

THE ELDERLY IN GUARDIANSHIP: A CRISIS OF CONSTITUTIONAL PROPORTIONS

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The guardianship system is in a state of crisis as it continues to undermine the interests of the elderly. Due to both federal and state reluctance to enact and reform legislation concerning guardianship procedures, the elderly subject to this system are being denied their constitutional rights. In his note, Mr. Andrews emphasizes that because the imposition of guardianship on an elderly person severely curtails the elder's rights and liberties, this system must focus on the protection of the elderly's constitutional rights. Mr. Andrews critiques the state of the current guardianship establishment. In addition, he concludes that both constitutional and policy reasons compel the need for change in this system. Mr. Andrews then provides recommendations by which to improve guardianship in order to effectively achieve its goal—protection of the elderly ward.

I. Introduction

A significant number of legislatures have not recognized the autonomy and liberty the U.S. Constitution guarantees older Americans. Many elderly lack the resources, knowledge, and stamina to advocate zealously their own interests and rights relative to the novel issues that accompany old age. Guardianship is the system whereby the state is supposed to care for and protect its elderly¹ citizens who are without the means to care for themselves. Too often, this system—designed to protect the elderly—is used to exploit them and rob them of their dignity and autonomy.

Guardianship threatens to remove from the elderly the ability to make basic life decisions and to live unfettered by the control of an-

1. This note focuses on the system of guardianship as it applies to older Americans. Guardianship also applies to those below the age of majority and to persons of any age who have a disability rendering them unable to care for themselves.

other. Because so much is at stake, the guardianship process should be subject to the strictest of constitutional and policy scrutiny. When a person is declared incompetent and a guardian is appointed, the ward loses many rudimentary rights, including the right "to marry or divorce; the right to vote; the right to make or revoke a will; the right to manage his or her own money; the right to drive; the right to buy, sell or lease property; the right to consent to or refuse medical treatment; and, the right to decide where to live."²

Many current guardianship statutes hastily disavow the rights of an elder with minimal constitutional oversight. The guardianship process gives insufficient attention to indispensable constitutional safeguards, such as the rights to equal protection of the laws and due process. A practitioner in this area correctly stated that "the current system fails to safeguard the rights of those claimed to be mentally incompetent."³ The objective of this note is to identify those rights which guardianship inadequately safeguards and to propose workable and practical solutions by which these rights can be secured. Part II of this note summarizes the growing recognition of the problem and the failed legislative remedial initiatives. Part III applies policy and constitutional scrutiny to existing statutes, and part IV summarizes practical solutions to this problem.

II. Background

A. The Problem

Guardianship across the United States is in a crisis. As the baby boomers⁴ age, unprecedented numbers of persons will likely face guardianship. "As the legal mechanism that most severely limits the

2. John Gillie, *Lawyer's Queries Lead to Probe of Guardian System: Process Fails to Protect Individuals Deemed 'Incompetent,' Accuser Says*, NEWS TRIB. (Tacoma, Wash.), May 28, 1995, at B1 [hereinafter Gillie, *Probe of Guardianship System*]. Recognizing the problem of a serious rights deprivation without adequate process, the bar associations in several counties in Washington formed a committee to report on the problems and propose workable solutions. *Id.*

3. John Gillie, *Lawyers Call for Guardianship Reform*, NEWS TRIB. (Tacoma, Wash.), June 15, 1995, at B1 [hereinafter Gillie, *Guardianship Reform*] (spoken by Tacoma attorney Doug Schaefer). Schaefer noted another disturbing trend: "a small group of attorneys with possible conflicts of interest dominate the guardianship business in the county." *Id.*

4. Baby Boomers are between 33 and 51 years of age in 1997 and soon will be entering retirement. See FORECASTING & ENVTL. SCANNING DEP'T, AM. ASS'N OF RETIRED PERSONS, *AGING BABY BOOMERS: HOW SECURE IS THEIR ECONOMIC FUTURE?* 4 (1994).

ward's personal autonomy, guardianship is perhaps the most serious issue on the horizon for the elderly"⁵ The issue is serious because of the rights and liberties one stands to lose if a guardianship is imposed, as well as the lack of safeguards in the guardianship procedure. An attorney recently noted, "The guardianship initiation procedures routinely applied by [the] court to its elderly victims are a mockery of justice and fundamental rights [The guardianship system] processes—not protects—the unfortunate elders alleged to be incompetent."⁶

The elderly are subject to increasing perils and challenges as they age. As the golden years set in and life takes its toll on the ability to care for oneself, older Americans may become less able to defend and care for themselves. This predicament requires special protection for the elderly, who are often subject to exploitation, outright abuse, or self-neglect. For example, Florida, a state with a higher-than-average proportion of elderly citizens,⁷ has taken special steps to ensure that its residents are protected and properly cared for in their elder years. Florida's governor created a Task Force on Elder Abuse Prevention which suggested that Florida appoint special elder law courts to deal with probate, guardianship, and abuse cases.⁸ Some judges, such as Thomas E. Penick, Jr., a Florida Circuit Court Judge in Pinellas-Pasco County, recognize the unique needs of the elderly.⁹ Representative Elliott Naishtat of Austin, Texas, notes that incapacitated elders "are unable to provide food, clothing, and shelter for themselves and are unable to care for their personal health and are unable to take care of

5. Joyce Price, *Guardians Often Hurt Those They're Supposed to Protect*, WASH. TIMES, Dec. 31, 1994, at A2.

6. Gillie, *Probe of Guardianship System*, *supra* note 2, at 1. This was in a letter to Pierce County Superior Court Judge Bruce Cohoe, who was appointed by fellow judges to look into the problems of guardianship in that county.

7. States with the lowest guardianship petitions had a below average proportion of persons over the age of 85. Conversely, states with the highest guardianship petitions have a population with a higher than average percentage of elderly. Florida has one of the largest percentages of elderly and had one of the largest numbers of guardianship cases. The other four states with the highest percentages were Indiana, Michigan, New York, and Ohio. These five states alone made up more than 64% of national guardianship cases in 1990. See Paula L. Hanford & Thomas Hafemeister, *The National Probate Court Standards: The Role of the Courts in Guardianship and Conservatorship Proceedings*, 2 ELDER L.J. 147, 155-56 (1994).

8. See *Report Shows Crime Leveling Off*, ST. PETERSBURG TIMES (Fla.), Oct. 4, 1995, at 4B.

9. "There has got to be a recognition that there are special needs among the elderly." *Id.*

their own financial affairs . . . [They] are subject to exploitation and neglect and abuse."¹⁰ The vulnerability of the aged makes them the most exploited group of people in the United States.¹¹ Florida consistently has been a progressive leader in enacting the kind of reform legislation¹² required to assure the elderly protection and peace in their golden years.¹³

Elderly wards are not the only group requiring legislative oversight. The guardians themselves must be subject to formal, specific, and consistent standards. "[U]nless you build in a lot of oversight, which rarely occurs, there's the potential for abuse."¹⁴ Joe Roubicek, a Florida police detective who recently investigated a now-jailed guardian for fraud, aptly noted, "There's no one to guard over the guardians."¹⁵

10. *Guardianship Services Bill Urged: Bush Defends Vetoing Plan to Create State Coordinating Board*, DALLAS MORNING NEWS, June 29, 1995, at 11D.

11. Patricia Johnson, president of the Pinellas County Guardian Association, the largest such association in Florida, suggested the reason for her work: "Wards of the court are the most frail, most easily exploited people in the whole United States." Carol Marbin, *Elderly Woman's Guardian Jailed*, ST. PETERSBURG TIMES (Fla.), Dec. 6, 1994, at 1B.

12. Most of Florida's guardianship laws are codified in FLA. STAT. ch. 744 (1994) and FLA. PROB. R. 5.560 (1994).

13. Florida abuse hot lines reported 17,480 allegations of elder abuse in 1993, of which 3,000 were verified and proved. See Peter Mitchell, *State Ready to Crack Down on Elder Abuse: Legislators and Gov. Chiles Are Pushing for Tougher Laws to Protect Against Abuse of Older Citizens*, ORLANDO SENTINEL, Mar. 8, 1994, at C1. Florida judges are also acting more proactively than ever to safeguard the elderly and incapacitated in the guardianship process. For example, "judges in Florida are handing down stiff sentences to professional guardians who are found guilty of exploiting their wards. Bart Strang of the Center for Gerontology in Fort Lauderdale: 'I think the courts are sending a clear message now that this type of abuse won't be tolerated.'" Marbin, *supra* note 11, at 1B; see also Mitchell, *supra*, at C1. Governor Chiles has supported a bill to have elder abuse treated more like child abuse. He said, "It is time to bring the dark side of family problems to light, and deal with it by cracking down on anyone abusing our citizens." *Id.* The law would transfer elder abuse issues from the Department of Health and Rehabilitative Services to the newly created Department of Elder Affairs. It would also give prosecutors an easier standard to prove felony abuse, revamping the statute to mirror that of child abuse. See *id.*

14. Price, *supra* note 5, at A2 (statement of John J. Regan, professor of health care law at Hofstra University Law School).

15. Cindy Elmore, *Guardian Charged, Held in Thefts from Elderly Client*, SUN-SENTINEL (Ft. Lauderdale), Sept. 20, 1995, at 2B.

B. The Basics of the Guardianship Process

"Guardianship is a little known and highly specialized area of law, but for those subject to its proceedings, it can mean the end of life as they've known it."¹⁶

Guardianship arises under the state power of *parens patriae*, a power "inherited from English law where the Crown assumed the 'care of those who, by reason of their imbecility and want of understanding, are incapable of taking care of themselves.'"¹⁷ As early as 1890, the U.S. Supreme Court recognized the doctrine as it was inherited from England, holding that the American Revolution gave the state the power previously vested in the British Parliament and king.¹⁸ The Court concluded that it is "indispensable that there should be a power in the legislature to authorize a sale of the estates of infants, idiots, insane persons and persons not known, or not in being, who cannot act for themselves."¹⁹ To care for persons unable to care for themselves, the state can appoint a guardian, often a relative.²⁰ If no suitable guardian is available, the state itself becomes the guardian of the elderly ward.

Guardianship begins when a person asks the court to make a determination whether another person is able to handle her affairs.²¹ When this motion is filed, the court often will appoint a guardian ad

16. Gillie, *Probe of Guardianship System*, *supra* note 2, at B1.

17. Phillip Tor, Note, *Finding Incompetency in Guardianship: Standardizing the Process*, 35 ARIZ. L. REV. 739, 739 n.1 (1993) (quoting NICHOLAS N. KITTRIE, *THE RIGHT TO BE DIFFERENT* 59 (1971) (quoting L. SHELFORD, *A PRACTICAL TREATISE ON THE LAW CONCERNING LUNATICS, IDIOTS, AND PERSONS OF UNSOUND MIND* 6 (1833))).

18. "The revolution devolved on the State all the transcendent power of parliament, and the prerogative of the crown, and gave their acts the same force and effect." *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 57 (1890) (citation omitted).

19. *Id.* at 58.

20. "But if we lose the ability to care for ourselves, we could find those rights handed over to someone else through a process called guardianship. When this happens, a court gives one person—the guardian—the duty and power to make decisions for another, the ward." Debra Gordon, *Volunteer Guardians: Helping to Care for Elderly When Friends, Family Can't*, VIRGINIAN-PILOT (Norfolk), Jan. 16, 1996, at A1.

