

THE CONVICTED FELON AS A GUARDIAN: CONSIDERING THE ALTERNATIVES OF POTENTIAL GUARDIANS WITH LESS-THAN- PERFECT RECORDS

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Courts require discretion in appointing guardians. Oftentimes, the legislature, when enacting legislation that prohibits felons from serving as guardians under any circumstances, prevents the courts from exercising discretion. Yet the need for guardians is increasing and will continue to do so because of the exponential growth in the aging elder population. At the same time, the pool of potential guardians is shrinking in size, partly because the members of this pool have a disproportionate amount of felonies. The groups most affected by these trends are the indigent and racial and ethnic minorities. The indigent lack the resources to hire guardians, often leaving family members as the only persons eligible and available to serve as guardians. Ethnic and racial minorities may be affected if they are part of a group that has historically possessed a disproportionate amount of felons. If poverty and race are considered along with an increasing number of convicted felons, 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 such a person appointed as a guardian, but certain statutes completely prevent the

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court from making such a consideration. The alternatives available to the convicted felon to mitigate against exclusion from guardianship 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. Finally, the uniform codes and proposed standards do not address the issue sufficiently. In this article, Professor Mike E. Jorgensen promotes allowing judicial discretion to appoint felons in certain situations where it would be in the best interest of the ward.

Introduction

The pool of potential guardians in the United States is shrinking, and the demand for guardians is increasing.¹ Considering that the number of felonies is also increasing,² more convicted felons may find that they are the only feasible persons to act as guardians for family members. This is especially true in situations where the ward is indigent or is a member of a racial or ethnic minority that has a disproportionate amount of convicted felons.³

Disqualifying all felons from serving as guardians is likely to negatively impair indigent and minority wards more than wards who possess estates with significant assets.⁴ In situations where estates are small or nonexistent, people are less willing to serve as guardians, es-

1. Charlene D. Daniel & Paula L. Hannaford, *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.”).

2. Christopher Uggen & Jeff Manza, *The Political Consequences of Felon Disfranchisement Laws in the United States* 1 (Nat’l Sci. Found., Working Paper No. WP-00-21, 2001).

3. *Id.* at 6. The impoverished are the most in need of guardians because 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. *Id.* at 5–6.

4. See *Wesley v. Collins*, 605 F. Supp. 802 (M.D. Tenn. 1985) (discussing the disenfranchising of voting blacks due to the disproportionate number of felons within the group and finding that the voting rights statute did not unlawfully dilute their vote under the Fourteenth or Fifteenth Amendments, notwithstanding the statute’s disproportionate effect on blacks, because it did not deprive blacks of equal protection); *Hetherington v. State Pers. Bd.*, 147 Cal. Rptr. 300 (Cal. Ct. App. 1978); 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 (2005).

pecially because a guardian's responsibilities are significant and modest estates cannot provide adequate compensation.⁵ Such cases present special legal challenges both to courts and to practitioners.

This article addresses the special legal challenges of allowing felons to serve as guardians, discusses different approaches or solutions that jurists should consider when selecting possible guardians with less-than-perfect records, and exposes deficiencies in the uniform codes, statutes, and standards concerning felons seeking appointments as guardians.⁶ Part I briefly explains the basics of guardianship law. Part II examines ways to reduce the effects of a prior felony conviction through annulment, expunction, and pardon, as well as alternatives to guardianship, such as the durable power of attorney, if available. Part III discusses decisions that policymakers 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 to appoint a guardian violates separation of powers or equal protection, and (3) whether there is a need for standardized uniform legislation regarding the appointment of felons as guardians. Furthermore, this article explores 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 issues of jurisdiction, venue, and conflict of laws that are inherent in the present guardianship system.⁷ Finally, this article addresses two of the dilemmas resulting from the present structure: the possibility of encouraging forum shopping, and the extent full faith and credit pertains to guardianship eligibility in interstate guardianships.

5. Alison 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 (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.").

6. It 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.

7. Daniel & Hannaford, *supra* note 1, at 353.

I. Problems in the Guardianship System and Who Is Affected

A. The Purpose of Guardianship

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*.⁸ In medieval England, this doctrine focused on the incapacitated and empowered the Crown to protect and care for people who could not do so for themselves.⁹ *Parens patriae* was first introduced to America during the colonial period and has since been fully adopted in the states.¹⁰

In each state, the doctrine of *parens patriae* has been codified in state-specific guardianship statutes delineating its primary purpose of protecting the best interest of the ward.¹¹ This power was first recognized by the Supreme Court in *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*,¹² where the Court held that “[i]t 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.”¹³ 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.¹⁴ Although the benevolent purpose of the ward’s best interest is undeniable, it is questionable

8. “*Parens patriae*” is translated as “parent of his or her country.” BLACK’S LAW DICTIONARY 1144 (8th ed. 2004); see also Daniel B. 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, 287 (1991).

9. *Parens patriae* is a power translated 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, 739 n.1 (1993) (quoting NICHOLAS N. KITTRIE, *THE RIGHT TO BE DIFFERENT* 59 (1971)).

10. See Paula L. Hannaford & Thomas L. Hafemeister, *The National Probate Court Standards: The Role of the Courts in Guardianship and Conservatorship Proceedings*, 2 ELDER L.J. 147, 150 (1994).

11. See Tor, *supra* note 9.

12. *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 66 (1890).

13. *Id.* at 58.

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

whether the guardianship system, in its present nonuniform stature, fulfills this purpose in the appointment of persons to serve as guardians.¹⁵

B. Guardianship Process

The term “guardianship” refers to the legal relationship established by giving a person (the guardian) legal responsibility for another person (the ward) and for the ward’s property when the ward is incapable of handling his or her affairs due to minority or incapacity.¹⁶ Procedurally, the court operates in a protective manner, similar to that of a parent, monitoring and managing the ward’s personal and property affairs.¹⁷ 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.¹⁸

The probate courts have jurisdiction over guardianship proceedings, but judicial discretion in selecting guardians is often limited by statutes.¹⁹ As this article will illustrate, a court’s struggle to balance the best interests of the ward with state statutory requirements can cause problems when selecting a guardian.²⁰ The competing tension between probate courts and legislatures can cause injustice throughout the system.²¹

C. Lack of Continuity in State Statutes

Although all fifty states and the District of Columbia have enacted guardianship statutes,²² the lack of statutory consistency among the states has created many problems in the guardianship arena, most

15. See Roger W. Andersen, *The Influence of the Uniform Probate Code in Nonadopting States*, 8 U. PUGET SOUND L. REV. 599, 600 (1985).

16. See Hannaford & Hafemeister, *supra* note 10, at 149.

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

18. See Griffith, *supra* note 8, at 283; U.S. GOV’T ACCOUNTABILITY OFFICE, GUARDIANSHIPS: COLLABORATION NEEDED TO PROTECT INCAPACITATED ELDERLY PEOPLE 13 (2004), available at <http://www.gao.gov/new.items/d04655.pdf>.

19. 57 C.J.S. *Mental Health* § 124(VIII)(B)(1) (2006).

20. *In re Estate of Roy v. Roy*, 637 N.E.2d 1228, 1233 (Ill. App. Ct. 1994) (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).

21. See *In re Lagrange*, 274 N.Y.S. 702 (N.Y. App. Div. 1934).

22. See *infra* app. A.

notably in relation to guardianship eligibility for felons.²³ For instance, there are at least three distinct categories of state laws concerning the eligibility of guardianship candidates with past felony convictions: (1) complete disqualification of the felon,²⁴ (2) required disclosure of the prior felony with consideration given to the ward's best interest,²⁵ and (3) statutory silence regarding a felon's eligibility.²⁶ As a result of these legal variations and society's increased mobility, the guardianship system is plagued with troubles concerning forum shopping and deference under full faith and credit. More specifically, issues arise as to what extent a forum court should give full faith and credit to a foreign court's guardianship order or decree.²⁷

D. Demographic Issues

In the past century, the median age of the U.S. population has increased significantly.²⁸ In 1860, the median age was twenty years,

23. See Daniel & Hannaford, *supra* note 1, at 351.

24. ARK. CODE ANN. § 28-65-203(a) (2006); CAL. PROB. CODE § 2650 (2006); FLA. STAT. § 744.309(3) (2006); N.C. GEN. STAT. § 35A-1290(c)(2) (2006); R.I. GEN. LAWS. §§ 33-15-6(b)(1), -44 (2006); WASH. REV. CODE ANN. § 11.88.020(1)(c) (West 2006).

25. ARIZ. REV. STAT. ANN. § 14-5106(A)(1) (2006); IDAHO CODE ANN. § 15-5-311(d) (2006); 755 ILL. COMP. STAT. 5/11a-5 (2006); NEV. REV. STAT. ANN. § 159.059 (West 2006); N.H. REV. STAT. ANN. § 464-A:4(v)(b) (2006); OHIO REV. CODE ANN. § 2111.03 (West 2006); OKLA. STAT. tit. 30, § 4-105(c) (2006); OR. REV. STAT. § 125.210(1) (2006); TEX. PROB. CODE ANN. § 678 (Vernon 2006); W. VA. CODE § 44A-1-8(a) (2006).

26. ALA. CODE § 26-2A-104 (2006); CONN. GEN. STAT. § 45a-676(f) (2006); DEL. CODE ANN. tit. 12, § 3902 (2006); GA. CODE ANN. § 29-5-2 (2006); HAW. REV. STAT. § 560:5-310 (2006); IND. CODE § 29-3-5-4 (2006); IOWA CODE § 633.559 (2006); MD. CODE ANN., EST. & TRUSTS § 13-206 (West 2006); MASS. GEN. LAWS ch. 201, § 6 (2006); MICH. COMP. LAWS § 330.1628 (2006); MINN. STAT. § 524.5-309 (2006); MISS. CODE ANN. § 93-13-121 (2006); MO. REV. STAT. § 475.050 (2006); N.J. STAT. ANN. § 3B:12-25 (West 2006); N.Y. MENTAL HYG. LAW § 81.19 (McKinney 2006); 20 PA. CONS. STAT. § 5511(f) (2006); S.D. CODIFIED LAWS § 29A-5-110 (2006); UTAH CODE ANN. § 75-5-311 (2006); VA. CODE ANN. § 37.2-1007 (2006); ALASKA STAT. § 13.26.145 (2005); COLO. REV. STAT. § 15-14-311 (2005); KAN. PROB. CODE ANN. § 59-3067 (West 2005); KY. REV. STAT. ANN. § 387.600 (West 2005); MONT. CODE ANN. § 72-5-312 (2005); NEB. REV. STAT. § 30-2627 (2005); N.D. CENT. CODE § 30.1-28-11 (2005); S.C. CODE ANN. § 62-5-410 (2005); TENN. CODE ANN. § 34-3-103 (2005); VT. STAT. ANN. tit. 14, § 3072 (2005).

27. Daniel & Hannaford, *supra* note 1, at 353.

28. See ADMIN. ON AGING, U.S. DEP'T OF HEALTH & HUMAN SERVS., A STATISTICAL PROFILE OF OLDER AMERICANS AGED 65+, at 1 (2003), available at http://www.aoa.dhhs.gov/press/fact/pdf/ss_stat_profile.doc; see also Robert Longley, U.S. Median Age Highest Ever, <http://www.usgovinfo.about.com/library/weekly/aa051801a.htm> (last visited Jan. 29, 2007).

but the median age in 1994 was thirty-four years.²⁹ In 1900, the life expectancy was roughly forty-six years for males and forty-eight years for females.³⁰ As of 1998, life expectancy was 73.8 years for males and 79.5 years for females.³¹

As the elderly population increases, approximately one million people are convicted of felonies every year in the United States.³² Not all felonies are for dishonesty, theft, or exploitation; about a third of felony convictions are for drug offenses.³³ Theft and burglary offenses constitute another third of felony convictions, and approximately one-third of those offenses are fraud related.³⁴ The remaining felony convictions are for violent offenses, weapon offenses, and nonviolent crimes.³⁵

These statistics have remained relatively constant since 1998.³⁶ As of 2001, one in thirty-seven adults in the United States had served time in prison.³⁷ In addition, 6.6% of persons born in 2001 will go to prison in their lifetimes if current rates of incarceration remain unchanged.³⁸ This statistic has increased from about 5% of persons born in 1991, and from almost 2% of persons born in 1974.³⁹

The increasing rate of felons requires contemplation when considering the pool of persons available to serve as guardians over those

29. FRANK B. HOBBS & BONNIE L. DAMON, U.S. DEP'T OF COMMERCE, SIXTY-FIVE PLUS IN THE UNITED STATES (1996), available at <http://www.census.gov/prod/1/pop/p23-190/p23-190.pdf>.

30. Elizabeth Arias, *United States Life Tables, 2003*, 54 NAT'L VITAL STAT. REP. 1, 34 tbl.12 (2006), available at http://www.cdc.gov/nchs/data/nvsr/nvsr54/nvsr54_14.pdf.

31. *Id.*

32. MATTHEW R. DUROSE & PATRICK A. LANGAN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICAL BULLETIN, FELONY SENTENCES IN STATE COURT, 2002 (2004) [hereinafter 2002 FELONY SENTENCES] (estimating that there were 1.1 million felony convictions in 2002); see also MATTHEW R. DUROSE & PATRICK A. LANGAN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICAL BULLETIN, FELONY SENTENCES IN STATE COURT, 2000 (2003) [hereinafter 2000 FELONY SENTENCES] (estimating that there were 983,823 felony convictions in 2000).

33. 2002 FELONY SENTENCES, *supra* note 32, at 2.

34. *Id.*

35. *Id.*

36. Compare 2000 FELONY SENTENCES, *supra* note 32, with MATTHEW R. DUROSE, DAVID J. LEVIN & PATRICK A. LANGAN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICAL BULLETIN, FELONY SENTENCES IN STATE COURTS, 1998 (2001).

37. THOMAS P. BONCZAR, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICAL SPECIAL REPORT, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001, at 1 (2003).

38. *Id.*

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

who are incapacitated due to infirmity, age, dementia, or physical ailments.⁴⁰ The approaches to defining eligibility for potential guardian applicants among states range from exercising little restraint in the appointment of guardians to completely prohibiting felons from being guardians.

The dramatically declining birth rate since the 1950s further exacerbates the problem.⁴¹ As a result, incapacitated elderly people may have few or no children eligible to act as their guardians. Precluding felons from serving as guardians further limits the potential pool of eligible guardians for the incapacitated elderly with few or no children.

These statistics indicate an increasing likelihood that persons with felony convictions may seek or have already received appointments as guardians⁴² of incapacitated spouses, parents, or children. Furthermore, as society becomes more mobile and guardians seek to move or relocate their wards to different jurisdictions with different eligibility requirements, questions arise regarding the level of deference the state accepting the transitioning ward (the forum state) must give to the guardianship orders and decrees of the prior state of residence (the foreign state).

40. Daniel & Hannaford, *supra* note 1 (“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, “[i]f 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?”).

41. CTR. FOR DISEASE CONTROL & PREVENTION, LIVE BIRTHS, BIRTH RATES, AND FERTILITY RATES BY RACE: UNITED STATES, 1909–99, <http://www.cdc.gov/nchs/data/statab/t991x01.pdf> (last visited Jan. 29, 2007).

42. 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, 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. See UNIF. PROBATE CODE § 5-102 (amended 1998). This article uses 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 guardianships established for minors in age. Oftentimes, states have different requirements for the different guardianship categories.

