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Someone's Afoot: Wisconsin's Foreign Guardianship Transfer Law

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SOMEONE’S AFOOT: WISCONSIN’S FOREIGN GUARDIANSHIP TRANSFER LAW

Due to a “grayer” and more mobile population with diminished mental capacities, the subject of interstate guardianships is attracting much-needed attention. In 2006, Wisconsin’s landmark guardianship reform included a process by which guardians and their wards could transfer their guardianships established in other states to Wisconsin. The statutory provisions providing for these “foreign guardianships” were a step in the right direction. However, the reality of transferring foreign guardianships and modifying them to comply with Wisconsin law has proved troublesome.

This Comment will focus on how Wisconsin’s foreign guardianship transfer law developed, the shortcomings in the law that have arisen over time, and possible reforms to the transfer law. A survey of Wisconsin registers in probate is particularly illuminating. Ultimately, Wisconsin legislators should either modify the existing foreign guardianship transfer law, adopt the Uniform Adult Guardianship & Protective Placement Jurisdiction Act (UAGPPJA) that an overwhelming majority of states have already adopted, or simply reject any transfer law for guardianships and require guardians to file petitions for new guardianships in Wisconsin.

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I. INTRODUCTION

Imagine the following situation: Susan Smith, a resident of Wyoming, has accepted a job offer in Milwaukee, Wisconsin. Besides the usual preparations that precede a move to a new state, Susan has a special responsibility requiring her attention: Susan serves as the guardian of the person and the estate for her elderly mother, Jane Doe, who is also a resident of Wyoming. Not wanting to leave her elderly mother alone in Wyoming, Susan intends to bring her along to Wisconsin. In order to ensure a smooth transition and maximum protection for both guardian and ward, Susan must begin a process in a Wisconsin court—and by extension the Wyoming court that initially granted the guardianship—that will ultimately transfer the guardianship established in Wyoming to Wisconsin. While Wisconsin has a procedure to accommodate the transfer of these “foreign” guardianships that many other states lack,¹ Susan should consider several important questions before beginning the transfer process.

Should she begin the transfer process in Wisconsin or in Wyoming? What happens if the Wyoming court is unresponsive or slow to act? What are the consequences to Susan and her mother if Wyoming's guardianship laws are vastly different from Wisconsin's guardianship laws? Should Susan or her mother request a hearing in a Wisconsin court upon transfer of the foreign guardianship? If the Wisconsin court grants the transfer, will it impose the same fiduciary duties on Susan and extend the same rights to her mother as a domestic guardianship does? Should Susan even bother with the transfer of the Wyoming guardianship to Wisconsin? Should she start over with a new guardianship petition in Wisconsin?

Consider a further complication in this scenario: in Wyoming, Jane Doe resides in a nursing home and needs almost constant care for her dementia. While the guardianship of the person and the estate was sufficient for Jane to obtain some type of protective services in Wyoming, will Susan need to obtain both a transferred guardianship and a protective placement order in Wisconsin, or is the determination under the Wyoming guardianship enough? Will the Wyoming

1. See generally WIS. STAT. ch. 54 (2009–2010) (containing the Wisconsin guardianship statutes as created by 2005 WIS. ACT 387).

guardianship need to be transferred and received in Wisconsin before a Wisconsin court grants a protective placement order?

Susan's—and her mother's—situation is not unique. Although the above scenario is hypothetical, these circumstances and their related problems are growing in frequency.² This Comment will examine the process used by out-of-state (“foreign”) guardians to transfer their guardianships and their wards to Wisconsin, bring attention to shortcomings in the current process, and suggest possible solutions. While questions of jurisdiction, venue, and recognition are also worthy of examination, this Comment focuses exclusively on the transfer process and its relevance to judges, practitioners, guardians, probate officers, legislators, and other interested parties.³

Part II of this Comment examines guardianships in general and distinguishes them from foreign guardianships; in addition, Part II highlights the importance of having a foreign guardianship procedure, especially in light of an increasingly “gray” and mobile society. Part III explores the evolution of Wisconsin's guardianship and foreign guardianship laws, from now-repealed chapter 880 of the Wisconsin Statutes, then to the Wisconsin Supreme Court's invitation to the Legislature in *Jane E.P.* to set standards for transferring and accepting foreign guardianships in this state, and finally to the new chapter 54. Part IV examines the 2006 creation of chapter 54, in which the Legislature substantially rewrote Wisconsin guardianship law and created the present foreign guardianship standards; Part IV then compares these standards to surrounding states and to those states with particularly innovative approaches. Part V discusses shortcomings with the foreign guardianship transfer process, along with several options for improvement. Options for improvement include minor revisions to the current law, adopting a model act to replace the current law, and having no transfer law at all and simply requiring guardians to file new

2. One could call the hypothetical of Susan and her mother “run of the mill.” However, several high profile interstate guardianship cases over the past ten years have drawn attention to transfer and jurisdictional conflicts in guardianship law. See, e.g., Ralph Blumenthal, *A Family Feud Sheds Light on Differences in Probate Practices from State to State*, N.Y. TIMES, Dec. 28, 2005, at A12 (highlighting the case of Lillian Glasser and the fight between her Texas daughter and Florida son over Mrs. Glasser and her \$25 million estate).

3. For a discussion of jurisdiction and venue issues in guardianship, in addition to an examination of interstate guardianship transfer laws, see Sally Balch Hurme, *Crossing State Lines: Issues and Solutions in Interstate Guardianships*, 37 STETSON L. REV. 87 (2007).

guardianship petitions in Wisconsin. Finally, Part VI provides a summary of this Comment and highlights its practical implications to practitioners, their clients, and even legislators.

II. THE GUARDIANSHIP PROCESS, DEFINING FOREIGN GUARDIANSHIPS, AND THE GROWING IMPORTANCE OF STATES HAVING TRANSFER PROCEDURES FOR FOREIGN GUARDIANSHIPS

A. *Guardianship & Foreign Guardianship Background*

Guardianships have long been a source of confusion for practitioners, social service workers, judges, and individuals with diminished capacities and their families.⁴ In Wisconsin, a guardian is “a person appointed by a court . . . to manage the income and assets and provide for the essential requirements for health and safety and the personal needs of a minor, an individual found incompetent, or a spendthrift.”⁵ This statutory definition illustrates the fact that physical impairment alone will not suffice for the appointment of a guardian; in the case of an adult, mental impairment is necessary.⁶ One should distinguish guardianships, especially in Wisconsin, from conservatorships, which are voluntary requests for a guardianship by a proposed ward.⁷

The modern concept of guardianship derives from English common law and the state power known as *parens patriae*, whereby “the Crown assumed the care of those who, by reason of their imbecility and want of understanding, are incapable of taking care of themselves.”⁸ The

4. MARY JOY QUINN, *GUARDIANSHIPS OF ADULTS: ACHIEVING JUSTICE, AUTONOMY, AND SAFETY* 2 (2005).

5. WIS. STAT. § 54.01(10) (2009–2010). In general, a guardian is “[o]ne who has the legal authority and duty to care for another’s person or property.” BLACK’S LAW DICTIONARY 774 (9th ed. 2009).

6. See WIS. STAT. § 54.10(3)(a). Modern guardianship law applies a two-part test: first, a court must find that a proposed ward suffers from some type of mental impairment, and second, the impairment prevents a proposed ward from caring for himself or his property. Roger B. Sherman, *Guardianship: Time for a Reassessment*, 49 FORDHAM L. REV. 350, 353 (1980).

7. WIS. STAT. § 54.01(3). But see UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 102(2) (1997) (defining a conservator as an individual appointed by a court to manage only the *estate* of a ward); PAT M. KEITH & ROBBYN R. WACKER, *OLDER WARDS AND THEIR GUARDIANS* 25 (1994) (differentiating between voluntary and involuntary guardianships).

8. Mark D. Andrews, *The Elderly in Guardianship: A Crisis of Constitutional*

United States Supreme Court eventually recognized this doctrine, rather archaically by today's standards, recognizing that it is "indispensable that there should be a power in the legislature to authorize a sale of the estates of infants, idiots, insane persons and persons not known, or not in being, who cannot act for themselves."⁹

Essentially, the guardianship process¹⁰ begins when a person¹¹ (the proposed guardian) petitions a court to determine if another person (the proposed ward) is capable of handling his or her own personal or pecuniary affairs.¹² The court will then appoint a guardian ad litem (GAL)¹³ to examine the proposed ward and typically order a psychological examination as well; then, the GAL's legal opinion and

Proportions, 5 ELDER L.J. 75, 79 (1997) (quoting Philip Tor, Note, *Finding Incompetency in Guardianship: Standardizing the Process*, 35 ARIZ. L. REV. 739, 739 n.1 (1993)). For a more comprehensive discussion of the history of guardianship, see QUINN, *supra* note 4, at 18–20 (recounting early forms of guardianship in ancient Rome, the Middle Ages, England, and colonial America); and A. Frank Johns, *Guardianship Folly: The Misgovernment of Parens Patriae and the Forecast of Its Crumbling Linkage to Unprotected Older Americans in the Twenty-First Century—A March of Folly? Or Just a Mask of Virtual Reality?*, 27 STETSON L. REV. 1, 6–28 (1997).

9. *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 58 (1890) (quoting *Sohier v. Mass. Gen. Hosp.*, 57 Mass. (3 Cush.) 483, 497 (1849)). Obviously, "infants, idiots and insane persons" is no longer an acceptable description of individuals in need of guardians. *Id.*

10. For discussions of the guardianship process in general and various solutions to overarching problems within the process, see Alison Patrucco Barnes, *Beyond Guardianship Reform: A Reevaluation of Autonomy and Beneficence for a System of Principled Decision-Making in Long Term Care*, 41 EMORY L.J. 633 (1992); Peter M. Horstman, *Protective Services for the Elderly: The Limits of Parens Patriae*, 40 MO. L. REV. 215, 215–34 (1975); John J. Regan, *Protective Services for the Elderly: Commitment, Guardianship, and Alternatives*, 13 WM. & MARY L. REV. 569 (1972); and Sherman, *supra* note 6.

11. Guardians may be individuals or entities, for-profit or non-profit. See QUINN, *supra* note 4, at 71–104. Of course, a person may voluntarily petition a court for guardianship over him or herself. KEITH & WACKER, *supra* note 7, at 25.

12. Andrews, *supra* note 8, at 79. Some have termed guardianship a "last resort" with a high standard for courts to grant a guardianship petition, as well it should be. WINSOR C. SCHMIDT, JR., *GUARDIANSHIP: COURT OF LAST RESORT FOR THE ELDERLY AND DISABLED*, at xiii (1995). Potential wards and guardians should first attempt to resolve problems in "other, less intrusive ways." KEITH & WACKER, *supra* note 7, at 69 (quoting Nancy Coleman & Jeanne Dooley, *Making the Guardianship System Work*, GENERATIONS, Supp. 1990, at 47, 50). Alternatives include durable powers of attorney, joint tenancies, home nursing services, assisted living facilities, and joint accounts in lieu of guardians of the estate.

13. Andrews, *supra* note 8, at 79–80. A guardian ad litem is a person who is "appointed by the court to appear in a lawsuit on behalf of an incompetent or minor party." BLACK'S LAW DICTIONARY 774 (9th ed. 2009).

the psychologist's mental health assessment, among other factors, will shape the court's ultimate finding of whether the proposed ward is incapacitated and in need of a guardian to manage his or her affairs.¹⁴ The standard used by legislatures to determine when a guardianship is appropriate varies; statutes often use "incompetency" and "incapacity" to describe the condition that warrants the appointment of a guardian.¹⁵ Wisconsin guardianship statutes use incompetency and incapacity.¹⁶ In either case, it is important to remember that these terms represent "a legal standard, not a medical conclusion."¹⁷ In other words, a doctor may consider a person to be incapacitated by medical standards but the court may not find that person to be incapacitated by legal standards, and vice versa.

