TEN YEARS AFTER: WHERE IS THE CONSTITUTIONAL CRISIS WITH PROCEDURAL SAFEGUARDS AND DUE PROCESS IN GUARDIANSHIP ADJUDICATION?†

A. Frank Johns

In 1987, the Associated Press published an exposé on the state of guardianship in the United States, generating a storm of criticism of the guardianship system across the country. This exposé, in part, led Mark Andrews to declare that American guardianship was in a state of constitutional crisis in his note, The Elderly in Guardianship: A Crisis of Constitutional Proportions, *published in the Winter 1997 edition of* The Elder Law Journal. *In light of the significant amount of guardianship reform that has occurred in the United States over the last ten years, Mr. Johns questions the seriousness of this constitutional crisis and the need for continuing alarm.*

Before addressing the concerns raised by Mark Andrews's note, Mr. Johns, recognizing the importance of using history as a bench mark for progress in the development of guardianship law, examines the development of guardianship over time.

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The author explores how guardianship law has developed since the ancient times of the Greeks and Romans, and how the English and the American cultures further molded guardianship. He then examines the court cases that Mark Andrews relied upon in his note, finding that they do not support Andrews's constitutional crisis conclusion. Mr. Johns then reviews the remarkable progress that various states have made in reforming their guardianship laws to ensure constitutional protections. To show further support for the degree and breadth of protection that states currently provide in their guardianship laws, he details the constitutional protections offered by the states at each significant stage of the guardianship process. Mr. Johns also provides intricately detailed charts that summarize each state's statute regarding these protections. Finally, the author concludes that, although there are some important issues left to address in the area of guardianship, the resolution of a constitutional crisis is not one of those issues.

I. Introduction

A. Andrews's Note

In *The Elderly in Guardianship: A Crisis of Constitutional Proportions*,[1] Mark Andrews sounds an old alarm. Andrews contends that the guardianship system[2] is in a state of crisis, undermining the interests of the elderly.[3] This article disagrees with his contention of statutory constitutional failures, his analysis of the two primary cases cited in the note, and his conclusions relating to current guardianship[4] statutes across America.

Andrews first contends that Congress and the states have failed to reform federal and state laws concerning guardianship procedural safeguards and due process, denying the constitutional rights of the elderly caught in this so-called system.[5] Andrews then focuses on the need for the protection of the constitutional rights of older Americans,[6] ending with recommendations to improve guardianship in or-

1. Mark D. Andrews, Note, 5 ELDER L.J. 76 (1997).

2. The author contends that a guardianship system hardly exists in America. Few states have even a semblance of a functioning guardianship system statewide, and fewer still have sufficiently sound foundations to accommodate the huge elderly population that is coming, many of whom will need guardianship.

3. *See id.* at 76-77.

4. Like many other notes, comments, and articles, the words "guardian" and "guardianship" in this article include the broad spectrum of words and language used across the country to describe surrogate decision making for another person through court appointment that transfers the power over an individual's rights, liberties, placement, and finances to another person or entity. These words and language include, but are not limited to, conservatorship, interdiction, committee, curator, fiduciary, visitor, public trustee, and next friend.

5. *See* Andrews, *supra* note 1, at 76-77.

6. *See id.* at 78. In the introduction, Andrews makes the sweeping statement that states hastily disavow the rights of an elder with minimal constitutional over-

der to achieve what he writes is its goal—protection of the elderly ward.[7]

B. What Alarms Currently Ring

Of the targeted concerns that linger in guardianship,[8] two are still urgent for which legitimate alarms continue to sound. The others are no longer alarming.

1. WHERE ARE WE TO FIND THE GUARDIANS?

The late Professor John J. Regan, preeminent in the field of law and aging, considered the shortage of guardians alarming.[9] In 1992, Regan stated his strong belief that there was a break in the linkage between judicial administration of guardianships and conservatorships, and the older Americans that constituted the vast majority of individuals placed within the guardianships and conservatorships.[10] That concern addressed the ineffective use of public and private sources to find enough guardians to serve the forecast of waves of unprotected, aging Boomers in the coming millennium.[11]

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sight. He supports his premise with no case law citation, or reference to any recent general commentary or law review article.

