

# Indiana's New Guardianship Code: A New Emphasis on Alternative Forms of Protection

DAVID M. BERRY\*

## I. INTRODUCTION

One of the most significant considerations that precipitated the wholesale amendment of Indiana's guardianship statutes with the enactment of Indiana's New Guardianship Code (the "NGC")<sup>1</sup> was the concern of many groups, especially senior citizen groups, that it was too easy to place a person under the protection of a guardianship.<sup>2</sup> Yet, it was also recognized that, in many cases, even though a guardianship may have been too easily established, the protected person<sup>3</sup> was in need of some form of assistance.<sup>4</sup> To provide assistance to individuals in situations where a full guardianship proceeding is unnecessary, the NGC provides various alternative proceedings in lieu of a guardianship.<sup>5</sup> In addition, the NGC does not affect and still permits other traditional statutory alternatives to a guardianship.<sup>6</sup>

This Article first offers a discussion of some of the alternative proceedings and approaches to a guardianship and their potential application to individuals in need of a level of assistance somewhat less than a full guardianship. Then, some of the NGC's more significant provision concerning guardianships will be examined. This discussion will include: the creation of a guardianship by the appointment of a

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\* Associate, Lowe Gray Steele & Hoffman, Indianapolis. B.A., University of Denver, 1981; J.D., Indiana University School of Law—Indianapolis, 1988. [As this Article was going to print, certain amendments to the New Guardianship Code were being considered by the Indiana General Assembly. The reader should be aware of the fact that some of the code sections cited in this Article may have been amended by the Legislature.—*Ed.*]

1. IND. CODE §§ 29-3-1-1 to -13-3 (1988).

2. Gates, *Background: A History of the Development of House Bill 1113*, ICLEF GUARDIANSHIP SEMINAR I-2 (1988); Gordon, *Small Estates, Parental Powers and Temporary Guardians*, ICLEF GUARDIANSHIP SEMINAR III-1 (1988).

3. Under the NGC, the term "protected person" replaces the word "ward" under prior Indiana law. IND. CODE § 29-3-1-13 (1988) defines "protected person" as "an individual for whom a guardian has been appointed or with respect to whom a protective order has been issued."

4. Gordon, *supra* note 2, at III-1.

5. See IND. CODE § 29-3-3-1 to -5 (1988).

6. Emison, *Alternatives to Guardianship*, ICLEF GUARDIANSHIP SEMINAR X-8 (1988).

guardian; the powers and duties of a guardian; the removal of a guardian; the termination of a guardianship; and foreign guardianships. This Article will not attempt to analyze every important new provision of the NGC and, as such, the practitioner is well advised to review the new Act in its entirety to represent clients most effectively.

## II. ALTERNATIVES TO GUARDIANSHIPS

### A. Facility of Payment

1. *Minors*.—The NGC permits a person who is either indebted to a minor<sup>7</sup> or who possesses property belonging to a minor in an amount not exceeding \$3,500 to pay the debt or deliver the property to certain persons without the appointment of a fiduciary, the giving of a bond or court order.<sup>8</sup> These NGC facility of payment provisions recognize that, in many situations, a minor needs financial assistance<sup>9</sup> even though the dollar amount of the transaction might be small. These provisions are designed to eliminate the “expense and complexity” of guardianship proceedings,<sup>10</sup> as well as to provide “some sense of security for the transferor.”<sup>11</sup> In addition, safeguards concerning the use of the property for the benefit of the minor<sup>12</sup> exist under the NGC’s duties of care imposed upon the recipient.

The NGC provides that property with value not exceeding \$3,500 may be paid to certain individuals without the need for any protective proceedings.<sup>13</sup> The NGC differs from the Uniform Guardianship and Protective Proceedings Act<sup>14</sup> (the “Uniform Act”) because the Uniform Act provides a higher ceiling of \$5,000 per year<sup>15</sup> relating to these facility of payment provisions. The NGC seemingly retains the lower \$3,500 amount from prior Indiana law concerning the small estates of minors.<sup>16</sup> Yet, the NGC differs from prior Indiana law on this matter because the \$3,500 threshold in the prior law related to “the whole estate of a

7. IND. CODE § 29-3-1-10 (1988) defines the term “minor” as “an individual who is less than eighteen (18) years of age.”

8. IND. CODE § 29-3-3-1 (1988).

9. Gordon, *supra* note 2, at III-1.

10. *Id.* at III-2; *See also* UNIF. GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT § 1-106 comment, 8A U.L.A. 445 (1983) which states, “Where a minor has only a small amount of property, it would be wasteful to require protective proceedings to deal with the property.”

11. Gordon, *supra* note 2, at III-2.

12. *Id.*

13. IND. CODE § 29-3-3-1(a) (1988).

14. UNIF. GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT, 8A U.L.A. 440 (1983).

15. *Id.* § 1-106, 8A U.L.A. 444.

16. *See* IND. CODE § 29-1-18-50 (repealed effective July 1, 1989).

minor . . . after payment of reasonable medical expenses, hospital bills, attorney's fees and other expenses incidental to the collection of any claim due the minor."<sup>17</sup> In contrast, the NGC's \$3,500 threshold relates to any debt or property belonging to a minor,<sup>18</sup> and not to the minor's entire estate. In this context, the NGC has adopted the transactional approach of the Uniform Act which makes it possible for other persons to handle the less complicated property affairs of a minor.<sup>19</sup> While prior Indiana law was couched in terms such as "whole estate,"<sup>20</sup> some commentators believed that the \$3,500 limit under prior Indiana law related not to the size of the minor's estate, but rather the size of the indebtedness to the minor.<sup>21</sup> Thus, the difference between the NGC and prior Indiana law might not be as significant as it first seems.

For the payment of amounts not exceeding \$3,500, these NGC facility of payment provisions are permissive; not mandatory.<sup>22</sup> Accordingly, there may be situations in which the establishment of a full guardianship or some other form of protective proceeding might be beneficial, even for such small amounts.<sup>23</sup> Conversely, for payment of amounts that exceed \$3,500, these NGC facility of payment provisions do not apply and some form of court authorization for the transfer should be obtained.<sup>24</sup>

Under the NGC, the person authorized to receive the payment of debt or delivery of property is "any person having the care and custody

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17. *Id.* These provisions recognize that a minor might not have assets of great value because he has not accumulated assets due to his age. While he might be in need of assistance concerning his financial affairs, a full guardianship or other protective proceedings would be too costly relative to the size of the minor's estate. See Gordon, *supra* note 2, at III-1.

18. IND. CODE § 29-3-3-1(a) (1988).

19. UNIF. GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT § 1-106 comment, 8A U.L.A. 445 (1983).

20. See IND. CODE § 29-1-18-50 (repealed effective July 1, 1989).

21. Shivey, *Guardianships* (preface to IND. CODE ANN. § 29-1-18) (West 1979) (The settlement of a claim of a minor by the minor's parents and an insurance company when the claim does not exceed \$3,500 after the payment of reasonable medical expenses, attorney fees and other collection costs does not require a guardianship.).

22. IND. CODE § 29-3-3-1 (1988) (The transferor *may* pay the debt or deliver the property without the appointment of a fiduciary, giving of bond, or other court order to other persons.).

23. One example would be protecting the minor's assets from the creditors of the transferee. Arguably, even though IND. CODE § 29-3-3-1(b) (1988) provides that the person receiving the property has the duty to apply the property to support, use, and benefit of the minor, the property will not be held in the minor's name, but rather the transferee's name and thus the property could be subject to the transferee's creditors.

24. See UNIF. GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT § 1-106 comment, 8A U.L.A. 445 (1983) ("Protective proceedings, including the possible establishment of a [guardianship], should be sought where substantial property is involved.').

of the minor with whom the minor resides"<sup>25</sup> or a "guardian of the minor."<sup>26</sup> In contrast, in addition to these recipients, the Uniform Act also permits payment to the minor if eighteen or more years of age or married<sup>27</sup> or to "a financial institution incident to a deposit in a state or federally insured savings account or certificate in the sole name of the minor with notice of the deposit to the minor."<sup>28</sup> These differences are not significant, especially when considering that the NGC definition of "minor" is "an individual who is less than eighteen years of age."<sup>29</sup> Thus, under the NGC, by definition, a minor cannot be eighteen or more years of age.

A person who, in good faith, pays or delivers property in accordance with the NGC's facility of payment provisions is not responsible for the proper application of that property.<sup>30</sup> Once the proper recipient has received the payment of debt or delivery of property, such recipient has a duty "to apply the property to the support, use and benefit of the minor."<sup>31</sup> This provision is more liberal than prior Indiana law which required court approval for any application of the property.<sup>32</sup> Yet, this provision might be too liberal because the terms "use" and "benefit" grant the recipient extremely broad discretion in the application of such funds<sup>33</sup> and are not extremely useful terms in creating a standard of care for the recipient. In addition, the NGC's standard of care fails to provide the duty to preserve and maintain the minor's assets and the

25. IND. CODE § 29-3-3-1(a)(1) (1988).

26. *Id.* § 29-3-3-1(a)(2).

27. UNIF. GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT § 1-106(a)(1), 8A U.L.A. 444 (1983).

28. *Id.* § 1-106(a)(4), 8A U.L.A. 444.

29. IND. CODE § 29-3-1-10 (1988); *see also* text accompanying note 7.

30. IND. CODE § 29-3-3-1(c) (1988). One suggested approach that a transferor may use to ensure protection under this facility of payment provision is to obtain a receipt in affidavit form. *See* Gordon, *supra* note 2, at III-5 - III-6.

31. IND. CODE § 29-3-3-1(b) (1988).

32. IND. CODE § 29-1-18-50(a) (1979) provided, "The person receiving such money or other assets shall hold and dispose of the same in such manner as the court shall direct."

