

THE LIBERTY AND PROPERTY OF ELDERS: GUARDIANSHIP AND WILL CONTESTS AS THE SAME CLAIM

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For elderly individuals property is identical and essential to individual liberty. The assets of the elderly are central to the laws of guardianship and inheritance. Recent reforms in these two areas of elder law have not been successful. In her article, Alison Barnes examines the common thread of guardianship actions and will contests. Professor Barnes argues that the past and current reform movements have been far from effective and more needs to be done to understand why elderly individuals' wishes and desires often are disregarded. Professor Barnes explains that the current legal processes often favor the traditional family members' goals for the elderly relative, rather than individual's desires. She demonstrates that societal endorsement of models of family relationships probably affect both guardianship and inheritance proceedings. Professor Barnes believes it is enlightening to reconsider the relationship between guardianship and inheritance laws and how knowledge and insight into one of the fields may be useful for the other.

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I. Introduction

The law has distinguished individual liberty from protected property rights under the Constitution and the common law.¹ Yet, for older people with physical or mental frailty, property is often virtually identical to liberty because assets are essential for liberty. Once isolated by a physical or mental disability, only the elder's assets can provide an avenue of access to human companionship and services, and a personal sphere of importance that prevents isolation and, potentially, meaninglessness in continuing life. Those assets, and their uses, are central to the laws of guardianship and inheritance. This article seeks to marshal the common thread of these disparate fields of law, as revealed by recent efforts at statutory reforms.

Over the past twenty-five years, journalists, commentators, and state legislatures have considered the validity of the judicial creation and management of guardianships.² Many reforms have been enacted to encourage more legal process, intended to produce more and better factual detail about the proposed ward, and greater precision in tailoring any determination of incapacity to the decision-making shortcomings of the ward and the suitability of the guardian.³ Reformers' interests center on the ward's opportunities to choose how to live and with whom to associate.⁴

Statutory reforms have shown little success in changing the impact of guardianship proceedings on elderly people.⁵ The proportion of plenary, as opposed to recommended limited guardianships, is virtually unchanged by the reforms.⁶ A recent expert review of the state of the guardianship process and purpose in large part reflects the recommendations of a landmark 1988 meeting⁷ held for the same pur-

1. See generally MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 24–25, 31 (1991).

2. Lawrence A. Frolik, *Guardianship Reform: When the Best Is the Enemy of the Good*, 9 STAN. L. & POL'Y REV. 347, 347 (1998).

3. See, e.g., Sally Balch Hurme, *Current Trends in Guardianship Reform*, 7 MD. J. CONTEMP. LEGAL ISSUES 143, 144–45 (1995–96); Fred Bayles & Scott McCartney, *Move Under Way to Reform Laws Covering Guardianship of Elderly*, L.A. TIMES, Jan. 17, 1988, at 4.

4. See Hurme, *supra* note 3, at 145.

5. See Frolik, *supra* note 2, at 347.

6. *Id.* at 354.

7. For a description of the meeting, held at the Johnson Foundation's Wing-spread facilities, and its recommendations, see Comm'n on the Mentally Disabled & Legal Problems of the Elderly, Am. Bar Ass'n, *Guardianship: An Agenda for Re-*

poses.⁸ No specific reason for the failure of reform, other than mere inertia in the existing process, is identified as an obstacle to be addressed in order to further promote reform efforts.⁹

In the same years, efforts to reform inheritance law sought to produce judicial decisions in accord with the principle of testamentary freedom.¹⁰ Yet, commentators note that those reforms are similarly defeated—often, like guardianship, at the time of judicial implementation.¹¹ Researchers in inheritance law have, due to a volume of cases, identified trends in will contest decisions that clearly favor the interests of family members, although a testator would have favored others.¹²

This article examines the extent to which the causes and the stakes in the guardianship and inheritance claims are related.¹³ Part II discusses the nature of reforms in each area and evidence that reforms have not met even modest expectations. It then collects the common threads that bind these two areas of legal process together. Part III discusses the meaning and legal treatment of family members in each of these two fields of law. Part IV discusses how the relationship of the two fields should be reconsidered and whether the knowledge or insights of one field might be useful to the other.

form, 13 MENTAL & PHYSICAL DISABILITY L. REP. 274 (1989) [hereinafter *Guardianship*].

8. See generally Frolik, *supra* note 2.

9. *Id.* at 351–55.

10. See Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 242 (1996).

11. See *id.* at 238 (noting commentator criticism of judicial implementation of wills acts as “the primary enemy of effectuation of testamentary intent”); see, e.g., Alison P. 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, 649 (1992) (noting that courts “fail to implement fully the spirit of the law and practical requirements” of guardianship reform statutes).

12. Leslie, *supra* note 10, at 257.

13. The similarities were noted years ago, but the assertions have not been related to the puzzles of the new era of reform. See, e.g., George J. Alexander, *Premature Probate: A Different Perspective on Guardianship for the Elderly*, 31 STAN. L. REV. 1003 (1979).

II. The Nature of Guardianship and Inheritance Law Reforms

A. Guardianship Reforms

The recent history of guardianship reform dates from the 1980s, as a result of two newspaper exposés of the process and its effects.¹⁴ In 1987, the Associated Press reported a nationwide investigation by sixty-seven reporters who reviewed over 2,200 case files in every state.¹⁵ The report found that only forty-four percent of respondents were represented by counsel, many hearings lasted five minutes or less, and opinions on the incapacity of proposed wards from persons of questionable expertise were readily accepted by the courts. The *St. Peters-*

14. HOUSE SELECT COMM. ON AGING, 100TH CONG., ABUSES IN GUARDIANSHIP OF THE ELDERLY AND INFIRM: A NATIONAL DISGRACE 13–32 (Comm. Print 1987) [hereinafter ABUSES IN GUARDIANSHIP]; Jeffrey Good & Larry King, *Wards of the Court*, ST. PETERSBURG TIMES, Dec. 14, 1986, at A1, reprinted in ABUSES IN GUARDIANSHIP, *supra*, at 81.

15. ABUSES IN GUARDIANSHIP, *supra* note 14, at 13–32. Earlier scholarly studies and commentary must be credited at least in part for journalistic interest. They include GEORGE ALEXANDER & TRAVIS LEWIN, THE AGED AND THE NEED FOR SURROGATE MANAGEMENT (1972) (reviewing 513 cases in New York state, concluding that guardianship provided no benefit that could not be achieved without an adjudication of incompetence and that in almost every case the elderly ward was in a worse position after adjudication than before; incompetence was found whenever divestiture was in the interest of some third person or institution); MARGARET BLENKER ET AL., FINAL REPORT—PROTECTIVE SERVICES FOR OLDER PEOPLE: FINDINGS FROM THE BENJAMIN ROSE INSTITUTE STUDY (1974) (finding that provision of enriched protective services, including guardianship, to an experimental group failed to prevent or slow the ward's deterioration or death; rather, the rate of institutionalization—found in other studies to have a positive correlation with mortality—was higher for wards); FINAL REPORT OF THE GRAND JURY, DADE COUNTY, FL. (Nov. 9, 1982) (reviewing 200 randomly selected guardianship cases opened between 1979 and 1981 revealing demographic information about wards and guardians indicating a seriously deficient adjudication and monitoring system); Kris Bulcroft et al., *Elderly Wards and Their Legal Guardians: Analysis of County Probate Records of Ohio and Washington*, 31 GERONTOLOGIST 156 (1991). The National Senior Citizens Law Center also examined 1,000 guardianship and conservatorship cases filed in Los Angeles in 1973–74 to determine the type of evidence presented, how many wards attended their hearings, and the outcomes. Peter M. Horstman, *Protective Services for the Elderly: The Limits of Parens Patriae*, 40 MO. L. REV. 215, 235–36 n.81 (1975).

Other guardianship studies include Leon County (Tallahassee) Florida (1977–82); Penn State University study of three counties (1983); San Mateo County (Cal.) study (reviewing at intervals in 1982, 1984, and 1986, and finding discrimination or prejudice against elderly persons by third parties such as convalescent homes which refused to accept a solitary, unsupervised, and injured resident without a conservatorship). WINSOR SCHMIDT, JR., GUARDIANSHIP: THE COURT OF LAST RESORT FOR THE ELDERLY AND DISABLED 190–93 (1995). The major studies cited above are also discussed. *Id.* at 181–209. For a brief history of guardianship prior to these studies, see Barnes, *supra* note 11, at 650–68.

burg Times produced a series of articles with similar findings.¹⁶ The undeniable and disturbing failure of guardianship law and practice to provide even minimal fair treatment to so many older people led to debates in most state legislatures,¹⁷ and extensive statutory reforms in many states.¹⁸ The new statutes drew provisions from two models: The Uniform Guardianship and Protective Proceeding Act (U.G.P.P.A.)¹⁹ and the model developed by the American Bar Association Commission on the Mentally Disabled.²⁰ Each model statute extended to prospective wards more rights to legal process.²¹ Aspects of the guardianship process subject to the most frequent and significant change include the definition of capacity, the requirements for guardianship petition and notice to the respondent, use of counsel, access to hear-

16. Good & King, *supra* note 14.

17. Bayles & McCartney, *supra* note 3, at 4. For a description of legal precedents and process, see *Lake v. Cameron*, 364 F. 2d 657 (1966) (emphasizing the concept of least restrictive alternative derived in reform guardianship statutes from civil commitment case law); *Lessard v. Schmidt*, 339 F. Supp. 1376 (1974) (describing the minimum constitutionally acceptable procedural due process); PAT M. KEITH & ROBBYN R. WACKER, *OLDER WARDS AND THEIR GUARDIANS* (1994) (describing the components of the guardianship process from petition and notice to the respondent, to annual oversight by court representatives) [hereinafter *OLDER WARDS*]. This volume also includes commentary on the prereform guardianship system from the popular press, health care literature, and the views of ethicists. *Id.* at 21–45. For a review of significant aspects of prereform guardianship statutes in every state and a discussion of the adjudication system, see LEGAL COUNSEL FOR THE ELDERLY, AM. ASS'N OF RETIRED PERSONS [AARP], *DECISION-MAKING, INCAPACITY, AND THE ELDERLY* 67–73 (1987).

18. A tabulation of provisions of statutes for each state is maintained by Sally Balch Hurme, Senior Legal Programs Specialist with Legal Counsel for the Elderly, a department of AARP (on file with the author). See also SALLY BALCH HURME, *STEPS TO ENHANCE GUARDIANSHIP MONITORING* 92–101, Charts II–IV (unpaginated) (ABA Comm'n on the Mentally Disabled and the Legal Problems of the Elderly, 1991); Hurme, *supra* note 3, at 143 (including a summary of many of the reforms).

19. The reform U.G.P.P.A. was developed by the National Conference of Commissions on Uniform State Laws and is codified as Article V of the Uniform Probate Code.