7. *See id.*

8. *See, e.g.*, Sally Balch Hurme, *Limited Guardianship: Its Implementation Is Long Overdue*, 28 CLEARINGHOUSE REV. 660 (1994); Lori A. Stiegel et al., *Three Issues Still Remain in Guardianship Reform*, 27 CLEARINGHOUSE REV. 577 (1993) (the focus is on the diversionary use of powers of attorney in lieu of guardianship; the respondent's right to be present in the court room; the role of counsel in guardianship proceedings; and limited guardianship); *see also infra* text accompanying notes 10-11. The scope of this article does not include an examination of where to find guardians, and how to monitor and account for the guardians that are there.

9. *See* JOHN J. REGAN, TAX, ESTATE & FINANCIAL PLANNING FOR THE ELDERLY § 16 (1994); John J. Regan, *Protecting the Elderly: The New Paternalism*, 32 HASTINGS L.J. 1111 (1981); JOHN REGAN & GEORGIA SPRINGER, SENATE SPECIAL COMM. ON AGING, 95TH CONG., PROTECTIVE SERVICES FOR THE ELDERLY: A WORKING PAPER (Comm. Print 1977); John J. Regan, *Intervention Through Adult Protective Services Programs*, 18 GERONTOLOGIST 250 (1978); John J. Regan, *Protective Services for the Elderly: Commitment, Guardianship, and Alternatives*, 13 WM. & MARY L. REV. 569 (1972). While the form of guardianship process with procedural due process rights had been enhanced, Regan still warned us all about the real problems to come more than 20 years later. *See Roundtable Discussion on Guardianship: Workshop Before the Senate Special Comm. on Aging*, 102d Cong. 21-31 (1992) [hereinafter *Roundtable Discussion*].

10. *See Roundtable Discussion, supra* note 9, at 21-31.

11. *See id.*

2. HOW WILL WE ASSURE MORE CONSISTENT, EFFECTIVE MONITORING AND ACCOUNTABILITY?

Another concern addressed in connection with Regan's alarm is the mounting need for more consistent, effective monitoring and accountability relating to the duties and fiduciary responsibilities of guardians.[12] These two targeted concerns of guardian accessibility and accountability are encompassed within the traditional purview of the constitutionality of statutory procedural safeguards and due process relating to the adjudication of the alleged incompetent person.[13]

C. This Article's Focus

In his note, Andrews organized several components addressing a constitutional crisis in guardianship.[14] However, he provided readers with no foundation or preface to the history behind guardianship; neither the ancient history spanning many centuries, nor the recent history spanning the last two decades.[15] Andrews primarily examines the 1987 Associated Press exposé[16] and the flurry of congressional activity that occurred just after the exposé hit newspapers across the country over a decade ago.[17] Since then, a vast number of states have overhauled their guardianship statutes.[18] Although Andrews uses Illinois's guardianship as a standard,[19] he never reviews the guardianship laws of the states that have made changes, assessing their implementation and application in the judicial community.[20]

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12. *See* Andrews, *supra* note 1, at 77.

13. *See* Stiegel et al., *supra* note 8, at 578 n.8.

14. *See* Andrews, *supra* note 1, at 93-110 (under a section titled "Constitutional Procedures," Andrews identifies what purports to be 10 issues rising to constitutional crisis).

15. *See generally id. passim*.

16. Fred Bayles & Scott McCartney, *Declared "Legally Dead": Guardian System Is Failing the Ailing Elderly*, AP, Sept. 20, 1987; *see also* Associated Press, *Guardians of the Elderly: An Ailing System* (Sept. 1987).

17. *See* Andrews, *supra* note 1, at 82.

18. *See* Lawrence A. Frolik, *Guardianship Reform: When the Best Is the Enemy of the Good*, 9 STAN. L. & POL'Y REV. 347, 351 (1998) ("No matter how many reforms or counter-reforms are enacted, no matter how the system is modified, there is no perfection this side of paradise. Rather [than focusing on reforming the guardianship system] . . . those concerned [should focus on] the actors in the guardianship system, and how the actors' behaviors might be improved.").

19. *See* Andrews, *supra* note 1, at 86. Illinois last amended its guardianship statute in the '70s. Andrews picked a nonillustrative, nonadapted statute that is out of the mainstream of reform efforts in guardianship. That Illinois has failed to update its guardianship statute is not illustrative of current reform elsewhere in the United States.