33. The Uniform Act specifically rejects such a broad standard and requires that the funds be used for the "support and education" of the minor. *See* UNIF. GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT § 1-106(c), 8A U.L.A. 444-45 (1983). In addition, UNIF. GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT § 1-106 comment, 8A U.L.A. 445 (1983) provides:

This section does not go as far as many facility of payment provisions found in trust instruments, which usually permit application of sums due a minor beneficiary to any expense or charge for the minor. It was felt that a grant of so large an area of discretion to any category of persons who might owe funds to a minor would be unwise.

duty to turn the remaining assets over to the minor upon attaining majority.<sup>34</sup>

A transferor may not avail himself to the NGC's facility of payment procedures if the transferor "knows that a guardian has been appointed for the minor or that proceedings for appointment of a guardian for a minor are pending."<sup>35</sup> In these situations, because court proceedings are currently in process, the primary purpose of the NGC's facility of payment procedures (*i.e.*, to avoid a full guardianship or other court proceedings) is not applicable. Accordingly, the transfer of assets should be made in conjunction with the pending proceedings.<sup>36</sup> Yet, this limitation seemingly contradicts the NGC's provision which enables a transferor to pay debt or deliver property to a guardian of the minor,<sup>37</sup> and the provisions which enable a guardian to receive property payable to the minor<sup>38</sup> or protected person.<sup>39</sup> This apparent contradiction is probably the result of the Uniform Act's distinction between a guardian and conservator,<sup>40</sup> which historically has not been followed in Indiana.<sup>41</sup> The Uniform Act's comparable provision prohibits the use of the facility of payment procedures for the transfer of a minor's assets if the transferor knows that a conservator has been appointed for the minor or that proceedings for appointment of a conservator are pending.<sup>42</sup> Yet, the Uniform Act permits the application of the facility of payment procedures

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34. *Contra*, UNIF. GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT § 1-106(c), 8A U.L.A. 444-45 (1983) which provides, "Any excess sums must be preserved for future support and education of the minor and any balance not so used and any property received for the minor must be turned over to the minor when majority is attained."

35. IND. CODE § 29-3-3-1(c) (1988).

36. Gordon, *supra* note 2, at III-5.

37. *See* IND. CODE § 29-3-3-1(a)(2) (1988); *see also* Gordon, *supra* note 2, at III-5 (suggesting that due to this contradiction, "there appears to be no need for the [NGC] to allow transfers of small amounts to a guardian of the minor as provided in I.C. § 29-3-3-1(a)(2)").

38. *See* IND. CODE § 29-3-8-2(a)(1) (1988).

39. *See* IND. CODE § 29-3-8-4(1) (1988). *See supra* note 3 (noting that a "protected person" is defined in IND. CODE § 29-3-1-13 (1988) as "an individual for whom a guardian has been appointed or with respect to whom a protective order has been issued"). As such, a minor may also be a protected person.

40. Under the Uniform Act, guardianship proceedings affecting minors are described in Article II, Part 1, while a conservator comes into existence incident to the protective proceedings as described in Article II, Part 3.

41. *See* Shivey, *supra* note 21, which states that the term "conservator" may be used interchangeably with the term "guardian." *See also* IND. CODE § 29-3-1-6 (1988) which defines "guardian" as "a person who is a fiduciary and is appointed by a court to be a guardian or *conservator* responsible as the court may direct for the person or the property of a disabled person or a minor." *Id.* (emphasis added).

42. UNIF. GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT § 1-106(b), 8A U.L.A. 444 (1983).

in spite of a transferor's knowledge that a guardian of the minor has been appointed or may be appointed as a result of a pending proceeding.<sup>43</sup> Under the Uniform Act, a guardian's powers do not include the authority to compel payment of money due to the minor, but include authority to receive payments made under the protection of the Uniform Act's facility of payment provisions.<sup>44</sup> In contrast, under the Uniform Act, a conservator has title to all assets of the minor's estate, except as otherwise provided in the case of a limited conservator.<sup>45</sup> Because the appointment of a conservator under the Uniform Act is a serious matter affecting the title to the minor's assets, this limitation to the Uniform Act's facility of payment provisions was created.<sup>46</sup> Unlike the Uniform Act, the NGC does not provide for the title of the minor's assets to be transferred to a conservator or guardian.<sup>47</sup> Thus, the rationale for such a limitation on the facility of payment provisions does not exist under the NGC. In sum, this limitation should be rendered to have no effect because the NGC provides that a transferor may pay debts or deliver property to a guardian of a minor without a court order,<sup>48</sup> and that a guardian has the power to receive such property which is payable to the minor.<sup>49</sup>

2. *Disabled Persons*.<sup>50</sup>—Unlike the Uniform Act, the NGC contains facility of payment provisions for disabled persons when the entire

43. *Id.* § 1-106 comment, 8A U.L.A. 445.

44. *Id.* § 2-109, 8A U.L.A. 467.

45. *Id.* § 2-319, 8A U.L.A. 503.

46. *Id.* § 1-106 comment, 8A U.L.A. 445.

47. *See supra* note 38 and accompanying text.

48. *See supra* note 35 and accompanying text.

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

50. IND. CODE § 29-3-1-4 (1988) defines "disabled person" as an individual who:

(1) cannot be located upon reasonable inquiry;

(2) is unable:

(A) to manage in whole or in part the individual's property;

(B) to provide self-care; or

(C) both;

because of insanity, mental illness, mental deficiency, physical illness, infirmity, habitual drunkenness, excessive use of drugs, incarceration, confinement, detention, duress, fraud, undue influence of others on the individual, or other disability; or

(3) has a developmental disability, the severity and chronicity of which:

(A) is attributable to a mental impairment or physical impairment, or both;

(B) is manifested before the person is twenty-two (22) years of age;

(C) is likely to continue indefinitely;

(D) results in substantial functional limitations in at least three (3) of the following:

(i) self-care;

(ii) receptive and expressive language;

(iii) learning;

property of the disabled person does not exceed \$3,500.<sup>51</sup> These provisions are essentially the same as prior Indiana law<sup>52</sup> with the exception that the NGC's term "entire property" replaces the term "whole estate," because the term "property" more correctly describes the facility of payment for disabled persons than does the term "estate."<sup>53</sup>

### B. Parental Powers

Under prior Indiana law, the parents of a minor were jointly deemed to be the natural guardians of the minor; except as otherwise determined in a divorce or other proceeding. In addition, a parent could not be the natural guardian if the parent was incompetent or if the child was married.<sup>54</sup> The parents, as natural guardians, were given the powers and subject to the limitations imposed upon guardians under prior Indiana law without the need for any court proceeding.<sup>55</sup> The NGC retains the same listing of situations where parental powers are limited as existed under prior Indiana law.<sup>56</sup> Yet, the NGC differs from prior law because the NGC does not grant the parents the general powers of guardians and related limitations.<sup>57</sup> Instead, the NGC provides that parents have two specified powers: the right to custody of the person of a minor and the power to execute certain documents.<sup>58</sup> Yet, the NGC does not specifically define the rights relating to the custody of the person of a

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- (iv) mobility;
  - (v) self-direction;
  - (vi) capacity for independent living; and
  - (vii) economic self-sufficiency; and

(E) reflects the person's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services that are of lifelong or extended duration and are individually planned and coordinated.

51. IND. CODE § 29-3-3-2 (1988).

52. See IND. CODE § 29-1-18-59(b) (repealed effective July 1, 1989).

53. See Gordon, *supra* note 2, at III-7, which states that the term "estate" in the Probate Code, IND. CODE § 29-1-1-3 (1988), denotes the real and personal property of a decedent or ward. Under the facility of payment provisions, there is no decedent and there may not be a ward if full guardianship proceedings have not been implemented.

54. IND. CODE § 29-1-18-5 (repealed effective July 1, 1989).

55. *Id.* § 29-1-18-5.

56. *Id.* § 29-3-3-3 (1988) provides for parental powers: (1) "except as otherwise determined in a dissolution of marriage proceeding or in some other proceeding authorized by law, including a guardianship proceeding;" or (2) unless a minor is married; and (3) if the parent is not a disabled person. It is important to note that dissolution decrees should specifically state who has these powers; otherwise, both parents may be required to perform the necessary action.

57. See *supra* note 53 and accompanying text.

58. IND. CODE § 29-3-3-3 (1988). This provision has no counterpart in the Uniform Act.

minor<sup>59</sup> or the term "custody." In addition, the NGC provides that parents have the power to execute, on the behalf of the minor, a number of specified documents including tax, probate and medical consents and waivers.<sup>60</sup> Specifically, the NGC grants the parents of a minor the authority to execute, on the minor's behalf, the agreement with the Internal Revenue Service required under Internal Revenue Code Section 2032A<sup>61</sup> This agreement is necessary for an executor to make the election to value certain classes of real estate used in connection with a farm or a closely-held business at their "current" use rather than the usual "highest," "best" or "most suitable" use for estate tax valuation purposes.<sup>62</sup> This election may reduce the size of a decedent's estate by \$500,000 and is primarily designed to prevent the potential problem that a portion of the family farm or business might have to be sold to pay estate taxes.<sup>63</sup> In addition, parents may execute, on the minor's behalf, the consent required by Internal Revenue Code Section 6324A(e) which attaches a lien against certain property to secure payment of the taxes deferred under Internal Revenue Code Section 6166.<sup>64</sup> This provision of the Internal Revenue Code provides for a fifteen-year installment payout with a five-year deferral of estate taxes attributable to the inclusion in the decedent's gross estate of certain qualifying farms or closely-held businesses.<sup>65</sup>

Moreover, parents may, on the behalf of minors, sign the minor's federal and state income tax returns.<sup>66</sup> With the advent of the "kiddie tax,"<sup>67</sup> more minors under the age of fourteen will be required to file income tax returns. Accordingly, this provision will be beneficial in the preparation of the minors' income tax returns because parents may sign for the minors. In addition, parents may execute, on the behalf of a minor, "any other consents, waivers or powers of attorney provided for under the Internal Revenue Code"<sup>68</sup> or provided for under any statute, including the Indiana inheritance tax law, the Indiana gross income tax law and the Indiana adjusted gross income tax law.<sup>69</sup>

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59. Gordon, *supra* note 2, at III-11.

60. IND. CODE § 29-3-3-3 (1988).

61. See Rev. Proc. 81-14, 1981-1 C.B. 669.

62. I.R.C. § 2032A (1986).

63. WEST'S FEDERAL TAXATION: CORPORATIONS, PARTNERSHIPS, ESTATES AND TRUSTS 586 (1981).

64. IND. CODE § 29-3-3-3(2) (1988).

65. I.R.C. § 6166 (1986).

66. IND. CODE § 29-3-3-3(7) (1988).

67. I.R.C. § 1(i) (1986).

68. IND. CODE § 29-3-3-3(3) (1988).

69. *Id.* § 29-3-3-3(5).

For probate purposes, parents are authorized to execute any waiver of notice relating to proceedings under the Indiana Probate Code.<sup>70</sup> In addition, parents are specifically authorized to sign the consent to unsupervised administration under the Indiana Probate Code<sup>71</sup> in situations where a minor is a beneficiary of the estate.