In general, the powers of the guardian are substantial, and the restrictions on the ward are profound, particularly to the lay person. Individuals with no guardianship background would perhaps be shocked to learn that when a court adjudicates a person as incapacitated, that person "loses many constitutionally protected liberties."¹⁸ In addition, a court will curtail other fundamental rights of the new ward, including "the right to marry or divorce, vote, make or revoke a will, manage one's money, drive, buy, sell or lease property, consent to or refuse medical treatment, and the right to decide where to live."¹⁹ The powers of the guardian are outlined by the court, which will then normally issue

14. WIS. STAT. § 54.10(3)(c) (2009–2010).

15. See Penelope A. Hommel et al., *Trends in Guardianship Reform: Implications for the Medical and Legal Professions*, 18 L. MED. & HEALTH CARE 213, 215 (1990) (noting that current trends gravitate toward using incapacity instead of incompetency).

16. See WIS. STAT. § 54.01(15)–(16) (defining "incapacity" and "individual found incompetent"); see also *id.* § 54.01(9p) (defining a "foreign ward" as "an individual who has been found by a foreign court to be *incompetent*" (emphasis added)).

17. Andrews, *supra* note 8, at 100; see also KEITH & WACKER, *supra* note 7, at 47–58 (discussing how courts assess incapacity and the various meanings of incapacity depending on the discipline, be it the social sciences, health care, or law).

18. Andrews, *supra* note 8, at 93 & n.90 (noting that basic decisions, including living location, contract making, money management, and gift making, are made by the guardian, not the ward). But see WIS. STAT. § 54.25(2) (stating that the ward under a Wisconsin guardianship retains certain rights depending on the level of incapacity as determined by a court). The ward always retains basic rights, such as private communication with the court, legal counsel, and protection agencies; to protest a residential placement; to petition for review of a guardianship; and rights guaranteed by the Wisconsin and United States constitutions. *Id.* § 54.25(2).

19. Andrews, *supra* note 8, at 79 n.21.

“letters” that indicate to third parties that the guardian has power to conduct business on behalf of the ward.²⁰

B. Why Are Foreign Guardianship Transfer Laws So Important?

When a ward has ties to more than one state, a guardianship could be described as an “interstate guardianship.”²¹ Another common term is a “foreign guardianship,” particularly from the point of view of a state or jurisdiction other than where the original guardianship was established. In Wisconsin, foreign guardianships are “guardianship[s] issued by a foreign court,”²² and chapter 54 provides a foreign guardian with a process to transfer the foreign guardianship (and the foreign ward) to Wisconsin.²³ Whatever a state’s verbiage or process, these foreign guardianships have become the subject of a growing body of legal literature as guardianship usage has grown and crossed state lines.²⁴

Despite the lack of a reporting requirement that would provide hard numbers for analysis, it is fair to assume that courts create and dissolve guardianships on a daily basis in Wisconsin and around the country.²⁵ Guardianship data was last collected on a mass scale in 1987,²⁶ and while

20. WIS. STAT. § 54.46(5). Letters of guardianship are a guardian’s proof of appointment by a court as guardian and authority to act on behalf of the ward.

21. Charlene D. Daniel & Paula L. Hannaford, *Creating the “Portable” Guardianship: Legal and Practical Implications of Probate Court Cooperation in Interstate Guardianship Cases*, 13 QUINNIPIAC PROB. L.J. 351, 354 (1999). In this paper, “foreign guardianship” means a guardianship that originates in another state. Guardianships originating in another country will be referred to as “international guardianships.”

22. WIS. STAT. § 54.01(9k).

23. *See infra* Part IV, Section B.

24. The seminal law review article drawing attention to the growing problem of foreign guardianships was A. Frank Johns et al., *Guardianship Jurisdiction Revisited: A Proposal for a Uniform Act*, 26 CLEARINGHOUSE REV. 647 (1992). For other articles discussing the interstate guardianship issue generally, see Daniel & Hannaford, *supra* note 21; Vicki Gottlich, *Finders, Keepers, Losers, Weepers: Conflict of Law in Adult Guardianship Cases*, 23 CLEARINGHOUSE REV. 1415 (1990); Hurme, *supra* note 3; Sally Balch Hurme, *Mobile Guardianships: Partial Solutions to Interstate and International Issues*, PROB. & PROPERTY, July/Aug. 2003, at 51, 51–54 [hereinafter Hurme II].

25. Local courts create guardianships subject to state law; federal guardianships or federal definitions of incompetence and incapacity do not exist despite several bills introduced in Congress over the years. *See, e.g.*, H.R. 372, 101st Cong. (1989); H.R. 5275, 100th Cong. (1988); H.R. 5266, 100th Cong. (1988).

26. *See* Fred Bayles & Scott McCartney, *Computer Database Developed by AP Analyzed Guardian Files*, in GUARDIANS OF THE ELDERLY: AN AILING SYSTEM 13 (Associated Press Special Report 1987) [hereinafter AP Report]. The 1987 special report randomly selected 2,200 guardianships from all fifty states and the District of Columbia. *Id.*

that data indicated that as many as 400,000 adults in the U.S. had a court appointed guardian, “[d]emographic trends suggest that today—more than [twenty] years later—this number is probably much higher.”²⁷ Likely, the overwhelming majority of these guardianships never leave the state in which they were established. However, incapacitated people can and do move. In fact, if recent trends are any indication, guardians and their wards will continue to move between states with greater frequency, and it will be vital that states have mechanisms in place to transfer these foreign guardianships.

Having proper mechanisms for the transfer and receipt of foreign guardianships among the states is important, primarily for three reasons. First, the U.S. population is “graying” and becoming increasingly more mobile.²⁸ Second, people of all ages—not just the elderly—with developmental disabilities or other maladies resulting in mental impairment require the appointment and care of a guardian.²⁹ Third, foreign guardianship transfer laws are also important due to a category of reasons that one could best describe as personal in nature to the ward or the guardian/caregiver. Each of these reasons is worthy of independent exposition and examination.

1. A Graying and More Mobile Population

As a preliminary matter, American society has become increasingly mobile.³⁰ In fact, “[o]ver 15 percent of Americans change their residence each year, with 3 percent of them moving to another state. While the vast majority of these movers are relatively young, nearly 5 percent of people age 65 and older also move each year.”³¹ A greater number of older Americans moving across state lines will only raise the possibility that these elderly will be protected by guardianships. As a

27. ALZHEIMER’S ASS’N, FACTSHEET: ADULT GUARDIANSHIP JURISDICTION 1 (2010), http://www.alz.org/national/documents/Adult_Guardianship_Factsheet.pdf. A much earlier study of six states—including Wisconsin—found 17,336 guardianships filed in a single year out of a total population of 29 million. See MELVIN T. AXILBUND, EXERCISING JUDGMENT FOR THE DISABLED: REPORT OF AN INQUIRY INTO LIMITED GUARDIANSHIP, PUBLIC GUARDIANSHIP AND ADULT PROTECTIVE SERVICES IN SIX STATES 21 (1979).

28. See *infra* Part II.B.1.

29. See *infra* Part II.B.2.

30. Grant Cnty. Dep’t Social Work v. Unified Bd. of Grant & Iowa Cntys. (*In re* Guardianship of Jane E.P.), 2005 WI 106, ¶ 9, 283 Wis. 2d 258, 700 N.W.2d 863 (citing Daniel & Hannaford, *supra* note 21).

31. *Id.* (citing Daniel & Hannaford, *supra* note 21, at 351–52) (internal citation omitted).

result, states will need to have mechanisms in place to help facilitate the transfer of these guardianships.

Also, due to advancements in medicine, Americans are living longer than ever—"individuals age[d] 65 and older [now] represent 12 percent of the U.S. population, up from just 4 percent in 1900."³² In addition, life expectancies for individuals who live to age sixty-five have increased. "Under current mortality conditions," those who survive to age sixty-five can expect to live another eighteen and one-half years, four years longer than those aged sixty-five in 1960.³³ Furthermore, the number of elderly Americans "will increase dramatically" between 2010 and 2030, starting with the retirement of the so-called baby boomers in 2011;³⁴ in 2030 the older population projects to be double what it is today, "growing from 35 million to 72 million."³⁵

Clearly, American society is graying and Americans are on the move. Consequently, as elderly Americans live longer, the chances that they will need guardianships—and that those guardians may in time develop into foreign guardianships—will no doubt increase.

2. Rise of the Developmentally Disabled and Persons with Diminished Mental Capacities

The rise in the elderly population has contributed to an increase in Alzheimer's dementia and other degenerative brain disorders that

32. *Id.* ¶ 10 (citing Peggie R. Smith, *Elder Care, Gender, and Work: The Work-Family Issue of the 21st Century*, 25 BERKELEY J. EMP. & LAB. L. 351, 352 (2004)). By 2030, Americans over age sixty-five will account for as much as twenty percent of the population. *Id.* Wisconsin's elderly population is also growing; in the last decade, Wisconsin's population aged sixty-five or older grew by 10.6%, mirroring the national trend of the graying of America. Bill Glauber, *Number of State's Older Residents Rises More Than 10%*, MILWAUKEE J. SENTINEL, Nov. 30, 2011, available at <http://www.jsonline.com/news/wisconsin/number-of-states-older-residents-rises-more-than-10-q838rn0-134760688.html>.

33. FEDERAL INTERAGENCY FORUM ON AGING-RELATED STATISTICS, OLDER AMERICANS 2010: KEY INDICATORS OF WELL-BEING 24 (2010).

34. *Id.* at 2. Baby-boomers are defined as individuals born between 1946 and 1964. *Id.*

35. *Id.* The growing number of elderly will have a direct impact on the health care system and guardianship; an aging population will accelerate claims on the health care system and one of those claims will be an increased demand for guardianship. Considering the aging population, it is reasonable to conclude that there will be more demand for guardianships in the future. For an estimate of how many Americans will be over age sixty-five by 2020, see Peter Laslett, *Introduction to AN AGING WORLD: DILEMMAS AND CHALLENGES FOR LAW AND SOCIAL POLICY* 3, 5 tbl.1 (John Eekelaar & David Pearl eds., 1989).

interfere with one's ability to live independently.³⁶ Individuals with dementias³⁷ in general, and Alzheimer's dementia³⁸ in particular, will need guardianships as their degenerative diseases progress and impact their ability to make decisions.³⁹ As individual life expectancy continues to rise in industrialized nations, dementia will become more common.⁴⁰ An estimated 5.1 million Americans suffered from Alzheimer's dementia as of 2007,⁴¹ and these numbers will almost surely increase. Even more, the American Alzheimer's Association predicts that

36. ALZHEIMER'S ASS'N, ALZHEIMER'S DISEASE FACTS AND FIGURES 5 (2007), available at http://www.alz.org/national/documents/Report_2007FactsAndFigures.pdf. In Wisconsin, "serious and persistent" mental disorders are excellent candidates for chapter 54 guardianships and chapter 55 protective placements. See *supra* notes 10–12 and accompanying text (explaining the need for a proposed ward's mental impairment in order for a court to grant a guardianship); WIS. STAT. § 54.01(14) (2009–2010) (defining "impairment" as a "developmental disability, serious and persistent mental illness, degenerative brain disorder, or other like incapacities"); *id.* § 55.001 (declaring it the intent of the Wisconsin legislature that individuals with developmental disabilities, serious and persistent mental illnesses, and degenerative brain disorders should receive protective services under chapter 55; in other words, individuals with diminished mental capacities that are likely to be permanent and have no likelihood of rehabilitation). These serious and persistent mental illnesses are distinguishable from a rehabilitative "mental health crisis" under chapter 51 that could subsequently result in a civil commitment to an appropriate medical facility. See WIS. STAT. § 51.001(1) (declaring it the policy of the state of Wisconsin that the full range of treatment options should be available to individuals with mental illness). At the time of this writing, the Wisconsin Supreme Court is considering whether an individual under a chapter 55 protective placement can also be temporarily committed under chapter 51. See *Fond du Lac Cnty. v. Helen E.F. (In re Helen E.F.)*, 2011 WI App 72, 333 Wis. 2d 740, 798 N.W.2d 707.

