Ethics and the Professional Guardian

By

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Chapter 1

What Are Ethics—and Who Cares?

Ethics is commonly considered the study of determining right from wrong. Since a professional guardian makes lots of decisions for a ward, it is useful to have a model or yardstick for considering various alternatives.

Academics however—sitting behind a desk with coffee and summers off—can’t leave it at that. They need to divide things up. So they talk about normative ethics (the study of what makes actions right or wrong) and meta-ethics (the study of the nature of ethical properties.) This is probably really exciting (if your major is philosophy) but doesn’t contribute much to the “should I do this or that” decision.

Applied ethics, on the other hand, is a more useful distinction. It seeks to use ethics in real-life situations. That’s the kind of ethics we’ll be talking about here.

Ethics have been around for a long time. The Greek philosopher Socrates (c. 469 BCE–399 BCE) thought ignorance creates wrong. If people have self knowledge, they will naturally do what is right. Given the state of the world (then and now), apparently self-knowledge is still waiting around to become acquired.

Self-realized people, with talents fully developed, when acting in accord with their natures, will do good, wrote Aristotle (384 BCE – 322 BCE). These theories are not terribly useful because they require a lot of preparation—you need to have self-knowledge or be self-realized for them to work. By contrast, utilitarianism provides a standard or benchmark by asking a question—does the possible act
contribute to the greatest happiness of the most people? One of this idea’s greatest proponents was Jeremy Bentham (1748-1832). (His body, seated, is kept on public display at the University College, London.) Bentham was in favor of animal rights, women’s rights, ending slavery, and decriminalizing homosexual acts.

Immanuel Kant (1724-1804) asked a question but got away from anything as loosey-goosey as happiness: if everyone did the possible act, would the act still be questionable? (You can’t see his body, which is in a mausoleum in Kaliningrad, Russia.)

Thomas Hobbes (1588-1679) argued for contractarianism. People (society) decide what is right in order for things to function more smoothly. Here you don’t have to be anything or even ask a question—you’re told what is right or wrong. Depending on what sort of society you’re in, such as a democratic republic, you may have some input in deciding the rules.

“Well, if someone is telling me how to behave, isn’t that law,” you might ask. Some conceptions of right and wrong may be codified into right or wrong. But there are still significant areas governed by non-statutory ethics. Sometimes behaviors that were once law become just ethics. For example, when the Ten Commandments were written, they were law and violation of some of them could be capital offenses. Now seven of them are at best ethics with only three (murder, theft, false witness) remaining on the books.

One might say, “OK, fine, but if ethics aren’t law, why should I care about them? Are they even enforceable?” If you have a duty of care to do something, such as decide for
a ward, and you are negligent, you might be held liable for damages. In a law suit, the court would look to see what a reasonable person would have done in the same circumstances. If you’re in a profession with a code of ethics, the court may well expect you to adhere to that code.

For example, if you had a duty to someone who got hurt as a result of your action (or non-action), your behavior might be evaluated against an ethical code if a reasonable person in your position would have followed those ethics. The professional guardian specifically has a fiduciary duty to the ward which requires a higher ethical commitment than would otherwise exist.

Today professional ethics tend to follow the contractarian model. You want to be in a particular profession, therefore you sign on to its code of ethics. Lawyers have the American Bar Association’s *Model Rules of Professional Conduct* (1983) (being lawyers, they can’t just say *ethics*). Doctors abide by the American Medical Association’s *Code of Medical Ethics* (1847). (OK, no jokes about why attorneys were 136 years behind the doctors.)

The story of ethics for professional guardians is wild and wooly. A 1972 study of 400 guardianships found the guardians and third parties were being protected and benefited, rather than the wards.¹ Fifteen years later, the Associated Press put fifty-seven reporters nationwide on an investigation of guardianships for the elderly.² They found the situation had deteriorated. In almost half the cases the AP examined, there were no accountings. Nearly a third had no medical evidence. 13% of the files were empty after the opening document.

Spurred by the AP series, the US House of Representatives opened hearings in 1987.³ One guardian
testified he had 210 wards and was overseeing $1.5 million without any experience or training. A *Money* magazine article in 1989 was titled “The Gulag of Guardianship.”

The American Bar Association convened a National Guardian Symposium in 1988. That same year the National Guardianship Association (NGA) was formed.

Michael Casasanto of the Franklin Pierce Law Center wrote a *Model Code of Ethics for Guardians* which he presented at a symposium in 1989. The NGA adopted the *Code* in 1991. Because a reasonable person might well be expected to be familiar with this *Code*, it will be the basis for this class.