20. See generally ABA Comm'n on the Mentally Disabled, *Legal Issues in State Mental Healthcare: Proposals for Change—Model Guardianship Statute*, 2 MENTAL DISABILITY L. REP. 444 (1978) (setting out provisions for statutory reforms).

21. Prior to reform, little procedural due process was provided in guardianship proceedings because the state's intervention is historically based in *parens patriae*, the obligation of the sovereign to act as protective parent for the financial and personal well-being of citizens incapable of caring for themselves, rather than in the police power to limit individual choices for the protection of society's health, safety, and welfare. A. Frank Johns, *Ten Years After: Where Is the Constitutional Crisis with Procedural Safeguards and Due Process in Guardianship Adjudication?*, 7 ELDER L.J. 33, 69–70 (1999). In theory, the state has no interests adverse to the prospective ward in *parens patriae* proceedings, so there should be no need for formal due process protection. See generally Horstman, *supra* note 15, at 222 (stating that *parens patriae* cannot justify actions that have a serious detrimental impact on individual rights and choices).

ings, and a court order specifying powers of the guardian (that is, providing limited rather than plenary powers to a guardian).²²

In order to further refine reform recommendations, with the elderly as well as mentally disabled people in mind, the ABA Commission on the Legal Problems of the Elderly joined with the Commission on Mentally Disabled to convene a national interdisciplinary meeting of guardianship experts in July 1988.²³ It was held in Racine, Wisconsin, at Wingspread, a house designed by Frank Lloyd Wright, hence the so-called Wingspread recommendations.²⁴ These statements recommend minimum due process requirements for petitions and hearings, mandatory attendance for respondents, a burden of proof of clear and convincing evidence borne by the petitioner, and active court oversight subsequent to adjudication of incompetency and appointment of a guardian.²⁵ In general, the more rigorous legal process favored a more refined determination of the existence and nature of the respondent's incapacity, and fulfillment of the courts' traditional oversight role.²⁶

The goal of reform advocates was to provide every prospective ward with the least restrictive alternative in assistance, the opportunity to turn down petitions when the evidence showed the respondent could make decisions, and limits on any guardian's powers to those that were necessary to the ward.²⁷ Thus, more petitions were deemed likely to be denied in whole or in part.²⁸ By means of the shift to limited guardianships, it was also anticipated that the stigma of adjudication of incompetency would be greatly diminished in favor of a view of guardianship services as helpful legal and personal assistance to maximize the independent function of persons with disabilities.²⁹ As a result, guardian-

22. See *OLDER WARDS*, *supra* note 17, at 167-74.

23. *Guardianship*, *supra* note 7, at 274. This author attended the Wingspread conference and the subsequent Wingspan conference discussed *infra* notes 57 through 69 and accompanying text.

24. *Id.* at 288-300.

25. See *id.*

26. See generally *id.* at 288.

27. Wingspread recommendations emphasized seeking and, if necessary, having states provide, alternatives to guardianship. 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, 49 (1997).

28. *OLDER WARDS*, *supra* note 17, at 175.

29. See Lawrence A. Frolik, *Plenary Guardianship: An Analysis, a Critique and a Proposal for Reform*, 23 *ARIZ. L. REV.* 599, 629-33 (1981) (citing the probabilities of erroneous decisions and their likely consequences).

ships would be created for persons who otherwise would have gone without advantageous help.

Beginning in 1992, the results of studies of guardianship reform implementation were published and compared to one another in an effort to understand the impact of reforms on the courts and participants in the guardianship system.³⁰ They include studies limited to sampling of case files in particular locales³¹ and national comparisons of the demographics of guardianship respondents.³² Briefly stated, none of the anticipated results of statutory reform fully materialized.³³ Specifically,

30. For a chronological review of recommendations and reforms, see Johns, *supra* note 27, at 69–107.

31. See, e.g., OLDER WARDS, *supra* note 17; Pat M. Keith & Robbyn R. Wacker, *Guardianship Reform: Does Revised Legislation Make a Difference in Outcomes for Proposed Wards?*, 4 J. AGING & SOC. POL'Y 139, 140 (1992); Herbert M. Kritzer & Helen Marks Dicks, *Adult Guardianships in Wisconsin: An Empirical Assessment* (Jan. 1992) (unpublished report, available at Center for Public Representation in Madison, Wisconsin), partially reprinted in Herbert M. Kritzer et al., *Adult Guardianship in Wisconsin: How Is the System Working?*, 76 MARQ. L. REV. 549 (1993).

32. See generally LAUREN BARRITT LISI ET AL., THE CTR. FOR SOC. GERONTOLOGY, NATIONAL STUDY OF GUARDIANSHIP SYSTEMS: FINDING AND RECOMMENDATIONS 7–8 (1994) [hereinafter TCSG NAT'L STUDY] (collecting data in ten states and thirty courts—California (3 courts), Colorado (2), Florida (1), Indiana (1), Kansas (4), Michigan (3), Minnesota (2), New York (4), Oregon (9), and Washington (1). The distribution of data collected depended upon the availability of volunteers from the Older Women's League (OWL). Reviewers attended hearings and interviewed participants as well as reviewing case files).

33. A number of statistics from these studies are interesting. For example, one national study on guardianship systems reported that sixty-seven percent of older respondents were female, unchanged from prior statistics and only slightly higher than the proportion of women in the general population over age sixty (sixty-three percent). *Id.* at 20. Also, the proportion of wards in various living arrangements remained virtually unchanged from prereform to postreform studies. *Id.* Nearly equal proportions of respondents lived in institutions (forty-three percent) and in the community (forty-seven percent), while ten percent were hospitalized. *Id.* at 21. The racial proportion of black and white wards remained about the same as in the general older population. *Id.* at 21–22.

Regarding assets, the study reports that approximately twenty-six percent of wards had assets of less than \$10,000, and thirty-three percent had assets of less than \$25,000, while nearly fifty-nine percent had assets of \$100,000 or less. *Id.* at 22. However, there is some question as to whether the finding reflects a bias toward limited assets due to failure to take into account the existence of conservatorships, a form of guardianship of property, and alternatives to guardianship such as durable powers of attorney that are likely to be preferred by more affluent elders and their families. *Id.* at 22 n.51. The Associated Press prereform study indicated the average size of the respondent's estate was \$97,551. See *id.* at 22. The thorough and painstaking review in *Older Wards and Their Guardians* acknowledges that the average amount of assets would likely rise significantly if they had reviewed conservatorship files. OLDER WARDS, *supra* note 17, at 62. The matter is significant in light of the proposal of this essay that a significant purpose of some guardianships is control of wards' property. In any case, the most common incapacity among prospective wards—reported for over ninety percent—was money

provisions favoring limited guardianship, which was central to the reforms, have had almost no impact at all.³⁴ According to *Older Wards and Their Guardians*, requests for limited guardianship increased from zero to one percent,³⁵ a change so small that its significance is questionable.³⁶ However, some increase was observed in the number of limited guardianships awarded: from one pre-legislation to two post-legislation in Iowa, and from four to forty-five in Colorado.³⁷ Regarding the number of petitions denied, the slight increase in Iowa and Missouri after legislative reform was countered by a one percent decrease in denials in Colorado.³⁸ The authors note the irony that, of ten petitions for limited guardianships, all were granted plenary powers.³⁹

Other findings must be treated with caution because studies used different methods to pursue their data. In addition, requirements of reform guardianship statutes and the customs governing implementation vary greatly from state to state and among localities within the states. Furthermore, the demographics of prospective wards may include disabled adults as well as older individuals.⁴⁰

management. TCSG NAT'L STUDY, *supra* note 32, at 23–24. One-fourth of wards in that study were reported to be financially exploited prior to filing. *Id.* at 23.

More than three-fourths of petitioners were personally acquainted with the respondent as family, friends, or neighbors. *Id.* at 26. The most frequent petitioners were the respondent's children, followed by nieces and nephews. *Id.* While fifteen percent were married, fully fifty-nine percent were widowed. *Id.* at 21.

One aspect awaiting further analysis is the observation that the average duration of guardianships decreased in each state, from 2.86 to 1.69 years in Iowa; 3.36 to 1.54 years in Missouri; and 3.36 to 1.54 years in Colorado. OLDER WARDS, *supra* note 17, at 179. Keith and Wacker conjecture that reforms may have caused guardianship to be viewed as truly a last resort, so interim steps delay the filing of a petition as long as possible out of regard for the individual's autonomy. *Id.* However, it is equally likely that families are avoiding an encounter with the reform guardianship system and its legal process, which is more intrusive on the family and more expensive than pre-reform adjudication.

34. OLDER WARDS, *supra* note 17, at 180; TCSG NAT'L STUDY, *supra* note 32, at 18–19, 100–01.

35. OLDER WARDS, *supra* note 17, at 177.

36. See *id.* at 177–79; see also ILL. GUARDIANSHIP REF. PROJECT: FINAL REP., Feb. 2001, at 19–20 (a report on the work of Equip for Equality, Morris A. Fred, Exec. Dir., a project to advance the human and civil rights of people with disabilities in Illinois) [hereinafter ILL. GUARDIANSHIP REF.] (noting that functional evaluation supports the implementation of limited guardianships when appropriate, the report finds that few have been created).

37. OLDER WARDS, *supra* note 17, at 178 tbl.10.2.

38. *Id.*

39. *Id.* at 178.

40. Kritzer et al., *supra* note 31, at 559. In one study, eighty-six percent of court files included the report of a physician, a hearing was held in only ninety-two percent of cases, ninety-four percent of case files included a notice of hearing, and eighty-seven percent of files included a guardian ad litem report. *Id.* at 562.

Nevertheless, the information supports observations that more stringent due process requirements are bypassed or implemented only as a matter of ceremony.⁴¹ For example, although reforms favored professional diagnosis and prognosis as a basis for appointment, one study found that seventy-two percent of petitions cited the infirmities of aging,⁴² while another study of several states found that physical illness associated with age was cited in forty-six percent of the cases despite the exclusion of advanced age as a basis for guardianship in various states.⁴³ Personal service of notice occurred in only sixty-five percent of the cases,⁴⁴ and the number of notices that included a statement of the rights of the respondent varied by state from ninety-eight percent to two percent.⁴⁵

Review of hearing policy produced mixed results which were frequently pessimistic about reforms. One state, Oregon, held no routine hearings.⁴⁶ As to the length of hearings, which generally should correlate with a careful and detailed review of the evidence, another study revealed that of 566 cases, twenty-five percent lasted less than five minutes, and fifty-eight percent lasted less than fifteen minutes.⁴⁷ Despite a statutory requirement that the respondent attend absent a specific finding by the court, seventy-five percent of guardian ad litem reports specified that the proposed ward should not be required to attend.⁴⁸ At least sixty-six percent of respondents were in fact absent, regardless of the statutory language.⁴⁹ Despite the reform emphasis on professional testimony, the record clearly indicated that a physician was present at only eight percent of hearings.⁵⁰ Further, many physician reports lack de-

In two percent of cases, the guardian ad litem clearly did not attend the hearing. *Id.* These statistics are greatly improved over the national APA report, but it is difficult to tell how much the reform statute affected process in the state of Wisconsin.

