreign state's order absent a challenge by an interested party.

Adopting the notice procedures found in other uniform acts, as in the prototype Uniform Adult Guardianship Jurisdiction Act, which provides that “[a]ll decrees rendered by a state . . . would be binding against all parties who received notice of the proceeding, and would be conclusive as to all issues of fact or law” If every interested party received notice in the forum state, and there were concerns about the eligibility of the proposed guardian, the forum state's courts would be able to consider the ward's best interest, and at the same time, provide due process notice to all concerned. Who should receive notice, however? Who is entitled to standing?

1. Rational Basis Challenges

When the policy makers determine that felons are excluded from serving as guardians

²²⁸For example, see *Mack v. Mack*, 618 A.2d 744, 746 (Md. 1993). The Circuit Court for Baltimore County held that the appointment of a guardian by the Florida court was not entitled to full faith and credit. (footnotes omitted). It appointed a temporary guardian and reserved judgment on the guardianship issue until a later hearing. The Florida guardian argued in her pretrial memoranda that the circuit court "should order withdrawal of Ronald's feeding tube." After a full hearing on this issue, the circuit court determined that "absent either a living will or a power of attorney for health care, the decision to withhold sustenance should be based on what intent Ronald had, or would have, as determined under a clear and convincing standard of proof." The court found insufficient evidence that Ronald would have desired to terminate his life support systems rather than exist in a permanent vegetative state. *See also*, William S. Heyman, Survey, Development in Maryland Law, 1992-93, 53 MD. L. REV. 908 (1994).

²²⁹Sally Balch Hurme, Current Trends in Guardianship Reform, 7 Md. J. Contemp. Legal Issues 143, n. 186 (Fall 1995-1996).

carte blanc, thus depriving the courts from making case-by-case decisions, many wards may be underserved. Does the state's interest in protecting the potentially vulnerable ward outweigh the ward's right to have a guardian appointed that will serve the ward's best interest, despite the proposed guardian's past criminal record?

Under the equal protection clause of the United States Constitution, in order for the government to impose different standards between classes of persons, i.e., felons versus non-felons, it must have a rational basis for making such a distinction.²³⁰

In order to challenge a state statute under the rational basis test, the challenger is first required to identify the purpose for which the statute was designed. After identifying the intended purpose of the statute, the more difficult challenge under rational basis is that the challenger must show that there is no rational basis for which the legislative body could have concluded that the statute would have served its intended purpose.²³¹ When dealing with vulnerable groups, such as the elderly and the developmentally disabled, the possibility of a statute prohibiting "felons" from serving as guardians being found to violate the Constitution's rational basis test is difficult, if not impossible.

Statutes such as Florida Statute § 744.309, however, may actually prevent needy wards from finding anyone eligible to serve as their guardian, especially when there is no estate funds.²³² Granted, felons are not the most empathetic classification to curry favor, yet the statutes that preclude felons from serving as guardians more dramatically affect the incapacitated and indigent that require a guardian. As a class, developmentally incapacitated

²³⁰Donald T. Kramer, *Equal Protection of the Laws; Generally; Rule Permitting Classification*, 16B AM. JUR. 2D *Constitutional Law* § 808 (2006).

²³¹ Donald T. Kramer, *Equal Protection of the Laws; Rational Basis Test*, 16B AM JUR 2D *Constitutional Law* § 813 (2006).

²³²FLA. STAT. ANN. § 744.309 (West 2006).

persons who are in need of a guardian are not only innocent victims, but also are detrimentally affected by a statute that has as its basis, the protection of said classes.

As discussed, an incapacitated person who is widowed may not under some states' restraining-type statutes, have the benefit of a spouse to serve as a guardian. A long-time spouse is not only a natural candidate to serve as a guardian but is also given substantial legislative priority with respect to the hierarchy of potential appointees.²³³ Yet, the prohibitory statutes are too broad when they prevent an indigent person, in need of a guardian, from appointing a spouse or the ward's son or daughter.

Similarly, divorcees also do not have the benefit of a spouse to assume a guardianship role in the event of incapacity, and may be limited to an adult son, daughter or sibling. The number of divorce filings has risen dramatically since 1950.²³⁴ Furthermore there is a significant elder population living without spouses, either due to divorce, death, or lifestyle choices.²³⁵

Under guardianship statutes, one governmental interest is to protect the ward from exploitation and abuse.²³⁶ Presumably, the legislature considered felons as "presumptively"

²³³Uniform Guardianship and Protective Proceedings Act of 1997 § 309 (a)(4) (West 2005).

²³⁴U.S. CENSUS BUREAU, MARITAL STATUS OF THE POPULATION 15 YEARS OLD AND OVER, SEX AND RACE: 1950-PRESENT 1 (2006), <http://www.census.gov/population/socdemo/hh-fam/ms1.pdf>.

²³⁵ WAN HE ET AL., U.S. DEPT. OF HEALTH AND HUMAN SERVICES, 65+IN THE UNITED STATES:2005 2 (2005), <http://www.census.gov/prod/2006pubs/p23-209.pdf>

²³⁶“To this end, guardianship and conservatorship for disabled persons shall be utilized only as is necessary to promote their well-being, including protection from neglect, exploitation, and abuse; shall be designed to encourage the development of maximum self-reliance and independence in each person; and shall be ordered only to the extent necessitated by each person’s actual mental and adaptive limitations.” KY. REV. STAT. ANN. § 387.500(3) (West 2005).

prone to exploit or abuse the vulnerable group of incapacitated wards, and therefore, made felons ineligible to serve as guardians, regardless of the nature of the felon, the age of the felon, the relationship between the felon and the ward, and the circumstances. Such a blanket prohibition may be both under-inclusive and over-inclusive.²³⁷

The rational basis standard of review does not require the basis to be the least restrictive means of achieving the permissible end so long as the state can rationally further its goal.²³⁸ Yet, the absolute prohibition against felons serving as guardians violates the "over-inclusive test."²³⁹ Not all felons are prone to be exploitative or abusive. Consider the adults existing with marginal capacity who have been taken care of by parents before reaching the age of majority. In such cases, the parents have taken care of the children, especially in cases where both the children and the parents are indigent. With indigency, where it is difficult for the ward to find a guardian to serve, the prohibition against felons serving as the guardian regardless of the relationship between the ward and the guardian, and the ward's lack of an estate, the basis for the rule is over-inclusive and may fail the rational basis test.²⁴⁰

²³⁷Chang v. Glynn County Sch. Dist., No. CV206-099, 2006 LEXIS 57095, 7-8 (S.D. Ga. Aug. 15, 2006).

²³⁸Tolchin v. Supreme Court of the State of New Jersey, 111 F.3d 1099 (3d Cir. 1997), *cert. denied*, 118 S. Ct. 435, 139 L. Ed. 2d 334 (U.S. 1997); Scariano v. Justices of Supreme Court of State of Ind., 38 F.3d 920 (7th Cir. 1994), *reh'g and suggestion for reh'g en banc denied*, 47 F.3d 173 (7th Cir. 1995) and *cert. denied*, 515 U.S. 1144, 115 S. Ct. 2582, 132 L. Ed. 2d 831 (1995).

²³⁹The ward is not stripped of protection by allowing felons to serve as guardians. Wards may be protected by other statutes too. For example, Michael G. Walsh, Homicide as Precluding Taking Under Will or by Intestacy, 25 A.L.R.4TH 787 (1983); Hatcher v Aetna Life Ins. Co., 105 F Supp. 808 (D. Or. 1952); *In re Estate of Klein*, 378 A2d 1182 (Pa. 1977).

²⁴⁰Sugarman v. Dougall, 413 U.S. 634, 643 (1973), *cited in* Chang v. Glynn County Sch. Dist., No. CV206-099, 2006 LEXIS 57095, 7-8 (S.D. Ga. Aug. 15, 2006).

