

Enhancing Self-Determination Through Guardian Self-Declaration

GERRY W. BEYER*

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* Professor of Law, St. Mary's University School of Law, San Antonio, Texas. B.A. 1976, Eastern Michigan University; J.D. 1979, Ohio State University; LL.M. 1983 and J.S.D. Candidate University of Illinois. This article is adapted from Chapter 6 of the working draft of the author's J.S.D. dissertation.

The author acknowledges with gratitude the valuable comments and suggestions of Professor Eugene Scoles, University of Illinois College of Law, and the excellent research assistance of Mr. Bruce Dean, J.D. 1989, St. Mary's University.

I. INTRODUCTION

“Man individually and as a race is possible on earth only because, not for weeks or months but for years, love and the guardianship of the strong over the weak has existed.”¹

The early history of recorded law provided evidence of the existence of legal protection for adults lacking the capacity necessary to act for themselves.² The Roman Law of the Twelve Tables in 449 B.C. contained a type of guardianship for mentally disabled persons who were thought to be capable of having lucid intervals.³ The Praetors⁴ later extended similar protection to all adults suffering from mental incapacity, even if the incapacity was permanent.⁵

Early English law also contains references to the special protections extended to incompetent individuals. A distinction was made between the guardianship of two categories of disabled adults: “idiots” or “born fools,” and “lunatics.”⁶ “Idiots” were individuals so mentally disabled

1. O. SCHREINER, *MAN TO MAN* ch. 7, quoted in R. MACKAY, *THE LAW OF GUARDIANSHIPS* ii (3d ed. 1980).

2. Protective devices for minors and the minor's ability to influence decisions regarding those devices are beyond the scope of this article. See generally H. BEVAN, *THE LAW RELATING TO CHILDREN* 396-423 (1973) (explaining role of guardians for minors under English law as well as how wishes of a minor, if sufficiently mature, were considered by the court (401)); J. LONG, *A TREATISE ON THE LAW OF DOMESTIC RELATIONS* §§ 271-94 (2d ed. 1913) (history, development and use of guardians to protect minors; wishes of a minor over fourteen years old concerning selection of guardian are considered by the court but are not controlling (§ 281)); E. PECK, *THE LAW OF PERSONS AND OF DOMESTIC RELATIONS* § 151 (3d ed. 1930) (“in most if not all of the states statutes have been enacted under the provisions of which an infant who has reached the age of fourteen years, and requires a guardian, is entitled to choose his own guardian. This right of choice is subject to control by the court to insure a suitable appointment . . .”).

3. See W. BUCKLAND, *A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN* 168 (P. Stein 3d ed. 1963) (lunatic placed in care of their *agnates* (paternal relatives) or if none, their *gentiles* (relatives connected by common descent)); see also R. ALLEN, E. FERSTER & H. WEIHOFEN, *MENTAL IMPAIRMENT AND LEGAL INCOMPETENCY* 2 (1968) [hereinafter ALLEN, FERSTER & WEIHOFEN].

4. Praetors were magistrates appointed by the Emperor to exercise civil jurisdiction. See C. SALKOWSKI, *INSTITUTES AND HISTORY OF ROMAN PRIVATE LAW WITH CATENA OF TEXTS* 34 (E. Whitfield trans. 1886).

5. See W. BUCKLAND, *supra* note 3, at 168. For individuals who fell within the prescription of the Twelve Tables, the Roman Law preferred to appoint *agnates*, but if *agnates* were absent or deemed unworthy, then the Praetor.

6. See 1 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 474 (7th ed. rev. reprinted 1966) (right of guardianship for an idiot was a profitable right analogous to right of wardship whereas lunacy was in the nature of a duty where no profit could be made by the appointed agent); 1 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 481 (2d ed. 1898) [hereinafter POLLOCK & MAITLAND].

that they were unlikely to regain sufficient mental capacity to act on their own at any time. On the other hand, "lunatics" had the potential of regaining their mental faculties at a future date.⁷ Under the early common law, lords⁸ were entitled to become the guardians of the land and person of incompetents.⁹ The lord could actually seize the land of an incurable idiot but he could only administer the real property of a lunatic because the land would have to be restored to the lunatic should he recover.¹⁰

In approximately 1216, near the end of the reign of King Henry III, the crown acquired the right of guardianship over incompetent persons, to the exclusion of lords, by virtue of a statute or ordinance.¹¹ The crown's right was documented in the statute *de Praerogativa regis* which has been traced to the early years of King Edward I.¹² The king was granted custody of idiots' lands and the right to take the profits produced from the lands without waste and had the reciprocal duty of providing for the idiots' necessaries.¹³ Upon the death of an idiot, the lands were returned to the idiot's rightful heirs.¹⁴ In a similar manner, the king managed the lunatic's lands and tenements and maintained the lunatic and his household with the profits.¹⁵ If the lunatic regained competency, the residue of the lunatic's estate would then be returned to him; the king was not permitted to claim anything for his own use.¹⁶

Originally, jurisdiction over persons of unsound mind was regarded as a valuable right and was therefore vested in the Court of Exchequer.¹⁷

7. See ALLEN, FERSTER & WEIHOFEN, *supra* note 3, at 2.

8. A lord was "[a] feudal superior or proprietor; one of whom a fee or estate [was] held." BLACK'S LAW DICTIONARY 850 (5th ed. 1979).

9. See 1 W. HOLDSWORTH, *supra* note 6, at 473.

10. See ALLEN, FERSTER & WEIHOFEN, *supra* note 3, at 2; 1 POLLOCK & MAITLAND, *supra* note 6, at 481.

11. See 1 W. HOLDSWORTH, *supra* note 6, at 473; 1 POLLOCK & MAITLAND, *supra* note 6, at 481.

12. See 1 W. HOLDSWORTH, *supra* note 6, at 473 n.8 (accepted as a genuine statute during the Middle Ages but may have been a private work or issued by some official upon the king's instructions; estimated date is between 1255 and 1290); 1 POLLOCK & MAITLAND, *supra* note 6, at 481 (while exact origins of this document are unknown, it may have been procured by Robert Walerand, a friend of the king, who foresaw that he was to leave an idiot as his heir and desired to have his lands come into the possession of the king rather than his lords).

13. See 1 W. HOLDSWORTH, *supra* note 6, at 473 (paraphrasing *de Praerogativa regis*).

14. *Id.*

15. *Id.* at 473-74.

16. *Id.* at 474.

17. *Id.* The Court of Exchequer was inferior to the King's Bench and the Court of Common Pleas. It was charged with "keeping the king's accounts and collecting the royal revenues." BLACK'S LAW DICTIONARY 322 (5th ed. 1979).

As time passed, the management of incompetents and their estates became viewed as a duty. By 1660, jurisdiction was almost always delegated to the Chancellor.¹⁸ The Chancellor would typically appoint a committee to oversee the affairs of the incompetent person and to carefully administer his property.¹⁹

In the United States, jurisdiction over incompetent persons was originally exercised by equity or law courts under specific statutory authority.²⁰ As the law developed, most, if not all, matters that involved the guardianship of incompetent persons became highly regulated by statute.²¹ Upon a proper petition and a finding that the person was incompetent, a guardian or committee was appointed by the court to care for the person and his estate.²² State statutes typically prioritize the

18. See 1 W. HOLDSWORTH, *supra* note 6, at 474-75. The Chancellor's jurisdiction rested upon two facts: (1) the share he received when writs were issued to inquire into the purported insanity, and (2) the express delegation by the crown of its powers and duties over persons of unsound mind who the Chancellor was to oversee personally. *Id.*

19. *Id.* at 475.

20. See J. LONG, *supra* note 2, at § 318.

21. See *id.*; J. MADDEN, HANDBOOK OF THE LAW OF PERSONS AND DOMESTIC RELATIONS § 151 (1931).

22. See J. LONG, *supra* note 2, at § 318. Early incompetency statutes, in general, allowed for the appointment of a guardian for mental incompetents in three broad areas: insane persons, idiots, and persons incapable of properly handling their own affairs. See, e.g., *In re Daniels*, 140 Cal. 335, 73 P. 1053 (1903) (upon petition of relative or friend, a guardian shall be appointed for a mentally incompetent person to manage property); *In re Clark*, 67 N.E. 212 (N.Y. 1913) (jurisdiction of county court included resident of county who was incompetent by reason of lunacy (unsound mind), idiocy or habitual drunkenness); *Shelby v. Farve*, 33 Okla. 651, 126 P. 764 (1912) (county court shall appoint guardians of minors, idiots, lunatics, persons non compos mentis and habitual drunkards); *In re Northcutt*, 81 Or. 646, 160 P. 801 (1916) (statute addresses three classes of persons: insane persons, idiots, and persons incapable of properly handling own affairs).

Modern adult incompetency statutes are broader in scope and allow the appointment of a guardian or conservator on the petition of a person interested in the welfare of an individual believed to be incapacitated or partially incapacitated. See CAL. PROB. CODE § 1820 (Deering 1981) (proposed conservatee, spouse, relative, interested state or local governmental entity, public officer or employee, or other interested person or friend may petition for appointment of conservator); OKLA. STAT. ANN. tit. 30, § 3-101 (West Supp. 1989) (any person interested in welfare of person believed to be incapacitated or partially incapacitated may file for court appointed guardian alleging degree and nature of incapacity); OR. REV. STAT. § 126.103 (1987) (any person interested in welfare of incapacitated person may file petition for finding of incapacity and appointment of guardian alleging proposed ward's lack of capacity). Oregon defines an incapacitated person as: "an adult whose ability to receive and evaluate information effectively or communicate decisions is impaired to such an extent that the person presently lacks the capacity to meet the essential requirements for the person's physical health or safety or to manage the person's financial resources." "Meeting the essential requirements for physical health and safety" means those actions necessary to provide the health care, food, shelter, clothing, personal hygiene

persons who may be appointed as guardian of the ward's person and estate. The incompetent's spouse and adult children are favored in these statutory preferences as evidenced by their placement at or near the top of the list.²³ These statutes codify the public's belief that close relatives are the most likely individuals to be solicitous of the ward's personal and financial welfare.

The central issue for consideration in this article is the extent to which an incompetent person may influence or control the court's selection of the person who will be charged with the management of his person and his estate.²⁴ Once a person is deemed incompetent by the court, unpleasant ramifications from that finding impact the incompetent's right of self-determination; important decisions regarding personal and business matters once made by the incompetent are now made by the guardian. Despite the withdrawal of the legal power to make decisions even as mundane as which washing machine to purchase, most state statutes that originally guided the court in the appointment of a guardian did not require the court to consider the desires or preferences of the incompetent as to whom the guardian should be. Although an incompetent individual may lack the legal capacity to contract, he certainly retains his emotional and psychological sense of self-worth. Thus, the appointment of a person with statutory priority, such as a spouse or adult child, may not be in the best interest of the incompetent due to conflicting interests or personal grudges against the incompetent that do not typically surface during the appointment process. Even if it is assumed that the person with priority would be adequate as a guardian of the person, the incompetent may prefer a different person as guardian of his estate, especially if the estate consists of assets requiring special management skills.

The case law which developed in the United States in the nineteenth and early twentieth centuries was inconclusive as to the ability of an incompetent to influence the court's decision regarding the person to be appointed as his guardian. Most courts held that they were not required

and other care without which serious physical injury or illness is likely to occur." "Manage financial resources" means those actions necessary to obtain, administer and dispose of real and personal property, intangible property, business property, benefits and income. OR. REV. STAT. § 126.003(4) (1987).

23. See, e.g., ARIZ. REV. STAT. ANN. § 14.5410A (1975); MICH. STAT. ANN. § 27.5454(3) (Callaghan Supp. 1988-89); MONT. CODE ANN. § 72-5-312(2) (1987).