21. "In the guardianship system, a petitioner—usually a relative—asks the court to determine whether another person is competent to handle his or her affairs. If the court finds the person incompetent, the court can strip the person of major fundamental rights." Gillie, *Probe of Guardianship System*, *supra* note 2, at B1. These rights include, among others: the right to marry or divorce, vote, make or revoke a will, manage one's money, drive, buy, sell or lease property, consent to or refuse medical treatment, and the right to decide where to live.

litem²² to advise the court of the person in question's ability to manage her affairs or estate. If the guardian ad litem finds that the elderly person is not competent to handle her affairs, the guardian ad litem will recommend to the court how the alleged incompetent's affairs should be handled. If the person is judged incompetent, a court may appoint either a conservator²³ to care for the incompetent's property or a guardian²⁴ to care for the ward's person and property.²⁵ The incompetent person is the ward²⁶ of the guardian or conservator. The terms *incompetency*²⁷ and *incapacity*²⁸ are most often used to describe the condition that warrants appointment of a guardian. Current trends gravitate toward using incapacity, because it carries a less pejorative stigma and focuses more on the capacity to manage one's affairs, rather than the more blanket term incompetency, which suggests a stigmatizing mental deficiency.

C. Condition of Guardianship Statistics

In 1987, the Associated Press documented the plight of the American elderly facing guardianship in a series of articles examining over 2200 guardianship cases nationwide from 1980 to publication in 1987.²⁹ One-third of the wards were moved from their homes during

22. Guardians ad litem are "supposedly independent experts appointed by the court to make recommendations regarding an allegedly incompetent person's ability to function independently and to suggest how that person's affairs should be handled if they are judged incompetent." Gillie, *Guardianship Reform*, *supra* note 3, at B1.

23. A conservator "controls only the ward's property." Tor, *supra* note 17, at 743. A conservator is essentially a limited guardian, who only possesses authority over property, not over the ward herself.

24. A guardian "cares for the ward's person and property." *Id.* The guardian has the property power of the conservator as well as power over the ward herself.

25. The same judicial process determines the need for either. *See id.* Also note these are general definitions. Most state statutes will have their own substantially similar, possibly more complex definitions.

26. A ward is the person for whom the guardian has been appointed to care and look after. *See* BLACK'S LAW DICTIONARY 1583 (6th ed. 1990).

27. Incompetency is a "lack of ability, knowledge . . . or fitness to discharge the required duty." *Id.* at 765. This term is disfavored when referring to the elderly because its traditional definition includes the notion of a stigmatizing mental illness or defect. Such a defect is not found in all who require a guardian.

28. Incapacity in this context means the inability to care for oneself. *See generally id.* at 760. This term is preferred because of its focus on the functional ability or inability to do something without the stigma of mental illness.

29. *See* Associated Press, *Guardians of the Elderly: An Ailing System* (1987), cited in Tor, *supra* note 17, at 739 n.6 [hereinafter *Guardians of the Elderly*]. The study took nearly a year to complete. The project was staffed with 57 reporters studying over 2,200 cases throughout the nation. Over 300 stories in national newspapers carried the findings. *See* John Parry, *Selected Recommendations from the*

guardianship.³⁰ Thirteen percent had absolutely no notice that a guardianship petition was pending.³¹ Nearly fifty percent of the wards completed the entire guardianship process without the benefit of legal representation.³² Incredibly, twenty-five percent of cases did not involve a hearing.³³ When there was a hearing, the person alleged to be incapacitated attended only eight percent of the time.³⁴ Moreover, judges approved the guardianship ninety-seven percent of the time.³⁵ One-third of all wards had guardians appointed for them even without a doctor's opinion prepared or presented to the court, the guardian, or the ward.³⁶ Further exacerbating the ire and suspicion of practitioners and the elderly, forty-eight percent of the files did not contain an annual accounting of money.³⁷ The study mentions no hopeful statistic to suggest that elderly wards' rights are being monitored or cared for by the implementation of standardized processes or fair and open procedures.³⁸ These statistics vividly portray the need for reform and accountability in this area of the law. The Associated

National Guardianship Symposium at Wingspread, 12 MENTAL & PHYSICAL DISABILITY L. REP. 398, 398 (1988).

30. See *Computer Analysis Yields Portrait of Elderly Wards*, L.A. TIMES, Sept. 27, 1987, § 2, at 1 [hereinafter *Computer Analysis*]. This article was one of the over 300 newspaper articles that carried the findings of the Associated Press study.

31. See *id.*

32. See *id.* The actual number is 44%. See *id.*

33. See Parry, *supra* note 29, at 398.

34. See *Computer Analysis*, *supra* note 30, at 1.

35. See *id.*

36. See *id.*

37. See *id.*

38. The study also concluded the following facts: the average age of wards was 79; two-thirds were female; and 64% were placed in nursing homes at some time during their guardianship. When the cause of the alleged incompetence was actually demanded and given, the leading reasons were the following:

19%—Inability to care for self or finances (note how vague this standard is);

16%—Senility or dementia (again, too abstract to be of any use to the courts or families);

11%—Organic or chronic brain syndrome;

8%—Old or advanced age (this appears to suggest that date of birth can be used to establish a *prima facie* case of incapacity);

8%—Mental illness (with no suggestion as to how the illness specifically affects one's ability to care for oneself);

6%—Stroke (see comments above);

2%—Alzheimer's disease;

1%—Forgetfulness;

1%—Alcoholism.

The average worth of the ward at the time of the guardianship proceeding was \$97,551. An average of 3.4 years later when the guardianship ended, an average of \$12,000 had been spent from the ward's estate. And in 11% of guardianships, the estate is depleted during guardianship. See *id.* at 1-2.

Press study led directly to several congressional hearings and many state laws to curb such abuse.³⁹ Yet in 1989, only two years after the Associated Press reported its findings, the guardianship system was described as a "national disgrace," with one-half million Americans termed "wards of the courts."⁴⁰

As helpful as massive reformation in guardianship law would be, legislative resistance has increased due to the perceived cost of such reformation measures and the current political drive to balance state and federal budgets. For example, some Texas legislators and reformers wanted to create a state coordinating board for guardianship services, a nonprofit corporation to help municipalities organize and fund guardianship services for the elderly and incapacitated.⁴¹ But Republican Governor George W. Bush vetoed the bill, explaining that he "campaign[ed] on a promise of less government, not more."⁴² Until the benefit of guaranteeing rights and due process for alleged incompetents outweighs its perceived costs, the pressing and substantive issues discussed in this note will remain unaddressed.⁴³

D. Growing Recognition of a Problem

As will be discussed in part III, public awareness of the sad state of guardianship is growing. Advocates for the aged and disabled are finally getting the message across: "elderly and disabled people often find themselves victimized within the legal system that was set up to protect them from abuse."⁴⁴ The media is finally reporting stories and cases of guardianship, exposing the abuses.⁴⁵ Toshio Tatara, Director of the National Center on Elder Abuse, pleads, "If there's anything that needs reform desperately, it's the guardianship system It's a mess There's a lot of room for bad judgment and for bad people to get involved. Financial exploitation is a very common effect."⁴⁶

39. See Price, *supra* note 5, at A2.

40. See *id.*

41. See *Guardianship Services Bill Urged: Bush Defends Vetoing Plan to Create State Coordinating Board*, DALLAS MORNING NEWS, June 29, 1995, at 11D.

42. *Id.* (quoting Karen Hughes, a spokeswoman for Governor Bush).

43. "You end up with a political debate of how to spend limited resources Because of this, no one has looked at guardianships in quite a while." John J. O'Connor, *Harshbarger Says Guardianship Laws Need Reform*, TELEGRAM & GAZETTE (Worcester, Mass.), Oct. 21, 1993, at B6.

44. Price, *supra* note 5, at A2.

45. For example, see Elmore, *supra* note 15.

46. Price, *supra* note 5, at A2.

Recognizing that they too will someday be elderly and may be subject to such proceedings themselves, younger Americans are beginning to herald the rights and dignity of older Americans. Younger generations are taking strides to address these concerns. "[G]eneration X' seems to be falsely accused of not caring . . . they do care. As a generation they seem to be committed to doing something about the ills of society."⁴⁷

E. Federal Initiatives

The federal government is slowly recognizing the importance of standardizing the guardianship process and safeguarding the dignity of older Americans in the guardianship program. President Clinton called for a Conference on Aging in May 1995, only the fourth such conference in U.S. history.⁴⁸ Yet, The National Guardianship Rights Act, a federal initiative to standardize guardianship, repeatedly stalls in Congress. This Act, as introduced by former Congressman Claude Pepper of Florida, would require that all persons facing guardianship receive adequate notice that someone has initiated a guardianship proceeding, have counsel (paid for by the state if necessary), be examined by a professional team before a final determination of incapacity, have the right to a jury trial, and have access to an immediate appeal. Under the legislation, the guardian must be of good character, receive training, submit annual reports, and be subject to judicial oversight. The U.S. Attorney General would be charged with enforcing this law and have the authority to withhold federal funding from states not in compliance.⁴⁹

47. Pamela McKuen, *Law Students Making Case for Free Legal Aid to Needy*, CHI. TRIB., Oct. 9, 1994, (Education), at 13. For example, Bill Graves, a 1993 graduate of the University of Illinois College of Law, took a government public interest job for Vilas County in northern Wisconsin. His duties include advising county board members deciding guardianships for abused children, the elderly, and developmentally disabled. See *id.*

48. See Michele Howe, *Navy Veteran Fights Peacetime Battles on Behalf of Beleaguered Senior Citizens*, STAR-LEDGER (Newark), June 25, 1995, available in 1995 WL 885b773.

49. [A]ll Americans facing the imposition of a guardianship [must] receive adequate notice of impending guardianship proceedings; be represented by trained attorneys and to have counsel provided if they cannot afford one; be afforded an examination by an independent professional team before any guardianship may be imposed; have the right to a jury trial; and have the right to prompt appeal of the decision or choice of guardian. The bill requires that all guardians be of competent character; receive thorough training; provide at least annual reports on the financial and physical well being of the incapacitated.

Congress drafted this Act⁵⁰ upon a finding that

[T]housands of elderly and infirm individuals are being deprived of their constitutional rights to personal liberty and control of their property by the imposition of guardianship orders without being accorded due process of law Under the 14th Amendment to the U.S. Constitution, Congress has the authority to enforce by appropriate legislation the constitutional rights to equal protection and due process of law.⁵¹

In introducing the same bill to the Senate, Senator Olympia Snowe of Maine noted that advanced old age alone is an adequate reason for placing a person under a guardianship in thirty-five states.⁵²

Though the findings are compelling, the bill's widespread support has been insufficient to prevent it from grinding to a halt in the House of Representatives. The late Congressman Pepper, in a public congressional rebuke, rose to address his colleagues and the nation eight months after he had introduced the bill: "Tragically . . . this last Congress did not see fit to enact . . . procedures for protecting those living under abusive guardianships" ⁵³ Congressman Pepper continued:

[O]ur subcommittee has uncovered widespread abuse and neglect in our Nation's guardianship system. We found our current system for protecting the incompetent to be nothing short of a national disgrace State and local guardianship systems have become sleeping watchdogs of personal liberty. The National Guardianship Rights Act assures that our courts will be ever vigilant in preserving the rights and protection afforded all Americans by our Constitution.⁵⁴

The record criticized the states which do not require notice of pending guardianship, do not provide counsel for the elderly, do not require

tated person; and be subject to annual review and automatic removal by the courts. The U.S. Attorney General would be charged with enforcing this civil rights legislation and is authorized to withhold Federal monies from States found not to be in compliance with the act.