**Chapter Highlights**

- Ethics is commonly considered the study of determining right from wrong.
- Your behavior as a guardian may be evaluated against a code of ethics if a reasonable person in your position would have followed those ethics.
Chapter 2
Decision-making for the Ward

“A guardian shall exercise extreme care and diligence when making decisions on behalf of a ward.

“All decisions shall be made in a manner which protects the civil rights and liberties of the ward and maximizes independence and self-reliance.”

--Rule 1, *A Model Code of Ethics for Guardians*

The *Model Code* starts off with a five part test it will use again and again in evaluating ethics:

- Ward’s preferences
- Substantial harm test
- Best interests test
- Independent opinion
- Knowledge

*Ward’s Preferences*

In Florida, if the ward is over the age of 14, the guardian “shall honor” the ward’s feelings about how and where to live, to the extent the ward’s resources permit. Right off, ethics put the ward first. The guardian who testified before Congress to having 210 wards (not in Florida!) didn’t have time to check what the wards wanted; he was too busy cashing checks. The emphasis has changed since the dark ages twenty years ago.
A court in another state wrote, “Even though the ward is incompetent; his preference is "entitled to serious consideration."” In that case, the ward preferred not to take Stelazine, which was being used to control schizophrenia. Ultimately the judge continued the court order requiring the administration of the drug. But the decision-making process began with the ward’s preference.\(^8\)

The preferences imply not only consulting the ward but involving the ward—to the extent of the ward’s capabilities—in decisions.\(^9\) The guardianship then aspires not to be an autocratic paternalistic procedure but a collaboration.

The preference may override a guardian’s personal feelings. For example, suppose a ward prefers to be involved in a lesbian relationship and the guardian disapproves of same-gender dating. If the guardian cannot address the situation neutrally, restraining personal feelings, it may be appropriate for the guardian to resign.

Finding out what the ward wants involves interviewing. There are special techniques for interviewing disabled persons. The guardian should be knowledgeable about these or utilize a skilled person to assist in the interview.\(^10\)

Guardians apparently are typically not too good at interacting with wards. One study showed wards “did not understand or were not necessarily satisfied with the efforts of their public guardians.”\(^11\)

Besides asking the ward, the guardian should look at the ward’s historical lifestyle and current values and lifestyle. While these will augment the ward’s preferences, they become even more valuable when the ward is unable to contribute.\(^12\)
It is possible the guardian will be unable to obtain this information, particularly the interview. The following four considerations would still be used to evaluate a decision. But the effort to obtain the ward’s preferences and, better, to collaborate with the ward must be made first.

**Substantial Harm Test**

Still, while the ward’s preference is the starting point and important, it is not conclusive. Some wards may want a Maserati ($135,000) on a Hyundai budget ($9,970) (who wouldn’t?) Or to take up skydiving while physically debilitated. So the guardian has 4 filters to run preferences through.

The first of these is the substantial harm test. When the guardian is “reasonably certain” the preference would substantially harm the ward or the ward’s interests, the decision may be made partially or wholly against the preference.

**Best Interests Test**

The ward may have preferences which are not likely to be harmful but which may not be in the best interests, such as starting a guinea pig farm or investing in the nephew’s start up to provide consumer travel to Venus. The second filter allows the guardian to ask if this decision in the ward’s best interests? This again may modify or abrogate the preference. The question of *what is* in the ward’s best interest may be informed by the next two filters. We will see later as we discuss specific aspects of the
ward’s life that the least restrictive alternative is crucial to deciding best interests.\textsuperscript{13}

The \textit{Model Code} writes “the use of the Best Interest Standard is a last resort, to be utilized only in cases where there is no previous competency or where the ward gave no indication of preference which could guide the guardian in making the decision.”\textsuperscript{14} Yet two pages later the \textit{Code} notes that if the guardian allows the ward’s preference in violation of the best interests, the guardian could be liable in a lawsuit.\textsuperscript{15} So whatever the \textit{Code} is trying to say here, the Best Interests Test remains a useful exercise and question to ask.

One of the problems the test guards against is conflict of interest, discussed later in this book. It is the best interests of the ward which are being evaluated and these are uninfluenced by the guardian’s situation.