Under the NGC, parents are also authorized to consent to medical or other professional care, treatment or advice for the minor's health and welfare.<sup>72</sup> Yet, under certain circumstances, this parental power may contradict the emancipated minor's right to consent to his own health care needs under the Indiana Health Care Consent Law.<sup>73</sup>

### C. *Temporary Guardianships*

The NGC provision relating to the appointment of temporary guardians<sup>74</sup> has no counterpart in the Uniform Act, but is similar to prior Indiana law.<sup>75</sup> There are four prerequisites for the appointment of an emergency temporary guardian: a guardian has not been appointed;<sup>76</sup> an emergency exists;<sup>77</sup> the welfare of the disabled person or minor requires immediate action;<sup>78</sup> and no other person appears to have authority to act in the circumstances.<sup>79</sup> These NGC prerequisites for the appointment of an emergency temporary guardian are more specific than under prior Indiana law which simply provided that the court need only find that the welfare of an incompetent required the immediate appointment of a guardian of his person or of his estate.<sup>80</sup> For minors, this NGC provision may apply only in those rare situations where parental powers are limited,<sup>81</sup> because the minor's parents have the right to custody of the person of a minor and the power to execute certain documents, including in particular, a consent to medical treatment.<sup>82</sup> At least arguably, these powers possessed by a minor's parents would prevent the

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70. *Id.* § 29-3-3-3(4). One suggested use of this power is for the parents to sign the waiver of the notice of the hearing on petition to sell real property in the decedent's estate coupled with the parents' signing of the consent to the sale of such property. See Gordon, *supra* note 2, at III-13.

71. IND. CODE § 29-3-3-3(6) (1988).

72. *Id.* § 29-3-3-3(8).

73. *Id.* § 16-8-12-2.

74. *Id.* § 29-3-3-4.

75. See *id.* § 29-1-18-24 (repealed effective July 1, 1989).

76. *Id.* § 29-3-3-4(a)(1) (1988).

77. *Id.* § 29-3-3-4(a)(2).

78. *Id.* § 29-3-3-4(a)(3).

79. *Id.* § 29-3-3-4(a)(4).

80. *Id.* § 29-1-18-24 (repealed effective July 1, 1989).

81. See *supra* note 54 and accompanying text.

82. IND. CODE § 29-3-3-3 (1988).

appointment of an emergency temporary guardian because the parents appear to have the authority to act in the circumstances.<sup>83</sup>

While any person may file a petition for the appointment of an emergency temporary guardian, the court, on its own motion, may also appoint an emergency temporary guardian.<sup>84</sup> The court may specify the period of appointment, not to exceed sixty days, for an emergency temporary guardian.<sup>85</sup> Generally, no appointment can be made prior to a hearing on the matter in which the NGC's notice requirements<sup>86</sup> have been satisfied.<sup>87</sup> Yet, the notice requirements may be waived if the court finds that "immediate and irreparable injury to the person, or injury, loss or damage to the property of the alleged disabled person or minor may result before the alleged disabled person or minor can be heard in response to the petition."<sup>88</sup> To protect the alleged disabled person or minor, the NGC provides that they may file a petition to terminate the emergency temporary guardianship or to modify the court order in those situations when notice was waived, in which the court must hear and determine the petition "at the earliest possible time."<sup>89</sup>

In addition, "if the proceeding is for the appointment of a temporary guardian of the person for an alleged disabled person or minor who is in need of medical care," then venue for the proceeding is in the county where the facility providing or attempting to provide medical care is located.<sup>90</sup> This provision is designed to provide flexibility in managing emergency situations that involve health care needs.<sup>91</sup>

A court may also appoint a replacement temporary guardian if the court finds that a previously appointed guardian is not effectively performing his fiduciary duties and that the welfare of the protected person requires immediate action. In these situations, the court may suspend the authority of the previously appointed guardian during the period of time in which the replacement temporary guardian has authority to act.<sup>92</sup>

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83. An example in which this prerequisite might prevent the appointment of a temporary guardian is in situations involving health care decisions if a person has the authority to act under Indiana's Health Care Consent Law (IND. CODE § 16-8-12-1 to -12) (1988)); see Gordon, *supra* note 2, at III-17.

84. IND. CODE § 29-3-3-4(a) (1988).

85. *Id.*

86. See *id.* § 29-3-6-1(a)(2); see also *infra* notes 172-79 and accompanying text.

87. IND. CODE § 29-3-3-4(a) (1988).

88. *Id.*

89. *Id.*

90. *Id.* § 29-3-2-2(a)(1)(B). Otherwise, venue is in the county where the alleged disabled person or minor resides. *Id.* § 29-3-2-2(a)(1)(A).

91. Wishard, *Overview: Indiana's New Guardianship Code*, ICLEF GUARDIANSHIP SEMINAR II-5 (1988).

92. IND. CODE § 29-3-3-4(b) (1988).

In this regard, the court has absolute discretion to determine the period for which the replacement temporary guardian has authority to act and is not limited to the sixty-day period relating to an emergency temporary guardian. The notice requirements for a replacement temporary guardian are the same as for an emergency temporary guardian.<sup>93</sup>

Similar to prior Indiana law,<sup>94</sup> the emergency and replacement temporary guardians have only the responsibilities and powers that are ordered by the court.<sup>95</sup> While the temporary guardianship proceedings are not subject to the NGC's provisions concerning protective order or regular guardianship proceedings,<sup>96</sup> the temporary guardianship proceedings may be joined with such other proceedings.<sup>97</sup> In this context, the temporary guardianship provisions are useful in bridging the gap between the time that a problem is recognized and the time in which a guardian is appointed or a protecting order is issued.<sup>98</sup>

#### *D. Protective Proceedings and Single Transactions*

A protective proceedings is "a proceeding for a protective order."<sup>99</sup> Likewise, a court may treat a proceeding for the appointment of a guardian as one for a protective order if the court finds that it is "not in the best interest of the disabled person or minor" to appoint a guardian.<sup>100</sup> While prior Indiana law had no similar provisions concerning

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93. IND. CODE § 29-3-6-1(a)(2) (1988) provides that if the petition is for the appointment of a temporary guardian (which includes a replacement temporary guardian), notice shall be given as required by IND. CODE § 29-3-3-4(a) which relates to emergency temporary guardians.

94. IND. CODE § 29-1-18-24 (repealed effective July 1, 1989) provides, "The appointment may be to perform specific duties respecting specific property or to perform particular acts, as stated in the order of appointment. The temporary guardian shall make such reports as the court shall direct, and shall account to the court upon termination of his authority."

95. IND. CODE § 29-3-3-4(c) (1988). Gordon, *supra* note 2, at III-19 recommends:

For the emergency temporary guardian, the court should be asked to grant all powers that may be necessary to deal with the existing emergency and any other matter that might arise during the specified period of appointment which would require action for the welfare of the disabled person or minor. For a substitute temporary guardian, the request should be for all powers that the previously appointed guardian had which might be necessary during the period of the temporary guardianship fixed by the court.

96. IND. CODE § 29-3-3-4(d) (1988).

97. *Id.* § 29-3-3-4(e) (1988).

98. For example, a petition for the appointment of a replacement temporary guardian may be joined with a petition for the appointment of a successor guardian under IND. CODE § 29-3-12-4 (1988).

99. IND. CODE § 29-3-1-14 (1988).

100. *Id.* § 29-3-5-3(c).

protective proceedings,<sup>101</sup> the NGC's provisions are similar to those of the Uniform Act.<sup>102</sup>

Any person may petition the court for the issuance of a protective order.<sup>103</sup> The procedure to initiate a protective order involves the same hearing and notice requirements involved with the procedure for requesting the appointment of a guardian.<sup>104</sup> The disabled person's or minor's rights at the hearing concerning the issuance of a protective order are the same as their rights at a hearing concerning the appointment of a guardian.<sup>105</sup>

In addition, except for minors, for a protective order to be issued for the benefit of a person, the court must first determine that the person is a disabled person.<sup>106</sup> The court must also find that the disabled person or minor "owns property or has income requiring management or protection that cannot otherwise be provided; . . . has or may have financial affairs that may be jeopardized or impaired; or . . . has property that needs to be managed to provide for the support or protection of the disabled person" or minor and that "the protection sought is necessary."<sup>107</sup> In addition, while not required for minors, the court must also find that the disabled person is unable to manage his property and financial or business affairs effectively.<sup>108</sup>

Upon making these findings, the court has extremely broad authority to make the orders it considers proper and appropriate to protect the person, business affairs and property of the disabled person or minor.<sup>109</sup> In addition, the court may also, without appointing a guardian, declare the person to be a protected person<sup>110</sup> and authorize or ratify any single transaction necessary and desirable to meet the needs of the protected person.<sup>111</sup> The NGC provides a non-exhaustive list of protective ar-

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101. Matthews, *Protective Proceedings and Single Transactions*, ICLEF GUARDIANSHIP SEMINAR IV-1 (1988).

102. See UNIF. GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT § 2-301, 8A U.L.A. 488-89 (1983).

103. IND. CODE § 29-3-4-1(a) (1988).

104. See *infra* notes 172-79 and accompanying text.

105. IND. CODE § 29-3-4-1(c) (1988).

106. *Id.* § 29-3-4-1(a).

107. *Id.* § 29-3-4-1(d), (e).

108. *Id.* § 29-3-4-1(d)(2).

109. *Id.* § 29-3-4-1(d), (e).

110. See *supra* note 3 and accompanying text.

111. IND. CODE § 29-3-4-1(f) (1988). This subsection is substantively the same as the Uniform Act, the official comment of which states:

It is important that the provision be made for the approval of single transactions or the establishment of protective arrangements as alternatives to full conservatorship. . . . This section, consistent with the concept of a limited

rangements that might involve more than one transaction, which includes: the payment, delivery, deposit, or retention of property; the sale, mortgage, lease, or other transfer of property; the entry into an annuity contract, a contract for life care, a deposit contract, or a contract for training and educating a person; and the addition to or establishment of a suitable trust.<sup>112</sup> Even though a court must act in authorizing single transactions and protective arrangements, it acts directly without appointing a guardian and, as a result, the comprehensively disabling effect of appointing a guardian is avoided.<sup>113</sup>

### E. Limited Guardianships

Under the NGC, there are two separate methods in which a limited guardian may be appointed. First, a court may appoint a limited guardian to assist in the establishment of any protective arrangement or single transaction.<sup>114</sup> In this context, the limited guardian has the authority conferred by the court order and serves until discharged by the court after reporting to the court all matters conducted under the order.<sup>115</sup> In addition, a limited guardian may be appointed in lieu of a guardian if it is alleged, and the court finds, that the welfare of a disabled person would be best served by limiting the scope of the guardianship.<sup>116</sup> In this context, the court order should be made to encourage the development of the disabled person's self-improvement, self-reliance, and independence and to contribute to the disabled person's living as normal a life as that person's condition and circumstances permit without psychological or physical harm to the disabled person.<sup>117</sup> For this second type of limited guardianship, the NGC provides no guidance as to the powers and duties of the limited guardian or the duration of the limited guardianship. Unlike the NGC, prior Indiana law provided that the powers and duties

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conservatorship, eliminates the necessity of the establishment of long-term arrangements in this situation.