20. Andrews provided only four footnotes that reference state guardianship statutes. *See id.* at 78 n.12 (Fla.), 86 n.63 (Ill.), 103 n.132 (N.H.), 107 n.142 (W. Va.).

This article provides a brief history of the cultures in which guardianship law has spawned; examines constitutional issues in several pertinent cases (including those cited by Andrews); canvasses states that have revised or amended their guardianship laws over recent decades; and provides a five-year statutory review of guardianship among the states and the District of Columbia.

II. A Brief Cultural History of Guardianship[21]

A. What Guardianship Is

In this article, guardianship is the broad spectrum of words and language used across the country to describe surrogate decision making. These words and language include, but are not limited to, conservatorship, interdiction committee, curator, fiduciary, visitor, public trustee, and next friend.[22] Having the potential of providing the most inclusive form of substitute decision making,[23] guardianship is a legal process or arrangement under which one person (a guardian) is granted the authority, legal right, and duty to care for another person (the ward) and his or her property.[24] There are many types of guardians; all are distinctively different. The distinction is often dictated by state statute.[25] The various types of guardian include the guardian ad litem;[26] the plenary or general guard-

21. The primary research and writing for section II of this article was first published by the author in an examination of public guardianship and the need for more guardians to serve unprotected poor older Americans in the next century. *See* A. Frank Johns, *Guardianship Folly: The Misgovernment of Parens Patriae and the Forecast of Its Crumbling Linkage to Unprotected Older Americans in the 21st Century*, 27 STETSON L. REV. 1 (1997) [hereinafter A.F. Johns, *Guardianship Folly*].

22. Many authors writing about guardianship use the word generically. *See, e.g.*, Sally Balch Hurme, *Current Trends in Guardianship Reform*, 7 MD. J. CONTEMP. LEGAL ISSUES, 143, 143-44 (1995-96).

23. *See* JOHN PARRY, MENTAL DISABILITY LAW: A PRIMER 99 (ABA 5th ed. 1995).

24. *See* BLACK'S LAW DICTIONARY 707 (6th ed. 1990).

25. Congress has yet to preempt the historically state-based power and control over this area of law. *See generally* A. Frank Johns, *Guardianship and Conservatorship*, *in* ADVISING THE ELDERLY CLIENT 15-16 (Louis A. Mezzullo & Mark Woolpert eds., Clark Boardman Callaghan 1994 & Supp. 1997) [hereinafter Johns, *Guardianship and Conservatorship*].

26. A guardian ad litem is a special guardian appointed or ordered by the court to prosecute or defend, on behalf of an infant or incompetent, a suit to which the infant or incompetent is a party, and such guardian is considered an officer of the court to represent the interest of the infant or incompetent in the litigation. *See* BLACK'S LAW DICTIONARY, *supra* note 24, at 706; *see also* 1982 Uniform Guardianship and Protective Proceedings Act § 1-403, 8A U.L.A. 439-542 (West 1993) [hereinafter 1982 UGPPA].

ian;[27] the guardian of the estate or conservatorship;[28] the guardian of the person;[29] and the limited guardian.[30]

B. The Lantern on the Stern Shines Through Many Cultures on the Doctrine of Parens Patriae

A better understanding of where guardianship is may be found in where it has been—its history is as telling as a lantern on the stern.[31]

Tuchman laments:

> [L]earning from experience is a faculty almost never practiced . . . "If men could learn from history, what lessons it might teach us," quoting Samuel Coleridge, "But passion and party blind our eyes, and the light which experience gives us is a lantern on the stern which shines only on the waves behind us." The image is beautiful but the message misleading, for the light on the waves we have passed through should enable us to infer the nature of the waves ahead.[32]

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27. Plenary guardianship is the full, entire, complete, absolute, perfect, unqualified, legal control of a person adjudicated incompetent or incapacitated, including authority over the person and property of the ward. *See* BLACK'S LAW DICTIONARY, *supra* note 24, at 1154. General guardianship is the merger of guardianship of the estate and guardianship of the person. *See, e.g.*, N.C. GEN. STAT. § 35A-1202(7) (1995).

28. The term "guardianship of the estate" means a guardian appointed solely for the purpose of managing the property, estate, and business affairs of the ward. *See, e.g.*, N.C. GEN. STAT. § 35A-1202(9).