\textit{Independent Opinion Test}

The professional guardian doesn’t stand alone. You can’t possibly be an expert in all areas. Sometimes seeking an independent opinion is mandated, as when court approval is required for an action. In Florida, there is a long list of actions the court must approve:

- Removing items from ward’s safe deposit box
- Withdrawing ward’s funds from a depository
- Continuing ward’s unincorporated business
- Continuing ward’s existing contracts
- Continuing ward’s trustee powers
- Changes to ward’s buildings
- Subdividing or developing ward’s land
- Entering into a lease
- Borrowing money including a mortgage
- Prepaying mortgage
- Buying real estate
- Guardian using ward’s home
- Moving ward out of the county
- Gifts to ward’s family
- Creating or amending trusts
- Experimental medical procedures
- Divorce
- Sterilization
- Abortion
- Terminating life support
- Paying burial/cremation expenses

Although not required by statute, other sources strongly urge guardians to check with the court before making these decisions:

- Organ transplants
- Do not resuscitate orders
- Medical treatments prohibited by ward’s religious beliefs
- Psychosurgery
- Electroconvulsive therapy

Even when not legally required to do so, a guardian will want to seek professional assistance in areas where the guardian is not qualified to judge the best interests of the ward. Certainly at the beginning of the guardianship, independent opinions will be needed to assess the ward’s needs and functional abilities.
The court will probably be unwilling to babysit the guardian and expects that counsel has been consulted before most matters are brought before the bench. Whether the ward’s caregivers are providing appropriate treatment and service may need to be periodically evaluated by a competent outsider. A contemplated medical procedure involving significant risk to the ward should trigger a second opinion. Advice from tax professionals may be appropriate.

Basically, here’s the downside if the guardian decides to “go it alone.” Should things go poorly and a plaintiff can show a reasonable person would have consulted an outside expert, changing the results, the guardian may be liable in a lawsuit. Or, more bluntly, if the ward deteriorates or dies from a disease whose new cure an (unconsulted) expert would have known about, the guardian has a problem.

The guardian will also want to listen to the ward’s caregivers and work with their recommendations. If the ward has other legal representatives, the ward will need to coordinate with them.

As a practical matter, the guardian will want to hear what the family has to say. Although not bound to follow their wishes, the guardian will probably find an included family is better than a hostile adversary.

Knowledge

While the guardian can rely on independent opinion for information, the guardian must still have a good deal of knowledge already. Particularly important is an up to date comprehension of the framework and possibilities available to the ward.
For example, are you aware of what an occupational therapist can do? This professional assists not only disabled people but also others to “participate in the activities of everyday life.” They can be an important component to a ward’s progress but first the guardian has to be aware of them. These and other professionals are integral players in effective guardianship.

One judge writes, “… a proper application of guardianship law requires adherence to the Florida Statutes, the applicable local court rules, Florida Probate Rules and applicable court decisions.” Continuing education is a step towards this. But the guardian will probably find more rigorous education is required to stay ahead.

The guardian also needs to recognize when a decision is outside the guardian’s scope. Either someone else, such as the court, should make this decision or outside input is required. Part of the knowledge a guardian must have is that of the guardian’s limitations.

**Real Life Application of Decision-making**

Let’s apply the 5 steps of decision-making to a real life case. The nation was struck by the Terri Schiavo situation in Florida. The guardian (apparently not a professional guardian) was her husband. We will take a look from the professional guardian point of view.

In February 1990 Ms. Schiavo collapsed at home. A year later her condition was diagnosed as a persistent vegetative state. Eight years later the decision was whether to remove life support.
1. **What was Ms. Schiavo’s preference?** Her husband contended she had earlier expressed a wish not to be kept on life support with no hope of improvement. The parents countered that her religious beliefs would have prevented such a desire. The religious argument would contribute to the review of the ward’s historic lifestyle, potentially important if the ward left no instructions and cannot now assist.

2. **Substantial harm test.** The decision would result in the end of Ms. Schiavo’s life. But it may be a rational choice for the guardian (thus honoring Ms. Schiavo’s purported preference) if no improvement is possible.

3. **Best interests test.** This is a very subjective decision in the case. The guardian might argue, as the husband did, that no improvement was possible, that she would never awake and be even partially functional. The parents disputed the vegetative state diagnosis and said Ms. Schiavo was minimally conscious, attempted to speak and would eventually be able to make the decision for herself. (A video on the internet allowed the entire country to assay an opinion on Ms. Schiavo’s condition; there was vigorous debate.)

4. **Independent opinion test.** There was no lack of independent opinion—probably every American had one. A professional guardian would need court permission to terminate life support (indeed, early on the husband involved the court.) Many doctors examined Ms. Schiavo, including a panel of five (two appointed by the husband, two by the family, one by the judge.)
5. **Knowledge.** The guardian would normally be expected to have a wide range of knowledge as to the ward’s options. In this case, however, the issues were specialized and a greater reliance would be placed on independent opinion.