134 CONG. REC. H7319 (daily ed. Sept. 8, 1988) (statement of Rep. Pepper).

50. A summary of the National Guardianship Rights Act legislation, some history, and implications can be found in Carol Mooney, *Guardianship Reform: A Federal Mandate*, 4-APR PROB. & PROP. 48 (1990).

51. 134 CONG. REC. H7319 (daily ed. Sept. 8, 1988) (statement of Rep. Pepper).

52. See 134 CONG. REC. E2892 (daily ed. Sept. 9, 1988) (statement of Sen. Snowe). The bill was also introduced in the U.S. Senate by Sen. Glenn. 135 CONG. REC. S667 (daily ed. Jan. 25, 1989) (statement of Sen. Glenn).

53. 135 CONG. REC. E1714 (daily ed. May 16, 1989) (statement of Rep. Pepper).

54. *Id.* at E1716, E1717.

the attendance of the elder, and consider advanced age itself as a strong factor to determine competence.⁵⁵

But Congress was again silent and the Act was not passed. The bill was introduced in the Senate in 1991 for a third time, this time by Senator John Glenn of Ohio, along with Senators Daniel Inouye of Hawaii and Brock Adams of Washington.⁵⁶ Representative Edward Roybal of California, now retired, again introduced the bill in the House.⁵⁷

Nongovernment agencies were also wrestling with the issue on a national level. The American Bar Association's Commissions on the Mentally Disabled and Legal Problems of the Elderly served as cosponsor of the National Guardianship Symposium, popularly known as "Wingspread," taking place in Racine, Wisconsin, in July 1988.⁵⁸

F. State Initiatives

After the Associated Press guardianship report, the resulting public outcry and federal initiatives, some states⁵⁹ began the slow process of reform.⁶⁰

Florida has been a leader in guaranteeing the rights of a ward in guardianship proceedings. Florida representatives were key congressional sponsors of the National Guardianship Rights Act. Florida statutes reflect the kind of protection that easily can be given to alleged incompetents to guarantee fairness to all parties, to simplify and

55. Also entered into the record were more grim statistics: eight states have no requirement that the alleged incompetents be notified that someone is petitioning to place them under guardianship; 15 states do not specify that the alleged incompetent has the right to counsel at the guardianship hearing; only 16 states require that the alleged incompetent be present at their own guardianship hearing; 33 states allow advanced age as a cause for determining an elderly person's competence; and only 12 states require that medical evidence be submitted in order to find a person incompetent. These statistics cumulatively come from 135 CONG. REC. at E1717 (1989).

56. See 137 CONG. REC. S1590 (1991).

57. See 137 CONG. REC. E425 (daily ed. Feb. 5, 1991) (statement of Rep. Roybal).

58. See Parry, *supra* note 29, at 398.

59. "[S]tate law governs the process by which courts determine that a person is incapacitated and how guardianships are imposed." 134 CONG. REC. H7139 (daily ed. Sept. 8, 1988) (statement by Rep. Pepper).

60. For example, Tacoma-Pierce County Bar Association President Joseph Quinn stated that "[t]he issue of people's constitutional rights is not one that the bar takes lightly That's why we're taking a closer look at our system." Gillie, *Probe of Guardianship System*, *supra* note 2, at B1.

streamline the process for the bar and bench, and to serve as an example to a nation desperate for overdue reform.⁶¹

Too often, state courts are forced to rewrite guardianship statutes to pass constitutional muster.⁶² The better method to preserve rights is for the legislature to reform guardianship laws and rules proactively to ensure they come clearly within constitutional boundaries. Although some states have worked admirably to achieve this end, many other states allow inadequate laws to remain in the statute books.

III. Analysis

Guardianship often fails those whom it was designed to protect. The problems with guardianship can be divided into three main areas: the period between the initiation of guardianship proceedings and the competency determination; the period during the competency determination; and the time following the determination of guardianship. Important policy issues arise in all stages of the guardianship process. The primary constitutional questions concern the period between the guardianship initiation and an incapacity adjudication. In the following analysis, Illinois statutes will be used as a standard.⁶³

A. From Petition to Adjudication: The Process of Guardianship

1. WHO MAY FILE A PETITION?

The majority of jurisdictions allow "any interested person" to file a petition for guardianship.⁶⁴ Illinois allows any "reputable" person to file a petition.⁶⁵ Illinois's statute indicates no preference for a family member, state social agency, or medical practitioner. The legislature could have enumerated what it intends to include or exclude by the overly vague word "reputable." The statute forces conjecture, as it does not clarify how or to whom the person must be reputable. In determining if the petitioner is reputable, one may look to the opinion of the alleged incompetent, the court, the state, the community, or his

61. Florida statutes relating to guardianship are codified in FLA. STAT. ch. 744 (1994) and the probate rules at FLA. PROB. R. 5.560 (1994).

62. See *In re Guardianship of Hedin*, 528 N.W.2d 567 (Iowa 1995); *In re Conservatorship of Foster*, 535 N.W.2d 677 (Minn. Ct. App. 1995).

63. Illinois guardianship laws are codified as 755 ILL. COMP. STAT. 5/11a-1-23 (West 1995).

64. See Parry, *supra* note 29, at 399.

65. 755 ILL. COMP. STAT. 5/11a-3.

or her professional colleagues. It is important to note that a person without good motives may still be reputable. The standard should therefore be clarified to take into account the motives of the person filing the petition. A statutory requirement of "reputable" cannot give any concrete guidance to the courts as they oversee the process. Eventually case law will define this "reputable" person to the aid of the bar, bench, family, and the alleged incompetent.

2. WHO MAY SERVE AS GUARDIAN?

The person filing the petition requesting guardianship over the alleged ward need not be the person who would serve as guardian if the elder was found to be incapacitated. Nor are the standards the same for who may serve as petitioner and guardian. Illinois requires a guardian to be eighteen or older, a U.S. resident (not citizen), "not of unsound mind," not an adjudged disabled (i.e., not a ward themselves), free of felony convictions,⁶⁶ and one "who[m] the court finds is capable of providing an active and suitable program of guardianship."⁶⁷ The reputable requirement placed on the person filing a petition for guardianship is not required of the person who actually serves as guardian. Common sense mandates that the guardian, the person to be given full control over the ward, be at least as reputable as the petitioner. Sound policy mandates a narrower restriction for those we sanction to care for our elderly, incompetent, and incapacitated.⁶⁸

3. NOTICE

Due process requires notice to be given when an adversarial judicial proceeding has begun. The proposed ward in a guardianship proceeding has a constitutional right to be notified that such proceed-

66. The statutory restriction prohibiting felons from acting as guardians has survived constitutional challenges based on the 14th Amendment's equal protection guarantee. The statutory distinction between felons and nonfelons is justified by the legitimate state interest in protecting wards from abuse and neglect. *Estate of Roy v. Roy*, 637 N.E.2d 1228 (Ill. App. Ct. 1994).

67. 755 ILL. COMP. STAT. 5/11a-5(a).

68. Although not the focus of this note, Illinois law also allows any public agency or nonprofit corporation to be appointed guardian of the incapacitated ward. The exception is that the agency directly providing residential services may not be appointed guardian. Such a provision lessens the likelihood of nursing home abuse and squandering of funds. See 755 ILL. COMP. STAT. 5/11a-5. See Dean Timothy Jost, *The Illinois Guardianship for Disabled Adults Legislation of 1978 and 1979: Protecting the Disabled from Their Zealous Protectors*. (*Issues in Mental Health Law*), 56 CHI.-KENT L. REV. 1087 (1980).

ings have been initiated.⁶⁹ Most state statutes have codified this right to notice.⁷⁰ Illinois, for example, requires personal service of the summons and a copy of the petition by a noninterested party at least two weeks prior to the hearing.⁷¹ It is not unusual for statutes to require notification to close family as well, although such notice is not constitutionally mandated.⁷²

Merely giving "notice," however, may not be sufficient to satisfy due process. If the allegations in the petition for guardianship have merit, the proposed ward may have trouble deciphering, understanding, or following the directions of the summons. The notice requirements⁷³ to a proposed ward may need to be stricter than the notice required in other civil proceedings, such as a commercial lawsuit.⁷⁴ Simple notice requirements assume that those receiving a summons can understand that he is a party to a civil action and can act accordingly by seeking advice from counsel. But this assumption may not be valid in a guardianship proceeding. In fact, the very nature of the allegations in the guardianship petition reflect the belief that the proposed ward is unable to handle the regular affairs of his life to such a

69. "Due process requires notice and an opportunity to be heard." *Milliken v. Meyer*, 311 U.S. 457, 463 (1940). The notice required is that necessary "to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *In re Estate of Potashnick*, 841 S.W.2d 714, 719 (Mo. Ct. App. 1992). In a somewhat different context also involving a civil action, Florida courts have held that "[l]ess than actual notice . . . would deprive [the ward] of his due process rights under the 14th Amendment to the U.S. Constitution." *In re Amendments to the Fla. Probate Rules*, 584 So. 2d 964, 969 (Fla. 1991).

70. Parry, *supra* note 29, at 401.

71. 755 ILL. COMP. STAT. 5/11a-10(e).

72. See *id.*; see also *Potashnick*, 841 S.W.2d 714. *Potashnick* refused to allow any familial interests which the family may have to require due process of law, for example, "notice" to the family. *Potashnick* held that the family has a cognizable familial interest in the ward, but not a property interest protected by the Due Process Clause. *Id.* at 719.

73. As an example, the Illinois statutory notice requirement states that "[u]nless he is the petitioner, the respondent shall be personally served with a copy of the petition and a summons not less than 14 days before the hearing. Service may be made by a private person 18 years of age or over who is not a party to the action." 755 ILL. COMP. STAT. 5/11a-10(e).

74. Notice in the usual commercial context requires only delivery of the information, not comprehension by the party to whom notice is given. "A person 'notifies' or 'gives' a notice or notification to another by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it." BLACK'S LAW DICTIONARY 1062 (6th ed. 1991). The sophistication of those receiving notice in business is sufficient to protect them against surprise. This assumption may not apply to the elderly if the petition has merit and may result in unfair surprise, prejudicing their ability to prepare and present an effective defense.

degree that warrants state action and protection. If these claims have merit, being "served" in the traditional sense is a futile act exercised only to fulfill the letter of the statutory command and constitutional due process minimum as defined by other civil actions where incapacity or incompetence are not alleged. This traditional "service" of an incompetent or incapacitated person fails to fulfill the purpose and spirit of the notice requirements, namely, that the alleged ward understand the nature of the proceedings against him and his obligations as a result of such proceedings.

4. PETITION AND REPORT

Statutes like Illinois's require that certain information be included in the petition for guardianship and the accompanying report. The report makes the specific factual allegations, opinions, and recommendations. The petition itself requires disclosure of certain basic facts about the alleged incompetent, including his family and proposed guardian (i.e., name, date of birth, address).⁷⁵ When delivered to the court, the petition should be accompanied by the report. The report requires the following relevant information to help the court determine the issue of incapacity: descriptions of the disability, a recent evaluation of mental and physical condition, an opinion regarding the scope of the proposed guardianship if any, and most importantly, the signatures of all persons who evaluated the respondent, one of whom must be a licensed physician. If the petitioner was unable to secure or create such a report, the court will order the evaluations done by qualified persons to be filed ten days prior to the hearing. While the petition contains basic information about the parties at interest, or potential parties at interest, the report contains the specific allegations that presumably will be evidenced at the hearing. If the respondent wishes to contest his guardianship at the hearing, it follows that he would need access to this report in order to prepare an adequate defense against the specific allegations in the report. The notice requirement compels service to the respondent of the petition but not the report.⁷⁶ If the respondent does not have access to the very allegations against which he is expected to defend himself, it is impossible to prepare any semblance of a defense.