37. Dementia is a "general term for a group of disorders that cause irreversible cognitive decline as a result of various biological mechanisms that damage brain cells." ALZHEIMER'S DISEASE FACTS AND FIGURES, *supra* note 36, at 2.

38. Alzheimer's dementia is "[t]he most common dementia, accounting for 50 to 75 percent of cases." *Id.*; see also WIS. STAT. § 46.87(1)(a) (defining Alzheimer's dementia as a "degenerative disease of the central nervous system characterized especially by premature senile mental deterioration, and also includes any other irreversible deterioration of intellectual faculties with concomitant emotional disturbance resulting from organic brain disorder"); *id.* §§ 54.01(6), 55.01(1v) (defining a degenerative brain disorder as "the loss or dysfunction of an individual's brain cells to the extent that he or she is substantially impaired in his or her ability to provide adequately for his or her own care or custody or to manage adequately his or her property or financial affairs").

39. See ALZHEIMER'S FACTSHEET, *supra* note 27, at 1.

40. *Dementia on the Rise in Aging Populations*, SCI. DAILY (Oct. 31, 2006), <http://www.sciencedaily.com/releases/2006/10/061031192543.htm>.

41. ALZHEIMER'S DISEASE FACTS AND FIGURES, *supra* note 36, at 5.

The number of Americans surviving into their 80s and 90s is expected to grow because of national demographics as well as advances in medicine, medical technology and other social and environmental improvements. Since the incidence and prevalence of Alzheimer's disease increase with advancing age, the number of persons with the disease is expected to grow as a proportion of this larger older population.⁴²

Finally, while elderly Americans are more likely to fall victim to the ravages of dementia and require the protection of a guardian, one cannot overlook the use of guardianships for younger individuals with developmental disabilities. For instance, the Centers for Disease Control and Prevention estimate that, as of 2006, "one in 110 American children . . . fall somewhere along the autism spectrum";⁴³ while some individuals are higher functioning and their symptoms are only "mild social impairment,"⁴⁴ more serious cognitive deficits may require the appointment of a guardian. Down syndrome is another disorder in which young adults with severe symptoms may also need guardianships of the person or the estate.⁴⁵ Other examples of conditions that may require the appointment of a guardian include mental retardation, cerebral palsy, spina bifida, and cystic fibrosis.⁴⁶

42. *Id.* Experts estimate "the number of people age 65 and over with Alzheimer's disease is estimated to be 7.7 million in 2030, a greater than 50 percent increase over the number currently affected." *Id.*

43. Alice Park, *Autism Numbers Are Rising. The Question Is Why?*, TIME, Dec. 19, 2009, available at <http://www.time.com/time/health/article/0,8599,1948842,00.html>. But see Claudia Wallis, *Research Uncovers Raised Rate of Autism*, N.Y. TIMES, May 9, 2011, at A4 (reporting that a recent South Korean study put the autism prevalence rate at 2.6% in a middle-class South Korean city, or about one in thirty-eight children). Because this rate is more than twice the rate typical of developed countries, some experts argue that perhaps autism here in the U.S. is underreported. Wallis, *supra*.

44. Park, *supra* note 43.

45. See David S. Smith, *Health Care Management of Adults with Down Syndrome*, 64 AM. FAM. PHYSICIAN 1031, 1036 (2001) (noting that adults with Down syndrome are capable of making medical decisions unless determined otherwise and that a guardianship may be appropriate in some cases). If a medical professional examines the individual and determines that the Down syndrome is severe enough, then a court may grant a petition for guardianship. *Id.*

46. QUINN, *supra* note 4, at 10.

3. General Reasons for the Rise of Foreign Guardianships

The Commission on National Probate Court Standards and Advisory Committee on Interstate Guardianships, a project of the National College of Probate Judges and the National Center for State Courts, provided several additional reasons for developing national standards for the transfer of interstate guardianships, but of no less importance:

The ward, his or her guardian, family or assets may be located outside of the jurisdiction of the court that originally established the guardianship. Some incapacitated adults desire to be closer to family or may need to be placed in a different, more suitable health care or living arrangements [sic]. Family caregivers that relocate for employment reasons reasonably may wish to bring the ward with them. The ward's real or personal property may remain in the existing jurisdiction, however, even after the ward has moved. . . . Guardians and family members, for example, may engage in forum shopping for Medicaid purposes or for state laws governing death and dying that are compatible with their views or the views of the ward.⁴⁷

So, in our hypothetical case with Susan Smith and her mother Jane, Susan's new job in Milwaukee is the reason that Susan and her mother/ward Jane will be moving to Wisconsin and bringing the foreign guardianship with them. The situation just as easily could have been Jane living in Wyoming with a guardian other than Susan, and Susan living in Wisconsin for a substantial period of time already. In this scenario, Jane may wish to move closer to her daughter in Wisconsin, and a Wisconsin court would have to transfer the guardianship.

47. NAT'L PROB. CT. STANDARDS § 3.5 (1993). The intentions and life decisions of guardians play a crucial role in the lives of their wards, and quite often the guardians are family members of the ward. QUINN, *supra* note 4, at 10 (“[A]pproximately 70% of guardians are family members.” (citing AP Report, *supra* note 27)). Furthermore, it is estimated that 85% of guardians live less than one hour driving distance from their wards. KEITH & WACKER, *supra* note 7, at 89.

III. WISCONSIN FOREIGN GUARDIANSHIP LAW BEFORE CHAPTER 54,
JANE E.P., & AN INVITATION TO THE LEGISLATURE TO CREATE
PERMANENT GUIDELINES FOR TRANSFERS

For years, Wisconsin's guardianship law was governed by Wisconsin Statutes Chapter 880.⁴⁸ Essentially, the old Wisconsin guardianship law was similar to the generic judicial petition and determination process used around the country.⁴⁹ However, the law was considered "badly organized,"⁵⁰ used "antiquated terms,"⁵¹ lacked due process protections for the proposed ward,⁵² and "contain[ed] a 'one legal standard fits all' [approach] regardless of whether guardianship of the person or guardianship of the estate [was] sought."⁵³ More importantly for this Comment's purposes, chapter 880 was largely silent on transfer of foreign guardianships. While section 880.05 stated that petitions for guardianship of a nonresident may be directed to the county circuit court where such nonresident or where the nonresident's property is found,⁵⁴ the rest of the guardianship statutes were silent on the actual receipt and acceptance of a foreign guardianship.⁵⁵

Wisconsin's elder law, specifically the provisions on how the state facilitates transfers of foreign guardianships, received a "wake-up call" of sorts from the Wisconsin Supreme Court in 2005 when the Court handed down its decision in *In re Guardianship of Jane E.P.*⁵⁶

48. See WIS. STAT. ch. 880 (2003–2004) (containing the old Wisconsin guardianship statutes).

49. See *id.* For a comprehensive explanation of Wisconsin's old guardianship law, see Herbert M. Kritzer et al., *Adult Guardianships in Wisconsin: How Is the System Working?*, 76 MARQ. L. REV. 549, 549–61 (1993); and QUINN, *supra* note 4, at 5–6 (describing the generic guardianship model used in jurisdictions across the U.S.: a petition to a court alleging that an individual lacks the capacity to manage their affairs; a subsequent examination and report by a medical professional; notice to interested parties; a court-appointed attorney to represent the best interests of the proposed ward; a possible hearing; a judicial determination; and subsequent filings by the proposed guardian and court review).

50. Betsy J. Abramson & Jane A. Raymond, *Landmark Reforms Signed into Law: Guardianship and Adult Protective Services*, WIS. LAW., Aug. 2006, at 6, 8.

51. *Id.* For example, "infirmities of aging" to describe organic brain damage caused by advanced age or other physical degeneration. *Id.* at 8, 62 & n.3.

52. *Id.* at 8.

53. *Id.* (citing WIS. STAT. § 880.01(4) (2003–2004)).

54. WIS. STAT. § 880.05; ELLEN J. HENNINGSEN & MARGE RESAN, COAL. OF WIS. AGING GROUPS, COMPARISON TABLE: CHANGES IN WISCONSIN'S GUARDIANSHIP LAW 40 (2006), <http://cwagwisconsin.org/wp-content/uploads/2010/12/880-54-Comparison.pdf>.

55. HENNINGSEN & RESAN, *supra* note 54, at 53.

56. 2005 WI 106, 283 Wis. 2d 258, 700 N.W.2d 863.

Jane E.P. was a forty-seven year old woman who suffered from Wernicke's encephalopathy,⁵⁷ a condition preventing her from managing her personal finances or caring for herself.⁵⁸ Per court order, Jane resided in a nursing home in Galena, Illinois.⁵⁹ The court ordered Jane's sister as her guardian.⁶⁰ Many of Jane's relatives lived across the Wisconsin border in Grant County, and they wanted to move Jane to a nursing home closer to them.⁶¹ The Grant County Department of Social Services petitioned for guardianship and protective placement in Wisconsin, but asked that Jane's sister remain her guardian.⁶²

However, the Unified Board of Grant and Iowa Counties (Board)⁶³ moved to dismiss the petition because the circuit court lacked competency⁶⁴ to proceed. The Board claimed that Wisconsin Statutes section 55.06(3)(c) required that Jane be a resident of Wisconsin at the time of filing, but Jane was still a resident of Illinois.⁶⁵ The circuit court agreed with the Board and dismissed the petition.⁶⁶ However, the court of appeals reversed, holding that section 55.06(3)(c), as applied to Jane, "violated her constitutional right to interstate travel."⁶⁷

57. *Id.* ¶ 3. Encephalopathy is "[a] neurological disorder characterized by confusion, apathy, drowsiness, ataxia of gait, nystagmus, and ophthalmoplegia." *Id.* ¶ 3 n.4 (quoting DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 590-91 (29th ed. 2000)). Wernicke's results from a "thiamine deficiency, usually from chronic alcohol abuse." *Id.*

58. *Jane E.P.*, 2005 WI 106, ¶ 3.

59. *Id.*

60. *Id.*

61. *Id.* ¶ 4.

62. *Id.* The court of appeals decision indicates that Jane's Illinois guardian, her sister Deborah V., filed the petition through the Grant County Corporation Counsel, although it is unclear why the guardian did not file the petition on her own. Grant Cnty. Dep't of Soc. Servs. v. Unified Bd. of Grant and Iowa Cntys. (*In re Guardianship of Jane E.P.*), 2004 WI App 153, ¶ 3, 275 Wis. 2d 680, 687 N.W.2d 72, *vacated*, 2005 WI 106, 283 Wis. 2d 258, 700 N.W.2d 863.