The absolute prohibition may also be under-inclusive to protect vulnerable wards from exploitation and abuse. Many elderly indigent wards fall victim to abuse and exploitation. The blanket prohibition of felons from serving as guardians does not protect the vulnerability of the indigent elderly or the "new adult" indigent, and is therefore under-inclusive to accomplish the legislature's goals.²⁴¹

2. *Should Adoption of Uniform Models and Standards be Mandatory?*

Because reducing the effect of a felony conviction via annulment, expunction, or pardon is not overly effective, another viable solution is the states' mandatory adoption of a uniform standard, statute, or code. Federal legislators and independent organizations have drafted numerous uniform standards and models, including the Uniform Probate Code, the Uniform Guardianship and Protective Placement Act, and the National Probate Court Standards,²⁴² to help aid the states in adopting more cohesive guardianship statutes.²⁴³ These unified standards are designed to improve interstate cooperation to "avoid jurisdictional competition and conflict between states, [in order] to protect the [ward's] best interest, and to discourage forum shopping."²⁴⁴

²⁴¹Miriam R. Kennedy, Considerations in Planning for Incapacity, 32115 NBI-CLE 232, 233 (2006).

²⁴²Commission on National Probate Court Standards, *National Probate Court Standards* 1 (1993). The National Probate Court Standards are reprinted with the consent of the National Center for State Courts, Interstate Guardianship Project Staff, Paula L. Hannaford, Esq., Project Director, 300 Newport Avenue (23185), P.O. Box 8798, Williamsburg, Virginia 23187-8798 [Telephone no. (757) 253-2000; FAX no. (757) 220-0449].

²⁴³Legal Encyclopedia, Uniform Probate Code, <http://www.answers.com/topic/uniform-probate-code> (last visited Aug 18, 2006).

²⁴⁴Amy Kosanovich & Michael J. Chmiel, *One Family in Two Courts: Coordination for Families in Illinois Juvenile and Domestic Relations Courts*, 37 LOY. U. CHI. L.J. 571, 588 - 89 (Spring 2006).

As will be discussed in greater detail hereafter, the Uniform Probate Code does not mention *felony* and the disqualification to act as a felon. The National Guardianship Standard explicitly prohibits felons from being guardians absolutely. Hence, should a uniform system move towards a "best interest" model for the ward with the requirement of disclosure of the prior felony? If disclosed, the court may then consider the felony as one element of determining the eligibility of the proposed guardian. In a case-by-case analysis, the court may exercise the best interest of the ward.

a. Uniform Probate Code and the Uniform Guardianship and Protective Placement Act

The Uniform Probate Code ("UPC") was proposed by the National Conference of Commissioners on Uniform State Laws ("NCCUSL")²⁴⁵ in 1969. The UPC was the product of a collaborative effort of the NCCUSL and the Real Property, Probate and Trust Law Section of the American Bar Association. In 1991 the UPC was replaced by a revised version, which was derived from a study of the UPC conducted by the Joint Editorial Board for the Uniform Probate Code, an organization representing the NCCUSL, the ABA, and the American College of Trust and Estate Lawyers.²⁴⁶

The UPC commissioners formed the national conference to discuss, draft and propose laws, codes, guidelines, and recommendations to the states that should be uniform and

²⁴⁵The NCCUSL was formed in 1892, and since that time has drafted over 200 uniform laws. It is a non-profit unincorporated association, comprised of state commissions on uniform laws from each state, the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands. There are over 300 commissioners that are appointed by each state. Each state determines the number of commissioners and the method of their appointment, and most states provide for such measures by statute. Conference members must be lawyers, qualified to practice law. Most commissioners are practicing lawyers, judges, legislators and legislative staff and law professors.

²⁴⁶Uniform Law Commissioners, www.nccusl.org (follow About NCCUSL; then follow Introduction to the Organization).

consistent in the treatment of said laws.²⁴⁷ Each proposed act is investigated, and a report is prepared for the Executive Committee as to whether the area of law is one where uniformity is desirable. Once the Executive Committee approves a recommendation a drafting committee is appointed, and proposed laws that are drafted are submitted for initial debate at the National Conference's annual meeting. Once the draft is approved, it may be officially adopted as either a uniform or model act. Once receiving approval by the requisite number of states it is then officially promulgated for consideration by the states.²⁴⁸

The Uniform Guardianship and Protective Proceedings Act ("UGPPA") was developed from implementation of the UPC by several states. While the UGPPA can be considered either a separate act or a subpart of the UPC,²⁴⁹ it is derived from Article 5 of the UPC and addresses guardianships and conservatorships. Not every state has adopted the

²⁴⁷*Id.*

²⁴⁸*Id.* The National Conference of Commissioners on Uniform Laws (NCCUSL) has also provided a framework for transferring the jurisdiction of guardians. See Section 107 of the Uniform Guardianship and Protective Placement Act (1997) (UGPPA). Under the UGPPA, a foreign guardian may petition for appointment in the new state if venue is or will be established. To date, the UGPPA has been adopted by Alabama, Colorado, Hawaii, Minnesota, and Montana. We note that NCCUSL is beginning the process of considering whether a revision to the UGPPA or a stand-alone jurisdictional provision should be proposed. See Sally Balch Hurme, *Mobile Guardianships: Finding Solutions to Interstate Jurisdiction Problems*, J. Nat'l College Prob. Judges 12 (Fall 2004). See also Uniform Law Commissioners, <http://www.nccusl.org/Update/> (follow About NCCUSL; then follow Constitution and Procedures); *In re Guardianship of Jane E.P.*, 700 N.W.2d 863 (Wis. 2005).

²⁴⁹ Uniform Law Commissioners, <http://www.nccusl.org>. In 1997 revisions to the UGPPA were proposed after a two year study by the ABA Senior Lawyers Division Task Force on Guardianship Reform. The Task Force consisted of representatives of the ABA Senior Lawyers Division, the ABA Real Property Probate and Trust Law Section, and the Commission on Legal Problems of the Elderly and Mental and Physical Disability Law. Other groups interested in guardianship, such as AARP and the National Senior Citizens Law Center also contributed heavily to the study.

UPC or the UGPPA.²⁵⁰

Both the UPC and the UGPPA are silent on the issue of whether felons may serve as guardians. The UPC and UGPPA's treatment of the issue of felons' guardianship eligibility is not sufficient to maintain uniformity among the states with respect to the issue. Even if such uniform acts were adopted by every state, uniformity could not be achieved under principles of statutory construction. For example, Florida's statute § 744.309 expressly makes felons ineligible to serve as guardians. If Florida adopted the UPC or UGPPA, which are both silent on the issue of felons' eligibility to serve as guardians, statutory construction that requires specific statutes to take precedence over broadly worded statutes, would undercut the uniformity created by nation-wide adoption of such uniform acts.²⁵¹

Also, although later adopted statutes generally prevail over formerly adopted statutes, a former statute will prevail where it is more specific than the latter.²⁵² Florida Statute § 744.309 is more specific with respect to felons eligibility than is the UPC or UGPPA, both of which are silent on the issue. States enacting statutes similar to Florida Statute § 744.309 will undermine the uniformity sought in enacting the UPC or UGPPA, as the more specific statutes will prevail in statutory construction over the UPC and UGPPA with respect to the

²⁵⁰Law by Source: Uniform Laws, Uniform Probate Code Locator (2003)
<http://www.law.cornell.edu/uniform/probate.html>. (Eighteen out of fifty states).

²⁵¹*Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) (holding that “where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment”).

²⁵²Principles of statutory construction suggest that the standard prescribed in later-enacted legislation should control. The legislature is presumed to know the existing law. *State ex rel. Tomasic v. Unified Government of Wyandotte County/Kansas*, 955 P.2d 1136, 1152 (Kan. 1998). If two statutes addressing the same subject are inconsistent, the later in time prevails to the extent of any inconsistency. *Id.*, *See also*, *Public Employees Retirement Ass'n v. Greene*, 580 P.2d 385 (Colo. 1978). In addition, a specific statute controls over general legislation. *Id.*, *See also*, *Motor Vehicle Division v. Dayhoff*, 609 P.2d 119 (Colo. 1980).

eligibility of felons.²⁵³

i. Interstate Guardianships

Guardianships are largely creatures of state statutes.²⁵⁴ Each state possesses its own rules for the creation, regulation, reporting and accounting of the guardianship estate and the ward. For example, Minnesota may provide a guardianship order that is effective in the State of Minnesota, but what happens if the ward relocates to Florida? Many wards have connections to relatives, assets and property in more than one state. The ward may find the availability of different health care resources or caregiving services by relocating to a different forum. Also, the caregivers may relocate for personal reasons and wish to move the ward with them.