41. Keith & Wacker, *supra* note 31, at 165, 180.

42. Kritzer & Dicks, *supra* note 31, at 18.

43. TCSG NAT'L STUDY, *supra* note 32, at 38–39.

44. *Id.* at 42.

45. *Id.* at 43.

46. *Id.* at 44.

47. *Id.* Volunteers sat in on the hearings for this determination. *Id.* The presence of a guardian ad litem caused the smallest increase in the length of a hearing, which averaged eighteen to twenty-six minutes, while the greatest increase was caused by the presence of the respondent (from sixteen to thirty-seven minutes) or the attorney for a respondent. *Id.* at 45.

48. Kritzer & Dicks, *supra* note 31, at 12.

49. TCSG NAT'L STUDY, *supra* note 32, at 49–50. This finding seems surprising given the AP national statistic of forty-nine percent absent. *Id.*

50. Kritzer & Dicks, *supra* note 31, at 13.

tailed information about the respondent's decision-making capacities.⁵¹ A 2001 task force in Illinois found that courts often are not provided with sufficient detailed information about respondents' decision-making capacities, instead receiving information about physical or other impairments.⁵²

Most states do not require the court to appoint counsel for the respondent.⁵³ Perhaps more significant, where counsel was required, a review of the record showed that respondent's counsel might not speak at all at the hearing, which suggests an unusually passive role.⁵⁴ All guardian reports in one county were fully missing from half of the case files reviewed;⁵⁵ the inventory of assets by the guardian after appointment was absent in thirty percent of reviewed case files.⁵⁶

Late in 2001, a second conference on guardianship, entitled *Wingspan*, convened in St. Petersburg, Florida, to consider the current state of legal process and human impact.⁵⁷ Approximately eighty experts, including judges, private counselors, professional guardians, and public guardians, engaged in a somewhat different form of deliberations that nonetheless resulted in recommendations for reforms.⁵⁸ The *Wingspan* recommendations are grouped into six general areas: (1) Overview; (2) Diversion and Mediation; (3) Due Process; (4) Lawyers as Fiduciaries; (5) Monitoring and Accountability; and (6) Agency

51. ILL. GUARDIANSHIP REF., *supra* note 36, at 25. In Wisconsin, this author has found that the presence of the respondent often is waived by some judges, and that the respondent might be present and still be ignored.

52. *Id.*

53. TCSG NAT'L STUDY, *supra* note 32, at 54. Guardians ad litem are appointed with great frequency, in part due to reform emphasis on sound information before the court. *Id.* at 59.

54. *Id.* at 57.

55. Kritzer & Dicks, *supra* note 31, at 18 n.40. The author's query: Does a list of the respondent's assets found in eighty-three percent of case files indicate success? Or does the lack of the list in seventeen percent of files indicate a failure to provide adequate process? *Id.* at 12 n.19.

56. *Id.* at 15.

57. *Wingspan* was sponsored by Stetson College of Law, the National Academy of Elder Law Attorneys, the ABA Commission on Legal Problems of the Elderly, the Borchard Foundation, the National College of Probate Judges, the Supervisory Council of the ABA Section on Real Property, Probate and Trusts, the National Guardianship Association, the Center for Medicare Advocacy, the Arc of the United States, and the Center for Social Gerontology, Inc. See A. Frank Johns & Charles P. Sabatino, *Introduction: Wingspan—The Second National Guardianship Conference*, 31 STETSON L. REV. 573 (2002).

58. Timothy L. Takacks et al., *The Elder Law eBulletin*, LexisNexis, at <http://www.tn-elderlaw.com/telb/020108.html> (Jan. 8, 2002).

Guardianship.⁵⁹ In each area, recommendations are categorized as one of four types:⁶⁰ (a) recommendations for statutory change; (b) recommendations for change in practices or guidelines; (c) recommendations for education and research funding; and, (d) recommendations for further study.⁶¹ Some areas had no recommendations in categories (c) or (d).⁶² A total of sixty-eight recommendations were adopted by the invited conference participants.⁶³

A number of issues appeared in the Wingspan recommendations that did not arise at Wingspread. For example, recommendations in the “Overview” area of Wingspan addressed interstate jurisdiction over guardianship proceedings,⁶⁴ and thus the recommendations for research multiplied.⁶⁵ The specific recommendations appeared to reflect changes in society and the increased number and diversity of the conferees. Similarly, “Diversion and Mediation” recommendations are more detailed, reflecting a decade of interest in alternative dispute resolution and, no doubt, the conferees’ experience with clients who seek to avoid the potential courtroom confrontation that might result from guardianship reform proceedings.⁶⁶ The Wingspan Conference recommends better development of a variety of funding mechanisms,⁶⁷ perhaps because those who do not make advance directives are disproportionately poor. The importance of the growing field of practicing, non-family guardians departs from the emphasis on public guardians that captured the attention of the Wingspread group.⁶⁸

59. Johns & Sabatino, *supra* note 57, at 579.

60. These types are designated here by lower case letters for greater ease for readers. The organization and categorization of the recommendations began with conference planners, were advanced during the conference by group leaders, and appear in final form as drafted in a report by the staff of the ABA Commission on Legal Problems of the Elderly for presentation to the ABA House of Delegates to be adopted as the policy of that organization. See Memorandum from Nancy Coleman et al. to Commission on the Legal Problems of the Elderly Members (Apr. 12, 2002) (on file with the author) [hereinafter Memo to Comm’n Members].

61. See *Wingspan—The Second National Guardianship Conference, Recommendations*, 31 STETSON L. REV. 595 (2002) [hereinafter *Recommendations*].

62. *Id.*

63. *Id.* The recommendations do not purport to have the endorsement of individual sponsor organizations. *Id.* at 595 n.1. The recommendations, commentary, and dissenting opinions are available at <http://www.naela.com> (last visited Mar. 4, 2003). *Id.*

64. Johns & Sabatino, *supra* note 57, at 595.

65. *Id.* at 596–97.

66. *Id.* at 598–600.

67. See *id.* at 600.

68. This author wrote on the emerging issue of professional standards for practicing guardians. Alison Barnes, *The Virtues of Corporate and Professional*

As a whole, however, the recent Wingspan recommendations restate the thirteen-year-old Wingspread recommendations. The gist of the Wingspan recommendations assert the need for better education of all actors in the system, that guardianship be used only after all alternatives are deemed failed or inappropriate, advocate appointment of counsel for zealous advocacy and separate investigators, and enhanced judicial monitoring of the quality of existing guardianships.⁶⁹

In large part, guardianship reform for the elderly marches in place. It is far better than the deterioration likely to result from society's neglect and disinterest. It is likely that some of the more egre-

Guardians, 31 STETSON L. REV. 941 (2002). The National Guardianship Association Standards for Guardians appear after that article. *Id.* at 996. While the Conference endorsed the National Guardian Association's standards as a model for development of standards of practice for guardians, it explicitly declined to adopt the standards as a recommendation of the Conference. Any inferences that I endorse the current standards that might arise from the layout or table of contents of the issue are here refuted. This author raises specific problems with the standards. *Id.* at 977-80.

69. *Recommendations, supra* note 61 *passim*. Among the sharp dissent created by the recommendations, the President of the American College of Trust and Estate Counsel (ACTEC) includes objection to Recommendation 28, that counsel should always be appointed for the respondent and act as an advocate rather than as guardian ad litem. Letter from Carlyn S. McCaffrey, ACTEC President, to conference organizers, Rebecca Morgan, Charles Sabatino, and Frank Johns (Apr. 8, 2002) (on file with author) [hereinafter ACTEC Letter]. The College asserts that in certain circumstances counsel should follow through with agreements the respondent made prior to incapacity. *Id.* Whether this is in the best interests of the ward, and/or sound professional asset management and/or positive for society in general is unclear. *Id.* Further, ACTEC objects to the role of counsel in Recommendation 29, which it quotes as follows:

[i]n order to assume the proper advocacy role, counsel for the respondent and the petitioner shall: (a) advise the client of all the options as well as the practical and legal consequences of those options and the probability of success in pursuing any one of those options; (b) give that advice in the language, mode of communication and terms that the client is most likely to understand; and (c) zealously advocate the course of actions chosen by the client.

Id. ACTEC asserts that the recommended role conflicts with the requirements of reasonable diligence in Model Rule of Professional Responsibility 1.3, which include zeal and advocacy on the client's behalf. *Id.*

The liaison between the Commission on Legal Problems of the Elderly and the ABA House of Delegates observes that Recommendation 18, for judicial preference for appointment as guardian any person named in an advance directive, including a durable power of attorney, is in conflict with the Uniform Guardianship and Protective Proceedings Act, which he deems to recommend a better policy. Memorandum from James R. Wade to ABA Commission on Legal Problems of the Elderly (Feb. 13, 2002), *attachment to* Memo to Comm'n Members, *supra* note 60. The UGPPA includes a priority list but gives the Court freedom to appoint another, regardless of lower or lack of priority, if it is in the best interests of the ward. *Id.*

gious wrongs are curtailed. Yet, it remains outside the mainstream of disability advocacy, which has won significant recognition in favor of implementation of assistance.⁷⁰ Mainstream recommendations from a national field of experts recognize increasing complexity in legislation, litigation, and delivery of guardianship services, without identifying the problems that impede the widespread implementation of practices that are clearly better, according to the law, and have been recommended for a decade.

B. The Laws of Wills: Reform Again with Few Results

The laws of wills and inheritance of property have, like guardianship laws, undergone reforms in the past two decades.⁷¹ Commentators in favor of the primary principle of testamentary freedom won changes in the revised Uniform Probate Code (UPC) of 1990,⁷² easing the formalities of execution.⁷³ While the existence of the testator's intent is usually shown by fulfillment of certain formalities in writing a will, judicial insistence on rigid fulfillment of formality requirements can result in rejection of a document clearly intended to be a will.⁷⁴

The formalities required to make a will have varied, perhaps reaching a peak in the nineteenth century.⁷⁵ A full array of will formalities typically includes that the will be (1) in writing; (2) signed by the testator (possibly at the end); (3) in the presence of two witnesses; (4) attested by the witnesses in the testator's presence (and possibly in each others' presence); and (5) "published" or declared by the testator

70. See, e.g., *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999) (requiring the state of Georgia to provide access to community-based care within a reasonable time for individuals deemed capable of living in the community and living in institutions). Like appellate opinions regarding contested guardianship, the state's obligation to provide community-based services for those who can use them is found in cases involving litigants, such as mentally disabled individuals, who are not old. See *id.*

71. See Leslie, *supra* note 10, at 236.

72. See UNIF. PROBATE CODE § 2-502 (1993).

73. See, e.g., Leslie, *supra* note 10, at 236, 239 (stating that the threat to testamentary freedom from strict adherence to formality requirements has been "a dominant theme in estates law scholarship" over decades).