29. The term "guardianship of the person" means a guardian appointed solely for the purpose of performing duties relating to the care, custody and control of the ward. *See, e.g.*, § 35A-1202(10).

30. The term "limited guardian" means that there is a limitation on the guardian's legal authority over the ward. A person may be incapable of making certain decisions for himself, but not incapable of making other decisions. For instance, a person who suffers from the effects of stroke or Alzheimer's disease may retain the capacity to make decisions independently about whether to undergo routine medical or dental treatment, but not about whether to undergo sophisticated surgical procedure. Similarly, the incompetent person may retain the ability to make rational choices between various alternatives for living arrangements, employment, or medical treatment, but be unable to effectively seek out the services without assistance. Or, a person may suffer complete lack of rational thought, but only during intermittent periods, followed by periods of total lucidity. Each individual's mind reacts differently to debilitating conditions, and even those individuals among us who are deemed "competent" for all purposes can and do make bad or illogical choices about their own affairs. This is the essence of the liberty which we cherish, that we each may experience the beneficial or adverse consequences of our own decisions, which we are allowed to make without the interference of others imposed upon us by the state. *See* Prefatory Note, 1982 UGPPA § 2-206(c).

31. *See* BARBARA W. TUCHMAN, THE MARCH OF FOLLY: FROM TROY TO VIETNAM 379, 383 (1984).

32. *Id.*

The lantern on the stern of guardianship shows that it is primarily built on the doctrine of parens patriae,[33] mandating that the State (the King) is the benevolent protector.[34] In those jurisdictions where the doctrine of parens patriae remains as the common law or statutory foundation, edicts, reasoned dictates of probate, and guardianship judges control.[35] In recent decades,[36] however, competing views of how guardianship laws should function have emerged, operating from opposite ends of the legal spectrum.[37] The historical view is based on parens patriae and informality, while the contemporary view is based on the adversarial process and formality. Each has strong support.[38] Many jurisdictions, including several states that embrace Article V of the Uniform Probate Code (UPC), have recently revised their guardianship statutes to provide alleged incompetent persons (AIP) the right to formal defenses based on the contemporary adversarial process.[39] As shown later in this article, even with these statutory changes, historical habits and practices of judges have been slow to change.[40]

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33. *See* L. Coleman & T. Solomon, *Parens Patriae Treatment: Legal Punishment in Disguise*, 3 HASTINGS CONST. L.Q. 345-62 (1976).

34. *See* Terry Carney, *Civil and Social Guardianship for Intellectually Handicapped People*, 8 MONASH U.L. REV. 199 (1982). Parens patriae has defined the crown as the ultimate parent of all its citizens. *See id.* at 205 n.30 (citing Eyre v. Shaftsbury, 2 P. Wms. 103, 24 E.R. 659 (1722)).

35. *See infra* note 335.

36. *See infra* Part IV.A.

37. *See infra* note 38.

38. *Compare* LAWRENCE A. FROLIK & MELISSA C. BROWN, ADVISING THE ELDERLY OR DISABLED CLIENT ¶ 17.2[5][c]-[e], at 17-8, -9 (Warren Gorham & Lamont 1992 & Cum. Supp. 1998):

> [A]n experienced judge may have been exposed to a great deal of unusual or odd behavior and consequently be less prone to interpret it as a lack of incompetency. . . . In most instances, you should advise the client to waive his right to a jury trial. . . . [F]ew states require the alleged incompetent to be represented by counsel. . . . [A]s a result, many guardianship hearings proceed with no counsel for the alleged incompetent. The court is expected to act in his or her best interest, however, and ensure that the hearing is conducted fairly.

with JOHN J. REGAN, TAX ESTATE & FINANCIAL PLANNING FOR THE ELDERLY ¶ 16.06[1] (Matthew Bender & Co. 1998):

> The proper function of defense counsel in a guardianship proceeding is to defend the client against the proposed order as vigorously as if the client were on trial in a criminal proceeding. A guardianship proceeding is as much a part of the adversarial system of justice as the criminal trial.

39. *See, e.g., infra* text accompanying notes 451-68.

40. *See* Estate of Milstein v. Ayers, 955 P.2d 78 (Colo. Ct. App. 1998). This case is given further treatment and analysis, *see infra* note 291 and accompanying text.