When the ward relocates, the responsibility for the transition falls upon state courts.²⁵⁵ The new forum will be responsible for monitoring and enforcing guardianship orders that may have been issued outside of their jurisdiction.²⁵⁶ How much deference should the new forum provide to the foreign venue's orders and decrees? In most cases, excepting guardianship of minor cases, "to which interstate compacts or agreements may be applicable, no agreements to cooperate in the handling of interstate guardianships currently exist."²⁵⁷

b. National Probate Court Standards:²⁵⁸

²⁵³*Id.*

²⁵⁴*See infra* Appendix A; Law by Source: Uniform Laws, Uniform Probate Code Locator, <http://www.law.cornell.edu/uniform/probate.html>.

²⁵⁵*Id.*

²⁵⁶*Id.*

²⁵⁷This does not consider principles of comity and full faith and credit.

²⁵⁸Commission on National Probate Court Standards and Advisory Committee on Interstate Guardianships, a Project of the National College of Probate Judges and the National Center for State Courts.

The interstate or international relocation of the ward after the guardianship has been established is not a new concept. The issue is how much credit should be given to foreign judgments or decrees.²⁵⁹ The National Probate Court Standards ("NPCS") are additional uniform standards that were designed to address, in part, the deficiencies inherent in the modern guardianship system concerning interstate relocations of the ward.²⁶⁰

The NPCS were developed by a commission ("the commission") comprised of members of the National Court Probate Judges and the National Center for State Courts to provide commonality and cooperation between the states in the guardianship system.²⁶¹

The comments to the National Probate Court Standards ("the Standards") "require probate courts to be accommodating and responsive to the wishes of the respondent as well as convenient and accessible. A guardianship is not intended to restrict freedom unreasonably or to limit the flexibility, choices, and convenience available to the ward."²⁶² How do the Standards protect the ward's choices, and yet provide the judiciary with the discretion it requires to act in the ward's best interest, especially in light of the absolute prohibition of certain persons from serving as guardians?

Although the Standards ideally would not unnecessarily limit the ward's choices and preferences, each state supports its own criteria of eligibility for the appointment of

²⁵⁹Symposium, *Creating the "Portable" Guardianship: Legal and Practical Implications of Probate Court Cooperation in Interstate Guardianship Cases*, 13 QUINNIPIAC PROB. L. J. 351, 366 (1999).

²⁶⁰Standard 3.3.11, National Probate Court Standards (1993).

²⁶¹ http://www.probatect.org/ohioprobatecourts/pdf/national_probate_standards.pdf.

²⁶²O'Sullivan and Saah, National Probate Court Standards, The Maryland Institute for Continuing Professional Education of Lawyers, Inc., *The Practitioner's Guide to Adult Guardianship and Guardianship Alternatives in Maryland*, Section 3.3 (2001).

guardians that may conflict with the forum state's requirements and the ward's choice of guardian.²⁶³ Should courts be free to adopt the Standards, regardless of their own legislative restraints, to allow the appointment pursuant to full faith and credit, or under principles of comity, in order to remove the barriers that impede the ward's wishes?²⁶⁴ The commentary to the Standards suggest that the guardian be familiar with the laws and requirements of the forum jurisdiction, but offers little guidance as to what the guardian should do if the eligibility requirements between the jurisdictions differ. Although the Standards do not require a hearing on the transfer of the guardianship, a hearing is generally required by the court or legislature, or is requested by the ward or interested persons named in the original petition.²⁶⁵ If the court does not require a hearing and no interested party sets the

²⁶³Standard 3.5.3 Transfer of Guardianship. The Commentary for this Standard

. . .is consistent with . . . the provisions of Standard 3.3.14, Reports by Guardian, . . . It is based on the assumption that most guardians are acting in the interest of the ward and that the notice and reporting requirements, and the opportunity to bring objections to the transfer to the attention of the court, are sufficient checks on the appropriateness of the transfer of the guardianship. Generally, receiving courts should allow the guardianship to be "imported," giving full faith and credit to the terms and powers of foreign guardianship orders. However, enforcement and necessary administrative changes (e.g., periodic reporting requirements, appointment of guardian ad litem or court visitor, bond requirements) of the guardianship *may be made to bring the guardianship into compliance with the requirements of the receiving jurisdiction (italics added)*. Ideally, such changes should be made in accordance with the receiving court's monitoring and review schedule and requirements. . . .

The commentary to this Standard fails to address whether the "full import" of the foreign order should be consistent with the forum state's eligibility requirements.

²⁶⁴Even under Standard 3.5.1 that requires that the different probate courts "communicate and cooperate to resolve guardianship disputes and related matters," said standards do not overcome the obstacles propounded by state legislatures through statutes. The ideals of the Standards would require the individual state legislatures to prepare accommodating and more consistently uniform legislation.

²⁶⁵*In re Estate of Roy v. Roy*, 265 Ill.App.3d 99 (Ill.App. Ct. 3rd Dist. 1994).

domestication of the guardianship order for a hearing, then it is possible that an ineligible person could act as a guardian, either to the benefit or to the detriment of the ward's best interests.²⁶⁶

When the Standards addressed deference to existing orders, the commission prepared Standard 3.3.11, titled "Qualifications and Appointment of Guardians," and its subsequent commentary. The commission recommended that the Standards adopt the "best interest of the ward" approach in the appointment of a guardian.²⁶⁷

While a sliding "best interest scale" preserves judicial discretion, the Standards are insufficient as they remain silent on the issue of felons' guardianship eligibility. The adoption of a uniform standard must adequately address all issues, or risk being trumped by the individual states' statutes that may address the issue with more specificity.²⁶⁸ For instance, depending on the state, the mother of the disabled child may still be disqualified under the Standard's best interest test since the uniform scheme does not specifically address the issue and the specific state statute may exclude her as a prior felon.²⁶⁹ Arguably under the construction of enforcing the more specific statute over the general statute, the uniform Standards do not alleviate the jurisdictional issues inherent in the proposed scheme.²⁷⁰ If the

²⁶⁶John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (March 1984). See also Barbara L. Hopkins, *The Fruit of the Task Force on Guardianship's Labors: Heightened Protection of Autonomy for Aged Persons and Persons with Disabilities* 7 MD. J. CONTEMP. LEGAL ISSUES 81 (Fall/Winter 1995-1996).

²⁶⁷Standard 3.3.11, National Probate Court Standards (1993).

²⁶⁸ A specific statute controls over general legislation. *Motor Vehicle Division v. Dayhoff*, 609 P.2d 119 (Colo. 1980).

²⁶⁹ See note 23, FCSL Elder Law Clinic Matter.

²⁷⁰*Supra* at 268.

Standards addressed the specific issue of whether courts may consider appointing felons as guardians, when combined with the best interest approach, the uniform standards would then have the potential to resolve interstate guardianship issues on this point.

The Commission of NPCCS addressed the deference that a forum jurisdiction may be given to the foreign order. Should the state legislatures or courts consider adopting the Standards of the NPCCS Commission?²⁷¹ If the Standards were adopted, would the Standards resolve the issue of the eligibility of the guardian appointment in interstate situations?

The commentary to Standard 3.5.3 provides that the Standards are intended to extend to interstate guardianships. For example, under Standard 3.5.3, certain provisions of the guardianship procedures are intended to be universally consistent, i.e., report requirements by a guardian, requirements for annual reports, and accountings by the guardian.²⁷² The

²⁷¹3.5 Interstate Guardianships

Standard 3.5.1 Communication and Cooperation Between Courts

Standard 3.5.2 Screening and Review of Petition

Standard 3.5.3 Transfer of Guardianship

Standard 3.5.4 Receipt and Acceptance of a Transferred Guardianship

Standard 3.5.5 Initial Hearing in the Court Accepting the Transferred Guardianship

Filings Trusts, Wills, Estates, Guardianship, and Mental Health Cases, 1984- 1990

Trends in Guardianship Filings: This standard is consistent with and extends to interstate guardianships the provisions of Standard 3.3.14, Reports by Guardian, and state requirements for annual reports and accountings by the guardian. Its intent is to facilitate the transfer of a guardianship to another state in cases in which the court is satisfied that the guardianship is valid and that the guardian has performed his or her duties properly in the interests of the ward for the duration of his or her appointment. It is based on the assumption that most guardians are acting in the interest of the ward and that the notice and reporting requirements, and the opportunity to bring objections to the transfer to the attention of the court, are sufficient checks on the appropriateness of the transfer of the guardianship.