75. See 755 ILL. COMP. STAT. 5/11a-8.

76. The statute provides only that respondent be personally served with "a copy of the petition and a summons." *Id.* 5/11a-10(e).

As previously discussed, if the petitioner does not include a report with the petition, the court on its own initiative will order the examination of the respondent to be filed with the court at least ten days prior to the hearing.⁷⁷ Again, there is no requirement to give a copy to the respondent or the attorney representing her. Equally as egregious, if the respondent needs fourteen days notice before the hearing date and if the report is not even filed with the court for four more days (ten days prior to the hearing date), the respondent is subject to a legally valid summons without any factually supported allegation of incapacity on file with the court or shown to respondent. This would not be allowed in any other civil context. A binding summons served on a party against whom no complaint had been filed is unimaginable, yet the standards of fairness appear to be reduced in the life-changing determination of one's capacity status. Such a barrier to an effective defense hardly can be said to comply with the due process requirements of the Fourteenth Amendment to the U.S. Constitution.⁷⁸

B. The Function of a Legal Advocate

1. RIGHT TO A LAWYER

In Illinois, every alleged incompetent has a statutory guarantee of representation by counsel.⁷⁹ The court will appoint the respondent

77. See *id.* 5/11a-9(b).

78. Notice has long been considered under a 14th Amendment analysis. For example, in *Memmonite Board of Missions v. Adams*, 462 U.S. 791 (1983), a landowner fell behind on his property taxes and his property was sold at a tax sale without proper notice to the defaulting owner. The Supreme Court held that:

prior to an action which will affect an interest in life, liberty, or property protected by the Due Process Clause of the Fourteenth Amendment, a State must provide "notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." . . . [T]his [is an] "elementary and fundamental requirement of due process"

462 U.S. at 795 (citing *Mullane v. Central Mancues Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). In the criminal context, the Supreme Court has held that "[w]hether a particular method of notice is reasonable depends on the outcome of the balance between the 'interest of the state' and 'the individual interest sought to be protected by the Fourteenth Amendment.'" *Illinois v. Gates*, 462 U.S. 791, 801 (1983) (O'Connor, J., dissenting).

79. 755 ILL. COMP. STAT. 5/11a-10(b) states in relevant part:

(b) The court (1) may appoint counsel for the respondent, if the court finds that the interests of the respondent will be best served by the appointment, and (2) shall appoint counsel upon respondent's request or if the respondent takes a position adverse to that of the guardian ad litem. The respondent shall be permitted to obtain the

counsel any time at or before the hearing, either when requested by respondent or upon the court's own motion if it finds the interests of the respondent will best be served by the appointment of counsel.⁸⁰ This supposed protection may not work to protect the potential ward's rights as the legislature likely intended. For example, if the court believes, based on the allegations of the petition and report, that guardianship is in the best interests of the proposed ward, then it is not in the best interests of the ward (in the court's opinion) to appoint counsel to help fight the petition, leaving the respondent without counsel unless she asks specifically for an attorney. The court may be influenced by some prejudicial but nondeterminative or irrelevant factors, such as the elderly person's appearance, speech, lack of preparedness, nervousness, or forgetfulness. As a consequence, the court might wrongfully conclude it would not be in the proposed ward's best interests to appoint a lawyer to fight the petition. These factors may be seen as a form of "evidence" by the court, and the result (no counsel appointed and a potentially unnecessary guardianship imposed) can be detrimental to the ward. Although prejudicial, these factors are not determinative of the person's ability to care for herself and to manage her estate.

The "best interests" of the ward is a legal conclusion to be determined as a matter of fact and law after trial, not at any prior time.⁸¹ The court has no basis to determine the best interests of the alleged incompetent at any time prior to the time for final adjudication of the competency issue. A congressional study found that "[g]uardianship in many ways is the most severe form of civil deprivation which can be imposed on a citizen of the United States."⁸² Noting that fifty-six

appointment of counsel either at the hearing or by any written or oral request communicated to the court prior to the hearing. The summons shall inform the respondent of this right to obtain appointed counsel. The court may allow counsel for the respondent reasonable compensation.

80. See *id.*

81. "Some critics note a paternalistic attitude among courts toward guardianship subjects. Instead of conducting an impartial hearing, courts may tend to look for what they believe to serve the best interests of the proposed ward." Phillip Tor & Bruce Sales, *A Social Science Perspective on the Law of Guardianship: Directions for Improving the Process and Practice*, 18 LAW & PSYCHOL. REV. 1, 11-12 (1994).

82. CHAIRMAN OF SUBCOMM. ON HEALTH & LONG-TERM CARE OF THE HOUSE SELECT COMM. ON AGING, 100TH CONG., ABUSES IN GUARDIANSHIP OF THE ELDERLY AND INFIRM: A NATIONAL DISGRACE 1 (Comm. Print 1987) [hereinafter ABUSES]. See *Vitek v. Jones*, 445 U.S. 480, 491 (1980) (quoting *Humphrey v. Cady*, 405 U.S. 504, 509 (1972)) (stating that civil commitment constitutes "a massive curtailment" of a fundamental right). See generally Jan Ellen Rein, *Preserving Dignity and Self-Deter-*

percent⁸³ of wards encounter this massive deprivation of their rights and liberties without the assistance of counsel, a congressional report called guardianship "a national disgrace."⁸⁴

2. THE ROLE OF THE LAWYER

The attorney for the alleged incompetent is in no position to determine the best interests of the client.⁸⁵ The role of the lawyer in a guardianship proceeding is to represent the spoken wishes of the client,⁸⁶ not to interpose paternalistic and unrequested personal judgments of another person's "best interests." Beyond rendering seasoned counsel, the lawyer should not be given the prerogative to fight for other than the spoken wishes of the client, within the bounds of law and ethics.

The 1987 Associated Press Guardianship Report⁸⁷ was so alarming to the public that the American Bar Association (ABA) responded by initiating the Wingspread Symposium, gathering experts in a variety of disciplines who formulated thirty-three draft recommendations for reform. One of the assumptions guiding the Wingspread Symposium was that "most clients, even those who are mentally disabled, when 'properly advised and assisted' [are able] to make decisions regarding important legal matters."⁸⁸ The attorney is to act as an advocate, pursuing the ward's wishes; not as the guardian, trying to determine the ward's best interests. The specific recommendation provides:

In order to assume the proper advocacy role, the respondent's . . . counsel must: 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 [sic] any of those options . . .

mination 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, 1825 (1992).

83. See *Computer Analysis*, *supra* note 30, at 1. The Associated Press report indicated that only 44% of wards had legal representation. *Id.*

84. Rein, *supra* note 82.

85. If the client is clearly unable to determine his or her best interests, the best interests of the ward are legally determined and communicated by the guardian ad litem, not the attorney. This may occur in cases of a comatose client as well as other rare cases. See 755 ILL. COMP. STAT. 5/11a-4.

86. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7, A Lawyer Should Represent a Client Zealously Within the Bounds of the Law (as amended Aug. 1980); see also Parry, *supra* note 29, at 406 n.28 (citing *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972)).

87. See *Guardians of the Elderly*, *supra* note 29.

88. Parry, *supra* note 29, at 402.

and zealously advocate the course of actions chosen by the client or the client's guardian ad litem.⁸⁹

The constitutional right to counsel is meaningless if the attorney's role is reduced to an independent determination of the client's best interests and advocacy solely within those narrow boundaries. The right to counsel fulfills its design only when the client (the alleged ward), in conjunction with the counsel of an attorney, determines the best course of action for him, and the lawyer advocates those interests.

C. Constitutional Procedures

When a person is adjudicated incapacitated, he loses many constitutionally protected liberties.⁹⁰ "Such a loss [of liberty] . . . should invoke 'the full panoply of procedural due process rights comparable to those present in civil commitment.'"⁹¹ Guardianship laws must address these and other factors to guarantee the "full panoply of procedural due process rights": presumption and burden, standards for the finder of fact, the power to compel and cross-examine witnesses, and the right to have the issue submitted to a jury.

Some of the following conclusions have not been tested in the courts. In some cases, where there is no constitutional ruling yet directly on point, the analysis proceeds by principle and analogy. The following constitutional conclusions may raise issues of first impression because the incapacitated may lack the vigor, wealth, or stamina to fully litigate the issues presented. Perhaps the courts have tried to resolve the cases on alternative grounds without reaching the constitutional issues. The following issues should be addressed by anyone litigating guardianship issues and in reviewing the sufficiency of current statutes.

1. PRESUMPTION AND BURDEN

An adjudicated incompetent loses more rights than the typical prisoner.⁹² An accused murderer enjoys a presumption of innocence as well as a heavy state burden to prove guilt beyond a reasonable

89. *Id.* at 402-03.

90. For example, decisions regarding where to live, the making of contracts, borrowing money, making gifts, and other basic decisions are made by the guardian, not the ward. See *Hedin v. Gonzales*, 528 N.W.2d 567, 573 (Iowa 1995).

91. *Id.* at 574 (quoting Sheryl Dicker, *Guardianship: Overcoming the Last Hurdle to Civil Rights for the Mentally Disabled*, U. ARK. LITTLE ROCK L.J. 485, 489 (1981)).

92. See ABUSES, *supra* note 82, at 4; see also *Vitek v. Jones*, 445 U.S. 480, 491-96 (illustrating the greater degree of protection afforded a convict compared to that afforded persons adjudicated incompetent or incapacitated).

doubt. The elderly, on the other hand, are not always presumed competent, and the burden of proof is universally less strict. If the elderly person wishes to contest the appointment of a guardian, the process is necessarily an adversarial one, and all rights due a citizen who may be deprived of liberty must be scrupulously honored.

As with defendants in trials of whatever sort, the elderly must be presumed innocent, that is, competent to manage their own affairs. The burden of proof must necessarily reside with the petitioner, the plaintiff in a guardianship proceeding. Too often the petition or report itself has been considered *prima facie* evidence of incapacity,⁹³ shifting the burden to the alleged incompetent to prove he is capable of managing his own affairs. Courts have been reluctant to recognize the adversarial nature of the proceeding,⁹⁴ especially when the potential ward contests the petition.⁹⁵ A contest deciding whether to remove the right to make life's most basic decisions is necessarily adversarial in nature. Guardianship proceedings too often resemble a trial in a civil law country, where judges serve as aggressive finders of fact, instead of the American common-law adversarial tradition where the judge serves as a neutral referee between two disputing parties. Due process should require a specific presumption of capacity in this drastic proceeding. The due process presumption mandates that the burden of proof be placed on the petitioner to allege and prove specific facts giving rise to a judgment of incapacity.

The presumption of capacity⁹⁶ and petitioner's burden of proof are more than constitutional technicalities. In effect, a double standard exists. Society is unwilling to tolerate in a seventy- or eighty-year-old person 'the same silly decision' that would go unchallenged if made by an individual in the prime of her life. If, for example, Susan at age forty-eight were to lavish all her funds on a twenty-year-old gigolo or to spend all her income at the racetrack, her actions might provoke disapproval, but they would hardly trigger a petition for conservatorship, even though her financial frivolity might ultimately land

93. "Though the burden of proof technically is on the petitioner, you should be aware that generally the judge will rely heavily on the medical statement, often making it dispositive of the case without objection." Rein, *supra* note 82, at 1840.