24. There are two basic types of guardians. A guardian of the person (a "tutor" under the civil law) is vested with the duty to care for the incompetent's person. A guardian of the estate, often called a conservator (a "curator" under the civil law), is in charge of administering the incompetent's estate. See J. MADDEN, *supra* note 21, § 144 (1931). Use of the term "guardian" in this article refers to both types unless otherwise indicated.

to give weight to the incompetent's preferences.²⁵ Nonetheless, other courts gave serious consideration to the incompetent's recommendation believing that the incompetent's best interests were often served by the appointment of a self-preferred guardian.²⁶ For example, the Massachusetts Supreme Court stated:

A man may be insane so as to be a fit subject for guardianship, and yet have a sensible opinion and strong feeling upon the question who that guardian shall be. And that opinion and feeling it would be the duty as well as the pleasure of the court anxiously to consult, as the happiness of the ward and his restoration to health might depend upon it.²⁷

The right of an incompetent to determine his fate to the greatest extent possible is increasingly recognized in the law. For example, the Utah Supreme Court recently stated that "a court in appointing a guardian must consider the interest of the ward in retaining as broad a power of self-determination as is consistent with the reason for appointing a guardian. . . ."²⁸ Likewise, one Illinois court emphasized that "[g]uardianship is to be used to encourage self-reliance and independence."²⁹

In an effort to provide the incompetent person with greater input into the court's decision-making process, most states have enacted statutes

25. See, e.g., *In re Coburn*, 165 Cal. 202, 131 P. 352, (1913) (court affirmed appointment of guardian not desired by incompetent because there is no requirement that court "give any weight to the preference of the ward"); *In re Cassidy's Guardianship*, 95 Cal. App. 752, 273 P. 69 (1928) ("under no existing provision is the court required to give any weight to the wishes of the ward"); *Kutzner v. Meyers*, 182 Ind. 669, 108 N.E. 115 (1915) (lower court did not err in refusing to permit the incompetent to select his own guardian); *In re Lynch*, 124 Minn. 492, 145 N.W. 378 (1914) (court did not abuse its discretion when it appointed suitable guardians merely because the incompetent preferred others); *In re Estate of Coulter*, 406 Pa. 402, 178 A.2d 742 (1962) (no error in appointing as guardian a bank which was unacceptable to ward because there was not a scintilla of evidence that the bank was not fully qualified to serve as his guardian).

26. See, e.g., *Broxson v. Spears*, 216 Ala. 385, 113 So. 248 (1927) (incompetent's wishes considered); cf. *In re Green's Guardianship*, 125 Wash. 570, 216 P. 843 (1923) (incompetent's indication that a particular person should not serve as guardian was one of many factors court considered in determining that such person was improperly appointed).

27. *Allis v. Morton*, 70 Mass. 63, 64 (1855).

28. *In re Boyer*, 636 P.2d 1085 (Utah 1981). Cf. *In re Reed's Guardianship*, 182 N.W. 329 (Wis. 1921) (in determining whether it was proper to appoint a guardian for a spendthrift, court stated that "liberty of the person and the right to the control of one's own property are very sacred rights which should not be taken away or withheld except for very urgent reasons").

29. *In re Estate of Bennett*, 122 Ill. App. 3d 756, 461 N.E.2d 667 (1984); cf. TEX. PROB. CODE ANN. § 130A (Vernon Supp. 1990) (limited guardianship "designed to encourage the development of maximum self-reliance and independence in the individual").

which grant the incompetent the right to express a non-binding preference regarding the person to be appointed as his guardian.³⁰ Despite the incompetent's right to have his desires considered, one study has concluded that "in a majority of guardianship proceedings, little or no thought is given to whether the *particular* guardian to be named is one who would be personally acceptable to the ward."³¹

In more recent years, commentators have urged and legislatures have recognized that during the selection of a guardian, attention should focus on preferences expressed by the incompetent while the individual was competent, rather than on nominations made while incompetent.³² Nevertheless, it must also be recognized that an incompetent person's expression of preference is inherently suspect; a person lacking the capacity to handle personal and property matters may also lack the capacity to select a proper guardian. Likewise, an incompetent person is more susceptible to influence from those who wish to be appointed as guardian but who do not actually have the person's best interests in mind.

In an effort to resolve these important issues, this article focuses on the growing trend in the United States to permit competent individuals to select their guardians before the onset of incompetency and ultimately recommends greater access and simplicity with specially designed statutory fill-in-the-blank forms. The various methods of guardian self-designation that have evolved are discussed in detail. Attention then turns to the forms which have been enacted by several state legislatures to encourage their citizens to take advantage of the opportunity to pre-select their guardians. After a critique of the effectiveness of these forms, two

30. See, e.g., HAW. REV. STAT. § 560:5-410(a)(2) (1985) (for appointment of conservator, court is to consider "[a]n individual or corporation nominated by the protected person if he is fourteen or more years of age and has, in the opinion of the court, sufficient mental capacity to make an intelligent choice"); KY. REV. STAT. ANN. § 387.600(2) (Michie/Bobbs-Merrill 1984) ("Prior to the appointment, the court shall make a reasonable effort to question the respondent concerning his preference regarding the person or entity to be appointed limited guardian, guardian, limited conservator, or conservator, and any preference indicated shall be given due consideration."); MICH. STAT. ANN. § 27.5454(2) (Callaghan Supp. 1988-89) ("In appointing a guardian under this section, the court shall appoint a person, if suitable and willing to serve, designated by the person who is the subject of the petition."); see also UNIF. PROB. CODE § 5-409(a)(2) (1987) (for appointment of conservator, court must consider "an individual or corporation nominated by the protected person 14 or more years of age and of sufficient mental capacity to make an intelligent choice").

31. ALLEN, FERSTER & WEIHOFEN, *supra* note 3, at 90 (emphasis in original).

32. See *infra* text accompanying notes 42-62; see also Gorman, *Planning for the Physically and Mentally Handicapped*, 11 INST. ON EST. PLAN. 15-1, 15-31 to -32, 15-37 to -39 (1977) (recommending that a competent person prepare a document nominating a guardian even though such instructions may not be legally binding because they would be helpful to the court).

recommendations are made. First, each jurisdiction should enact a free-standing self-designation of guardian act which encompasses a statutory fill-in-the-blank form. Second, each state should adopt the Uniform Power of Attorney Form Act after amending the Act to bring guardian self-designation within its scope.

II. METHODS TO SELF-DESIGNATE GUARDIANS PRIOR TO INCOMPETENCY

This section discusses and analyzes the six different methods which legislatures have developed to enable a person to nominate guardians prior to incompetency or disability. The methods vary considerably and some jurisdictions authorize several disparate techniques.

A. Appointment of a Guardian While Competent

At least one state permits individuals to secure a court appointed guardian prior to incompetency. In Vermont, a competent adult may petition the court for the appointment of a guardian.³³ The petitioner's preference of a guardian will be approved if the court finds that the petitioner (1) is not mentally ill or mentally retarded, (2) has not been coerced, and (3) understands the nature, extent and consequences of the guardianship over his person and estate as well as the procedures for revoking the guardianship.³⁴ The guardian will only receive the powers

33. VT. STAT. ANN. tit. 14, § 2671(a) (Supp. 1988).

34. *Id.* § 2671(b)(3), (d). Compare UNIF. PROB. CODE § 5-401, 8 U.L.A. 478 (1987) (provisions delineating responsibilities and scope of conservator) with *id.* § 5-301, 8 U.L.A. 459 (1987) (description of and responsibilities of guardian). Under § 5-401, a conservator may be appointed over the "estate and affairs of a person" if the court finds two conditions: 1) "that the person is unable to manage property and business affairs effectively for such reasons as mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance;" and 2) "the person has property that will be wasted or dissipated unless property management is provided or money is needed for the support, care, and welfare of the person or those entitled to the person's support and that protection is necessary or desirable to obtain or provide money." *Id.* § 5-401(c), 8 U.L.A. 478 (1987). In contrast, § 5-301 provides that a guardian of the person may be appointed 1) for a minor (an unmarried incapacitated person) by a parent by will or another writing signed by the parent and attested to by at least two witnesses; 2) a married incapacitated person by a spouse by will or another writing signed by the spouse and attested to by at least two witnesses. See *id.* § 5-301, 8 U.L.A. 459-60 (1987). Acceptance of the guardianship is effective when the guardian files acceptance of appointment in the court where the will is probated, or if another written instrument is used, in the court where the incapacitated person resides or is present. *Id.* § 5-301(a), (b). Under both situations, the guardian must give seven days written notice prior to his filing in court noting his intention to accept the guardianship. The appointment of a spouse has priority over the appointment of a parent. *Id.* § 5-301(b). Termination of the guardianship is made upon written objection to the appointment in the court at the place where the incapacitated person resides or is present. *Id.* § 5-301(d).

which the petitioner has specified in the petition³⁵ and the petitioner may file a motion to revoke the guardianship at any time.³⁶

This procedure provides an individual with tremendous flexibility: a person may secure the appointment of a guardian without being required to demonstrate an inability to care for himself or his property;³⁷ the guardianship may be revoked without proving a just cause;³⁸ and the guardian receives only those powers requested by the petitioner.³⁹ This technique provides the petitioner with a degree of certainty because the individual dictates the person who is originally appointed as guardian public notice of the petitioner's true intent.⁴⁰ However, a person may be reluctant to submit to this procedure while competent; he may not wish to relinquish control over his property or person or may be unwilling to incur the court costs and guardian fees which may accompany the voluntary guardianship. This type of statute is akin to a durable power of attorney. It was probably designed to allow a person to obtain immediate assistance with some aspect of his personal or business affairs without a complicated or embarrassing guardianship proceeding rather than as a method to obtain the appointment of a guardian who is to stand in the wings until actually needed.⁴¹

B. *Standby Guardianship/Conservatorship*

A somewhat recent approach adopted by several states authorizes a competent person to prepare and file a petition for the appointment of a guardian of his person or conservator of his estate before the need arises but delays court action on the petition until the occurrence of a specified triggering event.⁴² The Iowa statute enacted in 1963 will be discussed in detail because Iowa was the first state to provide for standby guardianships or conservatorships⁴³ and because the Iowa statute has

35. VT. STAT. ANN. tit. 14, § 2671(b)(2), (f) (Supp. 1988).

36. *Id.* § 2671(h).

37. *Id.* § 2671(d) (court may not appoint a guardian if petitioner is mentally ill or mentally retarded); *cf.* FLA. STAT. ANN. § 744.341 (West 1986) (a mentally competent person may petition the court for the appointment of a voluntary guardian but only if person "is incapable of the care, custody, and management of his estate by reason of age or physical infirmity").

38. VT. STAT. ANN. tit. 14, § 2671(h) (Supp. 1988).

39. *Id.* § 2671(f).

40. *Id.* § 2671(b)(3), (d).

41. *Id.* § 2671(a) (indication that user of procedure "desires assistance with the management of his or her affairs").

42. *See* IOWA CODE ANN. §§ 633.560, 633.591-.597 (West 1964); WYO. STAT. §§ 3-3-301 to -302 (1985).

43. 1963 Iowa Acts 326. The Bar Committee commenting on this statute stated that "[t]here appears to be no provision in the statutes of any other state for standby

become the model for other states which have enacted similar provisions.⁴⁴

Under Iowa law, a competent adult may execute a verified petition for the voluntary appointment of a conservator⁴⁵ or guardian on a standby basis.⁴⁶ The petition must specify the event or the level of mental or physical health which will trigger the effectiveness of the petition.⁴⁷ The petition may nominate the guardian or conservator and may contain other requests and recommendations, such as the amount of bond.⁴⁸ The person using this technique either deposits the petition with the clerk of the court in his county of residence⁴⁹ or gives the petition to any person, firm, bank or trust company he selects.⁵⁰ A competent petitioner may revoke the petition at any time by physically destroying it or by executing an acknowledged instrument of revocation.⁵¹

Once the threshold event occurs or the condition stated in the petition arises, the petition may be heard upon the filing of a verified statement by any person⁵² showing that the requisite event or condition has occurred.⁵³ The court is required to give due regard to the petitioner's nomination of guardian or conservator⁵⁴ and, because there is no requirement of notice, may promptly appoint the fiduciary indicated in the petition.⁵⁵

guardianships or conservatorships." The Committee believed that the new provisions would "permit a person of sound mind to plan for the infirmities of advanced age without giving up present control of his property, even to a trustee." Bar Committee Comment to §§ 633.591-.597 reprinted immediately preceding IOWA CODE ANN. § 633.591 (West 1964).