Generally, receiving courts should allow the guardianship to be "imported," giving full faith and credit to the terms and powers of foreign guardianship orders. However, enforcement and necessary administrative changes (e.g., periodic reporting requirements, appointment of guardian ad litem or court visitor, bond requirements) of the guardianship may be made to bring the guardianship into compliance with the requirements of the receiving jurisdiction.

²⁷²Standard 3.5.3, National Probate Court Standards (1993).

drafters intended the Standards to facilitate the transfer of guardianships to another state in cases in which the court is satisfied that the guardianship is valid and that the guardians have performed their duties properly in the interests of the ward for the duration of their appointment. The Standards are based on the presumption that most guardians are acting in the interest of the ward, and that the notice, reporting requirements, and the opportunity to bring objections to the transfer to the attention of the court, are sufficient checks on the appropriateness of the transfer. Specifically, the Standards indicate that “notice” is important because the drafters view the transfer of a guardianship as an “administrative procedure that does not require a determination by the foreign court of the ward's incapacity or the appropriateness of the guardian's appointment and assigned powers and responsibilities.”²⁷³

If the transfer of the guardianship is considered primarily administrative, should the forum court that is considering using the Standards as a guide provide complete deference to the foreign state’s guardianship order? If yes, should complete deference be extended without the forum jurisdiction verifying the guardian’s qualifications and eligibility under the forum state’s laws? Based on the discussions above, it is unlikely that the forum court would provide such a level of deference.

The Commentary to the Standards indicates that the forum court should allow the guardianship to be imported, “giving full faith and credit to the terms and powers of foreign guardianship orders.”²⁷⁴ However, the Commentary is silent as to how much scrutiny the forum court may give the existing order. Specifically, the Commentary states that “enforcement and necessary administrative changes (e.g., bond requirements, periodic

²⁷³Supra at 271.

²⁷⁴In re Guardianship of Jane E.P. 283 Wis.2d 258, 700 N.W.2d 863 (Wis. 2005). *See also*, Standard 3.5.3, National Probate Court Standards (1993).

reporting requirements, appointment of guardian ad litem or court visitor) of the guardianship may be made to bring the guardianship into compliance with the requirements of the receiving jurisdiction.”²⁷⁵ Does that mean that the forum court should scrutinize the guardian under the forum’s state’s eligibility requirements? If yes, does that also preclude an existing guardian from continuing to serve in a jurisdiction like Florida, when the existing guardian has a prior felony, regardless of the reason for the felony conviction? To what extent will the forum court be able to scrutinize, even under the adoption of the Standards?²⁷⁶

Under Standard 3.5.4, the forum court “should recognize the appointment and powers of the guardian and accept the guardianship under the terms as specified in the transferred guardianship order.” Again, the Standards have not addressed what the guardian is required to do, or should do, in the situation where the guardian is eligible in the foreign jurisdiction, but not in the forum jurisdiction.²⁷⁷

c. National Guardianship Association Standards

In 1991, the National Guardianship Association ("the NGA"), a non-profit corporation comprised of guardians, conservators, representatives, social workers, and

²⁷⁵*Id.*

²⁷⁶In re Guardianship of Jane E.P. 283 Wis.2d 258, 700 N.W.2d 863 (Wis. 2005). “Cooperation and communication, and a proper distribution of responsibilities among states, should facilitate the movement of guardianships and should be such that the parties would see it in their interests to comply with the requirements.” *Id.*

²⁷⁷Note that Standard 3.5.5 mandates that “no later than ninety (90) days after acceptance of a transfer of guardianship, the probate court should conduct a review hearing of the guardianship during which it may modify the administrative procedures or requirements of the guardianship in accordance with local and state laws and procedures.” Again, such a review will not resolve an inconsistency in guardian eligibility requirements. The Commentary to this Standard states that “Unless specifically requested to do otherwise by the ward, the guardian, or an interested person because of a change of circumstances, the court should give full faith and credit to the terms of the existing guardianship *concerning the rights, powers and responsibilities* of the guardian.” (Italics added).

attorneys, developed and adopted “The Model Code of Ethics for Guardians,” and an accompanying set of standards to serve as guidelines for providing guardianship services.²⁷⁸ The NGA, in response to continued abuses inherent in the guardianship system, revised its model standards in 2003 (“Model Standards”). Although the initial Model Standards did not denote specific qualifications for potential guardians and their eligibility, the revision included a detailed list of qualifications that a candidate must satisfy to be eligible to be a court-appointed guardian as set forth by the National Guardianship Foundation (“the NGF”).²⁷⁹ Persons with felony convictions were discussed and included in the class of persons that were ineligible to be considered registered guardians.²⁸⁰

Although the qualifications set forth by the NGA and NGF in the Model Standards were designed to benevolently screen potential guardians, the Standards are overreaching as they eliminate many potential candidates from serving as guardians. For example, under the Model Standards, the mother of the disabled child would still be disqualified to serve as her child’s guardian simply because she was convicted of a felony nineteen years earlier.²⁸¹ Rather than allowing the court to be the decision-maker in consideration of the ward’s best interest, the Model Standards restrain the court from appointing a guardian that may adequately represent the ward’s welfare. Once the discretion is removed from the court, the groups most subject to deprivation are the indigent and those races that possess a disproportionate number of felony convictions. Again, is disenfranchisement the goal of the Model Standards or should the courts be the responsible decision makers?

²⁷⁸ Sharon Rivenson Mark, Chapter 14. Duties, Responsibilities and Ethics for Guardians, 45 N.J. Prac., Elder Law--Guard. & Conserv. § 14, ftnt 1 (2006).

²⁷⁹National Guardianship Association, Standards of Practice 16 (2000), <http://guardianship.org/associations/2543/files/STANDARD.pdf>.

²⁸⁰*Id.*

²⁸¹ See note 23 FCSL Elder Law Clinic Matter.

d. The American Bar Association

In addition to the above-cited uniform models and standards governing the guardianship process, the American Bar Association ("the ABA") also proposed positions on the issue.²⁸² In 2002, the ABA's Commission on Law and Aging developed guardianship guidelines for state and local governments to consider for adoption.²⁸³ The recommendations are intended to guide states through policy-making decisions, including the establishment of uniform qualifications of eligibility for the appointment of guardians.²⁸⁴ Specifically, Recommendation 3b suggests states should adopt the NGA's *Standards of Practice* and *Model Code of Ethics for Guardianships* when determining whether a potential guardian is qualified.²⁸⁵

The ABA proposes a *carte blanc* prohibition on appointing felons as guardians, much like the position adopted in Florida. The ABA took this position, in part, because it was concerned about the elderly being a vulnerable group and subject to abuse.²⁸⁶ While the ABA's concerns for elderly abuse are valid, its *non-discretionary* prohibition on the appointment of felons as guardians is overreaching and inadequate. A blanket prohibition

²⁸²AMERICAN BAR ASSOCIATION, COMMISSION ON LEGAL PROBLEMS OF THE ELDERLY, REPORT TO THE HOUSE OF DELEGATES, <http://www.abanet.org/aging/wingspan.pdf>.

²⁸³ "Wingspan, The Second National Guardianship Conference was convened November 30 through December 2, 2001, more than a decade after the original 1988 Wingspread Symposium, to examine the progress made in the interim, and the steps that should be recommended for the future with respect to guardianship law, policy, and practice.;B5;B5" A. Frank Johns & Charles P. Sabatino, Wingspan--*The Second National Guardianship Conference*, 31 Stetson L. Rev. 573 (Spring 2002).