94. See Tor, *supra* note 17, at 745.

95. "Courts considering guardianship petitions often fail to adhere to the formal structure of the adversarial process." *Id.* at 746.

96. Illinois, for example, has recognized that a person is presumed to have capacity to manage her own affairs, and the status of incapacity arises only after the verdict. See *McCormick v. Blaine*, 178 N.E. 195, 200 (Ill. 1931).

her on the welfare rolls. The same indiscretions by a seventy- or eighty-year-old Susan, however, would likely prompt someone to seek a total or partial conservatorship. Similarly, if a middle-aged Susan were habitually using large amounts of cocaine or other mind-destroying drugs, she might be subject to criminal penalties, but it is unlikely that anyone would seek to place her under a guardianship. Contrast that with something far less serious, irregular eating patterns, which would likely provoke a petition for guardianship over Susan if she were a senior citizen.⁹⁷

Irrational disparate treatment of individuals based on age violates the equal protection promise of the Fourteenth Amendment to the Constitution.⁹⁸ An age discrimination claim under the Fourteenth Amendment's Equal Protection Clause, relating to guardianship, has not yet been raised.⁹⁹ Given the meager percentage of cases where the

97. See Rein, *supra* note 82, at 1844-45.

98. Laws making distinctions based on age are subject to rational basis scrutiny and survive only if rationally related to a legitimate state interest. See *Vance v. Bradley*, 440 U.S. 93 (1979). See also *City of Chicago v. Mosley*, 408 U.S. 92 (1972). In *Mosley*, an ordinance prohibiting school picketing except for a labor dispute unconstitutionally distinguished peaceful labor picketing and other peaceful picketing. In analyzing this differential treatment, the court held that "in all equal protection cases . . . the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment." *Id.* at 95. In the case of guardianship, there is no governmental interest furthered by treating the elderly differently than other citizens.

See also *Rinaldi v. Yeager*, 384 U.S. 305 (1966). In *Rinaldi*, the Supreme Court invalidated a state law that required reimbursement of the cost of the trial court transcript (required for an appeal) only from current inmates. The Court held:

The Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes It also imposes a requirement of some rationality in the nature of the class singled out. To be sure, the constitutional demand is not a demand that a statute necessarily apply equally to all persons. "The Constitution does not require things which are different in fact . . . to be treated in law as though they were the same." Hence, legislation may impose special burdens upon defined classes in order to achieve permissible ends. But the Equal Protection Clause requires that, in defining a class subject to legislation, the distinctions that are drawn have "some relevance to the purpose for which the classification is made."

Id. at 308-09 (citations omitted). By analogy, guardianship statutes must have procedural provisions which are relevant to determining actual incapacity. Clearly, the state has a legitimate interest in caring for its elderly citizens; in setting forth guardianship procedures, however, the state should focus on whether one requires state assistance to manage oneself and one's own estate. Any age-based assumptions a state makes will defeat the goal of guardianship, which is to *care only for those unable to care for themselves, not to care for the elderly just because they are older*. Thus, a state can draw a rational distinction for classification of one's capacity, not date of birth.

99. This is not at all surprising because most age discrimination claims concern employment issues. Age is a protected class under the Age Discrimination in

alleged incompetent is graced with counsel willing to follow the client's spoken wishes, this is hardly surprising.

2. FACT FINDER STANDARDS

Generally, the standard of proof in a given case should correspond to the value of the rights surrendered in the event of an unfavorable judgment. In a criminal trial, the accused is presumed innocent of the charges against her, and that presumption remains with the defendant throughout the trial until the time the state proves guilt beyond a reasonable doubt. Likewise, in civil litigation, the defendant is presumed to be innocent of the plaintiff's allegations until the plaintiff shows the allegations true by a preponderance of the evidence. Which standard is appropriate for the finder of fact in a guardianship proceeding is the issue. The Illinois statute makes no mention of the evidentiary burden that must be met by a petitioner.¹⁰⁰ Other jurisdictions, however, have realized the constitutional significance of the question, holding the standard must be proportionately high to the rights potentially surrendered. New York has taken a balancing approach to the state's interest in protecting its elderly citizens and the liberty interest of the elderly to be free from interference in their affairs.

[G]iven the gravity of the liberty and property interests at stake . . . the legislature has imposed the heavy evidentiary burden of requiring proof by clear and convincing evidence Such evidentiary protection is, in and of itself, inadequate as a matter of due process if there is no relation between that which must be

Employment Act, 29 U.S.C. §§ 621-634 (1994). Because the statute deals with age discrimination in employment, there has been no need for the courts to consider guardianship under the U.S. Constitution until now.

100. The Illinois appellate courts have not articulated an appropriate evidentiary burden for the guardianship statute, stating instead that "it is fundamental that the determination of whether or not respondent is incompetent is a uniquely factual question to be decided by the trial judge." *Estate of Galvin v. Galvin*, 445 N.E.2d 1223, 1225 (Ill. App. Ct. 1983). One appellate decision reported the following statement of a trial judge regarding the burden of proof that must be met to appoint a guardian:

There is no way in God's world that I am going to adjudicate him a disabled person. He is physically suffering from some disability He is eccentric . . . but there is no way I am going to adjudicate him in need of a guardian He lives a bizarre, strange life. I might not want to do it, but unless you can make an offer of proof that is going to show me that he does not understand the thing he's doing— He understands.

Id. at 1224.

proved and the interference with liberty which the state then imposes.¹⁰¹

Other jurisdictions also have felt compelled by the Constitution to raise the standard of proof from a mere preponderance of the evidence to the greater clear and convincing evidence standard, in lieu of the rights and privileges at stake. For example, the West Virginia Supreme Court made the constitutional ruling that "because a finding of incompetency involves a deprivation of an individual's exercise of liberty and property rights, a determination of incompetency . . . cannot be summarily made; such a finding must be established through clear and convincing evidence."¹⁰² The clear and convincing evidence standard seems to be the growing trend.¹⁰³ A preponderance of the evidence standard is seen as too broad considering the rights at stake. At the other extreme, the beyond a reasonable doubt standard is too difficult a burden for an evaluation of someone's capacity, which may be inherently a more nebulous conclusion than one's guilt in a criminal trial. One's functional capacity to manage his affairs is a hazier concept than is one's involvement in a crime. The beyond a reasonable doubt standard applied in determining partial capacity would be very difficult to satisfy, and thus, frustrate the establishment of a limited guardianship.¹⁰⁴ Unfortunately, courts may have to rewrite or augment their guardianship statutes to pass constitutional muster.

101. *In re Fisher*, 552 N.Y.S.2d 807, 813 (N.Y. Sup. Ct. 1989); see also *Santosky v. Kramer*, 455 U.S. 745 (1982).

102. *Shamblin v. Collier*, 445 S.E.2d 736, 741 (W. Va. 1994). A similar conclusion was reached by a Minnesota Court of Appeals. See *In re Conservatorship of Foster*, 535 N.W.2d 677, 681 (Minn. Ct. App. 1995).

103. In 1981, Utah rejected the "preponderance of the evidence test," as well as the "reasonable doubt" standard, and adopted the "clear and convincing evidence" standard of proof. The standard was determined by weighing the state's interest in having a guardian of the ward, the interest of the ward, the consequences of an erroneous judgment, and knowing or unknowing abuse by third parties. The court also noted the other jurisdictions which have already switched to this standard: Iowa, Nebraska, Illinois, and New Mexico. See *In re Boyer*, 636 P.2d 1085, 1091 (Utah 1981). See generally *Tor & Sales*, *supra* note 81, at 11.

104. Proving only a limited area of capacity beyond a reasonable doubt may be problematic. The proof required to sustain such a burden may inevitably spill over to other areas of incapacity which are not, in and of themselves, issues in the proceeding. Such a high burden of proof may require an unnecessary intrusion into the privacy of the elder by exploration on the public record of every personal and private act of the elder. This may result in a guardianship that is overbroad, or failure to sufficiently prove the need for any guardianship, when the appropriate measure is a limited guardianship. As a practical matter, then, requiring the highest standard of proof—beyond a reasonable doubt—is probably an unwise standard to adopt because it would discourage limited guardianship arrangements, which usually afford elderly persons greater autonomy than traditional plenary guardianships.

Absent a U.S. Supreme Court ruling on the issue, courts will be free to reach different conclusions about the standard of proof required to deprive one of her rights and liberties under guardianship.

3. COMPEL WITNESSES

The Constitution's Sixth Amendment guarantees a criminal defendant "compulsory process for obtaining witnesses in his favor."¹⁰⁵ This right probably was given to criminal defendants and not civil defendants because of the greater liberty interests surrendered in the event of a criminal conviction. As discussed above, however, the rights surrendered by a ward in the event of a full guardianship appointment are greater in quality and quantity than those surrendered by a convict. The spirit of the Constitution, therefore, mandates that alleged incompetents be given the right to compel witnesses to testify on their behalf, because the liberty potentially surrendered matches or exceeds the liberty surrendered by those to whom the protection facially applies. To date, the U.S. Supreme Court has not ruled explicitly that the ability to compel witnesses is constitutionally required for the ward in a guardianship. The Supreme Court's inaction, however, does not suggest that the right to compel witnesses in a guardianship proceeding is not constitutionally mandated. If not implied by the Sixth Amendment, the right to compel witnesses in a guardianship proceeding may be found in the Fourteenth Amendment's Due Process or Equal Protection Clauses.¹⁰⁶ Regardless, the Supreme Court should not have to rewrite state probate laws. Each state statute should contain this simple provision.¹⁰⁷

105. U.S. CONST. amend. VI.

106. The Sixth Amendment provides for a process to compel witnesses in one's behalf. *Id.* Presumably, this protection is provided due to the quantity and quality of the rights lost if a conviction results. Because the elderly lose similar rights both in quantity and quality, by analogy they should be afforded the same protection. That result comes in one of two ways. The court could interpret the text "[i]n all criminal prosecutions" to mean in all judicial proceedings where that quality and quantity of rights may be surrendered. *Id.* In the alternative, the court could require similar protection for those similarly situated (those who stand to lose valuable and basic rights) under a due process or equal protection 14th Amendment analysis. The Court has not yet made a ruling on this issue.

107. Illinois does not codify the right to compel witnesses in a guardianship proceeding. Rather it guarantees only the right to counsel, a six-person jury trial, to present evidence, and to cross-examine all witnesses. See 755 ILL. COMP. STAT. 5/11a-11(a) (West 1995).

4. CROSS-EXAMINE WITNESSES

The Sixth Amendment also provides that the defendant in a criminal setting be "confronted with the witnesses against him."¹⁰⁸ Following the reasoning above, this right also must be extended from criminal trials to guardianship proceedings.¹⁰⁹ Because the liberty interest at issue is so great, the respondent must be afforded the opportunity to challenge, refine, sharpen, or impeach the claims of the witnesses against her.¹¹⁰ Without such a basic and essential protection, the ward is subject to a massive civil deprivation without the most basic tenet of American jurisprudence, the right to be heard.¹¹¹

5. JURY TRIAL

Furthermore, the Sixth Amendment provides the right to a jury trial in a criminal prosecution.¹¹² The Seventh Amendment provides the right to trial by jury in federal civil cases.¹¹³ This protection is problematic in guardianship cases because most guardianship proceedings are within the state's probate court's jurisdiction, which sits without a jury.¹¹⁴ The lack of a jury leaves the judge as trier of fact and expert of law. Especially when the respondent is without the benefit of counsel to sharpen the legal and factual issues, the judge has far more discretion than is appropriate for this adversarial proceeding. The community standards and common sense of the jury, a necessary jurisprudential balancing factor, is also noticeably absent.