74. See *id.* at 235; Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 2-5, 9-10 (1941) (noting that the requirements of execution "should not be revered as ends in themselves, enthroning formality over frustrated intent").

75. Adam J. Hirsch, *Inheritance and Inconsistency*, 57 OHIO ST. L.J. 1057, 1060 (1996) (examining the acceptability of nuncupative wills based on testimony of neighbors and others). The brief report raises the question of whether land and other unique assets were subject to another, less malleable mode of proof. *Id.*

to the witnesses to be his or her will.⁷⁶ The purposes of the formalities are widely considered to help assure that the writer intended to express testamentary intent and that the document itself be a will, that the writing was not coerced or obtained through fraud or undue influence, and that the testator has sufficient capacity to make a will.⁷⁷

When formalities are strictly enforced by the courts to refuse probate of a will, the testator's actual intent is almost inevitably defeated.⁷⁸ The denial of probate therefore flies in the face of the principle of control by testamentary freedom.⁷⁹ Thus, reducing formality requirements should result in more wills being admitted for probate, thereby giving effect to their testators' intent.⁸⁰

The revised UPC provisions of 1990 simplify the formality requirements without abandoning them.⁸¹ The Code's requirements include only minimal formalities of a writing, signature of the testator, and attestation by two witnesses.⁸² A number of states had already

76. Leslie, *supra* note 10, at 290 n.13.

77. *Id.* at 235-39 & nn.13-18; Hirsch, *supra* note 75, at 1065-66.

78. Leslie, *supra* note 10, at 235.

79. *Id.*

80. *See id.* While advocating the sufficiency of substantial compliance, another view recognizes the usefulness of formalities because they assist in easy identification of will documents:

The standardization of testation achieved under the Wills Act also benefits the testator. He does not have to devise for himself a mode of communicating his testamentary wishes to the court, and to worry whether it will be effective. Instead, he has every inducement to comply with the Wills Act formalities. The court can process his estate routinely, because his testament is conventionally and unmistakably expressed and evidenced. The lowered costs of routinized judicial administration benefit the estate and its ultimate distributees.

John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 494 (1975).

81. UNIF. PROBATE CODE § 5-502 (1993), Execution; Witnessed Wills; Holographic Wills, provides as follows:

(a) Except as provided in subsection (b) and in Sections 2-503 . . . a will must be (1) in writing; (2) signed by the testator or in the testator's name by some other individual in the testator's conscious presence and by the testator's direction; (3) and signed by at least two individuals, each of whom signed within a reasonable time after he [or she] witnessed either the signing of the will as described in paragraph (2) or the testator's acknowledgement of that signature or acknowledgement of the will . . . [section on holographic wills omitted]

(c) Intent that the document constitute the testator's will can be established by extrinsic evidence . . .

Every state has at least these formalities in its Wills Act. Hirsch, *supra* note 75, at 1060. For a brief history of the formalities required to make a will, see also Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1035-38 (1994).

82. UNIF. PROBATE CODE § 2-502 (1993).

adopted similar provisions, sometimes retaining more formalities than the UPC.⁸³ States continue to have variable requirements, although eighteen states have adopted significant portions of the UPC.⁸⁴

To further reduce the power of formalities compliance to restrain testamentary freedom, the revised UPC section 2-503 includes a dispensing power:

Although a document . . . was not executed in compliance with Sec. 2-502, the document . . . is treated as if it had been executed in compliance with that section if the proponent of the document . . . establishes by clear and convincing evidence that the decedent intended the document to constitute (i) the decedent's will . . .⁸⁵

Thus, if the court finds that the testator has intended to make a will, it may accept the document admitted for probate even though it fails to comply with the formality requirements of the jurisdiction that has adopted a dispensing power.⁸⁶

The rollback of will formalities has seen limited success. First, relatively few states have adopted sections 2-502 and 2-503.⁸⁷ Further, courts have been reluctant in some cases to implement reforms, and

83. See, e.g., Leslie, *supra* note 10, at 274–78.

84. Robert Whitman, *Revocation and Revival: An Analysis of the 1990 Revision of the Uniform Code and Suggestions for the Future*, 55 ALB. L. REV. 1035, 1043 n.58 (1992).

85. UNIF. PROBATE CODE § 2-503 (1993). The Restatement (Second) of Trusts further encourages courts to allow the probate of wills in substantial compliance with formalities. Langbein, *supra* note 80, at 507. Langbein advocated the dispensing power provision of the UPC after he deemed the use of “substantial compliance” in the courts of Queensland to be a failure and the use of a dispensing power in the courts of South Australia to effectively govern the admissibility of wills to probate. See generally John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1, 52–53 (1987) (inferring from forty-one cases that the dispensing power produced reasoned and consistent results). Professor Leslie points out a likely error in Langbein's analysis, noting that the success of the dispensing power might be attributed to the fact that South Australia had statutory protections for disinherited family members, so the court could admit the will for probate without causing irreversible hardship within the family. Leslie, *supra* note 10, at 237.

86. Langbein, *supra* note 85, at 6. The provision regarding the dispensing power is particularly interesting in that it represents the first time extrinsic evidence is allowed to establish or interpret formally executed wills aside from instances of patent ambiguities. Leslie, *supra* note 10, at 279. By 2000, Section 2-503 had been adopted in six states: Colorado, Hawaii, Michigan, Montana, South Dakota, and Utah. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 statutory note 1 (1999) [hereinafter RSTMT. 3D].

87. RSTMT. 3D, *supra* note 86; Leslie, *supra* note 10, at 242 (fifteen states have adopted § 2-503); see also C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislature Reform: An Examination of the New Uniform Probate Code “Harmless Error” Rule and the Movement Toward Amorphism*, 43 FLA. L. REV. 599, 672 (1991) (discussing portions of code adopted and dispensing power).

judicial decisions often fail to reflect their jurisdiction's statutory law on formalities.⁸⁸

A review of the research is enlightening. Professor Leslie searched nationally for anomalies in wills decisions and for illustrative cases turning on flawed formalities.⁸⁹ Specifically, she looked at cases in which the challenge related to witnesses signing in the conscious presence of the testator and questionable fulfillment of the signature requirements where the testator was assisted in signing the will.⁹⁰ Professor Leslie found significant evidence that courts vary from case to case in the rigor with which they enforce formalities requirements.⁹¹ Thus, for example, in one case the will which is signed by witnesses around a corner and out of sight of the testator is deemed to be "in the conscious presence" and upheld.⁹² Yet in another case on similar facts, the will fails, lacking required formality.⁹³

In addition, she found that the doctrine intended to invalidate a will due to lack of intent is used selectively by courts to favor dispositions to family members.⁹⁴ In this instance, she reviewed cases in which the challenge to a will alleged undue influence.⁹⁵ Undue influence requires that the testator be coerced to make dispositions in a will as a result of influential words or acts of another⁹⁶ or that the influence imposes such control over the testator that the will of the other is substituted for the testator's.⁹⁷ Evidence of a confidential relation-

88. See Hirsch, *supra* note 75, at 1058–59; Mann, *supra* note 81, at 1036, 1040–41. Hirsch observes that the law of wills and inheritance of property has "a nebulous, unguided quality" despite UPC reform, and that others have noted the inconsistency. Hirsch, *supra* note 75, at 1058–59. See generally John T. Gaubatz, *Notes Toward a Truly Modern Wills Act*, 31 U. MIAMI L. REV. 497 (1977) (arguing there is little relationship between the rules of law and the stated objectives of proof of wills and will construction).

89. Leslie, *supra* note 10, at 260–66.

90. *Id.* at 266–73.

91. *Id.*

92. *Id.* at 261.

93. *Id.* at 260.

94. *Id.* at 255–57.

95. Leslie examined all cases between December 31, 1984, and January 1, 1990, and listed in Westlaw under topic number 409 (Wills), key numbers 154–66 (undue influence and related evidentiary and procedural issues) in which the court considered undue influence on motion for summary judgment, directed verdict, or judgment notwithstanding the verdict. *Id.* at 243–44 & nn. 41–42. The cases totaled 160. *Id.*

96. JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUSTS, AND ESTATES* 144 (4th ed. 1990), *citing* *Wingrove v. Wingrove*, 11 Prob. Div. 81 (1885).

97. *Lipper v. Weslow*, 369 S.W.2d 698, 703 (Tex. Civ. App. 1963), *cited in* DUKEMINIER & JOHANSON, *supra* note 96, at 144.

ship between the two supports an inference of undue influence, although the finding is not necessary for a legal conclusion of undue influence.⁹⁸ In particular, courts showed little consistency as to what indicates a confidential relationship.⁹⁹

The laws of wills and inheritance were subject to recommended reforms, both in the UPC and in state legislatures.¹⁰⁰ Selected reforms were adopted in the states.¹⁰¹ Yet, as with guardianship reform, it appears that the reformers' intentions are largely unrealized.

C. The Common Threads of the Reforms

For some elder law attorneys, pointing out the similarities between guardianship and inheritance reforms is a sufficient basis to establish inferences about ageism and denial of rights for elders.¹⁰² However, a careful catalog of the parallels between guardianship proceedings and will contests may lead to insight into new initiatives, or to an understanding of why and how to reconsider these initiatives.¹⁰³

First, it must be observed that the population at issue is older people with some property, however modest or substantial its value. The time at which we are concerned with these individuals is relatively short, that being when they anticipate the end of their lives.¹⁰⁴

98. Leslie, *supra* note 10, at 257. "Undue influence is one of the most bothersome concepts in all the law. It cannot be precisely defined." DUKEMINIER & JOHANSON, *supra* note 96, at 143. Courts have purported to require proof that the testator was susceptible to undue influence, the influencer had the disposition and opportunity to exercise the influence, and that the disposition results from the influence. *Id.* at 144.

99. Leslie, *supra* note 10, at 254–55.

100. *Id.* at 240.

101. *Id.*

102. Guardianship as a form of coercion for noncompliant elders is not a new subject. See, e.g., Annina Mitchell, *The Objects of Our Wisdom and Our Coercion: Involuntary Guardianship for Incompetents*, 52 S. CAL. L. REV. 1405, 1431 (1979).

103. The two areas, while clearly having similarities, usually are not considered together, probably because they are considered parts of very different legal fields. Inheritance is considered a part of the broader traditional doctrines of property, and guardianship (especially during reform) as part of the doctrines on civil rights and patient rights. The primary connection lies in the historical anomaly that both are heard in probate courts. On the identification of related fields, and impact of mistakes in identification, see generally Hirsch, *supra* note 75, at 1057.