44. See WYO. STAT. §§ 3-3-301 to -306 (1985).

45. IOWA CODE ANN. §§ 633.591 (West 1964).

46. *Id.* § 633.560.

47. *Id.* § 633.591.

48. *Id.* § 633.592.

49. *Id.* § 633.593.

50. *Id.*

51. *Id.* § 633.594. If the original petition was deposited with the clerk of the court, any written revocation may also be filed with the clerk. *Id.*

52. See *id.* § 633.595 (statute imposes no limitation on who may file verified statement that triggering event has occurred).

53. *Id.* § 633.595.

54. *Id.* § 633.592.

55. *Id.* § 633.596. Alternatively, the court "may set the petition for hearing on such notice as the court may prescribe." *Id.* According to one commentator, notice is generally the rule in most situations regarding guardianships and conservatorships while omission of notice is the exception. See Peters, *Conservatorships and Guardianships Under the Iowa Probate Code*, 49 IOWA L. REV. 678, 680 (1964). According to Peters' interpretation of § 633.596 of the Iowa Probate Code, only four situations exist where notice is not required:

- 1) the ward is a minor and the guardianship or conservatorship is requested by the person having his custody;

A similar procedure became available in Wyoming in 1985.⁵⁶ The major difference in the Wyoming procedure is the absence of the petitioner's ability to deposit the petition with the court.⁵⁷ In the majority of cases, this difference is likely to be of little practical significance because most individuals deliver the petition directly to the person they have named as guardian. This procedure provides for the safe storage of the document reducing the chance of accidental or unauthorized destruction, although it may be considered inefficient and wasteful of the court's valuable resources. Of course, merely because the petition is filed with the court is no guarantee that it will be found when it is needed unless the petitioner has made its existence and location of its filing known to someone who will bring it to the court's attention at the appropriate time.

C. *Nomination by Durable Power of Attorney*

The most common method adopted by state legislatures to permit individuals to select their own guardians is by an express nomination in a durable power of attorney.⁵⁸ This technique permits the principal to nominate both a guardian of his person and a guardian of his estate (conservator).⁵⁹

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- 2) where the ward individually voluntarily applies for the appointment;
 - 3) where a standby petition has been presented to the court and the stated occurrence or condition has occurred in the court's opinion; and
 - 4) when a foreign conservator seeks ancillary appointment.

Under the second clarification, the petition must state whether notice of involuntary proceedings for a conservator has been served upon the proposed ward. Other than these exceptions, notice pursuant to the Iowa Rules of Civil Procedure is required upon the proposed ward. *Id.*

56. 1985 Wyo. Sess. Laws 226 (codified at WYO. STAT. §§ 3-3-301 to -306 (1985)).

57. WYO. STAT. § 3-3-303 (1985) ("petition may be deposited with any person, firm, bank or trust company selected by the petitioner").

58. See ALA. CODE § 26-1-2(c)(2) (1986); ALASKA STAT. § 13.26.335(3) (Supp. 1988); ARK. STAT. ANN. § 28-68-203(b)(1) (1987); CAL. CIV. CODE § 2402(b) (Deering Supp. 1988) (item 7); D.C. CODE ANN. §§ 21-2043(b), 21-2083(b) (Supp. 1988); IDAHO CODE § 15-5-503(2) (Supp. 1988); ILL. ANN. STAT. ch. 110½, para. 803 (Smith-Hurd Supp. 1988) (item 8); IND. CODE ANN. §§ 29-3-5-5(a)(1), 30-2-11-3(b) (Burns Supp. 1988); KAN. STAT. ANN. § 58-612(b) (1983); MASS. ANN. LAWS ch. 201B, § 3(b) (Law. Co-op. Supp. 1989); NEB. REV. STAT. § 30-2667(2) (1985); N.C. GEN. STAT. § 32A-10(b) (1987); N.D. CENT. CODE § 30.1-30-03(2) (1987); OHIO REV. CODE ANN. § 1337.09(B) (Baldwin 1988); OKLA. STAT. ANN. tit. 58, § 1074B (West Supp. 1989); 20 PA. CONS. STAT. ANN. § 5604(c)(2) (Purdon Supp. 1988); TENN. CODE ANN. § 34-6-104(b) (1984); WASH. REV. CODE ANN. §§ 11.88.010(4), 11.94.010(1) (1987); W. VA. CODE § 39-4-3(b) (Supp. 1988); WIS. STAT. ANN. § 243.07(3)(b) (West 1987).

59. See ALA. CODE § 26-1-2(c)(2) (1986) ("guardian, curator or other fiduciary"); ALASKA STAT. § 13.26.335 (Supp. 1988) ("guardian or conservator"); ARK. STAT. ANN.

Many of these state statutes are based on the virtually identical provisions of the Uniform Probate Code⁶⁰ and the Uniform Durable Power of Attorney Act,⁶¹ both of which permit the principal to include fiduciary nominations in a durable power of attorney. Under these uniform acts, the principal is authorized to nominate the individuals he desires as his guardian and conservator. The court which hears the petition must appoint the named persons unless there is either good cause for not doing so or the selected person is disqualified.⁶² The drafters opined that the best reason for making a guardian self-designation was that such action would warrant the authority granted to the agent against future challenges by "arranging matters so that the likely ap-

§ 28-68-203(b)(1) (1987) ("conservator, guardian of his estate, or guardian of his person"); CAL. CIV. CODE § 2402(b) (Deering Supp. 1988) ("conservator of the person or estate or both, or a guardian of the person or estate or both"); D.C. CODE ANN. §§ 21-2043(b), 21-2083(b) (Supp. 1988) ("conservator, guardian of his or her estate, or guardian of his or her person"); IDAHO CODE § 15-5-503(2) (Supp. 1988) ("conservator, guardian of his estate, or guardian of his person"); ILL. ANN. STAT. ch. 110 $\frac{1}{2}$, para. 803-3 (Smith-Hurd Supp. 1988) (item 8) ("guardian of your person or a guardian of your estate"); IND. CODE ANN. §§ 29-3-5-5(a)(1), 30-2-11-3(b) (Burns Supp. 1988) ("conservator, guardian of his estate, or guardian of his person"); KAN. STAT. ANN. § 58-612(b) (1983) ("conservator, guardian of the principal's estate or guardian of the principal's person"); MASS. ANN. LAWS ch. 201B, § 3(b) (Law. Co-op. Supp. 1989) ("conservator, guardian of his estate, or guardian of his person"); NEB. REV. STAT. § 30-2667(2) (1985) ("conservator, guardian of the estate, or guardian of the person"); N.C. GEN. STAT. § 32A-10(b) (1987) ("conservator, guardian of his estate, or guardian of his person"); N.D. CENT. CODE § 30.1-30-03(2) (1987) ("conservator, guardian of the principal's estate, or guardian of the principal's person"); OHIO REV. CODE ANN. § 1337.09(D) (Baldwin 1988) ("guardian of his person, estate, or both"); OKLA. STAT. ANN. tit. 58, § 1074B (West Supp. 1989) ("conservator, guardian of his estate, or guardian of his person"); 20 PA. CONS. STAT. ANN. § 5604(c)(2) (Purdon Supp. 1988) ("guardian of his estate or of his person"); TENN. CODE ANN. § 34-6-104(b) (1984) ("conservator, guardian of his estate, or guardian of his person"); WASH. REV. CODE ANN. § 11.88.010(4) (1987) ("guardian or limited guardian of his or her estate or person"); W. VA. CODE § 39-4-3(b) (Supp. 1988) ("conservator, guardian of his estate, or guardian of his person"); WIS. STAT. ANN. § 243.07(3)(b) (West 1987) ("conservator, guardian of his or her estate, or guardian of his or her person").

60. § 5-503(b), 8 U.L.A. 514 (1987).

61. § 3(b), 8A U.L.A. 280 (1987).

62. UNIF. PROB. CODE § 5-503(b), 8 U.L.A. 514 (1987); UNIF. DURABLE POWER OF ATTORNEY ACT § 3(b), 8A U.L.A. 280 (1987); *see also* UNIF. PROB. CODE § 5-305(b), 8 U.L.A. 466 (1987) ("Unless lack of qualification or other good cause dictates the contrary, the Court shall appoint a guardian in accordance with the incapacitated person's most recent nomination in a durable power of attorney."); *id.* § 5-409(a) (except for fiduciary appointed under law of jurisdiction where protected person resides, court is to give first consideration when appointing a conservator to the individual or corporation nominated by a protected person who is at least fourteen years old and who has "sufficient mental capacity to make an intelligent choice"). Equivalent provisions are found in UNIF. GUARDIAN & PROTECTIVE PROCEEDINGS ACT § 2-205(b), 8A U.L.A. 480 (1987) (same as UNIF. PROB. CODE § 2-205(b)) and § 2-309(a) (same as UNIF. PROB. CODE § 5-409(a)).

pointee in any future protective proceedings will be the [agent] or another equally congenial to the principal and his plans."⁶³

D. Nomination in Living Will

Minnesota has recently enacted legislation which permits competent adults to nominate a guardian in a declaration of preferences regarding health care decisions.⁶⁴ In addition to providing instructions regarding the application or non-application of artificial life-sustaining procedures and forced administration of food and water should the declarant be in a terminal condition, the declarant may designate a proxy to carry out those wishes when the declarant becomes unable to communicate them.⁶⁵ Unless the declaration expressly provides otherwise, the designation of a proxy is deemed to be a nomination of a guardian of the person.⁶⁶

E. Nomination in Will-like Document

The second most common method by which a state grants a person the ability to designate his own guardian is through a document which must be executed with many, if not all, of the formalities of a valid will.⁶⁷ Some states refer directly to their will statutes and incorporate

63. UNIF. PROB. CODE § 5-503 comment, 8 U.L.A. 515-16 (1987); UNIF. DURABLE POWER OF ATTORNEY ACT § 3 comment, 8A U.L.A. 281-82 (1987) (also noting that existence of a durable power of attorney may preclude necessity for guardians).

64. 1989 Minn. Sess. Law Serv. ch. 3 (West) (to be codified at MINN. STAT. §§ 145B.01-.17).

65. *Id.* at ch. 3, § 3 (to be codified at MINN. STAT. § 145B.03(2)(b)(2)).

66. *Id.* (to be codified at MINN. STAT. § 145B.03(3)).

67. CONN. GEN. STAT. ANN. § 45-70(b) (West 1981) ("designation shall be executed, witnessed and revoked in the same manner as provided for wills"); FLA. STAT. ANN. § 744.312(3)(b)(2) (West 1986) (nomination must be signed "in the presence of at least two attesting witnesses present at the same time"); GA. CODE ANN. § 29-5-2(c)(1) (1986) (nomination must be written, signed, and "attested by at least two witnesses, and must not have been revoked by a later writing signed by such adult and attested by at least two witnesses"); ILL. ANN. STAT. ch. 110½, para. 11a-6 (Smith-Hurd Supp. 1988) (if nomination is "executed and attested in the same manner as a will, it shall have prima facie validity"); MINN. STAT. ANN. § 525.544(1) (West Supp. 1989) (nomination in written instrument "executed and attested in the same manner as a will"); MO. ANN. STAT. § 475.050(2) (Vernon Supp. 1989) (nomination by writing signed by nominator and "by two witnesses who signed at his request, before the inception of his incapacity or disability, at a time within five years before the hearing when he was able to make and communicate a reasonable choice"); OHIO REV. CODE ANN. § 2111.121 (Baldwin 1987) (written nomination must "be signed by the person making the nomination in the presence of two witnesses; signed by the witnesses; contain, immediately prior to their signatures, an attestation of the witnesses that the person making the nomination signed the writing in their presence; and be acknowledged by the person making the nomination before a notary

those requirements while others list requirements akin to those for a will.⁶⁸ In addition to nominating guardians, some states permit the self-declaration to control other aspects of the guardianship; for example, waiver of bond,⁶⁹ designation of successors,⁷⁰ grant of guardianship powers,⁷¹ and disqualification of named individuals.⁷² The enabling legislation may also govern other aspects of the self-designation process such as the method of resolving a conflicting designation in a durable power of attorney,⁷³ evidentiary presumptions,⁷⁴ revocation methods,⁷⁵ the effect of the declarant's divorce from a designated guardian,⁷⁶ and the recommendation of the format of the self-designation document.⁷⁷

States that employ will-like documents provide an easy method for a person to designate a guardian before the need arises, as do jurisdictions that provide for nomination in a durable power of attorney. However,

public"); S.D. CODIFIED LAWS ANN. § 30-27-25 (1984) (nomination "in writing with the same formalities including attestation as required to make a valid will"); TEX. PROB. CODE ANN. § 118A(a), (c) (Vernon Supp. 1989) (written declaration "must be attested to by at least two credible witnesses 14 years of age or older who are not named as guardian or alternative guardian in the declaration"; "declaration must have attached a self-proving affidavit signed by the declarant and the witnesses attesting to the competence of the declarant and the execution of the declaration"); WIS. STAT. ANN. § 880.09(7) (West Supp. 1988) (written instrument executed "in the same manner as the execution of a will").