This does not purport to be a complete examination of Ms. Schiavo’s dilemma (the courts ruled that her preference was not to continue life support in the situation and she died 13 days after being removed from it in 2005). But it shows the application of five decision-making principles in the real world.

Notice how critical her preference was—the court’s belief that she would not want life support in these circumstances was a tremendous blow to the family who was trying to keep her on life support. Ethical decision-making begins with the ward.

We will take a look at the relationship the guardian has with the ward and then apply the five decision-making steps to specific areas of that responsibility.

**Chapter Highlights**

- Ethical decision-making involves a five part test.
- All ethical decision-making begins with the ward’s preferences.
Chapter 3

Relationship with the Ward

“The guardian shall exhibit the highest degree of trust, loyalty and fidelity in relation to the ward.”

--Rule 2, A Model Code of Ethics for Guardians

There are three areas for a guardian to consider in the relationship with a ward:

- Enhance
- Protect
- Avoid

Enhance

The guardian is always striving to enhance the ward’s independence. Again and again in specific discussions that follow—in housing, care, and estate—“least restrictive” will be used to describe what the guardian should achieve for the ward. Insofar as possible, the guardian is trying to build the ward’s self-reliance. Ideally the guardian should work herself or himself out of a job.

The guardian might also be trying to prudently increase the ward’s assets. Unless the guardian is a financial professional or the ward’s assets are very small, it is likely that independent opinion will be important here.

Because the ward is crucially involved in the decision-making process (to the extent possible), the guardian has a duty to inform the ward. Only if particular information would
cause substantial harm to a ward may the guardian omit this sharing.27

To develop this kind of relationship, where the guardian can have a positive influence on (and collaborate with) the ward, typically the guardian must meet with the ward. One judge suggests a monthly meeting.28 In Florida, an annual meeting is required.29 Here is an instance where the ethical standard is probably higher than the legal; it is doubtful that an annual meeting could develop a relationship of the required quality (unless the ward is unable to communicate.)

The visits serve a dual purpose. Not only is the guardian meeting the ward, but the quality of care can be inspected. A checklist may be useful here.

The guardian will have a relationship too with the caregivers. Sometimes there is a perception that the regulator and the regulated develop a cozy interaction to the detriment of the consumer. The guardian must guard against this happening in dealings with caregivers. The paramount relationship is that with the ward.

The squeaky wheel gets the oil. Caregivers who know the guardian is keeping an eye out may do a better job for the ward. It never hurts to grease the wheel either, however. One guardian brought the underpaid staff at a nursing home little presents and snacks.

Nonetheless, the guardian should not have a personal relationship with the ward (unless the guardian is a family member). Particularly the guardian should not have a sexual relationship with the ward (unless the guardian is the ward’s spouse or such a relationship existed prior to the
The proper relationship has been described as “good, working, kind, professional and trusting.”

Protect

Enhance rests on the foundation of protect. The guardian safeguards the health and well being of the ward, defending “against abuse, neglect and exploitation.”

There is a delicate balance between enhancing the ward’s independence and protecting the ward from harm. There are no easy answers but the guardian is expected to be vigilant. John Wayne’s pistol may be a useful analogy. It was rarely in his hand but always riding on his hip. If trouble threatened, the holster was suddenly empty.

One of the third parties in the scope of the guardian’s care is the caregiver. Much trouble may be avoided by making a careful choice up front. Florida Guardianship Law and Information at page 54 provides a useful 28 items checklist for evaluating a nursing home or adult congregate living facility. Similar inspections after placing the ward there, sometimes unscheduled ones, would be useful.

To ascertain whether a ward has been harmed may require the assistance of an attorney. For example, if the ward has written a book or created distinctive cartoon characters which someone else is using for profit, it will likely take an attorney to determine whether copyright or trademark laws have been violated. This is another instance of the independent opinion stage of the decision-making process.

The ward has a “right to interpersonal relationships and sexual expression.” The guardian must ensure that such
demonstrations are consensual and private. Appropriate birth control, again chosen with input from the ward, should be arranged. Although unaddressed by the NGA’s Code or Standards, one supposes that if a ward is not capable of consent, the guardian would be bound to protect the ward from sexual partners. The inability to consent would appear to vitiate the right to sexual expression with another.

