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### **Guardianships vs. Special Needs Trusts, and Other Protective Arrangements: Ensuring Judicial Accountability and Beneficiary Autonomy**

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**GUARDIANSHIPS VS. SPECIAL NEEDS TRUSTS,  
AND OTHER PROTECTIVE ARRANGEMENTS:  
ENSURING JUDICIAL ACCOUNTABILITY AND  
BENEFICIARY AUTONOMY**

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#### INTRODUCTION

This article focuses on rising tensions and conflicts (perceived and actual) occurring among guardianships, special needs trusts (SNT) and other protective arrangements. The authors focus on three distinctly different applications, guiding participants through 1) Guardianship versus an SNT; 2) Supported decision-making versus an SNT; and 3) Guardianship versus other less restrictive options, including, but not limited to, an Achieving a Better Life Experience (ABLE) account, a representative payee, and a pooled SNT.

1) The first case study addresses conflicts between a guardianship and an SNT. It examines a situation when the person under guardianship is also the beneficiary of an SNT. The guardian and trustee are not the same person or entity and have competing interests when carrying out their respective duties and responsibilities. For this case study, there are general comments about guardianships and trusts, addressing the guardian's<sup>1</sup> fiscal accountability for the assets in the guardianship, and the guardian's advocacy for the quality of life and personal autonomy of the adult under guardianship. It continues with a discussion about the trustee's fiduciary duties and accountability for the corpus in the SNT<sup>2</sup>; the trustee's duty to make discretionary distributions to or for the benefit of the SNT beneficiary; and a duty to preserve the corpus of the SNT for distribution to contingent beneficiaries. It also gives an overview of the diversity of guardianship statutes, compared to the uniformity of trust statutes when analyzing jurisdiction.

2) In the second case study, the conflict is between the desires of a person who is in a supported decision-making arrangement and the views of the co-trustees of an SNT. The scenario takes place in a jurisdiction that does not formally recognize supported decision-

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1. *See infra* note 3. The terms "guardian" and "guardianship" in this article include the broad spectrum of words and language used across the country to describe the judicial transfer to a person or entity of legal authority over an individual's rights, liberties, placement, and finances.

2. The authors realize that the tensions between trusts on the one hand and conservatorships and guardianships on the other go beyond those related to special needs trusts, which are created primarily to maintain eligibility for means-tested public benefits. However, the limited focus of the article only addresses supplemental and special needs trusts.

making (SDM) and thus there is no court overseeing the person's decision-making process. The case study addresses how to consider, among other things, the balance between the contemporary desires of the person and the co-trustees' concerns regarding preservation of SNT resources.

3) The third case study arises in the context of a guardianship proceeding involving an adult with a disability living with an elderly caregiver who has resisted government and other assistance. In the course of the proceeding, the relevant actors become aware that alternatives such as appointment of an organizational representative payee and establishment of an ABLE Act Account can vitiate the need for appointment of a guardian.

Following the case studies are policy recommendations and practice pointers for working groups and National Guardianship Summit delegates to consider in their deliberations.

## I. OVERVIEW OF GUARDIANSHIPS & TRUSTS

### A. *General Summary of Guardianships*

The terms “guardian” and “guardianship” in this article include the broad spectrum of words and language used across the country to describe the judicial transfer to a person or entity of legal authority over an individual's rights, liberties, placement, and finances.<sup>3</sup> These words and language include, but are not limited to, conservatorship, interdiction, committee, curator, fiduciary, visitor, and next friend.<sup>4</sup> In

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3. See NAT'L GUARDIANSHIP ASS'N, THE FUNDAMENTALS OF GUARDIANSHIP: WHAT EVERY GUARDIAN SHOULD KNOW, 1 (2017) [hereinafter FUNDAMENTALS OF GUARDIANSHIP] (“For clarity, because of various terms used in the states, the term ‘guardianship’ . . . includes the appointment of a surrogate decision maker for either personal or financial matters. A reference to a guardian includes a conservator and all other types of guardian . . .”). The recent focus on Britney Spears's conservatorship in California, which has drawn an extraordinary amount of public attention, adds to the confusion of terms in that, in California, conservatorships can cover both personal and financial issues, whereas in most jurisdictions, guardianships deal with the person and conservatorships with the person's finances. See, e.g., Joe Coscarelli, et al., *Britney Spears Files to Remove Her Father From Conservatorship*, N.Y. TIMES (July 26, 2021), <https://www.nytimes.com/2021/07/26/arts/music/britney-spears-conservatorship-father-jamie.html>.

4. See Catherine A. Seal & Pamela B. Teaster, *Certification and/or Licensure of Guardians/Accountability of Guardian Professionals*, 72 SYRACUSE L. REV. 465, 467, 482, 486 (2022); Karen E. Boxx & Terry W. Hammond, *A Call for Standards: An Overview of the Current Status and Need for Guardian Standards of Conduct*

2017, the Uniform Law Commission developed the Uniform Guardianship Conservatorship, and Other Protective Arrangements Act (UGCOPAA), a model act that defines various forms of guardianship.<sup>5</sup> Throughout this article, we refer to the UGCOPAA to show how the expanded scope of “other protective arrangements” may be applied.

The National Guardianship Association (NGA), an organization solely focused on guardianship, is a pioneer in the development of guardianship ethics and standards.<sup>6</sup> NGA first developed national standards in 1991 and has continually expanded the standards “to cover more of the duties and responsibilities that face court-appointed guardians.”<sup>7</sup>

Consider the general description of various guardians for the purpose of analysis: 1) Guardian—a person appointed by the court to make decisions with respect to the personal affairs of an individual. The term includes a co-guardian but does not include a guardian ad litem;<sup>8</sup> 2) Guardian of the person—a person or entity appointed solely for the purpose of performing duties related to making decisions about the care, support, and wellbeing of an adult under guardianship;<sup>9</sup> 3) General or plenary guardian—a guardian of both the estate and the person, also described as plenary;<sup>10</sup> 4) Guardian of the estate—a guardian appointed solely for the purpose of managing the property,

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*and Codes of Ethics*, 3 UTAH L. REV. 1207, 1208, n.5 (2012) (explaining the general reference to various words used in guardianship).

5. See UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 102 (UNIF. L. COMM’N 2017).

6. See NAT’L GUARDIANSHIP ASS’N, <http://www.guardianship.org> (last visited Jan. 21, 2022).

7. See NAT’L GUARDIANSHIP ASS’N, STANDARDS OF PRACTICE 2 (4th ed. 2013), <https://www.guardianship.org/wp-content/uploads/2017/07/NGA-Standards-with-Summit-Revisions-2017.pdf> [hereinafter NGA STANDARDS OF PRACTICE]. References will be made to NGA’s standards in pertinent sections of the article.

8. See FUNDAMENTALS OF GUARDIANSHIP, *supra* note 3, at 1.

9. See *Id.* at 28–42; see NGA STANDARDS OF PRACTICE, *supra* note 7, at 11, 13 (“To ensure that provision is made for support, care, comfort, health, and maintenance of the person . . . [t]he guardian shall maintain a separate file for each person. The file must include, at a minimum, the following information and documents: [t]he person’s name, date of birth, address, telephone number, Social Security number, medical coverage, physician, diagnoses, medications, and allergies to medications; [a]ll legal documents involving the person . . .”); see Robert B. Fleming & Rebecca C. Morgan, *Standards for Financial Decision-Making: Legal, Ethical, and Practical Issues*, 2012 UTAH L. REV. 1275, 1276–77, n.6 (2012).

10. See FUNDAMENTALS OF GUARDIANSHIP, *supra* note 3, at 2.

estate, and business affairs of the adult under guardianship;<sup>11</sup> and 5) Limited guardian—a guardianship in which the authority of the guardian is restricted and identified rights of the person under guardianship are protected.<sup>12</sup>

Beyond this general description of guardianship, guardianship courts have broader power and authority to monitor and enforce accountability by guardians once they have ordered a guardianship.<sup>13</sup> In recent years, these broader guardianship powers and authority have expanded in scope and complexity<sup>14</sup> as judges have begun to focus on three principles: 1) the principle of least restrictive alternative;<sup>15</sup> 2) the principle of person-centered planning, which is intended to serve the interests of the person under guardianship based on his or her interests and choices;<sup>16</sup> and 3) the principle of supported decision-making,

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11. *See Id.*, *supra* note 3 at 49–53.

12. *See* UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 102(16); Nina A. Kohn & David M. English, *Limited Orders and Limited Guardianships: Legal Tools for Sidelining Plenary Guardianship*, SYRACUSE L. REV. 223, 225, 227 (2022).

13. *See* Sally Balch Hurme & Diane Robinson, *What’s Working in Monitoring Guardianships: Challenges and Best Practices*, 72 SYRACUSE L. REV. 289, 294 (2022).

14. *See In re* JP Morgan Chase Bank N.A. (Marie H.), 956 N.Y.S.2d 856, 857 (N.Y. Sur. Ct. 2012). Kristin Booth Glen, retired judge of the New York County Surrogate Court, one of the authors in this 2021 Summit, has been one of the leaders, both on and off the bench, in subjecting guardianship statutes and practices to close scrutiny. *See* Kristin Booth Glen & Cathy E. Costanzo, *What Guardians, Persons Seeking Guardianship, and Persons for Whom Guardianship is Sought Need to Know about Supported Decision-Making and Why*, 72 SYRACUSE L. REV. 97, 104 (2022); *see also* NGA STANDARDS OF PRACTICE, *supra* note 7, at 7 (“The guardian shall identify and advocate for the person’s goals, needs, and preferences. Goals are what are important to the person under guardianship, whereas preferences are specific expressions of choice . . . . Second, if the person has difficulty expressing what he or she wants, the guardian shall do everything possible to help the person express his or her goals, needs, and preferences.”).

15. *See* UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 102(16)102(13) (“Less restrictive alternative” defined as “an approach to meeting an individual’s needs which restricts fewer rights of the individual than would the appointment of a guardian or conservator. The term includes supported decision making, appropriate technological assistance, appointment of a representative payee, and appointment of an agent by the individual, including appointment under a [power of attorney for health care] or power of attorney for finances.”). *Id.*

16. *See* CONNIE LYLE O’BRIEN & JOHN O’BRIEN, THE ORIGINS OF PERSON-CENTERED PLANNING: A COMMUNITY OF PRACTICE PERSPECTIVE 14 (Responsive

which proposes diversions from the judicial application of guardianship to ways by which those serving the individual are able to do so without judicial process that takes away the person's autonomy.<sup>17</sup>

The UGCOPAA expressly identifies these principles as hybrids of plenary or general guardianship.<sup>18</sup> Its prefatory note states that a core value of guardianship is person-centered planning,<sup>19</sup> and it recognizes the role, and encourages the use, of less restrictive alternatives, including supported decision-making.<sup>20</sup> Adherence to

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Sys. Assocs., ed. 2000); The Centers for Medicare and Medicaid Services (CMS) requires that a person-centered planning process and assessment be used to develop a person-centered plan. *See* 42 C.F.R. § 441.725 (2011); *see also* A. Frank Johns, *Person-Centered Planning in Guardianship: A Little Hope for the Future*, 3 UTAH L. REV. 1541, 1548 (2012).

17. *See* Robert D. Dinerstein, *Supported Decision-Making for People with Disabilities: International Origins and Influences*, 42 TASH CONNECTIONS 15, 16 (2017), [http://tash.org/wp-content/uploads/2019/03/TASH\\_Connections\\_Vol42\\_Issue3.pdf](http://tash.org/wp-content/uploads/2019/03/TASH_Connections_Vol42_Issue3.pdf); *see also* KARRIE A. SHOGREN ET AL., SUPPORTED DECISION-MAKING: THEORY, RESEARCH, AND PRACTICE TO ENHANCE SELF-DETERMINATION AND QUALITY OF LIFE 145 (2019); *see also* DAVID GODFREY, AM. BAR ASS'N COMM'N ON L. AND AGING & NAT'L CTR ON L. AND ELDER RIGHTS, LEGAL BASICS: SUPPORTED DECISION-MAKING 2 (2017), <https://ncler.acl.gov/pdf/Legal-Basics-Supported-Decision-Making1.pdf>; *see also* Nina A. Kohn et al., *Supported Decision-Making: A Viable Alternative to Guardianship?*, 117 PENN. ST. L. REV. 1111, 1120 (2013); *see also* AM. BAR ASS'N, PRACTICAL TOOL FOR LAWYERS: STEPS IN SUPPORTING DECISION-MAKING, 1 (2016), [https://www.americanbar.org/content/dam/aba/administrative/law\\_aging/PRACTICALG\\_uide.pdf](https://www.americanbar.org/content/dam/aba/administrative/law_aging/PRACTICALG_uide.pdf). Delegates to the Fourth National Summit adopted a series of recommendations in favor of supported decision-making in Part II., Supported Decision-Making, Recommendations 2.1 through 2.4. *Fourth National Guardianship Summit Standards & Recommendations*, 72 SYRACUSE L. REV. 29, 32–34 (2022). *See id.* at 38, Recommendations 5.2 (urging National Guardianship Network to educate stakeholders in person-centered planning, options for alternative dispute resolution, and less restrictive alternatives).