68. See *supra* note 67.

69. See CONN. GEN. STAT. ANN. § 45-70(c) (West 1981); OHIO REV. CODE ANN. § 2111.121(A) (Baldwin 1987); S.D. CODIFIED LAWS ANN. § 30-27-25 (1984).

70. See OHIO REV. CODE ANN. § 2111.121(A) (Baldwin 1987); TEX. PROB. CODE ANN. § 118A(d) (Vernon Supp. 1990).

71. See S.D. CODIFIED LAWS ANN. § 30-27-25 (1984).

72. See TEX. PROB. CODE ANN. § 118A(b) (Vernon Supp. 1990) (persons disqualified by declarant "may not be appointed guardian under any circumstances").

73. See OHIO REV. CODE ANN. § 2111.121(B) (Baldwin 1987) (court "shall appoint the person nominated as guardian in the writing or durable power of attorney most recently executed if the person nominated is competent, suitable, and willing to accept the appointment").

74. See ILL. ANN. STAT. ch. 110½, para. 11a-6 (Smith-Hurd Supp. 1989) (attested and executed designation has prima facie validity); TEX. PROB. CODE ANN. § 118A(c) (Vernon Supp. 1990) ("A properly executed and witnessed declaration and affidavit are prima facie evidence that the declarant was competent at the time he executed the declaration and that the guardian named in the declaration would serve the best interests of the ward.").

75. TEX. PROB. CODE ANN. § 118A(e) (Vernon Supp. 1990) ("declarant may revoke a declaration in any manner provided for the revocation of a will . . . including by the subsequent reexecution of the declaration in the manner required for the original declaration").

76. *Id.* § 118A(f) ("If a declarant designates the declarant's spouse to serve as guardian . . . and the declarant is subsequently divorced from that spouse before a guardian is appointed, the provision of the declaration designating the spouse has no effect.).

77. *Id.* § 118A(g) (suggested, but not required, forms for declaration of guardian and accompanying self-proving affidavit).

the will-like document technique may have difficulties because of the rigid formalities associated with their execution. To be valid, will-like documents must comply with the technical requirements for wills or with similar formalities such as attestation, and are thus susceptible to invalidation for minor errors in their execution, e.g., one witness signing rather than the required two witnesses, witness attesting out of the declarant's sight, witness signing the self-proving affidavit rather than declaration. No case was located where a formality problem led to an ineffective designation of guardian, but cases are legion where a technical error has caused an otherwise valid will to fail.⁷⁸

In contrast to this formal will-like procedure which is wrought with hazards, durable powers of attorney have few formal requirements; a writing signed by the principal and properly notarized is often sufficient.⁷⁹ This method may thus be more effective in carrying out the desires of the declarant because of its ease of execution and the decreased chance of inadvertently failing to fulfill all of the necessary formalities.

F. Other Written Designations

Rather than impose a formalistic set of requirements for a valid self-declaration of a guardian, several jurisdictions permit competent adults to nominate a guardian in a simple written document.⁸⁰ The technical requirements of these written designations vary: some must be

78. See, e.g., *Orrell v. Cochran*, 695 S.W.2d 552 (Tex. 1985) (signature of testator on self-proving affidavit rather than on will rendered will invalid); *Boren v. Boren*, 402 S.W.2d 728 (Tex. 1966) (signatures of witnesses on self-proving affidavit rather than on will invalidated will); *Morris v. Estate of West*, 643 S.W.2d 204 (Tex. App.-Eastland 1982) (writ ref'd n.r.e.) (will invalid because attestation not in presence of testator where testator could not have seen witnesses sign without walking four feet to office door and fourteen feet down hallway). *But cf.* Langbein, *Substantial Compliance With the Wills Act*, 88 HARV. L. REV. 489, 489 (1975) ("insistent formalism of the law of wills is mistaken and needless"); Field, *Execution of Wills in Michigan*, 16 MICH. ST. B.J. 527, 531 (1937) ("adherence to ritualistic formality in the execution of wills contributes little, if anything, to the social purposes of law").

79. See, e.g., UNIF. STATUTORY FORM POWER OF ATTORNEY ACT § 1(b), 8A U.L.A. 123 (Supp. 1989) (signature of principal must be acknowledged).

80. See CAL. PROB. CODE § 1810 (Deering 1981) (nomination of conservator); COLO. REV. STAT. § 15-14-311(2)(b) (1987) (incapacitated person's spouse has priority over written self-declaration); ILL. ANN. STAT. ch. 110½, para. 11a-6 (Smith-Hurd Supp. 1989) (if writing attested and executed in the same manner as a will, it will have prima facie validity); ME. REV. STAT. ANN. tit. 18-A, § 5-311(b)(1) (1981); MD. EST. & TRUSTS CODE ANN. § 13-707(a)(1) (Supp. 1988) (declarant need not be an adult, just sixteen years old or older when designation signed); NEV. REV. STAT. ANN. § 159.061(1) (Michie 1987); N.Y. MENTAL HYG. LAW § 77.03 (McKinney 1988); OKLA. STAT. ANN. tit. 30, § 3-102 (West Supp. 1990) (requiring nomination to be substantially in the form contained in the statute); OR. REV. STAT. § 126.035(1) (1984).

signed,⁸¹ some must be acknowledged,⁸² while others merely need to be written.⁸³ The statutes authorizing these written designations also vary with respect to the time at which the declarant may make the designation: some must be made while the declarant is still competent,⁸⁴ while others may be made after the person becomes incompetent provided he had sufficient mental capacity to make an intelligent selection at the time the designation was executed.⁸⁵ In addition, some statutes expressly permit the nomination of alternate guardians⁸⁶ and provide rules of interpretation for use if the same person has executed multiple self-declarations.⁸⁷

These written designations are straightforward and relatively simple to use. They avoid many of the problems which accompany the will-like designations because technical formalities are eliminated or are considerably reduced. However, the lack of formalities may make these designations easier to forge or alter and may increase the chance of undetected undue influence, duress, or fraud.⁸⁸ Thus, jurisdictions considering the two approaches may conclude that the protective aspect of the formalities outweighs the potential frustration of intent that may occur if a self-declaration is executed with proper intent but fails to comport with the required formalities.⁸⁹ On the other hand, if forgery,

81. See CAL. PROB. CODE § 1810 (Deering 1981); MD. EST. & TRUSTS CODE ANN. § 13-707(a)(1) (Supp. 1988); NEV. REV. STAT. ANN. § 159.061(1) (Michie 1987) (written instrument must be "executed"); N.Y. MENTAL HYG. LAW § 77.03(d) (McKinney 1988) (petition or written instrument must be "duly executed"); OKLA. STAT. ANN. tit. 30, § 3-102 (West Supp. 1990); OR. REV. STAT. § 126.035(1) (1984) (written instrument must be "executed").

82. See N.Y. MENTAL HYG. LAW § 77.03(d) (McKinney 1988).

83. See COLO. REV. STAT. § 15-14-311(2)(b) (1987); ILL. ANN. STAT. ch. 110½, para. 11a-6 (Smith-Hurd Supp. 1988); ME. REV. STAT. ANN. tit. 18-A, § 5-311(b)(1) (1981).

84. See COLO. REV. STAT. § 15-14-311(2)(b) (1987); ILL. ANN. STAT. ch. 110½, para. 11a-6 (Smith-Hurd Supp. 1988) ("sound mind and memory"); OKLA. STAT. ANN. tit. 30, § 3-102A (West Supp. 1989) ("sound mind and not acting under duress, menace, fraud or undue influence"); OR. REV. STAT. § 126.035(1) (1987); NEV. REV. STAT. ANN. § 159.061(1) (Michie 1987).

85. See CAL. PROB. CODE § 1810 (Deering 1981); MD. EST. & TRUSTS CODE ANN. § 13-707(a)(1) (Supp. 1988); N.Y. MENTAL HYG. LAW § 77.03(d) (McKinney 1988); cf. ME. REV. STAT. ANN. tit. 18-A, § 5-311(b)(1) (1981) (issue of time of nomination not expressly discussed).

86. See OKLA. STAT. ANN. tit. 30, § 3-102(C) (West Supp. 1989).

87. *Id.* § 3-102(D) (most recent nomination controls or "[i]f two or more nominations bear the same most recent date the court may appoint one of the nominees or may appoint more than one of the nominees as coguardians"); CAL. CIV. CODE § 2402(b) (West Supp. 1988) (court must give effect to most recent writing).

88. *But see* Gulliver & Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 9-13 (1941) (doubtful that will formalities effectively protect the testator).

89. See, e.g., Ohio State Bar Association Probate and Trust Law Section Commentary (1983), reprinted following OHIO REV. CODE ANN. § 2111.121 (Baldwin 1987) (because a self-declaration of guardian is of "such sensitivity and importance" it should be executed with the same formalities as a power of attorney dealing with real estate).

undue influence, or other evil conduct is involved, there will usually be a person contesting the designation and the contest will often expose this improper behavior.

III. STATUTORY SELF-DESIGNATION OF GUARDIAN FILL-IN FORMS

Several states have enacted statutes that contain fill-in forms for use in designating a guardian before the need arises. These states have utilized four different approaches when drafting self-designation forms which reflect the approach taken by the jurisdiction regarding self-designation: as part of a statutory durable power of attorney, as part of a living will, as a will-like document, or as a separate written designation.

A. *Durable Power of Attorney*

Three states, Alaska, California, and Illinois, have provided for self-designation of guardians in their durable power of attorney fill-in forms.⁹⁰ There are, however, significant differences among the approaches of these states.

The standard Alaska statutory power of attorney form does not contain a provision relating to self-declaration of guardians;⁹¹ rather, appropriate language is provided as an option which may be included in the form.⁹² The suggested clause permits the principal to nominate one person to serve as both guardian and conservator should the need arise.⁹³ The provision does not permit different individuals to be named as guardian of the person and conservator of the estate nor is any place provided for the designation of alternate fiduciaries should the named person be unwilling or unable to serve.⁹⁴

California provides two different statutory power of attorney forms which may be used to effect a guardian self-declaration.⁹⁵ The general statutory power of attorney fill-in form permits the principal to nominate one person to serve as conservator of the principal's estate. Like Alaska's provision, no opportunity is given for the principal to nominate a successor or alternate conservator.⁹⁶ The form contains a plain-language

90. See ALASKA STAT. § 13.26.335(3) (Supp. 1988); CAL. CIV. CODE §§ 2450 (clause 7 - conservator of estate), 2500 (West Supp. 1988) (clause 10 - conservator of person); ILL. ANN. STAT. ch. 110½, para. 803-3 (Smith-Hurd Supp. 1988) (clause 9 - statutory form power of attorney for property); ILL. ANN. STAT. ch. 110½, para. 804-10 (Smith-Hurd Supp. 1988) (statutory form power of attorney for health care).

91. ALASKA STAT. § 13.26.332 (Supp. 1988).

92. *Id.* § 13.26.335(3).

93. *Id.* (name and address of nominated person should be stated).