104. Of course, younger people sometimes anticipate their deaths, and may make decisions about property or make wills. For the physically chronically disabled, the impact of such choices is not great, because this group on average has very little in assets, and perhaps the sympathetic societal perception that they should be accorded broad choices within their capabilities. See generally Alison P. Barnes, *The Policy of Politics of Community-Based Long-Term Care*, 19 NOVA L. REV.

The individual makes decisions about the property or assets, which may take the form of drafting a will or deciding to spend. The decisions represent change that may redirect valuable assets. They also may be implied by committing to a new relationship or obligation, or by endorsing a charitable cause that seeks funds from its constituency. Someone, usually a family member, objects to the nature of the decisions or fears the loss of assets when these become known, and then seeks a legal cause of action. If the objecting individual ignores these legal channels, the individual's independent acts may be tabulated as elder financial abuse during life, and simply theft or conversion after death. If the facts and the status of the participants support an action during the decision maker's lifetime, the only individual generally available to take the control of property is an involuntary guardian (or, in some states, a conservatorship arrangement—a guardianship of the property). If the principal problems are in the will or the facts favor a claim after the death of the property owner, then the legal action is a will contest.

Each of the reforms in guardianship law and inheritance law seeks to establish a focus on the individual, a focus deemed by reformers to be lacking.¹⁰⁵ The reforms are to be accomplished by means that appear to be contradictory, but in light of the underlying doctrine, are essentially the same. That is, each reform seeks to adjust the process of the inquiry in order to "return" to a question of the principal's intentions, which are deemed ideally to be at the heart of the matter. In the process of will reform, the formalities are to be simplified so the uninformed or inattentive testator can nevertheless have her intent carried out. In the process of guardianship reform, the individual receives more procedure to test the evidence of incapacity in order to preserve her right to autonomy, to the extent that autonomy exists. The focus is on the alleged incompetent individual through the professional evaluation of the evidence, and ideally of the physical, mental, and, especially, functional capabilities.

In each inquiry, the nature of the process is to be reformed by the input and valuing of different information in order to protect autonomous decisions. In guardianship, the rigorous evaluation of

487 (1995). As to the distinction between elders and younger disabled people who might be engaged in similar activities at issue, see *id.* at 495.

105. See generally Barnes, *supra* note 11 (discussing importance of the individual's role).

functional capacity and representation of the respondent's wishes are recommended to test the validity of the allegations in the petition. Similarly, a careful evaluation of any deviations from required will formalities may indicate the invalidity of the will, and the court should, if possible, determine whether the will nevertheless reflects the testator's intent. Process is amended to cue and facilitate greater attention to the choices of the elder. Thus, the parallel processes between guardianship for the elderly and will contests are identified. The analogous operations of each remain to be examined, including the possibility that the failures of reforms have a common basis.

Other aspects of the causes of action serve to limit any doubts that the principal difference is not substantive, but is a relatively small gap in timing to encompass a death. For example, the claim of undue influence invoked in will contests to invalidate the testator's expressed intent is analogous to the basis for guardianship or conservatorship termed "vulnerability" or, in the terms of an older statute, "being imposed upon by artful and designing persons."¹⁰⁶ In each issue of the individual's intent, capacity to make a will or make a life decision, the extent of capacity is dependent not only on the individual, but in very significant part on the nature of the other(s) with whom the individual interacts. To some extent, the individual's capacity depends also on the nature of the decision, because a person with the intent to change the principal's true decision might more easily confuse or deceive if the subject is complex and abstract. It would appear that the same "artful and designing persons" might seek advantages in either a guardianship proceeding or a will contest.

Other legal issues appear in both guardianship and will actions.¹⁰⁷ A doctrine that directly attacks the testator's intent is lack of mental capacity to make a will. In order to produce a valid will, the testator must have: at least minimal capacity, knowledge of the nature and extent of his or her property, knowledge of the persons who are the natural objects of his or her bounty, knowledge of the disposition being made of the property, and how the elements relate to an orderly plan for disposition of the testator's property.¹⁰⁸ The determi-

106. Compare George Alexander, *On Being Imposed Upon by Artful and Designing Persons: The California Experience with the Involuntary Placement of the Aged*, 14 SAN DIEGO L. REV. 1083, 1084-90 (1977), with Leslie, *supra* note 10, at 243-46.

107. Professor Leslie finds that courts may also manipulate the standard of proof and ignore significant evidence. Leslie, *supra* note 10, at 252 & n.80.

108. DUKEMINIER & JOHANSON, *supra* note 96, at 132.

nation of capacity is acknowledged to be difficult and fraught with uncertainties even when the individual is before the court.¹⁰⁹ Much harder it is to determine whether an individual had sufficient capacity at a past date, perhaps long past. One would expect that in applying the standard that only minimal capacity is required to make a will, a challenge on the basis of lack of capacity would be nearly useless.¹¹⁰ However, in a will contest, the judicial preference for a family-oriented norm creates an inference unintended in the law.¹¹¹ In order to be found competent, the testator must know who are the “natural objects of (his or her) bounty,” that is, close family members. When the will disposes of substantial property to persons who are not close family members, the evidence of incapacity mounts.¹¹² The circular reasoning tends to mark nontraditional dispositions as products of an incapacitated mind.

It appears that inheritance law reformers are engaged like guardianship reformers, in rearranging the furniture on the decks of a ship that has not altered course. The presence of family issues is clear in each area of law, but thus far no body of guardianship case law illustrates the propensity of courts specifically to manipulate statutory standards and common-law doctrines to achieve particular results. Nevertheless, it is reasonable to inquire further for evidence that the two reforms are essentially the same in their motivations, actors, and social significance.

III. The Family, Individual Rights, and the Law

The element that remains to be explored is the preference for family as revealed in recent research in will contests and inheritance.¹¹³ Professor Leslie found that courts are inclined to accept for probate those wills naming close family members as beneficiaries and

109. See, e.g., Bulcroft et al., *supra* note 15, at 161; Madelyn Anne Iris, 29 GERONTOLOGIST 39, 44 (Supp. 1988) (describing the various standards and participants involved in the process).

110. See, e.g., *Jeffries v. Thaiss*, 2002 WL 31188544 (Va. Cir. Ct. 2002) (where decedent had some type of cognitive impairment but was still found to have had testamentary capacity).

111. See Leslie, *supra* note 10, at 236.

112. See Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 235 (2001); Frolik, *supra* note 2, at 877 (noting that even unequal division among children “raises eyebrows”).

113. See Leslie, *supra* note 10, at 244.

to reject wills in which non-family members are beneficiaries.¹¹⁴ For example, of seventy cases in which challengers alleging undue influence were related to the testator in substantially equal degree to the beneficiaries, the will was upheld in fifty-two of these cases.¹¹⁵ In contrast, of thirty-six cases in which relatives challenged their disinheritance in favor of non-relatives, the court found undue influence in fifty percent.¹¹⁶

Guardianship includes a preference for family that has been critiqued in the past, but in large part accepted, apparently because family members are presumed to be in a caregiving relationship with the prospective ward.¹¹⁷ In order to have a similar empirical base in guardianship cases for comparison as with will contests, however, researchers would have to identify cases in which elderly individuals made gifts or provided support for a non-family member (strictly speaking, a new family member, if a marriage takes place) and also indicated that that person should serve as guardian in case of need. Alternatively, the ward might have a pattern of giving to non-family causes that the family guardian declines to follow, thereby directly or indirectly benefiting family members. These cases identify guardianship situations analogous to will cases favoring a nontraditional disposition. In each case, family members object to the elder's choices.

Unfortunately, no such trove of contested guardianship opinions exists. Indeed, appellate opinions in guardianship cases involving the aged are infrequent; opinions that announce judicial approval of autonomy almost always involve the choices of younger, disabled people.¹¹⁸ Guardianship, like cases of flawed will formalities,¹¹⁹ must for the moment be examined with reference to rules, examples, and inferences.

114. Professor Leslie acknowledges that too few cases appear annually for appellate decisions in which formalities are at issue. *Id.* at 259. Nevertheless, in the context of her research on manipulation of doctrine and preference for family members, she offers a selection of cases that are likely to be familiar in their general fact patterns to experienced practitioners and commentators. For other findings from her research, see *supra* note 95 and accompanying text.

115. *Id.* at 244 n.42.

116. *Id.*

117. Alison P. Barnes, *Commentary: The More Things Change: Principles and Practices of Reformed Guardianship*, in *OLDER ADULTS DECISION-MAKING CAPACITY* 254 (Michael Smyer et al. eds., 1996) [hereinafter *OLDER ADULTS*].

118. This, in itself, may be an indication of society's and/or the law's negative treatment of appeals by older people.

119. See Leslie, *supra* note 10.

A. The Family Ties That Generate Will Contests

As Professor Leslie observes, courts sometimes rely on family ties to indicate the correct beneficiaries in a contested will, contrary to the doctrine of testamentary freedom.¹²⁰ Initially, Leslie observes the phenomenon from the view of the law, with disapproval of the courts' deviation from decisions based on the rules of the law.¹²¹ However, the question of the status of family has a life and literature of its own.

A number of commentators have observed that decisions in support of the family structure are correct and positive.¹²² The institution of devolution of property within the family has been defended as fundamental to a stable, productive society in which individuals are motivated to produce more over a lifetime than they need.¹²³ In a subsequent article, Professor Leslie characterizes the basis for family preference in will contests as recognition of promises arising from long-term, interdependent relationships.¹²⁴ Professor Leslie points out that family relations include implicit or sometimes express promises of benefit by elders for which younger family members provide support; this dynamic is termed "reciprocity norm," borrowed from commercial contract law.¹²⁵ She asserts that courts often change the disposition of property because they recognize "bargains" made over the course of the family relationships.¹²⁶ The judicially imposed changes are a correction for the "rugged individualist" that is the testator in American law, unfettered by any of the relations and obligations developed in a lifetime.¹²⁷

Professor Leslie bases her observations, and at least tentative approval, on creative literature about bargains.¹²⁸ She proposes that family members have a rebuttable presumption that they have a reciprocity-based claim that competes with a non-family beneficiary.¹²⁹

120. *Id.* at 236.

121. *See id.* at 236-37.

122. *See generally* Mary Louise Fellows, *In Search of Donative Intent*, 73 IOWA L. REV. 611 (1988) (stating that the family preference is positive and that courts should apply a presumption in favor of the family because a majority of testators favor family).

123. *See* Foster, *supra* note 112, at 204.

124. Melanie B. Leslie, *Enforcing Family Promises: Reliance, Reciprocity and Relational Contract*, 77 N.C. L. REV. 551, 553-54 (1999).

125. *Id.* at 554-55.

126. *Id.* at 586.

127. *Id.* at 552-53.