18. *See* UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § Prefatory Note.

19. *See id.* (“The act has three overarching aims. First, it aims to reflect the person-centered philosophy endorsed by the NGS. The person-centered approach is evidenced in the act’s updated terminology . . . . [T]he act clarifies how appointees are to make decisions, including decisions about particularly fraught issues such as medical treatment and residential placement. These clarifications are consistent with the person-centered approach embraced by the act in that appointees are given specific guidance on involving the individual in decisions.”). *Id.*

20. *See* UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § Prefatory Note, § 102(31) (“To this end, the act provides that neither guardianship nor conservatorship is appropriate where an adult’s needs



lesser restrictive alternatives is recognized in the UGCOPAA, Article 5, Other Protective Arrangements.<sup>21</sup>

Beyond the over-arching objectives stated in its preface, the UGCOPAA presents eleven specific changes, the second of which focuses on supported decision-making, in that it “recognizes the role of, and encourages the use of, less restrictive alternatives, including supported decision-making.”<sup>22</sup> While not expressly including the principle of supported decision-making, the UGCOPAA, Article V, provides for protective arrangements instead of guardianship or conservatorship.<sup>23</sup> This is where most guardianship statutes are lacking, using generic terms such as “best interests” or “substituted judgment”<sup>24</sup> that pay insufficient attention to the autonomy and liberty interests of the person.

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can be met with technological assistance or supported decision-making.”). Supported decision making is defined as “assistance from one or more persons of an individual’s choosing in understanding the nature and consequences of potential personal and financial decisions, which enables the individual to make the decisions, and in communicating a decision once made if consistent with the individual’s wishes.” *Id.* For a further discussion of supported decision making, *see infra* Part II.

21. *See* UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 501.

22. *See* UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT, Prefatory Note (“Second, the act recognizes the role of, and encourages the use of, less restrictive alternatives, including supported decision-making and single-issue court orders instead of guardianship and conservatorship. To this end, the act provides that neither guardianship nor conservatorship is appropriate where an adult’s needs can be met with technological assistance or supported decision-making. It also provides for protective arrangements instead of guardianship or conservatorship; the 1997 version, by contrast, only provided for such an arrangement as an alternative to conservatorship. These alternative arrangements have the potential to reduce the extent to which individuals in need of protection are deprived of liberties. They can also reduce the time and cost associated with meeting individuals’ needs. Unlike a guardianship or conservatorship, long-term monitoring and reporting will generally be unnecessary.”). *Id.*

23. *See* UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 501 cmt. (“Section 501, together with the subsequent sections of Article 5, create an alternative to guardianship and conservatorship for individuals whose needs can be met without the imposition of such a restrictive arrangement. Specifically, these sections allow the court to enter an order that is precisely tailored to the individual’s circumstances and needs, and that is limited in scope and, potentially, duration.”).

24. *See, e.g.*, D.C. CODE § 21-2011 (2021) (defining “best interests” to mean “promoting personal well-being by assessing: (A) The reason for the proposed

Whether in the conventional construct of guardianship, or in its more complex and expanded construct, tensions increase for judges and guardians when the adult is also the beneficiary of a trust.

### *B. General Summary of Trusts*

#### *1. Trusts – Conventional Description*

A trust is a legal relationship in which legal title to property is entrusted to an individual or legal entity charged with fiduciary duties to manage and administer it for the benefit of another person.<sup>25</sup> In 2000, the Uniform Law Commission developed the Uniform Trust Code (UTC), a model act providing continuity and uniformity in the administration of all forms of trusts.<sup>26</sup> Conventional trusts are identified as *inter vivos*,<sup>27</sup> testamentary,<sup>28</sup> revocable,<sup>29</sup> or irrevocable.<sup>30</sup> Important to the analysis of Case Study No. 1 in this article is the hybrid testamentary supplemental needs trust, and the UTC treatment of jurisdiction by trust courts whose states have ratified the UTC.<sup>31</sup>

Structurally, there are five described methods for creating a trust,<sup>32</sup> and there are three components or identifiable entities that

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action, its risks and benefits, and any alternatives considered and rejected; and (B) the least intrusive, least restrictive, and most normalizing course of action possible to provide for the needs of the individual,” and “substituted judgment” to mean “making a decision that conforms as closely as possible with the decision that the individual would have made, based upon the knowledge of the beliefs, values, and preferences of the individual.”).

25. See RESTATEMENT (THIRD) OF TRUSTS § 2 (AM. LAW INST. 2003) (“A trust . . . is a fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons, at least one of whom is not the sole trustee.”).

26. See UNIF. TRUST CODE § 102 (UNIF. LAW COMM’N 2000).

27. RESTATEMENT (THIRD) OF TRUSTS §§ 10, 10 cmt. d.

28. See *id.* § 11 cmt. a.

29. See UNIF. TRUST CODE § 602; see also RESTATEMENT (THIRD) OF TRUSTS § 11 cmt.b.

30. See UNIF. TRUST CODE § 602; see also RESTATEMENT (THIRD) OF TRUSTS § 11 cmt.c.

31. See *infra* Part IV (A)(1)(B).

32. See RESTATEMENT (THIRD) OF TRUSTS § 10 (“Except as prevented by the doctrine of merger (§ 69), a trust may be created by: (a) a transfer by will of a property owner to another person as trustee for one or more persons; or (b) a transfer *inter vivos* by a property owner to another person as trustee for one or more persons;

create the trust.<sup>33</sup> For the purpose of this article, this general framework is sufficient. However, it belies the complex nature of conventional trusts and how trustees make distributions, much less the nature of unconventional and hybrid trusts.<sup>34</sup> The article, however, does address the situation when the hybrid trust is special or supplemental, intentionally created for persons with significant physical and/or mental disabilities.

*2. Trusts –Description of the SNT Hybrid: The General What, When, Why, and How*

*A. What*

An SNT is a discretionary trust that shelters assets and provides for detailed administration and distribution of SNT assets and income<sup>35</sup> for a person with a defined disability.<sup>36</sup> The primary purpose of an SNT is to sustain or enhance the quality of life of a person with a disability by gaining access to governmental programs and benefits through creating an immediate route to eligibility.<sup>37</sup>

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or (c) a declaration by an owner of property that he or she holds that property in trust for one or more persons; or (d) an exercise of a power of appointment by appointing property to a person as trustee for one or more persons who are objects of the power; and (e) a promise or beneficiary designation that creates enforceable rights in a person who immediately holds those rights as trustee, later receives property as trustee for one or more persons.”) *Id.*

33. *See* GEORGE G. BOGERT, LAW OF TRUSTS § 10 (4th ed. 1963). *See* UNIF. TRUST CODE § 402. The components are (1) the creator, grantor or settlor of the trust; 2) the identified person or entity named the beneficiary receiving income, principal, or both from the assets in the trust; and 3) the named or identifiable person or entity to be the trustee responsible for the administration of the trust, including distributions. *Id.*

34. This article does not attempt to include creation of more complex trusts, for example by a power of appointment, beneficiary designation, or an enforceable promise. *See* RESTATEMENT (THIRD) OF TRUSTS §§ 10 cmt. f, 10 cmt. g.

35. *See* 42 U.S.C. § 1396(p)(d)(4)(C). SNTs are the creation of the Omnibus Budget Reconciliation Act of 1993 (“OBRA ‘93”), 42 U.S.C. § 1396p(d)(4). The focus of this article is only on the testamentary SNT found in 42 U.S.C. § 1396p(d)(4)(C). All other § 1396p(d)(4) Medicaid qualifying SNTs are beyond the scope of this article.

36. *See* 42 U.S.C. § 1382c(a)(3).

37. While the terms “special” and “supplemental” are at times considered synonyms of each other, experts in the field reference states in which the “payback” requirement dictates the use of the word “special” in self-settled SNTs, and the word “supplemental” in third party SNTs that do not have the “payback” requirement for qualification. Another analysis focuses “special” on the protection of the SNT

### B. When

When created for persons with disabilities, trusts are considered hybrids with supplemental, special needs, payback, and pooled distribution requirements.<sup>38</sup> There are also accounts with trust-like functions, but not named or created as trusts, such as ABLE accounts.<sup>39</sup>

### C. Why

The SNT is needed when third party non-exempt assets would otherwise be given directly to the beneficiary, or the beneficiary owns assets that are not exempt for gaining eligibility, having failed the “means-test” for the program or service.<sup>40</sup>

The SNT accomplishes the task of enhancing the beneficiary’s quality of life by taking countable assets of the beneficiary, or third party assets to be used for the beneficiary, and sheltering or exempting them so that the assets are no longer countable.<sup>41</sup> At the same time, the SNT assures governmental approval of the transfer of assets into the SNT so the trustee can maintain and administer them in a way that sustains the beneficiary’s benefits eligibility, and distributes the assets and income in ways that supplement (never supplant) the

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corpus for the beneficiary while public benefits are maintained and focuses “supplemental” on the limitations on the trustee’s discretion to make distributions. Stuart D. Zimring, et al., *Fundamentals of Special Needs Trusts* §§ 1.02 1–4, n.3 (Matthew Bender & Co., Inc. ed., 2021) [*hereinafter FUNDAMENTALS OF SNTs*] (citing *Social Security Administration Program Operations Manual System (POMS)*); cf. ROBERT B. FLEMING & LISA NACHMIAS DAVIS, *ELDER LAW ANSWER BOOK* § 8.3, at 8–3 (2021) (identifying those states that actually detail variations in language that include “supplemental needs trusts”). They note the importance in reviewing state law to avoid requirements or assumptions made in the state law that will apply to the SNT. Note also that this discussion should not be confused with the term “supplemental benefits.”

38. Several Special Needs Trust resources are available for more extensive analysis. The most recent resources target fundamentals at the beginning of special needs trusts development and planning. See *FUNDAMENTALS OF SNTs*, *supra* note 37. A second SNT text is in handbook format. THOMAS D. BEGLEY, JR. & ANGELA E. CANELLOS, *SPECIAL NEEDS TRUSTS HANDBOOK* (Supp. ed. 2008).

39. See *infra* Part III.

40. Sebastian V. Grassi, Jr., *Estate Planning Options Available for Special Needs Families*, 43 U. MIAMI L. CTR. ON EST. PLAN. ¶¶ 907, 907.2 (2020).

41. In this article, sheltering and exempting has little to do with taxes and everything to do with benefits. While there are tax consequences, they are beyond the scope of this article.

governmental programs, products, placement, and services available to the SNT beneficiary.<sup>42</sup>

#### *D. How*

Once the non-exempt assets are transferred and titled in an SNT, its primary purpose is met by the creation of a source of sheltered funds that will enhance the beneficiary's quality of life while at the same time maintain eligibility for the means-tested governmental benefits.<sup>43</sup> The enhancement comes from the use of the sheltered SNT income and principal to supplement the benefits that are provided to the beneficiary.<sup>44</sup>

## II. OVERVIEW OF SUPPORTED DECISION-MAKING AND SPECIAL NEEDS TRUSTS AND THE ROLE OF *OLMSTEAD V. L.C.* AND THE INTEGRATION MANDATE

### *A. Guardianship Versus Supported Decision-Making*

As described above, guardianship involves court appointment of a person or entity to make decisions on behalf of an individual. Although, as noted, many statutes direct guardians to use substituted judgment in their decision-making—that is, to make the decision the person could make if he or she could make and communicate the choice(s) to be made—as well as operate within the concepts of person-centered planning and the least restrictive alternative, the essence of guardianship is that the guardian stands in the shoes of the person and makes the decisions.<sup>45</sup> In contrast, in supported decision-making, the person remains the decision-maker, aided by one or more supporters (of his or her choosing) but not displaced by them.<sup>46</sup>

42. See *supra* note 37 and accompanying text.

43. See *FUNDAMENTALS OF SNTs*, *supra* note 37, § 10.5[4].

44. Grassi, *supra* note 40, ¶ 907.7.

45. See Kohn, et al., *supra* note 17 at 1115–16.

46. See QUALITY TRUST, ET AL., NAT'L RES. CTR FOR SUPPORTED DECISION-MAKING: EVERYONE HAS THE RIGHT TO MAKE CHOICES, 2, [http://supporteddecisionmaking.org/choices\\_brochure\\_](http://supporteddecisionmaking.org/choices_brochure_) (for a general, plain-language discussion of supported decision making for people with disabilities and older adults). For two recent analyses of the relationship between guardianship and supported decision making for people with intellectual and developmental disabilities, see NAT'L COUNCIL ON DISABILITY, BEYOND GUARDIANSHIP: TOWARD ALTERNATIVES THAT PROMOTE GREATER SELF-DETERMINATION, 60–61, (2018), [https://ncd.gov/sites/default/files/NCD\\_Guardianship\\_Report\\_Accessible.pdf](https://ncd.gov/sites/default/files/NCD_Guardianship_Report_Accessible.pdf); and NAT'L COUNCIL ON DISABILITY, TURNING RIGHTS INTO REALITY: HOW GUARDIANSHIP AND

One of the authors has defined supported decision-making for people with disabilities as “a series of relationships, practices, arrangements, and agreements, of more or less formality and intensity, developed to assist an individual with a disability to make and communicate to others decisions about the individual’s life.”<sup>47</sup> Supported decision-making is a concept that originated over twenty-five years ago in British and gained traction in such countries as Sweden, Germany, and Australia.<sup>48</sup> Crucially, the adoption in 2006 of the UN Convention on the Rights of Persons with Disabilities (CRPD) gave supported decision-making an important impetus in its adoption of Article 12, equal recognition before the law, which explicitly calls for the states to provide individuals with the support they may require in exercising their legal capacity.<sup>49</sup> Although by its terms, Article 12 does not use the term “supported decision-making,” consistent interpretations of the article have seen supported decision-making as the kind of support that Article 12(3) contemplates.