UNIF. GUARDIANSHIP AND PROTECTIVE PROCEEDINGS § 2-308(a) comment, 8A U.L.A. 497 (1983).

112. IND. CODE § 29-3-4-1(f) (1988); *see also* Matthews, *supra* note 101, at IV-3 - IV-4. The author, in discussing the parameters of the term "suitable trust," states that the NGC does not specifically provide for the automatic termination of a trust established for the benefit of a minor upon the minor reaching the age of eighteen years of age. Although theoretically possible under the NGC, a trust of unlimited duration, established for the benefit of a minor who is not also disabled, which extends majority would probably be an unconstitutional taking of the minor's property.

113. Emison, *supra* note 6, at X-7.

114. IND. CODE § 29-3-4-3 (1988).

115. *Id.*

116. *Id.* § 29-3-5-3.

117. *Id.*

of the limited guardian should be specifically stated in the order of appointment, and that such powers and duties should not extend beyond what was prescribed in the order of appointment.<sup>118</sup> Under prior Indiana law, the ward retained all other rights, powers and duties.<sup>119</sup> Yet, in the NGC, no such guidance exists and practitioners are free to recommend and courts are free to formulate specific powers and duties in the orders of appointment. With such lack of direction from the NGC, it is not unexpected for practitioners to hesitate establishing a limited guardianship in lieu of a full guardianship or a protective proceeding.<sup>120</sup> Thus, the sparse language in the NGC might have the unintended result of discouraging limited guardianships.

The concept of limited guardianships has developed as a response to the traditional absolute authority granted to a guardian as well as recent insights into the nature of disabilities and the possibilities for rehabilitation and treatment when a protected person has control over his affairs.<sup>121</sup> As such, a limited guardianship is of particular significance to developmentally-impaired individuals.<sup>122</sup> The premise of the use of a limited guardianship in this regard is that a developmentally impaired person grows and develops with training. As the person develops, the limited guardianship can be further limited with the intent of its eventual termination.<sup>123</sup> In most states with limited guardianship statutes, the court must initially determine those areas of decisionmaking in which a disabled person is incapacitated.<sup>124</sup> The use of an individual functional assessment questionnaire is helpful in making such an assessment, because it is designed to identify functional limitations and to determine whether the limitations result in an inability to provide informed decisions on issues of legal significance.<sup>125</sup> Based upon such an assessment, the court may grant authority to the limited guardian in those areas of decisionmaking in which evidence indicates that the disabled person is incapacitated.<sup>126</sup>

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118. *Id.* § 29-1-18-21 (repealed effective July 1, 1989).

119. *Id.*

120. Emison, *supra* note 6, at X-8. Emison suggests that a petitioner is probably better advised to use protective proceedings rather than "this newly-stated version of a limited guardianship."

121. Casasanto, Saunders & Simon, *Individual Functional Assessment: A Guide to Determining the Need for Guardianship under New Hampshire Law*, 28 NEW HAMPSHIRE B.J. 13, 14-15 (1986) [hereinafter Casasanto].

122. See Secor, Parra, Schklar, Fosbinder & Brown, *Use of Limited Guardianship Proceedings for Disabled Persons*, 18 TENN. B.J. 14 (May 1982).

123. *Limited Guardianship: Survey of Implementation Considerations*, 15 REAL PROP. PROB. & TR. J. 544 (1980).

124. Casasanto, *supra* note 121, at 15.

125. *Id.* at 13-14 (The authors provide an individual functional assessment questionnaire and instruction manual.).

126. *Id.* at 15.

For example, a limited guardian may only have the authority to make decisions concerning medical treatment.<sup>127</sup>

Similar to protective proceedings and single transactions, a limited guardianship eliminates the necessity of the establishment of a full guardianship. Yet, there are differences between these alternatives to full guardianships. For instance, protective proceedings and single transactions focus on specific transactions of a disabled person,<sup>128</sup> while limited guardianships focus more on routine decisions made for a disabled person.<sup>129</sup> In addition, protective proceedings and single transactions involve direct court authorization or ratification of the transaction,<sup>130</sup> while limited guardianships involve the granting of authority to the limited guardian to make decisions in limited areas on behalf of the disabled person.<sup>131</sup> As previously stated, a limited guardian may be appointed by a court to assist in the establishment of any protective arrangement or single transaction.<sup>132</sup> In such a situation, the limited guardian's authority is limited to that conferred by the court order,<sup>133</sup> and because the court has directly authorized the underlying transaction, the limited guardian's authority would seem to be administrative in nature.

#### F. Other Alternatives to Guardianships

Under prior Indiana law, not all forms of protection of a disabled person or a minor were included in the guardianship law. While the NGC expands the number of alternatives in the guardianship law itself, other statutory alternatives outside the guardianship law still exist. One of the most notable examples is the Uniform Durable Power of Attorney Act.<sup>134</sup> A durable power of attorney differs from the common law power of attorney because a durable power of attorney may permit the agency relationship to continue after the subsequent disability or incapacity of

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127. *Id.* Other common areas identified by the authors concerning a limited guardian's authority to act include: travel, or decision where to live; refusal or consent to counseling services or other professional care where consent is legally necessary; making contracts; possessing or managing real or personal property or income from any source; making gifts; initiating, defending or settling lawsuits; lending or borrowing money; paying or collecting debts; managing a business; continuing to act as a partner of a partnership; accessing or releasing confidential records; and making decisions concerning education.

128. *See supra* notes 107-08 and accompanying text.

129. *See supra* note 123 and accompanying text.

130. IND. CODE § 29-3-4-1(f) (1988).

131. *See supra* note 122 and accompanying text.

132. *See supra* note 100 and accompanying text.

133. *See supra* note 111 and accompanying text.

134. IND. CODE § 30-2-11-1 to -7 (1988).

the principal or lapse of time.<sup>135</sup> In addition, the Uniform Durable Power of Attorney Act provides that the death of a principal who has executed a power of attorney, durable or otherwise, may not terminate the agent's authority until the agent has actual knowledge of the principal's death.<sup>136</sup> Furthermore, another salient feature of the Uniform Durable Power of Attorney Act is that it permits a person to nominate by a durable power of attorney his own guardian, and except for good cause or disqualification, the court must make its appointment in accordance with the person's most recent nomination.<sup>137</sup>

Another statutory alternative to a guardianship is the Indiana Uniform Gifts to Minors Act.<sup>138</sup> This Act creates a statutory trust with a support, maintenance, education and benefit standard for distribution.<sup>139</sup> The custodian has broad discretion to make such distributions without the need for court approval.<sup>140</sup> In addition, the custodian has all of the rights and powers of a guardian.<sup>141</sup> The duration of an Indiana Uniform Gift to Minors Act custodianship is limited to when the donee reaches the age designated by the donor which cannot be less than eighteen or greater than twenty-one years of age.<sup>142</sup>

An inter vivos trust is another alternative to a guardianship. The inter vivos trust, which separates legal title from beneficial title, can be an extremely powerful and flexible tool, albeit expensive.<sup>143</sup> Some of this expense can be deferred by postponing all but nominal funding until disability of the grantor-beneficiary occurs.<sup>144</sup> This standby arrangement requires the grantor to have also executed a durable power of attorney prior to disability for the purpose of funding the trust.<sup>145</sup>

Another alternative to a full guardianship is contained in the Model Health Care Consent Act.<sup>146</sup> Without court supervision, an individual, who is able to consent to particular health care, may appoint another person to act for him in the future if he becomes incapable of consenting.<sup>147</sup> This provision is designed to permit a person to plan who

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135. *Id.* § 30-2-11-1.

136. *Id.* § 30-2-11-4(a).

137. *Id.* § 30-2-11-3.

138. *Id.* § 30-2-8-1 to -10.

139. *Id.* § 30-2-8-4(b).

140. *Id.*

141. *Id.* § 30-2-8-4(j).

142. *Id.* § 30-2-8-2.5(g).

143. Emison, *supra* note 6, at X-11.

144. *Id.*

145. *Id.* The author further explains that a standby trust coupled with a durable power of attorney might not be the best tool to provide for the personal care needs of a person.

146. IND. CODE § 16-8-12-1 to -12 (1988).

147. *Id.* § 16-8-12-6.

shall serve as a representative in health care decisions during future incapability. A person becomes incapable of consent if, "in the good faith opinion of the attending physician, the individual is incapable of making a decision regarding the proposed health care."<sup>148</sup> If an attending physician makes this determination concerning a person who has appointed a health care representative under the Model Health Care Consent Act, then that representative has the authority to make health care decisions according to the terms of the appointment, until such time that the person becomes capable of consenting.<sup>149</sup> In addition, if an attending physician makes this determination concerning a person who has not appointed a health care representative and who has no judicially appointed guardian, then the Model Health Care Consent Act provides that a "spouse, parent, adult child or adult sibling" may consent to health care.<sup>150</sup> Resort to a probate court is also available under the Model Health Care Consent Act for the court to make a health care decision, to order health care for an individual incapable of consenting, or to appoint a health care representative for that individual.<sup>151</sup> The Model Health Care Consent Act also permits an individual to disqualify others from consenting to the individual's future health care.<sup>152</sup>

### III. GUARDIANSHIPS

#### A. *Jurisdiction and Venue*

Similar to prior Indiana law, the NGC provides that the court having probate jurisdiction<sup>153</sup> has exclusive original jurisdiction over all matters concerning guardians and protective proceedings.<sup>154</sup> The NGC provides two exceptions to a probate court's exclusive jurisdiction:<sup>155</sup> where "a juvenile court has exclusive original jurisdiction over certain matters relating to minors;"<sup>156</sup> and where "a mental health division of a municipal court . . . has concurrent jurisdiction in certain mental health proceedings

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148. *Id.* § 16-8-12-3(a).

149. *Id.* § 16-8-12-6(g).

150. *Id.* § 16-8-12-4(a).

151. *Id.* § 16-8-12-7.

152. *Id.* § 16-8-12-8.

153. IND. CODE § 29-3-1-3 (1988) defines "court" as the "court having probate jurisdiction and, where the context permits, the court having venue of the guardianship."

154. *Id.* § 29-3-2-1; *see also id.* § 29-1-18-4 (repealed effective July 1, 1989) for prior Indiana law.

155. *Id.* § 29-3-2-1(c), (d).

156. IND. CODE § 31-6-2-1 (1988) provides that a juvenile court has exclusive jurisdiction in all cases concerning a child's alleged delinquency, dependency or neglect. *See also In re Guardianship of Bramblett*, 495 N.E.2d 798 (Ind. Ct. App. 1986); *In re Guardianship of Neff*, 456 N.E.2d 1045 (Ind. Ct. App. 1983).