94. *Id.*

95. CAL. CIV. CODE §§ 2450, 2500 (West Supp. 1988).

96. *Id.* § 2450 (clause 7).

description of what a conservator does and when one will be appointed.⁹⁷ In addition, the California form explains that the principal may, but need not, nominate the same person selected as his agent.⁹⁸ If the principal also wishes to nominate a conservator over his person, a separate statutory durable power of attorney fill-in form designed specifically for health care decisions must be used.⁹⁹ The relevant form language regarding nomination is basically the same as for a conservator of the estate, i.e., only one person may be nominated and plain-language descriptions and instructions are included.¹⁰⁰

California's bifurcated approach is unnecessarily cumbersome by requiring that separate forms be used to nominate conservators and guardians. This inconvenience and added expense could easily be alleviated by combining the two options in one form as Illinois has done. The Illinois statutory short-form power of attorney for property provides the principal with the opportunity to nominate both types of guardians in a single document: one person as guardian of his person and the same or a different person as guardian of his estate.¹⁰¹ Like the Alaska and California forms, the Illinois form is deficient in its failure to provide for the nomination of alternates or successors.¹⁰² In language similar to the California forms, the Illinois form contains plain-language explanations and instructions.¹⁰³ Illinois also has a statutory short form power of attorney for health care in which the principal may nominate a guardian of his person, but not a guardian of his estate.¹⁰⁴

B. *Living Will*

Minnesota is the only state to include provisions for guardian pre-selection in its statutory living will form.¹⁰⁵ However, the ability to self-designate is buried deep within the boilerplate language of the form and thus may easily be overlooked. Clause eight of the living will form is

97. *Id.* ("The conservator is responsible for the management of your financial affairs and your property. You are not required to nominate a conservator but you may do so. The court will appoint the person you nominate unless that would be contrary to your best interests.').

98. *Id.* The form also requests the nominee's address. *Id.*

99. *Id.* § 2500 (clause 10).

100. *Id.* (e.g., "The conservator is responsible for your physical care, which under some circumstances includes making health care decisions for you.').

101. ILL. ANN. STAT. ch. 110¹/₂, para. 803-3 (Smith-Hurd Supp. 1988) (clauses 9 & 10).

102. *Id.*

103. *Id.*

104. *Id.* § 804-10 (clause 6).

105. 1989 Minn. Sess. Law Serv. ch. 3, § 4 (West) (to be codified at MINN. STAT. § 145B.04).

labeled "Proxy Designation" and begins with a two paragraph explanation of the declarant's opportunity to name a person to make health care decisions for the declarant should the declarant be unable to communicate his desires.¹⁰⁶ The last sentence of the second paragraph provides that the person designated as a health care proxy is simultaneously nominated as guardian or conservator of the declarant's person if a guardian or conservator becomes necessary.¹⁰⁷ This provision is neither conspicuous nor is it explained in the notices and warnings supplied at the beginning of the form.¹⁰⁸ In addition, the form fails to give the declarant the option of indicating a different guardian of the person or striking the language concerning guardian selection, despite a statutory mandate that the declaration may provide that a proxy designation is not to be deemed a guardian designation.¹⁰⁹ In many cases it may be appropriate to have the declarant's health care proxy and guardian of the person be the same individual, but this decision should be consciously made by the declarant and should not be the result of inadvertence.

The remainder of the self-designation provision is adequate. The declarant is given the opportunity to designate a primary and alternate guardian.¹¹⁰ The designations provide for detailed descriptions of the selected individuals to increase the chance that they may be located when needed; the declarant is provided with blank spaces for the guardians' names, addresses, telephone numbers, and relationships, if any, to the declarant.¹¹¹

C. *Will-like Document*

In comprehensive landmark legislation effective August 26, 1985, Texas became the first, and so far the only state, to enact a will-like statutory fill-in form for guardian self-designation.¹¹² This form is not incorporated into some other type of estate planning form; it is a free-standing document devoted entirely to a person's ability to designate a guardian in the event of later incompetence or need of a guardian.¹¹³ The declarant may designate different persons to serve as guardian of

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* § 3 (to be codified at MINN. STAT. § 145B.03(3)).

110. *Id.* § 4 (to be codified at MINN. STAT. § 145B.04).

111. *Id.*

112. 1985 Tex. Gen. Laws ch. 929 (codified at TEX. PROB. CODE ANN. § 118A (Vernon Supp. 1989)).

113. *Id.* See generally, Jorrie & Krier, *One Less Worry for Adults Facing Incapacity*, 49 TEX. B.J. 28 (1986) (discussion of history, purpose, and operation of Texas fill-in form and enabling legislation).

the person and guardian of the estate.¹¹⁴ Unlike the Alaska, California and Illinois forms which incorporate self-designation of guardians in durable powers of attorney, the Texas form provides the declarant with the option of naming up to three alternate guardians of the person and of the estate should any guardian be unable or unwilling to serve.¹¹⁵ The form also provides blanks for the date of execution and the signatures of the declarant and the witnesses.¹¹⁶

The Texas form is unique because it allows the declarant to expressly disqualify up to three persons from serving as guardian of the person and three persons from serving as guardian of the estate.¹¹⁷ Anyone so disqualified, including those who would otherwise have statutory priority, such as a spouse or an adult child, may not be appointed as the declarant's guardian "under any circumstances."¹¹⁸ The absolute preclusion of these individuals is justified "under the theory that there are millions of people . . . from which to choose potential guardians."¹¹⁹ Providing the declarant with the chance to disqualify certain individuals is perhaps equally as important as the ability to nominate guardians. Scenarios exist where a person would not want those with statutory priority to control his personal or financial destiny, e.g., an unfaithful spouse or a greedy, hateful, or spendthrift child.¹²⁰

To be effective, the declaration of guardian form must be "attested to by at least two credible witnesses 14 years of age or older who are not named as guardian or alternative guardian in the declaration"¹²¹ and be accompanied by a self-proving affidavit.¹²² Unlike wills where the use of self-proving affidavits is optional, the guardian designation appears to be ineffective without the self-proving affidavit. Together, the declaration and self-proving affidavit are "prima facie evidence that the declarant was competent at the time he executed the declaration and that the guardian named in the declaration would serve the best interests of the ward."¹²³ The statute also contains a form for the self-proving affidavit which has blank spaces for the declarant's and the two witnesses' signatures as well as the proper notarial jurat.¹²⁴

114. TEX. PROB. CODE ANN. § 118A(g) (Vernon Supp. 1990) (clauses 1 & 2).

115. *Id.*

116. *Id.*

117. *Id.* (clauses 4 & 5).

118. *Id.* § 118A(b).

119. Jorrie & Krier, *supra* note 113, at 28.

120. *Id.* (guardian with statutory priority could punish a ward who is trapped in a failing body).

121. TEX. PROB. CODE ANN. § 118A(a) (Vernon Supp. 1990).

122. *Id.* § 118A(c).

123. *Id.* The nominee will be appointed unless disqualified or court finds he would not serve the ward's best interests. *Id.* at § 118A(d).

124. *Id.* § 118A(g).

D. *Written Designation*

From its enactment in 1961 to 1988, Oklahoma's self-designation of guardian statute required the document to be executed in the same manner as a will.¹²⁵ Effective December 1, 1988, this long-standing statute was amended to provide for self-designation by a simple written designation.¹²⁶ In addition to changing the method of self-selection, the statute became the first of its type to supply a fill-in form which may be used to make the nomination.¹²⁷

The recommended form is concise and requires only a minimum number of formalities. The form provides the declarant with the opportunity to designate one person to serve as guardian of the person, guardian of the estate, or both.¹²⁸ If an individual wishes to designate different persons as guardian of the estate and of the person, separate forms need to be used or the statutory form altered.¹²⁹ Spaces are supplied for the declarant to indicate the nominee's name and current residence, the declarant's relationship to the nominee, and the city, state, and date of execution.¹³⁰ As with the durable power of attorney forms of Alaska, California, and Illinois, no provision is made for alternate or successor guardians.¹³¹ The nominations made by the declarant are binding on the court unless the court disqualifies the nominee.¹³²

IV. ANALYSIS

The statutory declaration of guardian fill-in forms appear to be designed for use by attorneys and the non-lawyer public.¹³³ The availability and low cost of legislatively sanctioned forms is likely to increase the number of individuals who choose to nominate their own guardians

125. OKLA. STAT. ANN. tit. 58, § 896 (West 1985) (current version at OKLA. STAT. ANN. tit. 30, § 3-102 (West Supp. 1989)). The only case interpreting the original statute is *In re Guardianship of Campbell*, 450 P.2d 203 (Okla. 1966) where the court held, *inter alia*, that the self-designation of guardian must be accomplished by the declarant before being adjudged incompetent. *Id.* at 206-07.

126. OKLA. STAT. ANN. tit. 30, § 3-102 (West Supp. 1989).

127. *Id.* § 3-102(B).

128. *Id.*

129. *Id.* (only minor alterations are permitted because nomination must be "substantially" in the statutory form).

130. *Id.*

131. *Id.*

132. *Id.* § 3-102(A).

133. For example, the Illinois statute contains a statement of purpose which includes the following: "The General Assembly finds that the public interest requires a standardized form of power of attorney that individuals may use to authorize an agent [guardian] to act for them in dealing with their property and financial affairs." ILL. ANN. STAT. ch. 110½, para. 803-1 (Smith-Hurd Supp. 1988).

before the need arises. This section examines how effectively statutory self-designation forms carry out the primary goal of guardianship, i.e., to do what is in the best interest of the ward.¹³⁴

A. Increased Chance of Desired Person Serving as Guardian

Perhaps the most important reason a person would elect to use a self-declaration of guardian is to increase the likelihood that a specific person will be appointed as guardian in the event of later incompetency or incapacity. Without such a designation, there is no assurance that a court-appointed guardian will be the person the disabled individual would have desired to control his person or estate. To the contrary, the person the court appoints could be someone the incompetent person would never have wanted to serve as his guardian.

The psychological benefits of self-selection are considerable, both before and after the declarant needs a guardian. After designating a guardian, a person may be more secure about the future, knowing that should anything happen to him, his personal affairs and business concerns would be handled by a trusted family member, friend, or financial institution. Just as a will may relieve some of the fears that accompany the anticipation of death,¹³⁵ a self-declaration of guardian may alleviate the stress associated with accepting the prospect of becoming unexpectedly disabled or that a current disease or injury will worsen, leading to incapacity. Likewise, a disabled person will gain strength from knowing that he is still having an effect on his situation by seeing a guardian appointed in accordance with his wishes. The self-selected guardian may have more detailed knowledge of the ward's desires and may thus be able to provide a more supportive environment as well as one more conducive to comfort and perhaps even recovery.

B. Reduced Chance of Undesired Person Serving as Guardian

If a valid self-declaration of guardian exists, the chance of a person being appointed as guardian who is unsuitable to the ward is greatly

134. See, e.g., *Boylan v. Kohn*, 172 Ala. 275, 55 So. 127 (1911) ("The paramount consideration of the law has always been the best interests of the ward and of his estate, and this is peculiarly the case in respect to the selection of his guardian."); *In re Estate of Bennett*, 122 Ill. App. 3d 756, 461 N.E.2d 667 (Ill. Ct. App. 1984) ("the primary concern in the selection of a guardian is the best interest and well being of the disabled person"); *In re Kane*, 121 N.Y.S. 667, 667 (Thompkins County Ct. 1910) (purpose of court in appointing guardian for incompetent adult is "the welfare and comfort of the incompetent and his interests").

135. See Shaffer, *The "Estate Planning" Counselor and Values Destroyed By Death*, 55 IOWA L. REV. 376, 377 (1969) (individuals who plan their estates become "more aware of their lives, more reconciled to what is real in their lives, and better able to make choices and to develop").

reduced. Presumably, the declarant would give careful thought to the nomination so that undesirable family members, friends, and institutions are not listed. If the court believes it to be in the ward's best interests, however, others may be appointed in contradiction to the ward's intent, albeit unexpressed.¹³⁶

Accordingly, the best method to prevent a particular person from serving as guardian is for the declarant to include a statement in the designating document which indicates that person's unsuitability without requiring the declarant to detail the reasons behind his decision to exclude that person. Inclusion of such information would open the door to the court making an evaluation of the declarant's reasoning. This evaluation would be unproductive because the only issue in disqualification situations is whether the declarant had sufficient mental capacity when he excluded the named person; it is irrelevant whether the court agrees with the wisdom of the declarant's decision.