A brief review of guardianship history provides an understanding of why guardianship currently works the way it does, assisting readers to not only grasp the logic of its past process molded over the centuries, but to also understand the nature of its future process heading into the third millennium. The historical review shows that, when left to the heads of government, the procedural and substantive liberty interests of the people were compromised. In the most recent generation of American culture, states have recognized guardianship law's historical impact, taking steps to correct constitutional deficiencies of procedural and substantive due process.

C. Ancient History—Guardianship Through Many Cultures

As a function of law, guardianship is ancient. Over 2500 years ago, guardianship law's ancient precursors formed a pattern of taboos and tribal customs.[41] Guardianship policy has been chronicled through the collective governments[42] of the Greeks, the Romans, the English, and the Americans, spanning the globe and the centuries and functioning under monarchy, oligarchy, and democracy.[43] What follows is a brief summary of law and guardianship in those cultures.

1. GUARDIANSHIP AND GREEK CULTURE

During the golden age of Greece, the prevailing explanation for mental disabilities was that the person afflicted was possessed by demons.[44] Such maladies were thought to be a result of supernatural powers imposing punishment, and the cure was magic.[45] Exorcising the demon from the mentally disabled person in a variety of bizarre and inhuman ways was the chief method of treatment.[46] Brutal physical tortures were used, such as crushing the victim's body or remov-

41. *See generally* THE MENTALLY DISABLED AND THE LAW (Samuel J. Brakel & Ronald S. Rock, eds., U. Chi. Press Rev. ed. 1971) [hereinafter BRAKEL & ROCK]. The revised edition by Brakel and Rock adds quantitative and qualitative dimensions that compromise a seminal work further examined later in this article. *See id.* For example, Egyptian rituals took mentally disabled persons to the temples for restoration where they endured incantations, threats, and such physical remedies as herbs and oils, administered by priest-physicians. *See id.* at 1.

42. "Collective governments" is applied in two equally appropriate ways in this context: (1) the multiple regimes controlling a country over the centuries; and (2) the several countries to which the principle is being applied in this text.

43. *See generally* A.F. Johns, *Guardianship Folly*, *supra* note 21, at 6-30.

44. *See id.*

45. *See id.*

46. *See id.*

ing sections of a disabled person's skull to drive out, or let out, the evil spirit.[47]

In Greece, between the fourth and third centuries B.C., there were attempts in medicine to dispel the previous theory that mental disabilities were supernaturally induced. Hippocrates (460-370 B.C.), the father of medicine, and Greek physicians and philosophers who followed him, impressed on the Greek medical society the view that mental disabilities were a natural phenomena.[48] Some in the medical community suggested that the mentally disabled be confined in the salubrious atmosphere of a comfortable, sanitary, and well-lit place.[49] Similar attempts to advance a humane approach in law were not successful.[50] Legally, little regard was given to the idea that mental disability was primarily a medical problem rather than a religious one.[51] At the time, guardianship was only a vehicle through which the afflicted's assets and finances were controlled, leaving the medical and personal needs of the afflicted to religious rituals, tribal taboos, and chance.[52]

Guardianship in the Athenian age caught famous, infamous, and common citizens alike in its embrace.[53] An example of one such Greek citizen caught in the rigors of the incompetency inquisition is Sophacles.[54] Edith Hamilton recounted the struggle of Sophacles in his extreme old age,[55] by first quoting Schopenhauer, the great philosopher of doom, who defined all tragedy in terms of this one aged idea: "Tragic pleasure . . . is in the last analysis a matter of acceptance."[56]

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47. *See* BRAKEL & ROCK, *supra* note 41, at 1.
48. *See id.*
49. *See id.*
50. *See id.*
51. *See id.*
52. *See id.*
53. *See* EDITH HAMILTON, THE GREEK WAY 66 (Norton Library ed. 1964).
54. *See id.*
55. *See id.* at 158-59.
56. *Id.* at 157.