²⁸⁴*Id.*

²⁸⁵American Bar Association Commission on Legal Problems of the Elderly Report to the House of Delegates, <http://www.abanet.org/aging/wingspan.pdf>.

²⁸⁶Press Release, American Bar Association, ABA Commission to Develop Recommendations on Medical Forensic Issues Related to Elder Abuse and Neglect (Mar. 28, 2002), <http://www.abanet.org/aging/forensic.doc>.

against felons serving as guardians fails to adequately address and prevent elder abuse and it may deprive the indigent from having loving representation by family members.

CONCLUSION

With the demand for eligible guardians significantly increasing, and society becoming more mobile, certain groups of people have tremendous needs to consider and whether felons should be excluded as potential guardians, regardless of the circumstances. It is ultimately up to the legislatures or the courts to make the decision of whether a person is appointed as a guardian. When the legislature removes the court's discretion in determining the appointment of a guardian, the balance of power has been impaired.²⁸⁷ Should uniformity exist between the states and should the "full faith and credit" clause of the Constitution control? What other alternatives exist for potential guardians with felonies, if any?

As discussed above, relying on alternatives, such as removing or nullifying a prior felony conviction is improbable in most situations. Having a conviction dismissed upon rehabilitation is limited in scope, and generally only applicable at the time of conviction. Expunging or sealing a record is rarely available, and obtaining a pardon depends more upon the politics and tradition of a state than upon legal procedures. Furthermore, because the remedies of dismissal, expunction, and pardon must generally be applied for in the state or jurisdiction where the conviction was entered,²⁸⁸ there is no guarantee that once obtained,

²⁸⁷Whipple v. Dep't of Corrs., State of Fla., 892 So.2d 554 (Fla. 3d Dist. Ct. App. 2005). The Florida Third District Court of Appeal referenced the Bush v. Schiavo case that held that a legislative enactment unconstitutionally encroached upon the power of the judiciary where the act effectively reversed a properly rendered final judgment. Also, in Moore v. Pearson, 789 So.2d 316, 319 (Fla. 2001), the court found that the Department of Corrections violated the separation of power doctrine when it refused to implement an otherwise lawful coterminous sentence); Hudson v. State, 682 So.2d 657 (Fla. 3d Dist. Ct. App. 1996); Slay v. Singletary, 676 So.2d 456, 457 (Fla. 1st Dist. Ct. App. 1996).

An

²⁸⁸ A notable exception to this is Ohio, which allows a petitioner to obtain expunction of Ohio's records of a conviction in another state or federal court. OHIO REV. CODE ANN. § 2953.32 (West 2006); Barker v. State, 402 N.E.2d 550 (Ohio 1980).

they will be given deference in other jurisdictions. However, if such relief is obtained, it is at least arguable that it may qualify a previously ineligible petitioner for guardianship in the four states that disqualify those with felony convictions from serving as guardians.

Nonetheless, pursuing a dismissal, expunction, or pardon may not be a feasible option to many. The possibility of actually obtaining one of these remedies is questionable, as these are extraordinary remedies in most states.²⁸⁹ These remedies are, therefore, of limited use and probably only effective in a few situations where guardianships are sought by those with past felony convictions.

The deference a forum court should provide under of "full faith and credit" to a foreign order or decree is not clear from state to state. In some states, the deference appears almost absolute so long as the foreign state had jurisdiction and there was no fraud in obtaining the judgment. In other states, full faith and credit is either denied or the foreign judgment or decree may be modified by the forum state. Hence, there is the unanswered question in many states as to whether a guardian who would be ineligible to serve as a guardian in a restraint state, but who has been appointed in a foreign state, may continue to act within the forum state under principles of full faith and credit, or comity.

Another alternative limited in scope is the durable power of attorney. This remedy requires the ward to have, at some point, enjoyed capacity and designated a guardian as the attorney-in-fact. The obvious limitations are, (1) the power of attorney can be challenged in court and (2) the ward must enjoy capacity to execute a power of attorney.

The failure of the above alternatives leaves many unanswered questions. Have the states adopted the uniform standards as proposed by the National Probate Court? If so, do

²⁸⁹ *See, e.g., State v. Schumacher*, 959 P.2d 465, 468 (Idaho Ct. App. 1998) (dismissal and expunction of records is "extraordinary remedy").

the standards adequately address the "portability" of the guardianship appointment from state to state? Should the courts have the case-by-case discretion to make decisions in furtherance of the ward's best interest, or should the legislation control whether a guardian may be appointed?

APPENDIX A

State Statute	Surrogate Decision Makers, including Durable Powers of Attorney	Guardianship statutes
<i>Alabama</i>	<i>Ala. Code §26-1-2.</i>	<i>Ala. Code § 26-2A-1 Ala. Code § 12-13-21 Ala. Code § 26-9-1</i>
<i>Alaska</i>	<i>Alaska Stat. §47.30.825. Alaska Stat. § 13.26.332</i>	<i>Alaska Stat. §13.26.150. Alaska Stat. §13.26.344. Alaska Stat. § 13.26.090</i>
<i>Arizona</i>	<i>Ariz. Rev. Stat. ann. § 36-561. Ariz. Rev. Stat. Ann. § 14-5501</i>	<i>Ariz. Rev. Stat. Ann. § 14-5101</i>
<i>Arkansas</i>	<i>Ark. Code Ann. § 28-68-101</i>	<i>Ark. Code Ann. § 28-65-302. Ark. Code Ann. § 28-65-101</i>
<i>California</i>	<i>Cal. Prob. Code § 4000</i>	<i>Cal. Prob. Code . § 2356. Cal. Welf. & Inst. Code § 5325. Cal. Welf. & Inst. Code § 5326.6. Cal. Prob. Code § 1500</i>
<i>Colorado</i>	<i>Colo. Rev. Stat. § 15-14-501 Colo. Rev. Stat. § 15-1-1303</i>	<i>Colo. Rev. Stat. 13-20-403. Colo. Rev. Stat. § 15-14-301 Colo. Rev. Stat. § 15-14-101</i>
<i>Connecticut</i>	<i>Conn. Gen. Stat. § 45A-562</i>	<i>Conn. Gen. Stat. § 45a-677. Conn. Gen. Stat. § 45a-668</i>
<i>DC</i>	<i>D.C. Code Ann. §21-2211. D.C. Code Ann. § 7-1305.07. D.C. Code Ann. § 21-2081</i>	<i>D.C. Code Ann. § 7-1305.06. D.C. Code Ann. § 21-2047. D.C. Code Ann. § 21-2041</i>
<i>Delaware</i>	<i>Del. Code Ann. tit. 12, § 4901</i>	<i>Del. Code Ann. tit. 16 §5161. Del. Code Ann. tit. 12 § 3901</i>
<i>Florida</i>	<i>Fla Stat. Ann. §765.113. Fla. Stat. Ann. § 709.01</i>	<i>Fla. Stat. Ann. § 394.459. Fla. Stat. Ann. § 394.4598. Fla. Stat. Ann. § 744.3215. Fla. Stat. Ann. § 744.3725. Fla. Stat. Ann. § 458.325. Fla. Stat. Ann. § 744.101.</i>
<i>Georgia</i>	<i>Ga. Code Ann. § 31-36-1</i>	<i>Ga. Code Ann. § 31-8-108. Ga. Code Ann. § 29-4-1.</i>
<i>Hawaii</i>	<i>Haw. Rev. Stat. § 327E-5. Haw. Rev. Stat. § 551D-1.</i>	<i>Haw. Rev. Stat. § 560:5-101. Haw. Rev. Stat. § 560:5-301.</i>
<i>Idaho</i>	<i>Idaho Code § 15-5-501</i>	<i>Idaho Code § 66-405. Idaho Code § 15-5-301.</i>
<i>Illinois</i>	<i>405 Ill. Comp. Stat. 5/2-102. 755 Ill. Comp. Stat. 45/1-1.</i>	<i>405 Ill. Comp. Stat. 5/2-110. 20 Ill. Comp. Stat. 3955/1.</i>
<i>Indiana</i>	<i>Ind. Code § 30-5-1-1.</i>	<i>Ind. Code § 29-3-1-1. Ind. Code § 12-26-16-2.</i>
<i>Iowa</i>	<i>Iowa Code § 144B.1. Iowa Code § 633B.1.</i>	<i>Iowa Code § 229.23. Iowa Code § 633.552.</i>
<i>Kansas</i>	<i>Kan. Stat. Ann. § 58-625. Kan. Stat. Ann. § 58-650.</i>	<i>Kan. Stat. Ann. § 59-2978. Kan. Stat. Ann. § 76-12b10. Kan. Stat. Ann. §59- 3018(g)(3)(g). Kan. Stat. Ann. § 59-3050.</i>