The effect of a non-nomination is questionable in most jurisdictions because most statutes and accompanying fill-in forms fail to address the issue;¹³⁷ only the Texas form provides for express disqualification.¹³⁸ The inclusion of an express disqualification provision is especially important in cases where the ward is so disabled that he is unable to express his displeasure with a particular guardian.

C. Conservation of Resources

Self-declarations of guardians may also conserve valuable resources. When a guardian is pre-selected, the court's expenditure of time to ascertain the identity of a proper guardian is reduced.¹³⁹ Unless the appointment of the nominee is contested for cause, the court will be

136. See Jorrie & Krier, *supra* note 113, at 28 (discussing difficulties arising if the declarant is not given the ability to preclude a person from serving as guardian).

137. Even in the absence of a statute authorizing a non-nomination, courts may give consideration to a person's expressed wishes. See *In re Green's Guardianship*, 125 Wash. 570, 216 P. 843 (1923) (incompetent's indication that a particular person should not serve as guardian was one of many factors the court considered in holding that such person was improperly appointed); Gorman, *Planning for the Physically and Mentally Handicapped*, 11 INST. ON EST. PLAN. 15-1, 15-31 to -32, 15-37 to -39 (1977) (suggests that nominating document indicate individuals who the declarant does not want appointed as guardian despite the non-binding affect of the request because the statement would be helpful to the court).

138. TEX. PROB. CODE ANN. § 118A (Vernon Supp. 1989).

139. Studies have shown that most guardianship cases are uncontested and that the judge rarely makes a detailed inquiry into the person nominated as guardian in the petition. See ALLEN, FERSTER & WEIHOFEN, *supra* note 3, at 91 (1968). This practice may lead to undesirable persons being appointed as guardian, especially if the incompetent person is unable to articulate his displeasure with the nominee.

able to handle guardian appointments quickly and effectively. Should reasons for the preferred guardian's disqualification be discovered from evidence presented in court, that same evidence is likely to indicate the reasons the court should appoint the designated alternate, again conserving the court's resources. Because less court time will be required, fewer assets of the declarant's estate will be dissipated for court costs and attorney's fees.¹⁴⁰ The accelerated appointment procedure will also place the ward's person and estate into competent hands more rapidly, perhaps before serious personal or business problems arise.

D. Potential for Abuse

Perhaps the greatest concern with the enactment of self-declaration of guardian fill-in forms is the potential for abuse. If a self-designation document is obtained through fraud, duress, or other coercion, the negative ramifications to the ward are particularly harmful because the designated guardian could abuse his power causing the declarant tremendous financial and psychological hardship, physical pain, and even a premature death. Likewise, a document executed by a declarant who does not fully understand the legal significance of what is being done may result in designations that do not actually reflect the declarant's intent.

Accordingly, some critics argue that the price of greater self-determination encouraged by the existence of a simple statutory form is not worth the risk.¹⁴¹ Conversely, others urge that the significant advantages of a self-designation should not be withheld from the public because the forms may be improperly completed or abused by a few unscrupulous individuals.¹⁴² As one commentator has stated, "Every device that enables people to act for themselves is subject to abuse and misunderstanding. But most people have a basic store of common sense. They are honest, fair and intelligent enough to know when they need advice."¹⁴³

140. See 11 D. MALOUF, WEST'S TEXAS FORMS - ESTATE PLANNING § 4A.8 (Supp. 1989) (discussing Texas' fill-in form, author concluded that "[t]he pre-selection of a guardian (and more particularly the prohibition of someone undesirable from serving as guardian) could have prevented some of the really hard-fought and expensive litigation in the past").

141. Cf. Lustgarten, *Against Such Wills*, TR. & EST., Jan. 1984, at 9 ("statutory will would do great disservice to the families of persons availing themselves of it").

142. See Zartman, *The New Illinois Power of Attorney Act*, 76 ILL. B.J. 546, 553 (1988) (in discussing statutory durable power of attorney fill-in form which provides for guardian nomination, author concludes that potential for abuse and misunderstanding is counterbalanced by ability of people to control their own affairs); cf. Blattmachr, "Statutory Will" *Positive Development*, TR. & EST., Jan. 1984, at 8 (statutory will fill-in forms are "a great service to the Bar and to the public").

143. Zartman, *supra* note 142, at 553.

V. RECOMMENDATIONS

The ability of a person to nominate a guardian before the need arises, coupled with the likelihood of a court appointing that person, is an important part of a comprehensive estate plan. It is foreseeable that many individuals would choose to exercise this right to obtain the benefits of guardian self-selection.¹⁴⁴ Because self-designations may be used by a broad segment of the population, it would be consistent for legislatures to provide fill-in forms as they have for wills,¹⁴⁵ durable powers of attorney,¹⁴⁶ living wills,¹⁴⁷ and other estate planning documents.¹⁴⁸

144. The author's personal experience reflects that more than 80% of people desiring estate plans are very excited about the prospects of selecting their own guardian and, under Texas law, disqualifying certain individuals from possible appointment.

145. See CAL. PROB. CODE §§ 6240-46 (Deering Supp. 1988); ME. REV. STAT. ANN. tit. 18A, § 2-514 (Supp. 1987); MICH. COMP. LAWS ANN. § 700.123c (West Supp. 1988); WIS. STAT. ANN. §§ 853.50-.62 (West Supp. 1988).

146. See ALASKA STAT. § 13.26.332 (Supp. 1988); CAL. CIV. CODE § 2450 (West Supp. 1988); ILL. ANN. STAT. ch. 110½, para. 803-3 (Smith-Hurd Supp. 1988); MINN. STAT. ANN. § 523.23 (West Supp. 1988); N.C. GEN. STAT. § 32A-1 (1987).

147. See ALA. CODE § 22-8A-4(c) (1984); ALASKA STAT. § 18.12.010(c) (1986); ARIZ. REV. STAT. ANN. § 36-3202(C) (1986); ARK. STAT. ANN. § 20-17-202(b) & (c) (Supp. 1987) (two forms are provided; one for use when patient is in a terminal condition and another for use when patient is permanently unconscious); CAL. HEALTH & SAFETY CODE § 7188 (West Supp. 1989); COLO. REV. STAT. § 15-18-104(3) (Supp. 1986); CONN. GEN. STAT. ANN. § 19a-575 (West Supp. 1988); D.C. CODE ANN. § 6-2421(c) (Supp. 1988); FLA. STAT. ANN. § 765.05(1) (West 1986); GA. CODE ANN. § 31-32-3(b) (1985); HAW. REV. STAT. § 327D-4 (Supp. 1987) (form for physicians' certification of patient's terminal condition also provided; *id.* § 327D-10(b)); IDAHO CODE § 39-4504 (1985); ILL. ANN. STAT. ch. 110½, para. 703(e) (Smith-Hurd 1987); IND. CODE ANN. § 16-18-11-12(b) (Burns Supp. 1988) (a life-prolonging procedures will declaration form also provided; *id.* § 16-18-11-12(c)); IOWA CODE ANN. § 144A.3(3) (West Supp. 1988); KAN. STAT. ANN. § 65-28,103(c) (1985); LA. REV. STAT. ANN. § 40:1299.58.3(C)(1) (West Supp. 1989); ME. REV. STAT. ANN. tit. 22, § 2922(4) (Supp. 1988); MD. HEALTH-GEN. CODE ANN. § 5-602(c) (Supp. 1988); 1989 Minn. Sess. Law Serv. ch. 3, § 4 (West) (to be codified at MINN. STAT. ANN. § 145B.04); MISS. CODE ANN. § 41-41-107(1) (Supp. 1988) (statute also provides a form for revocation of a declaration; *id.* § 41-41-109(1)); MO. ANN. STAT. § 459.015(3) (Vernon Supp. 1989) (form also contains a revocation clause); MONT. CODE ANN. § 50-9-103(3) (1987); NEV. REV. STAT. § 449.610 (1987); N.H. REV. STAT. ANN. § 137-H:3 (Supp. 1988); N.C. GEN. STAT. § 90-321(d) (1985); OKLA. STAT. ANN. tit. 63, § 3103(D) (West Supp. 1989); OR. REV. STAT. § 97.055(1) (1987); S.C. CODE ANN. § 44-77-50 (Law. Co-op. Supp. 1988); TENN. CODE ANN. § 32-11-105 (Supp. 1988); TEX. HEALTH & SAFETY CODE ANN. § 672.004 (Vernon 1990); UTAH CODE ANN. § 75-2-1104(4) (Supp. 1988) (statute also contains form for use by attending physician to certify various care and treatment alternatives; *id.* § 75-2-1105(4)); VT. STAT. ANN. tit. 18, § 5253 (1987); VA. CODE ANN. § 54.325.8:4 (Supp. 1987); WASH. REV. CODE ANN. § 70.122.030 (Supp. 1989); W. VA. CODE § 16-30-3 (1985); WIS. STAT. ANN. § 154.03(2) (West Supp. 1988); WYO. STAT. § 35-22-102(d) (1988).

148. Statutory self-proving affidavits are found in ALA. CODE § 43-8-132 (Supp. 1988); ALASKA STAT. § 13.11.165 (1985); ARIZ. REV. STAT. ANN. § 14-2504 (Supp. 1988);

A. Method of Self-Designation

Jurisdictions have employed two basic methodologies in enacting self-designation of guardian fill-in forms: as part of a statutory durable power of attorney form or as a separate document.¹⁴⁹ No state has supplied forms for both methods although several states authorize multiple techniques for guardian self-designation.¹⁵⁰ A state should refrain from resolving the debate as to which methodology is "better"; instead, the state should provide both options. Each method has its own positive and negative characteristics which are best evaluated by the individual who will use the form for his own particular needs.

Providing for the self-designation of a guardian as part of a durable power of attorney fill-in form encourages a person to plan for incom-

COLO. REV. STAT. § 15-11-504 (Supp. 1986); DEL. CODE ANN. tit. 12, § 1305 (Repl. 1987); FLA. STAT. ANN. § 732.503 (West Supp. 1989); GA. CODE ANN. § 53-2-40.1 (Supp. 1988); HAW. REV. STAT. § 560:2-504 (Repl. 1985); IDAHO CODE § 15-2-504 (1979); IND. CODE ANN. § 29-1-5-3(b) (Burns Supp. 1988); IOWA CODE ANN. § 633.279(2) (West Supp. 1988); KAN. STAT. ANN. § 59-606 (1983); KY. REV. STAT. ANN. § 394.225 (Michie/Bobbs-Merrill 1984); ME. REV. STAT. ANN. tit. 18-A, § 2-504 (1981); MASS. ANN. LAWS ch. 192, § 2 (Law. Co-op. Supp. 1989); MINN. STAT. ANN. § 524.2-504 (West Supp. 1989); MO. ANN. STAT. § 474.337 (Vernon Supp. 1989); MONT. CODE ANN. § 72-2-304 (1987); NEB. REV. STAT. § 30-2329 (1985); NEV. REV. STAT. § 133.050 (1987); N.H. REV. STAT. ANN. §§ 551:2-a, :5-b (Supp. 1988); N.J. STAT. ANN. §§ 3B:3-4 to :3-6 (West 1983); N.M. STAT. ANN. § 45-2-504 (1978); N.C. GEN. STAT. § 31-11.6 (1984); N.D. CENT. CODE § 30.1-08-04 (Supp. 1987); OKLA. STAT. ANN. tit. 84, § 55 (West Supp. 1989); 20 PA. CONS. STAT. ANN. § 3132.1 (Purdon Supp. 1988); R.I. GEN. LAWS § 33-7-26 (1984); S.C. CODE ANN. § 62-2-503 (Law. Co-op. Supp. 1988); S.D. CODIFIED LAWS ANN. § 29-2-6.1 (1984); TEX. PROB. CODE ANN. § 59 (Vernon 1980); UTAH CODE ANN. § 75-2-504 (1978); VA. CODE ANN. §§ 64.1-87.1 to -87.2 (1987); WYO. STAT. § 2-6-114 (1980).

International will certificates are found in CAL. PROB. CODE § 6384 (Deering Supp. 1989); CONN. GEN. STAT. ANN. § 45-194e (West Supp. 1989); MINN. STAT. ANN. § 524.2-1005 (West Supp. 1989); N.D. CENT. CODE § 30.1-08.2-05 (Supp. 1987); OR. REV. STAT. § 112.232(5) (1987).