The ward’s estate, as well as person, is guarded. The estate is administered “only for the benefit of the ward.” This statement might seem superfluous but the history of guardianships has been occasionally checkered. The guardian is bound to administer the estate as a “prudent person” would, utilizing any special talents the guardian has. Of course, if the guardian is lacking in any special talents, help from others should be sought if a prudent person in the same situation would do so.

There is an incentive to make lots of use of professionals. If an investment goes bad and the guardian didn’t do what a prudent person would have done, the loss may be charged to the guardian. As in, “get out your check book.” Ouch.

Who would sue the guardian to recover the losses? If the ward regains competency, the ward might. If the ward dies, the beneficiaries or heirs may bring suit.

Disputes with third parties do not necessarily need to end up in court. Mediation is another possibility. Here a trained, neutral third party talks to both parties to try and craft a solution acceptable to everybody. The mediator will talk to both together and separately, trying out ideas and probing for the real concerns. Mediation has 3 big advantages over the conventional courtroom: (1) it’s much
faster, (2) it’s much less expensive, and (3) it’s win-win (in the courtroom, one party loses).

There are disputes of course where mediation is inappropriate. But when available, it can work like magic. Many courts are now requiring mediation as a part of the judicial process.

Be mindful about mediation, however. In one case, a woman was suing after an auto accident. She claimed she had been hit while going 60 miles an hour on the freeway. In mediation, defendant’s insurance company told her that was impossible—the forensic evidence indicated a low speed collision. When mediation failed, the woman took heed and changed her story about the accident. Had the judge heard her first story contrasted with the evidence, she would have lost. The judge didn’t hear the first story because what is said in mediation is confidential. So mediate but don’t show all your cards!

Confidentiality is another way to protect the ward. The Model Code does not bring this up but the Standards say “The guardian shall keep the affairs of the ward confidential.”

The initial investigation of a ward’s assets and their ongoing management are both covered by confidentiality. There is an exception if disclosing information to the family would assist the ward.

A final person to protect the ward from is the guardian.

Avoid
The guardian should avoid conflicts of interest or even the appearance of conflicts. There are a number of boundaries. Possibly the biggest is the guardian should never provide direct services.

The guardian cannot (unless the court permits):

- provide legal services to the ward
- provide housing to the ward
- provide medical services to the ward
- work in the same facility where the ward lives or for any provider of direct services to the ward
- be connected to any service provider employed for the ward
- invite or accept any kickbacks or rebates from any service provider employed for the ward
- employ any of the guardian’s family or friends on behalf of the ward
- sell or purchase on ward’s behalf any property or services from the guardian’s family including a business in which a member of the family has any financial interest (family includes spouse, lineal descendants and collateral kindred)
- be involved in any business dealings with the ward
- acquire any purchase or other interest which adversely effects the interests of the ward
- be named as a beneficiary of the ward
- buy or use the ward’s car
- use the ward’s home
- “use the ward’s assets for the private gain of the guardian”

The guardian may be tempted to save the ward’s estate money
by using a do it yourself guide rather than hiring a professional.\textsuperscript{51} This, however, may violate the prohibition against direct services even if such use would be otherwise prudent.

The guardian should avoid representing too many wards so that effective assistance cannot be provided to each ward. One guardian had 210 wards;\textsuperscript{52} it is difficult to imagine each ward received adequate attention. The Teaster ratio recommends a maximum of 20 wards per guardian.\textsuperscript{53} Florida caps the number of wards per guardian at 40.\textsuperscript{54}

The guardian must even protect the ward from the guardian, not using the ward or the ward’s assets to enrich the guardian beyond the professional fee.

**Chapter Highlight**

- The guardian has 3 considerations in the relationship with the ward: enhance, protect, avoid.
“The guardian shall assume legal custody of the ward and shall ensure the ward resides in the least restrictive environment available.”

--Rule 3, A Model Code of Ethics for Guardians

Nationwide in 2005 “well over half the wards were in institutional settings.” The range was from 37% institutionalized in Kansas to 97% in Los Angeles. Apparently they haven’t heard about the least restrictive thing yet in LA.

First, of course, the guardian will obtain the ward’s preferences as to where the ward would prefer to live. The ward may prefer to remain in the present living situation. If that’s the least restrictive, most normal environment possible for the ward, great.

But for many wards, remaining in the present home may fail the substantial harm test. The assistance and care the ward needs may be unavailable there or obtainable only at great expense.

The best interest test may indicate that the ward’s economic resources would be better used in a facility with assisted care. The opportunities for enhancing a ward’s potential may be better available elsewhere.