Two primary populations of persons affected by the reduced guardian pool are the incapacitated in racial and ethnic minority groups 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.⁴³ While the child is under the age of majority, the natural parent may make both personal decisions and health care decisions for the child.⁴⁴ If the child's disability status expires by operation of law, the child will be presumed competent.⁴⁵ Only upon a showing of incapacity will the court appoint a guardian or guardian advocate.⁴⁶ A problem may arise 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, because courts in some states lack discretion to appoint the parent-guardian regardless of the circumstances, including the nature of the felony, the

43. Florida Coastal School of Law's Elder Law Clinic represented the mother of a developmentally disabled child in 1999, a case in which the author had some limited involvement. The mother, as natural guardian in Florida, had the right to make decisions for her daughter and to obtain medical and dental care. See Memorandum of Law at 1, *In re* Guardian Advocate for Altamese Thomas, Case No. 2001-209 CG (Fla. Cir. Ct. 2001) (on file with The Elder Law Journal) [hereinafter Clinic Memo]. When the daughter turned eighteen years of age, however, Florida law presumed she was competent and her legal disability was removed as a matter of law. *Id.* at 2. The mother sought assistance from the clinic to obtain a guardianship over her daughter, whom she had been taking care of for eighteen years, so that she could continue to make decisions for her daughter's welfare. However, the mother was disqualified because Florida statutes prohibit a felon from serving as a guardian regardless of the circumstances. *Id.* Nineteen years earlier, the mother had a felony conviction for accessory to robbery. *Id.* This was her only conviction or trouble with the law. *Id.* The court felt compelled under the statute to disqualify the mother from acting as her daughter's guardian. *Id.* The court interpreted the statute as a total disqualification for eligibility. *Id.* The court further denied eligibility despite the clinic's arguments that the conviction may be eligible for expungement, that the mother may be eligible for a pardon, or that her rights might be restored.

44. See *In re* Guardianship of MEO, 138 P.3d 1145, 1152 (Wyo. 2006); see also ARK. CODE ANN. § 28-65-501 (2006); DEL. CODE ANN. tit. 13, § 701(a) (2006); FLA. STAT. § 744.301(1) (2006); GA. CODE ANN. § 29-2-3 (2006); ME. REV. STAT. ANN. tit. 19-A, § 1651 (2006); MD. CODE ANN., FAM. LAW § 5-203 (West 2006); MO. REV. STAT. § 475.025 (2006); N.C. GEN. STAT. § 35A-1201(a)(b) (2006); OKLA. STAT. tit. 30, § 1-112c (2006); VA. CODE ANN. § 31-1 (2006); *McConnell v. McConnell*, 177 N.E. 692, 696 (Ill. 1931); *Cruickshank-Wallace v. County Banking & Trust Co.*, 885 A.2d 403 (Md. Ct. Spec. App. 2005); *Lacy v. Arvin*, 780 A.2d 1180, 1186 (Md. Ct. Spec. App. 2001).

45. 81 AM. JUR. 2D *Witnesses* § 209 (2006) (presumption of competence to testify as a witness at age 14); SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 9:3 (4th ed. 1993).

46. See, e.g., MASS. GEN. LAWS ch. 201, § 6(a) (2006).

lapse of time since the felony, the severity of the felony, and the ward's best interest.⁴⁷

The elderly are similarly at risk of being deprived of a suitable guardian.⁴⁸ For instance, assume that an elderly husband becomes incapacitated after years of marriage, has no children able to serve as guardians, and the only feasible person able to serve is his wife who has a prior felony conviction. In certain states, the wife would be completely precluded from serving as her husband's decision maker due to her felony conviction. The indigent are disproportionately affected because they generally lack estates with sufficient funds to hire professional guardians and their likely pool of potential guardians are usually family members who volunteer to assist without compensation.⁴⁹ Even if a professional guardian is retained, the guardian may not be appointed to make health care decisions as a spouse would. However, a felon spouse who is unable to make decisions over the property of the ward would also be precluded under guardianship statutes from making the incapacitated person's health care decisions.⁵⁰ 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 prohib-

47. FLA. STAT. § 744.309(3) (2006).

48. Caroline 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, 277-78 (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.").

49. See Guardianship and Conservatorship Interim Committee Minutes (Aug. 10, 2004), <http://www.legislature.idaho.gov/sessioninfo/2004/interim/guardian0810min.pdf>; see also JOINT LEGISLATIVE AUDIT & REVIEW COMM'N OF THE VA. GEN. ASSEMBLY, IMPACT OF AN AGING POPULATION ON STATE AGENCIES (2005), available at <http://jlarc.state.va.us/Meetings/November05/Aging.pdf>.

50. ARK. CODE ANN. § 28-65-203(a) (2006); FLA. STAT. § 744.309(3) (2006); N.C. GEN. STAT. § 35A-1290(c)(2) (2006).

its the felon from serving as guardian take priority over court discretion?

II. May a Felon Be a Guardian?

With three categories of state law concerning the eligibility of felons to become guardians, the lack of judicial discretion begs the questions 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.⁵¹ The first category of laws includes statutes that deny felons eligibility to be a guardian.⁵² The second category includes state statutes that require either divulgence by the applicant or inquiry by the court into any past felony convictions of the proposed guardian.⁵³ The states in this category may require the court to consider such convictions when appointing a guardian or to mandate automatic disqualification absent proof that appointment is in the best interests of the incapacitated person.⁵⁴ The third category includes the states whose statutes are silent on this issue.⁵⁵ Presumably, the silent-statute states 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 to a mere legal inconvenience. This lack of uniformity may create legal quagmires for those guardians appointed in foreign jurisdictions who relocate their wards to forum jurisdictions that strictly prohibit felons from serving as

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

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

53. The states in this category are Arizona, Idaho, Nevada, New Hampshire, Ohio, Oklahoma, Oregon, Texas, and West Virginia.

54. ARIZ. REV. STAT. ANN. § 14-5311 (2006); 755 ILL. COMP. STAT. 5/11-3 (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) (LexisNexis 2006).

55. The states in this category are 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.

guardians. It may also impair those groups where indigency may affect the available guardianship eligibility pool.

As the demand for eligible guardians increases and society becomes more mobile, there will likely be an increase in situations where a potential guardian will be ineligible for such an appointment in his or her state of residency, but will be eligible in a different state. Conversely, a guardian who has been appointed in a foreign state may, upon relocating, find himself ineligible to continue serving as guardian in the new forum state. These scenarios may lead to forum shopping 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 felons from serving as guardians may also affect guardianship when the ward reaches the age of majority. What happens when the only available guardian is a parent who 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 socioeconomically disadvantaged classes.⁵⁶

Other than in forums such as Arkansas, Florida, Rhode Island, and Washington that prohibit felons from serving as guardians,⁵⁷ certain steps inside and outside the guardianship proceedings may reduce the effect of a prior felony conviction on the appointment of a guardian.

Once an existing guardian is prohibited by statute from continuing to act as guardian or the felon is the only available guardian, the legal practitioner must consider whether alternatives to the appointment of the felon as a guardian are available. Some alternatives include minimizing the felony conviction through annulment, dismissal, pardon, or expungement. Another alternative is utilizing durable powers of attorney. The following sections discuss these alternatives.

56. Barnes, *supra* note 5 (noting that unpaid proxies are difficult to find as there is seldom anyone willing 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." *Id.*

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

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

Most states have procedures whereby a person may, under certain conditions, have a felony conviction dismissed or annulled,⁵⁸ or have the records of the conviction expunged or sealed.⁵⁹ In addition, the executive branches of the various states have the power to pardon and restore civil rights to convicted felons.⁶⁰

1. DISMISSAL OR ANNULMENT OF THE FELON'S RECORD

If a felon can undo his felony, may he then be appointed as a guardian?⁶¹ The effect of dismissal or annulment of felonies on guardian eligibility is uncertain.⁶² Because the remedies of dismissal, expunction, or pardon must generally be obtained in the state or juris-

58. 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).

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

60. 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).

61. FED. R. EVID. 609(c) states that evidence of a conviction 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 need to be disclosed to the court upon filing an application of guardianship? Candor is very important in guardianship proceedings. If the conviction is disclosed on the application, is it evidence that is not admissible to the court to consider in its decision whether to appoint the person as a guardian?

62. *State ex rel. Gains v. Rossi*, 716 N.E.2d 204, 207 (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. 893E (2006 & Supp. 2007) ("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.").

diction where the conviction was entered,⁶³ there is no guarantee that other jurisdictions will give deference to these remedies and allow the felon to serve as a guardian.⁶⁴

It is arguable that obtaining dismissal or annulment in states with statutes that are silent as to the effect of the pardon or annulment, however, may qualify a previously ineligible petitioner for guardianship.⁶⁵ Moreover, in the four states that disqualify felons from serving as guardians,⁶⁶ a felon who obtained a pardon or an annulment could arguably be eligible to serve as a guardian.

For example, Arkansas allows a person to be a guardian who “is . . . not a convicted and unpardoned felon.”⁶⁷ The statute’s use of the present tense in “is . . . not a convicted and unpardoned felon,” suggests that only currently extant felony convictions would disqualify a potential guardian.⁶⁸ The type of felony is not limited in Arkansas, and the law would arguably apply to any pardoned felony, regardless of its nature. Likewise, Washington law disqualifies a potential guardian “who *is* . . . convicted of a felony or of a misdemeanor involving moral turpitude.”⁶⁹ Again, it is not the fact of past conviction but the state of current conviction that the statutory language disqualifies. Thus, in jurisdictions where a dismissal effectively treats the felony as if it never occurred,⁷⁰ a petitioner who has had a

63. 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).

64. *Cf. Barker*, 402 N.E.2d 550.

65. Allan H. Knickerbocker, *Effect of Pardon or of Probation and Dismissal*, 31A CAL. JUR. 3D *Evidence* § 760 (2006) (stating that witness impeachment is prohibited if the felony conviction is pardoned).

66. The four states are Arkansas, Florida, Rhode Island, and Washington. ARK. CODE ANN. § 28-65-203(a) (2006); FLA. STAT. § 744.309(3) (2006); R.I. GEN. LAWS § 33-15-6(b)(1) (2006); WASH. REV. CODE ANN. § 11.88.020(1)(c) (West 2006).

67. ARK. CODE ANN. § 28-65-203(a); *see also* *Bailey v. Maxwell*, No. CA 05-700, 2006 WL 476982, at *3 (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).

68. ARK. CODE ANN. § 28-65-203(a).

69. WASH. REV. CODE ANN. § 11.88.020(1)(c) (emphasis added).

70. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-907 (2006); *United States v. Rowlands*, 451 F.3d 173 (3d Cir. 2006); *United States v. Crowell*, 374 F.3d 790 (9th Cir. 2004). The general rule appears to be that a defendant who moves to expunge records asks that the court destroy or seal the records, but the court does not remove or vacate the conviction itself. *See also* LA. REV. STAT. ANN. § 44:9 (2006 & Supp. 2007).

conviction dismissed upon completion of a successful probation⁷¹ or who obtains a pardon⁷² would arguably not be disqualified from serving as a guardian.⁷³

In comparison, the language of the Florida statute disqualifies anyone who “has been convicted of a felony.”⁷⁴ 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.”⁷⁵ This reasoning, employed by the Florida Supreme Court, could disqualify a felon from serving as guardian regardless of pardon, annulment, or restoration of rights.⁷⁶

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.”⁷⁷ Rhode Island also disqualifies any person convicted of theft-related offenses from serving as a conservator.⁷⁸ As previously implied, guardianship candidates who have successfully achieved dismissal may argue that they do not have a “criminal background which bears on suitability to serve as guardian” because they are no longer “convicted of” a theft-related offense.⁷⁹

Several possible impediments may prevent a felon from obtaining dismissal, expungement, or annulment.⁸⁰ Some states impede the

71. See LA. CODE CRIM. PROC. ANN. art. 893E(1)(b)(2) (2006 & Supp. 2007).

72. See Knickerbocker, *supra* note 65.

73. LA. CODE CRIM. PROC. ANN. art. 893E(1)(b)(2).

74. FLA. STAT. § 744.309(3) (2006).

75. See R.J.L. v. State, 887 So. 2d 1268, 1281 (Fla. 2004) (stating that although a pardon forgives a crime, it does not declare innocence or remove the fact that it happened).

76. See *id.* at 1280 (“A pardon does not eliminate the adjudication of guilt, creating a fiction that the crime never occurred.”).

77. R.I. GEN. LAWS § 33-15-6(b)(1) (2006).

78. *Id.* § 33-15-44.

79. *Id.* § 33-15-6(b)(1); see also 3A C.J.S. *Aliens* § 1276 (2006).

80. *United States v. Janik*, 10 F.3d 470, 472-73 (7th Cir. 1993) (affirming the district court’s denial of expunction for a soldier concerned about the effects on his future career of a conviction overturned on Speedy Trial Act grounds, because constitutionally sufficient evidence existed to support the conviction); *United States v. Smith*, No. 87-3837, 1988 WL 19174, at *1 (6th Cir. Mar. 8, 1988) (holding that there should be no expunction of a valid conviction for which defendant was subsequently pardoned); *Schwab v. Gallas*, 724 F. Supp. 509, 510-11 (N.D. Ohio 1989) (holding that expunction of a valid felony conviction was not warranted by the fact that the movant had fulfilled the requirements of the sentence and had since led a law-abiding life); see also *United States v. Crowell*, 374 F.3d 790, 797 (9th Cir. 2004) (holding that the court has no authority to expunge a record of a valid

dismissal of a felony conviction by requiring the felon to complete certain rehabilitative prerequisites,⁸¹ as well as by limiting dismissals to first-time offenses.⁸² However, some state statutes prevent even first-time offenders from serving as guardians by disallowing dismissal or annulment of certain felonies, such as sexual offenses,⁸³ crimes of violence,⁸⁴ or other categories of criminal conduct.⁸⁵

Additionally, the time to apply for an annulment may be very restrictive. Felons must generally qualify for annulment or dismissal at the time of sentencing by convincing the court to withhold judgment or sentence for reasons such as a good character and by showing a minimal likelihood that they will repeat the offending behavior.⁸⁶ Furthermore, the eligibility may require the convicted person to suc-

conviction absent a legal ground for setting aside that conviction); *United States v. Wiley*, 89 F. Supp. 2d 909, 913 (S.D. Ohio 1999) (denying expungement of a valid conviction despite the fact that the defendant was depressed at the time of the offense, had been law-abiding since, and was experiencing significant hardship because of the past conviction); *United States v. Gillock*, 771 F. Supp. 904, 909-10 (W.D. Tenn. 1991) (denying a request for expungement of a valid conviction and finding no extraordinary circumstances in the argument that the defendant had been law-abiding since the conviction and that his professional opportunities continued to be hurt by his past conviction); *Ex parte Gray*, 109 S.W.3d 917 (Tex. Crim. App. 2003).

81. Included in this analysis are only the states that either disqualify from guardianship 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.

82. See ARK. CODE ANN. § 16-93-303 (2006) (allowing courts the discretion to not enter judgment or pronounce sentence upon first-time offenders).

83. See ARIZ. REV. STAT. ANN. § 13-907(D)(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).

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

85. See ARIZ. REV. STAT. ANN. § 13-907(D)(5) (excluding convictions where the victim is younger than fifteen years of age); N.H. REV. STAT. ANN. § 651:5(V) (denying annulment for obstruction of justice or where extended terms of imprisonment apply).

86. See ARK. CODE ANN. § 5-4-301(9); *State v. Trowbridge*, 516 P.2d 362, 363 (Idaho 1973) (listing factors to take into account when determining whether to grant probation).

cessfully complete probation or other rehabilitative programs and to remain crime-free for a period of time thereafter.⁸⁷

Although dismissal of a conviction yields the highest likelihood of removing barriers to guardianship,⁸⁸ the procedures are limited in application. The states that allow dismissal or annulment restrict application of the remedy both as to the types of crimes and as to the procedural qualifications.⁸⁹ These procedures may benefit a potential guardian within the rather small group of persons with criminal convictions entitled to dismissal.⁹⁰

Assuming that the felon qualifies in the rare instance for an annulment or dismissal of the felony conviction, the dismissal of the conviction will be automatic under a portion of state statutes.⁹¹ The remaining 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.⁹² 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.⁹³ In other states, the legal effect of dismissal is to make the conviction “as if it never happened.”⁹⁴ It is unclear whether this is suf-

87. ARK. CODE ANN. § 5-4-311 (requiring applicant to have successfully completed probation); IDAHO CODE ANN. § 19-2604(1) (same).