The United States has signed but not ratified the CRPD, so Article 12 does not have the force of law. However, an increasing number of states have adopted supported decision-making agreement laws.<sup>50</sup> In addition, several courts have adopted supported decision-making arrangements in lieu of guardianship,<sup>51</sup> the American Bar Association

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ALTERNATIVES IMPACT THE AUTONOMY OF PEOPLE WITH INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, 23–25, (2019), [https://ncd.gov/sites/default/files/NCD\\_Turning-Rights-into-Reality\\_508\\_0.pdf](https://ncd.gov/sites/default/files/NCD_Turning-Rights-into-Reality_508_0.pdf).

47. Robert D. Dinerstein, *Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road from Guardianship to Supported Decision-Making*, 19 HUM. RTS. BRIEF 1, 3 (2012); see Convention on the Rts. of Persons with Disabilities, on Its Eleventh Session, U.N. General Comment No.1 ¶ 29 at 6–7 (May 19, 2014).

48. See *SDM as an International Movement*, CTR FOR PUB. REP., (last visited Jan. 21, 2022), <https://supporteddecisions.org/about-supported-decision-making/sdm-as-an-international-movement/>.

49. See Convention on the Rights of Persons with Disabilities and Optional Protocol, U.N. art. 12 (2006).

50. See Zachary Allen & Dari Pogach, *More States Pass Supported Decision-Making Agreement Laws*, 41 BIFOCAL A.B.A COMM. ON L. & AGING, 159, 161 n.1 (2019) (listing Texas, Delaware, District of Columbia, Alaska, Wisconsin, Indiana, North Dakota, Nevada, and Rhode Island as having such laws as of October 2019).

51. See, e.g., *Matter of Dameris L.*, 956 N.Y.S.2d 848, 856 (N.Y. Sur. Ct. 2012); see also *Va. Cir. Ct. Order at 6*, *Julia S. Ross, et al., v. Margaret J. Hatch* (City Newport, Aug. 2, 2003) (No. CWF120000426P-03), [http://www.supporteddecisionmaking.org/sites/default/files/ross\\_hatch\\_trial\\_court\\_decision.pdf](http://www.supporteddecisionmaking.org/sites/default/files/ross_hatch_trial_court_decision.pdf).

has adopted a resolution advocating supported decision-making as a less restrictive alternative to guardianship,<sup>52</sup> and several jurisdictions have undertaken pilot projects to assess supported decision-making.<sup>53</sup>

*B. Applying Olmstead and the Integration Mandate*

The above discussion is heavily informed by state law, which is the principal source of law for understanding the relationship among guardianship, supported decision-making, and special needs trusts. But federal disability rights law also potentially has a role to play in analyzing the complex issues involved in these intersections.

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52. See AM. BAR ASS'N, 113 RESOLUTION: ADOPTED BY THE HOUSE OF DELEGATES 1 (Aug. 14–15, 2017). Urges state, territorial, and tribal legislatures to (1) amend their guardianship statutes to require that supported decision making be identified and fully considered as a less restrictive alternative, before guardianship is imposed, and (2) require that decision-making supports that would meet the individual's needs be identified and fully considered in proceedings for termination of guardianship and restoration of rights. See *id.* The Resolution further urges courts to consider (1) supported decision making as a less-restrictive alternative to guardianship and (2) decision making supports that would meet the individual's needs as grounds for termination of a guardianship and restoration of rights. See *id.*

53. See *Supported Decision-Making*, CTR. FOR PUB. REP., <https://supporteddecisions.org/supported-decision-making-pilots/massachusetts-sdm-pilot/> (last visited Jan. 22, 2022) (Massachusetts SDM pilot program); *Supported Decision-Making New York*, HUNTER/CITY UNIV. OF N.Y. ET AL., <https://sdmny.hunter.cuny.edu/> (last visited Jan. 22, 2022) (sponsored by the Center for Public Representation and Nonotuck Resource Associates, Inc., New York) (*Supported Decision-Making New York*, sponsored by Hunter/City University of New York, New York Alliance, Disability Rights-New York, and The Arc Westchester); THE ARC OF N. VA. & THE BURTON BLATT INST. AT SYR. UNIV., "I LEARN THAT I HAVE A VOICE IN MY FUTURE" SUMMARY, FINDINGS, & RECOMMENDATIONS OF THE VIRGINIA SUPPORTED DECISION-MAKING PILOT PROJECT, 3, (Lucy Beadnell, et al. eds., 2021), <https://thearcfnova.org/content/uploads/sites/6/2021/02/SDM-Pilot-Project-Final-Report-2.2.21.pdf>. (Virginia pilot program). In addition, the National Resource Center for Supported Decision Making received three years of funding from the U.S. Administration on Community Living to support state grants for supported decision-making demonstration projects. See *Supported Decision Making Program*, ADMIN. FOR CMTY. LIVING, (last modified July 2, 2021), <https://acl.gov/programs/consumer-control/supported-decision-making-program>. The above organizations all have excellent information on supported decision-making, including addressing a number of very practical concerns about the practice. The delegates to the Fourth National Summit recommended that governments and organizations promote, and fund, supported decision-making pilot projects. See *Fourth National Guardianship Summit Standards & Recommendations*, *supra* note 17, at 33 (Recommendation 2.2).

Specifically, the integration mandate of the Americans with Disabilities Act,<sup>54</sup> as explicated in the Supreme Court case of *Olmstead v. L.C.*,<sup>55</sup> serves as a backdrop to the issues at hand. In *Olmstead*, the Supreme Court held that “unjustified institutional isolation of persons with disabilities is a form of discrimination.”<sup>56</sup> Although *Olmstead* itself dealt with unnecessary institutionalization of two women in a facility for people with psychiatric and intellectual disabilities, courts and commentators have extended or urged extension of its reasoning to other settings, such as sheltered workshops, voting, and penal incarceration, among other areas.<sup>57</sup> An influential article by law professor, Leslie Salzman argues specifically that the integration mandate should be applied to guardianship proceedings.<sup>58</sup> As she notes, “[B]y limiting an individual’s right to make his or her own decisions, guardianship marginalizes the individual and often imposes a form of segregation that is not only bad policy, but violates the Act’s mandate to provide services in the most integrated and least restrictive manner.”<sup>59</sup>

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54. See 28 C.F.R. § 35.130(d) (2016); Americans with Disabilities Act § 42 U.S.C. 12101 (1990).

55. See 527 U.S. 581, 607 (1999).

56. *Id.* at 600.

57. See Robert D. Dinerstein & Shira Wakschlag, *Using the ADA’s “Integration Mandate,” to Disrupt Mass Incarceration*, 96 DENVER L. REV. 917, 926–30 (2019) (for a discussion of extending the ADA’s integration mandate to address mass incarceration, and noting other areas where *Olmstead* has been extended beyond civil institutionalization). Comprehensive listing of the Department of Justice’s *Olmstead* litigation can be found at <https://www.ada.gov/olmstead/>. *Olmstead: Community Integration for Everyone*, DEP’T OF JUSTICE, <https://www.ada.gov/olmstead/> (last visited Jan. 22, 2022). Delegates to the Fourth National Summit adopted Recommendation 5.2 that, *inter alia*, the National Guardianship Network should educate stakeholders on the proposition that services should be provided in the most integrated setting, in compliance with the Americans with Disabilities Act of 1990. See *Fourth National Guardianship Summit Standards & Recommendations*, *supra* note 17, at 38 (Recommendation 5.2).

58. Leslie Salzman, *Rethinking Guardianship (Again): Substitute Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act*, 81 U. COLO. L. REV. 157, 157 (2010). Delegates to the Fourth National Summit adopted Recommendation 2.4, providing, “The Department of Justice and other federal and state agencies should recognize that supported decision-making can be a reasonable accommodation under the Americans with Disabilities Act of 1990, as amended, in supporting an individual in making their own decisions and retaining the right to do so.” See *Fourth National Guardianship Summit Standards & Recommendations*, *supra* note 17, at 34 (Recommendation 2.4).

59. Salzman, *supra* note 58 at 157.



Even if one does not take the argument that far,<sup>60</sup> however, the requirement that people with disabilities receive needed services in the most integrated (and least restrictive) setting should inform the court proceedings that we deploy to manage their person and financial arrangements.

### III. OVERVIEW OF GUARDIANSHIPS AND ABLE ACCOUNTS

The Achieving a Better Life Experience (ABLE) Act of 2014 provides for state-created savings programs for eligible persons with disabilities.<sup>61</sup> When properly created as 529A ABLE accounts, qualified distributions from the accounts are not taxed if the distributions are for qualified designated beneficiaries.<sup>62</sup> Under the 2017 Tax Cuts and Jobs Act, ABLE accounts were expanded.<sup>63</sup>

However, note that there is a required payback not taxed if from ABLE accounts whether or not they are funded with first-party funds (the Medicaid beneficiary's funds) or third-party funds.<sup>64</sup> The individual with a disability can create and fund them with the assistance of the person's guardian, trustee, or supporter(s).<sup>65</sup> An

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60. See Robert D. Dinerstein et al., *Emerging International Trends and Practices in Guardianship Law for People with Disabilities*, 22 ILSA J. INT'L & COMPAR. L. 435, 447–48 (2016). Note, however, that the Committee on the Rights of Persons with Disabilities, which interprets the UN Convention on the Rights of Persons with Disabilities, has taken the position that Article 12 of the Convention, Equal recognition before the law, requires use of supported decision making in lieu of guardianship. See *id.* Although the delegates to the Fourth National Summit did not come out against guardianship altogether, they did adopt a recommendation to eliminate plenary guardianship. See *Fourth National Guardianship Summit Standards & Recommendations*, supra note 17, at 35 (Recommendation 3.2).

61. See Stephen Beck Jr. Achieving a Better Life Experience (ABLE) Act of 2014, Pub. L. No. 113–295, 128 Stat. 4010 (2014). For a complete orientation on ABLE accounts, see the ABLE National Resource Center website, <https://www.ablenrc.org/what-is-able/what-are-able-accounts/>. About ABLE Accounts, ABLE NAT'L RES. CTR., <https://www.ablenrc.org/what-is-able/what-are-able-accounts/> (last visited Jan. 21, 2022).

62. *ABLE Accounts – Tax Benefit for People with Disabilities*, INTERNAL REVENUE SERV. (July 15, 2021), <https://www.irs.gov/government-entities/federal-state-local-governments/able-accounts-tax-benefit-for-people-with-disabilities>.

63. See Tax Cuts and Jobs Act, Pub. L. No. 115–97, § 11024, 131 Stat. 2054 (2017).

64. See *Spotlight on Achieving a Better Life Experience (ABLE) Accounts*, SOC. SEC. ADMIN., <https://www.ssa.gov/ssi/spotlights/spot-able.html?tl=18> (last visited Jan. 22, 2022).

65. See *id.*

ABLE account may be an ideal way to give the person more say over use of the funds in the account, as the Social Security Administration (SSA) has stated clearly that the trustee of a SNT or any third-party discretionary trust can add funds to an ABLE account.<sup>66</sup>

#### IV. CASE STUDIES<sup>67</sup>

The case studies described in the introduction, for which we have provided a summary foundation of applicable law and application, begin with guardianship versus special needs trust, followed by supported decision-making versus special needs trust, and ending with guardianship versus ABLE account and other alternatives.

##### *A. Case Study No. 1: Guardianship Versus Special Needs Trust*

###### *1. Assumptions and Practical Application of Guardianship and Trust Laws Applied to this Case Study*

Critical to the focus of this case study is whether judges have jurisdiction. The jurisdictional analysis is two-fold: 1) whether judges of guardianship also have jurisdiction and authority over trusts, trustees, trust assets, and trust beneficiaries; and 2) conversely, whether judges of trusts have jurisdiction over guardianships, guardians, guardianship assets, and persons under guardianship.<sup>68</sup>

##### *A. Guardianship Jurisdiction*

With only two states so far ratifying the UGCOPAA, there is little continuity and similarity in the guardianship statutes across the country.<sup>69</sup> This variation hampers a thorough guardianship

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66. SOC. SEC. ADMIN., *SOCIAL SECURITY ADMINISTRATION PROGRAM OPERATIONS MANUAL (POMS): SI 01120.200 B(12), B(16) (2000)*, <https://secure.ssa.gov/poms.nsf/lnx/0501120200>.