The ABA's National Guardianship Symposium does not make the suggestion that a jury option be required in every contested

108. U.S. CONST. amend. VI.

109. Illinois provides for the cross-examination of all witnesses. See 755 ILL. COMP. STAT. 5/11a-11(a).

110. Every person making an allegation of incapacity or facts giving rise to incapacity should be cross-examined by respondent's counsel on issues such as expertise, motives, recollection, context, and factual basis for conclusions. For example, the doctor who affixed her signature to the report accompanying the petition should be available for cross-examination.

111. The right to be heard should be read broadly to include every reasonable opportunity to present an effective defense, including cross-examination.

112. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ." U.S. CONST. amend. VI.

113. "In Suits at common law . . . the right of trial by jury shall be preserved . . ." *Id.* amend. VII. This right is not mandated upon the states. The Supreme Court ruled it is not a fundamental aspect of due process and therefore does not apply to the states through the 14th Amendment. See *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211 (1916). Most states, however, routinely allow a jury trial in all civil cases.

114. See *Tor & Sales*, *supra* note 81, at 23.

case.¹¹⁵ In reaching this conclusion, the ABA failed to sufficiently consider the historic American jurisprudential regard for the jury, as well as the benefit its real world experience can bring to the proceeding. The role of the jury is an asset, not a detriment to a just adjudication of competency. The jury's variety of experience, diversity in worldview, and freshness to the legal complexities of guardianship make its assistance a necessity.¹¹⁶

Detractors of the jury system may point to the court's time and expense, administrative hassle, imposition on the time of citizens, and inconsistent results that may accompany jury decisions. Although these are not insignificant concerns, they do not outweigh the benefits of the jury system. If a small claims defendant can receive a jury trial, the elderly person faced with guardianship deserves one as well. Holding otherwise would be an intolerable inconsistency that would reflect poorly on the law's commitment to the elderly.

6. DETERMINING INCAPACITY: THE HEARING

The policy and constitutional problems with guardianship statutes that are most likely to have an unfair impact on the determination of capacity arise in the definition of incapacity and in applying the facts of a given case to that definition. When evaluating the adequacy of statutory guardianship definitions, three factors must be highlighted.¹¹⁷

First, incapacity is a legal standard, not a medical conclusion. The legal standard for incapacity may differ significantly from a medical conclusion of incapacity. Although the input of the medical community is relevant, it must be incorporated into the legal definition of incapacity to make a proper adjudication.

Second, legal capacity must be used within the context of one's ability to do something. A person cannot be incapacitated outside the context of her ability to act toward a specific purpose. A person may be lacking capacity to make one kind of decision, while retaining capacity in other areas, because the skills necessary in one situation may

115. In the specific listed rights of the alleged incapacitated at the hearing, the right to a trial by jury was not listed. See Parry, *supra* note 29, at 402.

116. Some states, like Illinois, do recognize the valuable role juries play in guardianship proceedings and have codified the right to have a jury hear the case. 755 ILL. COMP. STAT. 5/11a-11(a) (West 1995).

117. These points are liberally borrowed and adapted from Stephen J. Anderer, *A Model for Determining Competency in Guardianship Proceedings*, 14 MENTAL & PHYSICAL DISABILITY L. REP. 107, 108 (1990).

differ from those required in another. Capacity is not an all-or-nothing proposition; people can have varying degrees of capacity.¹¹⁸

Third, capacity may be contingent on external factors. A change in surroundings, circumstances, or environment may affect capacity. The individual's skills may improve with treatment, training, greater exposure to a particular type of situation, or the passage of time. The court must consider these factors in determining whether or not guardianship is necessary at all, and if so, its proper scope.

Historically, the statutory definitions have fallen into three categories: the Causal Link approach, the Uniform Probate Code approach, and the Functional Model approach. As its name implies, the Causal Link approach links capacity to the diagnosis of certain mental abilities. Under this approach, the very diagnosis of a condition may result in a determination of incapacity. Often, there is no required nexus between the mental disability and the actual ability to care for oneself.¹¹⁹ The Causal Link method is tidy. Once the alleged incompetent has been medically diagnosed with any one of a number of ailments, the court can order a guardianship.¹²⁰ For example, a Causal Link statute may include "old age," "imperfection or deterioration of mentality," and "incompetent to manage his person" as categories to be used with testimony of an inadequate caring for self as a basis for guardianship.¹²¹ But old age, in and of itself, is irrelevant to the capacity inquiry. Some persons ninety years of age are more competent than some fifty-five-year-olds. A presumption of incapacity should not follow merely from age. Moreover, the other two categories are so vague as to be of little guidance to a jury or the court. A nebulous inquiry like "imperfection . . . of mentality" or "incompetent to manage [one's] person" gives too much discretion to the finders of fact, who lack precise guidelines. Such vagueness will inevitably result in inconsistent results for persons with similar conditions adjudicated in the same jurisdiction.¹²²

118. In the legal arena, different degrees of capacity are required by the law for different acts. For example, the legal capacity to make a contract, to marry, and to write a will differ. Under guardianship the relevant capacity inquiry is whether the person has the ability to care for her person and estate.

119. "The disabilities are assumed to inhibit or destroy the ability to care for oneself or one's property." Tor, *supra* note 17, at 743.

120. See *id.* at 742.

121. See MINN. STAT. § 525.24 (1975) (discontinued version of Minnesota guardianship statute), cited in Tor & Sales, *supra* note 81, at 5 n.14.

122. See Tor & Sales, *supra* note 81, at 4 ("[B]road judicial discretion gives rise to the likelihood of different outcomes of incompetency determinations for persons

The Uniform Probate Code approach,¹²³ on the other hand, "connects a mental or physical condition to cognitive functioning, such that the condition renders an individual incapable of understanding, communicating, or making responsible decisions."¹²⁴ It also avoids some of the negative connotation associated with the word "incompetent," focusing instead on "capacity," even though the definitions are nearly identical.¹²⁵ The ABA's Wingspread conference rejected this approach because a diagnosis alone, without its corresponding allegations of functional deficits, fails to meet the *legal* definition of incapacity.¹²⁶ Too much emphasis rests on the reports of medical practitioners who focus on specific medical diagnoses and capacity. The judge and jury may give an inappropriately large amount of weight to these persuasive medical reports without due consideration of the requisite legal standards. A medical advisor may be compelled to plead for her own view of the respondent's best interests, based on her medical opinion, and the court must not lose sight of its duty to balance this consideration with the legally important civil rights and liberties affected when a guardianship is imposed.¹²⁷

The most practical of the statutory approaches, the Functional Model approach, focuses on the functional limitations one experiences in daily activities and the corresponding need of assistance.¹²⁸ Medical opinions are relevant only so far as they shed light on one's ability

with similar disabilities who are adjudicated in the same jurisdiction. It also increases the likelihood of discrepant decisions by the same judge when hearing cases for defendants with similar conditions.").

123. "'Incapacitated person' means any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause (except minority) to the extent of lacking sufficient understanding or capacity to make or communicate responsible decisions." UNIF. PROBATE CODE § 5-103(7) (amended 1989), 8 U.L.A. 436 (Supp. 1996).

124. Tor, *supra* note 17, at 743.

125. Incompetency is defined as a "disqualification, inability or incapacity . . . [in] fitness to discharged the required duty." BLACK'S LAW DICTIONARY 765 (6th ed. 1990). The definition of incapacity is substantially similar. *Id.* at 760.

126. See Parry, *supra* note 29, at 404.

127. The Illinois guardianship statute mirrors the Uniform Probate Code's approach. The statute directs the court to inquire about the level of the potential ward's "general intellectual and physical functioning," the impairment of "adaptive" behavior if it is a person with a developmental disability, the nature and severity of the mental illness, the capacity of defendant to make "responsible" decisions concerning his person, the capacity of defendant to "manage" his estate and financial affairs, and any other area deemed appropriate. 755 ILL. COMP. STAT. 5/11a-11(e) (West 1995). This statute is riddled with irrelevancies and terms so vague, including "responsible," "capacity," and "general intellectual and physical functioning" as to be of no practical use to bench, bar, or fact finder.

128. Tor, *supra* note 17, at 745.

to perform life's basic functions. A bland diagnosis of some disability, without a resulting functional deficiency relating to one's ability to care for oneself, is irrelevant. Further, the testimony of those who know the respondent best, usually family and friends, achieves prominence to the extent it illuminates the ability or disability of the elderly person to care for herself. Well-written functional statutes will list specific activities, such as securing food, clothing, and health care, which can be evaluated by the courts in determining whether the respondent is able to remain self-sufficient, and if not, what degree of intervention is required.¹²⁹ The Functional Model approach is also helpful to those issuing medical opinions. It forces the health care provider to state her conclusion in practical, legal terms, resulting in less unhelpful medical jargon and technicalities. Such specific criteria is also more helpful to a jury charged with the important task of determining whether someone should lose control of most of life's decisions.¹³⁰ Special verdict forms, allowing the jury to specifically determine what areas of incapacity, if any, they find, aid this analysis as well. It allows the jury to do its job—inquiry of the facts. Specific questions such as, "Can the respondent adequately feed herself?" and "Is the defendant able and willing to properly clothe himself?" are vastly easier to answer than is some vague and broad conclusion based on nothing more specific than "one's ability to care for him or herself." Functional statutes also may require an inquiry about a potential ward's access to family, friends, and emergency resources.¹³¹

New Hampshire has a Functional Model approach statute. The statute begins by defining a functional limitation as "behavior or conditions . . . which impair [one's] ability to participate in and perform minimal activities of daily living that secure and maintain proper food, clothing, shelter, health care or safety for himself or herself."¹³² The statute defines incapacity as "a legal, not a medical disability . . . measured by functional limitations Inability to provide for personal needs or to manage property shall be evidenced by acts or occurrences, or statements which strongly indicate imminent acts or occurrences."¹³³

129. See *Tor & Sales*, *supra* note 81, at 7.

130. This assumes the jurisdiction allows juries in guardianship cases. The probate court, however, often sits without the benefit of a jury, in which case the judge will be making these factual determinations.