88. LA. CODE CRIM. PROC. ANN. art. 893E(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.”).

89. *See, e.g.*, *Baker v. State*, 884 S.W.2d 603 (Ark. 1994) (stating that a defendant who otherwise qualified for dismissal but failed to promptly object to the entry of judgment was not entitled to a dismissal of the conviction).

90. *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, it remains unclear whether a dismissal or annulment may allow the applicant to become eligible.

91. *See, e.g.*, ARK. CODE ANN. §§ 5-4-311, 16-93-303(b). *Contra* ARIZ. REV. STAT. ANN. § 13-907(A) (2006); IDAHO CODE ANN. § 19-2604(3); N.H. REV. STAT. § 651:5 (2006).

92. Each state makes its own independent decision in the absence of a uniform standard that applies to this situation.

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

94. N.H. REV. STAT. ANN. § 651:5(X); *see also* *Tembruell v. City of Seattle*, 392 P.2d 453 (Wash. 1964) (responding to the defendant’s argument that a deferred sentence coupled with dismissal of the charge did not constitute conviction of a felony, the court held that because there was no adjudication of guilt or a sentence, the defendant was not convicted of any felony within the meaning of that phrase in the police pension statute).

ficient to remove the disqualifications preventing a felon from being appointed as a guardian.

2. EXPUNGEMENT AND THE SEALING OF THE FELON'S RECORD

Another option,⁹⁵ different from dismissal, is to have the record of the conviction expunged⁹⁶ or sealed.⁹⁷ Unlike dismissal or annulment, which make the conviction as if it never happened, the effect of expungement⁹⁸ under most state statutory schemes is that it does not remove the conviction.⁹⁹ An expungement is simply a defendant's request that the court destroy or seal the records of the conviction; it does not absolve the conviction itself.¹⁰⁰

a. The Process of Obtaining Expungement or Sealing of Record of Conviction A felon who is otherwise qualified to apply for an expungement of record may be required to notify appropriate law enforcement or prosecutorial agencies before requesting expunction from a court.¹⁰¹ Similar to the requirements for dismissal and annulment of the felony conviction, expungement may have significant impediments to the

95. 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.

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

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

98. The terms "expungement" and "expunction" appear to be used similarly in many court cases. For the purpose of this article, the terms are treated as interchangeable even though there may be technical differences that do not affect the assertions herein.

99. 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. *See supra* note 26 and accompanying text. What little reference is made in state statutes is inferred. For example, "a guardian who is not a convicted and *unpardoned* felon" seems to imply that a pardoned felon will be eligible to seek the appointment as a guardian. *See* ARK. CODE ANN. § 28-65-203(a) (2006) (emphasis added). On the other hand, 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 asking the court to remove or vacate the conviction itself. *United States v. Rowlands*, 451 F.3d 173, 176 (3d Cir. 2006) (quoting *United States v. Crowell*, 374 F.3d 790 (9th Cir. 2004); *see also* ARIZ. REV. STAT. ANN. § 13-907 (2006)).

100. *Rowlands*, 451 F.3d at 176.

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

feasibility of receiving relief from the conviction.¹⁰² In Minnesota,¹⁰³ for example, a defendant who pleads guilty may not receive an expungement of records due to the guilty plea.¹⁰⁴

Additionally, expungement is typically a legislative prerogative rather than a judicial decision.¹⁰⁵ Expungement in most states is limited to a single incident of criminal conduct or a first-time offense.¹⁰⁶ As with dismissals of felony convictions, certain convictions related to particular crimes, including sex offenses, domestic violence, and other crimes of violence, are not eligible for expunction.¹⁰⁷

Another impediment for potential guardians is that they may have to wait a certain period of time after final discharge related to the

102. *Rowlands*, 451 F.3d at 177 (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* TEX. CODE CRIM. PROC. ANN. art. 55.01 (Vernon 2006); *Ex parte M.R.R.*, No. 07-05-0294-CV, 2006 WL 1547764 (Tex. Crim. App. June 7, 2006) (finding that the court had no inherent or equitable power to expunge criminal records, but any authority was dependent upon expunction statutes). *But see* MINN. STAT. ANN. § 609A.02 (West 2006); *State v. A.C.H.*, 710 N.W.2d 587, 589 (Minn. Ct. App. 2006) (finding that “[t]he district court has the authority to grant expungement of criminal records statutorily and through its inherent power”).

103. *See* MINN. STAT. ANN. § 609A.02(3).

104. *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, 363 (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 determining 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”) (quoting *State v. Ambaye*, 616 N.W.2d 256, 258 (Minn. 2000)); *Jones v. St. Louis County Police Dep’t*, 133 S.W.3d 524, 525 (Mo. Ct. App. 2004) (finding that “courts have limited power to equitably expunge records to cases involving illegal prosecution, acquittal, or extraordinary circumstances”).

105. *Toia v. People*, 776 N.E.2d 599, 604 (Ill. App. Ct. 2002) (“[A]n individual is eligible for expungement only where the legislature has authorized expungement.”); *see also* 20 ILL. COMP. STAT. ANN. 2630/5 (West 2006). *Compare* *Camfield v. City of Oklahoma City*, 248 F.3d 1214, 1234 (10th Cir. 2001) (“[C]ourts have inherent equitable authority to order the expungement of an arrest record or a conviction in rare or extreme instances.”), *with* *People v. Thon*, 746 N.E.2d 1225, 1229 (Ill. App. Ct. 2001) (“[T]he Governor is constitutionally empowered to grant pardons. But the power to expunge is controlled by statute. An individual is eligible for expungement only where the legislature has authorized expungement.”).

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

107. *See* NEV. REV. STAT. ANN. § 179.245(5) (West 2006) (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); *id.* § 12-1.3-2(a) (disqualifying convictions for a “crime of violence”).

conviction before becoming eligible to apply for an expungement.¹⁰⁸ Such a waiting period exists in jurisdictions that disqualify applicants for expunction who have pending criminal matters in order to prevent the felon from enjoying the expungement of the first felony only to be convicted of a subsequent felony.¹⁰⁹

Finally, a commonsense restraint, implied if not expressed, is that expunction statutes also require a balancing approach in weighing the interests of the state against the interests of the applicant.¹¹⁰ Hence, like the dismissal of felony convictions, expungement is not easily obtained, and there are many impediments to achieving the expungement.

b. The Effect of Expungement or Sealing upon the Requirement to Report a 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 vary from state to state.¹¹¹ In some states, the expunction of the felony means that the conviction must legally be treated as never having occurred.¹¹² 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.¹¹³ 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, an expungement arguably will not make an otherwise disqualified guardian qualified because the expungement is

108. See NEV. REV. STAT. ANN. § 179.245(1); OHIO REV. CODE ANN. § 2953.32(A)(1) (imposing a three-year waiting period); R.I. GEN. LAWS § 12-1.3-2(c) (imposing a ten-year waiting period).

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

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

111. Gulbis, *supra* note 59, at 964.

112. See MINN. STAT. ANN. § 609.02 (West 2006); OHIO REV. CODE ANN. § 2953.32(C)(2) (West 2006) (treating a conviction as if it never occurred), *id.* § 2953.33(B) (providing that a person is restored to all rights and may generally not be questioned about the expunged conviction); R.I. GEN. LAWS § 12-1.3-4(b) (allowing a person to state that he or she has never been convicted); *State v. Davisson*, 624 N.W.2d 292, 296 (Minn. Ct. App. 2001) (explaining that a finding of guilt is equivalent to a plea of guilty for purposes of expungement).

113. See NEV. REV. STAT. ANN. § 179.245.

only the sealing of the record and not the erasing of the conviction.¹¹⁴ In certain jurisdictions, guardianship eligibility depends not only on the expungement of a felony conviction, but also on the restoration of the applicant's citizenship rights.¹¹⁵

3. OBTAINING A PARDON FROM THE FELONY CONVICTION

State governors or panels within the executive branches of the various states have the power to fully or partially pardon people convicted of felonies.¹¹⁶ Pardon is an executive act reserved for the governor or some other agency in the executive branch.¹¹⁷ Application must usually be made to the governor, a board, or a commission.¹¹⁸ Many states grant the pardoning power through statutes, while other states argue that the decision to pardon may be made in conjunction with the courts after balancing the interests of society and law enforcement.¹¹⁹ The typical statutory scheme that allows for the consid-

114. *United States v. Crowell*, 374 F.3d 790, 792 (9th Cir. 2004).

115. *State v. Hanes*, 44 P.3d 295 (Idaho Ct. App. 2002) (Weston, J., dissenting). Dissenting Justice Weston referenced *State v. Schumacher*, 959 P.2d 465 (Idaho Ct. App. 1998), where the 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. *Schumacher*, 954 P.2d at 467. Under *Schumacher*, a defendant who has been convicted and placed on probation must seek the expungement of his or her conviction in order to have his or her civil rights restored. *See id.* at 466–67. This is an extraordinary remedy and is denied to probationers who have been adjudicated to be in violation of the terms of their probation. *Id.* at 467. In *Hanes*, Justice Weston recognized that Section 3 disqualifies persons from acting as guardians who have been convicted of a felony and have not been restored to the rights of citizenship. *Hanes*, 44 P.3d at 298–99. However, he noted that 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 of the Idaho Constitution because the defendant has not been *convicted* of a felony.” *Id.* at 298. Moreover, 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.” *Id.* (quoting IDAHO CONST. § 18-310(2)).

116. *Huntington v. Attrill*, 146 U.S. 657, 669 (1892); *see also* Green, *supra* note 60, at 502–03.

117. *Huntington*, 146 U.S. at 669; *see also* Green, *supra* note 60, at 502–03.

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

119. *United States v. Sutton*, 521 F.2d 1385 (7th Cir. 1975) (“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.” (quoting *Thrall v. Wolfe*, 503 F.2d 313, 316 (7th Cir. 1974))).

eration of a pardon requires the felon's rehabilitation,¹²⁰ a waiting period,¹²¹ and the pardon to be in harmony with constitutional law.¹²²

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 to the prosecuting and law enforcement agencies that obtained the conviction.¹²³ Because pardons are usually exclusively executive decisions, the executive branch may be vested with the complete discretion of granting or denying the request.¹²⁴ If the decision is purely under the control of the executive branch, the determination may turn on political considerations rather than on the merits.¹²⁵

b. *The Legal Effect of a Pardon* Because a pardon does not consummate in a finding of absence of guilt, it does not necessarily erase a conviction.¹²⁶ Hence, in some jurisdictions, a pardon alone, like an

120. Alan Ellis & Peter J. Scherr, *Federal Felony Conviction, Collateral Civil Disabilities*, CRIM. JUST., Fall 1996, at 42; see also *Dixon v. McMullen*, 527 F. Supp. 711, 718 (N.D. Tex. 1981) (noting that a pardon implies guilt, that Texas courts may forgive, but they do not forget, that the fact is not obliterated, and that there is no wash); *People v. Ansell*, 24 P.3d 1174, 1178–79 (Cal. 2001).

121. *Ansell*, 24 P.3d at 1178.

122. *Barbour v. Democratic Executive Comm. of Crawford County*, 269 S.E.2d 433, 434 (Ga. 1980); see also *Ansell*, 24 P.3d at 1186–87 (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 Pardon Relief and Its Relationship to Federal Firearm Disability*, 77 N.D. L. REV. 419, 421–22 (2001).

123. See, e.g., ARK. CODE ANN. § 5-4-607(b)(1) (2006); WASH. REV. CODE ANN. § 9.94A.885(3) (West 2006).

124. See, e.g., Office of the Pardon Attorney, U.S. Dep't of Justice, Pardon Information & Instructions, http://www.usdoj.gov/pardon/pardon_instructions.htm (last visited Mar. 29, 2007); see also Violet, *supra* note 122, at 423.

125. See Kathryn L. 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, 148–51 (2003) (discussing President Clinton's pardon of Marc Rich after extensive lobbying by Rich's wife).

126. See generally *United States v. Matassini*, 565 F.2d 1297 (5th Cir. 1978); Gary L. Hall, Annotation, *Pardon as Restoring Public Office or License or Eligibility Therefore*, 58 A.L.R. 3D 1191, 1203–04 (Supp. 2006) (explaining that a defendant is still a convict for purposes of the federal prohibition of receipt or possession of a firearm by a convicted felon). In *Fields v. State*, 85 So. 2d 609 (Fla. 1956), the Supreme Court

expungement, may not assist a proposed guardian because it does not reverse the conviction.¹²⁷ A pardon may, however, make a person eligible for expunction of records of convictions,¹²⁸ or it may restore that person to the same rights as if the conviction had not occurred.¹²⁹ Nevertheless, such remedies may not be available in all cases.¹³⁰ If they are available, the pardoned felon may be eligible to serve as a guardian in some states but not in others.

4. SUMMARY FOR THE MITIGATION OF THE CONVICTION

Although the above remedies are options 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.

For many people, pursuing a dismissal, expunction, or pardon may not be a feasible option.¹³¹ The probability of actually obtaining the dismissal, expunction, or pardon is low, as these are extraordinary

of Florida held that a felony conviction for which the offender has received a full and unconditional pardon is not a prior felony conviction under Florida's habitual offender laws. *Id.* at 611. 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. *Id.* Rather, the court stated that inasmuch as the legislature did not expressly include pardoned convictions in the relevant statute, it is taken as evidencing an intention on the part of the legislature that pardoned convictions not be counted as prior live felony convictions. *Id.*

127. 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 81 AM. JUR. 2D *Witnesses* § 882 (2006).

128. See, e.g., ARK. CODE ANN. § 16-90-605 (2006).

129. See, e.g., FLA. STAT. § 940.05 (2006). California's section 4853 states in pertinent part that "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." CAL. PENAL CODE § 4853 (West 2006). Note, however, that under section 4852.15, 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. *Id.* § 4852.15.

130. See, e.g., ARK. CODE ANN. § 16-90-605(c) (West 2006) (prohibiting the expunction of the records of a conviction for sex offenses or for offenses resulting in death or serious injury where the victim was under the age of eighteen).

131. See LA. REV. STAT. ANN. § 44:9(E)(1)(b) (2006); *State v. Tumblin*, 868 So. 2d 902, 905 (La. Ct. App. 2004) (holding that the trial court was not authorized to expunge defendant's felony conviction because his sentence was "imposed," not deferred, and thus, he was not eligible to have his sentence dismissed, which was a prerequisite to expungement).

remedies in most states.¹³² The remedy may require legislative approval under statutory authority¹³³ and may be limited only to the state where the conviction was entered, which may be different and far from both the current residence of the potential guardian and the state where the guardianship is sought.¹³⁴ Finally, even if relief is obtained through one of the remedies, there is no guarantee that the probate court will view the dismissed, expunged, or pardoned felony as removing the barriers to appointment because the acts of expungement or pardon do not remove the conviction; they merely cause the court to destroy or seal the records of the conviction.¹³⁵

Despite the potential remedies a felon may pursue to become an eligible guardian, the feasibility of using the alternatives of dismissal, annulment, expungement, sealing, or pardon are not realistic to the general population. This is especially significant to the indigent and other vulnerable groups, taking into consideration the resources needed to pay the legal costs of seeking such remedies. Hence, groups such as those with a higher percentage of felonies and the impoverished may need to seek other, more affordable alternatives. One possibility, if the ward was competent at some point in his or her life, is the execution of a durable power of attorney.

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

Many states, under statute, allow a principal who possesses capacity to choose an the attorney-in-fact to make temporal decisions for the principal under a power of attorney.¹³⁶ Generally, the attorney-in-

132. See, e.g., *State v. Schumacher*, 959 P.2d 465, 467 (Idaho Ct. App. 1998) (stating that dismissal and expunction of records is an “extraordinary remedy”).

133. *United 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 that no other circumstances existed to warrant such relief).

134. See generally *United States v. Noonan*, 906 F.2d 952 (3d Cir. 1990) (holding that even though the defendant had received a presidential pardon, he was not entitled to expunction of his court records relating to his conviction; 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, and that the presidential pardon would not eradicate a defendant’s guilt so as to justify expunction of his criminal record); Gulbis, *supra* note 59.