67. The case studies in Section IV are based on the authors' experiences in these practice areas. They are offered as illustrative examples of the kinds of conflicts that can arise and some ways to address them. They are not intended to convey the facts of any actual case. Further information concerning these case studies may be obtained by contacting the authors directly.

68. This analysis is similar to how assets in trust are not part of a decedent's estate.

69. See UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 104(b)–(d); Note that the delegates to the Fourth National Guardianship Summit adopted a recommendation that states should adopt the UGCOPAA. *Fourth National Guardianship Summit Standards & Recommendations*, *supra* note 17, at 34–35 (Recommendation 3.1). Delegates also urged the National Center for State Courts and the National College of Probate

jurisdictional examination. However, it is helpful to be aware of how jurisdiction is expressly conferred under the UGCOPAA. The UGCOPAA expressly defines jurisdiction in Article I, Section 104, applying it to adult guardianships in Article 3 and other protective arrangements in Article 5.<sup>70</sup> When jurisdiction is determined by a state that has ratified the UGCOPAA, that state determines the boundaries of guardianship jurisdiction and whether it will include construction and administration of trusts, or declare concurrent jurisdiction with all other courts.<sup>71</sup>

Generally, guardianship courts have jurisdiction over all forms of guardianship (and protective arrangements in some states).<sup>72</sup> Virtually all states have statutory requirements for accountings and status reviews in plenary or general guardianship.<sup>73</sup> In guardianships of the person, there are status reviews of the guardians' affirmative duty to act in the adults' best interests, to enhance their quality of life, and to

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Judges to "support states to develop rules, forms, and procedures to implement the [UGCOPAA]." *Id.* at 37 (Recommendation 5.4).

70. UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 104(b)–(d);

(b) The [designate appropriate court] has jurisdiction over a guardianship, conservatorship, or protective arrangement under [Article] 5 for an adult as provided in the [insert citation to Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act].

(c) After notice is given in a proceeding for a guardianship, conservatorship, or protective arrangement under [Article] 5 and until termination of the proceeding, the court in which the petition is filed has: (1) exclusive jurisdiction to determine the need for the guardianship, conservatorship, or protective arrangement; (2) exclusive jurisdiction to determine how property of the respondent must be managed, expended, or distributed to or for the use of the respondent, an individual who is dependent in fact on the respondent, or other claimant; (3) nonexclusive jurisdiction to determine the validity of a claim against the respondent or property of the respondent or a question of title concerning the property; and (4) if a guardian or conservator is appointed, exclusive jurisdiction over issues related to administration of the guardianship or conservatorship.

(d) A court that appoints a guardian or conservator, or authorizes a protective arrangement under [Article] 5, has exclusive and continuing jurisdiction over the proceeding until the court terminates the proceeding or the appointment or protective arrangement expires by its terms.) *Id.*

71. *See id.*

72. *See id.*

73. *See Hurme & Robinson, supra* note 13 at 292–93, 305.

pursue restoration.<sup>74</sup> However, implementation of status reviews in many states is less than ideal.<sup>75</sup>

The complexity regarding guardianship jurisdiction occurs because there are different judicial structures having jurisdiction over guardianship, with different names, and controlling different areas of law.<sup>76</sup> One example is how states organize what are called “probate courts.”<sup>77</sup> Some states with the name “probate” for their courts include jurisdiction over guardianship with decedent estate administration and trusts.<sup>78</sup> Other states under the same rubric of “probate court” for their courts, limit jurisdiction to decedent estate administration and trusts, relegating guardianship jurisdiction to other courts.<sup>79</sup>

The complexity and confusion over guardianship jurisdiction does not end with different probate court jurisdiction applications. When the word “probate” is not used, a state may bind guardianship and trust jurisdiction under the same court.<sup>80</sup>

When assets are transferred and held in trust, title is vested in the trust(ee).<sup>81</sup> If the assets had been owned by the person under guardianship but transferred into the SNT prior to adjudication and appointment, title would no longer be held by the person under guardianship and not considered assets in the guardianship estate.<sup>82</sup>

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74. *See id.*; *see also* UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 423; *see, e.g.*, N.C. GEN. STAT. §35A-1201(a)(5) (2021); *see, e.g.*, N.C. GEN. STAT. §35A-1242(a) (2021).

75. *See* Hurme & Robinson, *supra* note 13 at 310–12.

76. *See id.*

77. *See* *About Michigan’s Trial Courts*, MICH. COURTS: ONE COURT OF JUSTICE, <https://www.courts.michigan.gov/courts/trial-courts/> (last visited Jan. 21, 2022).

78. *See id.*

79. *See* *Probate*, FLA. COURTS HELP, <https://help.flcourts.org/Other-Resources/Probate>.

80. *See, e.g.*, N.C. GEN. STAT. §35A-1203 (2021) (guardianship jurisdiction); *see also* N.C. GEN. STAT. §§ 36C-2-202, 203 (2021) (trust jurisdiction). If guardianship jurisdiction is statutorily granted, it often confers limited authority, such as only allowing review of a trustee’s duties in the administration of the trust. *See id.* Although limited, this language could give guardianship judges authority to hear issues related to the trustee’s duty to make trust distributions to the trust beneficiary who is also a person under guardianship.

81. *See* RESTATEMENT (THIRD) OF TRUSTS § 10.

82. *See id.* at § 40(d) illus. 2 (distinguishing the legal and equitable interests in trust property).

While there are states that provide guardianship judges concomitant jurisdiction and authority over trusts,<sup>83</sup> the greater difficulty is when the guardianship and trust statutes grant no statutory jurisdiction and authority over guardianship and trusts in the same court.<sup>84</sup> In these states, guardianship judges, lacking jurisdiction, are precluded from ordering the trustee of a trust to pay out of the trust corpus any of the costs or expenses of the beneficiary of the trust that would promote the best (or expressed) interests of that beneficiary who is also the person under guardianship.<sup>85</sup> It is also problematic when there are guardianships of persons with no assets and therefore no guardianship estate, as the guardians have no funds with which to advocate and litigate the adults' interests in trust assets of which they are beneficiaries. In some states, the court may have the authority to appoint an attorney or court evaluator.<sup>86</sup>

### *B. Trust Jurisdiction*

There is greater continuity and similarity in trust statutes across the country. This is evident as shown in the thirty-five states and District of Columbia that have ratified the UTC.<sup>87</sup> A general overview of the UTC is found in its General Provisions and Definitions, general comments.<sup>88</sup>

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83. See MICH. COMP. LAWS ANN. § 700.1303(3) (West 2021). “The underlying purpose and policy of this section is to simplify the disposition of an action or proceeding involving a decedent’s, a protected individual’s, a ward’s, or a trust estate by consolidating the probate and other related actions or proceedings in the probate court.” *Id.*

84. See N.C. GEN. STAT. § 36C-2-202 (2021); see also N.C. GEN. STAT. § 35A-1203(a) (2021). Delegates to the Fourth National Summit adopted Recommendation 5.2, which provided, *inter alia*, that “States and organizations should address fiduciary conflicts through revisions of the relevant uniform acts, and statutes and rules addressing the gap in subject matter jurisdiction when conflict issues arise.” *Fourth National Guardianship Summit Standards & Recommendations*, supra note 17, at 38 (Recommendation 5.2).

85. See N.C. GEN. STAT. § 35A-1311 (2021).

86. See N.Y. MENTAL HYG. LAW § 81.09 (McKinney 2021).

87. See *Trust Code*, UNIF. LAW COMM’N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=193ff839-7955-4846-8f3c-ce74ac23938d> (last visited Jan. 22, 2022).

88. UNIF. TRUST CODE § art. 1. The Uniform Trust Code is primarily a default statute. Most of the Code’s provisions can be overridden in the terms of the trust. The provisions not subject to override are scheduled in Section 105(b). These include the duty of a trustee to act in good faith and with regard to the purposes of

Probate jurisdiction in the United States falls into two big camps. In one group of states, mostly on the East Coast, the probate court has limited jurisdiction and cannot enter broader orders.<sup>89</sup> In the other group of states, the courts have general jurisdiction.<sup>90</sup> In these broader jurisdiction states, courts sometimes but not always are divided between probate, juvenile, chancery, etc. but only for purposes of administrative convenience.<sup>91</sup> Although conflict between court divisions does occur in these states, the inability to enter broad orders is less an issue than in the East Coast states where jurisdiction is unclear.<sup>92</sup>

Specifically, under the UTC, subject matter jurisdiction and personal jurisdiction are expressly determined.<sup>93</sup> Other specific

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the trust, public policy exceptions to enforcement of spendthrift provisions, the requirements for creating a trust, and the authority of the court to modify or terminate a trust on specified grounds. The remainder of the article specifies the scope of the Code (Section 102), provides definitions (Section 103), and collects provisions of importance not amenable to codification elsewhere in the Uniform Trust Code. Sections 106 and 107 focus on the sources of law that will govern a trust. Section 106 clarifies that despite the Code's comprehensive scope, not all aspects of the law of trusts have been codified. The Uniform Trust Code is supplemented by the common law of trusts and principles of equity. Section 107 addresses selection of the jurisdiction or jurisdictions whose laws will govern the trust. A settlor, absent overriding public policy concerns, is free to select the law that will determine the meaning and effect of a trust's terms." *Id.*

89. See N.Y. SURR. CT. PROC. ACT § 201 (McKinney 2021).

90. See Nat'l Guardianship Network, *State Probate Court Jurisdiction*, NAT'L ACAD. OF ELDER LAW ATTORNEYS (2016), [https://www.naela.org/NGN\\_PUBLIC/About\\_Nav/State\\_Probate\\_Court\\_Jurisdictions.aspx](https://www.naela.org/NGN_PUBLIC/About_Nav/State_Probate_Court_Jurisdictions.aspx).

91. See Lewis M. Simes & Paul E. Basye, *The Organization of the Probate Courts in America*, in MICH. LEGAL STUDIES, PROBLEMS IN PROBATE LAW 385, 385 (Hessel E. Yntema ed., 1946).

92. David English, Professor, University of Missouri School of Law, with A. Frank Johns, author, during Delegate Deliberation, Fourth National Guardianship Summit hosted by Syracuse University College of Law (May 14, 2021).

93. See UNIF. TRUST CODE § 202 "(a) By accepting the trusteeship of a trust having its principal place of administration in this State or by moving the principal place of administration to this State, the trustee submits personally to the jurisdiction of the courts of this State regarding any matter involving the trust.(b) With respect to their interests in the trust, the beneficiaries of a trust having its principal place of administration in this State are subject to the jurisdiction of the courts of this State regarding any matter involving the trust. By accepting a distribution from such a trust, the recipient submits personally to the jurisdiction of the courts of this State regarding any matter involving the trust." *Id.*

sections that should be examined include Section 106 acknowledging that the UTC is supplemented by the common law of trusts;<sup>94</sup> Section 107, addressing the governing law;<sup>95</sup> and Sections 410 and 411, addressing proceedings to determine modification or termination of trusts, and modification of non-charitable irrevocable trusts by consent.<sup>96</sup>

“Governing law of the trust” requires clarification. This phrase means that if the trust document declares “This trust shall be governed by the laws of [insert state name],” the named state’s laws govern the trust and the trustee carrying out administration and operation.<sup>97</sup> However, when the beneficiary of the trust is on Medicaid, the laws of the state where the beneficiary is resident or domiciled determine eligibility.<sup>98</sup> Assume for an example the trust was created in New York, with an expressed declaration that the laws of New York apply. Assume, too, that the beneficiary is a resident and domiciled in North Carolina. While the trustee must adhere to New York law for trust administration and operation, the trustee must understand which North Carolina Medicaid guidelines apply to distributions out of the trust.

Many states ratifying the UTC have placed jurisdiction over trusts in probate courts.<sup>99</sup> As discussed above regarding guardianship jurisdiction,<sup>100</sup> many of those probate courts are given concurrent

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94. *See id.* § 106. The Uniform Trust Code codifies those portions of the law of express trusts that are most amenable to codification. The Code is supplemented by the common law of trusts, including principles of equity. To determine the common law and principles of equity in a particular state, a court should look first to prior case law in the state and then to more general sources, such as the Restatement of Trusts, Restatement (Third) of Property: Wills and Other Donative Transfers, and the Restatement of Restitution. *Id.*

95. *See id.* § 107. “The meaning and effect of the terms of a trust are determined by: (1) the law of the jurisdiction designated in the terms unless the designation of that jurisdiction’s law is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue; or (2) in the absence of a controlling designation in the terms of the trust, the law of the jurisdiction having the most significant relationship to the matter at issue.” *Id.*

96. *See id.* § 410–11.