If the guardian decides to remove the ward from their home, the Model Code suggests a third party review
(independent opinion—the fourth element of ethical decision-making) of that decision prior to the move, even when such precaution is not required by law. Similarly, the decision to place the ward in an institution providing only custodial care should be reviewed by a third party, the Model Code says.

In Florida, moving the ward further than the adjacent county requires court approval. If the move is just to the next county over, the court must be notified and advised of the compelling reason for the change.

The guardian must have a keen knowledge of the housing options available (the fifth and final element of decision-making discussed in Chapter 2). For example, the differences between (and advantages/disadvantages of) adult congregate living facilities and extended care facilities should be familiar territory.

The role of the guardian in the ward’s living arrangements does not end with the initial placement. Continuing monitoring by the guardian, including unannounced visits conducted without a guide, is important to ensure the ward’s quality of life.

It is necessary for the guardian to be accessible and to return phone calls. Keeping good contact with care providers and other third parties is difficult if they can’t reach the guardian. One guardian in Illinois got into legal trouble partially because the care provider and ward found him “difficult to reach.”
Chapter Highlights

- The decision about where the ward is to live is made using the five parts test.

- Where the ward is to live is not a one-time decision but requires continual monitoring.
Chapter 5

Care, Treatment and Services

“The guardian shall assume responsibility to provide informed consent on behalf of the ward for the provision of care, treatment and services and shall ensure that such care, treatment and services represents [sic] the least restrictive form of intervention available.”

--Rule 4, A Model Code of Ethics for Guardians

Decision-making

As always, the beginning of the discussion is the ward’s preferences with the goal of using the least restrictive alternative. In the case of medical care, the ward may have documented wishes prior to incapacitation “in an advance directive, a living will, a durable power of attorney, or any other written or oral declaration of intent.” Before the ward is asked for current preferences, the ward should be briefed on the diagnosis and treatment options. The guardian should thoroughly document all medical decisions.

The evaluation of substantial harm and best interests will likely rely heavily on independent opinion. There are many instances in which a second opinion is ethically required or mandated by statute. The third party evaluation may be done by an independent physician, the court or in some cases both. Such situations include:

- Significant risk to the ward
- Psychosurgery
- Experimental treatment
- Sterilization
- Abortion
- Electroshock therapy
- General or major anesthesia
- Extensive use of x-rays
- Eye surgery
- Amputation
- Any treatment using mechanical or chemical restraints
- Organ transplants
- Medical treatment prohibited by ward’s religious beliefs
- Withholding or withdrawing medical treatment
- Termination of life support

The family and close friends of the ward are likely to have opinions about treatment. While the ward should listen to these,\textsuperscript{65} it also makes good sense to do so. Listening and considering this input may lessen conflict between the guardian and these parties, possibly preventing litigation.

The knowledge element of medical decision-making involves informed consent.\textsuperscript{66} The guardian must have full disclosure of the facts and adequate information on the issue. The guardian must have the freedom to act voluntarily and without coercion.

\textit{Monitoring}

The guardian cannot assume the ward’s care is happening as planned—the guardian must monitor and check. The \textit{Standards} envision a three prong approach.\textsuperscript{67}

First, the guardian requires each provider a service plan for the ward.
Second, in monthly visits, the guardian reviews how that plan is being carried out and examines any documentation including “all charts, notes, logs, evaluations, and other documents regarding the ward.” The guardian looks at the ward’s physical appearance condition and evaluates the appropriateness of continuing the present arrangements. The signs of elder abuse are part of the guardian’s knowledge and the guardian is alert for these.

Finally, the guardian maintains “substantive communication” with the provider and participates in all conferences regarding the ward. The guardian cannot be a shrinking violet!

Chapter Highlights

- The five parts test is used to decide on the ward’s care.

- The guardian cannot assume the ward’s care is proceeding according to plan—continual monitoring is required.
Chapter 6

Estate

“The guardian of the estate shall provide competent management of the property and income of the estate. In the discharge of this duty, the guardian shall exercise intelligence, prudence and diligence and avoid any self-interest.”

--Rule 5, *A Model Code of Ethics for Guardians*

The primary goal of managing the ward’s estate is to provide for the ward’s needs. All of the five parts of the model for ethical decision-making come to fore. In determining the ward’s preferences, a will or estate plan made prior to incapacitation may be of particular value.

The best interests of the ward are met by a prudent management of assets. But there is a tension —to make sure the assets last and continue to provide for the ward, there is a need for income. If there is insufficient income, the guardian must pursue available sources, including public programs.