135. 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. See *supra* notes 26, 99 and accompanying text.

136. See *infra* app. A.

fact, as an agent, acts on behalf of the principal to accomplish the principal's purposes.¹³⁷ The agent's authority and ability to act is limited to what the principal may undertake.¹³⁸ If the principal, under a general power of attorney, is unable to act due to incapacity, the agent's ability to act is likewise restrained.¹³⁹

Many states, however, have expanded the ability of the agent to act, not only allowing a general power of attorney, but also providing 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 to continue acting in the principal's name, even where the principal has subsequently become incapacitated and unable to make important decisions.¹⁴⁰

Because 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 acts as a substitute for appointing a guardian under guardianship statutes.¹⁴¹ The durable power of attorney, if valid, is an excellent alternative to a guardianship in most situations.

137. 3 AM. JUR. 2D *Agency* § 21 (2006) [hereinafter *Agency*]; Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 GA. L. REV. 1, 4-6 (2001); Judith C. Ensor, Awilda R. Marquez & Kathryn A. Turner, *Property, Development in Maryland Law, 1985-86*, 46 MD. L. REV. 801, 818-20 (1987). Many legislatures have created statutory authority for a principal to choose an attorney-in-fact to act in his or her behalf. If the principal has executed a power of attorney pursuant to the requirements of the statute, the attorney-in-fact may make the decisions delegated to him or her in the power of attorney without the necessity of obtaining court approval, as in a guardianship proceeding. Likewise, and more importantly, when the attorney-in-fact or agent acts without court approval, he or she may also act without judicial review and oversight as well, thus creating an environment ripe with the potential for abuse and exploitation by the agent of the principal's property.

138. *Agency*, *supra* note 137.

139. *Id.* § 55.

140. 20 PA. CONS. STAT. ANN. § 5604(b) (West 2006); *Agency*, *supra* note 137, § 2b.

141. Carolyn L. Dessin, *Financial Abuse of the Elderly: Is the Solution a Problem?*, 34 MCGEORGE L. REV. 267, 282-88 (2003); Robert Craig Waters, *Florida Durable Power of Attorney Law: The Need for Reform*, 17 FLA. ST. U. L. REV. 519, 522-24 (1990); Sean W. Scott, *Incapacity Plan*, <http://www.virtuallawoffice.com/incap.html> (last visited Jan. 28, 2007). Note that the filing of a guardianship may suspend the use of the 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 judicial scrutiny.¹⁴² The significant impediments to the utilization of the durable power of attorney tend to originate from the reluctance of financial and brokerage institutions to honor the agency, and not from limitations on its use through statutes, common law, or inadequate drafting.¹⁴³

A major advantage of a written power of attorney is that the principal or ward, while having capacity, chooses a surrogate decision maker, rather than a statute or a court making the decision after the principal's incapacity.¹⁴⁴ 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.¹⁴⁵ Furthermore, state statutes may establish the priority of surrogate decision makers, and a guardian appointed under a statutory priority may not be the principal's first choice.¹⁴⁶ Another advantage of a durable power of attorney is that it is not subject to the regular and statutorily required judicial review placed upon a court-appointed guardian.¹⁴⁷ Most state statutes require the guardian to prepare an inventory and to make an appearance or an accounting on an annual basis.¹⁴⁸

Additionally, the agent under a power of attorney is typically not required to report or provide accountings of the disposition of the

142. Waters, *supra* note 141, at 522–23.

143. Major Michael N. Schmitt & Captain Steven A. Hatfield, *The Durable Power of Attorney: Applications and Limitations*, 132 MIL. L. REV. 203, 211 (1991).

144. Elaine Hightower Gagliardi, *Estate Planning Goals*, in MODERN ESTATE PLANNING § 36.15, at 3 (2006).

145. Christy Holmes, Comment, *Surrogate Decisionmaking in the 90s: Learning to Respect Our Elders*, 28 U. TOL. L. REV. 605, 608–10 (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 (1997); Mark Fowler, Note, *Appointing an Agent to Make Medical Treatment Choices*, 84 COLUM. L. REV. 985, 1025–27 (1984).

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

147. Michael A. Kirtland, *Estate Planning for Protected Persons*, 65 ALA. LAW. 404, 407 (2004).

148. REBECCA BERG & KAREN P. CAMPBELL, FLORIDA GUARDIANSHIP: A RESOURCE FOR FAMILIES DEALING WITH ALZHEIMER'S DISEASE 5–6, available at <http://alzoneonline.phhp.ufl.edu/en/reading/guardian.pdf> (last visited Jan. 28, 2007).

principal's assets to a court, whereas a guardian is under a statutory duty to make such reportings, to obtain prior court approval before dissipating assets, and to possibly post a bond.¹⁴⁹ Furthermore, the attorney-in-fact has more discretion to make decisions quickly and on matters that a guardian may not be allowed to make due to court supervision and statutory restraints.¹⁵⁰ Typically, guardianships are more restricted and are subject to greater scrutiny by the courts as compared to an attorney-in-fact acting independently of the judiciary's observations.¹⁵¹

2. THE RISKS INHERENT IN A DURABLE POWER OF ATTORNEY

Due to the 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.¹⁵² The primary disadvantage of a durable power of attorney is that it allows the agent to more easily abuse or exploit the principal because of the ability to act quickly, with few statutory restraints, and without judicial review.¹⁵³ As a result, there may be greater temptation and opportunity to exploit and abuse the principal and the principal's assets than there would be for a guardian.

3. DISTINGUISHING CHARACTERISTICS

In most if not all jurisdictions in the United States, the guardianship commences when the proposed guardian initiates the proceedings with a petition.¹⁵⁴ The potential guardian provides personal information with the petition for the court to consider before appointing the applicant as the guardian.¹⁵⁵ The petition may inquire into the applicant's fitness to be a guardian, including whether he or she has been convicted of a felony.¹⁵⁶

149. *Id.*

150. FLA. STAT. ANN. §§ 744.3215(4), .3725 (2006).

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

152. Carolyn L. Dessin, *Acting as Agent Under a Financial Durable Power of Attorney: An Unscripted Role*, 75 NEB. L. REV. 574, 588–95 (1996); Holmes, *supra* note 145, at 607–12.

153. Boxx, *supra* note 137, at 12–13.

154. *See generally infra* app. A.

155. 39 AM. JUR. 2D *Guardian and Ward* § 65 (2006); *see also* MINN. STAT. ANN. § 525.542 (West 2006).

156. *See infra* app. A.

One of the most significant differences between a court appointed guardian and an attorney-in-fact selected by the principal is that the principal will generally not do a background check or require an application prerequisite for the selection of the attorney-in-fact.¹⁵⁷ Anyone who qualifies under the power of attorney statutes may serve as an attorney-in-fact, regardless of criminal history.¹⁵⁸ Such a process is not typical for a guardianship appointment.¹⁵⁹

The durable power of attorney is also problematic in many situations where it may not be feasible for the ward to have prepared the document, such as when the ward does not possess the capacity¹⁶⁰ or when the power of attorney was not timely executed before incapacity. Again, the classes most affected are the indigent, because of their lack of financial resources to have such instruments prepared, and those who lack the capacity to prepare the document.¹⁶¹

In such cases where powers of attorney are not executed and the ward has no estate, it may be difficult to exercise the guardianship alternative.¹⁶² If the proposed guardian, frequently a family member, has a felony conviction, the ward may be denied adequate choices of substitute decision makers in certain states.¹⁶³

157. *Id.*

158. The statutes are generally silent on whether a criminal may be an attorney-in-fact, instead adopting a "best interest of the principal requirement" as consistent with the fiduciary duties that courts have historically imposed on attorneys-in-fact. See, e.g., MO. REV. STAT. § 404.714 (2006); N.Y. GEN. OBLIG. LAW §§ 5-1501, -1503 (McKinney 2007). "[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) (citing *Moglia v. Moglia*, 144 A.D.2d 347, 348 (N.Y. App. Div. 1988)). 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, 752 (N.Y. App. Div. 1990).

159. *Bailey v. Maxwell*, No. CA 05-700, 2006 WL 476982 (Ark. Ct. App. Mar. 1, 2006) (finding that the appellant had not shown that she was qualified to serve as guardian because she offered no testimony stating that she was not a convicted and unpardoned felon); see also ARK. CODE ANN. §§ 28-65-210(3) & -203(a) (2006).

160. Lawrence A. Frolik & Mary F. Radford, "Sufficient" Capacity: *The Contrasting Capacity Requirements for Different Documents*, 2 NAT'L ACAD. ELDER L. ATT'YS J. 303, 313 (2006).

161. Louis S. Rulli, *Employment Discrimination Litigation Under the ADA from the Perspective of the Poor: Can the Promise of Title I Be Fulfilled for Low-Income Workers in the Next Decade?*, 9 TEMP. POL. & CIV. RTS. L. REV. 345, 377 (2000).

162. Barnes, *supra* note 5, at 713 ("With unpaid proxies, however, there is seldom anyone willing to undertake the task.")

163. Florida has an absolute ban on appointing a felon as a guardian, regardless of the circumstances. FLA. STAT. § 744.309(3) (2006).

When the power of attorney is not a feasible alternative and a felon who was successfully appointed as guardian relocates the ward to a different state, it is unclear whether the courts in the forum jurisdiction will exercise full faith and credit of prior adjudications of incapacity and the appointment of the guardian.

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 various uniform guardianship models and standards in an attempt to bring consistency to the different guardianship statutes.¹⁶⁴ Although not binding or mandatory, they serve as guides for state legislatures and encourage uniform application among the states.¹⁶⁵ In all cases, however, the uniform schemes that have been presented are insufficient because they do not provide for judicial discretion when determining whether the appointment of the guardian is in the ward's best interest.

1. UNIFORM STANDARDS

Although all fifty states and the District of Columbia have enacted guardianship statutes, most states have been reluctant to conform to a national uniform standard.¹⁶⁶ Only eighteen states have adopted the Uniform Probate Code (UPC), and the majority have adopted statutes inconsistent with other states' statutory schemes.¹⁶⁷

This article does not discuss the tensions that inherently exist between the federal system and its interaction with state sovereignty except to observe that it is not unusual for states to adopt uniform laws and adapt them to their individual needs.¹⁶⁸ 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

164. Daniel & Hannaford, *supra* note 1, at 371–72.

165. 10 WEST GROUP, ENCYCLOPEDIA OF AMERICAN LAW 189–90 (1998).

166. *See infra* app. A.

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

168. Some examples include the Uniform Child Custody Jurisdiction Act, Uniform Probate Code and the Uniform Guardianship and Protective Placement Act.

forum states give deference to a foreign state's judgments and decrees under the U.S. Constitution or other legislative provisions?

2. FULL FAITH AND CREDIT

The question remains as to what extent the forum state must honor a prior guardianship order where a guardianship has already been established in one state and the ward moves to a different jurisdiction.¹⁶⁹ Jurisdictions appear to provide different levels of full faith and credit¹⁷⁰ when honoring and giving deference to the enforcement of the foreign jurisdiction's order. Some states appear to honor the foreign judgment *carte blanche*, 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*,¹⁷¹ Bryan Pulley had been living with his father, Mr. Pulley, in Boonville, Missouri, when at age seventeen, Bryan was involved in a serious automobile accident and suffered a permanent brain injury.¹⁷² A few weeks after the accident, Bryan moved to Michigan with his mother, Mrs. Sandgren, to gain eligibility for medical rehabilitation treatments in Michigan.¹⁷³ In 1994, following Bryan's eighteenth birthday, the Michigan probate court appointed Mrs. Sandgren as Bryan's guardian and Bryan continued to live with his mother, who served as the payee for Bryan's social security benefits.¹⁷⁴

In 1998, Mrs. Sandgren and Bryan moved to Virginia, where Mrs. Sandgren became unhappy with Bryan's rehabilitative progress, and thereafter, Bryan returned to live with Mr. Pulley in Missouri.¹⁷⁵ In October 2003, Mr. Pulley petitioned the Missouri court to register the foreign Michigan guardianship order, and the guardianship case

169. 39 AM. JUR. 2D *Guardian and Ward* § 74 (2006) (“[T]he appointment of a guardian cannot be questioned in a collateral proceeding, unless the proceedings show upon their face that the court was without jurisdiction to make the order of appointment.”). Thus, the title of the guardian cannot be collaterally attacked because of mere irregularities in the appointment or in the underlying proceedings. *Bd. of Children's Guardians of Marion County v. Shutter*, 34 N.E. 665, 666–67 (Ind. 1893).

170. Daniel & Hannaford, *supra* note 1, at 354 n.12.

171. 197 S.W.3d 162 (Mo. Ct. App. 2006).

172. *Id.* at 164.

173. *Id.*

174. *Id.*

175. *Id.*

was transferred to Missouri on August 24, 2004.¹⁷⁶ On December 9, 2004, the Missouri court entered a judgment that removed Mrs. Sandgren as Bryan's guardian, and the court appointed Mr. Pulley as Bryan's successor guardian.¹⁷⁷ Mrs. Sandgren appealed Mr. Pulley's appointment in the Missouri court.¹⁷⁸

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.¹⁷⁹ In Missouri and similar jurisdictions, courts generally interpret Article IV, Section 1 of the U.S. Constitution as requiring 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.¹⁸⁰

The Missouri court not only gave the Michigan order deference, but also held that with respect to a foreign order or judgment the courts in Missouri must presume that the foreign court had jurisdiction and that the court rendered a valid judgment in accordance with the state's laws.¹⁸¹

In jurisdictions like Missouri that provide complete deference to a foreign jurisdiction's orders and decrees, the forum state is precluded from making any inquiry into the merits of the underlying case and must accept the order "free from questioning the logic or consistency of the decision, or the validity of the legal principles upon which it is based."¹⁸²

Under this rationale, 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. In the absence of a uniform

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 165 (explaining that 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); *see also* U.S. CONST. art. IV, § 1.

180. FLA. STAT. §§ 744.306, .308 (2006); MO. ANN. STAT. § 475.055(3) (West 2006); N.H. REV. STAT. ANN. § 464-A:44 (2006); S.D. CODIFIED LAWS, § 29A-5-114 (2006); TENN. CODE ANN. § 34-1-117(b)(1) (West 2006); TEX. PROB. CODE ANN. § 881 (Vernon 2006); W. VA. CODE ANN. § 44A-1-12(a) (LexisNexis 2006).

181. *Pulley*, 197 S.W.3d at 166.

182. *Id.*

application of guardianship laws, one may question whether such a policy is always in the best interest of the ward or whether it encourages forum shopping.

b. Partial Credit Yet how much deference must the forum court allow? In the case of *In re Replogle*,¹⁸³ Elizabeth Replogle, a forty-one-year-old developmentally challenged adult, resided in Indiana for most of her life.¹⁸⁴ Elizabeth's mother, Ms. Zierer, had been appointed Elizabeth's guardian under an Indiana guardianship order.¹⁸⁵ After the appointment as guardian, Ms. Zierer moved Elizabeth to Ohio.¹⁸⁶ Several years later, in January 2004, Elizabeth's sister, Nancy Smith, filed a petition in the Indiana court seeking to have Ms. Zierer removed as Elizabeth's guardian.¹⁸⁷ Ms. Smith's petition alleged that Ms. Zierer abused Elizabeth and that Elizabeth was moved to a nursing home facility in Ohio without notice to or approval of the Indiana court.¹⁸⁸

On May 25, 2004, the Indiana court entered an order requiring Ms. Zierer to return Elizabeth to Indiana.¹⁸⁹ Immediately thereafter, Jennie Lee Clark filed the guardianship action in Ohio in which she asked the court to appoint her as Elizabeth's guardian.¹⁹⁰ The court appointed Clark as Elizabeth's emergency guardian for a limited time.¹⁹¹ 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.¹⁹² The Ohio trial court, pursuant to Ms. Smith's request, entered an order terminating the Ohio guardianship.¹⁹³

On appeal, the Ohio Court of Appeals held that under the full faith and credit clause of the Constitution, Ohio was not required to give the foreign judgment more preclusive effect than would be con-

183. 841 N.E.2d 330 (Ohio Ct. App. 2005).