. . . relating to guardianships and protective orders."<sup>157</sup>

If the alleged disabled person or minor resides in Indiana, then venue for the appointment of a guardian or for protective proceedings is generally in the county of that person's residence.<sup>158</sup> If the alleged disabled person or minor does not reside in Indiana, then venue is in any county where any property of the person is located.<sup>159</sup> As previously stated, if the proceeding is for the appointment of a temporary guardian of the person, who is in need of medical care, then venue is in the county where the facility is located that is providing, or attempting to provide medical care, regardless of the person's residence.<sup>160</sup>

If proceedings are commenced in two or more counties, then the court in which the first proceeding was commenced is to determine proper venue.<sup>161</sup> All other proceedings are stayed.<sup>162</sup> If this court determines that proper venue is in another county, the court must transfer the original file to the proper court.<sup>163</sup> In addition, a court may transfer a guardianship or protective proceeding to another court in Indiana upon the court's finding of certain conditions<sup>164</sup> or to a court outside Indiana if the other court agrees to assume jurisdiction.<sup>165</sup> This permissive type of transfer requires notice and a hearing in the same manner as is required for the appointment of a guardian.<sup>166</sup> Finally, if a court which appointed a guardian does not have probate jurisdiction, the proceeding must be transferred to the court which has proper jurisdiction and venue.<sup>167</sup>

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157. IND. CODE § 33-6-1-2(a)(8) (1988) provides that the mental health division of a municipal court has concurrent jurisdiction with any other authorized court to declare and administer temporary guardianships in conjunction with mental health proceedings, involuntary mental commitments and voluntary mental commitments.

158. *Id.* § 29-3-2-2(a)(1)(A).

159. *Id.* § 29-3-2-2(a)(2).

160. *Id.* § 29-3-2-2(a)(1)(B), (a)(2); *see also supra* note 90 and accompanying text.

161. IND. CODE § 29-3-2-2(b) (1988).

162. *Id.*

163. *Id.*

164. IND. CODE § 29-3-2-2(c) (1988) lists the conditions in which a court may transfer jurisdiction:

- (1) the proceeding was commenced in the wrong county;
- (2) the residence of the disabled person or the minor has been changed to another county;
- (3) the proper venue is determined to be otherwise under the Indiana Rules of Trial Procedure; or
- (4) it would be in the best interest of the disabled person or the minor and the property of the minor or the disabled person.

165. *Id.* § 29-3-2-2(c).

166. *Id.* § 29-3-2-2(c); *see also infra* notes 172-79 and accompanying text.

167. *Id.* § 29-3-2-2(d). While this NGC subsection uses the term "probate juris-

### B. *Appointment of Guardian*

A guardianship is commenced when a person files a petition for the appointment of a guardian.<sup>168</sup> The petition must contain a number of specific items,<sup>169</sup> all of which are substantially the same items required in a petition under prior Indiana law.<sup>170</sup> Only one petition needs to be filed for the appointment of a guardian for two or more minors or disabled persons who are the children of a common parent, parent and child, or husband and wife.<sup>171</sup>

Service of notice under the NGC<sup>172</sup> is to be given in the same manner prescribed under the Indiana Probate Code with regard to personal service, publication to nonresidents,<sup>173</sup> registered mail, personal service on nonresidents, and service on attorneys.<sup>174</sup> When a petition for appointment of a guardian or the issuance of a protective order relates

diction," presumably this term also includes juvenile courts and the mental health division of a municipal court, both of which have jurisdiction in certain circumstances pursuant to IND. CODE § 29-3-2-1. See *supra* notes 155-57 and accompanying text.

168. *Id.* § 29-3-5-1. See also Fruehwald, *Appointment of a Guardian*, ICLEF GUARDIANSHIP SEMINAR V-5 (1988).

169. IND. CODE § 29-3-5-1(a) (1988) states that a petition must contain the following:

- (1) The name, age, residence, and post office address of the alleged disabled person or minor for whom the guardian is sought to be appointed.
- (2) The nature of the disability.
- (3) The approximate value and description of the property of the disabled person or minor, including any compensation, pension, insurance, or allowance to which the disabled person or minor may be entitled.
- (4) If a limited guardianship is sought, the particular limitations requested.
- (5) Whether a guardian has been appointed or is acting for the disabled person or minor in any state.
- (6) The residence and post office address of the proposed guardian.
- (7) The names and addresses, as far as known or as can reasonably be ascertained, of the persons most closely related by blood or marriage to the person for whom the guardian is sought to be appointed.
- (8) The name and address of the person or institution having the care and custody of the person for whom the guardian is sought to be appointed.
- (9) The names and addresses of any other disabled persons or minors for whom the proposed guardian is acting if the proposed guardian is an individual.
- (10) The reasons the appointment of a guardian is sought and the interest of the petitioner in the appointment.
- (11) The name and business address of the attorney who is to represent the guardian.

170. *Id.* § 29-1-18-11 (repealed effective July 1, 1989).

171. *Id.* § 29-3-5-6 (1988).

172. *Id.* § 29-3-6-1.

173. See Fruehwald, *supra* note 168, at V-7. The author noted that publication for non-residents should be avoided under a logical extension of the United States Supreme Court's holding in *Tulsa Collection Services v. Pope*, 108 S. Ct. 1340 (1988).

174. See IND. CODE § 29-1-1-12 to -14 (1988).

to a minor, notice of the hearing on the petition must be given to: "the minor, if he is fourteen years or older, unless the minor has signed the petition; . . . any living parent of the minor, unless parental rights have been terminated by court order; . . . any person alleged to have the principal care and custody of the minor during the sixty (60) days immediately preceding the filing of the petition;" and "any other person that the court directs."<sup>175</sup> If it is alleged that the person is a disabled person, notice of the hearing on the petition must be given to: the alleged disabled person; the alleged disabled person's spouse; the alleged disabled person's adult children, or if none, the alleged disabled person's parents; any person serving as the guardian for, or who has the care and custody of, the alleged disabled person; if there is no person to be notified from the above persons other than the alleged disabled person, then at least one person most closely related by blood or marriage to the alleged disabled person; any person known to the petitioner to be serving as the alleged disabled person's attorney-in-fact under a durable power of attorney; and any other person that the court directs.<sup>176</sup> Notice is not required for guardianship and protective proceedings concerning a disabled person if the person to be notified waives notice or appears at the hearing on the petition.<sup>177</sup> In addition, a court may, upon a showing of good cause, waive notice of a petition for the appointment of a successor guardian.<sup>178</sup> Yet, at least arguably, notice cannot be waived for guardianship and protective proceedings relating to minors.<sup>179</sup>

After a petition has been filed, the court is to set a hearing date.<sup>180</sup> Unless an alleged disabled person is represented by counsel, a court may appoint an attorney to represent the alleged disabled person and may grant such attorney the powers and duties of a guardian ad litem.<sup>181</sup> In addition, if a court determines that the alleged disabled person or minor is not represented or adequately represented by counsel, then the court must appoint a guardian ad litem and must set out, as part of the record, the reasons for such appointment.<sup>182</sup> Unlike prior Indiana

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175. *Id.* § 29-3-6-1(a)(3).

176. *Id.* § 29-3-6-1(a)(4).

177. *Id.*

178. *Id.* § 29-3-6-1(a)(1).

179. IND. CODE § 29-3-6-1(a)(4) (1988) provides, "Notice is not required under this *subdivision* if the person to be notified waives notice or appears at the hearing on the petition." (emphasis added) This subdivision only deals with disabled persons and not minors. There appears to be no rationale to prevent waiver of notice to the designated persons for proceedings relating to minors. One wonders whether the word "subsection" should be substituted for the word "subdivision."

180. *Id.* § 29-3-5-1(c).

181. *Id.*

182. *Id.* § 29-3-2-3.

law,<sup>183</sup> the NGC does not define the term “guardian ad litem,” nor does it define the powers and duties of a guardian ad litem. As such, other statutory provisions and related case law must be examined to provide these definitions.<sup>184</sup> An alleged disabled person<sup>185</sup> must be present at the hearing unless the court finds that certain circumstances exist.<sup>186</sup> The alleged disabled person may present evidence and cross-examine witnesses.<sup>187</sup> In addition, a jury trial may be requested.<sup>188</sup> Finally, any person may apply for permission to participate in a hearing if the court determines that the best interest of the alleged disabled person or minor will be so served.<sup>189</sup>

A guardian will be appointed if the court finds that the individual for whom the guardian is sought is a disabled person<sup>190</sup> or a minor and the appointment of a guardian is necessary as a means of providing

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183. IND. CODE § 29-1-18-1(b) (repealed effective July 1, 1989) defined a guardian ad litem as “one appointed by a court, in which particular litigation is pending, to represent a ward or an unborn person in that particular litigation.”

184. See *id.* § 34-2-3-1 (1988); see also *Bowen v. Sonnenburg*, 411 N.E.2d 390, 396 (Ind. Ct. App. 1980) (emphasis in original) (“Guardian ad litem is someone appointed by the court in which a particular litigation is pending to represent a ward or unborn person *in that particular litigation* . . . [and the] status of a guardian ad litem exists [only] in the particular litigation in which the appointment occurs.”); *Ziegler v. Ziegler*, 39 Ind. App. 21, 23, 78 N.E. 1066, 1068 (1906) (quoting *Gibbs v. Potter*, 166 Ind. 471, 475, 77 N.E. 942, 944 (1906) (emphasis in original) (“The extent of the authority of a guardian *ad litem* must be found in the statute authorizing his appointment and in the order of the court made in pursuance thereof.”)).

185. No mention is made of whether or not a minor must be present at the hearing. See *Fruehwald*, *supra* note 168, at V-8.

186. IND. CODE § 29-3-5-1(d) (1988). These circumstances are:

- (1) it is impossible or impractical for the alleged disabled person to be present due to the alleged disabled person’s disappearance, absence from the state, or similar circumstance;
- (2) it is not in the alleged disabled person’s best interest to be present because of a threat to the health or safety of the alleged disabled person as determined by the court;
- (3) the disabled person has knowingly and voluntarily consented to the appointment of a guardian or the issuance of a protective order and at the time of such consent the disabled person was not disabled as a result of a mental condition that would prevent that person from knowingly and voluntarily consenting; or
- (4) the disabled person has knowingly and voluntarily waived notice of the hearing and at the time of such waiver the disabled person was not disabled as a result of a mental condition that would prevent that person from making a knowing and voluntary waiver of notice.

187. *Id.* § 29-3-5-1(e).

188. *Id.*; see IND. R. TR. P. 38 for the time period necessary to request a jury trial.