<i>Kentucky</i>	<i>Ky. Rev. Stat. Ann. § 386.093.</i>	<i>Ky. Rev. Stat. Ann. §387.660. Ky. Rev. Stat. Ann. § 202B.060. Ky. Rev. Stat. Ann. § 387.500. Ky. Rev. Stat. Ann. § 387.010.</i>
<i>Louisiana</i>	<i>La. Rev. Stat. Ann. § 9:1517. La. Rev. Stat. Ann. § 6:922.</i>	<i>La. Code Civ. Proc. Ann. art. 4541.</i>
<i>Maine</i>	<i>Me. Rev. Stat. Ann. tit. 18-A § 5-501.</i>	<i>Me. Rev. Stat. Ann. tit.18-A § 5-101. Me. Rev. Stat. Ann. tit.18-A § 5-301.</i>
<i>Maryland</i>	<i>Md. Code Ann. Health-Gen. § 5-605. Md. Code Ann. Est. & Trusts § 13-601.</i>	<i>Md. Est. & Trusts Code Ann. § 13-704.</i>
<i>Massachusetts</i>	<i>Mass. Gen. Laws ch. 201B § 1.</i>	<i>Mass. Gen. Laws ch. 123 § 23. Mass. Gen. Laws ch. 201 § 6.</i>
<i>Michigan</i>	<i>Mich. Comp. Laws § 330.1717. Mich. Comp. Laws § 700.5501.</i>	<i>Mich. Comp. Laws § 330.1600.</i>
<i>Minnesota</i>	<i>Minn. Stat. § 523.01.</i>	<i>Minn. Stat. § 525.56. Minn. Stat. § 525.619. Minn. Stat. § 524.5-301.</i>
<i>Mississippi</i>	<i>Miss. Code Ann. § 87-3-101.</i>	<i>Miss. Code Ann. § 93-13-111. Miss. Code Ann. § 93-13-121.</i>
<i>Missouri</i>	<i>Mo. Rev. Stat. § 404.700. Mo. Rev. Stat. § 404.800.</i>	<i>Mo. Rev. Stat. §630.133. Mo. Rev. Stat. § 475.01.</i>
<i>Montana</i>	<i>Mont. Code. Ann. § 72-5-501.</i>	<i>Mont. Code Ann. § 72-5-101. Mont. Code Ann. § 72-5-301.</i>
<i>Nebraska</i>	<i>Neb. Rev. Stat. § 30-2664. Neb. Rev. Stat. § 30-3401.</i>	<i>Neb. Rev. Stat. § 30-260.1 Neb. Rev. Stat. § 30-2617.</i>
<i>Nevada</i>	<i>Nev. Rev. Stat. 449.830. Nev. Rev. Stat. 449.850 Power of attorney. Nev. Rev. Stat. § 449.800. Nev. Rev. Stat. § 111.450.</i>	<i>Nev. Rev. Stat. § 159.013.</i>
<i>New Hampshire</i>	<i>N.H. Rev. Stat. Ann. § 137-J:1.</i>	<i>N.H. Rev. Stat. §464-A: 25. N.H. Rev. Stat. § 464-A:1. N.H. Rev. Stat. § 161-F:52.</i>
<i>New Jersey</i>	<i>N.J. Stat. Ann. § 46:2B-8.1.</i>	<i>N.J. Stat. Ann. § 30:4-24.2. ... See also N.J. Stat. Ann. § 30:4-27.11d. N.J. Stat. Ann. § 30:4-27 11d. N.J. Stat. Ann. § 30:6D-5. N.J. Stat. Ann. § 3B:12-24. N.J. Stat. Ann. § 3B:12-56.</i>
<i>New Mexico</i>	<i>N.M. Stat. Ann. § 45-5-501. N.M. Stat. Ann. § 45-5-601.</i>	<i>N.M. Stat. Ann. § 43-1-15. N.M. Stat. Ann. § 45-5-301.</i>
<i>New York</i>	<i>N.Y. Est. Powers & Trusts Law § 10-1.1. N.Y. Est. Powers & Trusts Law §11-1.1.</i>	<i>NY Mental Hyg. § 33.03. N.Y. Surr. Ct. Proc. Act Law § 403. N.Y. Surr. Ct. Proc. Act Law § 1701.</i>

<i>North Carolina</i>	<i>N.C. Gen. Stat. § 122C-73. N.C. Gen. Stat. § 32A-1. N.C. Gen. Stat. § 32A-8. N.C. Gen. Stat. § 32A-15.</i>	<i>N.C. Gen. Stat. § 35A-1201.</i>
<i>North Dakota</i>	<i>N.D. Cent. Code § 23-12-13. N.D. Cent. Code § 30.1-30-01.</i>	<i>N.D. Cent. Code § 23-06.5-03. N.D. Cent. Code § 25-01.2-11. N.D. Cent. Code § 25-03.1-40. Rights of Patients. N.D. Cent. Code § 30.1-28-12. (5-312) N.D. Cent. Code § 30.1-28-01.</i>
<i>Ohio</i>	<i>Ohio Rev. Code Ann. § 1337.01. Ohio Rev. Code Ann. § 1337.11.</i>	<i>Ohio Rev. Code Ann. § 5122.271. Ohio Rev. Code Ann. § 2111.01.</i>
<i>Oklahoma</i>	<i>Okla. Stat. tit. 43A § 11-106. Okla. Stat. tit. 58 § 1071.</i>	<i>Okla. Stat. tit. 30 § 3-119. Okla. Stat. tit. 30 § 1-101. Okla. Stat. tit. 30 § 3-101.</i>
<i>Oregon</i>	<i>Or. Rev. Stat. § 127.540. Or. Rev. Stat. § 127.005.</i>	<i>Or. Rev. Stat. § 125.300.</i>
<i>Pennsylvania</i>	<i>20 Pa. Cons. Stat. § 5601.</i>	<i>20 Pa. Cons. Stat. Ann. § 5521. 20 Pa. Cons. Stat. Ann. § 5501.</i>
<i>Rhode Island</i>	<i>R.I. Gen. Laws § 23-4.10-1 R.I. Gen. Laws § 34-22-6.</i>	<i>R.I. Gen. Laws § 33-15-1.</i>
<i>South Carolina</i>	<i>S.C. Code Ann. § 44-22-40. S.C. Code Ann. §44-22-140. S.C. Code Ann. § 62-5-501.</i>	<i>S.C. Code Ann. § 62-5-101. S.C. Code Ann. § 62-5-301.</i>
<i>South Dakota</i>	<i>S.D. Codified Laws § 27A-16-18. S.D. Codified Laws § 27A-16-1. S.D. Codified Laws § 59-6-11.</i>	<i>S.D. Codified Laws §27A-12-3.20. S.D. Codified Laws § 27A -12-3.22. S.D. Codified Laws § 29A-5-101.</i>
<i>Tennessee</i>	<i>Tenn. Code Ann. § 33-6-1001. Tenn. Code Ann. § 34-6-101.</i>	<i>Tenn. Code Ann. § 33-6-415. Tenn. Code Ann. § 34-1-101.</i>
<i>Texas</i>	<i>Tex. Civ. Prac. & Rem. Code Ann. § 137.011. Tex. Health & Safety Code Ann. § 166.152. Tex. Health & Safety Code Ann. § 166.163. Tex. Health & Safety Code Ann. § 313.004. Tex. Prob. Code Ann. § 481.</i>	<i>Tex. Prob. Code Ann. § 601.</i>
<i>Utah</i>	<i>Utah Code Ann. § 62A-12-504. Utah Code Ann. § 75-5-501.</i>	<i>Utah Code Ann. § 17A-3-611. Utah Code Ann. § 75-5-301.</i>
<i>Vermont</i>	<i>Vt. Stat. Ann. tit. 14 § 3501.</i>	<i>Vt. Stat. Ann. tit. 18 § 7627. Vt. Stat. Ann. tit. 14 § 3060. Vt. Stat. Ann. tit. 14 § 2602. Vt. Stat. Ann. tit. 14 § 2671.</i>
<i>Virginia</i>	<i>Va. Code Ann. § 11-9.1.</i>	<i>Va. Code Ann. § 37.1-134.21. Va. Code Ann. § 32.1-162.18. Va. Code Ann. § 54.1-2986. Va. Code Ann. § 37.2-1000.</i>