184. *Id.* at 332.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. Jennie Lee Clark's relationship to Elizabeth Replogle is unclear. As the court stated, the "record in this case is sparse. The relevant facts [were] gleaned from the pleadings." *Id.*

191. *Id.* at 333.

192. *Id.*

193. *Id.*

sistent under Ohio law, despite the fact that the Indiana guardianship order could be modified in Indiana.¹⁹⁴ Hence, the full faith and credit clause did not require the Ohio court to give the Indiana order *carte blanche* deference and enforcement, but it did require full faith and credit deference in enforcing the Indiana order with no more preclusive effect than the order would have had in Ohio.¹⁹⁵

Consider further the case of *Teresa L. v. Sauk County*,¹⁹⁶ where the Wisconsin Court of Appeals found that the judiciary may modify a foreign order appointing a guardian despite the full faith and credit clause.¹⁹⁷ Teresa and Jimmie were divorced in the summer of 1992, and in January 1993, Jimmie was hospitalized in Miami after an accident.¹⁹⁸ The Guardianship Program for Dade County, Florida, was appointed as Jimmie's guardian.¹⁹⁹ On October 6, 1993, Teresa petitioned the Wisconsin Circuit Court to appoint her as guardian of Jimmie's person and estate.²⁰⁰ Sauk County gave notice of its intention to move to dismiss Teresa's petitions for lack of venue because Jimmie was not a resident of the county or physically present therein, but prior to the hearing Teresa moved Jimmie to Wisconsin.²⁰¹

On October 20, 1993, the Wisconsin Circuit Court directed Teresa to transport Jimmie back to Florida.²⁰² It dismissed Teresa's petitions after finding that Jimmie was not a resident of Wisconsin and held that the Wisconsin Circuit Court was required to give full faith and credit to the factual findings of the Florida court.²⁰³ The next day, Teresa moved the Wisconsin Circuit Court to grant her petition for guardianship on the alternative statutory ground that Jimmie was in

194. *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 U.S. Constitution. *Id.* 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. *Id.* (citing *Kovacs v. Brewer*, 356 U.S. 604 (1958) (noting that when a guardianship order is obviously modifiable in the rendering state, it is necessarily modifiable in the forum state)).

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

196. No. 93-2826, 1993 WL 538272 (Wis. Ct. App. Dec. 30, 1993).

197. *Id.* at *3.

198. *Id.* at *10-11.

199. *Id.* at *11.

200. *Id.* at *1.

201. *Id.*

202. *Id.*

203. *Id.* at *2.

Wisconsin under extraordinary circumstances requiring medical aid or the prevention of harm to his person.²⁰⁴

The Wisconsin Court of Appeals found that Teresa was legally capable of discharging her duties as established by the court in Florida.²⁰⁵ The court of appeals also 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 because "the error was one of law and resulted in the erroneous exercise of the [Wisconsin] Circuit Court's discretion."²⁰⁶ The Wisconsin appellate court found that the trial court was not required to extend full faith and credit to the Florida order because 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."²⁰⁷ Hence, the Wisconsin court was not required to give the Florida order full faith and credit without scrutiny from the forum court.²⁰⁸ 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."²⁰⁹

Because 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.²¹⁰ Consequently, the court held that the state may ignore the residency findings in the Florida order without offending the Full Faith and Credit Clause.²¹¹

204. *Id.*

205. *Id.*

206. *Id.* at *5.

207. *Id.*

208. *See id.*

209. *Id.* (quoting *N.Y. ex rel. Helvey v. Helvey*, 330 U.S. 610, 615 (1947)); *see also In re Kassler*, 19 N.Y.S.2d 266 (1940). New York does not require recognition of the foreign guardianship in that foreign guardians cannot assert authority outside of the jurisdiction governing the appointment of the foreign state. *Id.* 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. *Id.*

210. *Teresa L.*, 1993 WL 538272, at *4.

211. *Id.*; *see also State ex rel. Kern v. Kern*, 116 N.W.2d 337, 340 (Wis. 1962). In *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. *Id.* at 836. The New York court found that the paternal grandmother maintained lawful custody of the children under New York law even though the paternal aunt argued that the federal Constitution required that full faith and credit be given to a Florida custody-and-guardianship order. *Id.* at 837. The court found that at the time of the entry of the Florida order, the children's aunt did not have lawful custody and had not been

By limiting its deference to foreign judgments, the Ohio court may not be required to give a foreign decree *carte blanche* deference in a guardian's appointment, even if felons could serve as guardians in a foreign state such as Indiana. On the other hand, the felon-guardian could arguably serve in Ohio, even if Ohio otherwise objected to felons serving as guardians, because Ohio's eligibility requirements for the appointment of a guardian would be more "preclusive" than Indiana's. Nevertheless, the question that still remains is how much deference a forum state must 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 consideration of the ward's "best interest."²¹²

In *Hilkmann v. Hilkmann*,²¹³ the Pennsylvania Supreme Court explored the concept of comity in deciding whether to extend deference

appointed their guardian by the New York court. *Id.* Hence, the trial court held that the Constitution did not require the extension of full faith and credit to neither the Florida guardianship order nor the custody order because the aunt was not in legal custody of the children when the Florida court entered the order. *Id.*; see also *Helvey*, 330 U.S. 610; *Morgan v. Potter*, 157 U.S. 195 (1895); *Bachman v. Mejias*, 136 N.E.2d 866 (N.Y. App. Div. 1956); Albert A. Ehrenzweig, *Interstate Recognition of Custody Decrees: Law and Reason v. the Restatement*, 51 MICH. L. REV. 345, 346 (1953).

212. *Guardianship of Enos*, 670 N.E.2d 967 (Mass. App. Ct. 1996). The Massachusetts court enforced a Florida guardianship order after a daughter removed her ninety-year-old incapacitated mother to Massachusetts in violation of the Florida decree. *Id.* at 969. The court acknowledged that some states have declined to give full faith and credit to guardianship decisions issued by other states, but it 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." *Id.* at 968. Hence, the Massachusetts court declined to grant habeas corpus writ to the daughter when the guardian failed to proffer a reason not to accord the Florida orders full faith and credit, thus allowing Florida to continue enforcing criminal charges against the daughter in Florida. *Id.* at 968-69. The court considered the ward's best interest, and the paramount consideration was the well-being of the ward and whether travel would be an unacceptable risk to her, despite the fact that Florida had both personal and subject-matter jurisdiction, was the more convenient forum, was the residence of all of the potential witnesses, and was the jurisdiction to which the guardian had submitted herself. *Id.* at 969.

213. 858 A.2d 58 (Pa. 2004).

to a foreign court's guardianship order.²¹⁴ In July of 1999, Leila Hilkmann filed a guardianship petition with the Israeli Court of Family Affairs to become the guardian of her son, Daniel.²¹⁵ The mother attached to the guardianship petition a medical opinion by the son's pediatrician that described Daniel's mental incapacity, and the Israeli social welfare division, in conjunction with the Israeli Court of Family Affairs, temporarily appointed Mrs. Hilkmann as guardian for six months.²¹⁶ The father, Dirk H. Hilkmann, received the mother's petition but failed to respond immediately.²¹⁷ 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.²¹⁸ Subsequently, Mr. Hilkmann responded on February 8, 2000, protesting the Israeli court's grant of permanent guardianship.²¹⁹

In July 2000, the Hilkmann children flew to the United States to see their father for a previously scheduled visit, but while Daniel's sister returned to Israel, Daniel remained with his father, who enrolled Daniel in a local community college program for persons with special needs.²²⁰ On September 5, 2000, Mrs. Hilkmann registered the Israeli guardianship order in a Pennsylvania court and filed a petition requesting that Pennsylvania enforce the Israeli guardianship order by forcing Daniel to return with her to Israel.²²¹

The Pennsylvania Supreme 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.²²² The Pennsylvania court found that the Full Faith and Credit Clause of the U.S. Constitution was inapplicable to a foreign country's decree.²²³ The Pennsylvania court considered whether the principle of comity supported its enforcement of a foreign guardianship despite lacking statutory or other authority to give deference to the Israeli or-

214. *Id.* at 60.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.* at 61.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.* at 63-65.

223. *Id.* at 64-65.

der.²²⁴ The court noted that the Israeli order was not tainted by fraud, would not outrage the court's sense of justice, and was not obtained for the purpose of contravening the state's laws or public policy.²²⁵

Mr. Hilkmann disputed that the Israeli court correctly found his son to be "incompetent," arguing 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.²²⁶ Mrs. Hilkmann, on the other hand, argued that the court should give deference to the Israeli order under the principle of comity.²²⁷

The court considered that comity had been extended to nonguardianship matters when domesticating foreign money judgments²²⁸ and accepting foreign adoptions.²²⁹ Nonetheless, the appellate court found that the trial court abused its discretion by violating Pennsylvania's public policy and the court's sense of justice.²³⁰ The Pennsylvania Supreme Court also noted the appellate court's concern that the trial court's "decision would allow any foreign citizen to enforce a guardianship decree and commensurate finding of incompetency, regardless of the manner in which it was issued."²³¹ The court refused to extend carte blanche deference under principles of comity, instead choosing to exercise its "sideline quarter-backing" and discretion.²³² The Pennsylvania court did not grant deference under principles of comity out of concern that the Israeli court failed to hear sufficient evidence of Daniel's competency and that Daniel's interests were not represented at the Israeli proceeding by a guardian ad litem.²³³

Had the circumstances been different in the foreign jurisdiction, would a sister state enforce the foreign order under principles of comity? Courts generally scrutinize a foreign order under principles of comity more closely than they might under full faith and credit.²³⁴

224. *Id.* at 65–70.

225. *Id.* at 67.

226. *Id.* at 68.

227. *Id.* at 65.

228. *Id.* at 68.

229. *Id.* at 65.

230. *Id.* at 68.

231. *Id.* at 63.

232. *See id.* at 68.

233. *Id.*

234. *State v. Nath*, 52 P.3d 857, 861 (Idaho 2002).

Likewise, in the case of *Kulekowskis v. DiLeonardi*,²³⁵ the court found that there was “an element of discretion when determining whether to grant comity to a foreign judgment.”²³⁶ “Anthony DeSilva and Tammy Lynn Wright (‘Tammy’) were married in October 1986 and bought a home together in Winnipeg, Canada.”²³⁷ In December 1987, DeSilva and Tammy were involved in a serious automobile accident in Illinois that left Tammy quadriplegic with permanent and extensive brain damage.²³⁸ On March 24, 1988, despite the objections of Tammy’s parents, Mr. and Mrs. Wright, the Illinois court appointed DeSilva as sole guardian of his wife’s estate and person with no restrictions.²³⁹

In July 1989, DeSilva transferred Tammy back to their home in Winnipeg so she could receive Canada’s socialized health care services for which she was eligible.²⁴⁰ After the move, DeSilva took Tammy to Chicago for further testing, and Mrs. Wright’s attorney represented to the Winnipeg Police Department that DeSilva had kidnapped Tammy from her home in Winnipeg.²⁴¹ The attorney, however, did not inform the Winnipeg Police Department of DeSilva’s legal guardianship over Tammy.²⁴² The Winnipeg Police Department arranged for DeSilva and his companions to be stopped at the border by the Royal Canadian Mounted Police and the Ontario Provincial Police, and DeSilva was charged with kidnapping.²⁴³ At Canada’s request, the U.S. Attorney sought DeSilva’s extradition and DeSilva brought before the Illinois court a writ of habeas corpus seeking relief from the outstanding extradition order.²⁴⁴ In support of his habeas petition, DeSilva claimed that the dual criminality element mandated by the Treaty of Extradition between the United States and Canada (the Treaty) was lacking.²⁴⁵

The Illinois court granted DeSilva’s habeas relief for noncompliance with the dual criminality requirement of the Treaty, reasoning

235. 941 F. Supp. 741 (N.D. Ill. 1996).

236. *Id.* at 746.

237. *Id.* at 742.

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.* at 743.

243. *Id.*

244. *Id.* at 744.

245. *Id.*

that it would be necessary to examine DeSilva's conduct under the reverse fact scenario required by the dual criminality element of the Treaty.²⁴⁶ If the facts were reversed, the court found that Illinois would be unable to successfully prosecute DeSilva for kidnapping because it would not require him to register his Canadian guardianship in Illinois.²⁴⁷ Illinois would recognize a valid Canadian guardianship under principles of comity, and a Canadian guardian, like an Illinois guardian, would not be capable of kidnapping his ward from Illinois.²⁴⁸ Thus, because the guardians' conduct would not be criminal in Illinois, the dual criminality requirement of the Treaty was not satisfied.²⁴⁹

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, explaining that comity "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."²⁵⁰ Comity is extended by U.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]."²⁵¹ The court found that in order to extend comity, the moving party must establish a prima facie case that the judgment was entitled to recognition.²⁵²

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.²⁵³ The court held that interpreting comity as giving a tribunal total discretion was "fallacious insofar as it casts the decision of whether to accord recognition to a foreign judgment in an arbitrary and whimsical light."²⁵⁴ Comity required not an arbitrary decision but a decision based on the recognition that the court's authority is condi-

246. *Id.*

247. *Id.* at 746.

248. *Id.* at 750.

249. *Id.* at 745-46.

250. *Id.* at 747.

251. *Id.*

252. *Id.*

253. *Id.* at 748.

254. *Id.* at 746.

tioned on the application of the four-part test.²⁵⁵ In this case, the court found that the guardian met the necessary threshold criteria to invoke the doctrine of comity.²⁵⁶

If full faith and credit is recognized, how much comity should be given?²⁵⁷ Arguably, under full faith and credit, and furthermore, under principles of comity, the court may conditionally accept the foreign order, then make inquiries and modifications.²⁵⁸

3. THE WARD'S BEST INTEREST AND 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 its courts to accept foreign guardianships if the transfer of the guardianship from the foreign jurisdiction is in the best interest of the ward.²⁵⁹ Under judicial discretion, would 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.²⁶⁰ This policy could be argued to allow the foreign jurisdiction's guardianship appointment, regardless of whether the Texas court would have ap-

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

256. *Kulekowskis*, 941 F. Supp. at 748. Guardianship decisions have occasionally been denied full faith and credit in some jurisdictions. See, e.g., *Mack v. Mack*, 618 A.2d 744, 749–51 (Md. 1993).

257. See *Hoyt v. Sprague*, 103 U.S. 613, 631 (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 N.Y.*, 34 F.2d 916 (2d Cir. 1929) (applying *Hoyt v. Sprague*); *Mack*, 618 A.2d at 749–51 (holding that full faith and credit does not apply to foreign guardianship orders).

258. See *infra* app. C.

259. 42A TEX. JUR. 3D *Guardianship and Conservatorship* § 480 (2007).

260. ROBERT H. WEBER, *ESTATE PLANNING FOR THE AGING OR INCAPACITATED CLIENT IN MASSACHUSETTS: PROTECTING LEGAL RIGHTS, PRESERVING RESOURCES, AND PROVIDING HEALTH CARE OPTIONS* §§ 3.6–.7 (Mass. Continuing Legal Educ., Inc. 2005).

pointed the guardian under its laws.²⁶¹ It may also 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.²⁶² Under either argument, the matter has not been decided and therefore creates ambiguity.

B. Preservation of Checks and Balances

The constitutional doctrines of separation of powers and checks and balances were designed to separate the branches of government and ensure that each branch is free from the control and coercion of the others.²⁶³ 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.²⁶⁴ Precisely at issue is whether the first fundamental prohibition delineated by the 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*²⁶⁵ established the judiciary’s fundamental power of judicial review. 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.²⁶⁶ While the Constitution is clear that no branch may encroach upon the power of another, the separation of powers has continually been challenged by statutes attempting to remove the court’s discretionary powers.²⁶⁷

Four states’ guardianship statutes, as well as the majority of uniform models and standards, explicitly prohibit the appointment of felons as guardians,²⁶⁸ thus effectively removing the judiciary’s decision-making ability concerning felons’ guardianship eligibility. De-

261. Daniel & Hannaford, *supra* note 1, at 366.

262. *Id.*

263. *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 603 (1935).