97. Thomas P. Gallanis, *The Use and Abuse of Governing-Law Clauses in Trusts: What Should the New Restatement Say?*, 103 IOWA L. REV. 1711, 1716 (2018).

98. *See* N.Y. SOC. SERV. LAW § 369(2)(b)(i)(B) (McKinney 2021).

99. *See* UNIF. TRUST CODE § 203.

100. *See supra* Part IV(A)(1)(A).

statutory authority and jurisdiction over guardianships and trusts.<sup>101</sup> To complicate the analysis, some UTC states grant jurisdiction over both guardianships and trusts without denominating them as “probate courts.”<sup>102</sup> However, regardless of whether or not the UTC is ratified, all states declare in their statutes that there is subject matter and personal jurisdiction over trust beneficiaries.<sup>103</sup>

As of the writing of this article, thirty percent (30%) of all states had not ratified the UTC.<sup>104</sup> These non-UTC states<sup>105</sup> have a variety of judicial courts with different names and divisions.<sup>106</sup> The analysis is more complicated in that some of these non-UTC states name their state judicial entity “probate courts,” but do not expand jurisdiction to include guardianship. Other non-UTC states not naming their state court “probate court” expand jurisdiction over guardianships and trusts.<sup>107</sup>

For the purpose of Case Study No. 1, the state’s statutes have guardianships and trusts in the same court with original and exclusive jurisdiction of guardianships and trusts.

### C. Case Study No. 1

Joe D., Sr., and Jane D. were the parents of Joe D., Jr., Cindy J., and Tom D. Jane died ten years ago; Joe Sr. died two years ago. They live in a UTC state with its court named “probate court” in which dual

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101. See MICH. COURTS: ONE COURT OF JUSTICE, *supra* note 77; compare FLA. STAT. ANN. §§ 736.0201–736.0202 (West 2021), with FLA. STAT. ANN. § 744 (West 2021) (showing no connection between trusts and guardianship, and no clear reference to concurrent jurisdiction in the courts); compare IND. CODE ANN. § 29-3-5-1 (West 2021), with IND. CODE ANN. § 30-4-6-1 (West 2021) (illustrating no clear concurrent jurisdiction between the two).

102. See N.C. GEN. STAT. § 35A-1103 (2021); see also N.C. GEN. STAT. §§ 36C-2-202–203 (2021); see also UNIF. LAW COMM’N, *supra* note 87 (identifying non-UTC states).

103. See *supra* Part III. Therein lies one of the tools for persons under guardianship.

104. See UNIF. L. COMM’N, *supra* note 87.

105. Rhode Island, New York, Delaware, Indiana, Georgia, Louisiana, Texas, Oklahoma, Iowa, South Dakota, Idaho, Washington, Nebraska, California, Alaska, and Hawaii. *Id.* Note that in February 2021, Hawaii filed legislation to ratify the UTC. See S.B. 385, 31st Leg., Reg. Sess. (Haw. 2021).

106. See, e.g., *Civil Division Court D08*, INDIANAPOLIS & MARION CTY., <https://www.indy.gov/activity/civil-division-court-d08> (last visited Jan. 25, 2022).

107. See, e.g., *id.* (notifying interested parties that probate, including guardianship, matters are addressed in Marion Superior Court).



jurisdiction over guardianships and trusts are maintained. Joe Sr. funded a Testamentary Special Needs Trust (SNT) for Tom, age fifty-eight, a person diagnosed in the mid-range of the Autism spectrum. Joe Sr. did so because he wanted to protect the public benefits Tom was receiving: SSDI (disabled dependent of a deceased parent, often referred to as disabled adult child benefits) and Medicaid benefits, by and through the Home and Community Based Services waiver.

Joe Sr. had been Tom's guardian of the person. Tom is highly intelligent but struggles functionally with social and behavioral maturity. Tom lives with two roommates in a group home (townhouse) for higher-functioning adults in which they have greater independence with case managers and life coaches than they would have in a congregate setting. Tom is a part-time employee, working as an assistant trainer on the high school football team that Joe Jr. coaches.

Knowing his children as well as he did is the reason Joe Sr. nominated Joe Jr. to be appointed successor guardian for Tom and named his daughter Cindy as trustee of Tom's testamentary SNT. Of the \$3,000,000 in his estate, Joe Sr. left a total of twenty percent to Joe Jr. and Cindy (\$600,000.00 - \$300,000.00 each), and the net remaining estate of \$2.4 million to fund the testamentary SNT for Tom, as the primary beneficiary, with Joe Jr. and Cindy as contingent beneficiaries, to share equally, per stirpes beyond Tom's life.

Joe Jr., aged sixty-one, with no disability, is divorced with no children. He became the successor guardian of the person of Tom, with whom he has always been close. He is a former athlete and coaches the high school football team. Joe Jr. was successful in advocating for Tom to be hired as a part-time assistant trainer to the team. Joe Jr. is intuitive and sensitive and has always done things for others. He is comfortably, but modestly, situated, with little regard for wealth, finances, and taxes.

Cindy, age fifty-one, with no disability, is married, with two children. She has always been resentful of how Joe Sr. and Jane doted over Tom, often leaving her to fend for herself, while Joe Jr. had Tom, his younger brother, and best friend. While Cindy, a CPA, has always been careful and prudent with finances (which is why Joe Sr. appointed her the trustee of the testamentary SNT for Tom), in the last year she has divorced her husband, who lost almost all of their assets in risky investments during the COVID-19 economic recession, including all of Cindy's inheritance from Joe Sr. Long story short, Cindy would not provide any distributions out of the SNT for Tom that would enhance his quality of life. Although it was never said,

Cindy was intent on having as much of the corpus as possible remaining in the SNT at the time of Tom's death.<sup>108</sup>

Joe Jr., on behalf of Tom, has made many requests to Cindy, as trustee of Tom's SNT, to purchase various things that would enhance Tom's quality of life, including a computer, additional training and services from an occupational therapist, and expenses for Joe Jr. to chaperone Tom on a trip to Washington, DC. Joe Jr. has insisted to no avail that Cindy convene the trust advisory committee (written into the trust document) to consider Joe Jr.'s many requests.

Additionally, Joe Jr. had on several occasions requested Cindy to produce a full accounting of the SNT since the SNT became active right after Joe Sr. died. He specifically requested that Cindy produce all receipts and disbursements, including any payments for fees and commissions paid to Cindy personally, and any other disbursements that would be for the benefit of Cindy or her children. Cindy never responded. Joe Jr. also sent the requests in writing and referenced a letter of intent their parents drafted. The letter outlines what their parents' intentions were in creating the SNT for Tom and listed some of the requested items in their actual letter of intent.<sup>109</sup>

Out of utter frustration with Cindy, and believing he had no alternative, Joe Jr. filed a motion with the guardianship court requesting the judge order Cindy to make distributions from Tom's SNT to cover the many items requested.<sup>110</sup>

Additionally, Joe Jr. filed a separate petition under the state trust code for the probate judge to remove Cindy as trustee of Tom's SNT, in part because Cindy was and is now in a material conflict of interest due to the financial strain on her, and her self-interest in benefitting from the remaining assets in the SNT at the time of Tom's death.

In her filed response to the guardianship motion, Cindy argued that Tom's SNT has express language declaring that upon Joe Sr.'s

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108. We believe that this fact pattern is all too common, and thus many legal advocates suggest using an impartial trustee, or a trust protector, for this very reason.

109. For a discussion of letters of intent, *see* BY THEIR SIDE, NEXT STEPS TO CONSIDER: PLANNING BEYOND THE SPECIAL NEEDS TRUST 1 (2017), <http://www.bytheinside.org/Images/PDFs/NextStepsR.pdf>; THERESA M. VARNET & RICHARD C. SPAIN, HOME CONTROL THROUGH TRUST AND ESTATE PLANNING 7 (3d. ed. 2004), <https://www.fletchertilton.com/1C2194/assets/files/Documents/Home%20Control%20Booklet.pdf>.

110. *See generally* Robert B. Fleming & Rebecca C. Morgan, Standards for Financial Decision-Making: Legal, Ethical, and Practical Issues, 2012 Utah L. Rev. 1275.

death two years earlier, the SNT became irrevocable, and that as trustee of the SNT, she has complete authority and discretion over any distributions from the corpus of Tom's SNT, and therefore the motion should be denied.

Cindy also filed her response to the petition under the trust code, declaring that the terms of the SNT exempt her, as trustee, from any judicial process related to accountings, bonding, or disclosures regarding distributions made out of the SNT, or any allegations of fiduciary breach of duty or self-dealing by the trustee.

#### *D. Analysis*

Consider the two competing tensions developed in this Case Study No. 1: First, the tension to frame the analysis so that it includes guardianship and trust laws applicable in as many states as possible;<sup>111</sup> and second, the tension to show how the guardian and trustee find remedies to address their conflicting interests when serving the same person under the guardianship and the trust.<sup>112</sup>

Applying the first tension of competing and potentially contradictory state laws to this case study, compare the UGCOPPA, Article 3 Adult Guardianship, and Article 5 Other Protective Arrangements, with the Uniform Trust Code (UTC), Section 2-203(a), specifically declaring the court's personal and subject matter jurisdiction over irrevocable trusts when disputes arise regarding the trustee's powers and administrative duties.<sup>113</sup> Unlike this case study,

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111. Hence the reference to the UGCOPPA with its visionary and proactive approach to guardianship, conservatorships, and other protective arrangements. The problem is based on one of the co-author's extensive practice experience in North Carolina in this area of the law.

112. See Gerard G. Brew, *Trusts in Guardianship: Using "Family Freeze" Agreements to Resolve Disputes*, 46 AM. C. TR. & EST. COUNS. L. J. 9, 9, 13 (2020) (showing that although the article uses New Jersey Guardianship law as its reference, the anecdotal illustrations are applicable to the general tensions found when families confront the parent's decline in mental function and the competing interests of the children, suggesting the guardianship litigation is more akin to "will contests in disguise"). Brew offers the "high profile Doris Duke will contest" when suggesting that "the decedent's estate planning was like musical chairs." *Id.* at 13 n.15 (first citing *In re Duke*, 663 N.E.2d 602, 603 (N.Y. 1996); and then citing Don van Natta Jr., *Deal Reached Over the Estate of Doris Duke*, N.Y. TIMES, Apr. 11, 1996, at B1).

113. See UNIF. TRUST CODE § 2-203 (UNIF. L. COMM'N 2000); see also N.C. GEN. STAT. § 36C-2-203 (2021) ("(1) To appoint or remove a trustee, including the appointment and removal of a trustee pursuant to G.S. 36C-4-414(b) and the appointment of a special fiduciary pursuant to G.S.36C-8B-9. (2) To approve the resignation of a trustee. (3) To review trustees' fees . . . and review and settle interim

there are many state statutes that do not grant dual jurisdiction and authority to one judge over guardianships and trusts.<sup>114</sup>

Applying the second tension of guardians and trustees finding remedies for their competing and potentially conflicting interests to this case study, Joe Jr. could seek the court's order for mediation between him as Tom's guardian and Cindy as his trustee.<sup>115</sup> If mediation were successful, this resolution could lead to a settlement that would be in the form of a "care-plan" for Tom, in which Cindy would agree to make distributions from the SNT on a monthly basis for categorical items directly associated with Tom's activities of daily living.<sup>116</sup> She would also agree to consider periodic requests made by Joe Jr. that would further enhance Tom's quality of life, and allowing Joe Jr. to accompany Tom on outings and trips.<sup>117</sup> The court, in accepting the settlement, should require periodic status reports<sup>118</sup> and

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or final accounts. (4) To (i) convert [income trusts to a different calculation]. (5) To transfer a trust's principal place of administration. (6) To require a trustee to provide bond and determine the amount of the bond, excuse a requirement of bond, reduce the amount of bond, release the surety, or permit the substitution of another bond with the same or different sureties. (7) To make orders with respect to a trust for the care of animals. . . . (8) To make orders with respect to a noncharitable trust without an ascertainable beneficiary. . . ."); *see also* N.C. GEN. STAT. § 36C-8B-9 (2021); *see also Keith v. Wallerich*, 687 S.E.2d 299, 302 (N.C. Ct. App. 2009) (showing that the North Carolina Court of Appeals broadly defined the word "administration" in connection with a trust to mean "a judicial action in which the court undertakes the management and distribution of property").

114. Since the focus of the article and this case study address conflicts between guardians and trustees, it is beyond the scope of the article to reach a broader and more extensive assessment of state guardianship and trust statutes to determine how many have joint jurisdiction over guardianships and trusts, or to determine the opposite where jurisdiction is in separate courts.