63. A board was established under section 51.42(3)(a) of the Wisconsin Statutes to "administer a community mental health, developmental disabilities, alcoholism and drug abuse program." *Jane E.P.*, 2005 WI 106, ¶ 5 n.5 (citing WIS. STAT. § 51.42(3)(a) (2001-2002)).

64. If a court has personal and subject matter jurisdiction, but for some other reason lacks power to render a valid judgment, the Wisconsin Supreme Court has described that inability to render judgment as "lack of competency." State *ex rel.* Sandra D. v. Getto, 175 Wis. 2d 490, 493 n.1, 498 N.W.2d 892, 893 n.1 (1993) (citing Mueller v. Brunn, 105 Wis. 2d 171, 176-78, 313 N.W.2d 790, 792-93 (1982)).

65. *Jane E.P.*, 2005 WI 106, ¶ 5.

66. *Id.*

67. *Id.* ¶ 6 (citing *Jane E.P.*, 2004 WI App 153, ¶ 22-24). The Wisconsin Court of

The Board appealed to the Wisconsin Supreme Court. In the opinion, written by Justice Ann Walsh Bradley, the court observed that the case presented “an opportunity to examine some of the current problems associated with the transfer of interstate guardianships.”⁶⁸ After citing the increase in the emergence of interstate guardianships,⁶⁹ the court noted that transfers of interstate guardianships “pose complex legal and procedural issues laden with serious public policy questions.”⁷⁰ For instance,

What happens when the relatives are in different states and are fighting over which state most appropriately should exercise jurisdiction? What happens when the motives are not based on what is in the best interest of the ward, but rather on the fortune of the ward who has property in several states?⁷¹

The court elaborated on these questions by discussing three cases on interstate guardianship transfer from other states.⁷² While one of the cases demonstrated that jurisdiction can be used as a “procedural vehicle to advance the parties’ substantive claims,”⁷³ the other two cases revealed that “courts can and do endeavor to afford respect for the proceedings of another legal system.”⁷⁴

The majority then turned to the merits in *Jane E.P.* The court briefly acknowledged the Board’s contentions that (1) section 55.06(3)(c) did not unconstitutionally burden Jane’s right to interstate travel, and (2) section 55.06(3)(c) is a bona fide residency requirement.⁷⁵ The court also recognized the Board’s assertion “that even if Jane’s right to travel is burdened, such a burden is justified by the fiscal impact that counties and the State would suffer by providing services to

Appeals relied on *Bethesda Lutheran Homes & Servs., Inc. v. LEEAN*, 122 F.3d 443 (7th Cir. 1997), *appeal after remand*, 154 F.3d 716 (7th Cir. 1998), which found under “similar circumstances” that section 55.06(3)(c) “impeded the constitutional right to travel.” *Id.*

68. *Jane E.P.*, 2005 WI 106, ¶ 8.

69. *See supra* Part II.

70. *Jane E.P.*, 2005 WI 106, ¶ 13.

71. *Id.*

72. *Id.* ¶¶ 14–22 (citing *In re Guardianship of Margaret Enos*, 670 N.E.2d 967 (Mass. App. Ct. 1996); *Mack v. Mack*, 618 A.2d 744 (Md. 1993); *In re Guardianship of Ralph DeCaigny*, No. C3-93-1269, 1994 Minn. App. LEXIS 126 (Feb. 1, 1994)).

73. *Id.* ¶ 22 (citing *Mack*, 618 A.2d 744).

74. *Id.* (citing *Enos*, 670 N.E.2d 967; *DeCaigny*, 1994 Minn. App. LEXIS 126).

75. *Id.* ¶ 23.

nonresidents.”⁷⁶ However, in the interest of comity, the court decided to start its analysis with the Illinois court that granted the original guardianship and was “charged with the responsibility of ensuring Jane’s safety and well-being” in an Illinois nursing home.⁷⁷

Comity, the court noted, “is based on respect for the proceedings of another system of government”;⁷⁸ in other words, states recognizing the judicial acts of another state within their territory.⁷⁹ In light of an aging and mobile society, the court believed that such interstate cooperation was necessary.⁸⁰ In fact, the court lamented that a little cooperation between the circuit courts and county governments in Jane’s case could have solved the problem and avoided costly litigation in front of the Wisconsin Supreme Court.⁸¹

Most importantly, the court’s decision addressed the root of the problem in Jane’s case and in many others like hers. In 2005, a large majority of states—including Wisconsin and Illinois—did not have sufficient provisions in their guardianship statutes to accommodate transfers from another state.⁸² The court “strongly encourage[d]” the legislature to address the issue of foreign guardianship transfer;⁸³ in the meantime, the court adopted the National Probate Court Standards to guide future courts if confronted with interstate guardianships.⁸⁴

IV. 2005 WISCONSIN ACT 387: GUARDIANSHIP REFORM & WISCONSIN’S FIRST FOREIGN GUARDIANSHIP TRANSFER LAW

A. *Legislative History of 2005 Wisconsin Act 387*

At the time that the Wisconsin Supreme Court decided *Jane E.P.*, a major overhaul of Wisconsin’s guardianship law was already proceeding

76. *Id.*

77. *Id.* ¶ 24.

78. *Id.* ¶ 25.

79. *Id.*

80. *Id.* ¶ 26.

81. *See id.*

82. *Id.* ¶ 27.

83. *Id.* ¶ 28.

84. *Id.* ¶ 31. However, the minority objected to the creation of “what amounts to a statute for the interstate transfer of guardianships While some type of an interstate compact may be helpful, that is a task that the constitution set out for the legislature.” *Id.* ¶ 64 (Roggensack, J., concurring in part and dissenting in part).

through the Legislature.⁸⁵ Twelve years earlier, the Elder Law Section of the State Bar of Wisconsin started a “comprehensive review” of chapter 880, and after four drafts and input from other interested organizations,⁸⁶ the Elder Law section persuaded several legislators to submit the reform proposal for consideration by the Legislature.⁸⁷ Senate Bill 391,⁸⁸ which proposed to reform the guardianship, protective placement, and powers of attorney statutes, was introduced on October 17, 2005,⁸⁹ and received a public hearing three days later.⁹⁰

While elder⁹¹ and disability⁹² groups supported Senate Bill 391 at the October 20, 2005 Senate hearing, several other groups registered their opposition to the bill in its then-present form.⁹³ The Wisconsin Counties Association (WCA), in particular, voiced its opposition, based on fiscal considerations and the lack of provisions addressing the transfer of foreign guardianships.⁹⁴ The WCA argued that Senate Bill 391 would overturn the interstate guardian transfer procedure laid out by the

85. See S.B. 391, 2005–2006 Leg., 97th Sess. (Wis. 2005), available at <http://legis.wisconsin.gov/2005/data/SB-391.pdf>.

86. The drafts were shared with: Wisconsin Coalition for Advocacy (now Disability Rights Wisconsin); Elder Law Center of the Coalition of Wisconsin Aging Groups; the Wisconsin State Bar’s Public Interest Section, Real Property Section, Probate & Trust Section, and Children & the Law Section; the Wisconsin Department of Health and Family Services (now separated into the Department of Health and Department of Children and Families); the Wisconsin Guardianship Association; and the Wisconsin Registers in Probate Association. See *Reform of the Wisconsin Guardianship Statute: Hearing on SB 391 Before the S. Comm. On Health, Children, Families, Aging and Long Term Care*, 2005 Leg., 97th Sess. 2 (Wis. 2005) (statement of Att’y Betsy Abramson, Advisor, Elder Law Section, Wis. State Bar) [hereinafter *Reform of the Wisconsin Guardianship Statute*].

87. Senate and Assembly members both signed on as cosponsors to the guardianship reform legislation. See S.B. 391, 2005–2006 Leg., 97th Sess. (Wis. 2005), available at <http://legis.wisconsin.gov/2005/data/SB-391.pdf> (listing both Senate and Assembly cosponsors).

88. *Id.*

89. *Id.*

90. See *Reform of the Wisconsin Guardianship Statute*, *supra* note 86.

91. See *id.* (statements of Att’y Ellen Henningsen, Wis. Guardianship Support Center, Coalition of Wis. Aging Groups, and Att’y William Donaldson, Counsel to the Wis. Board on Aging and Long Term Care).

92. See *id.* (appearance for, Dianne Greenley, Wisconsin Coalition for Advocacy).

93. See *id.* (appearances against, Jeffery Myer, Attorney, Legal Action of Wisconsin; Andy Phillips & Neil Blackburn, Unified Community Services).

94. See Memorandum from Craig M. Thompson, Legis. Dir., Wis. Cnty. Ass’n, to Members of the S. Comm. on Health, Children, Families, Aging and Long Term Care 1–2 (Oct. 20, 2005) (on file with Wis. Legislative Council).

Wisconsin Supreme Court in *Jane E.P.*, decided only months earlier.⁹⁵ Specifically, under Senate Bill 391 “a guardian [could] simply declare an incompetent’s state of residency and such a declaration will be sufficient to grant [a Wisconsin court] jurisdiction.”⁹⁶ The WCA considered this procedure to be “unworkable” from both a policy and financial standpoint for county health departments and circuit courts.⁹⁷ Ultimately, the WCA argued that in light of the fact that the bill was drafted before the decision in *Jane E.P.*, Senate Bill 391 should be amended “to properly address the interstate guardianship issue.”⁹⁸

The authors of Senate Bill 391, key Senate Health Committee members, and other stakeholders in the guardianship reform process took the WCA suggestion and crafted a comprehensive interstate guardianship transfer process; this provision and others were included in Senate Substitute Amendment One.⁹⁹ The Senate Committee approved of these changes in a four to one vote on February 9, 2006.¹⁰⁰ Eventually, the full Senate¹⁰¹ and Assembly¹⁰² approved Senate Bill 391, and it was signed into law by then-Governor Doyle on May 10, 2006, as 2005 Wisconsin Act 387.¹⁰³

95. *Id.* at 3.

96. *Id.*

97. *Id.* (“Rather than requiring a guardian to first obtain the consent of the [foreign] court that has already exercised jurisdiction, as the Court in *Jane E.P.* required, a guardian could simply move the incompetent individual across state lines.”). In addition, the Wisconsin Counties Association argued that S.B. 391 would create “a situation where Wisconsin counties become magnets for out-of-state persons in need of protective services.” *Id.*

98. *Id.*

99. S.S.A. 1 to S.B. 391 2005–2006 Leg., 97th Sess. (Wis. 2005), available at <http://legis.wisconsin.gov/2005/data/SB391-SSA1.pdf>; see also WIS. LEGISLATIVE COUNCIL AMENDMENT MEMO: 2005 SENATE BILL 391, at 1 (2006).

100. WIS. S.J., 97th Sess. at 590–91 (2006).

101. *Id.* at 622–23.

102. WIS. ASSEM. J. 97th Sess. at 1117 (2006).

103. 2005 Wis. Sess. Laws 1332. For further review, see 2007 Wis. Sess. Laws 777, which reconciles conflicts between 2005 Wis. Act 264 (recodifying and revising chapter 55, relating to protective placements), 2005 Wis. Act 387 (revising chapter 880, relating to guardianships and moving it to the newly created chapter 54), and 2005 Wis. Act 388 (revising the elder abuse and reporting provisions in chapter 46 and creating parallel provisions in chapter 55 for non-elderly adults). See WISCONSIN LEGISLATIVE COUNCIL ACT MEMO: 2007 WIS. ACT 45 (2008).