264. FLA. CONST. art. II, § 3; *Bush v. Schiavo*, 885 So. 2d 321, 329 (Fla. 2004).

265. 5 U.S. 137, 177 (1803).

266. *See id.* at 176–79.

267. For example, in *State v. Curtin*, a Florida court recognized that the Sexual Predator Act could arguably violate the separation of powers doctrine because it eliminated the court’s discretionary function. *State v. Curtin*, 764 So. 2d 645 (Fla. Dist. Ct. App. 2000).

268. *See supra* note 24 and accompanying text.

spite the resulting 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 *In re Lagrange*²⁶⁹ 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 must at times [become] the unwitting instruments of hardship and even of downright injustice."²⁷⁰ Rather than infringing on or effectively eliminating the judiciary's discretionary power by an outright prohibition against certain people 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's discretion to determine whether a felon may be an eligible guardian, the balance of powers established as early as *Marbury* are again challenged and the judiciary's checks and balances are again eroded.²⁷¹ The separation of the powers of government encompasses both the state and federal constitutions.²⁷² When a statute removes judiciary discretion, the statute arguably violates the separation of powers between the branches of the government.²⁷³

269. 274 N.Y.S. 702 (1934).

270. *Id.* at 706.

271. Describing the fundamental role of the judiciary, the Court in *Marbury v. Madison* stated that it "is emphatically the province and duty of the judicial department to say what the law is." *Marbury*, 5 U.S. at 177; *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, 23 (Mass. 1996).

272. The constitution of the State of Florida provides that the powers of the state government 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).

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

However, in the case of *Reyes v. State*,²⁷⁴ the Florida Fourth District Court of Appeal held that the Sexual Predator Act, which effectively removed any discretion from the trial court, did not violate the 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.²⁷⁵ But not all Florida courts agreed. In *State v. Curtin*,²⁷⁶ Florida's First District Court of Appeal was concerned that the Sexual Predator Act may violate the separation of powers because it removed court discretion to impose the sexual predator designation on a defendant.²⁷⁷

Recognizing the limitations imposed on the judiciary by restraining its case-by-case decision making, policymakers should reconsider the removal of court discretion in appointing felons as guardians, especially because the demand for eligible guardians may outstrip the supply of available guardians.²⁷⁸ By adopting a "best interest of the ward test," even though it may be more subjective and not as judicially efficient, legislatures would preserve the significant role of judicial interpretation, and the ward's best interest would preserve the balance that is required for a rational basis standard of review.

274. 854 So. 2d 816 (Fla. 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 statutory criteria, thus removing from the trial court any discretion in making this determination. *Id.* at 819. In *Kelly v. State*, 795 So. 2d 135, 137 (Fla. Dist. Ct. App. 2001), the Fifth District rejected this argument as did the Second District in *Milks v. State*, 848 So. 2d 1167, 1169 (Fla. Dist. Ct. App. 2003). *Cf.* *State v. Cotton*, 769 So. 2d 345 (Fla. 2000) (holding that the Prison Releasee Reoffender Punishment Act, although removing all discretion from the trial court and transferring it to the state attorney, did not violate the separation of powers clause).

275. *Reyes*, 854 So. 2d at 819; *see also* FLA. CONST. art. II, § 3; FLA. STAT. § 775.21(4)(a)1, (5)(a)1 (2006).

276. 764 So. 2d 645.

277. *Id.*

278. In October 2003, the Florida Legislature passed a law that gave Governor Jeb Bush the authority to order that Terri Schiavo's feeding tube be reinserted. *Bush v. Schiavo*, 885 So. 2d 321, 328 (Fla. 2004). 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." *Id.* at 337. 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. *Id.* at 336.

C. Considerations of Policymakers

Two growing demographic trends, the increasing average age of the population and the increase in numbers of felony convictions,²⁷⁹ are currently on a collision course. Although the increasing number of felony convictions will disqualify only a small percentage 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. Policymakers may wish to rethink the laws that absolutely exclude persons with past felony convictions before more wards are denied familial assistance.

Uniform statutes in other areas of law balance the interests of affected categories of individual rights versus the states' interests, and legislatures may wish to borrow from such statutes with similar interstate concerns, such as the Uniform Child Custody Jurisdiction and Enforcement Act, or the prototype Uniform Adult Guardianship Jurisdiction and Protective Proceedings Act (UAGJPPA).²⁸⁰ In addition, Maryland's proposed Section 13-105(b)(3)²⁸¹ provides for full faith and credit of foreign guardianship orders if the foreign orders were issued in compliance with that state's guardianship procedures.²⁸² This would require an independent review of the foreign state's guardianship procedures for the court to determine whether the foreign order was entered in compliance with its own procedures.

Legislatures should also consider adopting the notice procedures found in uniform acts like the UAGJPPA, which provides that "[a]ll

279. Daniel & Hannaford, *supra* note 1.

280. Bureau of Justice Statistics, U.S. Dep't of Justice, Number of Felons Convicted in State Court (2002), <http://www.ojp.usdoj.gov/bjs/glance/felconv.htm>.

281. See, e.g., 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. *Id.* at 751. The court appointed a temporary guardian and reserved judgment on the guardianship issue until a later hearing. *Id.* at 761. The Florida guardian argued in her pretrial memoranda that the circuit court "should order withdrawal of Ronald's feeding tube." *Id.* at 748. 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." *Id.* The court found insufficient evidence that Ronald would have desired to terminate his life support systems rather than exist in a permanent vegetative state. *Id.*; see also William S. Heyman, *Developments in Maryland Law, 1992-93*, 53 MD. L. REV. 616, 908 (1994).

282. Sally Balch Hurme, *Current Trends in Guardianship Reform*, 7 MD. J. CONTEMP. LEGAL ISSUES 143 n.186 (1996).

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.”²⁸³ 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 provide due process notice to all concerned.

1. RATIONAL BASIS CHALLENGES

When policymakers determine that felons are excluded from serving as guardians *carte blanche*, 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 U.S. Constitution, the government must have a rational basis for imposing different standards for different classes of persons, in this case, felons versus non-felons.²⁸⁴ Classifications created by legislation that do not target either suspect classes, protected groups, or fundamental interests are not subject to a strict scrutiny test, but are subject to the rational basis review.²⁸⁵ Legislation is presumed to be valid and will be sustained if the classification drawn by a statute is rationally related to a legitimate state interest.²⁸⁶ To challenge a state statute under the rational basis test, the challenger must first identify the purpose for which the statute was designed, then show that there is no rational basis under which the legislative body could have concluded that the statute would have served its intended purpose.²⁸⁷ When dealing with vulnerable groups such as the elderly and the developmentally disabled, it is difficult, if not impossible, to convince a court that a statute prohibiting felons from serving as guardians violates the Constitution’s rational basis test.

Nevertheless, statutes such as Florida Statute section 744.309 may actually prevent needy wards from finding anyone eligible to

283. *Id.*

284. 16B AM. JUR. 2D *Constitutional Law* § 808 (2006).

285. *Id.* § 813.

286. *Id.*

287. *Id.*

serve as their guardian, especially when the ward has no estate funds.²⁸⁸ Granted, felons are not the most empathetic classification to curry favor; yet the statutes that preclude felons from serving as guardians dramatically affect the incapacitated and indigent who require a guardian. As a class, developmentally incapacitated persons who are in need of a guardian are innocent victims who are detrimentally affected by a statute that has as its basis the protection of said classes.

An incapacitated person may not have the benefit of a spouse to serve as a guardian under some states' restraining type statutes. A long-time spouse is a natural candidate to serve as a guardian and has substantial legislative priority with respect to the hierarchy of potential appointees,²⁸⁹ but some 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 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 child or sibling. The number of divorce filings has risen dramatically since 1950,²⁹⁰ and a significant segment of the elder population lives without a spouse, either due to divorce, death, or lifestyle choices.²⁹¹

Under guardianship statutes, one governmental interest is to protect the ward from exploitation and abuse.²⁹² It seems that some legislatures considered felons to be presumptively 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 felony, the age of the felon, the relationship between the felon

288. See FLA. STAT. § 744.309 (2006).

289. UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT OF 1997 § 310(a)(4) (West 2005).

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

291. WAN HE ET AL., U.S. DEP'T OF HEALTH & HUMAN SERVS., 65+ IN THE UNITED STATES: 2005, at 2–3 (2005), available at <http://www.census.gov/prod/2006pubs/p23-209.pdf>.

292. 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).

and the ward, and other circumstances. Such a blanket prohibition may be both underinclusive and overinclusive.²⁹³

The rational basis standard of review does not require the least restrictive means of achieving the permissible end so long as the state can rationally further its goal.²⁹⁴ Yet the absolute prohibition against felons serving as guardians is overinclusive.²⁹⁵ Not all felons are prone to be exploitative or abusive. Consider adults with marginal capacity who have been cared for by parents before reaching the age of majority. In such cases, the parents are the primary caregivers for the children, especially in cases where both the children and the parents are indigent. In situations like indigency where it is difficult for the ward to find a guardian and where the ward lacks an estate, the basis for the rule prohibiting felons as guardians is overinclusive and may fail the rational basis test.²⁹⁶

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 especially effective, another viable solution is requiring the states to adopt a uniform standard, statute, or code. Federal legislators and independent organizations have drafted numerous uniform standards and models—including the UPC, the Uniform Guardianship and Protective Placement Act (UGPPA), and the National Probate Court Standards²⁹⁷—to help the states adopt

293. *Cabell v. Chavez-Salido*, 454 U.S. 432, 440 (1982).

294. *Scariano v. Justices of Supreme Court of State of Ind.*, 38 F.3d 920 (7th Cir. 1994). *But cf.* *Tolchin v. Supreme Court of the State of N.J.*, 1111 F.3d 1099 (3d Cir. 1997) (“In addressing these questions [of the rational basis standard], we consider, among other things, whether less restrictive means of regulation we available.”).

295. *See, e.g., Hatcher v. Aetna Life Ins. Co.*, 105 F. Supp. 808 (D. Or. 1952); *In re Estate of Klein*, 378 A.2d 1182 (Pa. 1977); Michael G. Walsh, Annotation, *Homicide as Precluding Taking Under Will or by Intestacy*, 25 A.L.R. 4TH 787 (1983).

296. *Sugarman v. Dougall*, 413 U.S. 634, 643 (1973) (holding that a statute prohibiting employment of all aliens is overinclusive). The absolute prohibition may also be underinclusive 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, underinclusive to accomplish the legislature’s goals. Miriam R. Kennedy, *Considerations in Planning for Incapacity*, in *ESTATE PLANNING BASICS* 232 (2006).

297. NAT’L PROBATE COURT STANDARDS (Comm’n on Nat’l Probate Court Standards & Advisory Comm’n on Interstate Guardianships 1993), available at http://www.probatect.org/ohioprobatecourts/pdf/national_probate_standards.pdf [hereinafter *PROBATE STANDARDS*].

more cohesive guardianship statutes.²⁹⁸ 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.”²⁹⁹

The UPC does not mention “felony” and does not disqualify felons from acting as guardians. The National Guardianship Standard explicitly prohibits felons from being court-appointed registered guardians.³⁰⁰ The drafters of both the UPC and the Standard should consider moving toward a best interest model for the ward that requires disclosure of the prior felony. One benefit of this model is that if a felony is disclosed, the court may consider it as one element of determining the eligibility of the proposed guardian. In a case-by-case analysis, the court may then exercise the best interest of the ward.

a. Uniform Probate Code and the Uniform Guardianship and Protective Placement Act In 1969, the UPC was proposed by the National Conference of Commissioners on Uniform State Laws (NCCUSL).³⁰¹ The original UPC was replaced in 1991 by a revised version, which was derived from a study conducted by the Joint Editorial Board for the Uniform Probate Code, an organization representing the NCCUSL, the American Bar Association (ABA), and the American College of Trust and Estate Lawyers.³⁰² The UPC commissioners also formed a national conference to discuss, draft, and propose laws, codes, guidelines, and recommendations that should be uniform and consistent in

298. ENCYCLOPEDIA OF AMERICAN LAW, *supra* note 165.

299. Amy 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 (2006).

300. STANDARDS OF PRACTICE 17 (Nat’l Guardianship Assoc. 2002), available at <http://www.guardianship.org/members/pdf/standards.pdf> [hereinafter STANDARDS OF PRACTICE].

301. The NCCUSL was formed in 1892, and since that time has drafted more than 200 uniform laws. Unif. Law Comm’rs, About NCCUSL, <http://www.nccusl.org/update/> (follow About NCCUSL hyperlink; then follow Information About NCCUSL hyperlink) (last visited Jan. 29, 2007). It is a nonprofit, 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. *Id.* There are more than 300 commissioners appointed by each state. *Id.* Each state determines the number of commissioners and the method of their appointment, and most states provide for such measures by statute. *Id.* Conference members must be lawyers, qualified to practice law. *Id.* Most commissioners are practicing lawyers, judges, legislators, legislative staff, and law professors.

302. *Id.*

the treatment of said laws among the states.³⁰³ The UGPPA, which can be considered either a separate act or a subpart of the UPC,³⁰⁴ is derived from Article 5 of the UPC and addresses guardianships and conservatorships.³⁰⁵ Not every state has adopted the UPC or the UGPPA.³⁰⁶

Both the UPC and the UGPPA are silent on the issue of whether felons may serve as guardians and are, therefore, 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 section 744.309 expressly makes felons ineligible to serve as guardians.³⁰⁷ If Florida were to adopt the UPC or UGPPA, which are both silent on the issue of felons' eligibility to serve as guardians, statutory construction requires that specific statutes take

303. *Id.* During national conferences, 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. *Id.* Once the Executive Committee approves a recommendation, a drafting committee is appointed, and drafts of proposed laws are submitted for initial debate at the National Conference's annual meeting. *Id.* Once the draft is approved, it may be officially adopted as either a uniform or model act. *Id.* When the draft receives approval by the requisite number of states, it is then officially promulgated for consideration by the states. *Id.* In addition, the National Conference of Commissioners on Uniform Laws has provided a framework for transferring the jurisdiction of guardians. See § 107 of the Uniform Guardianship and Protective Placement Act (1997) (UGPPA) for specific information regarding this framework. Under the UGPPA, a foreign guardian may petition for appointment in the new state if venue is or will be established. *Id.* To date, the UGPPA has been adopted by Alabama, Colorado, Hawaii, Minnesota, and Montana. *In re* Guardianship of Jane E.P., 700 N.W.2d 863, 871 n.13 (Wis. 2005). 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 *id.*; Sally Balch Hurme, *Mobile Guardianships: Finding Solutions to Interstate Jurisdiction Problems*, J. NAT'L C. PROB. JUDGES 12 (2004); Unif. Law Comm'rs, Constitution and Bylaws, <http://www.nccusl.org/Update/> (follow About NCCUSL hyperlink; then follow Constitution and Procedures hyperlink) (last visited Jan. 29, 2007).

304. Unif. Law Comm'rs, Uniform Guardianship and Protective Proceedings Act (1997), http://www.nccusl.org/update/uniformact_summaries/uniformacts-s-ugappa97.asp (last visited Jan. 29, 2007). In 1997, revisions to the UGPPA were proposed by the ABA Senior Lawyers Division Task Force on Guardianship Reform. *Id.* 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. *Id.* Other groups interested in guardianship, such as AARP and the National Senior Citizens Law Center, also contributed heavily to the study. *Id.*

305. *Id.*

306. Legal Info. Inst., *supra* note 167 (Eighteen states have adopted one or the other.).

307. FLA. STAT. § 744.309 (2006).

precedence over broadly worded statutes and would thus undercut the uniformity created by nationwide adoption of such uniform acts.³⁰⁸

Moreover, although recent statutes generally prevail over older statutes, an older specific statute will nonetheless prevail over a more recent general statute.³⁰⁹ Because Florida Statute section 744.309 is more specific with respect to felons' eligibility than is the UPC or UGPPA, both of which are silent on the issue, section 744.309 will apply. States with statutes similar to Florida Statute section 744.309 thus undermine the uniformity sought in enacting the UPC or UGPPA, as the more specific statutes diverge from the UPC and UGPPA with respect to the eligibility of felons.³¹⁰

b. Interstate Guardianships Guardianships are largely creatures of state statutes.³¹¹ Each state has 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? Caregivers may relocate for personal reasons and wish to move the ward with them. Difficult issues may arise in these situations because many wards have connections to relatives, assets, and property in more than one state. The ward may also find the availability of different health care resources or caregiving services by relocating to a different forum.