Anatomical gift forms are found in COLO. REV. STAT. § 12-34-105(5)(a) (1985); DEL. CODE ANN. tit. 16, § 2719 (Supp. 1988); D.C. CODE ANN. § 2-1504(b)(2) (1988); FLA. STAT. ANN. § 732.914(2)(b) (West 1976); IDAHO CODE § 39-3409 (1985); MD. EST. & TRUSTS CODE ANN. § 4-505 (Supp. 1988); MICH. STAT. ANN. § 14.15(10104)(2) (Callaghan 1988); MISS. CODE ANN. § 41-39-39(2) (1981); OHIO REV. CODE ANN. § 2108.10 (Baldwin 1987); W. VA. CODE § 16-19-4(f) (1985).

Form marital property agreements are found in WIS. STAT. ANN. §§ 766.588-.589 (West Supp. 1988).

149. See *supra* text accompanying notes 66-78.

150. Compare, e.g., OHIO REV. CODE ANN. § 1337.09(B) (Baldwin 1988) (nomination in durable power of attorney) with OHIO REV. CODE ANN. § 2111.121(A) (Baldwin 1988) (nomination in will-like document); OKLA. STAT. ANN. tit. 58, § 1074B (West Supp 1989) (nomination in durable power of attorney) with OKLA. STAT. ANN. tit. 30, § 3-102 (West Supp. 1989) (nomination in written designation); WIS. STAT. ANN. § 243.07(3)(b) (West 1987) (nomination in durable power of attorney) with WIS. STAT. ANN. § 880.09(7) (West Supp. 1988) (nomination in will-like document).

petency more thoroughly. To complete the durable power of attorney form, a person is forced to examine a broader range of issues rather than just considering the appropriate person to nominate as guardian.¹⁵¹ The best plan for incompetency often involves both a durable power of attorney and a guardian self-designation so that the same person designated as agent also serves, if needed, as the principal's guardian.¹⁵² Conversely, consolidation of authority in one person may increase the risk of abuse. Also, durable power of attorney fill-in forms are complex and may be more confusing to a person who has not received legal advice than a form designed only for guardian self-designation.

If a separate fill-in form dealing only with the nomination of guardians is provided by statute, the length and complexity of the form is reduced. This may increase the number of individuals who will use the form and receive the benefits of self-designation.¹⁵³ However, a person using such a form may be misled into believing that additional planning for incompetency is not needed. The person may be well-advised to execute a durable power of attorney and thus, in many instances, avoid the necessity of guardianship and its concomitant problems of expense, publicity, embarrassment, and delay.¹⁵⁴ Self-designation makes guardianships less troublesome but does not eliminate the need for additional incompetency planning techniques.¹⁵⁵

As stated above, a jurisdiction should elect to provide forms for both alternatives rather than resolve the debate between whether a self-declaration of guardian should be subsumed within a durable power of attorney or should exist independently.¹⁵⁶ Although no state has thus far provided alternative forms, several of the jurisdictions which authorize different methods of self-designation have enacted rules to resolve the

151. See Zartman, *supra* note 142, at 546 (1988) (Illinois statutory power of attorney forms "designed to force consideration of a number of basic issues").

152. See, e.g., UNIF. DURABLE POWER OF ATTORNEY ACT comment § 3, 8A U.L.A. 281-82 (1987) (permits principal to use durable power of attorney to designate guardian so "that the likely appointee in any future protective proceedings will be the attorney in fact or another equally congenial to the principal and his plans"); R. CAMPFIELD, ESTATE PLANNING AND DRAFTING 53-54 (1984) ("To avoid having someone try to vitiate the power by instituting incompetency proceedings, we can name the same individual as agent and conservator.').

153. See *supra* § D(1)-(3).

154. See R. CAMPFIELD, *supra* note 152, at 52 ("Conservatorships are expensive and time consuming. There is a stigma attached to incompetence and the proceedings are a matter of public record.').

155. *Id.* at 53 ("Predesignation of [c]onservator . . . does not solve all of the problems but at least the client will have some choices.').

156. Cf. 11 D. MALOUF, WEST'S TEXAS FORMS - ESTATE PLANNING § 4A.8 (Supp. 1989) (discussing whether attorneys should combine self-designation of guardian form with durable power of attorney form).

problem which arises when the durable power of attorney names one person as guardian and the separate self-designation nominates a different person. Generally, these provisions give preference to the most recently executed document.¹⁵⁷

If a jurisdiction elects to provide a separate fill-in form for the predesignation of guardians, either alone or in conjunction with a durable power of attorney, the decision must be made as to what type of separate form should be adopted. As detailed earlier, two different types of separate forms are increasing in popularity: the will-like document¹⁵⁸ and the simple written designation.¹⁵⁹ The will-like document must be executed with formalities, thus reducing the chance of undetected fraud or overreaching. At the same time, however, these formalities may cause designations to be invalidated because of minor technical errors. Other types of written designations are simple to execute but may be more susceptible to abuse.

There is no easy way to ascertain the type of statutory fill-in form that will achieve the best result. Reported litigation concerning the existing statutory forms is scant¹⁶⁰ and any estimate of their effectiveness is speculative. The separate form should have some formalities, such as the signature of the declarant and the witnesses, to decrease the chance for fraud and undue influence¹⁶¹ as well as to impress the seriousness of the occasion on the declarant.¹⁶² States may be encouraged to implement these proposals if the National Conference of Commissioners on Uniform State Laws (N.C.C.U.S.L.) would take the lead in proposing such legislation.

The N.C.C.U.S.L. should immediately consider drafting a free-standing self-designation of guardian uniform act, including a fill-in form. In addition, the Uniform Statutory Form Power of Attorney Act¹⁶³ and

157. See, e.g., OHIO REV. CODE ANN. § 2111.121(B) (Baldwin 1987) ("court shall appoint the person nominated as guardian in the writing or durable power of attorney most recently executed"); OKLA. STAT. ANN. tit. 30, § 3-102(D) (West Supp. 1989) (statute also provides that if several nominating documents "bear the same most recent date the court may appoint one of the nominees or may appoint more than one of the nominees as coguardians").

158. See *supra* text accompanying notes 66-78.

159. See *supra* text accompanying notes 79-88.

160. The lack of reported case law may be due to the time required for the technique to gain acceptance among estate planning attorneys and the public. See 11 D. MALOUF, WEST'S TEXAS FORMS - ESTATE PLANNING § 4A.8 (Supp. 1989) ("It will probably take a considerable time before this new device becomes well known among estate planners.').

161. But see Gulliver & Tilson, *supra* note 88, at 9 (doubtful that will formalities effectively protect the testator).

162. See *id.* at 5 ("ceremonial precludes the possibility that the testator was acting in a casual or haphazard fashion").

163. See UNIF. STATUTORY FORM POWER OF ATTORNEY ACT (1988).

the fill-in form provided therein, should be amended to provide for guardian self-designation. This would be a consistent step for the Commissioners because the Uniform Durable Power of Attorney Act and the Uniform Probate Code already authorize the nomination of guardians in a durable power of attorney.¹⁶⁴

B. Contents of a Self-Designation Form

The current self-designation of guardian forms are not adequate to resolve the issues which must be addressed in guardianship planning. Many statutory forms fail to provide the opportunity to make separate designations of guardians of the person and guardians of the estate¹⁶⁵ or do not provide for the designation of successors.¹⁶⁶ Even the well-constructed Texas form could be improved to overcome its lack of warnings and instructions to inform non-attorneys of the nature and effect of the form.¹⁶⁷ Regardless of the type of self-designation form adopted by a particular jurisdiction, each fill-in form and its enabling legislation should, at a minimum, provide the following:

- Ability to name separate persons as guardian of the person and guardian of the estate;

- Provisions for alternate or successor guardians should a guardian be unable or unwilling to serve;

- Information, instructions, and warnings in plain language so non-attorney users will better understand how guardianship functions, the correct method of completing the form, and the effect of a properly completed form, along with a statement explaining that disability planning may also require a durable power of attorney;

- Ability to disqualify named persons from being appointed as guardians;

- The effect of a declarant's divorce from the designated guardian;

- An option to file the document with the clerk of the court so that the self-designation may be readily located, thus avoiding possible haphazard storage and further reducing the chance of unauthorized destruction;

- A description of revocation methods;

164. UNIF. DURABLE POWER OF ATTORNEY ACT § 3(b), 8A U.L.A. 280-81 (1987); UNIF. PROBATE CODE §§ 5-503, 5-305(b), 5-409(a)(2), 8 U.L.A. 514-15, 466-67, 487-88 (1987).

165. See, e.g., ALASKA STAT. § 13.26.335(3) (Supp. 1988); OKLA. STAT. ANN. tit. 30, § 3-102(B) (West Supp. 1989).

166. See, e.g., CAL. CIV. CODE § 2450 (West Supp. 1988) (clause 7); OKLA. STAT. ANN. tit. 30, § 3-102 (West Supp. 1989).

167. TEX. PROB. CODE ANN. § 118A (Vernon Supp. 1990).

— A method of handling conflicting designations in multiple documents;

— A method to increase the chance of a document's authenticity to ensure that the declarant realized the importance of executing the document, e.g., requirement of witness(es) or an acknowledgment; and

— The ability to limit or expand the statutorily supplied powers of the guardian.

C. Sample Guardian Preference Act (including statutory form)

As an aid to states who may wish to enact a free-standing guardian self-designation statute, the following enabling legislation, complete with a fill-in form, is provided below for consideration.

GUARDIAN PREFERENCE ACT¹⁶⁸

SECTION 1. SHORT TITLE

This Act may be cited as the Guardian Preference Act of _____.¹⁶⁹

SECTION 2. DEFINITIONS

For the purposes of this Act,

(a) "Conservator"¹⁷⁰ means a person who is appointed by the appropriate court¹⁷¹ to manage the declarant's estate under _____.¹⁷²

(b) "Declarant" means a person who has executed a Guardian Preference Document.

(c) "Guardian" means a person who is appointed by the appropriate court¹⁷³ to care for the declarant's person under _____.¹⁷⁴

(d) "Incompetent" means that a person is entitled to have a guardian or conservator appointed under _____.¹⁷⁵

SECTION 3. CAPACITY TO EXECUTE A GUARDIAN PREFERENCE DOCUMENT

168. The term "preference" is used, rather than "designation," "selection," or "nomination," so that it is clear that the document expresses a preference which, under certain circumstances, does not need to be followed by the court.

169. The name of the enacting jurisdiction should be inserted.

170. If the jurisdiction refers to a conservator as a "guardian of the estate," appropriate changes to this definition should be made.

171. The name of the court responsible for conservators may be specifically mentioned.

172. Reference to the jurisdiction's conservatorship statutes should be made.

173. The name of the court responsible for conservators may be specifically mentioned.

174. Reference to the jurisdiction's guardianship statutes should be made.

175. Reference should be made to other statutory definitions which explain when a person is incompetent, incapacitated, or otherwise unable to manage his own affairs so that a guardian or conservator is required.

A person, other than a minor who has not had the disabilities of minority removed or an incompetent person, may execute a guardian preference document under this Act.

SECTION 4. EXPRESSION OF PREFERENCES

(a) Nomination of Guardian and Conservator.

A declarant may designate persons, including alternates and successors, to serve as the declarant's guardian or conservator in a guardian preference document.

(b) Disqualification of Guardian and Conservator.

A declarant may disqualify named persons from serving as the declarant's guardian or conservator in a guardian preference document.

(c) Limitation of Guardian's or Conservator's Powers.

A person may expressly limit the authority otherwise granted to a guardian or conservator in a guardian preference document.

SECTION 5. REQUIREMENTS OF GUARDIAN PREFERENCE DOCUMENT

The guardian preference document must meet all of the following requirements to be valid:

(a) In writing;

(b) Signed by the declarant or in the declarant's name by another adult competent person who signs in the declarant's presence and by the declarant's direction;

(c) Signed by at least two adult competent persons who are not named as a guardian or conservator in the document and each of whom witnessed either (1) the declarant or the declarant's proxy signing the guardian preference document or (2) the declarant acknowledging the guardian preference document; and

(d) Accompanied by a self-proving affidavit signed by the declarant (or proxy) and the witnesses attesting to the competence of the declarant and the execution of the guardian preference document.