B. How Guardianships Work Under the New Chapter 54

Without question, 2005 Act 387 totally revised chapter 880 by amending or renumbering every surviving section, repealing other sections, and creating many new sections.¹⁰⁴ In fact, the guardianship changes in 2005 Act 387 were so significant that chapter 880 was completely replaced by the new chapter 54.¹⁰⁵ Although a complete explanation of the far-reaching changes in 2005 Act 387 is beyond the scope of this Comment, several important changes must be noted, particularly the creation of a foreign guardianship transfer process.¹⁰⁶

First, 2005 Act 387 made important definitional changes. For instance, the more modern “degenerative brain disorder” replaced the antiquated term “infirmities of aging.”¹⁰⁷ Also, the new law “ceases referring to individuals as a noun—‘an incompetent’—and instead more sensitively creates a definition for an ‘individual found incompetent,’ as ‘an individual who has been adjudicated by a court as meeting the requirements of sec. 54.10(3).’”¹⁰⁸

Second, in the appointment of a guardian, 2005 Act 387 strengthened the due process protections for proposed wards by requiring a court to find, before the appointment of a guardian, that “there is no less restrictive means of meeting the need for assistance.”¹⁰⁹ The new law also creates different standards for the appointment of a guardian of the estate and a guardian of the person.¹¹⁰

104. Abramson & Raymond, *supra* note 50, at 8.

105. *Id.*

106. For a complete discussion of the differences between the old guardianship law in chapter 880 and the present chapter 54, see generally HENNINGSEN & RESAN, *supra* note 54; and Abramson & Raymond, *supra* note 50.

107. WIS. STAT. § 54.01(6) (2009–2010). This definition was also replaced in chapters 51 and 55. For previous definitions, see chapter 880 of the Wisconsin Statutes (2003–2004), which contains the old Wisconsin guardianship statutes.

108. Abramson & Raymond, *supra* note 50, at 8 (quoting WIS. STAT. § 54.01(16) (2005–2006), as created by 2005 Wis. Act 387).

109. *Id.*

110. WIS. STAT. § 54.10(3)(a)(2) (2009–2010) (providing the standards for guardianship of the person), *id.* § 54.10(3)(a)(3) (providing the standards for guardianship of the estate). Chapter 54 also improves the guardianship process by listing factors for courts to consider in determining whether guardianship is the appropriate mechanism. See Abramson & Raymond, *supra* note 50, at 9; see also WIS. STAT. § 54.10(2)(b) (instructing the courts to consider for guardians of the estate, among other factors, the reports of the GAL and medical professionals alternatives to guardianship that may be available, the preferences of the proposed ward, the nature of the proposed ward’s care, the extent of the disability, and whether the disability is temporary or long term); *id.* § 54.10(2)(c) (instructing the courts to

Finally, the new guardianship law “emphasizes limited guardianship and reverses presumptions of full guardianship by limiting the guardian to powers that are authorized by statute or court order and that are the least restrictive form of intervention.”¹¹¹ This concept of limitation is significant because under the new guardianship law, a court can remove some rights of the ward and give them to the guardian, and a court can remove some rights but not give them to the guardian;¹¹² in other words, a ward retains these rights unless a court specifically removes them.

Of course, 2005 Act 387 also provided a mechanism for the transfer and receipt of interstate guardianships—referred to as “foreign guardianships” under the Act. To the author’s knowledge, no publication or source describes the Wisconsin foreign guardianship transfer process in detail.¹¹³ Therefore, a breakdown of the process for practitioners, petitioners, and judges follows.

1. Determining Whether a Foreign Guardianship Exists

A foreign guardianship exists if a court of another state found an individual to be incompetent or a spendthrift, and that court imposed a guardianship order on that individual.¹¹⁴

2. Determining Whether the Petition for Receipt and Acceptance of a Foreign Guardianship or Protective Placement is Appropriate

A petition for the receipt and acceptance of a foreign guardianship in Wisconsin is appropriate if the foreign ward resides in Wisconsin or intends to move to Wisconsin.¹¹⁵ Also, “[t]o be eligible for court-ordered protective placement or protective services, an individual shall have filed a petition to transfer a foreign guardianship, whether present

consider whether additional evaluation is necessary for the court to make an informed decision respecting the individual).

111. Abramson & Raymond, *supra* note 50, at 9.

112. *Id.*; see also WIS. STAT. § 54.25(2).

113. One Wisconsin secondary source does an excellent job of explaining the purpose of the transfer law in general terms and listing the contents of the transfer petition. 18 JAY E. GRENIG, WIS. PRAC. SERIES: ELDER LAW §§ 4.23–.25 (2011–2012 ed.).

114. See WIS. STAT. §§ 54.01(9g) (defining a foreign court as “having competent jurisdiction of a foreign ward”); *id.* § 54.01(9i) (defining a foreign guardian); *id.* § 54.01(9k) (defining a foreign guardianship); *id.* § 54.01(9m) (defining a foreign state as a state other than Wisconsin); *id.* § 54.01(9p) (defining a foreign ward as “an individual who has been found by a foreign court to be incompetent or a spendthrift”).

115. *Id.* § 54.34(3).

in the state or not, or shall be a resident of the state; and shall have a need for protective placement or protective services.”¹¹⁶

3. Establishing Jurisdiction and Venue

Circuit courts have subject matter jurisdiction over the petition by a foreign guardian for the receipt and acceptance of a foreign guardianship, and if granted, to the accepted guardianship.¹¹⁷ Venue for a foreign guardianship petition should be “directed to the circuit court of the county in which the foreign ward resides or intends to reside.”¹¹⁸

4. Filing the Foreign Guardianship Petition

The foreign guardian needs to file form GN-3800 with the court to petition for “Receipt and Acceptance of Foreign Guardianship to Transfer Guardianship to Wisconsin.”¹¹⁹ This petition may also request that the court modify any provision of the foreign guardianship as necessary to conform to the requirements of this state.¹²⁰

The petitioner must file or attach with the petition the following:

116. *Id.* § 55.06; *see also id.* § 55.055(1)(c) (stating that “[t]he guardian of a ward who has been found incompetent in a state other than this state may consent to admission of the ward [to protective services] . . . if the ward is currently a resident of this state”); *id.* § 55.055(1)(d) (“A resident of this state who is the guardian of a ward who has been found incompetent in, and resides in, a state other than this state may consent to an admission [to protective placement] if the guardian intends to move the ward to this state *within 30 days* after consent to admission. A petition to transfer a foreign guardianship and, if applicable, a petition for protective placement shall be filed in this state *within 60 days* [of admission].” (emphasis added)).

117. *Id.* § 54.30(1).

118. *Id.* § 54.30(2). Practically speaking, intent of the foreign guardian to reside in Wisconsin is the actual standard even though the statutes mention only the ward.

119. *See id.* § 54.30(2) (directing the petition for transfer of a foreign guardianship to be filed with the county in which the ward resides or intends to reside); *id.* § 54.34(3) (listing the contents of the foreign guardianship petition that have been incorporated into Form GN-3800); *id.* § 54.38(1m) (describing the requirements of notice of a filed petition for transfer of a foreign guardianship); *id.* § 54.40 (directing that a GAL shall be appointed when a petitioner files a petition for transfer of a foreign guardianship); *id.* § 54.44(1)(c) (setting the deadlines for hearings on a foreign guardianship transfer petition); *id.* § 54.46(1m) (listing the elements for dismissal of a transfer petition); *id.* § 54.46(1r) (listing the elements for granting a transfer petition). Petitioners & practitioners can find form GN-3800 online at <http://www.wicourts.gov/formdisplay/GN-3800.pdf?formNumber=GN-3800&formType=Form&formatId=2&language=en>.

120. WIS. STAT. § 54.46(1r)(b)(4).

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(a) A certified copy of the foreign guardianship order that includes all of the following:

1. All attachments that describe the duties and powers of the foreign guardian.

2. All amendments or modifications to the foreign guardianship order that were entered after issuance of the original foreign guardianship order, including any order to transfer the foreign guardianship.

(b) The address of the foreign court that issued the foreign guardianship order.

(c) A listing of any other guardianship petitions for the foreign ward that are pending or that have been filed in any jurisdiction at any time within 24 months before the filing of the petition under this subsection and the names and addresses of the courts in which the petitions have been filed.

(d) The petitioner's name, residence, current address, and any relationship of the petitioner to the foreign ward other than as foreign guardian.

(e) The name, age, principal residence, and current address of the foreign ward.

(f) The name and address of any spouse of the foreign ward and any adult children, parents, or adult siblings of the foreign ward. If the foreign ward has no spouse, adult child, parent, or adult sibling, the name and address of at least one adult who is next closest in degree of kinship, as specified in s. 990.001 (16), to the ward, if available.

(g) The name and address of any person other than the foreign guardian who is responsible for the care or custody of the foreign ward.

(h) The name and address of any legal counsel of the foreign ward, including any guardian ad litem appointed by the foreign court.

(i) The reason for the transfer of the foreign guardianship.

(j) A general statement of the foreign ward's property, its location, its estimated value, and the source and amount of any other anticipated income or receipts.¹²¹

121. *Id.* § 54.34(3).

5. Serving Notice to Interested Parties

The petitioner must serve notice on interested parties by certified mail with return receipt requested, or by fax.¹²² Notice shall be served on the foreign ward, and the notice shall state that the ward has a right to a hearing and that the request for a hearing must be made *within thirty days* of service.¹²³ Notice shall also be served on the foreign court, and the Wisconsin court asks a foreign court (1) to certify the fitness of the foreign guardian back to the Wisconsin court and (2) to provide all documents relating to the foreign guardianship.¹²⁴ And notice shall be served on all interested persons, including any foreign legal counsel or foreign guardian ad litem.¹²⁵ Failure to comply with the notice requirements, or the foreign court's failure to comply with the order of certifications and copies *within thirty days* after receipt of the notice, will deprive the Wisconsin court of jurisdiction.¹²⁶

6. Appointing a Guardian Ad Litem for the Foreign Ward

A court shall appoint a GAL when there is a petition for receipt and acceptance of foreign guardianship.¹²⁷

7. Duties/Rights Before the Hearing, If a Hearing Is Requested

If the ward or interested person receiving notice challenges validity of the guardianship, or authority of the foreign court to appoint a foreign guardian, they may request a hearing on the petition *within ninety days* after the date that the petition was received.¹²⁸ The ward or interested party may also request the court to stay proceedings to afford a hearing on the merits.¹²⁹

Meanwhile, the GAL interviews the foreign ward and foreign guardian, reviews records, determines whether the foreign ward demands or needs advocate counsel, makes recommendations to the

122. *Id.* § 54.38(1m).

123. *Id.* § 54.38(1m)(a)(1)(a). Section 54.44(1)(c) states that if a motion for hearing on the petition is made by the foreign ward, then the hearing shall be heard within ninety days after it is filed with the court.

124. *Id.* § 54.38(1m)(a)(2).

125. *Id.* § 54.38(1m)(a)(3); *see id.* § 54.44(1)(c).

126. *Id.* § 54.38(1m)(b).

127. *Id.* § 54.40(1).

128. *Id.* § 54.44(1)(c). The court should decide if the guardianship should be challenged in Wisconsin circuit court or in the foreign court. *See id.*

129. *Id.* § 54.44(1)(c)(3).