When the ward relocates, the responsibility for the transition falls upon state courts.³¹² The new forum will be responsible for monitoring and enforcing guardianship orders that may have been issued

308. *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”).

309. Principles 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 Gov’t of Wyandotte County*, 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* *Pub. Employees Ret. Ass’n v. Greene*, 580 P.2d 385 (Colo. 1978). In addition, a specific statute controls over general legislation. *Tomasic*, 955 P.2d at 1152; *see also* *Motor Vehicle Div. v. Dayhoff*, 609 P.2d 119 (Colo. 1980).

310. *Dayhoff*, 609 P.2d 119.

311. *See infra* app. A. *See generally* Legal Info. Inst., *supra* note 167.

312. *Daniel & Hannaford*, *supra* note 1, at 352.

outside of the jurisdiction.³¹³ No clear standard exists as to how much deference the new forum should give to the foreign venue's orders and decrees.

c. National Probate Court Standards 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.³¹⁴

The National Probate Court Standards (NPCS or the Standards)³¹⁵ 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.³¹⁶ The NPCS were developed by a commission comprised of members of the National College of Probate Court Judges and the National Center for State Courts to provide commonality and cooperation between the states in the guardianship system.³¹⁷ The comments to the NPCS "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."³¹⁸ 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 NPCS ideally would not unnecessarily limit the ward's choices and preferences, each state supports its own eligibility criteria for the appointment of guardians that may conflict with the forum state's requirements and the ward's choice of guardian.³¹⁹ To

313. *Id.*

314. *Id.* at 366.

315. PROBATE STANDARDS, *supra* note 297.

316. *See id.* at 66–68.

317. *See generally id.*

318. JOAN L. O'SULLIVAN AND ANDREA I. SAAH, NATIONAL PROBATE COURT STANDARDS § 3.3 (Md. Inst. for Continuing Prof'l Educ. of Lawyers 2001).

319. PROBATE STANDARDS, *supra* note 297, at 104.

[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 guardian-

accomplish the ward's wishes, protect judicial discretion, and provide for the ward's best interest, courts should be free to adopt the NPCCS, regardless of their own legislative restraints, to allow the appointment pursuant to full faith and credit or principles of comity.³²⁰ The NPCCS commentaries suggest that the guardian be familiar with the laws and requirements of the forum jurisdiction but offer little guidance as to what the guardian should do if the eligibility requirements between the jurisdictions differ.³²¹ 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.³²² If the court does not require a hearing and no interested party sets the domestication of the guardianship order for a hearing, 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.³²³

In response to the question of deference to existing orders, the NPCCS commission prepared Standard 3.3.11, titled "Qualifications and Appointment of Guardians," and its subsequent commentary with a recommendation that the NPCCS adopt the "best interest of the

ship. 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*. Ideally, such changes should be made in accordance with the receiving court's monitoring and review schedule and requirements.

Id. (emphasis added). 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. *Id.*

320. Even under Standard 3.5.1, which 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. *See id.* at 102-03 (indicating that courts should work with state judicial and legal organizations and legislative committees to develop or modify rules, statutes, standards, codes, or procedures). The ideals of the NPCCS would require the individual state legislatures to prepare accommodating and more consistently uniform legislation.

321. *Id.* at 104-05.

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

323. John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1113 (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, 96-99 (1996).

ward” approach in the appointment of a guardian.³²⁴ Should the state legislatures or courts consider adopting the Standards of the NPCCS Commission?³²⁵

Although a sliding, best interest scale preserves judicial discretion, the Standards are insufficient as they remain silent on the issue of felons’ guardianship eligibility. A uniform standard must adequately address all issues or risk being trumped by individual state statutes that may address the issue with more specificity.³²⁶ For instance, the mother of a disabled child may still be disqualified under the NPCCS best interest test because the uniform scheme does not specifically address the issue and a specific state statute may exclude her as a prior felon.³²⁷ 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.³²⁸ If the NPCCS addressed the specific issue of whether courts may consider appointing felons as guardians in conjunction with the best interest approach, the uniform standards would have the potential to resolve interstate guardianship issues on this point.

324. PROBATE STANDARDS, *supra* note 297, at 66–68.

325. *Id.* at 101–02.

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.

Id. at 104–05.

326. A specific statute controls over general legislation. *Motor Vehicle Div. v. Dayhoff*, 609 P.2d 119, 121 (Colo. 1980).

327. See Clinic Memo, *supra* note 43, at 2; see also PROBATE STANDARDS, *supra* note 297.

328. See PROBATE STANDARDS, *supra* note 297.

The NPCCS Commission addressed a forum jurisdiction's deference to a foreign order in the commentary to Standard 3.5.3, which provides that the Standards are intended to extend to interstate guardianships and that certain provisions of the guardianship procedures are intended to be universally consistent, including reporting requirements by a guardian, requirements for annual reports, and accountings by the guardian.³²⁹ The NPCCS drafters intended to facilitate the transfer of guardianships to another state in cases where 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.³³⁰ The Standards are based on the presumption that most guardians are acting in the interest of the ward, and that the notice and reporting requirements, as well as the opportunity to object to the transfer, 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."³³¹

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 NPCCS 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."³³² 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 reporting requirements, appointment of

329. PROBATE STANDARDS, *supra* note 297, at 104-05.

330. *Id.*

331. *Id.*

332. *In re Guardianship of Jane E.P.*, 700 N.W.2d 863, 877 (Wis. 2005); *see also* PROBATE STANDARDS, *supra* note 297, 104-05.

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.”³³³ Does that mean that the forum court should scrutinize the guardian under the forum 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 NPCS?³³⁴ These questions remain unanswered.

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.”³³⁵ 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.³³⁶

d. National Guardianship Association Standards In 1991, the National Guardianship Association (NGA), a nonprofit corporation comprised of guardians, conservators, representatives, social workers, and 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.³³⁷ In response to continued abuses inherent in the guardianship system, the NGA revised its model standards in 2003 (Model Standards).³³⁸ Unlike the initial standards, the revision included a detailed list of specific qualifications

333. PROBATE STANDARDS, *supra* note 297, 104–05.

334. “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.*

335. *Id.* at 105.

336. 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.” *Id.* at 105–06. Again, such a review will not resolve an inconsistency in guardian eligibility requirements. According to the Commentary to this Standard, “[u]nless 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.” *Id.* (emphasis added).

337. STANDARDS OF PRACTICE, *supra* note 300, at 1.

338. *Id.*

that a candidate must satisfy to be eligible to be a court-appointed guardian.³³⁹ The Model Standards include persons with felony convictions in the class of persons ineligible to be considered registered guardians.³⁴⁰

Although the Model Standards were designed to benevolently screen potential guardians, they overreach by disqualifying many potential candidates from serving as guardians. For example, the mother of a disabled child would still be disqualified to serve as her child's guardian simply because she was convicted of a felony nineteen years earlier.³⁴¹ Rather than allowing the court to be the decision maker in considering the ward's best interest, the Model Standards restrain the court from appointing a guardian who may adequately represent the ward's welfare. Once the discretion is removed from the court, members of socioeconomic groups with a disproportionate number of felony convictions are most likely to be deprived of adequate guardians. Unless disenfranchisement is the goal of the Model Standards, the courts should be the responsible decision makers in guardianship cases.

e. The American Bar Association The ABA has also taken positions on the issue.³⁴² In 2002, the ABA's Commission on Law and Aging developed guardianship guidelines for state and local governments to consider for adoption.³⁴³ The recommendations are intended to guide states through policymaking decisions, including the establishment of uniform eligibility qualifications for the appointment of guardians.³⁴⁴ Specifically, Recommendations 45 and 46 suggest that states adopt the

339. *Id.* at 16.

340. *Id.* at 17.

341. *Id.*

342. COMM'N ON LEGAL PROBLEMS OF THE ELDERLY, AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES (2002), available at http://www.abanet.org/aging/resources/docs/elder_abuse.pdf.

343. A. Frank Johns & Charles P. Sabatino, *Wingspan—The Second National Guardianship Conference*, 31 STETSON L. REV. 573 (2002). "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." *Id.* at 573–74.

344. *Id.* at 595.

NGA's Standards of Practice and Model Code of Ethics for Guardianships to determine whether a potential guardian is qualified.³⁴⁵

Much like the position adopted in Florida, the ABA proposes a *carte blanche* prohibition on appointing felons as guardians.³⁴⁶ The ABA took this position partly out of concern about the elderly being a vulnerable group and subject to abuse.³⁴⁷ Although the ABA's concerns for elderly abuse are valid, its *nondiscretionary* prohibition on the appointment of felons as guardians is overreaching and inadequate. A blanket prohibition against felons serving as guardians fails to adequately address and prevent elder abuse, and it may deprive people of 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 that are important to consider when determining whether felons should be excluded as potential guardians, regardless of the circumstances. It is ultimately up to the legislatures or the courts to decide whether a person is appointed as a guardian. However, when the legislature removes the court's discretion in determining the appointment of a guardian, the balance of power has been impaired.³⁴⁸

Relying on improbable alternatives such as removing or nullifying a prior felony conviction, does not address the issue. The dismissal of a conviction upon rehabilitation is limited in scope and is 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 obtained in the state or jurisdiction

345. *Id.* at 604.

346. Press Release, Am. Bar Ass'n, ABA Commission to Develop Recommendations on Medical Forensic Issues Related to Elder Abuse and Neglect (Mar. 28, 2002) (on file with The Elder Law Journal).

347. *Id.*

348. *Bush v. Schiavo*, 885 So. 2d 321, 331 (Fla. 2004) (holding that a legislative enactment unconstitutionally encroaches upon the power of the judiciary where the act effectively reverses a properly rendered final judgment); *Moore v. Pearson*, 789 So. 2d 316, 319 (Fla. 2001) (finding that the Department of Corrections violated the separation of power doctrine when it refused to implement an otherwise lawful coterminous sentence).

where the conviction was entered,³⁴⁹ there is no guarantee that other jurisdictions will give them deference. However, if such relief is obtained, it is at least arguable that a previously ineligible petitioner may qualify for guardianship in the four states that disqualify felons from serving as guardians.

Nonetheless, pursuing a dismissal, expunction, or pardon may not be a feasible option for many people because these are “extraordinary remed[ies]” in most states.³⁵⁰ These remedies are, therefore, of limited use and probably effective in only a few situations where guardianships are sought by applicants with past felony convictions.

The deference a forum court should provide under full faith and credit to a foreign order or decree is not consistent 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, it is unclear whether a guardian who has been appointed in a foreign state, but who would be ineligible to serve as a guardian in a forum state, may continue to act within the forum state under principles of full faith and credit or comity.

Another alternative with a limited 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 limitations are that the power of attorney can be challenged in court and that the ward must enjoy capacity to execute a power of attorney.

The failure of the above alternatives leaves many unanswered questions. Do the uniform standards proposed by the National Probate Court 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? A guardianship’s purpose is to protect the ward. When model codes, acts, or legislation, fail to provide uniformity in administration and prevent the ward from either being protected or exercising the ward’s best interest, they fail their purpose.

349. A notable exception 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(a)(1) (West 2006).

350. *State v. Schumacher*, 959 P.2d 465, 467 (Idaho Ct. App. 1998).

Drafters may protect the ward by adding language to their mandates that provide as follows:

The purpose of this Code is to protect the person and the property of the ward. Even though certain persons may not be fit or otherwise eligible to act as the ward's guardian, as set forth within this Code, the court or judicial body appointing the guardian should have discretion to appoint the person that promises to be the best guardian of the ward and his or her property. Regardless of the limitations set forth in this Code, the deciding body may exercise discretion in the appointment of the guardian based on the proposed guardian's relationship and history with the ward, the availability of other persons eligible, able, and willing to act as the ward's guardian, and other factors relevant to the decision.

If the deciding body had case-by-case discretion, many of the possible detriments mentioned in this article would cease to be of concern, and the guardian best suitable for the needs of the ward would be appointed.

APPENDIX A**State Guardianship Statutes and Statutes for Advance Directives**

The states listed below have two different and distinct statutory schemes. Each statutory scheme is independent and separate from the other. Although both schemes provide for surrogate decision makers, each scheme provides different rules for each surrogate. Guardians who act as proxy decision makers have more restrictions under guardianship statutes than proxy decision makers have under advance directive statutes.

Jurisdiction	Advance Directives Statutes	Guardianship Statutes
<i>Alabama</i>	ALA. CODE § 26-1-2	ALA. CODE § 12-13-21 ALA. CODE § 26-2A-1 ALA. CODE § 26-9-1
<i>Alaska</i>	ALASKA STAT. § 47.30.825 ALASKA STAT. § 13.26.332	ALASKA STAT. § 13.26.150 ALASKA STAT. § 13.26.344 ALASKA STAT. § 13.26.090
<i>Arizona</i>	ARIZ. REV. STAT. § 14-5501 ARIZ. REV. STAT. § 36-561	ARIZ. REV. STAT. § 14-5101
<i>Arkansas</i>	ARK. CODE ANN. § 28-68-101	ARK. CODE ANN. § 28-65-101 ARK. CODE ANN. § 28-65-302
<i>California</i>	CAL. PROB. CODE § 4018	CAL. PROB. CODE § 1500 CAL. PROB. CODE § 2356 CAL. WELF. & INST. CODE § 5325 CAL. WELF. & INST. CODE § 5326.6
<i>Colorado</i>	COLO. REV. STAT. § 15-14-501 COLO. REV. STAT. § 15-1-1303	COLO. REV. STAT. § 15-14-101 COLO. REV. STAT. § 15-14-301 COLO. REV. STAT. § 13-20-403
<i>Connecticut</i>	CONN. GEN. STAT. § 45A-562	CONN. GEN. STAT. § 45A-677 CONN. GEN. STAT. § 45A-668

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Jurisdiction	Advance Directives Statutes	Guardianship Statutes
<i>District of Columbia</i>	D.C. CODE ANN. § 21-2211. D.C. CODE ANN. § 7-1305.07 D.C. CODE ANN. § 21-2081	D.C. CODE ANN. § 7-1305.06 D.C. CODE ANN. § 21-2041 D.C. CODE ANN. § 21-2047
<i>Delaware</i>	DEL. CODE ANN. tit. 12, § 4901	DEL. CODE ANN. tit. 12 § 3901 DEL. CODE ANN. tit. 16 § 5161
<i>Florida</i>	FLA. STAT. ANN. § 709.01 FLA. STAT. ANN. § 709.08 FLA. STAT. ANN. § 765.113	FLA. STAT. ANN. § 394.459 FLA. STAT. ANN. § 394.4598 FLA. STAT. ANN. § 458.325 FLA. STAT. ANN. § 744.101 FLA. STAT. ANN. § 744.3215 FLA. STAT. ANN. § 744.3725
<i>Georgia</i>	GA. CODE ANN. § 31-36-1	GA. CODE ANN. § 31-8-108 GA. CODE ANN. § 29-4-1
<i>Hawaii</i>	HAW. REV. STAT. § 327E-5 HAW. REV. STAT. § 551D-1	HAW. REV. STAT. § 560:5-101 HAW. REV. STAT. § 560:5-301
<i>Idaho</i>	IDAHO CODE ANN. § 15-5-501	IDAHO CODE ANN. § 66-405 IDAHO CODE ANN. § 15-5-301
<i>Illinois</i>	405 ILL. COMP. STAT. 5/2-102 755 ILL. COMP. STAT. 45/1-1	20 ILL. COMP. STAT. 3955/1 405 ILL. COMP. STAT. 5/2-110
<i>Indiana</i>	IND. CODE § 30-5-1-1	IND. CODE § 12-26-16-2 IND. CODE § 29-3-1-1
<i>Iowa</i>	IOWA CODE § 144B.1 IOWA CODE § 633B.1	IOWA CODE § 229.23 IOWA CODE § 633.552
<i>Kansas</i>	KAN. STAT. ANN. § 58-625 KAN. STAT. ANN. § 58-650	KAN. STAT. ANN. § 59-2978 KAN. STAT. ANN. § 59-3018(g)(3)(g) KAN. STAT. ANN. § 59-3050 KAN. STAT. ANN. § 76-12b10