189. IND. CODE § 29-3-5-3(f) (1988).

190. See *supra* note 50.

care and supervision of the physical person or property of the disabled person or minor.<sup>191</sup> The court may limit the scope of the guardianship if it finds that the welfare of a disabled person would be best served.<sup>192</sup> In addition, if the court finds that it is "not in the best interest of the disabled person or minor to appoint a guardian," the court may treat the petition for guardianship as a protective order or dismiss the proceedings.<sup>193</sup>

Except for minors, the threshold question concerning whether to appoint a guardian is whether or not the person is a disabled person.<sup>194</sup> Except for the use of more modern terms in the NGC, the NGC's definition of a "disabled person" is not materially different from the definition of an "incompetent"<sup>195</sup> under prior Indiana law.<sup>196</sup> As a result, under NGC, a physical condition by itself is sufficient for the appointment of a guardian.<sup>197</sup> Since the NGC is similar to prior Indiana law, the holding in *In re Wurm*<sup>198</sup> may still be applicable. In that case, the court held that the appointment of a guardian must be grounded on a finding that the person is unable to reasonably deal with his business affairs because of mental impairment, albeit with the recognition that mental attributions can be affected by physical disabilities.<sup>199</sup>

### C. Guardians

Similar to prior Indiana law<sup>200</sup> and the Uniform Act,<sup>201</sup> the NGC provides a court with broad discretion in appointing a guardian who is

191. IND. CODE § 29-3-5-3 (1988).

192. See *supra* notes 116-20 and accompanying text.

193. IND. CODE § 29-3-5-3(c) (1988).

194. See *supra* notes 186-87 and accompanying text.

195. See IND. CODE § 29-1-18-1(c) (repealed effective July 1, 1988).

196. Cremer, *Litigation: Guardianships-Conservatorship*, ICLEF GUARDIANSHIP SEMINAR IX-1 (1988).

197. *Id.* See also *supra* note 50. IND. CODE § 29-2-1-4(3)(A) (1988) clearly provides that disability may be attributable to a mental impairment or physical impairment.

198. 360 N.E.2d 12 (Ind. Ct. App. 1977).

199. *Id.* at 15.

200. IND. CODE § 29-1-18-10 (repealed effective July 1, 1988) provided that the court must appoint a guardian of an incompetent person who is most suitable and willing to serve. See also *In re Guardianship of Brown*, 436 N.E.2d 877 (Ind. Ct. App. 1982) (appointment of guardian is within discretion of trial court which must have ultimate regard for best interests of incompetents).

201. See UNIF. GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT § 2-205, 8A U.L.A. 480 (1983) which provides that any qualified person may be appointed guardian of an incapacitated person. This comment to this section further provides that "qualified" in its application to "persons" is not defined in the Uniform Act, meaning that an appointing court has considerable discretion regarding the suitability of an individual to serve as a guardian. *Id.* § 2-205 comment, 8A U.L.A. 481.

qualified and willing to serve.<sup>202</sup> It has been suggested that this broad discretion is limited by the rules relating to the appointment of a personal representative for a decedent's estate.<sup>203</sup> As such, a qualified guardian may also have to be: eighteen years of age or older; competent; not a convicted felon; and, if a resident corporation, qualified to act as a fiduciary in Indiana.<sup>204</sup> Under the NGC,<sup>205</sup> courts should give due regard to the same considerations listed in prior Indiana law regarding the appointment of a guardian.<sup>206</sup> In addition, the NGC provides that a court should give due regard to designations made by an alleged disabled person in a durable power of attorney and to any person acting for the disabled person pursuant to a durable power of attorney<sup>207</sup> executed before the person became disabled.<sup>208</sup> While the court has broad discretion in appointing a guardian, the court should give preference, in the order listed, to: a person designated in a durable power of attorney; the disabled person's spouse; the disabled person's adult child; the disabled person's parent; a person designated in a disabled person's parent's will; any person related to the disabled person by blood or marriage with whom the disabled person has resided for more than six months prior to the filing of the petition; and a person nominated by the disabled

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202. See IND. CODE § 29-3-5-4 (1988).

203. See Fruehwald, *supra* note 168, at V-11. Prior Indiana law provided that persons who are qualified to serve as personal representatives for a decedent's estate are qualified to serve as a guardian. See IND. CODE § 29-1-18-9 (repealed effective July 1, 1989). It does not appear that such provision was carried over into the NGC.

204. IND. CODE § 29-1-10-1(b) (1988).

205. *Id.* § 29-3-5-4.

206. IND. CODE § 29-1-18-10 (repealed effective July 1, 1988) provided that a court should give due regard to:

- (1) any request made by one for whom a guardian is being appointed by reasons of old, age, infirmity, or other incapacity, other than insanity, mental illness, mental retardation, senility, habitual drunkenness, or excessive use of drugs;
- (2) any request for the appointment contained in a will or other written instrument;
- (3) any request made by a minor of the age of fourteen (14) years or over for the appointment of his guardian;
- (4) any request for the appointment made by the spouse of an incompetent;
- (5) the relationship by blood or marriage to the person for whom guardianship is sought;
- (6) the assets or interests of the incompetent and the incompetent's estate.

207. IND. CODE § 29-3-1-5 (1988) defines "durable power of attorney" as a power of attorney that:

- (1) is executed by a disabled person before that person became a disabled person;
- (2) provides that the power survives the person's incompetence; and
- (3) is executed in accordance with the law in effect in the jurisdiction in which it was executed on the date it was executed.

208. *Id.* § 29-3-5-4(1), (6). See also *supra* note 137 and accompanying text.

person who is caring for or paying for the care of the disabled person.<sup>209</sup> The court must select the person it considers best qualified to serve as a guardian when persons who want to be a guardian have equal priority.<sup>210</sup> A court may also act in the best interests of the disabled person or minor by selecting a low or no priority person over a higher priority person.<sup>211</sup> Prior Indiana law specifically included a provision permitting the department of public welfare, any other public agency or any charitable organization which was charged with the care and custody of an incompetent to be appointed as a guardian.<sup>212</sup> The NGC essentially maintained these provisions by including these organizations in its definition of "person"<sup>213</sup> in connection with whom may be appointed a guardian. While these provisions permit a court having probate jurisdiction to appoint such an organization as a guardian for a disabled person, a juvenile court has exclusive jurisdiction to do so for minors.<sup>214</sup>

Similar to prior Indiana law,<sup>215</sup> the NGC requires that a guardian must execute and file a bond.<sup>216</sup> The NGC recognizes two exceptions to this requirement: if the guardian is a bank or trust company;<sup>217</sup> or if the court finds a bond unnecessary and enters an order to that effect.<sup>218</sup> The bond must not be less than the value of the guardianship property in which the guardian has the power to sell, convey or encumber without a court order, plus one year's estimated income.<sup>219</sup> The court may accept

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209. *Id.* § 20-3-5-5(a).

210. *Id.* § 29-3-5-5(b).

211. *Id.*

212. *Id.* § 29-1-18-9 (repealed effective July 1, 1988).

213. IND. CODE § 29-3-1-12 (1988) defines "person" as:

an individual, organization, association, not-for-profit corporation, corporation for profit, partnership, financial institution, trust, department of public welfare or other governmental entity, or other legal entity.

214. *See supra* note 156 and accompanying text. *See also In re Guardianship of Neff*, 456 N.E.2d 1045 (Ind. Ct. App. 1983) (Superior Court's order directing an infant be made a ward of county department of public welfare was improper exercise of court's probate jurisdiction).

215. IND. CODE § 29-1-18-22 (repealed effective July 1, 1989).

216. *Id.* § 29-3-7-1 (1988).

217. IND. CODE § 28-1-1-3(b) (1988) defines "bank or trust company" as: a financial institution organized or reorganized as a bank, savings bank, private bank, or trust company under the laws of this state with the express power to receive and accept deposits of money subject to withdrawal by check, and possessing such other rights and powers granted by the provisions of this article in express terms or by implication. The term "bank" or "bank or trust company" does not include a building and loan association, credit union, or industrial loan and investment company.

218. *Id.* § 29-3-7-1(a).

219. *Id.*

other collateral, including a pledge of securities or a mortgage of land.<sup>220</sup> In addition, the court has the authority to reduce the amount of the bond provided that the protected person's property is adequately protected.<sup>221</sup> As a condition of the bond reduction, a court may direct the guardian to take specific steps to provide protection of the protected person's property.<sup>222</sup> Where there is a surety on the bond, the NGC provides specific requirements concerning the respective liability of sureties and guardians; consent by the surety to the jurisdiction of the court; notice to sureties; proceedings against a surety for breach of the guardian's duties; and the duration of the obligations under the bond.<sup>223</sup>

Letters of guardianship should be issued only after the bond, if required, and the oath of a guardian have been filed with the clerk of the court.<sup>224</sup> The oath, which must state that the guardian will faithfully discharge the duties of the guardian's trust according to law, must be subscribed before the clerk or any other officer authorized to administer oaths.<sup>225</sup> For corporate guardians, an acceptance of appointment must

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220. *Id.* § 29-3-7-1(b).

221. *Id.* § 29-3-7-1(c).

222. IND. CODE § 29-3-7-1(c) (1988) provides that a court

(1) Direct the guardian to invest all, or a part of, the property subject to the guardian's control in:

(A) stocks, bonds, or other securities of any corporation, public or private, which are listed or admitted to trading on the New York Stock Exchange, the American Stock Exchange, the Midwest Stock Exchange, the Pacific Coast Stock Exchange, or any other exchange regulated by the Securities and Exchange Commission; or

(B) securities that are obligations issued or guaranteed by the United States. . . .

(3) Direct the guardian to transfer all, or a part of, the property subject to the guardian's control to a bank or trust company organized under the laws of Indiana or of the United States and operating a bank or trust company located within Indiana to administer the estate as an agent for the guardian.

(4) Direct the guardian to:

(A) transfer any or all stocks, bonds, and securities subject to the guardian's control only after obtaining an order of the court directing the transfer; and

(B) require that notice of this restriction on the transfer of such stocks, bonds, and securities be placed upon the certificates evidencing those stocks, bonds, and securities.

(5) Direct the guardian to comply with all, part, or any combination of the requisites specified in subdivisions (1) through (4).

(6) Direct the guardian to take any other action that the court determines necessary to provide adequate protection to the property of the protected person.

223. *Id.* § 29-3-7-2(a).

224. *Id.* § 29-3-7-3.