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court about the fitness of the foreign guardian and whether the court should grant the petition.¹³⁰

Finally, the court should grant or deny the motion for stay of proceedings. Additionally, the court could order a physician or psychologist or both to examine the foreign ward and furnish the court with a written report.¹³¹

8. Hearing by the Court

A court shall hear petitions for the receipt and acceptance of foreign guardianships, and any proposed modifications to them, *within ninety days* after the filing of the petition, but only if the foreign ward or interested person moves for such a hearing.¹³² The petitioner/foreign guardian shall physically attend the hearing, unless the court excuses attendance or permits attendance by phone for good cause.¹³³ The foreign ward should also attend, unless waived by GAL after considering the foreign ward's ability to meaningfully participate in the hearing, the effect attendance would have on the foreign ward's physical or psychological health, and the foreign ward's "expressed desires."¹³⁴

Hearings are closed unless the attorney for a foreign ward moves that a hearing be open.¹³⁵

Witnesses may appear in person or by phone; they testify and are cross-examined.¹³⁶

9. Granting/Dismissal of Petition

The court shall grant a petition and may issue Letters of Guardianship if it finds *all* of the following: the foreign guardian is in good standing with foreign court, the foreign guardian is not moving or has not moved a foreign ward from the foreign jurisdiction in order to "circumvent provisions of the foreign guardianship order," and the transfer from the foreign jurisdiction is in the ward's best interest.¹³⁷

130. *Id.* § 54.40(4).

131. *Id.* § 54.36(1).

132. *Id.* § 54.44(1)(c). The court may, *sua sponte*, move for such a hearing. *Id.*

133. *Id.* § 54.44(3)(b).

134. *Id.* § 54.44(4)(c).

135. *Id.* § 54.44(5).

136. *Id.* §§ 54.44(3)–(4).

137. *Id.* § 54.46(1r)(a). In addition, the court may modify the foreign guardianship order in the following ways: surety bond requirements, appointment of a GAL, reporting requirements, and "[a]ny other provisions necessary to conform the foreign guardianship to

If the transfer is granted, the court should coordinate with the foreign court and may do *any* of the following: delay the effective date, make the transfer contingent upon the termination of the foreign guardianship, recognize concurrent jurisdiction with the foreign court for a reasonable period of time, or make arrangements the court finds necessary to transfer the guardianship.¹³⁸

On the other hand, the court shall dismiss a petition if it finds *any* of the following: the foreign guardian is not in good standing with the foreign court, the foreign guardian is moving the foreign ward's person or property in order to avoid provisions of a foreign guardianship order, or the transfer to Wisconsin is not in the best interest of the ward.¹³⁹

C. How Wisconsin's Foreign Guardianship Transfer Law Compares to Other States

Wisconsin was not the first state to adopt a foreign guardianship transfer law, but the law it ultimately adopted is stronger than several other states' comparable transfer provisions. For instance, New Jersey guardianship statutes allow a foreign guardian to file an action for the transfer and appointment of the foreign guardian in New Jersey;¹⁴⁰ the ward need not already be present in the state to file the action.¹⁴¹ Notice is given to the ward, interested persons, and the foreign court.¹⁴² Also, the New Jersey statute provides in-state guardians with a mechanism to remove a guardianship from that state to another.¹⁴³

While many states have enacted some sort of legislation addressing interstate or foreign guardianship transfers,¹⁴⁴ several states' guardianship transfer provisions are of note:

the requirements of this chapter and other requirements of this state." *Id.* § 54.46(1r)(b). The court may also require an inventory to be filed at the time of the transfer. *Id.* § 54.46(1r)(c).

138. *Id.* § 54.46(1r)(d).

139. *Id.* § 54.46(1m).

140. Hurme, *supra* note 3, at 115 (citing N.J. STAT. ANN. § 3B:12-66(2) (2007)).

141. *Id.* at 115-16 (citing N.J. STAT. ANN. § 3B:12-66(2)).

142. *Id.* at 116 (citing N.J. STAT. ANN. § 3B:12-66(2)(b)).

143. *Id.* at 115 (citing N.J. STAT. ANN. § 3B:12-66(1)).

144. See, e.g., ALA. CODE § 26-2B-101 (LexisNexis Supp. 2011); ALASKA STAT. § 13.27.210 (2010); ARIZ. REV. STAT. ANN. § 14-12302 (Supp. 2011); ARK. CODE ANN. § 28-74-302 (Supp. 2011); COLO. REV. STAT. § 15-14.5-302 (2011); DEL. CODE ANN. tit. 12, § 39A-302 (2007); D.C. CODE § 21-2403.02 (Supp. 2011); GA. CODE ANN. § 29-4-88 (2007); HAW. REV. STAT. ANN. § 560:5-107(c) (LexisNexis 2010); IDAHO CODE ANN. ch. 15-9 (2009); KY. REV. STAT. ANN. § 387.842 (LexisNexis 2011); MD. CODE ANN., EST. & TRUSTS § 13.5-302

Missouri specifies that even if the ward or guardian move [*sic*] out of state, the guardianship is not terminated. . . . Kansas decidedly gets the award for having enacted the most detailed process to petition the court to give full faith and credit to the prior adjudication, to appoint a guardian or conservator, and to terminate the other state's proceedings. Indiana appears to be the only state that extends the extraterritorial reach of its own guardians. An Indiana guardian has the authority, upon the court's approval, to relocate the ward to another state.¹⁴⁵

Finally, three states bordering Wisconsin have enacted some type of guardianship transfer provision. Illinois, Iowa and Minnesota have adopted the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act.¹⁴⁶ Michigan, on the other hand, does not have a transfer procedure for foreign guardianships other than a provision that requires a court to determine if it has jurisdiction in a case or where a petition was originally filed.¹⁴⁷

V. DIFFICULTIES ENCOUNTERED WITH THE WISCONSIN FOREIGN GUARDIANSHIP LAW SINCE 2006 & SUGGESTED IMPROVEMENTS

A. *Principal Deficiencies with the Current Transfer Law*

Since Wisconsin county probate registers are not required to report guardianship data to the state, and no private entity collects any guardianship information, no central repository of guardianship data (and foreign guardianship data) exists. However, a small sampling of

(LexisNexis 2011); MONT. CODE ANN. § 72-5-625 (2011); NEB. REV. STAT. § 30-3917 (Supp. 2011); NEV. REV. STAT. § 159.2024 (LexisNexis Supp. 2009); N.H. REV. STAT. ANN. § 464-A:45 (2004); N.M. STAT. ANN. § 45-5A-302 (2011); N.D. CENT. CODE § 28-35-16 (2006); OKLA. STAT. tit. 30, §§ 3-315–316 (2009); OR. REV. STAT. § 125.840 (2011); S.C. CODE ANN. § 62-5-313 (2009); S.D. CODIFIED LAWS § 29A-5-114 (2004); TENN. CODE ANN. § 34-8-301 (Supp. 2011); TEX. PROB. CODE ANN. § 892 (West 2003); UTAH CODE ANN. §§ 75-5b-301, -302 (Supp. 2011); VA. CODE ANN. § 37.2-1047 (2011); VT. STAT. ANN. tit. 14, § 3172 (2011); WASH. REV. CODE § 11.90.410 (Supp. 2011); W. VA. CODE § 44C-3-2 (LexisNexis 2010).

145. Hurme, *supra* note 3, at 116 (footnotes omitted); *see also* IND. CODE § 29-3-9-2 (LexisNexis 2011); KAN. STAT. ANN. § 59-3061 (2005); MO. REV. STAT. § 475.055 (West 2009); Hurme II, *supra* note 24, at 58.

146. 755 ILL. COMP. STAT. 8/301, 8/302 (West 2008 & Supp. 2009); 2010 Iowa Acts 367, § 16; MINN. STAT. ANN. §§ 524.5-801, -802 (West 2002 & Supp. 2011); *see infra* Part V for a discussion of the UAGPPJA.

147. *See* MICH. COMP. LAWS ANN. § 700.5317 (2002).

information from an informal survey to members of the Wisconsin Probate Register Association is informative.¹⁴⁸

Twenty-seven out of seventy-one Wisconsin county register in probate offices responded to an e-mail survey circulated in late 2010 and again in late 2011.¹⁴⁹ In 2010, the responding counties accepted six foreign guardianship petitions, and as of September, 2011, two responding counties reported four transfer petitions filed so far in 2011.¹⁵⁰ These same counties also received thirty-six foreign guardianship petitions since 2005 Act 387 took effect in late 2006.¹⁵¹ Several registers in probate have indicated difficulties with the current transfer provisions; in fact, two shortcomings with Wisconsin's foreign guardianship transfer law were repeatedly cited by probate offices in the survey.

First, section 54.46(5)—letters of guardianship due to incompetency and disposition of the guardianship petition—directs a court to issue letters under the seal of the court to the guardian of the person or estate.¹⁵² Guardianship letters, issued as Form GN-3200 or Form GN-3210,¹⁵³ authorize the guardianship, specify what powers the guardian has, and indicate whether there are any limitations on the guardianship.¹⁵⁴ However, nowhere in section 54.46(1r)—the disposition of a petition for the receipt and acceptance of a foreign guardianship in

148. Survey from author to Wis. Register in Probate Ass'n (Fall 2010 & Fall 2011) [hereinafter Survey] (questions and responses on file with author). The survey was first circulated in Fall 2010 and received twenty-two responses. The survey was circulated again in Fall 2011 during a Wisconsin Register in Probate Association educational conference and four additional registers in probate responded.

149. *See id.* (including response from Barron, Burnett, Calumet, Chippewa, Columbia, Crawford, Dane, Door, Dunn, Eau Claire, Fond du Lac, Grant, Green Lake, Iowa, Kewaunee, Monroe, Outagamie, Ozaukee, Pierce, Polk, Price, Sauk, Shawano, Trempealeau, Waukesha, Waupaca, and Wood counties). Menominee and Shawano counties share a probate office.

150. *Id.* Notably, Eau Claire County reported one petitioner filed a transfer petition in March 2011, and as of September 2011 the transfer was still not complete.

151. *Id.*

152. WIS. STAT. § 54.46(5) (2009–2010).

153. *See* GN-3200, Letters of Guardianship of the Person Due to Incompetency, Wisconsin Records Management Committee (Apr. 2008); and GN-3210, Letters of Guardianship of the Estate Due to Incompetency, Wisconsin Records Management Committee (Apr. 2008).

154. *See* GN-3200, Letters of Guardianship of the Person Due to Incompetency; and GN-3210, Letters of Guardianship of the Estate Due to Incompetency, Wisconsin Records Management Committee (Apr. 2008).

Wisconsin—is the court *required* to issue letters to the foreign guardian who transfers the foreign guardianship order to this state. One could infer that the letters requirement of section 54.46(5) applies to both newly disposed and transferred guardianships, even though this direction is not explicit in section 54.46(1r); after all, both provisions are included in the same section: disposition of petition. However, judges, practitioners, and probate officers find the lack of explicit direction to be confusing; nevertheless, sometimes Wisconsin courts issue guardianship letters anyway.¹⁵⁵ In addition, most entities—including banks and nursing homes—want guardianship letters that a court certified within the last sixty days.¹⁵⁶

The practical implications of this ambiguity are substantial. Using the hypothetical in Part I as an example, if Susan Smith's petition for the acceptance and receipt of her mother's Wyoming guardianship is granted by a Wisconsin court, but no Wisconsin guardianship letters are issued, Susan would be forced to use her Wyoming letters when acting on behalf of her mother in guardianship matters. Banks, nursing homes, and other institutions may find this arrangement confusing; time and limited resources are wasted in an attempt to ascertain whether the guardianship for Susan's mother is legitimate and whether Susan is a legitimate guardian. In addition, new Wisconsin letters would not specify whether the ward retains the same rights and powers, fewer, or more than those granted by the foreign court.