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<i>Kentucky</i>	KY. REV. STAT. ANN. § 386.093	KY. REV. STAT. ANN. § 202B.060 KY. REV. STAT. ANN. § 387.010 KY. REV. STAT. ANN. § 387.500 KY. REV. STAT. ANN. § 387.660
<i>Louisiana</i>	LA. REV. STAT. ANN. § 9:1517 LA. REV. STAT. ANN. § 6:922	LA. CODE CIV. PROC. ANN. ART. 4541
<i>Maine</i>	ME. REV. STAT. ANN. TIT. 18-A § 5-501	ME. REV. STAT. ANN. tit.18-A, § 5-101 ME. REV. STAT. ANN. tit.18-A, § 5-301
<i>Maryland</i>	MD. CODE ANN., HEALTH- GEN. § 5-605 MD. CODE ANN., EST. & TRUSTS § 13-601	MD. CODE ANN., EST. & TRUSTS § 13-704
<i>Massachusetts</i>	MASS. GEN. LAWS ch. 201B, § 1	MASS. GEN. LAWS ch. 123, § 23. MASS. GEN. LAWS ch. 201, § 6
<i>Michigan</i>	MICH. COMP. LAWS § 330.1717 MICH. COMP. LAWS § 700.5501	MICH. COMP. LAWS § 330.1600
<i>Minnesota</i>	MINN. STAT. § 523.01	MINN. STAT. § 524.5-301 MINN. STAT. § 525.56 MINN. STAT. § 525.619
<i>Mississippi</i>	MISS. CODE ANN. § 87-3-101	MISS. CODE ANN. § 93- 13-111 MISS. CODE ANN. § 93- 13-121
<i>Missouri</i>	MO. REV. STAT. § 404.700 MO. REV. STAT. § 404.800	MO. REV. STAT. § 475.01 MO. REV. STAT. § 630.133
<i>Montana</i>	MONT. CODE ANN. § 72-5- 501	MONT. CODE ANN. § 72- 5-101 MONT. CODE ANN. § 72- 5-301
<i>Nebraska</i>	NEB. REV. STAT. § 30-2664 NEB. REV. STAT. § 30-3401	NEB. REV. STAT. § 30- 260.1 NEB. REV. STAT. § 30- 2617
<i>Nevada</i>	NEV. REV. STAT. § 111.450 NEV. REV. STAT. § 449.800 NEV. REV. STAT. 449.830 NEV. REV. STAT. 449.850	NEV. REV. STAT. § 159.013

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Jurisdiction	Advance Directives Statutes	Guardianship Statutes
<i>New Hampshire</i>	N.H. REV. STAT. ANN. § 137-J:1	N.H. REV. STAT. §464-A:25 N.H. REV. STAT. § 464-A:1 N.H. REV. STAT. § 161-F:52
<i>New Jersey</i>	N.J. STAT. ANN. § 46:2B-8.1	N.J. STAT. ANN. § 30:4-24.2 <i>See also</i> N.J. STAT. ANN. § 30:4-27.11d N.J. STAT. ANN. § 30:4-2711d N.J. STAT. ANN. § 30:6D-5 N.J. STAT. ANN. § 3B:12-24 N.J. STAT. ANN. § 3B:12-56
<i>New Mexico</i>	N.M. STAT. ANN. § 45-5-501 N.M. STAT. ANN. § 45-5-601	N.M. STAT. ANN. § 43-1-15 N.M. STAT. ANN. § 45-5-301
<i>New York</i>	N.Y. EST. POWERS & TRUSTS LAW § 10-1.1 N.Y. EST. POWERS & TRUSTS LAW § 11-1.1	NY MENTAL HYG. § 33.03 N.Y. Surr. Ct. Proc. Act Law § 403 N.Y. Surr. Ct. Proc. Act Law § 1701
<i>North Carolina</i>	N.C. GEN. STAT. § 32A-1 N.C. GEN. STAT. § 32A-8 N.C. GEN. STAT. § 32A-15 N.C. GEN. STAT. § 122C-73	N.C. GEN. STAT. § 35A-1201
<i>North Dakota</i>	N.D. CENT. CODE § 23-12-13 N.D. CENT. CODE § 30.1-30-01	N.D. CENT. CODE § 23-06.5-03 N.D. CENT. CODE § 25-01.2-11 N.D. CENT. CODE § 25-03.1 N.D. CENT. CODE § 30.1-28-12 (5-312) N.D. CENT. CODE § 30.1-28-01
<i>Ohio</i>	OHIO REV. CODE ANN. § 1337.01 OHIO REV. CODE ANN. § 1337.11	OHIO REV. CODE ANN. § 2111.01 OHIO REV. CODE ANN. § 5122.271
<i>Oklahoma</i>	OKLA. STAT. tit. 43A § 11-106 OKLA. STAT. tit. 58 § 1071	OKLA. STAT. tit. 30 § 1-101 OKLA. STAT. tit. 30 § 3-101 OKLA. STAT. tit. 30 § 3-119

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Jurisdiction	Advance Directives Statutes	Guardianship Statutes
<i>Oregon</i>	OR. REV. STAT. § 127.005 OR. REV. STAT. § 127.540	OR. REV. STAT. § 125.300
<i>Pennsylvania</i>	20 PA. CONS. STAT. § 5601	20 PA. CONS. STAT. ANN. § 5501 20 PA. CONS. STAT. ANN. § 5521
<i>Rhode Island</i>	R.I. GEN. LAWS § 23-4.10-1 R.I. GEN. LAWS § 34-22-6	R.I. GEN. LAWS § 33-15-1
<i>South Carolina</i>	S.C. CODE ANN. § 44-22-40 S.C. CODE ANN. § 44-22-140 S.C. CODE ANN. § 62-5-501	S.C. CODE ANN. § 62-5-101 S.C. CODE ANN. § 62-5-301
<i>South Dakota</i>	S.D. CODIFIED LAWS § 27A-16-1 S.D. CODIFIED LAWS § 27A-16-18 S.D. CODIFIED LAWS § 59-6-11	S.D. CODIFIED LAWS § 27A-12-3.20 S.D. CODIFIED LAWS § 27A-12-3.22 S.D. CODIFIED LAWS § 29A-5-101
<i>Tennessee</i>	TENN. CODE ANN. § 33-6-1001 TENN. CODE ANN. § 34-6-101	TENN. CODE ANN. § 33-6-415 TENN. CODE ANN. § 34-1-101
<i>Texas</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	TEX. PROB. CODE ANN. § 601
<i>Utah</i>	UTAH CODE ANN. § 62A-12-504 UTAH CODE ANN. § 75-5-501	UTAH CODE ANN. § 17A-3-611 UTAH CODE ANN. § 75-5-301
<i>Vermont</i>	VT. STAT. ANN. tit. 14, § 3501	VT. STAT. ANN. tit. 14, § 2671 VT. STAT. ANN. tit. 14, § 2602 VT. STAT. ANN. tit. 14, § 3060 VT. STAT. ANN. tit. 18, § 7627
<i>Virginia</i>	VA. CODE ANN. § 11-9.1.	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.
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Jurisdiction	Advance Directives Statutes	Guardianship Statutes
<i>Washington</i>	WASH. REV. CODE § 11.94.010.	WASH. REV. CODE § 11.88.005 WASH. REV. CODE § 11.92.043 WASH. REV. CODE § 71.05.370
<i>West Virginia</i>	W. VA. CODE § 39-4-1	W. VA. CODE § 44A-1-1
<i>Wisconsin</i>	WIS. STAT. § 155.01 WIS. STAT. § 155.20 WIS. STAT. § 243.07	WIS. STAT. § 51.61 WIS. STAT. § 880.01
<i>Wyoming</i>	WYO. STAT. ANN. § 3-5-101. WYO. STAT. ANN. § 3-5-201.	WYO. STAT. ANN. § 3-1-101 WYO. STAT. ANN. § 3-2-101 WYO. STAT. ANN. § 3-2-202 WYO. STAT. ANN. § 3-5-205 WYO. STAT. ANN. § 25-5-132

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

2000 Census Figures		Total in Group	Percent of Total Population	Ratio of Americans Between the Ages of 20 and 64 Years Old to Americans 65 Years Old and up
	Number of Americans 65 +	35,061,000	12.43%	4.75/1
	Number of Americans 20-64	166,515,000	59.02%	
2020 Census Figures (projec- tions)				
	65 +	54,632,000	16.26%	3.52/1
	20-64	192,285,000	57.26%	
2030 Census Figures (projec- tions)				
	65+	71,453,000	19.65%	2.76/1
	20-64	197,027,000	54.19%	

Table One shows that the eligible “younger” persons per elderly person that are possibly qualified to act as a guardian is projected to decrease by 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-sixty-four age category being eligible to act as guardians based purely on chronological age.

If the projections are accurate, the potential guardian applicants for the sixty-five-and-older population segment will be significantly reduced within the next twenty-five years. In 2000, there were 4.75 Americans between the ages of twenty and sixty-four for every American age sixty-five and older.

This figure will decline by 2020 to 3.52 Americans between the ages of twenty and sixty-four for every American age sixty-five and older and will continue to decline to 2.76 Americans age twenty to sixty-four for every American age sixty-five 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 Distribution³⁵¹	Percent of Population as a Whole	2004 Age Distribution³⁵²	Percent of Population as a Whole
Younger than 5	12.1%	Younger than 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 and older	4.1%	65 and older	12.3%

Life Expectancy Increases: The life expectancy for Americans in 1900 was about forty-seven years. FRANK HOBBS & NICOLE STOOPS, U.S. CENSUS BUREAU, DEMOGRAPHIC TRENDS IN THE 20TH CENTURY A11 (2002), available at <http://www.census.gov/prof/2002pubs/censr-4.pdf>. In 1900, the younger population of the United States was dramatically larger by proportion than it is today. Those age nineteen or younger comprised 44.4% of the population. In 2004, the younger population comprised 27.7% of the population, and the life expectancy had increased to 77.9 years. U.S. Census Bureau, Statistical Abstract of the United States 75, tbl.98 (2007), available at <http://www.census.gov/prof/2006pubs/07statab/vitstat.pdf>.

Aging Demographics and the Population as a Whole: In 1900, 51.4% of the U.S. population was between the ages of twenty and sixty-four, and

351. FRANK HOBBS & NICOLE STOOPS, U.S. CENSUS BUREAU, DEMOGRAPHIC TRENDS IN THE 20TH CENTURY A-7 tbl.5 (2002), available at <http://www.census.gov/prod/2002pubs/censr-4.pdf>.

352. Population Div., U.S. Census Bureau, Annual Estimates of the Population by Sex and Five-Year Age Groups for the United States: April 1, 2000 to July 1, 2005, <http://www.census.gov/popest/national/asrh/NC-EST2005/NC-EST2005-01.xls> (last visited Feb. 1, 2007).

4.1% of the population was age sixty-five or older. There were 12.5 Americans aged twenty to sixty-four per every American age sixty-five and older.

The population in the United States in 2004 of people ages forty-five to sixty-four comprised 24.1% of the population. In 1900, the same population segment accounted for 13.7% of the total population. In contrast, at the turn of the twentieth century, 44.4% of the population approached age twenty as 51.4% of the population approached senior citizen status. The forty-five to sixty-four 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 age sixty-five 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 older than sixty-five will increase between 2000 and 2030 by 7.22%, while at the same time the population of Americans ages twenty to sixty-four is projected to decrease by 4.83%.

In the same time period, the projected number of Americans age sixty-five and older will increase from roughly thirty-five million in 2000 to more than seventy-one million in 2030, more than doubling that population category. The total U.S. population is projected to increase from about 282 million to more than 363 million between 2000 and 2030. This is an increase of nearly eighty-one million, and of that projected increase in total population, Americans age sixty-five and older represent more than thirty-six million of that increase figure, equal to a 44.68% increase of the estimated population increase between 2000 and 2030.

When considering that the life expectancy is now nearly thirty-one 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 0.7 divorces per 1000 people, which increased to 2.6 per 1000 people in 1950. In 2005, that figure has reached 3.6 divorces per every 1000 people.*

In 2004, 20.6% of men ages sixty-five to seventy-four were either divorced, widowed, or never married. For men in the seventy-five to eighty-four age category, that figure was 27.5%, and it increases further to 41.7% for men over the age of eighty-five. For women, the figures are even more staggering. In 2004, 43.4% of women age of sixty-five to seventy-four and 63.7% of women in the age group of seventy-five to eighty-four were divorced or widowed, and 84.9% of women over the age of eighty-five 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 older than sixty-five 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 age sixty-five to seventy-four years, and 19.1% of men seventy-five 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 sixty-five to seventy-four years of age and 37% of women seventy-five and older lived alone. By 2004, the percentage of women between the ages of sixty-five and seventy-four living alone had actually decreased to 29.4%, but the percentage of women seventy-five and older living alone had risen to 49.9%.*

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

TABLE THREE

Older Americans Living Alone	Indigency Level per 1000	Size of Households and Families	Felonies per 1000
Caucasian men = 19%, Caucasian women = 41% ³⁵³	Caucasians in poverty = 86 per 1000 ³⁵⁴	2.54 persons per household for Caucasian households, 3.08 persons per family for Caucasian families ³⁵⁵	4.71 Caucasian male prison inmates per 1000 Caucasian males ³⁵⁶
Hispanic men = 16%, Hispanic women = 25% ³⁵⁷	Hispanic Americans in poverty = 219 per 1000 ³⁵⁸	3.32 persons per household for Hispanic households, 3.52 persons per family for Hispanic families ³⁵⁹	12.24 Hispanic American male prison inmates per 1000 Hispanic American males ³⁶⁰

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

353. FED. INTERAGENCY FORUM ON AGING RELATED STATISTICS, POPULATION (2006), available at <http://www.agingstats.gov/update2006/Population.pdf> [hereinafter POPULATION].

354. Eunice Moscoso, *Poverty Rate Rises for Fourth Year in a Row*, COX NEWS SERVICE, Aug. 31, 2005, http://www.coxwashington.com/reporters/content/reporters/stories/2005/08/31/POVERTY_CENSUS31_COX.html.

355. Population Div., U.S. Census Bureau, Average Number of People per Household (2002), <http://www.census.gov/population/socdemo/hh-fam/cps2002/tabAVG1.xls> [hereinafter People per Household].

356. Bureau of Justice Statistics, U. S. Dep't of Justice, Prison Statistics (2005), <http://www.ojp.usdoj.gov/bjs/prisons.htm> [hereinafter Prison Statistics].

357. POPULATION, *supra* note 353.

358. Moscoso, *supra* note 354.

359. People per Household, *supra* note 355.

360. Prison Statistics, *supra* note 356.

APPENDIX C

GA. CODE ANN. § 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 ANN. FAM. 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 ANN. FAM. 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. (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>
N.H. REV. STAT. ANN. § 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. ANN. § 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. ANN. § 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>
<i>(Continued on next page)</i>	

Table—Continued

N.H. REV. STAT. ANN. 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 Rev. Code. Ann § 2111.02 (West 2006)	<i>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.</i>
V.A.T.S. (Vernon's Texas Stats & Codes Ann.) Probate Code § 892(f)	<i>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>