131. See *Tor*, *supra* note 17, at 753.

132. N.H. REV. STAT. ANN. § 464-A:2 (VII) (1992).

133. See *id.* § 464-A:2 (XI).

The ABA suggested five elements to determine incapacity.¹³⁴ First, the definition must distinguish between partial and total incapacity. Second, a medical diagnosis is relevant only to the extent it provides insight into one's functional ability to care for oneself. Third, in determining incapacity, the inquiry should focus on behavior over time, not on one or two specific events whose prejudicial character may lead to a premature conclusion. Fourth, a finding of incapacity should be accompanied by a finding that the alleged incompetent is likely to suffer substantial harm because of the specified disabilities to manage her personal or financial affairs. Finally, "mere labels that identify a person by his or her age, eccentricities, poverty, or medical diagnoses—for example advanced age, homeless or schizophrenic—should not be sufficient to justify a finding of incapacity [In other words,] medical diagnoses alone should not be used to make functional assessments."¹³⁵

7. GUIDELINES THAT ARE FAIR: AVOIDING A DOUBLE STANDARD

Courts may wish to break down the capacity inquiry into the respondent's ability to care for self and property, depending on whether the petitioner is seeking guardianship or conservatorship. Care for oneself should be further divided into manageable segments. A breakdown proposal should focus on the alleged incompetent's ability to secure nutrition, clothing, personal hygiene, health care, shelter, and safety.¹³⁶ Consider the following interrogatories for each category, not necessarily in order of importance.¹³⁷ First, inquiry should be made into the elderly person's nutritional habits in order to determine whether she is able to maintain a correct diet and properly acquire, store, and prepare food. Second, basic to the ability to take care of oneself is the ability to clothe oneself. The respondent must be able to dress and undress, using clothes adequate for the weather. Third, autonomy assumes a basic amount of personal hygiene. The finder of fact must determine if the respondent is able to wash herself, use the bathroom, and keep her clothes and living environment reasonably clean. Fourth, health care is a crucial aspect of the capacity

134. See Parry, *supra* note 29, at 404.

135. *Id.*

136. See Anderer, *supra* note 117, at 110.

137. Such inquiries are examples, not an exhaustive list. Statutes should reflect this broad construction in order to give effect to the underlying purpose of the guardianship statute.

determination because of its potential for immediate, adverse results. The alleged incompetent must be able to take care of minor health problems as they arise, take prescribed medication, alert others of serious health problems, and be able to reach a doctor if necessary. Fifth, proper self-maintenance also requires adequate shelter. The elderly person should have the ability to maintain shelter that is safe and adequately heated and ventilated, contact people to make routine repairs, and create an environment in which the respondent can meet her other needs. A final regiment in this inexhaustive list is that the court must ensure the safety of the proposed ward. Any action exhibiting a life-threatening behavior (i.e., wandering, leaving a lighted stove, provoking others) should weigh in favor of guardianship.

Although thoughtfully worded questions provide concrete aid to judge and jury, these questions illustrate a lingering misunderstanding of guardianship. They wholly fail to take account of environmental factors which may significantly mitigate an inability to perform some of the questioned activities. For example, if an elderly person has voluntarily checked herself into an assisted living center, where three meals a day are provided, it is of no relevance that she herself could not acquire, store, or prepare food. If a physical disability keeps one homebound, but he receives a "meals on wheels" nightly nutritious dinner, it is of no relevance that lunch was candy, a cigarette, and coffee. In determining what functions the defendant has, the court must first determine what functions are needed:

The capability to manage one's person does not resolve itself upon the question of whether the individual can accomplish tasks without assistance but rather whether the individual has the capability to take care of himself . . . [so] that all his needs are met through whatever device is reasonably available under the circumstances.¹³⁸

Comparing the standards set for the elderly with those of the typical American teenage or college student provides a helpful analysis. Interestingly, the conditions and disabilities that lead to guardianship for the elderly provoke only rolling eyes in the parents of a teenager or college student. Arguably, few college students' meals "meet their nutritional needs." Maybe even fewer are vigorously committed to "keeping clothes clean" or "keeping the living environment clean." A vast number of college freshmen "exhibit life-threatening

138. *Shamblin v. Collier*, 445 S.E.2d 736, 740 (W. Va. 1994) (citing *In re Estate of McPeak*, 368 N.E.2d 957, 960 (Ill. App. Ct. 1977)).

behaviors" such as excess drinking, driving under the influence, drug experimentation, walking alone at night, speeding, unsafe sexual experiences, and the list goes on.¹³⁹ Such behaviors inspire alma mater nostalgia in youth, but result in a petition of guardianship for an elder.

The same inconsistent standards relate to estate management. If an adult student lives above her means, accumulates student loans, and spends excessively on credit cards, hardly anyone takes notice. If the elderly engage in such behavior, an unjust presumption of incompetency requiring guardianship arises. Ironically, a college student wearing shorts in the middle of winter is considered stylish, while an elderly person doing the same evokes state intervention. This double standard is not only insulting to an older person's dignity and autonomy, but it raises significant constitutional equal protection concerns.¹⁴⁰ If a student over the age of majority squandered his education and money on wine and romance, it might prompt a parental rebuke, but the odds of a guardianship petition arising are vacuous. That the same action by an elderly person may result in guardianship is *prima facie* evidence that the elderly do not yet have the equal protection of the laws nor respect for their individual choices and autonomy. The threshold of guardianship must be higher than improvident choices.

The fact that someone else might, or could make better choices is not the point. In a constitutional system such as ours, which prizes and protects individual liberties to make decisions, even bad ones, the right to make those decisions must be preserved. . . . The integrity of the elderly, no less than any other group of our citizens, should not be invaded, nor their freedom of choice taken

139. A survey of 30,000 students at Southern Illinois University at Carbondale found that nearly 8% of students carry dangerous weapons to class, 12% feel unsafe at school, 39% had a binge drinking experience in the past two weeks, 23% said their campus promoted drug use, and 10% had received threats of physical violence. See Frank Fisher, *Poll: Many Collegians Feel Unsafe at School*, CHI. SUN-TIMES, June 7, 1995, at 6. College health centers in New York City have broad concern that students continue to engage in unsafe sex, despite education programs. AIDS is now the leading cause of death for men aged 25 to 44. See Katherine Pushkar, *Sex and Death After Age 18: City Colleges Eschew AIDS Education*, VILLAGE VOICE, Apr. 18, 1995, at 10.

140. As discussed above, this specific issue has not yet reached the courts. That fact is not dispositive given the often diminished zeal, capacity, and resources of the elderly to contest such an assumption on constitutional grounds. A person facing old age issues and a guardianship proceeding is not likely to be a good candidate for protracted constitutional litigation in the federal courts.

from them by the state simply because we believe that decisions could be "better" made by someone else.¹⁴¹

West Virginia codified this principle: a finding that the individual displays poor judgment, alone, is not sufficient evidence that the individual is a protected person.¹⁴²

8. THE LEAST RESTRICTIVE ADJUDICATION

The finder of fact should determine how the ward is incapacitated and how the limited guardianship will address the specific areas of incapacity. A state cannot accomplish a legitimate purpose "by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."¹⁴³ If the elderly person is found to be incapacitated, the guardianship adopted "must be narrowly tailored to achieve the basic statutory purpose."¹⁴⁴ To pass constitutional muster, the guardianship appointed must have authority only over those areas in which the ward has been found specifically incapacitated. For example, if the ward is able to handle his affairs, but forgets to eat, power over his residence and checkbook is a power which exceeds the extent of the impairment and constitutes an unconstitutional removal of liberty without a corresponding state interest. "[T]he concurrent determination of impairment in the management of one's affairs and of need for an appointment of a [guardian] can and should, constitutionally, be only that and no more."¹⁴⁵ This line of case law suggests that an all-or-nothing guardianship scheme may be unconstitutional. Affecting a full deprivation of constitutional rights in order to assist the ward in a minor area of incapacity is overbroad and consequently denies due process protection.¹⁴⁶ A simple statute providing for a plenary guardian in cases of total incapacity and a limited guardian when the respondent lacks only some relevant capacity easily passes constitutional overbreadth scrutiny.¹⁴⁷ Not only is such a provision constitutionally mandated, but also serves the public inter-

141. *In re Fisher*, 552 N.Y.S.2d 807, 813-15 (N.Y. Sup. Ct. 1989).

142. *See* W. VA. CODE § 44A-1-4 (1982 & Supp. 1996).

143. *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

144. *In re Boyer*, 636 P.2d 1085, 1090 (Utah 1981).

145. *In re Fisher*, 552 N.Y.S.2d 807, 814 (1989) (footnote omitted); *see also In re Mikulanec*, 356 N.W.2d 683, 687 (Minn. 1984) (holding "once [guardianship] is created . . . the powers of the guardian should be kept to the bare minimum necessary to care for the ward's needs.").

146. *See Hedin v. Gonzales*, 528 N.W.2d 567, 577-78 (Iowa 1995).

147. Illinois has such a statute, codified at 755 ILL. COMP. STAT. 5/11a-12(b)-(c) (West 1995).

est by preventing fraud and abuse while retaining individual autonomy for as long as practicable.

9. CONSTITUTIONALLY MANDATED SPECIFICITY

Courts are sometimes forced to rewrite guardianship statutes that are unconstitutionally vague. The U.S. Supreme Court has held that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is and what is not prohibited in each particular case.¹⁴⁸

A person in Illinois may be adjudicated as disabled (incapacitated) if "he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning the care of his person, or . . . is unable to manage his estate or financial affairs"¹⁴⁹ due to the impairment. This statute should not survive serious constitutional scrutiny. Whether the "capacity to make or communicate responsible decisions" is a "legally fixed standard" is quite uncertain. This standard does not give enough guidance or criterion by which to measure one's capacity. Nor is this standard "sufficiently definite."¹⁵⁰ If the statute affects fundamental liberties and is so vague that people "of common intelligence must necessarily guess at its meaning,"¹⁵¹ the statute is unconstitutional.¹⁵²

Vague standards of incapacity have the potential to result in more unwarranted appointments of guardianships than any other factor. For example, statutes as vague as that of Illinois do not give the trier of fact any guidance or standards for determining the meaning of the word "responsible." Without more statutory guidance, the life-changing determination of guardianship is based on nothing more than arbitrary intuition. In fact, statutes similar to that in Illinois have been struck down. In *Colyar v. Third Judicial District Court*,¹⁵³ a case directly on point, the court held the word "responsible" standing alone "lends itself to a completely subjective and, therefore, potentially arbitrary and nonuniform, evaluation of *what* is decided rather

148. See *Giaccio v. Pennsylvania*, 382 U.S. 399, 401-02 (1966).

149. 755 ILL. COMP. STAT. 5/11a-3(a)(1)-(2).

150. *United States v. Petrillo*, 332 U.S. 1, 7-8 (1947).

151. *State v. Packard*, 250 P.2d 561, 563 (Utah 1952) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)).

152. See *In re Boyer*, 636 P.2d 1085, 1088 (Utah 1981).

153. 469 F. Supp. 424 (D. Utah 1979).

than an objective evaluation of the *method* by which the decision is reached."¹⁵⁴

10. ADEQUATE MONITORING

Many abuses occur after the ward has been determined incapacitated and is left to the guardian, out of the watchful eye of the court. The 1987 Associated Press study indicated that only sixteen percent of the cases studied contained annual reports of the ward's condition.¹⁵⁵ The guardian has nearly full power over the ward, especially in a plenary guardianship arrangement. If not monitored, the ward's situation may become oppressive, neglectful, or even abusive.¹⁵⁶ Indeed, wards report a high dissatisfaction rate—they apparently were happier "incompetently" managing their own lives.¹⁵⁷ Approaching old age has enough grim alternatives: increasing frailty, loss of spouse and friends, more dependence, and decreased physical capacity, including less stamina and energy. The prospect of being confined in an oppressive, neglectful, or abusive guardianship cannot be added to the list.

Some states mandate a practical monitoring process that allows the court adequate supervision, while not unduly burdening the guardian. Florida, for example, requires the guardian to submit an annual report on the ward and requires the court to review that report.¹⁵⁸ The court must approve it for the guardian to retain the guardianship for the coming year.¹⁵⁹ The report may not, in any way, expand the power of the guardian without a hearing,¹⁶⁰ and the ward himself may object to the report and demand a hearing.¹⁶¹ With these simple safeguards, Florida guarantees minimal, but effective judicial oversight of its incapacitated citizens. Such safeguards necessarily will result in more accountability and fewer instances of abuse and neglect.