115. *See* NGA STANDARDS OF PRACTICE, *supra* note 7, at 5(VI), 12(I)(B), 13(VI); *Compare* UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 317, *with* N.C. GEN. STAT. § 35A-1108(a)–(b) (2021) (indicating that an issuance of notice can be produced by the clerk for a multidisciplinary evaluation of completion of a mediation), *and* N.C. GEN. STAT. § 7A-38.3B (2021) (showing that the Clerk of Superior Court, as the judge of guardianship, has the discretionary authority to order mediation by a board-certified mediator).

116. *See* UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 316.

117. *See id.*

118. An important issue is whether the court could require reports from the guardian only, or also from the trustee. It is unclear whether the guardianship court

hearings in which Joe Jr., Tom, and Cindy would give testimony under oath regarding compliance with the settlement.<sup>119</sup> It would also require Tom to tell the court in his own words how he has benefitted from these expenditures, thereby enhancing his autonomy and empowering him.<sup>120</sup>

If mediation fails, Joe Jr. should consider filing a motion in the guardianship case, calling for the trustee to answer the allegation that Cindy is in a material conflict of interest since she has expressly declared her intent to protect the corpus of the trust from being distributed solely for her own self-interest and ignoring the clear and convincing intent of the grantors as evidenced by the letter of intent, to which the trust document specifically referred.<sup>121</sup> In most states, Joe Jr. could also file an action for declaratory relief.<sup>122</sup> Regardless of the statutory vehicle used, and regardless of the express language in the testamentary trust, Cindy would have to answer the allegations for which she probably has no defense.<sup>123</sup> This is where Joe Jr. may prevail, and successfully obtain the payment of his attorney's fees and costs out of the trust.<sup>124</sup>

Once before the court, and under the UGCOPPA, the judge should enter an order appointing a guardian ad litem (GAL), or court visitor,<sup>125</sup> to investigate the facts and circumstances surrounding the guardianship and the SNT, and to file reports with recommendations regarding the "best interests" of Tom, and the accountability for Joe Jr. to provide for Tom when he is only the successor guardian of the person.<sup>126</sup> The GAL might also address supported decision-making options for Tom to achieve greater independence and self-

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would have jurisdiction over the trustee. It is possible that as part of the agreement the trustee could agree to the guardianship court's jurisdiction.

119. See UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 317; Hurme & Robinson, *supra* note 13 at 296, 305, 310–12.

120. See UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 317.

121. See N.C. GEN. STAT. § 36C-8-802 (2021).

122. See N.C. GEN. STAT. § 1-253 (2021).

123. See N.C. GEN. STAT. § 1A-1, RULE 7 (2021).

124. See UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 119; in North Carolina, consider the coupling of N.C. GEN. STAT. § 36C-10-1004 (2021) with N.C. GEN. STAT. § 6-21.2 (2021) for the awarding of attorney's fees and costs.

125. See UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 115.

126. See *id.* at § 317; Kohn & English, *supra* note 12, at 224, 234, 240–45.

determination.<sup>127</sup> The resulting report might provide the court with evidence that Joe Jr. in fact was acting on behalf of his brother Tom and not just suggesting outings, trips, and other expenditures that he desired for himself.<sup>128</sup>

Turning to the trust, the judge should consider the underlying intent of the creator of the trust, and how administration and distributions would fulfill Joe Sr.'s legacy, and his intended priority of sustaining Tom's quality of life, with only secondary consideration for the contingent beneficiaries, especially Cindy, to whom he had already provided an ample inheritance.

### *B. Case Study No. 2*

Juan G. is a person with moderate intellectual disability. He is forty-five years old. He is the son of Carlos and Maria G. He has two siblings, Joaquin G. and Teresa L., who are forty-eight and fifty years old, respectively. Juan lived at home with his parents and siblings until he was twenty-five, whereupon his parents arranged for him to live in a group home run by a reputable nonprofit agency. The group home was in the same state but some five hours away. Juan was very close to his parents. Among other things they shared a love for light pop and rock and roll music.

Juan's parents remained actively involved in his life after he went to the group home, visiting him frequently and having him home for periodic visits. Joaquin and Teresa each stayed in contact with Juan, but their visits were less frequent because they had both moved relatively far away, had demanding jobs, and were raising their own families. Most of their contact with Juan was by phone.

Juan works in supported employment in the community where he lives. He opened his own bank account and makes decisions about what personal and other items he wishes to purchase. He has been fortunate in not having had significant health needs and has never confronted a medical decision that has required a sophisticated discussion of informed consent. (He has been able to consent for his annual flu shots, for example.) Juan's parents had thought about petitioning for guardianship for him but never got around to it. Moreover, they thought that Juan seemed to be able to function making his own decisions, and he was very good about consulting with them regarding decisions that were more complicated or difficult.

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127. *See id.*

128. *See infra*, Case Study No. 2 (illustrating a situation where this distinction may be more problematic).

Juan's parents did learn about special needs trusts and, although they were not well off, decided to set one up for him. They funded the trust with a payment of \$20,000. They made Joaquin and Teresa co-trustees. The trust instrument is vague about its purposes, reciting only that the funds in the trust should be used to "supplement but not replace" any governmental benefits to which Juan is entitled, and that the funds should be used for "necessary expenses not otherwise reimbursable" by the government. The trust instrument does not identify any specific kinds of activities that the SNT should fund. Joaquin and Teresa would receive any monies remaining in the trust should Juan pre-decease them.

Juan's parents Carlos and Maria G. died within two months of each other five years ago. Joaquin and Teresa took over as co-trustees of the special needs trust. Juan missed his parents dearly and sought more frequent contact with Joaquin and Teresa. They obliged, though contact still was mostly by phone or FaceTime and Zoom. The group home staff thought that Juan would benefit from having a few people help Juan with decision-making. They suggested that he consider entering into a supported decision-making arrangement with two people with whom he had become close. One was someone with whom he worked at his supported employment position. (This person was not his supervisor.) The second was someone who used to work at the group home but, though he no longer did so, had remained in contact with Juan as a friend. These two men—Larry and Stan—agreed to serve as supporters for Juan, and Juan agreed to have them serve in that capacity. This arrangement was informal, as Juan did not live in a state that formally recognized supported decision-making.<sup>129</sup>

Juan is an avid fan of the musician Billy Joel and for a number of years has talked about wanting to see him in concert. (Assume all events occur pre-pandemic.) He has discussed at length his plans with his supporters, Larry and Stan, and, well aware of Juan's taste in music, they agree with Juan's choice, although they emphasize that it is Juan's and not their decision to make. Billy Joel plays his concerts at Madison Square Garden, New York, which is several hundred miles away from Juan's home. Working with Larry and Stan, Juan has planned a trip to New York City, where he would stay for a few days, take in the concert and see other sights in New York. A staff member from his group home would accompany him but would have to pay the staff member's expenses and salary for this special trip.

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129. See Allen & Pogach, *supra* note 50, at 160 and accompanying text.

With the assistance of Larry and Stan, Juan approaches his siblings, the co-trustees of the SNT, to authorize a distribution to him that would enable him to attend the concert and spend time in New York City. With their help, he has estimated that the total cost for him and his staff would be \$3,000. Joaquin and Teresa balk at the expenditure. They tell Juan that “he only thinks he wants to see Billy Joel,” and point out to him that he tends to obsess about seeing certain performers (e.g., Neil Diamond, Barry Manilow) only to lose interest after a while. They believe that Juan will do so with Billy Joel as well, and that the expenditure, therefore, would be a waste of money. They also are suspicious that the staff member who would accompany Juan on the trip may simply want to attend the concert and visit New York City without having to pay for it out of pocket. They tell Juan that they will not approve the expenditure.

Juan is disappointed and angry, and his supporters Larry and Stan are as well. With Juan’s permission (and with Juan also on the phone), Larry speaks directly with Joaquin and Teresa, emphasizing that he and Stan have talked with Juan at great length and that they believe he really is interested in going to the concert. The trustees respond that they have a fiduciary obligation to preserve Juan’s assets for what they deem to be more important expenditures and they believe this proposal to be frivolous. When Larry and Juan object to this characterization, Joaquin and Teresa respond that “Neither Larry nor Stan is Juan’s guardian,” and therefore cannot force them to authorize the expenditure.

What recourse does Juan have?

### *1. Analysis*

The first thing to observe about the above problem is that even if Juan were under guardianship the court in the guardianship matter (assuming the court agreed with Juan’s guardian about the wisdom of the expenditure) might not be able to require the SNT trustees to authorize the expenditure for the trip to see Billy Joel.<sup>130</sup> Even if guardianship were helpful, however, it would be a high price for Juan to pay to give up his autonomy over important life decisions (even if the guardianship were limited) just to be able to attend a concert.

Of course, the co-trustees have a potential conflict of interest here, since any expenditure on Juan’s behalf potentially reduces the trust remainder that would be distributed to them if Juan pre-deceases

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130. See *In re Goldblatt*, 618 N.Y.S.2d 959, 961 (N.Y. Surr. Ct. 1994) for the role of court approval.



them. But even if the co-trustees were acting in good faith, their decision is inconsistent with the basic concepts of person-centered planning, least restrictive intervention, and Olmstead-related integration that we have discussed in this article.<sup>131</sup> Juan's request is not likely to be harmful to himself or others; it is consistent with his values (his love for this form of popular music); and it is the result of conversations he has had with his supporters, who know Juan well and support him in his desire to attend the concert. Indeed, one can make the case that the supporters Larry and Stan know Juan's preferences much better than Joaquin and Teresa, who are not in close contact with him.

Juan, perhaps with his supporters' assistance, could contact the local protection and advocacy office to see whether its lawyers might be willing to work with him and his supporters to try to persuade the co-trustees to reconsider. Perhaps the lawyers from the Protection and Advocacy organization ("P&A") have examples of the kinds of expenditures SNTs regularly authorize, and if Juan's proposed expenditure is not unusual, the co-trustees might be willing to authorize Juan's request.

At this point, unless Juan can persuade Joaquin and Teresa to reconsider, it would appear his only recourse would be to hire a lawyer (or get the P&A to represent him without a fee) to file an action against the co-trustees.<sup>132</sup> A court that values Juan's autonomy and the strength of his supported decision-making arrangements (and perhaps that likes Billy Joel's music) might well agree to require the co-trustees to approve the payment.<sup>133</sup> It might seem that the dispute would be more easily resolved in Juan's favor if the SNT had specific language in it that indicated what Juan's preferences were (including his taste in music) but the presence of such language in the trust document could lead a court or relevant government agency to invalidate the trust. A better alternative would be for the trust settlors (in this case Juan's parents) to have issued a letter of intent at the time the trust was created that would guide the actions of the trustees.<sup>134</sup> Juan's lawyers might be able to argue in court that the co-trustees have a conflict of interest and should be ordered either to approve the

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131. See UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 102(13); O'BRIEN & O'BRIEN, *supra* note 16, at 14; *Olmstead v. L.C.*, 527 U.S. 581, 600 (1999).

132. See N.C. GEN. STAT. § 36C-10-1010 (2021).

133. See *In re Goldblatt*, 618 N.Y.S.2d at 961.

134. See *id.* at § 6.06(1).

expenditure or possibly be replaced as trustees, but the latter could also be a tough argument given that Juan's parents, as the settlors of the trust, specifically designated Juan's siblings as the co-trustees.

The clash of informal and formal decision-making arrangements is common in the lives of people with disabilities.<sup>135</sup> Here, the formal modality—the SNT—ironically may present the worst of both worlds for the person with a disability, as there is no probate court to supervise a court-appointed person such as a guardian.<sup>136</sup> Rather, unless challenged, the co-trustees are left to exercise their own judgment about how the trust funds should be expended.<sup>137</sup> As indicated, SNTs with a letter of intent would be one potential solution to the problem. So, too, might be a requirement that SNT trustees receive training that would emphasize the role of SNTs as supporting autonomy and integration rather than impeding it.

### C. Case Study No. 3

Adult Protective Services filed a petition for guardianship for Zoe W., who is ninety-five years old. Zoe lives in her own home, which she owns outright. She is the primary caregiver for her grandson Harry W., who has cerebral palsy and mild intellectual disability, and was orphaned when his parents perished in a motorcycle accident a number of years ago. He is fifty years old. There are no other family members involved in looking out for either Harry or Zoe. None of their arrangement is formal or official. Zoe is very distrusting of “lawyers and the court system,” and has never been to court on any type of matter. Zoe's physical health is deteriorating rather rapidly, and the isolation she and Harry experienced during the pandemic has made things worse. Zoe admitted that she started to get rather “blue.” She can no longer take care of herself, let alone Harry. Although their neighbors have been trying to help them, out of the goodness of their hearts, Zoe distrusts this assistance and thinks, “all they want is my money.”

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135. See Joint Position Statement from Am. Ass'n on Intellectual and Developmental Disabilities & The Arc, *Autonomy, Decision-Making Supports, and Guardianship*, (April 10, 2016), <https://supporteddecisionmaking.org/news/autonomy-decision-making-supports-and-guardianship>.