128. *See id.* at 554-56 & nn.4-14.

129. *See id.* at 588.

Leslie based this in part on the fact that “most people are aware of the family norm or passing assets intergenerationally within families and disinheriting only for cause.”¹³⁰ Leslie includes the requirement that family members act like family, providing basic support needs and making themselves attentive and available.¹³¹ Her views tend to support the idea that courts should review the testator’s disposition of property and correct the terms that are not “fair” to family members who have relied upon and cared for the deceased.¹³² The question of the worthiness of the taker therefore is the issue to be explicitly addressed before the court, with differing burdens on the non-family-member beneficiary and the family-member contestant of the will.

Professor Frances Foster, in her 2001 article, explores the analysis of testamentary disposition to family members.¹³³ She argues against the family paradigm because it is likely to exclude persons who are not in a traditional family relationship, but rather have ties of commitment or caregiving without bonds of blood or marriage.¹³⁴ She is particularly critical of the family paradigm as tending to exclude claims of non-relative dependants for support from the estate of the deceased.¹³⁵ Among the corrections Professor Foster considers is a “functional approach” that would identify those who act like family members and exclude those family members who abandoned the deceased as unworthy of taking.¹³⁶ If a “family paradigm” cannot be abandoned, she recommends a change in the definition of family to include persons in family-type relationships of support by the elder or care and companionship to the elder by persons presently considered to be unrelated.¹³⁷

Each commentator, while making contributions to the explanation for standardless judicial decisions in will contests, includes reasoning that returns to a societal standard of “worthy” persons, who are finally subject to discernment by the court. Neither author en-

130. *Id.* Leslie notes that six or seven percent of testators disinherit close family members. *Id.* at 587 n.120.

131. *Id.* at 588.

132. *See id.* at 630–36.

133. Foster, *supra* note 112 (discussing the family paradigm in wills and intestacy law that serves to protect the interests of family members despite contrary intention of the deceased).

134. *Id.* at 209–16.

135. *Id.* at 226.

136. *Id.* at 232.

137. *Id.* at 227–31.

dorses the empowerment of testamentary freedom over some less singular standard. To the extent that each endorses some version of assumptions about life relationships, their arguments are essentially anti-testator's intent, implicitly criticizing the ideal of testator's intent as failing to reflect the true dynamics of relationships.

B. Relationships in the Family of the Guardian and Ward

Guardianship clearly contemplates a preference for family.¹³⁸ Many state guardianship statutes express the preference for appointment of a relative.¹³⁹ Others provide a priority list of persons to be appointed guardian that typically tracks the priority found in intestacy laws: spouse, adult child, parent.¹⁴⁰ Because the role of guardian is a caregiving one, however, some statutes include in the priority list the nominee of the ward, and/or cohabitants of some duration, thereby deviating from a pure family preference.¹⁴¹ One statute includes "a relative or friend who has demonstrated a sincere, long-standing interest in the welfare of the incapacitated person."¹⁴² Because guardianship is a care-providing relationship, however, the most obvious, traditionally oriented inference is that family members are most likely to be reliable in such a role.

Guardianship petitions are filed by family members in a significant proportion of cases, though this varies from state to state.¹⁴³ Even in a state where a large proportion of guardianships are initiated by social services agencies, family members initiate guardianship proceedings fifty-three percent of the time when the respondent resides in the community.¹⁴⁴

Nevertheless, family is "deeply involved" in a high proportion of guardianship cases: in seventy-seven percent of petitions, the proposed guardian is a family member, and the estimated total of guardi-

138. See SCHMIDT, *supra* note 15, at 154.

139. See, e.g., FLA. STAT. § 744.312 (1997).

140. See, e.g., COLO. REV. STAT. § 15-14-311 (1997).

141. ALASKA STAT. § 13.26.145(1), (4) (Michie 2000).

142. *Id.* § 13.26.145(d)(5).

143. See Kritzer & Dicks, *supra* note 31, at 8 (in Wisconsin, the petition was initiated by a family member in forty-one percent of cases, less often than by a social service agency). The high participation of social services agencies may represent avoidance of guardianship by middle-class families or a significant population of younger, mentally disabled adults with more current ties to social services than to their families.

144. *Id.* at 8-9.

ans who are family members is eighty-five percent.¹⁴⁵ The caregiving of the family is difficult to gauge; however, the hours of caregiving per day and week apparently remain high.¹⁴⁶

Only secondarily does it occur, perhaps because of guardianship reform discourse, that power flows to the guardian, not only over the ward's choices (which, presumably, the ward is incapable of making), but also over the ward's assets. The statistics of reform guardianship provide a little insight. First, a petition for guardianship of the property is significantly more likely to cite the infirmities of aging as the reason.¹⁴⁷ Further, requests for guardianship of the property are more likely to seek plenary powers.¹⁴⁸ Other researchers report, based on interviews with guardianship participants, that adversarial guardianship proceedings do not generally provide opportunity for respondents to speak for their interests because of fear that a challenge would disrupt family relationships and cause retaliation by family caregivers.¹⁴⁹

The preference for and involvement of family in guardianship is significant in nullifying the effects of guardianship reform.¹⁵⁰ A principal impediment to implementation is that the reform model originated with those involved with guardianships other than family guardianships for elderly people.¹⁵¹ The two groups instrumental in developing the reform model were advocates for persons with developmental disabilities and those for quality social services for the poor.¹⁵² The circumstances of participants in each of these groups are quite different from those of elderly people and their families, and are better suited to the reform measures of limited guardianship and

145. *Id.* at 10.

146. TCSG NAT'L STUDY, *supra* note 32, at 71–72 (finding hours of care were not significantly diminished although an estimated forty-six percent of petitioners sought nursing home placement for prospective wards).

147. See Kritzer & Dicks, *supra* note 31, at 8 (noting that the infirmities of aging (that is, a “diagnosis” that is not identified with a specific physical or mental diagnosis) are cited in a mere thirty-seven percent of petitions for guardianship of the person only, while seventy-one percent of petitions for guardianships of the person and property are likely to cite “infirmities of aging”).

148. See Kritzer & Dicks, *supra* note 31, at 41.

149. TCSG NAT'L STUDY, *supra* note 32, at 53, *citing* Bulcroft et al., *supra* note 15, at 162.

150. See generally Barnes, *supra* note 117, at 254–55.

151. See *id.* at 255. An estimated seventy-five percent of guardians are family members. Phillip B. Tor & Bruce D. Sales, *A Social Science Perspective on the Law of Guardianship: Directions for Improving the Process and Practice*, 18 LAW & PSYCHOL. REV. 1, 35 (1994).

152. Barnes, *supra* note 117, at 255.

greater procedural due process, both of which modeled on law reforms to protect the rights of mentally ill persons.¹⁵³

Advocates for people with developmental disabilities frequently are family members, but their situation differs from that of family guardians for elders.¹⁵⁴ Most often the guardian is the parent or sibling of the developmentally disabled person and has always had responsibility for meeting the needs of the prospective ward.¹⁵⁵ In addition, the ward has never been competent and so has a known and limited range of preferences to be respected. For this group, the disabilities of the ward are known and are well served by the functional assessment approach to defining the ward's need for guardian assistance. More rigorous due process represents a promise of greater protection for the ward in the future when no family member may be available to serve as guardian, rather than a question by the courts about the fitness of family members currently serving as guardians. The stability of the symptoms of the developmental disability is well-suited to limited guardianship, which might continue without change for decades. The use of reform guardianship therefore raises few controversies when used for people with developmental disabilities and might provide important protection from exploitation.

Social services providers, in contrast, approach guardianship reforms from the perspective of wards that have little in the world besides their human and civil rights.¹⁵⁶ Reform advocates serving the poor are often lawyers, and therefore see the guardian/ward relationship in its appropriate legal terms, that is, as a relationship between the individual and the state.¹⁵⁷ The construction of such a relationship should include due process to enable individuals to raise any and all personal interests so they are not burdened or taken by the state.

Neither people with developmental disabilities nor those who are incapacitated and poor have personal assets to be protected for

153. *See generally id.* at 261–64.

154. Kritzer et al., *supra* note 31, at 559.

155. An interesting finding from review of guardianship case files is that formal guardianship usually is not sought by parents of a developmentally disabled person at the time of the child's majority. *Id.* at 561. Rather, petitions appear for guardianship over much older developmentally disabled persons. It is likely that the formal proceeding is delayed until the parents are unable to provide assistance due to age, disability, or death, at which point a court-appointed guardian becomes necessary. *See id.*

156. Barnes, *supra* note 117, at 259.

157. *See generally* Barnes, *supra* note 68, at 941.

use later in their lives.¹⁵⁸ Thus, the weight of concern for civil and human rights looms much greater than the concern for sound property management. This concern is all the more important because housing and personal care purchased for the minimum cost in the market will more often fail to meet basic needs, exposing wards to neglect and abuse if careful monitoring is lacking. A guardian must be chosen carefully and held to standards of quality appropriate to a state actor.¹⁵⁹

In contrast, older wards frequently have significant property, the management of which is important not only to beneficiaries, but also in assuring quality of life for the ward throughout old age. The property is not more important than civil or human rights, surely, but instead is a means by which to deliver quality long-term care selected from the options the community offers. In keeping with this view, it seems most reasonable that the principal opposition to guardianship reforms is the state bar's section of real property, probate, and trust lawyers.¹⁶⁰ For these attorneys, their clients' interests are best served by professional management of the assets, often with cooperation and assistance from family members.¹⁶¹ Limited guardianship complicates the ability of an attorney and the family to manage the property by raising questions in the minds of third parties to management transac-

158. People with disabilities, including developmental disabilities, are likely to have minimal assets and income in the lowest bracket reported by the U.S. census. Barnes, *supra* note 104, at 496.

159. See generally Penelope A. Hommel, *Guardianship Reform in the 1980s: A Decade of Substantive and Procedural Change*, in OLDER ADULTS, *supra* note 117 (Michael Smyer et al. eds., 1996); Charles P. Sabatino, *Competency: Refining Our Legal Fictions*, in OLDER ADULTS, *supra* note 117, at 1, 3 (discussing how guardianship is a trigger to tell us when the state legitimately can take action to limit an individual's rights to make decisions about his or her own person or property).