> Acceptance is not acquiescence or resignation. To endure because there is no other way out is an attitude that has no commerce with tragedy. Acceptance is the temper of mind that says, "Thy will be done" in the sense of "Lo, I come to do thy will." It is active, not passive. Yet it is distinct from the spirit of the fighter, with which, indeed, it has nothing in common. It accepts life, seeing clearly that thus it must be and not otherwise. "We must endure our going hence even as our coming hither." To strive to understand the irresistible movement of events is illusory; still more so to set ourselves against what we can affect as little as the planets in their orbits. Even so, we are not mere spectators. There is nobility in the world, goodness, gen-

Athens's tremendous stream of life, which had made Marathon, Thermopylae, and Salamis[57] possible, was passing away.[58] By the time Sophocles had reached manhood, he was resigned to watch the decline of the heroic Athenian endeavor and the failure of those high hopes.[59] Athens birthed freedom for the world only to destroy her own glorious offspring. Athenian power decayed from imperial and tyrannical misgovernment.[60] The Athenian march of folly sought to bring all of Greece beneath her yoke. The rest of Greece turned on Athens and, before Sophocles died, Sparta was at Athens's gates causing her sun to set.[61]

Sophacles was depressed and debilitated by the end of his life and the end of Athenian life.[62] He had reached that moment when death was close at hand.[63] He seemed unable to manage his affairs.[64] His son took him into court and charged that he was incompetent.[65] The aged tragedian's sole defense was presented when he stood before the jurors and read from a play he had just written.[66] Exactly what he read is not known, but it could easily have been:

> The long days store up many things nearer to grief than joy.
> Death at the last, the deliverer.
> Not to be born is past all prizing best.
> Next best by far when one has seen the light
> Is to go thither swiftly whence he came.
> When youth and its light carelessness are past,
> What woes are not without, what grieves within,
> Envy and faction, strife and sudden death.
> And last of all, old age, despised,
> Infirm, unfriended.[67]

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tleness. Men are helpless so far as their fate is concerned, but they can ally themselves with the good, and in suffering and dying, die and suffer nobly. "Ripeness is all."

Id. at 157.

57. *See id.* at 158 ("Gods then were men and walked upon the earth.").
58. *See id.*
59. *See id.*
60. *See id.*
61. *See id.*
62. *See id.*
63. *See id.*
64. *See id.* at 66.
65. *See id.*
66. *See id.*
67. *Id.* at 158.

Those great words did not fall on deaf ears. The case was dismissed, the complainant fined, and the defendant departed in honor.[68] One author notes that it was a literal instance of poetic justice,[69] explaining that such a dramatic climax is probably unique in any era of civilization.[70]

2. GUARDIANSHIP AND ROMAN CULTURE

Many current organized guardianship structures originate from the Roman Empire.[71] A summary of the laws of the Roman Empire begins with the Classical law, and extends to laws enacted during the reign of Justinian.[72] Earlier treatment of Roman law starts with a statement of the Private Law during the Age of Cicero, reflecting the conquest of Greece with the influence of Greek ideas on Roman institutions.[73] The *Ius Naturale*, borrowed from Greek philosophy, appeared in use among Roman lawyers at the time of Augustus.[74] This and other traditions of legislation by more or less legendary kings are what later writers reported to be citations from *leges regiae.*[75]

For this article, the law of the Roman Empire begins with the Roman XII Tables. The XII Tables—a comprehensive collection of rules framed by the *decemviri*, officers especially appointed for the purpose—were enacted in approximately 450 B.C. by the *Comitia Centuriata*, the first expressed legislation of the Roman state affecting private law.[76] The XII Tables provide an early reference to guardianship: "If a person is a fool, let this person and his goods be under the protection of his family or his paternal relatives, if he is not under the care of anyone."[77]

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68. *See id.* at 66 ("Judge a man who could write such poetry not competent in any way? Who that called himself a Greek could do that? Nay: dismiss the case; fine the complainant; let the defendant depart honored and triumphant.").

69. *See id.*

70. *See* R.C. ALLEN ET AL., MENTAL IMPAIRMENT AND LEGAL INCOMPETENCY 8 (Prentice Hall 1968) [hereinafter ALLEN].

71. *See generally* BRAKEL & ROCK, *supra* note 41, at 1-13.

72. *See* W.W. BUCKLAND, A TEXT BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN V. (Cambridge University Press 2d ed. 1932).

73. *See id.*

74. *See id. Ius naturale* expresses a tendency in the trend of legal thought, a ferment operating all over the law. *See id.* at 55.

75. *See id.* at 2-3. "It is probable that the *leges regiae* are merely declarations of ancient custom: They are largely sacral and play no important part in later law." *Id.* at 1.