The guardian must provide competent administration. If there are areas where the guardian is not sufficient (perhaps the tax implications of estate planning), independent professional opinion must be sought.

Knowledge of the statutory limitations for the guardian’s particular state must be well known to the guardian. For example, Florida requires far more in order to sell personal
property than do the *Standards of Practice*. A guardian working in Florida must know the local rules.\textsuperscript{75}

To illustrate, to sell any asset in Florida requires the guardian to take the following steps (in addition to the usual decision-making):\textsuperscript{76}

- Get an appraisal of the asset
- Get a physician’s statement about the ward’s ability to use the asset now and in the future
- Have an attorney prepare a petition to sell
- Have the attorney notify all interested parties and allow them time to file an objection or place a bid
- Submit the petition to the court

The sale of the asset may not be made to the guardian or the guardian’s spouse, co-worker, employee, agent, attorney or any corporation or trust in which the guardian has a substantial interest, according to the *Standards of Practice*.\textsuperscript{77} Similarly, the guardian cannot buy from any of these people on the ward’s behalf.

The guardian may not loan or give away assets without court permission. Nor may the guardian borrow from or loan to the ward’s estate. (In Colorado, the Guardianship Alliance says a guardian is not “required to provide for a ward out of his/her own funds [or …] required to provide actual physical custody of the ward …”\textsuperscript{78} In Florida, the guardian is prohibited from these actions absent court approval.)

All of this is to avoid even the appearance of self-interest in the guardian’s dealings with the ward. Continuing in that line, there should be no comingling of the guardian’s and ward’s funds and detailed records should be maintained.\textsuperscript{79}
Charitable contributions or those to family or close friends will be based on the ward’s practice prior to incapacitation. Of course, the guardian will review the best interest test. Can the ward afford to continue such largesse, for instance? Such gifts may require court approval, as gifts to the ward’s family do in Florida. Any donation to the guardian should receive court approval.  

Chapter Highlights

- The primary goal of managing the ward’s estate is to provide for the ward’s needs.
- Selling assets may involve a detailed process.
Chapter 7

Endgame: Terminating or Limiting Guardianship

“The guardian has an affirmative obligation to seek termination or limitation of the guardianship whenever indicated.”

--Rule 6, A Model Code of Ethics for Guardians

Guardianship may be unique among jobs—you’ve done it best when you lose it. As we’ve seen before, “least restrictive” is a key value in evaluating options for the ward. If the situation improves so much that the incapacitation is gone and the ward can move to no restrictions—hooray! The guardian should get a bonus. Well, maybe next legislative session. So in the back of the guardian’s mind, there should always be this goal—trying to lose the job. Often this is not possible. But it’s the best result when it can happen.

This possibility is so important that if the ward requests a modification or termination of the guardianship, the guardian is obliged, the Model Code says, to so petition the court. If the guardian disagrees that the ward is ready for such a change, the guardian must hire independent counsel for the ward to pursue changing or ending the guardianship. Though it might sound farcical to the uninitiated, this is regarded as a fiduciary duty of the guardian. Any attempt to interfere with the ward in this matter constitutes a breach of that duty.81

(This procedure avoids the 1987 result where a judge ruled a ward, being incompetent, was incapable of hiring her
own counsel to contest her status. The Mississippi Supreme Court disagreed.\footnote{82)}

In Florida, anyone may file a suggestion to the court that the guardianship be limited or terminated. The court then appoints a physician to examine the ward and report back within 20 days of being appointed. If the doctor’s report is negative or if anyone files an objection to the suggestion, the court schedules a hearing.\footnote{83} This wide avenue to review guardianship may be a check on the problem of abuse of power.\footnote{84}

The threshold for removing incapacitation varies from state to state so the guardian is expected to know what it is in the ward’s jurisdiction.\footnote{85} The other four elements of ethical decision-making are also apparent in this final issue—the ward’s preference, which even the ward can exercise by going to court; the substantial harm and best interest tests which may lead the guardian to oppose the petition; independent opinion—counsel hired even against the guardian’s best judgment.

Another way a guardianship can end is when the ward dies. The guardian’s ability to independently act for the ward then ceases.\footnote{86} All further actions require court approval. These may include making funeral arrangements if no one else is available.\footnote{87}

**Chapter Highlights**

- The best result is if the guardian loses the job because the ward becomes independent again.
● The guardian must assist the ward if the ward seeks to limit or remove guardianship, even if the guardian disagrees.
Chapter 8

Getting Into Trouble

We have spent a good deal of time discussing how to make right decisions as opposed to bad ones for the ward. For a less subtle approach to ethics, perhaps we should list a number of ways the guardian can screw up and get removed. These items are from Florida's law but would likely trigger concern in any state.