The second difficulty that Wisconsin probate offices have encountered with the current transfer law is the lack of realistic deadlines for a foreign court to comply with the request for information on the original guardianship.¹⁵⁷ For instance, a foreign court has a mere thirty days to provide certifications and copies of the foreign guardianship to the Wisconsin court, or else the Wisconsin court will lose jurisdiction.¹⁵⁸ If a foreign court delays in its response, the petition process—at the expense to the petitioner, ward and Wisconsin court, not to mention added time—would have to begin over again.

155. Survey, *supra* note 148.

156. Interview with Sally Lunde, Waukesha Cnty. Register in Probate, in Waukesha, Wis. (Aug. 18, 2011) [hereinafter Lunde Interview].

157. See Survey, *supra* note 148 (including the responses of Barron, Chippewa, Columbia, Dane, Ozaukee, and Waukesha counties).

158. WIS. STAT. § 54.38(1m)(b)(2) (2009–2010); see also *supra* Part IV (describing Wisconsin's foreign guardianship transfer process and the relevant deadlines).

Several counties in the author's survey of probate offices have indicated that their offices have experienced delays in receiving the proper certifications and copies of documents from foreign courts.¹⁵⁹ In one case, the foreign court was in a state with judicial districts where judges visit only once every four weeks; consequently, the foreign court delayed the needed information because a judge was not available to authorize the certifications.¹⁶⁰ Of the twenty-seven counties that responded to the author's survey, nine counties reported a problem with obtaining the proper certifications and copies from the foreign court.¹⁶¹ Of course, section 54.38(1m)(b)(2) says that a Wisconsin court can keep jurisdiction of the transfer petition if the foreign court "give[s] indication of compliance within a reasonable period of time,"¹⁶² however, no working definition of "reasonable period of time" exists, and thirty days is still a fairly unrealistic deadline for a foreign court to indicate that it will comply in a reasonable period of time.

Using our example of Susan and her mother, if Susan petitions a Wisconsin court for a transfer of her mother's Wyoming guardianship, Susan and the Wisconsin court are largely at the mercy of the Wyoming court that first granted the guardianship petition. If the Wyoming court delays or refuses to act, the transfer petition in Wisconsin cannot go forward.¹⁶³ Ultimately, Susan will either have to wait for the Wyoming court to send the proper certifications or initiate an entirely new guardianship petition in the Wisconsin court.¹⁶⁴

Next, the lack of a required hearing on the transfer petition raises questions about whether a foreign ward has adequate procedural due process; Wisconsin statutes require a hearing on a foreign guardianship transfer petition only if a foreign ward or interested party requests it.¹⁶⁵ One commentator has argued that "[m]erely giving 'notice' . . . may not

159. Survey, *supra* note 148.

160. Survey, *supra* note 148 (Barron County response (Nov. 2010)).

161. *Id.* (including responses of Barron, Chippewa, Columbia, Dane, Eau Claire, Fond du Lac, Ozaukee, Polk, and Sauk counties (Nov. 2010)).

162. WIS. STAT. § 54.38(1m)(b)(2).

163. This situation is akin to the Eau Claire County foreign guardianship transfer petition that as of September 2011 was still pending. *See supra* note 150. Or, failure to obtain the necessary documents from the foreign court will result in the dismissal of the transfer petition for lack of competency. GRENIG, *supra* note 113, § 4:25.

164. *See infra* Part V, section B (discussing whether Wisconsin should simply repeal the foreign guardianship transfer provisions of the statutes).

165. *See* WIS. STAT. § 54.44(1)(c).

be sufficient to satisfy due process. If the allegations in the petition for guardianship have merit, the proposed ward may have trouble deciphering, understanding, or following the directions of the summons.”¹⁶⁶ As was discussed in Part II, a ward loses most of his or her liberty under a guardianship order.¹⁶⁷ One writer has commented that “[s]uch a loss [of liberty] . . . should invoke ‘the full panoply of procedural due process rights.’”¹⁶⁸ In addition, a mandatory court hearing on the transfer petition is an opportunity for a judge to assess the foreign guardian and ensure that the foreign guardian understands his or her responsibilities under Wisconsin law. A mandatory court hearing also provides an opportunity for the judge to answer any questions the foreign guardian might have.¹⁶⁹

Furthermore, other state statutes and courts have different standards for what constitutes incompetency or incapacity, whether a court should take into account the desires of the ward when designing the guardianship, and whether the ward’s condition has improved measurably so that a court could modify the conditions of the guardianship. Accordingly, a mandatory judicial hearing is the best method for a court to determine if the foreign ward is truly incompetent, and for a court to determine if and how it should modify the foreign guardianship order.

Another potential problem with the current foreign guardianship transfer law is how chapter 55’s protective placement and protective services option fits into the transfer scheme. The concept of protective placement¹⁷⁰ is unique to Wisconsin.¹⁷¹ Thus, a foreign guardian could

166. Andrews, *supra* note 8, at 88.

167. See *supra* notes 21–22 and accompanying text.

168. Andrews, *supra* note 8, at 93 (quoting Sheryl Dicker, *Guardianship: Overcoming the Last Hurdle to Civil Rights for the Mentally Disabled*, 4 U. ARK. LITTLE ROCK L.J. 485, 489 (1981) (alteration in original)).

169. See Lunde interview, *supra* note 156; see also KEITH & WACKER, *supra* note 7, at 93 (explaining that guardians’ lack of understanding of their role impedes effective assistance of their wards).

170. Statutes define protective placement as “a placement that is made to provide for the care and custody of an individual.” WIS. STAT. § 55.01(6); see also *id.* § 55.08(1) (listing the standards for protective placement in Wisconsin). Section 55.01(6r) provides that “‘protective services’ includes any of the following”:

- (a) Outreach.
- (b) Identification of individuals in need of services.
- (c) Counseling and referral for services.

transfer a foreign guardianship to Wisconsin and seek a protective placement; however, it is unclear if a Wisconsin court needs to successfully transfer and receive the foreign guardianship before ordering a protective placement.¹⁷² For instance, in returning to our hypothetical, let us presume that Jane brings her mother to Wisconsin while her foreign guardianship transfer petition is pending and also seeks out a nursing home for her mother. The nursing home, a residential facility that meets protective placement requirements, will likely be looking for evidence of an established Wisconsin guardianship, which does not yet exist.¹⁷³

Finally, Wisconsin's foreign guardianship transfer provisions do not appear capable of accepting truly foreign guardianships, or at the very least, the statutes make no explicit provision for guardianships transferred from outside the United States. In the survey of county probate offices, one county reported an initial transfer petition from a guardian and ward from another country;¹⁷⁴ however, the petitioner later withdrew the petition. Considering the growth in the elderly population and its increasing mobility,¹⁷⁵ non-American guardianships—or the equivalent of a guardianship—are bound to present themselves to Wisconsin courts in the future, even if infrequently.

(d) Coordination of services for individuals.

(e) Tracking and follow-up.

(f) Social services.

(g) Case management.

(h) Legal counseling or referral.

(i) Guardianship referral.

(j) Diagnostic evaluation.

(k) Any services that, when provided to an individual with developmental disabilities, degenerative brain disorder, serious and persistent mental illness, or other like incapacity, keep the individual safe from abuse, financial exploitation, neglect, or self-neglect or prevent the individual from experiencing deterioration or from inflicting harm on himself or herself or another person.

171. See Lunde interview, *supra* note 156.

172. *Id.*

173. *Id.*

174. See Survey, *supra* note 148 (including Waukesha County response).

175. See *supra* Part II.

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B. Making Wisconsin's Foreign Guardianship Law Work: Proposals for Improvement

Wisconsin's foreign guardianship transfer law is at a crossroads and is in need of reform.¹⁷⁶ But how? The Legislature could amend the current law, but joining a growing number of states by adopting a model transfer act is also a possibility. Also, the Legislature could repeal current law and require foreign guardianships to file new petitions for guardianship.

1. Possible Modifications to Current Law

Given the preceding discussion of the problems with Wisconsin's current foreign guardianship transfer law, the Wisconsin Legislature can and should act to amend the statutes with the following proposed modifications to current law.

First, the Wisconsin Legislature should amend the law such that Wisconsin courts "shall" issue letters once a Wisconsin court transfers a foreign guardianship to Wisconsin. This modest correction to the statutes would eliminate one of the most frequent complaints by judges and probate officers about the current transfer provisions.

Second, the Wisconsin Legislature should modify the law such that the deadlines by which foreign courts must provide information to a Wisconsin court. The ninety-day deadline is used other places in chapter 54, and it would be natural to extend this deadline to action by foreign courts. Action by one state to compel another state to act is not possible; however, the Legislature can extend the date by which a foreign court must act, or indicate that it will act, with relative ease. Furthermore, a ninety-day deadline would better account for time and resource constraints on foreign courts, much like the constraints Wisconsin courts currently face.¹⁷⁷ Next, the Wisconsin Legislature should amend the law to require hearings for the ward in all cases of a foreign transfer, or perhaps in all cases of guardianship petition filing.

176. *See supra* Part V.A.

177. In 2010, petitioners opened 35,081 total probate actions in Wisconsin. WIS. CIR. CT. AUTOMATED PROGRAM, WIS. CIR. CT., PROBATE DISPOSITION SUMMARY: STATEWIDE SUMMARY (2011), available at <http://www.wicourts.gov/publications/statistics/circuit/docs/probatestate10.pdf>. These actions include not only petitions for guardianships and conservators, but also estate proceedings, protective placements, mental health commitments, and adoptions. *Id.* 2010 statistics do not include Portage County, because as of 2010 Portage was not yet part of the statewide automated system that produced these reports.

Also, a simple change that would incorporate protective placement into the foreign guardianship petition forms could clarify the problem of protective placements and transferred foreign guardianships.¹⁷⁸ Finally, the legislature should either make provisions for foreign country guardianships or specify that guardians should start over with a Wisconsin petition for standard guardianship.

2. Adopting Model Standards

On the other hand, the Legislature could choose to pursue wholesale changes to the foreign guardianship transfer law by adopting national standards or a model act.¹⁷⁹ For instance, the National Probate Court Standards (NPCS),¹⁸⁰ used by the Wisconsin Supreme Court in *Jane E.P.*,¹⁸¹ is one set of standards that the Legislature could adopt. However, the NPCS transfer standard for guardianships merely sets forth “guiding principles”¹⁸² for courts and state legislatures; the standard itself only promotes cooperation between courts and encourages receipt of a guardianship “upon a properly executed request for a transfer.”¹⁸³ Wisconsin’s foreign guardianship transfer law is beyond such basics, and thus the NPCS is likely not worth adopting in place of the current law.

Another option would be the Uniform Guardianship and Protective Proceedings Act (UGPPA); this is a model law “adopted by the National Conference of Commissioners on Uniform State Laws [(NCCUSL)] to provide uniformity among state laws on the determination of capacity and appointment of guardians or conservators.”¹⁸⁴ The UGPPA also lacks the level of detail of current Wisconsin law; UGPPA section 107 allows transfers between states and urges courts to consider what is in the best interest of the ward, requires notice be given to the ward and other interested persons, and also

178. Admittedly, if the foreign court delays in responding to the Wisconsin court, the foreign guardian may be no better off. However, this simple change would at least simplify the process for both the petitioner and the court system.

179. See generally Johns et al., *supra* note 24 (proposing a uniform act on foreign guardianships and among the first law review articles to do so).