225. *Id.*

be executed and acknowledged by an appropriate corporate officer.<sup>226</sup> In addition, the oath and acceptance, if applicable, must be filed and recorded as part of the guardianship proceedings.<sup>227</sup> Any limitations on a guardian's powers and responsibilities, including the creation of a limited guardianship,<sup>228</sup> must be endorsed on the letters of guardianship.<sup>229</sup> A guardian must use the letters of guardianship as evidence that he has all, and the protected person has none, of the rights to possess and dispose of the guardianship property.<sup>230</sup> The letters of guardianship should be used to provide notice by delivering them to all relevant financial institutions and persons and recording them in counties where real estate is located.<sup>231</sup>

#### *D. Powers and Duties of a Guardian*

Under prior Indiana law, a guardian could be appointed by a court as the guardian of the person or the guardian of the estate,<sup>232</sup> with different types of duties depending on the nature of the guardianship.<sup>233</sup> This dichotomy was not retained in the NGC and, as a result, a guardian has duties concerning both the person and the property of the protected person. A guardian has the right to take possession of the guardianship property and the right to dispose of such property.<sup>234</sup> While the protected person has title to the guardianship property, he is prohibited from transferring or assigning it.<sup>235</sup> The guardian has specified mandatory duties under the NGC which include: to abide by the standards of care and conduct applicable to trustees;<sup>236</sup> the duty to protect and preserve

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226. *Id.*

227. *Id.*

228. *See supra* notes 114-33 and accompanying text.

229. IND. CODE § 29-3-7-3(c) (1988); *id.* § 29-3-8-8(b).

230. *Id.* § 29-3-7-6(a); *see also id.* § 29-3-1-7, which defines "guardianship property" as the property of a disabled person or a minor for which the guardian is responsible.

231. *Id.* § 29-3-7-6(b).

232. *Id.* § 29-1-18-1 (repealed effective July 1, 1988).

233. *Id.* § 29-1-18-28.

234. *Id.* § 29-3-7-5 (1988).

235. *Id.* While an attempted transfer or assignment of guardianship is ineffective, it may generate a claim under IND. CODE § 29-3-10-1 (1988).

236. *See id.* § 30-4-3-6 which provides:

(a) The trustee has a duty to administer a trust according to its terms.

(b) Unless the terms of the trust provide otherwise, the trustee also has a duty:

- (1) to administer the trust solely in the interest of the beneficiaries;
- (2) to treat multiple beneficiaries impartially;
- (3) to take possession of and maintain control over the trust property;
- (4) to preserve the trust property;
- (5) to make the trust property productive;

the guardianship property;<sup>237</sup> the duty to conserve the guardianship property in excess of the protected person's current needs;<sup>238</sup> the duty to encourage the protected person's self-reliability and independence; and to consider recommendations relating to the appropriate standard of support, care, education and training for the protected person or the protected person's dependent made by the protected person's parent or guardian.<sup>239</sup> In addition, a guardian of a minor has all of the responsibilities of a parent regarding the minor's custody and support, while the guardian of a disabled person is responsible for the disabled person's care and custody.<sup>240</sup> In addition, the guardian has the following duties, without limitation:<sup>241</sup> (1) the guardian must be or shall become sufficiently acquainted with the protected person and maintain sufficient contacts with the protected person to know of the protected person's capabilities,

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- (6) to keep the trust property separate from his individual property and separate from or clearly identifiable from property subject to another trust;
  - (7) to maintain clear and accurate accounts with respect to the trust estate;
  - (8) upon reasonable request, to give the beneficiary complete and accurate information concerning any matter related to the administration of the trust and permit the beneficiary or his agent to inspect the trust property, the trustee's accounts, and any other documents concerning the administration of the trust;
  - (9) to take whatever action is reasonable to realize on claims constituting part of the trust property;
  - (10) to defend actions involving the trust estate;
  - (11) not to delegate to another person the authority to perform acts which the trustee can reasonably perform personally; and
  - (12) to supervise any person to whom authority has been delegated.

The apparent genesis of IND. CODE § 29-3-8-3(1) (1988) seems to be the UNIF. GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT § 2-316, 8A U.L.A. 502 (1983) which provides that a conservator must act as a fiduciary and observe the standards of care applicable to trustees.

237. IND. CODE § 29-3-8-3 (1988) provides that the duty to preserve guardianship property is a mandatory duty of a guardian. Yet, IND. CODE § 29-3-8-1 (1988) provides that a guardian of a minor has this duty unless otherwise ordered by the court and that a guardian of a disabled person has this duty to the extent ordered by the court. This inconsistency in a guardian's duty to preserve can only lead to confusion, especially since one of the standards of care of a trustee which is also imposed upon a guardian is the duty to preserve the trust property. *See id.* § 30-4-3-6(a)(4).

238. This provision is contained in IND. CODE §§ 29-3-8-1(a)(3), (b)(1) & -3(3) (1988).

239. *Id.* § 29-3-8-3. *See Wishard, supra* note 91, at II-12. The author states that the phrase "or guardian" at the end of this section is either an oversight or redundancy that should be corrected.

240. IND. CODE § 29-3-8-1 (1988).

241. One wonders if the phrase "without limitation" is meaningful since IND. CODE § 29-3-8-8 (1988) provides that a court may limit the responsibilities of a guardian and create a limited guardianship.

disabilities, limitations, needs, opportunities, and physical and mental health; (2) upon termination, the guardian must comply with the appropriate NGC provisions concerning termination;<sup>242</sup> (3) the guardian must report the physical and mental condition of the protected person to the court as ordered by the court; and (4) the guardian has any other responsibilities that the court may order.<sup>243</sup>

The NGC's duties of a guardian of a minor or disabled person are extremely similar to the duties of a guardian contained in the Uniform Act.<sup>244</sup> For those guardians under prior Indiana law who were guardians of the estate (*e.g.*, a bank or trust company), the NGC duties relating to becoming acquainted with and maintaining contacts with the protected person and making reports concerning the physical and mental condition of the protected person to the court are probably ominous. In this context, these duties, which presumably were borrowed from the Uniform Act's duties of a guardian, have no logical relationship to such guardianships which more closely resemble conservatorship under the Uniform Act. Under the Uniform Act, the relationship established to protect the person of a disabled person is a guardianship<sup>245</sup> and the relationship established to protect the property of a disabled person is a conservatorship.<sup>246</sup> Each relationship has separate duties and powers.<sup>247</sup> Because of these separate duties, guardianships under the Uniform Act are not likely to be attractive positions for banks or trust companies who are more interested in handling the disabled person's estate than in his or her personal well being.<sup>248</sup> Likewise, because the NGC imposes the Uniform Act's duties of a guardian, guardianships under the NGC are not likely to be attractive to banks or trust companies. In these situations, the bank or trust company is well advised to create a limited guardianship in which its duties are limited to the management, protection, preservation and conservation of the guardianship property.<sup>249</sup> Presumably, these duties would be similar to the duties of guardians of the estate under prior Indiana law,<sup>250</sup> the duties of a conservator under the Uniform Act,<sup>251</sup>

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242. *See id.* § 29-3-12-1 to -5.

243. *Id.* § 29-3-8-1.

244. *See* UNIF. GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT § 2-109, 8A U.L.A. 467-69 (1983); *id.* § 2-209, 8A U.L.A. 485.

245. *See id.* § 1-201(6), 8A U.L.A. 447.

246. *Id.* § 1-201(3), 8A U.L.A. 447.

247. *See id.* §§ 2-109, 2-209, 2-316, 8A U.L.A. 467-69, 485 & 502.

248. *Id.* § 2-107 comment, 8A U.L.A. 466.

249. IND. CODE § 29-3-8-8 (1988).

250. *See id.* § 29-1-18-28(b) (repealed effective July 1, 1989).

251. *See* UNIF. GUARDIAN AND PROTECTION PROCEEDINGS ACT § 2-316, 8A U.L.A. 502 (1983).

or the duties of a trustee under the Indiana Trust Code.<sup>252</sup> Yet, as previously mentioned, the NGC provides nominal guidance concerning the establishment of limited guardianships,<sup>253</sup> and, as such, practitioners are free to formulate the provisions of the limited guardianships provided that they obtain court approval. This lack of guidance from the NGC could easily result in a reduction of the duties of guardians, who under prior Indiana law were guardians of the estate, because such guardians are free to tailor the terms of limited guardianships. It is not unexpected that such discretion may be used by guardians to reduce their duties.

The NGC provides that the guardian has all of the powers necessary to perform his responsibilities.<sup>254</sup> In addition to this broad grant of power, the NGC provides a non-exhaustive list of specific powers.<sup>255</sup> While most of these enumerated powers stem from the Uniform Act or prior Indiana law,<sup>256</sup> some provisions are noteworthy. The NGC provides that the guardian has "[t]he power to purchase a home for the minor or the minor's dependents."<sup>257</sup> More importantly, the NGC provides that the guardian has the authority "to delegate to the protected person certain responsibilities for decisions affecting the protected person's business affairs and well-being."<sup>258</sup> The NGC provides that any transaction concerning guardianship property is void if there is a substantial conflict of interest between the protected person's interest and the guardian's personal interest.<sup>259</sup>

Within ninety days after appointment, a guardian must file a complete inventory of the guardianship property together with an oath or affirmation that the inventory is believed to be complete and accurate, while a temporary guardian has thirty days to do the same.<sup>260</sup> Unless otherwise directed by the court, a guardian must file a verified written account of the guardian's administration at least biennially and not more than thirty days after the anniversary date of the guardian's appointment.<sup>261</sup>

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252. See *supra* note 236 and accompanying text.

253. See *supra* note 120 and accompanying text.

254. See IND. CODE § 29-3-8-2 (1988); *id.* § 29-3-8-4.

255. See *id.*

256. See UNIF. GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT § 2-109, 8A U.L.A. 467 (1983); IND. CODE § 29-1-18-31 to -43 (repealed effective July 1, 1989).

257. IND. CODE § 29-3-8-2(a)(7) (1988); see also Wishard, *supra* note 91, at II-11 to II-12 which states that this change from prior law is believed to have limited applicability.

258. IND. CODE § 29-3-4(2) (1988).

259. IND. CODE § 29-3-8-5 (1988) specifically provides that any sale or encumbrance of guardianship property "to a guardian or guardian's spouse, agent, attorney, or any corporation, trust, or other organization in which the guardian has a substantial beneficial interest" is a conflict of interest and void.

260. *Id.* § 29-3-9-5.

261. *Id.* § 29-3-9-6(a).