76. *See id.* (citations omitted).

77. BRAKEL & ROCK, *supra* note 41, at 1 (citing BRUNS, FONTES JURIS ROMANI ANTIQUI 23-24 (Editio alterata aucta amendata 1871)).

The XII Tables did not state the whole law. There were general rules, considered in earlier Rome and in other nascent civilizations, with no great difference between religious and legal rules.[78] It fell to priestly officers, the Pontiffs, to expound the laws and devise their own analysis.[79] During this Roman age, nothing was thought to be capable of altering the provisions of the XII Tables—the fundamental law.[80] Pontiffs, however, had the power to alter the law by ingenious and useful, though not very logical, interpretations.[81]

Another powerful group in the Empire was the jurists, authorized to respond to legal inquiry under seal and binding those cases in which they did respond.[82] The jurists developed the *alieni juris* concept, which provided for central control of a person, such as an infant by its father or guardian.[83] Women required their *tutor's* authority to be contractually bound.[84] This consideration as *manus* and bondage of women was the initial concept of disability.[85]

Civil status was civil capacity[86] and *sui juris*[87] was considered with the principles of *capitis deminutio.*[88] *Capitis deminutio*, which encompassed three legal degrees, maxima, media (or minor), and min-

78. *See* BUCKLAND, *supra* note 72, at 2.

79. *See id.*

80. *See id.*

81. *See id.*

82. *See id.* at 22 n.5.

83. *See id.* at 134. *Alieni juris* are those under the control or authority of another person, such as an infant controlled by its father or guardian. *See* BLACK'S LAW DICTIONARY, *supra* note 24, at 72; *see also infra* note 87 (definition of *sui juris*).

84. *See* BUCKLAND, *supra* note 72, at 134, 142-43. Under civil law, a *tutor* is much like a guardian appointed to care for a minor and administer the minor's estate. *See* BLACK'S LAW DICTIONARY, *supra* note 24, at 1518.

85. *See, e.g.*, BUCKLAND, *supra* note 72, at 134. *Manus* indicates power or control (as in physical coercion) and is often used interchangeably with *potestas*. *See* BLACK'S LAW DICTIONARY, *supra* note 24, at 965; *see also infra* note 94 (definition of *potestas*).

86. *See* BUCKLAND, *supra* note 72, at 135. "*Caput* is civil capacity." *Id. Caput* means a person's civil status. *See* BLACK'S LAW DICTIONARY, *supra* note 24, at 212.

87. *Sui juris* is defined as one who is independent due either to obtaining age of majority or being removed from the care of a guardian. *See* BLACK'S LAW DICTIONARY, *supra* note 24, at 1434.

88. *See* BUCKLAND, *supra* note 72, at 134.

ima,[89] had the effect of delivering a civil death, like an "annihilation," to those individuals with diminished capacity.[90]

The Roman laws evolved from the law of the persons to the law of the family and persons *sui juris*, which applied only to persons under disabilities.[91] The Roman law applied to various defects under guardianship, both *tutela* or *cura*.[92]

Guardianship's universal nature was uniquely evidenced in Rome's XII Tables and treated as civil law.[93] The governing principle that everyone *sui juris* under puberty with property or exceptions must have a tutor extended the *potestas* concept.[94] The *potestas* was artificially extended for a male child until he founded his own *potestas*.[95] Women required perpetual *tutela* because they could never have such power or authority.[96] Practical reasoning for this was that *tutela* was more for the guardian's benefit than the child's.[97] The *tutor* took the child's property upon the child's death; however, once a male child reached majority, the *tutor's* interest vanished and the *tutela* ceased.[98]

Similar to current law, the Roman Empire law restricted the appointment of *tutors*.[99] For example, the law prohibited appointment of slaves, hostile aliens, and intermediate citizens.[100] In addition, a woman could not be a *tutor* unless her father died with no prior appoint-

89. *See id.* at 135-36. Maxima took one's liberty, citizenship, and family rights; media (or minor) withdrew citizenship but not liberty, such as banishment; and minima changed family status, severing paternal ties but leaving liberty and citizenship unaffected. *See id.* at 135. Sally Hurme, reviewer of this article, concluded that the civil death concept is the precursor to limited guardianship because it is actually an awareness of differing levels of rights removed or retained.