160. The stance of the Wingspan recommendations—strongly in favor of rights of wards—illustrates the dissatisfaction of probate and trust lawyers with constraints on their management of assets. The American College of Trust and Estate Counsel (ACTEC) expressed objection to the manner in which the Conference recommendations were reached, noting that the final process differed from that originally contemplated. ACTEC Letter, *supra* note 69. Thus, rather than the original cap of thirty recommendations, sixty-eight were adopted during the final plenary session of three hours and forty-five minutes. *Id.* Of these, seven recommendations received close votes that called for discussion. Each speaker was limited to one minute on any question, with total time for any proposal limited to ten minutes. *Id.* ACTEC believes the ground rules “made effective interchange and discourse impossible” and the recommendations “deeply flawed.” *Id.*

161. Barnes, *supra* note 117, at 258–59 (noting that the same counselors generally seek to avoid the need for guardianship and through advance directives handle all their clients' property issues privately).

tions, because the extent of the guardian's authority is not the familiar plenary power.¹⁶²

To the extent that guardianship acts to disadvantage family members in their relationships with their elderly relative, it is likely to be seldom used.¹⁶³ The reforms place unwanted burdens on the family members of elderly wards in a number of ways, beginning with the basis of elderly individual rights to testamentary freedom.¹⁶⁴ The perspective and rhetoric of individual legal rights is particularly unsuited to the relationship between these participants in guardianship, a relationship that exists to provide care over time, giving and receiving based on trust, duty, need, and, ideally, love.¹⁶⁵ The values system of such long-term caregiving could be termed an ethics of accommodation.¹⁶⁶

It appears that guardianship reform is particularly ill-suited to the circumstances and relationships of most elderly wards. Rather, it is directed toward subgroups with distinct legal rights issues. Recognizing this, why has no further reform in the law been proposed? Why do most states continue to address guardianship for younger disabled wards and elderly wards under the same statute? And why

162. *Id.* at 255–56. Courts may be inclined to believe that no older ward has the possibility for improvement from their level of incapacity at the time of hearing, a widespread fallacy termed decrement. See generally Robert Rubinson, *Constructions of Client Competence and Theories of Practice*, 31 ARIZ. ST. L.J. 121 (1999) (stating that decrement is a single, pervasive assumption about the elderly that exerts a profound influence on how attorneys and the elderly construe competence and communicate with each other). This poses questions of increasing complexity and must in large part be left for another article. However, it is worth noting that many older people are in a crisis and at their worst point when a guardianship is sought, and are likely to improve with stability and adequate assistance. *Id.* This applies to virtually all diagnoses that leave the ward conscious; even Alzheimer's patients improve and may have few symptoms for years on a regimen of pharmaceuticals for depression and confusion. See Barnes, *supra* note 117, at 263.

163. On the growing number of professional guardians, see generally Barnes, *supra* note 68 (examining the potential to professionalize nonlawyer guardians as a means to assure quality of services to their wards).

164. See *Monroe v. Shrivvers*, 29 Ohio App. 109, 112 (1927). The paradigm of individual rights asserted in response to oppression arises from eighteenth century political philosophy, describing the relationship between the individual and the sovereign state. See GLENDON, *supra* note 1, at 17 (stating that the paradigm of rights oversimplifies the relationships between individual and government, and between individuals). Thus, while a consideration of rights—civil and human—is relevant to the discussion of guardianship, it cannot be expected to characterize the relationship in a family guardianship.

165. This author first published a discussion of the three difficulties with guardianship reform implementation. Barnes, *supra* note 117, at 254–68.

166. Bart Collopy et al., *The Ethics of Home Care: Autonomy, and Accommodation*, 20 HASTINGS CENTER REP., Mar./Apr. 1990, at 1, 1.

do advocates stump without result for active monitoring over the course of the guardian/ward relationship?

The underlying cause for ignoring the law (and neglecting reforms to make it responsive to the most frequent circumstances) is that society favors the transfer of power over property from aged persons who would make “nontraditional,” that is, non-family decisions, to the control of younger family members.¹⁶⁷ The movements for rights of younger physically, mentally, and developmentally disabled persons have had a greater and quicker impact on society in terms of education and social programs.¹⁶⁸ To better understand the expense of elderly autonomy to society, one might consider that it is not limited to the cost of procedural reforms. Rather, it is the social cost of property controlled by individuals reasonably assured to leave this life relatively shortly, when they manage their assets in ways that do not promote social order or reinforce family expectations.¹⁶⁹ That is, elderly people may become a liability for conventional social order if they choose to spend their assets in ways which do not benefit their beneficiaries or serve socially approved causes, though their purposes are neither illegal nor, for other age groups, subject to criticism or constraint.¹⁷⁰

It is useful to recall that guardianship in early modern English law was concerned with managing property, not personal affairs, and the sovereign who had responsibility for the impaired most often gave management of the lands to the family, reserving only some receipts for costs.¹⁷¹ The property orientation of guardianship persisted through the centuries.¹⁷² At the end of the nineteenth century, several states passed new legislation authorizing a less formal procedure for guardianship of property, often called “conservatorship,” which assisted caregivers of elderly persons without requiring extensive court process.¹⁷³ The statutes did not apply to incapacitated persons who were not old.¹⁷⁴

167. Barnes, *supra* note 117, at 264–66 (asserting that elders become a threat to conventional social order when they choose to spend their assets in ways that do not benefit their heirs or other socially approved causes).

168. Barnes, *supra* note 11, at 645–50.

169. See Barnes, *supra* 117, at 264.

170. See *id.* at 264–65.

171. Barnes, *supra* note 11, at 650–52.

172. See *id.* at 652 (noting that the English laws carried over to the American colonies).

173. See Alison P. Barnes, *Florida Guardianship and the Elderly: The Paradoxical Right to Unwanted Assistance*, 40 FLA. L. REV. 942, 963 n.54 (1987).

174. See George J. Alexander, *Avoiding Guardianship*, in PROTECTING JUDGMENT-IMPAIRED ADULTS: ISSUES, INTERVENTIONS AND POLICIES 165 (Edmund F. DeJowski

A sampling of specific cases illustrates judicial preference for family property interests in guardianship cases.¹⁷⁵ The cases arise from numerous types of decision making, including money-losing business transactions and relationships with non-family members that might redirect assets from the family.¹⁷⁶ In the typical scenario, an elderly person meets a much younger person (often of perceived inferior socio-economic circumstances) and begins spending for gifts, travel, or a new home.¹⁷⁷ He may propose or make a will in favor of his new companion, over the objections of his adult children.¹⁷⁸ Courts are often willing to find incapacity in order to redistribute assets along more conventional lines.¹⁷⁹

In other cases, an older person apparently held to a higher standard of success in property management, makes decisions that tend to redistribute property along conventional family lines. For example, in *Estate of Oltmer*,¹⁸⁰ an eighty-year-old woman unsuccessfully appealed an adjudication of incompetency and appointment of a guardian based on one unsound land trade and favoring a son over her daughters in distri-

ed., 1990) [hereinafter PROTECTING]. Professor Alexander, an entrenched opponent to guardianship, observed very early that new guardianship or conservatorship statutes are subject to reinterpretation in the courts that negates any benefits to the ward. *Id.* at 166.

175. See Note, *The Disguised Oppression of Involuntary Guardianship: Have the Elderly Freedom to Spend?*, 73 YALE L.J. 676, 691 (1964) [hereinafter *Disguised Oppression*] (observing that society generally will not interfere with someone's property management despite mistakes and mismanagement). The limitation on an individual's right to spend is found in the basis for guardianship termed "spendthrift" which still appears in a number of state statutes.

176. *Id.*

177. See, e.g., *In re Josiah Oakes*, 8 Law Rptr. 122 (Mass. 1845) (holding that respondent widower could be restrained by the appointment of a guardian for the safety of himself and others when he became engaged); *Disguised Oppression*, *supra* note 175, at 677-78 (guardianship following respondent's gift to widowed friend); *In re Ver Vaecke's Estate*, 194 N.W. 135 (Mich. 1923); *In re Benjamin F. Roll*, 283 A.2d 764 (N.J. 1971).

178. *Hoffman v. Kohns*, 385 So. 2d 1064, 1067 (Fla. Dist. Ct. App. 1980) (invalidating a will executed one day after the testator married his housekeeper).

179. For guardianship petitions provoked by an elderly parent developing ties to a younger man or woman see, e.g., *Gardella v. Gardella* 146 A. 621, 622 (R.I. 1929) (holding a guardianship petition cannot be sustained "merely by proof that [the family members'] prospective inheritance may be lost"); *In re Towson's Estate*, 12 P.2d 1003 (Cal. Ct. App. 1932) (elderly man spending extended time with his nurse); *Fischer v. Adams*, 38 N.W.2d 337 (Neb. 1949) (elderly man and his nurse); *In re Wolff's Guardianship*, 44 N.E.2d 465 (Minn. 1950) (elderly man and his housekeeper); *Guardianship of Walters*, 231 P.2d 473 (Cal. 1951) (elderly woman and a fifty-three-year-old oil promoter).

180. 335 N.W.2d 560, 562 (Neb. 1983).

bution of land.¹⁸¹ The daughters sought guardianship.¹⁸² The court observed that Oltmer spent money too rapidly and lived a “questionable life style.”¹⁸³ Thus, an elder might simply be stopped from spending money in a way that is deemed foolish. Similarly, in *Cummings v. Stanford*,¹⁸⁴ the court approved a guardianship appointment because a sixty-five-year-old woman purchased a third home while leaving one home unused, took five weeks vacation in Florida with her sons, and could not account for several thousand dollars she had spent.¹⁸⁵

In *In re Wurm*,¹⁸⁶ a seventy-seven-year-old widow failed in her attempt to have the court reverse an order imposing a guardianship, although she had agreed to guardianship on persuasion by her adult children on the night of her husband’s funeral.¹⁸⁷ The court reasoned that she “had problems with advanced age and its attendant infirmities of confusion,” was unaware of the amount of money in her savings account, and did not understand the guardianship papers she had signed.¹⁸⁸ The dissent brings some needed clarity to the account, pointing out that Wurm wrote rational letters to her children, paid her bills, and understood what property she possessed.¹⁸⁹ The only reason articulated by the children for insisting on the guardianship was that a son had seen television programs about exploitation of elderly people and wanted by means of the guardianship to protect his mother from such abuse.¹⁹⁰

The standard that provides for variable results in guardianship cases is legal incapacity. Perhaps like undue influence, it is a standard that remains vague despite all commentary and research intended to clarify it. Additional process similarly fails to lead reliably to consistent results. In this context, the definition of incapacity for aged people with

181. *Id.*; see also *In re Coburn*, 131 P. 352 (Cal. 1913) (elderly man’s failure to collect all the money due him under a contract cause for imposition of a guardianship). *But see In re Baldrige*, 266 P.2d 103 (Cal. App. 1954) (one bad loan was not sufficient basis for creation of a guardianship).

182. *Id.* at 561.

183. *Id.* at 562. As with many cases, the dissent provides the principal insight into the facts in dispute.

184. 388 S.E.2d 729 (Ga. Ct. App. 1989).

185. *Id.* at 729–30.

186. 360 N.E.2d 12 (Ind. App. 1977)

187. *Id.* at 13.

188. *Id.* at 15.

189. *Id.* at 17 (Stratton, J., dissenting).