The accounting must contain "a description of the condition and circumstances of the protected person."<sup>262</sup> The NGC provides for notice of the hearing of each account,<sup>263</sup> which, if given, enables the court order approving the account to be binding on all persons.<sup>264</sup> In addition, the NGC provides for *ex parte* approval of the account, other than a final account, which may be subsequently reviewed by the court.<sup>265</sup>

#### *E. Removal of a Guardian*

The NGC<sup>266</sup> retains the provisions in prior Indiana law<sup>267</sup> concerning the removal of a guardian by adopting the grounds for removal contained in the Indiana Probate Code, which provides that a court may remove a personal representative if he "becomes mentally incompetent, disqualified, unsuitable or incapable of discharging his duties, has mismanaged the estate, failed to perform any duty imposed by law or by any lawful order of the court, or has ceased to be domiciled in Indiana."<sup>268</sup> A personal representative under the Indiana Probate Code and, hence, a guardian under the NGC becomes disqualified if he is: under eighteen years old; not competent; a convicted felon; or a resident corporation not qualified to act as a fiduciary in Indiana.<sup>269</sup> "Unsuitability does not require actual misconduct or breach of duty, but includes incapacity, unwillingness, or inability to discharge the duties in the particular case with fidelity and efficiency."<sup>270</sup> In addition, "if there is such animosity . . . [as] to interfere with the . . . conduct of the guardianship, the guardian may be removed as unsuitable."<sup>271</sup> Mismanagement includes failure to manage with the "scrupulous integrity" required of a fiduciary,<sup>272</sup> failure to make the property productive,<sup>273</sup> failure to care for the property,<sup>274</sup> and commingling of the property with the fiduciary's

262. *Id.* § 29-3-9-6(c).

263. *Id.* § 29-3-9-6(d).

264. *Id.* § 29-3-9-6(f).

265. *Id.* § 29-3-9-6(e).

266. *Id.* § 29-3-12-4.

267. *See id.* § 29-1-18-25 (repealed effective July 1, 1989).

268. *Id.* § 29-1-10-6 (1988).

269. *See supra* note 200 and text accompanying notes 200-06.

270. Falender, *Removal, Termination and Foreign Guardians*, ICLEF GUARDIANSHIP SEMINAR VII-13 (1988) (citing *In re Estate of Baird*, 408 N.E.2d 1323, 1327 (Ind. Ct. App. 1980) (quoting *Grossman v. Grossman*, 343 Mass. 565, 179 N.E.2d 900 (1962))).

271. Falender, *supra* note 270, at VII-13 (citing *Estate of Jaworski v. Jaworski*, 479 N.E.2d 89 (Ind. Ct. App. 1985)).

272. *E.g.*, *Helm v. Odle*, 129 Ind. App. 478, 157 N.E.2d 584 (1959) *cited in* Falender, *supra* note 270, at VII-26.

273. *E.g.*, *Brannock v. Stocker*, 79 Ind. 558 (1881), *cited in* Falender, *supra* note 270, at VII-26.

274. *Id.*

personal assets.<sup>275</sup> Failure to comply with the law or a lawful order of court includes failure to file an inventory,<sup>276</sup> a bond<sup>277</sup> or an accounting<sup>278</sup> as required by the NGC or court order. Finally, the Indiana Probate Code's removal provision concerning ceasing to be domiciled in Indiana arguably should not apply to the NGC.<sup>279</sup>

The manner for removal contained in the Indiana Probate Code<sup>280</sup> is incorporated by reference in the NGC.<sup>281</sup> These removal procedures provide that a court either on its own motion, or on petition of any person interested in the guardianship, shall order the guardian to appear and show cause why he should not be removed.<sup>282</sup> This procedure includes notice and hearing provisions.<sup>283</sup> In addition, a court may remove a guardian under an *ex parte* emergency procedure.<sup>284</sup> Arguably, the terms of NGC might prohibit a court from removing a guardian on its own motion.<sup>285</sup>

Upon removal, the authority and responsibility of a guardian terminates.<sup>286</sup> While the removal of a guardian does not invalidate the guardian's acts or omissions prior to removal,<sup>287</sup> it also does not affect the guardian's liability for such acts or the obligation to account for the guardian's conduct of the guardian's trust.<sup>288</sup> Upon the removal of a guardian, the guardian must give a final accounting to the court.<sup>289</sup> Finally, upon finding that a guardian is not effectively performing his fiduciary duties and that the welfare of the protected person requires immediate action, a court may appoint a replacement temporary guardian.<sup>290</sup>

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275. *E.g.*, *In re Guardianship of Brown*, 436 N.E.2d 877, 888 (Ind. Ct. App. 1982); *Rigby v. Leister*, 147 Ind. App. 438, 261 N.E.2d 891 (1970) *cited in* Falender, *supra* note 270, at VII-26, VII-27.

276. *E.g.*, *Rigby v. Leister*, 147 Ind. App. 438, 261 N.E.2d 891 (1970) *cited in* Falender, *supra* note 270, at VII-27.

277. *See, e.g.*, *Toledo, St. Louis & Kansas City R.R. v. Reeves*, 8 Ind. App. 667, 35 N.E. 199 (1894) *cited in* Falender, *supra* note 270, at VII-27.

278. *E.g.*, *Rigby v. Leister*, 147 Ind. App. 438, 261 N.E.2d 891 (1970) *cited in* Falender, *supra* note 270, at VII-28.

279. *See* Falender, *supra* note 270, at VII-13 to VII-14.

280. IND. CODE § 29-1-10-6 (1988).

281. *Id.* § 29-3-12-4(a).

282. *Id.* § 29-1-10-6(a).

283. *Id.*

284. *Id.* § 29-1-10-6(b).

285. *See* Falender, *supra* note 270, at VII-15. The NGC specifically states that a court may remove a guardian "on petition" which could be construed to prohibit a court from removing a guardian on its own motion. IND. CODE § 29-3-12-4(a) (1988).

286. IND. CODE § 29-3-12-5 (1988).

287. *Id.* § 29-3-12-4(c).

288. *Id.* § 29-3-12-5.

289. *Id.* § 29-3-12-4(a); *see also supra* notes 261-65 and accompanying text.

290. *See supra* notes 92-93 and accompanying text.

### F. Termination of a Guardianship

The NGC's grounds for termination<sup>291</sup> are substantially the same as prior Indiana law.<sup>292</sup> Unless a minor is adjudicated a disabled person, the guardianship of a minor must terminate upon the minor's attaining eighteen years of age or the minor's death and may terminate upon the adoption or marriage of the minor.<sup>293</sup> Furthermore, the guardianship of a disabled person must terminate upon the court's determination that the protected person is no longer disabled or upon the protected person's death.<sup>294</sup> The court also has broad discretion to terminate the guardianship for other reasons.<sup>295</sup>

The protected person or any other person may petition for an order terminating the guardianship or a protective order.<sup>296</sup> "A request for an order may also be made informally to the court."<sup>297</sup> Presumably, the NGC's general notice and hearing requirements apply to any petition or request for termination.<sup>298</sup> This right to petition may be limited by the court's authority to specify in a prior order a minimum period, not exceeding one year, during which a petition for termination may not be filed.<sup>299</sup>

Upon termination, the guardian has no more than thirty days to file a written verified account of the guardian's administration.<sup>300</sup> The authority and responsibility of a guardian terminates upon the termination of the guardianship,<sup>301</sup> with the exception of certain ministerial functions.<sup>302</sup>

291. See IND. CODE § 29-3-12-1 (1988).

292. See *id.* § 29-1-18-47 (repealed effective July 1, 1989).

293. *Id.* § 29-3-12-1(a) (1988).

294. *Id.* § 29-3-12-1(b).

295. IND. CODE § 29-3-12-1(c) (1988) provides:

(c) The court may terminate any guardianship if:

- (1) the guardianship property does not exceed the value of three thousand five hundred dollars (\$3,500);
- (2) the guardianship property is reduced to three thousand five hundred dollars (\$3,500);
- (3) the domicile or physical presence of the protected person is changed to another state and a guardian has been appointed for the protected person and the protected person's property in that state; or
- (4) the guardianship is no longer necessary for any other reason.

296. *Id.* § 29-3-12-3.

297. *Id.*

298. See *supra* notes 172-89 and accompanying text.

299. IND. CODE § 29-3-12-3 (1988).

300. *Id.* § 29-3-9-6(a)(2); see also *supra* notes 261-65 and accompanying text.

301. IND. CODE § 29-3-12-5 (1988).

302. IND. CODE § 29-3-12-1(d) (1988) provides that if the guardianship terminates for any reason other than death, the guardian "may pay the claims and expenses of

### G. *Foreign Guardianships*

The NGC<sup>303</sup> has expanded the substantive provisions contained in prior Indiana law<sup>304</sup> concerning foreign guardianships. The NGC allows a foreign guardian to collect debts and assets in Indiana upon proof of his appointment and the presentation of an affidavit containing specified information.<sup>305</sup> “If the person to whom the affidavit is presented does not know of any other guardianship proceeding pending in Indiana,” payment or delivery may be made in response to the affidavit without further liability.<sup>306</sup> A foreign guardian may exercise all powers of a guardian with respect to property of a disabled person or minor located in Indiana and to maintain actions and proceedings in Indiana if certain requirements have been met.<sup>307</sup> Finally, upon collecting debts and assets or exercising any power of a guardian with respect to property located in Indiana, the foreign guardian submits personally to the jurisdiction of Indiana courts in a proceeding relating to such property.<sup>308</sup>

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administration that are approved by the court and exercise other powers that are necessary to complete the performance of the guardian’s trust, including payment and delivery of the remaining property for which the guardian is responsible to the protected person. In addition, IND. CODE § 29-3-12-1(e) provides that if the guardianship terminates because of the protected person’s death, the guardian

may pay the expenses of administration that are approved by the court and exercise other powers that are necessary to complete the performance of the guardian’s trust and may deliver the remaining property for which the guardian is responsible to the protected person’s personal representative. If approved by the court, the guardian may pay directly the following:

- (1) Reasonable funeral and burial expenses of the protected person.
- (2) Reasonable expenses of the protected person’s last illness.
- (3) The protected person’s federal and state taxes.
- (4) Any statutory allowances payable to the protected person’s surviving spouse or surviving children.
- (5) Any other obligations of the protected person.

303. *Id.* § 29-3-13-1 to -3.

304. *Id.* § 29-1-18-52 (repealed effective July 1, 1989).

305. *Id.* § 29-3-13-1(a) (1988). The affidavit must state:

- (1) That the foreign guardian does not know of any other guardianship proceeding, relating to the disabled person or minor, pending in Indiana.
- (2) That the letters of the foreign guardian were duly issued.
- (3) That the foreign guardian is entitled to receive the payment or delivery.

306. *Id.* § 29-3-13-1(b).

307. *Id.* § 29-3-13-2. These requirements are: (a) that no guardian has been appointed, and no petition in a guardianship proceeding is pending in Indiana; (b) that the guardian has been appointed by a court in the state of the disabled person’s or minor’s domicile; and (c) that the guardian files an authenticated copy of the guardian’s appointment and a bond in the court in the county in which the disabled person’s or minor’s property is located.

308. *Id.* § 29-3-13-3.