154. *Id.* at 433.

155. See *Computer Analysis*, *supra* note 30, at 1.

156. See *Tor & Sales*, *supra* note 81, at 24.

157. Studies by psychiatrists, psychologists, gerontologists, and environmental psychologists illustrate and prove that the mental health of many elderly greatly deteriorates when deprived of any control or choice in their lives. See Rein, *supra* note 82, at 1836. See generally Judith Rodin, *Aging & Health: Effects of the Sense of Control*, 23 *SCIENCE* 1271, 1271 (1986) (confirming that sense of control and health are directly related).

158. See FLA. STAT. ch. 744.369(4) (1996).

159. See *id.* at ch. 744.369(8).

160. See *id.*

161. See *id.*

In contrast, the Illinois statute gives very little guidance to the courts, providing only "[if] the court directs, the guardian of the person shall file with the court at intervals indicated by the court, a report The court may take such action as it deems appropriate pursuant to the report."¹⁶² Illinois makes no provision to account for the ward's assets and estate. If the incapacitated person feels she is not being cared for in the manner specified in the guardianship decree, her options are limited by her inability to make a contract with an attorney, the lack of judicial supervision, and vague statutes that do not plan for this contingency. If the court chooses not to require a report, the ward may be "imprisoned" for life. The statute does not provide for the termination of the guardianship in the event the ward's capacity returns. The only practical method to terminate the guardianship is by recommendation of the guardian to the court in his report, if it is required. As previously discussed, the Constitution requires that guardianship be construed as narrowly as possible to meet the specific areas of incapacity of the ward. A ward could end up a *de facto* lifetime prisoner of the guardian without any judicial oversight.

This dilemma highlights the need for specific periodic reports. The postguardianship reports may be constitutionally mandated due to the potential for unsupervised deprivation of liberty, although no court has yet addressed this issue. Without the reports, the guardianship may last longer than the ward's incapacity. This extension is not the least restrictive adjudication and may be constitutionally invalid for the reasons discussed above. No state law should be construed to allow a personal deprivation of personal liberty interests, unless it is tailored and monitored to be flexible enough to desist, if necessary, and unless the abrogation of rights is monitored to insure no more autonomy is surrendered by the ward than the exact judgment of the court. By not requiring a periodic report, the legislature has failed to account for the realities of life: changed circumstances and abuse of the process. As such, the statute suffers the constitutional deficits of vagueness and overbreadth.

IV. Resolution and Recommendation

Many of the recognized issues negatively affecting the nation's elderly in guardianship proceedings can be rectified by more specific

162. 755 ILL. COMP. STAT. 5/11a-17(b) (West 1995).

and constitutionally balanced state statutes. The stalled federal initiative, the National Guardianship Rights Act, would have the benefit of bringing state standards up to a constitutional and reasonably fair standard. But the wisdom of allowing guardianship-related issues into federal legislative and judicial jurisdiction is questionable at best.¹⁶³ Some states, like Florida, lead the way with the kind of sound public policy reforms that pass constitutional scrutiny, and safeguard the liberty and dignity of the elderly. Other statutory schemes, like that of Illinois, represent the archaic laws of vagueness, overbreadth, and overly broad discretion that ensures the lack of uniformity, arbitrariness, and inability of the ward to obtain a redress of the injustice. State by state, laws must be changed to reflect attention upon the due process rights of the elderly and realization of the strong public policy reasons mandating the changes.

At every stage in the guardianship process, the state's interest in protecting its citizens must be balanced with the powerful constitu-

163. If the federal government adopted a guardianship law, federal court original jurisdiction would expand to hear guardianship cases. 28 U.S.C. § 1331 (1996). The federal courts have historically resisted involvement in domestic issues, and this would represent a radical departure from that tradition. "We tend to think of the federal government as having responsibility for international relations, and to envision state governments as addressing legal issues of purely domestic concern." Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295, 297. "The enactment of the AFDC [Aid to Families with Dependent Children] program in 1935 marked the first time that the federal government became involved in child support matters, an area historically left up to the states as were most domestic relations issues." Nancy Rank, *Beyond Jurisprudential Midrash: Toward a Human Solution to Title IV-D Child Support Enforcement Problems Across Indian Country Borders*, 33 ARIZ. L. REV. 337, 340 (1991).

The prospect of nationalizing guardianship laws also raises federalism issues. Guardianship has traditionally been the duty of the state, not the federal government. Whether family law belongs in the federal courts under diversity jurisdiction is somewhat contested within federal court jurisprudence. Although neither the Constitution nor the federal diversity statute explicitly prevents federal courts from considering family law issues, there has developed both a legislative and judge-made Domestic Relations Exception, precluding federal courts from hearing divorce, alimony, and child custody cases The Exception is necessary to preserve to the states their traditional functions and to protect federalism because power over domestic relations is not explicitly allocated to the federal government

Naomi R. Cahn, *Family Law, Federalism, and the Federal Courts*, 79 IOWA L. REV. 1073, 1088-89 (1994) (footnote omitted).

State probate courts are already uniquely qualified and experienced in this area, and there is no need to crowd the federal docket with this state law issue. On the other hand, a federal standard would give rights and liberties to the elderly whether or not the state had enacted the needed reform. If the federal government specified guidelines, into which state statutes had to fit, the issue would remain a predominately state concern.

tional liberty interest of the individual. Strict scrutiny must be applied to the entire process to ensure policy and constitutional compliance.

Because the guardian has so much authority over the ward, the court should scrutinize who may petition for guardianship and who may serve as a guardian. The relationship between the petitioner and the respondent should be an area of inquiry by the courts. An insufficient relationship, or the presence of a conflict-of-interest motive, such as a family member with an obvious financial interest in the guardianship, should be enough to dismiss the petition outright. Finally, the guardian should be a person of "competence and character," meaning a person of the legal age of majority, a nonfelon, and one who has demonstrated an ability to handle the earnest responsibility of guardianship. The petition itself should require such a showing on the part of both the petitioner and the potential guardian, if known at the filing of the petition.

The notice requirement must also be adapted to the special needs of a person who may be incapacitated. Large-print notices, clearly explaining the nature of the proceeding, the rights the ward stands to lose, the obligations of the ward in the proceeding, the rights of the respondent, and including a copy of the petition and report, and a phone number of the local agency charged with advocating for the elderly in these proceedings (the Office of the Public Guardian or another similar agency) with instructions to call for instructions or advice, should be part of the notice requirement. If there is an allegation of illiteracy, the notice should be delivered both in writing and orally.

If the petition is to be effectively challenged, the notice must include a copy of the report, allowing the respondent an opportunity to see the charges against her and to prepare an adequate defense. The law also should require notice to immediate family members, and if none are available, to their children or siblings. Decisions such as guardianship are best made by the potential ward's family. Also, other family members may be able to enlighten the court as to the improper motives of the petitioner. Finally, notice to the family prevents the unwelcome surprise of a family member being subject to the control of a third party.

Further, the court must appoint counsel for respondent unless he specifically refuses. The counsel's duty should be to represent the client's spoken wishes, not to make an independent valuation of the respondent's best interests. The "best interests" analysis by the lawyer and judge should be abandoned. Respondent's counsel has no place

making his own decision as to the "best interests" of the alleged incompetent and to represent the respondent on that basis. This kind of representation is intolerable in any other proceeding and is certainly inappropriate in a proceeding to remove the incompetent's rights. In a bench proceeding, the judge need only find by clear and convincing evidence as a matter of fact the presence or absence of specific areas of incapacity. Guardianship is an adversary proceeding, and the judge should assume the traditional role of neutral arbiter of the facts and act only on the basis of such findings. The entire purpose of the guardianship proceeding is to identify specific areas of incapacity, if any, and to assign another to care for the ward in those areas. If competent persons are not restrained by a judicial determination of best interests and narrow advocacy within that boundary, neither should the elderly be, merely because they may have an area of incapacity.

The procedural protection mandated at the hearing should mirror those of a criminal defendant at trial. The presumption must be sanity and the burden of proof should mandate the petitioner to prove incompetence by evidence that is clear and convincing. The potential ward must retain the right to compel witnesses to testify on her behalf. The right to cross-examine all witnesses, including the author of any report to be used at the hearing, must not be abridged. The option of a jury trial should be included in every state's guardianship laws.

The most important statutory revision required is the standard by which incapacity is judged. The state's power to deprive one of his liberty rights is based on the state's interest in protecting the ward and others from harm, not in determining the "best interests" of a citizen, nor in depriving a citizen of rights based on some purely medical conclusion. A standard to determine one's incapacity must allow for partial areas of incapacity. An all-or-nothing determination of capacity exceeds the scope of the ward's need and the state's interest. Standards should be constructed toward a specific determination of incapacity in a specific essential area (food, clothing, shelter, and self-care). Fact-specific standards and special jury interrogatories should be developed to aid the finder of fact in focusing on the area of incapacity. A purely medical diagnosis of some kind of disability without a corresponding functional disabling result must be regarded as irrelevant.

In enacting such statutes, states must take care not to have a double standard by elevating the standard beyond what would be ex-

pected for a younger person. To ask for higher standards of self-care for an elderly person than a younger person denies the elderly equal protection of the laws by making a finding based on age. The questions must address the essential issue: what, if any, specific area of incapacity exists that requires judicial intervention. Environmental factors, such as current living arrangement and access to voluntary care, must be factors in determining what areas of incapacity require the care of a judicially appointed guardian. Statutes that allow too much judicial discretion and do not provide enough guidance for a fact finder to consistently determine capacity are unconstitutionally vague and overbroad and must be rewritten. When removing one's liberty rights, the Constitution requires a more standard process and consistent results.

After an adjudication of incapacity, the court must restrict guardianship to the least restrictive means, so as not to restrict the ward's liberty beyond the state's interest in the balance of protecting its citizens. For example, if a ward's only inability is eating properly, the guardianship should be limited to the delivery of food. If the ward's only incapacity is her inability to pay her bills, the guardianship should be limited to checkbook access by the guardian.

Finally, because of the significant rights at stake and the unique potential for abuse in a guardianship, the legislature has an obligation to require periodic reports by the guardian. Such reports should include a specific financial statement. Americans are suffering from a guardianship system that is outdated, too discretionary, and often unconstitutional. The problem in determining guardianship has been recognized for years by lawmakers, legal commentators, the news media, and the elderly themselves. Yet federal reform has stalled and apparently been tabled indefinitely, and only a few states have enacted the desperately needed reform. As a result, the elderly are often denied some of their most basic and precious constitutional rights, notably due process and equal protection.

V. Conclusion

Guardianship is in crisis. Guardianship laws apply a double standard to the elderly and strip them of constitutional protections. Beyond the lives of those affected, the real tragedy is the simplicity with which these issues could be redressed. Statutory reform is required, and some states serve as models from which the rest of the

Union should take note. Most of the reforms are commonsense measures. They stem from treating the guardianship process as adversarial and granting to the respondent the same rights given to an accused criminal, because the rights surrendered by a ward are often greater than those given up by one in the prison system. In addition to statutory reform, courts must be aware and vigilant to protect the elderly ward's interest in autonomy, privacy, and liberty, when weighed against the state's interest in protecting its citizens.