- Fraud in obtaining her or his appointment.
- Failure to discharge her or his duties.
- Abuse of her or his powers.
- An incapacity or illness, including substance abuse, which renders the guardian incapable of discharging her or his duties.
- Failure to comply with any order of the court.
- Failure to return schedules of property sold or accounts of sales of property or to produce and exhibit the ward's assets when so required.
- The wasting, embezzlement, or other mismanagement of the ward's property.
- Failure to give bond or security for any purpose when required by the court or failure to file with the annual guardianship plan the evidence that the sureties on her or his bond are alive and solvent.
- Conviction of a felony.
- Appointment of a receiver, trustee in bankruptcy, or liquidator for any corporate guardian.
- Development of a conflict of interest between the ward and
the guardian.

- Having been found guilty of, regardless of adjudication, or entered a plea of nolo contendere or guilty to, any prohibited offense
- A material failure to comply with the guardianship report by the guardian.
- A failure to comply with the rules for timely filing the initial and annual guardianship reports.
- A failure to fulfill the guardianship education requirements.
- The improper management of the ward's assets.
- A material change in the ward's financial circumstances such that the guardian is no longer qualified to manage the finances of the ward, or the previous degree of management is no longer required.
- After appointment, the guardian becomes a disqualified person

A court hearing is held to determine whether the guardian should be removed.

**Chapter Highlight**

- Ethical decision-making provides a mechanism for choosing. Another way to choose is not to do any of the long list of statutory problem areas.
What to Do Next

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1 Mary Joy Quinn, *Guardianships of Adults*, (Springer, 2005), p. 21
5 Special Committee on Aging, United States Senate, *Innovative Approaches to Guardianship*, 1993, http://www.archive.org/stream/innovativeapproa00unit/innovativeapproa00unit_djvu.txt
9 National Guardianship Association, *Standards of Practice*, 2007, p. 7
13 National Guardianship Association, *Standards of Practice*, 2007, p. 6
19 National Guardianship Association, *Standards of Practice*, 2007, p. 6
22 National Guardianship Association, *A Model Code of Ethics for Guardians*, p. 18
26 Wikipedia, *Terry Schiavo case*, http://en.wikipedia.org/wiki/Terry_Schiavo, 2009. The independent opinion in the case was intense: “By March 2005, the legal history around the Schiavo case included fourteen appeals and numerous motions, petitions, and hearings in the Florida courts; five suits in Federal District Court; Florida legislation struck down by the Supreme Court of Florida; a subpoena by a congressional committee to qualify Schiavo for witness protection; federal legislation (Palm Sunday Compromise); and four denials of certiorari from the Supreme Court of the United States.” (ibid))
An exception applies if the guardian was named a beneficiary prior to the ward being adjudicated incapable.

An exception applies if the guardian is in the ward’s family.

An exception applies if the guardian is the ward’s spouse or dependent.


Mary Joy Quinn, *Guardianships of Adults*, (Springer, 2005), pp. 119

Mary Joy Quinn, *Guardianships of Adults*, (Springer, 2005), pp. 25

Mary Joy Quinn, *Guardianships of Adults*, (Springer, 2005), pp. 98


National Guardianship Association, *A Model Code of Ethics for Guardians*, p. 15

National Guardianship Association, *A Model Code of Ethics for Guardians*, p. 15


66 National Guardianship Association, *Standards of Practice*, 2007, p. 4
67 National Guardianship Association, *Standards of Practice*, 2007, p. 11
68 National Guardianship Association, *Standards of Practice*, 2007, p. 11
70 Mary Joy Quinn, *Guardianships of Adults*, (Springer, 2005), pp. 14
74 National Guardianship Association, *Standards of Practice*, 2007, p. 14
75 National Guardianship Association, *A Model Code of Ethics for Guardians*, p. 17
77 National Guardianship Association, *Standards of Practice*, 2007, p. 16-17
78 Guardianship Alliance of Colorado, Frequently Asked Questions, [http://www.guardianshipallianceofcolorado.org/faq.html#8](http://www.guardianshipallianceofcolorado.org/faq.html#8)
80 National Guardianship Association, *A Model Code of Ethics for Guardians*, p. 18
84 National Guardianship Association, *A Model Code of Ethics for Guardians*, p. 10
86 National Guardianship Association, *Standards of Practice*, 2007, p. 17