<i>Washington</i>	<i>Wash. Rev. Code § 11.94.010.</i>	<i>Wash. Rev. Code § 11.92.043. Wash. Rev. Code § 71.05.370. Wash. Rev. Code § 11.88.005.</i>
<i>West Virginia</i>	<i>W. Va. Code § 39-4-1.</i>	<i>W. Va. Code § 44A-1-1.</i>
<i>Wisconsin</i>	<i>Wis. Stat. § 155.20. Wis. Stat. § 243.07. Wis. Stat. § 155.01.</i>	<i>Wis. Stat. § 51.61. Wis. Stat. § 880.01.</i>
<i>Wyoming</i>	<i>Wyo. Stat. Ann. § 3-5-101. Wyo. Stat. Ann. § 3-5-201.</i>	<i>Wyo. Stat. Ann. § 3-2-202. Wyo. Stat. Ann. § 3-5-205. Wyo. Stat. Ann. § 25-5-132. Wyo. Stat. Ann. § 3-1-101. Wyo. Stat. Ann. § 3-2-101.</i>

APPENDIX B

At the same time the demand for potential guardians for the elderly is increasing, the potential pool of eligible applicants is decreasing dramatically and will continue to decrease. For example, notice the following demographic trends:

TABLE ONE

<i>2000 Census Figures</i>		<i>total in group</i>	<i>per cent of total population</i>	<i>Americans of 20-64 years old/every American 65 + years</i>
	<i>Number of Americans 65 +</i>	<i>35,061,000</i>	<i>12.42%</i>	<i>4.75/1</i>
	<i>Number of Americans 20-64</i>	<i>166,515,000</i>	<i>59.02%</i>	
<i>2020 Census Figures (projections)</i>				
	<i>65 +</i>	<i>54,632,000</i>	<i>16.26%</i>	<i>3.52/1</i>
	<i>20-64</i>	<i>166,515,000</i>	<i>57.26%</i>	
<i>2030 Census Figures (projections)</i>				
	<i>65+</i>	<i>71,453,000</i>	<i>19.65%</i>	<i>2.76/1</i>
	<i>20-64</i>	<i>197,027,000</i>	<i>54.19%</i>	

Table One shows that the eligible “younger” persons per elderly person that are possibly qualified to act as a guardian, reduces almost 50% between 2000 and 2030. This table does not differentiate between elderly persons capable of acting as guardians for other elderly persons or account for the under “64” age category being eligible to act as guardians based purely on chronological age.

If the projections are accurate, the potential guardians applicants for the population segment

65 and older will be significantly reduced within the next twenty five years. In 2000 there were 4.75 Americans between the ages of 20 and 64 for every American aged 65 and older. This figure will decline by 2020 to 3.52 Americans aged 20-64 for every American aged 65 and older and will continue to decline to 2.76 Americans aged 20-64 for every American aged 65 and older in 2030.

The age distribution categories in 1900 versus the 2004 distributions, show that the “younger generation” has decreased significantly while the “older generation” has increased exponentially. If this trend continues, the possible demand for guardians will increase and the pool of eligible guardians (assuming that guardians will be from chronologically younger generations) will decrease.

TABLE TWO

1900 Age Distribution	% of population as a whole	2004 Age Distribution	% of population as a whole
Under 5	12.1%	Under 5	6.8%
5-19	32.3%	5-19	20.9%
20-44	37.7%	20-44	35.6%
45-64	13.7%	45-64	24.1%
65+	4.1%	65+	12.3%

Life Expectancy Increases: The life expectancy for Americans in 1900 was 49.2. In 1900, the younger population of the United States was dramatically larger by proportion than it is today. Those aged 19 or under, comprised 44.4 % of the population. In 2004, the younger population comprised 27.7 % of the population and the life expectancy increased to 77.85 years (2006).

Aging Demographics and the Population as a Whole: In 1900, 51.4 % of the US population was between the ages of 20 and 64 and 4.1 % of the population was aged 65 and older. There were 12.5 Americans aged 20-64 per every American aged 65 and older.

The population in the United States in 2004 aged 45-64 comprised 24.1 % of the population. In 1900, the same population segment accounted for 13.7 % of the total population. Whereas, at the turn of the 20th century, 44.4 % of the population approached the age of majority as the population approached senior citizen status. The 45-64 age population segment comprised 13.7 % of the population in 1900, and in 2004, only 27.7 % of the population approached the age of majority as the population approached senior citizen

status, i.e., 24.1%.

Those figures illustrate that there is a significantly greater proportion of Americans aged 65 and older (12.3 % in 2004) as compared to 1900 (4.1 %). The younger population is declining proportionately as compared to the overall population and the older population is dramatically increasing in size.

Reviewing the projections for the immediate future, we observe that the population of Americans over 65 will increase between 2000 and 2030 by 7.23 %, while at the same time the population of Americans aged 20-64 is projected to decrease by 4.83 %.

In the same time period, the projected amount of Americans aged 65 and older will increase from 35 million in 2000 to over 71 million in 2030, more than doubling that population category. The total US population is projected to increase from 282 million to 363 million between 2000 and 2030. The increase is a population increase of nearly 81 million, and of that projected increase in total population, Americans aged 65 and older represent over 36 million of that increase figure. That represents a 44.68 % increase of the estimated population increase between 2000 and 2030.

When considering that the life expectancy is now nearly 29 years older as compared with 1900 and that there is a significantly smaller list of potential applicants for guardians for those who have reached the age of senior citizen status, certain groups will be disproportionately affected if felons are ineligible to serve as guardians over their loved ones.

Decline in Household Populations: As the older population, relative to the overall population, continues to increase, there has been a decline in the population per household and the population per family. In 1955 the population per household was 3.33 and the population per family was 3.59. Those figures have declined and in 2005 the population per household and per family were 2.57, and 3.13, respectively.

Marriage: The rate of marriage has also declined. In 1900, there were 9.3 marriages per every 1000 people. The marriage statistic rose to 11.1 marriages per every 1000 people in 1950, but it has steadily declined since 1950. In 2005 the figure had declined to 7.5 marriages per every 1000 people. The decline in the marriage rate is corroborated with a rise in the divorce rate. In 1900 there were .7 divorces per 1000 people, which raised to 2.6 per 1000 people in 1950. In 2005 that figure has reached 3.6 divorces per every 1000 people.

20.6% of men aged 65-74 were either divorced, widowed, or never married in 2004. For men in the age category of 75-84, that figure raises to 27.5%, and it increases further to 41.7% for men over the age of 85. For women, the figures are even more staggering. In 2004, 43.4% of women in the ages of 65-74 were divorced or widowed, and 63.7% of women in the age group of 75-84, and 84.9% of women over the age of 85 were either divorced, widowed, or never married.

Americans living alone: The changes in demographics show an increase in older Americans living alone. In 2004, 18.8% of men, and 39.7% of women over 65 years of age lived alone. The number of older Americans living alone increased as the age of the individual increased, as well. In 1970, 11.3% of men 65 to 74 years, and 19.1% of men 75 and older lived alone. Those figures rose to 15.5% and 23.1%, respectively, by 2004. For women the statistics are even more alarming. In 1970, 31.7% of women 65 to 74 years of age, and 37% of women 75 and older lived alone. By 2004, the percentage of women between the ages of 65 to 74 living alone had actually decreased to 29.4% but the percentage of women 75 and older living alone had risen to 49.9% .