SECTION 6. EFFECT OF GUARDIAN PREFERENCE DOCUMENT

If the declarant requires a guardian or conservator, a valid guardian preference document shall have the following effect:

(a) Nominated Guardian and Conservator.

(1) A properly executed and witnessed guardian preference document accompanied by a self-proving affidavit is prima facie evidence that the declarant was competent at the time the document was executed and that the guardian and conservator named in the document would serve the declarant's best interest.

(2) Unless the court finds that the person designated in the document to serve as guardian or conservator is disqualified under

_____ ¹⁷⁶ or would not serve the best interests of the declarant, the court shall appoint the person as guardian or conservator in preference to those otherwise entitled to serve as guardian or conservator under _____ ¹⁷⁷.

(3) If the designated guardian or conservator fails to qualify, is dead, refuses to serve, resigns, is removed or dies after being appointed guardian or conservator, or is otherwise unavailable to serve as guardian or conservator, the court shall appoint the next qualified designated alternate guardian or conservator named in the document.

(4) If the guardian or conservator and all alternates fail to qualify, are dead, refuse to serve, are removed, later die or resign, the court shall appoint another person to serve as otherwise provided in _____ ¹⁷⁸.

(b) Disqualified Guardian or Conservator.

Under no circumstances may the court appoint a person disqualified from serving as a guardian or conservator in the declarant's guardian preference document.

SECTION 7. REVOCATION OF GUARDIAN PREFERENCE DOCUMENT

(a) Physical Act.

A guardian preference document is revoked if it is burned, torn, canceled, obliterated, or destroyed by the declarant, or by another person in the declarant's presence and by the declarant's direction, with the intent and for the purpose of revoking the guardian preference document.

(b) Subsequent Writing.

(1) Revocation Instrument

A guardian preference document is revoked if the declarant executes an instrument in conformity with this Act which indicates that the document is revoked.

(2) Subsequent Guardian Preference Document

The declarant's execution of a subsequent guardian preference document revokes all prior guardian preference documents.¹⁷⁹

(c) Effect of Divorce.

176. Reference to the appropriate state statute disqualifying certain persons from serving as guardian or conservator, e.g., minors, incompetents, and convicted felons.

177. Reference to the appropriate state statute prioritizing the individuals who are entitled to consideration for appointment as guardian or conservator.

178. Reference to the appropriate provisions governing the appointment of guardians and conservators.

179. If the jurisdiction permits guardian self-designation in any other way, e.g., through a durable power of attorney, a statement should be included that the most recently dated instrument of any type which purports to designate a guardian prevails.

If the declarant designates the declarant's spouse to serve as a guardian or conservator and the declarant is subsequently divorced from that spouse before a guardian or conservator is appointed, all provisions of the document designating the spouse have no effect.

SECTION 8. DEPOSIT OF GUARDIAN PREFERENCE DOCUMENT WITH THE COURT

A guardian preference document may be deposited by the declarant or the declarant's agent with any court for safekeeping under rules of the court. The guardian preference document shall be kept confidential. While the declarant is competent, the court may deliver the guardian preference document only to the declarant or to a person authorized by the declarant in a signed writing. Upon receipt of adequate evidence that proceedings to appoint a guardian or conservator for the declarant have been instituted, the court shall deliver the guardian preference document to the court in which such proceedings are pending.¹⁸⁰

SECTION 9. FORM OF GUARDIAN PREFERENCE DOCUMENT

A guardian preference document and the accompanying affidavit may be in any form adequate to clearly indicate the declarant's intentions regarding nominating or disqualifying persons to serve as guardian or conservator. Except as provided in Section 10, the following forms may, but need not, be used:

GUARDIAN PREFERENCE DOCUMENT

THIS IS AN IMPORTANT LEGAL DOCUMENT. BEFORE COMPLETING THIS DOCUMENT, YOU SHOULD KNOW THESE IMPORTANT FACTS:

1. This form is used to nominate persons you would like to serve as your guardian or conservator should your physical or mental condition later require the court to appoint a guardian or conservator for you. The court will appoint the persons you indicate unless they are disqualified under the law or the court finds they would not act in your best interest.

2. A guardian is responsible for your person. Your guardian will make decisions regarding your living conditions, health, and safety.¹⁸¹

3. A conservator is responsible for the management of your financial affairs and your property.

4. Unless you specifically state otherwise, your guardian and conservator will have the powers to make decisions for you which are

180. The same procedure that a jurisdiction uses for the deposit of wills could be adapted to work for guardian preference documents as well. *Cf.* UNIF. PROB. CODE § 2-901, 8 U.L.A. 176 (1987).

181. If the jurisdiction authorizes durable powers of attorney for health care, an appropriate reference to them should be made.

granted to them under state law. For example, your conservator will have the ability to sell your home and other property but will not have the ability to make gifts to your family members.¹⁸²

5. If you appoint an agent under a durable power of attorney or durable power of attorney for health care, their authority ends upon the appointment of a guardian or conservator.¹⁸³ Accordingly, you may wish to consider naming the same person as guardian that you named as your agent in a health care power of attorney and the same person as conservator that you named as your agent in a property power of attorney.

6. The persons you nominate should be persons you know and trust. You should discuss with them your intent to nominate them to make certain you are comfortable with them and that they would be willing to serve should the need arise.

7. You may also use this form to disqualify persons from serving as your guardian or conservator. Under no circumstances will the court appoint persons that you disqualify.

8. This guardian preference document must be witnessed and signed by at least two adult competent persons who are not named as your guardian or conservator. Each of them must witness either your signing of the document or your acknowledging the document as yours.

9. This guardian preference document also requires that you and the witnesses go before a notary and sign an affidavit attesting to your competence and the execution of the document.

10. As long as you are competent, you may revoke this document. Some of the ways you may revoke this document include by physically destroying it or by executing another guardian preference document. If a later document is executed, the "last in time" controls any conflicting designations. A later guardian preference document must meet the same requirements as this form.

11. If you name your spouse as a guardian or conservator and are then divorced, all designations of your spouse will not be given effect.

12. You should keep this document in a place where it is likely to be found should you need a guardian or conservator. You may wish to tell your family or close friends that you have signed a guardian preference document and where you keep it. You also have the right to file this document with the court for safekeeping.

13. You do not need an attorney's assistance to complete this document but if there is anything in this document that you do not understand, you should ask an attorney to explain it to you.

182. The examples given should comport with state law.

183. This provision should be altered to comport with state law.

14. Other legal techniques are also available to help you plan for potential disability. These include _____.¹⁸⁴

GUARDIAN PREFERENCE DOCUMENT OF

(print your name)

SECTION 1. NOMINATION OF GUARDIAN

I designate _____ to serve as my guardian, _____ as first alternate guardian, _____ as second alternate guardian, and _____ as third alternate guardian.

SECTION 2. NOMINATION OF CONSERVATOR

I designate _____ to serve as my conservator, _____ as first alternate conservator, _____ as second alternate conservator, and _____ as third alternate conservator.

SECTION 3. SUCCESSORS

If any guardian, conservator, or alternate dies, fails to serve, refuses to qualify, is removed or resigns, the next named alternate succeeds the prior named guardian or conservator and becomes my guardian or conservator.

SECTION 4. ALTERATION OF STATUTORY POWERS

The powers granted to guardians and conservators under state law shall be limited, expanded, or modified as follows:

_____.

SECTION 5. DISQUALIFICATION OF GUARDIANS

I expressly disqualify the following persons from serving as my guardian: _____, and _____.

SECTION 6. DISQUALIFICATION OF CONSERVATORS

I expressly disqualify the following persons from serving as my conservator: _____, and _____.

SIGNED this _____ day of _____, 19____.

184. Reference to state durable power of attorney statutes and, if enacted, statutory forms.

Declarant

Witness

Witness

SELF-PROVING AFFIDAVIT

Before me, the undersigned authority, on this date personally appeared the declarant and _____ and _____ as witnesses, and all being duly sworn the declarant said that the above instrument was his/her Guardian Preference Document and that he/she has made and executed it for the purposes therein expressed. The witnesses declared to me that they are each 18 years of age or older, that they saw the declarant sign the document or acknowledge the document, that they signed the document as witnesses, and that the declarant appeared to them to be of sound mind.

Declarant

Witness

Witness

Subscribed and sworn to before me by the above named declarant and witnesses on this the _____ day of _____, 19__.

(SEAL)

Notary Public in and for the
State of _____.
My commission expires

SECTION 10. COMMERCIALY PUBLISHED GUARDIAN PREFERENCE DOCUMENTS

All guardian preference documents commercially prepared for sale or distribution shall be substantially in the form set forth in Section 9. Anyone who prints, distributes, or sells guardian preference documents in any other form shall be guilty of _____.¹⁸⁵ Failure of a commercially prepared guardian preference document to be in the required form shall have no effect on the validity of the document.

185. Insert appropriate misdemeanor offense under local law.

VI. CONCLUSION

From the beginning of recorded law, legal protection has existed for adults lacking the capacity to act for themselves. This protection should be continued and expanded to permit competent adults to indicate their preference regarding the individuals to be named as their guardian or conservator should the need arise. Unless the designated person is unfit, the courts should be required to comply with the individual's request. To encourage individuals to use this important estate planning technique, legislatures should enact laws directly addressing the self-declaration of guardian issue and include fill-in-the-blank forms designed for use by non-legally trained individuals.

Guardian self-selection benefits both the individual and the court. The declarant will achieve peace of mind by knowing that the individual to be appointed by the court is one that is trusted by the declarant. A self-selected guardian is more likely to be familiar with the declarant's desires and will thus provide a more supportive environment which may increase the incompetent's chances of recovery. Guardian self-declaration will also reduce the chance that a distrusted person will succeed to the role of the principal's guardian especially if potential guardians may be expressly disqualified. In addition, there will be a reduction of the costs associated with the proceedings to determine who is the most qualified person to serve as the incompetent's guardian. From the court's perspective, self-declaration achieves the ultimate purpose for which a guardian is appointed, viz, to encourage self-reliance, independence,¹⁸⁶ and the restoration of the declarant's health.¹⁸⁷ Court time is also conserved because the court need only determine if the declarant had capacity when the self-declaration was executed and that the designated individual is not disqualified.

There is no doubt that some unscrupulous individuals will abuse a self-declaration of guardian procedure. It is difficult, if not impossible, to provide a fail-safe procedure which prevents all improper use. Despite this risk, the author urges that the significant benefits of guardian self-selection should not be withheld from the public because of the fear of abuse or misuse by a few evil people.

Once a legislature decides that it wishes to provide its constituents with the opportunity to pre-select guardians, the decision must be made

186. See *In re Estate of Bennett*, 461 N.E.2d 667, 671 (Ill. 1984) (guardianship should be used to encourage self-reliance and independence); TEX. PROB. CODE ANN. § 130A (Vernon Supp. 1990) (guardianship should encourage development of maximum self-reliance and independence of the ward).

187. See *Allis v. Morton*, 70 Mass. 63, 64 (1855) (court should anxiously consult desires of the ward because his health may depend upon it).

as to the appropriate method. Numerous methods have been developed which usually involve a separate act to permit guardian self-selection or the attachment of guardian self-selection to other legislation, usually a durable power of attorney. Because each method has its own advantages and disadvantages, the recommendation is made that enabling legislation for both alternatives be enacted.

To further encourage people to avail themselves of the opportunity to designate their own guardian, legislatures should also provide statutory fill-in-the-blank forms. These forms could be completed by individuals without the necessity of hiring an attorney and incurring the accompanying expense. This author also urges that the National Conference of Commissioners of Uniform State Law draft a free-standing self-designation uniform act, complete with a fill-in form, as well as amend the Uniform Statutory Form Power of Attorney Act and the accompanying fill-in form to provide for guardian self-designation.

Individual states and the N.C.C.U.S.L. should appreciate the tremendous value of guardian self-designation and take rapid steps to make this estate planning technique widely available. The right of self-determination will then be enhanced as individuals will be better able to provide for themselves in the event of disability; a time in their lives when security in the future is needed but often not available.