190. *Id.* at 18.

regard to money and asset management is critical to effectuating guardianship reforms.

Traditional guardianship statutes relied heavily on medical/psychiatric diagnosis,¹⁹¹ an aspect which has been criticized because the courts failed to set a legal standard for incompetency.¹⁹² The legal standard typically in a petition for guardianship was a restatement of the statute itself.¹⁹³ In reaction, early reform statutes rely heavily, if not exclusively, on functional assessment.¹⁹⁴ At least theoretically, however, traditional statutes included a “causal link” requirement that the petitioner must show that harmful or aberrant behavior was caused by the mental failure. In short, the traditional causal link definition was adequate as drafted, and preferable to pure functional statutes; it failed only in the application when courts failed to examine the nature of the behavior complained of by the petitioner.¹⁹⁵

Unfortunately, both traditional and reform definitions fail to clarify the standard. Courts have, for example, recognized as sufficient evidence of incapacity such statements as “being forgetful,” rendering the respondent unable to “manage business relationships.”¹⁹⁶ Other respondents have been “confused about the guardianship application,” and “mentally incompetent . . . frail but not yet in a nursing home.”¹⁹⁷ More recently, courts have confused mental and functional status to such a degree that in one study the most common “health problem” was “failure to manage personal finances.”¹⁹⁸

191. See Jan Ellen Rein, *Preserving Dignity and Self-Determination of the Elderly in the Face of Competing Interests and Grim Alternatives: A Proposal for Statutory Refocus and Reform*, 60 GEO. WASH. L. REV. 1818, 1869 (1992).

192. Barnes, *supra* note 17 (confusion of medical and legal standards).

193. *Id.*

194. See *supra* notes 36–40 and accompanying text (III-Limited guardianship/functional assessment); see, e.g., N.Y. MENTAL HYG. LAW § 81.08(5) (McKinney 1996); MICH. COMP. LAWS ANN. § 700.443(1) (West 2002).

195. Barnes, *supra* note 173.

196. See Roger Peters et al., *Guardianship of the Elderly in Tallahassee, Florida*, 25 GERONTOLOGIST 532, 536 (1985).

197. Bulcroft et al., *supra* note 15, at 160.

198. *Id.* at 159. The excellent work done by legal commentators and researchers in search of a definition or understanding of capacity in mental health proceedings is beyond the scope of this article. However, it is useful to understand the care and rigor brought to such studies. See, e.g., Elyn R. Sacks, *Competency to Refuse Treatment*, 69 N.C. L. REV. 945, 949–61 (proposing six standards for determining capacity to make decisions in property and personal matters); see also Barbara Mishkin, *Determining Capacity for Making Health Care Decisions*, 19 ADVANCES IN PSYCHOSOMATIC MED. 151 (1989); Symposium, *Competency, Coercion, and Risk of Violence: Legal Interests with Fundamental Issues of Mental Health*, 82 MARQ. L. REV. 713 (1999). Many of the comments in this article have been expressed about mental health procedural reforms. See Mi-

Ageism undoubtedly plays a part in the discriminatory institution-ization of incapacitated people of different age groups.¹⁹⁹ Ageism is a negative perception of individuals based on their age, which has been directed with special vehemence toward elders with disabilities.²⁰⁰ The result of such attitudes is a denial of full personhood and respect for disabled elders,²⁰¹ which has been called “gerontophobia.”²⁰² This in turn causes the lives and choices of wards to be undervalued.

Institutional assistance, in terms of health and social services, may be imposed on older people far more often than others.²⁰³ The simplified stereotype associated with such unwanted assistance views the elderly as being always in decline, a stereotype of “decrement.”²⁰⁴ The stereotype of decrement also affects elders themselves, as it is internalized into a view of their own capabilities and expectations.²⁰⁵ Researchers interviewing wards found they refrained from resisting the appointment of a guardian because of self-doubt.²⁰⁶

IV. Drawing Together the Unfinished Inquiry

Socially endorsed models of family relationships probably inform both inheritance and guardianship case decisions.²⁰⁷ Many believe that the younger generation gains a right to an elderly person’s assets, a belief that might have had some basis in past decades when families toiled together on farms or in family crafts businesses. In settings of mutual

chael L. Perlin, *Back to the Past: Why Mental Disability Law “Reforms” Don’t Reform*, 4 CRIM. L.F. 403 (1993) (review and commentary on JOHN Q. LA FOND & MARY L. DURHAM, *BACK TO THE ASYLUM: THE FUTURE OF MENTAL HEALTH LAW AND POLICY IN THE UNITED STATES* (1992) (citing trends in attitudes toward assistance to people with mental illness, through the era of “deinstitutionalization” to a return toward coercive assistance)); see also Bruce Dennis Sales & Lynn R. Kahle, *Law and Attitudes Toward the Mentally Ill*, 3 INT’L J.L. & PSYCHIATRY 391 (1980).

199. See Barnes, *supra* note 104, at 501.

200. See Elias S. Cohen, *The Elderly Mystique: Constraints on the Autonomy of the Elderly with Disabilities*, 28 GERONTOLOGIST 25, 27 (Supp. 1988).

201. See generally *id.*

202. *Id.* at 27.

203. See ABUSES IN GUARDIANSHIP, *supra* note 14, at 12–14.

204. Rubinson, *supra* note 162, at 122–29; see also Linda S. Whitton, *Ageism: Paternalism and Prejudice*, 46 DEPAUL L. REV. 453 (1997).

205. Rubinson, *supra* note 162, at 140.

206. See Bulcroft et al., *supra* note 15, at 162.

207. Professor Leslie observes that family relationships rarely rupture beyond repair before the death of one of the parties, so wills law addresses controversies about family promises. Leslie, *supra* note 124, at 635. Perhaps guardianship should be cynically viewed as the access to and control of inheritance because of the opportunity to spend.

dependency, adult children stayed at or near the home and often joined in the family trade.²⁰⁸ When parents became older and no longer could work as effectively, the next generations cared for them.²⁰⁹ This is a persuasive argument for a vested interest in the assets that support the work all have shared. The model, however, clearly does not reflect common patterns among American families in recent decades.

In each field, recommended or actual reforms tend to enlarge the “family” circle to reflect the fact that more individuals form deep and lasting relationships, some including the intimacy of cohabitation, without formal recognition from the state.²¹⁰ Guardianship and family consent statutes include recognition of such relationships in their priority lists identifying those who can make important decisions for another.²¹¹ Recommended reforms in intestacy statutes and judicial deliberations may be somewhat delayed in comparison. As an innovation that could provide some relief short of major statutory overhaul, this seems to be a good place for advocacy.²¹²

Further research certainly is called for in guardianship cases to determine the nature of judicial decisions about the need for a guardian and who to appoint as guardian. The lack of appellate opinions has and will continue to hamper the development of legal principles, but the cases are frequent and their details might be discovered as they were in some of the existing guardianship reform studies. The most controversial scenario is probably well-known to elder law attorneys: a crisis for the elder, often calling for health-care decisions, the devoted friend who expects to be appointed guardian, and the family member—perhaps hitherto uninvolved in the everyday life of the elder—who asserts a right to make the decisions. Who does the court choose and why? Is it respectful of the elder’s apparent wishes to the extent they can be known? Or, is it a reflection of family pride and expectations?

A tempting path is to remove guardianship and will contests from the courts to alternative dispute resolution. Professor Foster suggests mediation in order to avoid the devastating impact of “legal process,” where abstract legal rules rather than persons are at issue.²¹³ Mediation

208. See Rein, *supra* note 191, at 1848–49.

209. *Id.*

210. See *supra* notes 133–37 and accompanying text.

211. See *supra* Part III.B.

212. Resistance might arise from the same sector that has impeded the extension of employee benefits to same sex couples, but should be less controversial because each change will affect fewer pocketbooks.

213. Foster, *supra* note 112, at 239.

in guardianship has received considerable attention.²¹⁴ Although this author cannot broadly endorse mediation when the person whose property is at issue is so seriously compromised, being either incapacitated or dead, the discussion and use of mediation will undoubtedly proceed. This discussion should proceed with recognition of all of the issues, including the “family paradigm” that is part of these disputes.²¹⁵ Part of that recognition is the fact that family actors are likely to proceed as they always have, whether caring, neglectful, distant, or exploitative.²¹⁶

Finally, dialogue must take up the taboo subject of preserving the family structure over the rights and wishes of elders by declaring invalid their decisions to make wills with nontraditional provisions. The most important issue here is the extent to which such a subject and its legal resolution can be articulated in the law. Would not the endorsement of such a rule cause nearly all in society to recoil, as we do with institutional isolation and abuse or involuntary euthanization of the aged and disabled?

Yet, this author believes that without this discussion, no direct steps toward change can take place. Guardianship is a legal fiction, a “trigger to tell us when the state legitimately may take action to limit an individual’s rights to make decisions about his or her own person or property.”²¹⁷ Professor Leslie, in the context of will contests as contract litigation, discusses how the legal claim against a family member who failed to recognize an implicit obligation cheapens the trust relationship and betrays the family.²¹⁸

V. Conclusion

In these two sensitive family matters, the law is a coarse and destructive instrument. The law must take into account and reflect the culture of personal relationships. The current issues illustrate that the law

214. See, e.g., Susan N. Gary, *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes over Guardianship and Inheritance*, 32 WAKE FOREST L. REV. 397 (1997); Susan D. Hartman, *Mediation of Disputes Arising in Adult Guardianship Cases*, RES GESTAE, Apr. 1998, at 41.

215. In cases with sufficient assets, professional guardianship services might be chosen to resolve a dispute rather than a family member or friend. See, e.g., *In re Guardianship of Esther L.K.*, No. 00-2960-FT, 2001 WL 225050, at * 3 (Wis. Ct. App. Mar. 8, 2001) (professional guardianship services chosen for elderly nursing home resident over the objection of her estranged daughter).

216. See Frolik, *supra* note 2, at 351–53 (stating that the “acculturated actors” in guardianship must be reeducated to produce change).

217. Sabatino, *supra* note 159, at 3.

218. See Leslie, *supra* note 124, at 558.

is doing so by endorsing the majority or traditional view, rather than the view of the individual and a minority of others.²¹⁹ The law is built on aspirations rooted in common beliefs, and this discussion runs counter to those fundamentals of our legal system.²²⁰ Yet, it is possible that some understanding gained from frank discussion may show a way to reduce the current dissonance between values and practice, and improve the function of these laws.

219. See ILL. GUARDIANSHIP REF., *supra* note 36, at 28 (calling for willingness to closely examine the attitudes about individuals with disabilities that form the basis of how professionals in the guardianship system construct the social reality on which their work is based).

220. Walter O. Weyrauch, *Aspirations and Reality in American Law*, in *LAW, MORALITY, AND RELIGION: GLOBAL PERSPECTIVES* (Alan Watson ed., 1996).