Decrease in the size of eligible guardians: As the size of families and households decline, divorce rate increase, and the age of the older population increase at their projected rates, the number of potentially eligible guardians per person will also decline.

BIBLIOGRAPHY OF SOURCE INFORMATION

1. www.cia.gov/cia/publications/factbook/rankorder/2102rank.html
2006 Life Expectancy = 77.85
2. www.efmoody.com/estate/lifeexpectancy.html 1900 Life Expectancy = 49.2
3. www.demographia.com/db-uspop1900.htm. 1900 United States population
4. www.census.gov/popest/states/tables/NST-EST2004-01.pdf 2004 United States population
5. www.infoplease.com/ipa/A0110384.html. Age distribution from 1900 to 2004
6. www.census.gov/ipc/www/usinterimproj/natprojt02a.pdf
Age distribution projections for years 2020 and 2030
7. <http://www.census.gov/population/socdemo/hh-fam/hh6.pdf>
Population per household, population per family 2005-1955
8. http://www.cdc.gov/nchs/data/nvsr/nvsr54/nvsr54_20.pdf 2005 divorce rate, 2005 marriage rate
9. http://www.cdc.gov/nchs/data/series/sr_21/sr21_024.pdf;
<http://www.infoplease.com/ipa/A0005044.html>
1900 divorce rate and marriage rate; 1950 divorce rate and marriage rate
10. <http://agingstats.gov/update2006/Population.pdf>
Percentage of older Americans living alone by sex 1970-2004; percentage of older Americans divorced, widowed, or never married

TABLE THREE

Older Americans Living Alone	Indigency level per 1000	Size of Households and Families	Felonies per 1000
Caucasian men = 19%, Caucasian women = 41% ²⁹⁰	Caucasians in poverty = 86 per 1000 ²⁹¹	2.54 persons per household for Caucasian households, 3.08 persons per family for Caucasian families ²⁹²	4.63 Caucasian male prison inmates per 1000 Caucasian males ²⁹³

²⁹⁰U.S. CENSUS BUREAU, AMERICAS FAMILIES AND LIVING ARRANGEMENTS: 2005, <http://www.census.gov/population/www/socdemo/hh-fam/cps2005.html>; FEDERAL INTERAGENCY FORUM ON AGING RELATED STATISTICS, POPULATION (2006), <http://agingstats.gov/update2006/Population.pdf>.

²⁹¹Eunice Moscosco, *Poverty Rate Rises For Fourth Year in a Row*, COX NEWS SERVICE, Aug. 31, 2005, http://www.coxwashington.com/reporters/content/reporters/stories/POVERTY_CENSUS31_COX.html.

²⁹²U.S. CENSUS BUREAU, AMERICAS FAMILIES AND LIVING ARRANGEMENTS: 2005, <http://www.census.gov/population/www/socdemo/hh-fam/cps2005.html>.

²⁹³U. S. DEP'T, OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISON STATISTICS (2005), <http://www.ojp.usdoj.gov/bjs/prisons.htm>.

Hispanic men= 16% Hispanic women = 27% ²⁹⁴	Hispanic Americans in poverty = 219 per 1000 ²⁹⁵	3.32 persons per household for Hispanic households, 3.69 persons per family for Hispanic families ²⁹⁶	12.20 Hispanic American male prison inmates per 1000 Hispanic American males ²⁹⁷

The pool of eligible guardians will dwindle for indigent wards very fast, especially when indigent levels are considered for different races.

²⁹⁴U.S. CENSUS BUREAU, AMERICAS FAMILIES AND LIVING ARRANGEMENTS: 2005, <http://www.census.gov/population/www/socdemo/hh-fam/cps2005.html>; FEDERAL INTERAGENCY FORUM ON AGING RELATED STATISTICS, POPULATION (2006), <http://agingstats.gov/update2006/Population.pdf>.

²⁹⁵Eunice Moscosco, *Poverty Rate Rises For Fourth Year in a Row*, COX NEWS SERVICE, Aug. 31, 2005, http://www.coxwashington.com/reporters/content/reporters/stories/POVERTY_CENSUS31_COX.html.

²⁹⁶ U.S. CENSUS BUREAU, AMERICAS FAMILIES AND LIVING ARRANGEMENTS: 2005, <http://www.census.gov/population/www/socdemo/hh-fam/cps2005.html>.

²⁹⁷ U. S. DEP'T, OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISON STATISTICS (2005), <http://www.ojp.usdoj.gov/bjs/prisons.htm>.

APPENDIX C	
Ga § 29-4-88.	<i>(a) The court may grant a petition for receipt and acceptance of a foreign guardianship provided the court finds that: (1) The guardian is presently in good standing with the foreign court; and (2) The transfer of the guardianship from the foreign jurisdiction is in the best interest of the ward. (b) In granting the petition, the court shall give full faith and credit to the provisions of the foreign guardianship order concerning the determination of the ward's incapacity. (enacted in 2004, effective July 1, 2005).</i>
Md Code, Family Law § 5-305.	<i>(b) In accordance with the United States Constitution, this State shall accord full faith and credit to: 1) an order of another state as to adoption or guardianship in compliance with the other state's laws; and (2) termination of parental rights in compliance with the other state's laws.</i>
MD Code, Family law, § 5-3A-05 and § 5-3B-04	<i>(a) In this section, "order" includes any action that, under the laws of another jurisdiction, has the force and effect of a comparable judicial order under this subtitle. "Order of another state" (b) In accordance with the United States Constitution, this State shall accord full faith and credit to: (1) an order of another state as to adoption or guardianship in compliance with the other state's laws; and (2) termination of parental rights in compliance with the other state's law.</i>
N.H. Rev. Stat. § 463:32-a	<i>Any person who has been appointed guardian of the person of a minor by a foreign court of competent jurisdiction, for a minor who is temporarily in this state, shall be accorded the powers of guardianship as reflected in the order appointing the guardian, with full faith and credit, for a period of time not exceeding 120 days.</i>
N.H. Rev. Stat. § 463:32-b	<i>I. Any person who has been appointed guardian of the person or estate or both, by a foreign court of competent jurisdiction, for a minor who has become a resident of this state, or who intends to move to this state, shall be accorded the powers of guardianship as reflected in the order appointing the guardian, with full faith and credit, for a period of time not exceeding 120 days following the date of the ward's residence in this state. . . .</i>
N.H. Rev. Stat. § 464-A:44	<i>II. Any person who has been appointed guardian of the person for a person who is temporarily in this state by a court of competent jurisdiction in any other state shall be accorded the powers of guardianship as reflected in the order appointing the guardian, with full faith and credit.</i>
N. H. Rev Stat. 464-A:45	<i>I. Any person who has been appointed guardian of the person or estate or both by a foreign court of competent jurisdiction, for a person who has become a resident of this state, or who intends to move to this state, shall be accorded the powers of guardianship as reflected in the order appointing the guardian, with full faith and credit, for 120 days following the date of the ward's residence in this state or until an order is issued on a petition for transfer of the guardianship filed within 120 days of the date of the ward's residence in this state.</i>
Ohio	<i><u>The judgment of another state's court as to the imposition of a guardianship is entitled to full faith and credit under the Constitution of the United States.</u></i>

<p>V.A.T.S. (Vernon's Texas Statutes and Codes Annotated) Probate Code, § 892</p>	<p><i>f) The court shall grant an application for receipt and acceptance of a foreign guardianship if the transfer of the guardianship from the foreign jurisdiction is in the best interests of the ward. In granting an application under this subsection, the court shall give full faith and credit to the provisions of the foreign guardianship order concerning the determination of the ward's incapacity and the rights, powers, and duties of the guardian.</i></p>
<p>Tex. Prob. Code Ann. § 892(f)</p>	<p><i>The court must grant an application for receipt and acceptance of a foreign guardianship if the transfer of the guardianship from the foreign jurisdiction is in the best interests of the ward. In granting an application, the court must give full faith and credit to the provisions of the foreign guardianship order concerning the determination of the ward's incapacity and the rights, powers, and duties of the guardian.</i></p>