136. See N.C. GEN. STAT. § 35A-1103 (2021); see also N.C. GEN. STAT. § 36C-2-202 (2021).

137. See N.C. GEN. STAT. § 36C-2-208 (2021).

Harry is sad because his grandmother is unhappy and cannot do all the things she used to do, and he is nervous because it feels like no matter what he does, “Grandma Zoe is unhappy.” The neighbors contacted adult protective services because they were concerned about the condition of the home and worried that both Zoe and Harry might be suffering neglect and be at risk of becoming homeless. There have been many notices left on the door at the home, and one of the notices is for a property tax foreclosure. Zoe asserts that she cannot afford to pay her property taxes, does not want to pay them because they do nothing for her, and believes she has paid enough in income taxes already. She does not want the “government” to take her grandson away from her or from her home. The court-appointed guardian ad litem (GAL) reported to the guardianship court that she is at imminent risk of having both happen.

The GAL reported that Zoe was going to object to any guardianship being imposed upon her. She also was going to object to anyone assisting her with the management of her money, paying her bills, or coordinating care for Harry in her home. Upon receiving this information from the GAL, the court appointed a temporary guardian for Zoe, and ordered the guardian to attempt to get a handle on the financial situation to determine if a guardian of the estate or conservator needed to be appointed for Zoe and/or Harry. After an investigation, which Zoe fought every step of the way, the court was able to confirm the following: Harry has no guardian, never has had a guardian and he is a delightful guy! He does receive Social Security Disability Insurance (SSDI) on his parents’ record as a DAC (Disabled Adult Child) beneficiary. He also gets Medicaid and services from a Habilitation Supports waiver, including skill-building assistance and supportive employment. Those services stopped when the COVID-19 shut down started. There is an immediate concern because Zoe is his Representative Payee and has allowed over \$5,000 to accumulate in that account.

The GAL worked closely with United Cerebral Palsy (“UCP”) in determining what needed to be done to protect Harry, and make sure that his grandmother’s decline does not necessitate a move to a more restrictive setting and more long-term court involvement. This was really an important goal because the court is required to inquire into these facts before ordering a protective measure for Harry or Zoe, to assure that they are living in the least restrictive setting. As noted below, consider as a “tool in the toolbox” working with UCP, which

has a grant whereby it can act as representative payee for the individual.<sup>138</sup>

### *1. Analysis*

In this matter, UCP assisted Harry in requesting the Social Security Administration (“SSA”) to change his representative payee from Zoe to UCP. This change would allow UCP to work with Zoe to transfer the money to which she was entitled from Harry’s benefits to cover his expenses for food and shelter. That brought his account balance lower, but not low enough to be under the \$2,000 maximum permissible for continued Medicaid eligibility.<sup>139</sup> UCP and the GAL then jointly requested an attorney be appointed for Harry and paying the retainer with the funds from his SSA overage. The new attorney drafted a letter to SSA informing the agency of the uses for the funds, thereby hoping to avoid a penalty. Then the court-appointed attorney drafted a power of attorney and appointment of a patient advocate for

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138. Some people with developmental disabilities or dementia might need help managing their money. The goal is to ensure that benefit payments from the Social Security Administration (SSA) and/or the Supplemental Security Income (SSI) are managed properly. The good news is that, in Michigan, MI-UCP can be appointed by the SSA to be the representative payee for people with disabilities who cannot manage or get someone else to manage their money. MI-UCP’s responsibilities include money management, providing protection from financial abuse and victimization, and establishing a productive, long-term relationship with their clients.

The core responsibilities of money management are to pay for the person’s present and foreseeable needs and to properly save any excess funds. *See Representative Payee*, SOC. SEC. ADMIN., [www.socialsecurity.gov/payee](http://www.socialsecurity.gov/payee) (last visited Jan. 28, 2022); *Representative Payee*, MICH. UNITED CEREBRAL PALSY, <https://www.mi-ucp.org/financialservices> (last visited Jan. 28, 2022). MI-UCP’s definition of the term “needs” includes everything the person would otherwise manage for themselves. *See id.* As the payee, MI-UCP keeps detailed records of the person’s expenses and savings and, upon request, provides an accounting to SSA. *See id.*

Organizations in other jurisdictions also can serve as organizational representative payees. *See Social Services*, BREAD FOR THE CITY, <https://breadforthecity.org/social-services/> (last visited Jan. 28, 2022). For example, in Washington, D.C., the nonprofit agency Bread for the City is authorized to serve as organizational representative payee for clients receiving services from the Department of Behavioral Health. *See id.*

139. *See* MICH. STATE LONG TERM CARE OMBUDSMAN PROGRAM, MEDICAID AND LONG TERM CARE 15, [https://www.michigan.gov/documents/miseniors/MedicaidLTC\\_274718\\_7.pdf](https://www.michigan.gov/documents/miseniors/MedicaidLTC_274718_7.pdf) (last visited Jan. 28, 2022).

Harry. The attorney agreed with the GAL that although Harry had a developmental disability, he had the capacity to execute these documents (and the court agreed). Harry named his grandmother and UCP jointly as power of attorney and UCP only as his patient advocate for end-of-life and mental health treatment. Any additional advocates involved in his life will need to work with UCP and Zoe. This arrangement—essentially one of supported decision making—will assist Harry in avoiding the need to have his rights removed to maintain him in the same community setting in which he has lived for decades.

As Zoe was contesting the proposed guardianship, the court ordered a neuro-psychological examination and a complete physical for her. The psychologist and physician conducted these examinations and determined that although her capacity has diminished, most of what was happening with her related to her depression and an untreated urinary tract infection (UTI). After Zoe agreed to treatment for the UTI, motivated by her belief it would help her avoid guardianship, she bounced right back. She was able to hire her own attorney to draft a power of attorney and patient advocate designation for her. She was able to secure the assistance of her local pastor for this role. The pastor was also able to secure a property tax abatement for her real estate taxes, thereby allowing her to stay in her home. The attorney and pastor also worked with Zoe to help secure a provider agency to provide services to Harry. This was done in lieu of removing him from Zoe's home. It also helped her stay healthy as she was concentrating on her needs and allowing the agency to provide services to Harry to concentrate on his needs. This was also done, so that Harry would be familiar with staff coming and going from the home in case Zoe's health declined again, or, worse, she would need to leave the home.

Notwithstanding all these developments, Harry was still over the asset limit in the representative payee account. Therefore, UCP assisted him in establishing an ABLE account, and transferring money each month into that account to keep him under the \$2,000 limit. These funds were also used to make some repairs to the home so that Harry could live there, potentially with a housemate when Zoe passed away. UCP worked with the Habilitation Supports waiver to make sure that services were in place so that staff knew how to keep both him and Zoe safe. The pastor who was assisting Zoe had a very sincere heart-to-heart talk with Zoe, and they agreed that when she passed away, she wanted all her funds to go to keep Harry safe from the "government." Because Harry had a disability and was under the age

of sixty-five, her attorney advised Zoe that she could transfer her home and other assets to a pooled trust for the sole benefit of Harry. This is an exempt transfer for Medicaid purposes and, as a result, Zoe now qualified for a different home and community-based waiver that covers senior citizens. The organization that established and managed the trust agreed to accept her home through a life estate deed, so that Harry and not the government would get the home. The agency providing Harry services was able to contract with the new waiver agent and now also provides services to Zoe.

Due to the use of all the tools mentioned above, the court, the GAL, the advocates, and the agency staff were able to maintain Zoe and Harry in their community setting, which was clearly the least restrictive setting. They were also able to avoid the need for a court-appointed Guardian/Conservator for both Harry and Zoe, while assuring there were adequate less restrictive options available to achieve the goals a guardianship or conservatorship would have accomplished. All too often guardianship or a protective trust is the first thing folks look to rather than the more supportive and less restrictive tools mentioned in this case study.<sup>140</sup>

## V. RECOMMENDED POLICY AND PRACTICE TOOLS

### A. Case Study No. 1

#### 1. Recommended Policy

States and organizations should address fiduciary conflicts through revisions of relevant trust and guardianship uniform acts ratified in their states, and other statutes and rules addressing the gap in subject matter jurisdiction when conflict issues arise.

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140. See *Fourth National Guardianship Summit Standards & Recommendations*, *supra* note 17, at 38 (Recommendation 5.2) “National Guardianship Network organizations should address fiduciary conflicts by expanding, developing, and encouraging education for all stakeholders about . . . [t]ools for resolving fiduciary conflict, including mediation, eldercare coordination, Protection and Advocacy agencies, appointment of a guardian ad litem, use of Achieving Better Life Experience (ABLE) accounts and special needs trusts.” *Id.*

## 2. *Recommended Practice Tools*

### A. *Retaining Jurisdiction*

One tool available to the judge is to order the retention of jurisdiction over the administration of the guardianship and the trust, calendaring periodic status reviews of Cindy's distributions out of the SNT for Tom's benefit.<sup>141</sup> In some states, the judge must assure that the person is living in the least restrictive setting, in which case the court should ask the GAL to address this issue in the GAL report.<sup>142</sup> If not statutorily required in guardianship, but required in the trust terms, the court could instruct the GAL to address the issue in the GAL report.<sup>143</sup>

### B. *Care-Plan*

Another tool would be for the court to order that a "care-plan" be developed between Joe Jr., and Cindy to be audited by the GAL and presented to the court at the time of the periodic review.<sup>144</sup> This plan should incorporate the specific intention of the grantor in the letter of intent.<sup>145</sup> For example, if they had season tickets purchased so Tom could attend local college basketball games while they were alive and they wanted the tradition to continue, they could so indicate in the plan. Furthermore, if Tom always lived in an unlicensed setting and wants to continue to do so, the plan could include expenses to facilitate his choice and maintain his residence as his least restrictive setting.<sup>146</sup>

### C. *Financial Audit of Trust Corpus*

Another tool available to the court would be ordering a certified professional to perform an audit of all corpus in the trust, advising the court regarding Cindy's investment strategy, assuring diversification, and examining all fees and commissions Cindy has paid to the investment advisors, and for the fees and commission she paid to

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141. See UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 104.

142. See *id.* at § 304(d).

143. See *id.*

144. See NGA STANDARDS OF PRACTICE, *supra* note 7, at 11; see also Glen & Costanzo, *supra* note 14, at 117–18, 131; *Fourth National Guardianship Summit Standards & Recommendations*, *supra* note 17, at 36–37 (Recommendation 4.2) (calling on states to implement a post-appointment monitoring system that includes, among other things, a written care and financial management plan).

145. See NGA STANDARDS OF PRACTICE, *supra* note 7, at 12.

146. See *id.* at 10–11.

herself.<sup>147</sup> This audit would include an income and principal analysis mandated under the state's statute.<sup>148</sup>

#### *D. Order Restricting Accounts*

An order restricting accounts would place the majority of the trust corpus in separate accounts, specifically naming all participating investment and banking institutions.<sup>149</sup> The named entities would be prohibited from making any change where funds are held or making any distributions out of the restricted accounts without Cindy, as trustee, filing a motion with the court for approval.<sup>150</sup>

#### *E. Bond on Unrestricted Corpus*

The court might require Cindy to bond all corpus of the SNT that has not been otherwise placed under an order restricting accounts.<sup>151</sup>

#### *F. Expanded Limitations on the Guardianship*

As a function of the court's examination of Tom's quality of life, Tom should be invited to appear before the judge to describe his goals, needs, and preferences.<sup>152</sup> Just as any adult might not tell his siblings everything about his life, Tom might discuss with the court matters he would never raise with Joe Jr. or Cindy. For example, Tom might have

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147. See N.C. Gen. Stat. §36C-8-801 through 36C-8-804 (2021).

148. As of the time of this article, the Uniform Fiduciary Principal and Income Act (approved for enactment in all states in 1997, and last amended or revised in 2008) has been enacted in one state (Utah 2019) and has been introduced in five states (Arkansas, Tennessee, Kansas, Colorado, and Washington State 2021). See UTAH CODE ANN. § 22-3-101 (LexisNexis 2021); see also H.B. 1693, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021); see also S.B. 404, 111th Gen. Assemb., Reg. Sess. (Tenn. 2019); see also S.B. 107, 89th Leg., Reg. Sess. (Kan. 2021); see also S.B. 171, 73rd Gen. Assemb., Reg. Sess. (Colo. 2021); see also S.B. 5132, 67th Leg., Reg. Sess. (Wash. 2021). However, many other states have enacted similar principal and income statutes. See, e.g., N.C. GEN. STAT. § 37A-1-101 (2021).

149. See NGA STANDARDS OF PRACTICE, *supra* note 7, at 19; see also UNIF. TRUST CODE § 303 (“To the extent there is no conflict of interest between the representative and the person represented or among those being represented with respect to a particular question or dispute . . . a [guardian] may represent and bind the ward if a [conservator] of the ward's estate has not been appointed.”).

150. This procedure is common when the person under guardianship (or conservatorship) is a minor. See UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 209.