180. NAT’L PROB. CT. STANDARDS, *supra* note 47.

181. See *supra* Part III.

182. NAT’L PROB. CT. STANDARDS, *supra* note 47, at xiv.

183. *Id.* § 3.5.4.

184. Hurme, *supra* note 3, at 90 n.12.

requires that new letters of guardianship be issued upon transfer.¹⁸⁵ Again, Wisconsin's law would appear to be beyond what is contained in the small provision for guardianship transfers in the UGPPA.

Greater potential lies with the Uniform Adult Guardianship & Protective Proceedings Jurisdiction Act (UAGPPJA), also a product of the NCCUSL.¹⁸⁶ The UAGPPJA was the result of an effort by the Commissioners "to provide consistent and uniform guidance to courts in transjurisdictional matters."¹⁸⁷ Unlike the UGPPA model law, this act is a model interstate jurisdiction act¹⁸⁸ and was specifically crafted for use as a stand-alone provision in state codes that have not adopted the UGPPA.¹⁸⁹ The UAGPPJA is based on the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA),¹⁹⁰ which provides states with a framework to resolve child custody disputes when parents reside in different states during or following divorces.¹⁹¹ As of January 2012, twenty-nine states¹⁹² and the District of Columbia have enacted the

185. UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 107 (1997).

186. For a discussion of other states and their consideration of the UAGPPJA, see, for example, Hugh M. Lee, *Alabama's New Uniform Guardianship and Protective Proceedings Jurisdiction Act: Providing Clear Guidance for the Management and Resolution of Interstate Guardianship and Conservatorship Disputes*, 71 ALA. LAW. 388 (2010) (discussing the recent adoption of the UAGPPJA in Alabama); Stephen Rauls, Note, *Family Law—Guardianship—The Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act: A Uniform Solution to an Arkansas Problem*, 33 U. ARK. LITTLE ROCK L. REV. 75 (2010) (arguing for the adoption of the UAGPPJA in Arkansas).

187. Hurme, *supra* note 3, at 119.

188. *Id.* at 121. The name of the act was intended to convey that it covers adult guardianships of property and persons, and conservatorships. *Id.*

189. *See id.* at 121; *see also* UNIF. ADULT GUARDIANSHIP & PROTECTIVE PROCS. JXN. ACT prefatory note (2007) (noting that states may enact the UAGPPJA separately or as part of the UGPPA). It is also important to note that Wisconsin could adopt the UAGPPJA alongside the current guardianship statutes; in other words, much of the current chapter 54 could remain in place even if this uniform act is adopted.

190. Hurme, *supra* note 3, at 121.

191. *Id.*

192. These states include Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, Idaho, Illinois, Indiana, Iowa, Kentucky, Maryland, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, and West Virginia. UNIF. LAW COMM'N, LEGISLATIVE FACT SHEET: ADULT GUARDIANSHIP AND PROTECTIVE PROCEEDINGS JURISDICTION ACT (2007), *available at* <http://www.nccusl.org/LegislativeFactSheet.aspx?title=Adult%20Guardianship%20and%20Protective%20Proceedings%20Jurisdiction%20Act>.

UAGPPJA, and the Act has endorsements from prominent national organizations.¹⁹³

Article III of the UAGPPJA lays out the guardianship transfer process.¹⁹⁴ Interestingly, “the transfer proceedings would transpire in both the ‘old’ and the ‘new’ state before the [ward] has been moved to the new jurisdiction.”¹⁹⁵ The new state would have jurisdiction even though the foreign ward is not yet present in the state.¹⁹⁶ The guardian files a petition with the new state¹⁹⁷ and the old state.¹⁹⁸ The court in the old state would grant a provisional transfer to a court in the new state,¹⁹⁹ notice is given to the foreign ward and interested parties,²⁰⁰ and a hearing is granted if there is any objection;²⁰¹ the old state court “must be satisfied that the plans for care in the new state are reasonable and sufficient and that the new state will accept the transfer.”²⁰²

Meanwhile, the foreign guardians must also file a petition with the new state to accept the old state guardianship;²⁰³ the same notice and hearing structure is also present in the new state.²⁰⁴ And, no “later than [ninety] days after issuance of a final order accepting transfer of a guardianship . . . the court shall determine whether the guardianship . . .

193. Endorsements for the state-by-state adoption of the UAGPPJA come from the National Academy of Elder Law Attorneys, the National Guardianship Association, the National College of Probate Judges, the Alzheimer Association, the Conference of Chief Justices, and the Council of State Governments as “Suggested State Legislation.” UNIFORM LAW COMMISSION, THE UNIFORM ADULT GUARDIANSHIP AND PROTECTIVE PROCEEDINGS JURISDICTION ACT (2007), *available at* <http://www.nccusl.org/Act.aspx?title=Adult%20Guardianship%20and%20Protective%20Proceedings%20Jurisdiction%20Act>.

194. UNIF. ADULT GUARDIANSHIP & PROTECTIVE PROCS. JXN. ACT art. III.

195. Hurme, *supra* note 3, at 127 (citing UNIF. ADULT GUARDIANSHIP & PROTECTIVE PROC. JXN. ACT art III).

196. *Id.*; *see also* UNIF. ADULT GUARDIANSHIP & PROTECTIVE PROC. JXN. ACT § 203. This provision is similar to Wisconsin’s standard for venue, which states that a transfer petition should be directed to a circuit court “of the county in which the foreign ward resides or intends to reside.” WIS. STAT. § 54.30(2) (2009–2010).

197. UNIF. ADULT GUARDIANSHIP & PROTECTIVE PROC. JXN. ACT § 301(a).

198. *Id.* § 302(a).

199. *Id.* § 301(d).

200. *Id.* § 301(b).

201. *Id.* § 301(c).

202. Hurme, *supra* note 3, at 127; UNIF. ADULT GUARDIANSHIP & PROTECTIVE PROC. JXN. ACT § 301(e).

203. UNIF. ADULT GUARDIANSHIP & PROTECTIVE PROC. JXN. ACT § 302(a).

204. *Id.* § 301(b)–(c).

needs to be modified to conform to the law of [the new] state.”²⁰⁵ Throughout the process, the UAGPPJA “emphasi[zes] . . . the importance of communication and cooperation between courts.”²⁰⁶ In addition, the UAGPPJA provides for the “recognition and enforcement of a guardianship or protective proceeding order . . . by authorizing a guardian or conservator to register these orders in other states.”²⁰⁷ Finally, the UAGPPJA also applies to guardianship orders of foreign countries.²⁰⁸

The UAGPPJA has the advantage of not applying deadlines by which the old state or foreign court must act; indeed, cooperation and comity between courts is the basis for the model act. In addition, the UAGPPJA also has a provision to deal with the transfer of international guardianships.²⁰⁹ However, the UAGPPJA makes no provision for the issuance of letters by the new state, hearings on the transferred guardianship are not mandatory unless a party raises an objection, and both states would need some form of the UAGPPJA for the process to work.²¹⁰

3. Repeal the Transfer Law and Specify that Foreign Guardians Should Start Over

Finally, the Legislature could amend the statutes to clarify that foreign guardians should simply start over and file new guardianship petitions in Wisconsin, rather than transferring existing guardianships from another state.²¹¹ This option would eliminate the problem of non-

205. *Id.* § 302(f).

206. Hurme, *supra* note 3, at 129 (citing UNIF. ADULT GUARDIANSHIP & PROTECTIVE PROC. JXN. ACT § 105 cmt. at 12).

207. *Why States Should Adopt UAGPPJA*, UNIF. LAW COMM’N, <http://www.nccusl.org/Narrative.aspx?title=Why%20States%20Should%20Adopt%20UAGPPJA> (last visited Apr. 9, 2012).

208. UNIF. ADULT GUARDIANSHIP & PROTECTIVE PROC. JXN. ACT § 103.

209. *See id.* For another example of the transfer of international guardianships, see the Convention on the International Protection of Adults, *released for signature* Oct. 2, 1999, 39 I.L.M. 7, *available at* <http://www.hcch.net/e/conventions/text35e.html> (providing for impaired adults and the avoidance of conflict between jurisdictions). However, the United States is not a party to this convention. For a list of countries participating in the International Convention, see *Status Table, International Protection of Adults* (May 1, 2011), http://www.hcch.net/index_en.php?act=conventions.status&cid=71. For a detailed discussion of this convention, see Aimee R. Fagan, Comment, *An Analysis of the Convention on the International Protection of Adults*, 10 ELDER L.J. 329 (2002).

210. *See* UNIF. ADULT GUARDIANSHIP & PROTECTIVE PROC. JXN. ACT.

211. Survey, *supra* note 148 (including responses of Dunn, Waukesha, and Wood

cooperation by the foreign court, a Wisconsin court could set a hearing in the near future to determine competency, and a Wisconsin court would issue new letters to the guardian.²¹² The principal drawback to this approach would be properly terminating the guardianship in the foreign state either before or after the granting of the guardianship in Wisconsin.

VI. CONCLUSION

What are the implications of the preceding discussion for Susan Smith?²¹³ Besides starting the petition process for the transfer of the foreign guardianship, Susan could ask the foreign court of Wyoming for information that would be helpful for the Milwaukee County court in accepting and transferring the foreign guardianship before she even files the petition. However, the Wyoming court may not act without an order or form from the Wisconsin court. Therefore, Susan may need to begin the petition process in Wisconsin first. Also, notice of the Wisconsin transfer petition would be served on Jane Doe, the foreign ward, and other interested persons; but, unless Jane has the capacity to object or an interested person does on Jane's behalf, no hearing will be scheduled by the Wisconsin court to determine if transferring the guardianship is in Jane's best interest or if the terms of the guardianship should be modified. Finally, one can only speculate as to whether the Wyoming court that granted the original guardianship will act promptly to deliver certifications and copies that the Wisconsin court needs to accept the guardianship in Wisconsin.

Without question, Wisconsin's current foreign guardianship transfer law is better than the pre-chapter 54 guardianship statute, which provided practically no guidance to courts on how to achieve a transfer. In fact, this lack of guidance provided the very basis for the appeal in *Jane E.P.* and the subsequent Wisconsin Supreme Court decision. Act 387, the current guardianship and conservator laws of chapter 54 that include the foreign guardianship transfer provisions, was the product of painstaking research, drafting, and compromise that answered the call to reform Wisconsin guardianship laws and heed the invitation of the

counties).

212. See GRENIG, *supra* note 113, § 4:25 (noting that "there is no specific prohibition on the filing of a 'traditional' guardianship petition in lieu of . . . a petition for transfer").

213. See hypothetical introduced *supra* Part I.

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Wisconsin Supreme Court to act in an area that was once underdeveloped.

Nevertheless, improvements are needed, whether they are requirements to issue letters once a foreign guardianship is transferred to Wisconsin, altering the deadline for receiving the proper information from a foreign court, or crafting a policy for dealing with out-of-country guardianships that request transfers to Wisconsin. Of course, Wisconsin could adopt the UGAPPJA; however, this model act is best utilized if both the transferring and receiving states have implemented the legislation. Otherwise, having guardians simply start over and file new petitions for guardianship might be the best practical suggestion unless and until the Legislature makes the needed modifications.

Foreign guardians like the hypothetical Susan Smith, the judge and probate officers ruling on and processing her petition, the practitioner advocating for Susan's case, and of course, Susan's ward, all deserve a process that is clear and fair. Inevitably, the Legislature will once again consider additional changes to Wisconsin's guardianship laws, and when the Legislature does, how Wisconsin accepts guardianships from another state hopefully will be a priority for policymakers.

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