151. See NGA STANDARDS OF PRACTICE, *supra* note 7, at 20.

152. See *id.* at 7, 11; see also Kohn & English, *supra* note 12, at 240–43; Glen & Costanzo, *supra* note 14, at 108–10, 114, 118.



a partner or best friend with whom he wants to live and be less dependent on his siblings. If the GAL concludes that Tom might have concerns he would rather discuss directly with the judge, the GAL could recommend that Tom meet with the judge privately in chambers.<sup>153</sup>

Tom may express to the GAL these desires for his autonomy to be increased, and for Cindy to pay for the increased expenses for him to live on his own.<sup>154</sup> It may raise an issue for the GAL to present to the court that there should be a limited guardianship for medical or some other sub-set of life decisions,<sup>155</sup> or an appropriate protective arrangement under UGCOPPA, Article 5.<sup>156</sup>

### *G. Separate Action for Restoration*

Following this course of facts, the GAL may support Tom in seeking the appointment of an attorney to represent him in a petition to restore, fully or partially, his capacity.<sup>157</sup> This raises a fundamental issue as to the constitutionality of Tom's right to counsel.<sup>158</sup>

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153. The legal term is “in camera” (in chambers and private), where the judge would only meet with Tom, the attorneys, and the GAL. It would be wise for the judge to ask that all parties stipulate to the “in camera” meeting so the judge is not exposed to challenges of bias and interference.

154. See NGA STANDARDS OF PRACTICE, *supra* note 7, at 14; see also UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 305.

155. See UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 301(b); see also Kohn & English, *supra* note 12, at 6–7.

156. See UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 501(b); see also *Matter of Dameris L.*, 956 N.Y.S.2d at 856; see generally JONATHAN MARTINIS & PETER BLANCK, SUPPORTED DECISION-MAKING: FROM JUSTICE FOR JENNY TO JUSTICE FOR ALL (2019).

157. See NGA STANDARDS OF PRACTICE, *supra* note 7, at 24. Restoration can be extremely difficult to obtain, however, restoration actions are increasing where advocates are looking to courts to restore the capacity of the person under guardianship. See *id.*; see also Glenn & Costanzo, *supra* note 14 at 108.

158. See *Rud v. Dahl*, 578 F.2d 674, 675 (7th Cir. 1978); UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 501; Kohn & English, *supra* note 12 at 245–46.

*H. Letter of Intent*

Instead of the court entering an order as mentioned in recommended practice (b) above, Joe Jr. and Cindy could agree to abide by Joe Sr's letter of intent.<sup>159</sup>

*I. Pre-litigation Mediation*

Joe Jr. and Cindy could agree to have pre-litigation mediation.

*J. Voluntary Consent Order for Mediation*

Depending on where litigation is initiated, the parties could voluntarily agree for the court to order mediation under certain criteria with the court naming the certified mediator.<sup>160</sup>

*K. Guardianship Court Litigation<sup>161</sup>*

In courts having jurisdiction over both guardianships and trusts that have persons under guardianship (Ward) as beneficiaries, the guardian would file a pleading under the guardianship caption, and then add a second caption that has the Guardian as Petitioner or Plaintiff versus the Trustee as Respondent or Defendant. The Guardian would demand an evidentiary hearing in which evidence would be submitted that the Trustee has failed to make required distributions of income and corpus of the trust for the beneficiary of the trust who is also the ward.<sup>162</sup>

In those courts only having guardianship jurisdiction, the guardian may have to file separate actions in each court having jurisdiction or move to a higher-level court.

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159. Sample trust settlor's letter of intent and a memorandum setting forth the person's quality of life requisites are available on co-author Dudek's website, [pekdadvocacy.com](http://pekdadvocacy.com).

160. See N.C. GEN. STAT. § 7A-38.3B. (2021).

161. See HON. LAWRENCE J. PAOLUCCI, OVERVIEW OF PROBATE COURT JURISDICTION, § 3(B) (last revised July 24, 2021) <https://www.wcpcc.us/AttyTrain/Materials/jurisdiction.pdf>. As explained earlier in the article, this may not be a problem in those states that confer jurisdiction of both guardianships and trusts in the same court. See N.C. GEN. STAT. § 36c-2-202(a) (2021).

162. See N.C. GEN. STAT. § 35A-1207 (2021) (motion to modify . . . (a) consideration of any matter pertaining to the guardianship).

*L. Trust Court Litigation*<sup>163</sup>

In courts having jurisdiction only over trusts, but a trust has a person under guardianship (Ward) as beneficiary, the guardian would file a new action as Petitioner or Plaintiff versus the Trustee as Respondent or Defendant. The same process would apply as in section K above with the Guardian demanding an evidentiary hearing in which evidence would be submitted that the Trustee has failed to make required distributions of income and corpus of the trust for the beneficiary of the trust who is also the ward.<sup>164</sup>

*M. General Civil Trial Court Litigation*

In those states where guardianship judges have no statutory authority over SNTs, guardians may have other advocacy and litigation options in higher-level courts of general jurisdiction. Once in the higher-level courts, guardians may also be awarded attorneys' fees<sup>165</sup> and costs paid out of the assets of the trusts.<sup>166</sup>

*B. Case Study No. 2**1. Recommended Policy*

States should consider adopting specific statutes authorizing supported decision-making arrangements. These statutes should consider addressing supported decision-making both as an alternative to guardianship and as a freestanding modality. As statutory development in this area is still relatively new, legislators and advocates need to think carefully about such issues as the need to adopt safeguards to make sure supporters do not take advantage of the

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163. See PAOLUCCI, *supra* note 161, § 3(C). Under most trust statutes with a separate trust court, the statute may expressly direct the judge to follow the terms of the trust and give effect to the intent of the grantor, the potential conflict between guardian and trustee in theory may be resolved. FLA. STAT. ANN. § 736.04114(3) (West 2021).

164. See N.C. GEN. STAT. § 36C-2-203 (a) (9) (2021) (stating that Clerks of Superior Court do not have exclusive jurisdiction over matters pertaining to ...the administration or distribution of any trust).

165. See UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT §119 (a)–(b) (UNIF. L. COMM'N 2017).

166. See UNIF. TRUST CODE § 1004 (UNIF. L. COMM'N 2010). As mentioned earlier, once in a court that has jurisdiction over trusts, the judge should give weight and credence to the terms of the trust and give effect to the intent of the grantor, quickly bringing an end to conflict between Joe, Jr. as guardian, and Cindy, as trustee. FLA. STAT. ANN. § 736.04114(3) (West 2021).

supported person, the fiduciary responsibility (if any) of the supporter for decisions by the individual being supported, and the need to hold harmless those who reasonably rely upon decisions (or giving of consent) that the person being supported makes.

In addition, SNTs should take account of the existence of supported decision-making if those arrangements are in place when the SNT is created. If supported decision-making comes into existence at a later time, SNT trustees should be urged to seek authority to interact with supporters so long as the person being supported agrees

## *2. Recommended Practice Tools*

Draft a letter of intent when creating the SNT to specify the preferences and values of the person with a disability who is the beneficiary of the trust to clarify whether the trustee should authorize future expenditures.

Suggest that before appointment SNT trustees be required to attend one or more training sessions designed to explain (in operational terms) such concepts as person-centered planning, least restrictive alternatives, supported decision-making, the integration mandate, and, in general, the importance of autonomy for people with disabilities.<sup>167</sup>

Take advantage of resources such as the National Resource Center for Supported Decision-Making<sup>168</sup> to keep updated on developments, including statutory developments, within supported decision-making.

Consult with your state protection and advocacy organization for assistance in advocating for the rights of people with disabilities to receive services in the most integrated, least restrictive setting, and to make sure that arrangements such as SNTs or other instruments do not infringe on those rights.

## *C. Case Study No. 3*

### *1. Recommended Policy*

States should consider amending their guardianship statutes to require consideration of less restrictive alternatives, including but not limited to supported decision making, prior to appointment of a

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167. See *Fourth National Guardianship Summit Standards & Recommendations*, supra note 17, at 32–33 (Recommendation 2.1).

168. See NAT'L RES. CTR. FOR SUPPORTED DECISION-MAKING, <http://supporteddecisionmaking.org/> (last visited Jan. 28, 2022).

guardian. The statutes should also require the court-appointed guardian ad litem to address such alternatives in the GAL's recommendation/report to the court. Before any guardian is appointed, the court must assess, on the record, whether there are any less restrictive alternatives to guardianship that can prevent the risk of abuse, exploitation, and or neglect of the individual. Such less restrictive options should be attempted (or there should be an on-the-record justification why to do so would be inappropriate) before any guardian is appointed.

If an individual can execute a power of attorney, a guardianship would not be appropriate. A court need not order a plenary guardianship even if it decides it must retain jurisdiction over the attorney in fact to assure that he or she is performing his or her duties adequately.

For example, Michigan now requires that the court inquire into the existence of a patient advocate designation, and if there is one, that the preference of the person with a disability be honored.<sup>169</sup> This happens sometimes, even if a guardian is subsequently appointed.<sup>170</sup>

Finally, even if the court orders the appointment of a guardian, it can direct the guardian to use supported decision-making practices in the guardianship.<sup>171</sup>

## 2. *Recommend Practice Tools*

Representative payee – Check to see if an adequate amount of support could be achieved by adding a professional representative payee (such as the UCP chapter discussed in the Case Study) to handle disability cash benefits.<sup>172</sup> If such a service available, it should be used to avoid the need to appoint a conservator or guardian of the estate.<sup>173</sup> SSA oversight, which requires the rep payee to submit periodic reports, provides protection for the individual.<sup>174</sup>

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169. See MICH. COMP. LAWS ANN. § 700. 5507(4)(6); 5509 (1)(b) (West 2021).

170. See MICH. JUDICIAL INST., INTRODUCTION TO CONSERVATORSHIP & GUARDIANSHIP PROCEEDINGS 38–39 (2021).

171. See Robert D. Dinerstein, *Tales from a Supportive Guardianship*, 53 CT. REV.: J. AM. JUDGES ASS'N 74, 83 (2017); see also D.C. CODE § 21-2047(a)(7)–(8) (2021).

172. See MICH. UNITED CEREBRAL PALSY, *supra* note 138.

173. See UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 102(13).

174. See SOC. SEC. ADMIN., *supra* note 138.

ABLE Act Account – An ABLE Act account that can protect the person’s accumulated benefits (or a combination of wages and benefits) and allow for them to supplement their long-term services and supports in an effort to remain in the least restrictive supportive housing setting should be used.<sup>175</sup> Also, if the person has a validly executed power of attorney the agent (or attorney in fact) appointed in that document can assist with the use of this account. Furthermore, SSA has access to most ABLE Act accounts and can provide another line of oversight into its use.<sup>176</sup> The Internal Revenue Service can always inquire as well.<sup>177</sup>

Pooled SNT – Court intervention in Case Study No. 3 could have been avoided altogether if a pooled special needs trust had been established, either as part of a supported decision-making process or independently.<sup>178</sup> The pooled SNT could allow for maintaining the person in the least restrictive setting, taking advantage of the long-term services and supports system. Such an approach gives effect to the Olmstead decision and the ADA integration mandate.

Guardians, other surrogates, or anyone purporting to act to protect the individual should not be able to interfere with the person’s legal rights, including the right to live in the community and to make one’s own decisions (with or without support) without determining if their decisions can be accommodated reasonably with other tools in a less restrictive manner. Thirty-one years after the passage of the American with Disabilities Act is long enough for those with disabilities of any age to see their rights vindicated.

#### CONCLUSION

An individual’s decisions regarding his or her person or estate can be complex under the best of circumstances. When the individual in question has a disability or is an older person (with or without cognitive limitations), those complexities multiply. Add in the complicated interrelationships among formal vehicles such as

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175. See ABLE NAT’L RES. CTR., *supra* note 61.

176. See SOC. SEC. ADMIN., *supra* note 138.

177. See *ABLE Accounts: Tax Benefit for People with Disabilities*, INTERNAL REVENUE SERV., <https://www.irs.gov/government-entities/federal-state-local-governments/able-accounts-tax-benefit-for-people-with-disabilities> (last visited Jan. 28, 2022).

178. See Amy C. O’Hara, *Your Special Needs Trust Explained*, SPECIAL NEEDS ALL., <https://www.specialneedsalliance.org/the-voice/your-special-needs-trust-explained-2/> (last visited Jan. 28, 2022).

guardianship and trusts, not to mention new “other protective arrangements” such as supported decision-making, and mix in special needs trusts and ABLE accounts, and one could be forgiven for throwing up one’s hands and crying uncle.

In this article, we have attempted to demystify some of these options and give examples, through case studies, of how in even the most fraught conflicts it is possible to wend one’s way through the thicket and come up with a plan that can serve the range of interests involved. Although much of this material is highly technical, at bottom the goal is very simple: how to provide as much support as is necessary, but no more support than is necessary, to enable the individuals in question to thrive and enjoy as much autonomy as they desire. In that way, important principles such as the least restrictive alternative, person-centered planning, and services in the most integrated setting can be given their true effect.