90. *See id.* at 135-36.

91. *See id.* at 142.

92. *See id.* The *tutela* form of guardianship continues to the age of puberty. *See* BLACK'S LAW DICTIONARY, *supra* note 24, at 1517. *Cura* is guardianship in civil law which began at puberty and ended at the completion of the 25th year. *See id.* at 380. *Tutela* was the more important, over minor-age males or females, or over women of any age based on gender. *See* BUCKLAND, *supra* note 72, at 142.

93. *See* BUCKLAND, *supra* note 72, at 142.

94. *See id. Potestas* also means power and is usually used in the context of a father's power over his children, or masters over slaves. *See* BLACK'S LAW DICTIONARY, *supra* note 24, at 1168.

95. *See* BUCKLAND, *supra* note 72, at 142.

96. *See id.*

97. *See id.*

98. *See id.* at 142-43.

99. *See id.* at 150.

100. *See id.* at 150-53.

ment of a *tutor*, the woman promised not to remarry, and the magistrate appointed her.[101]

With the above predicate, one can examine persons of intellectual, mental, and physical defect under Roman law. Justinian excluded altogether deaf or dumb persons from being *tutors*.[102] However, since lunacy was regarded as curable, it was a ground for temporary excuse but not a disqualification.[103] If a lunatic was neither an imbecile nor dumb, the lunatic's property would not be transferred under the title and ownership of the *tutor*.[104] This may explain why most families desired a declaration of lunacy for their family member, thus keeping the property's ownership interest out of the *tutor's* control.[105]

The XII Tables recognized *cura furiosi*, lunatics capable of lucid moments, and gave their paternal families guardianship.[106] Similar protection was also extended to all cases of mental incapacitation, even when permanent.[107] Both within and without the XII Tables, the curator's functions to care for the lunatic's person were similar to an infant's *tutor*, and the XII Tables empowered the curator to alienate the lunatic's property for administrative purposes.[108]

However, even during the Roman Empire, guardianship administration was problematic. Generally, the *tutor* was required to act in a business-like manner, but was sometimes required to act contrary to the manner of one acting carefully in his own interest.[109] Yet, the entitlement to sell without any requirement to consider the ward's interests resulted in an inefficient system.[110] Inherent conflict between ward and *tutor* made it difficult to apply to the ward's personal needs.[111]

Constantine tried to correct the conflict by forbidding the *tutor* to sell urban or suburban property or valuable movables except under

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101. *See id.* at 150-51.
102. *See id.* at 151.
103. *See id.* "A curator is appointed meanwhile, a tutor is appointed." *Id.* at 151 n.14 (citation omitted).
104. *See id.* at 141-46.
105. *See id.* at 162.
106. *See id.* at 168.
107. *See id.* at 168 n.3.
108. *See id.* Thus, the actual care of the person of the *cura furiosi* was only a fiction in order to gain control over property. *See id.*
109. *See id.* at 154.
110. *See id.* at 155-59.
111. *See id.* at 164.

justifiable circumstances.[112] The *tutor* had to take immediate steps to recover debts due the ward, bring and defend actions on behalf of the ward, and invest money within a certain time frame.[113] Constantine held the *tutor* liable for interest if he unreasonably delayed or used the money personally.[114] The change in the *tutela* concept applied these administrative rules to the ward's interest.[115] The ward's interest then assumed a primary role, but the interest was almost unreasonably safeguarded.[116]

Contracts, however, remained more personal in nature.[117] In early classical law, the *tutor's* contract was his own and enforceable only by or against him.[118] The ward had neither right nor liability, but the *tutor's* liability could come before the tribunal.[119]

The *tutor's* administrative care varied throughout Roman history.[120] The *tutor's* actions were restricted only for gross negligence, which was a difficult evidentiary matter to prove.[121] At one time the *tutor* was required to manage the ward's property with the same care he took with his own affairs.[122] Some text, disputed among lawyers, imposed liability for all negligence.[123] Acts resulting from the *tutor's* plunder were void and a cause of action existed for damages.[124] Property gifts by the *tutor*, and transactions between the *tutor* and his ward, were void.[125] However, the *tutor's* administration was limited to property, and the ward's other necessities fell within the curator's functions.[126]

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112. *See id.* Under Justinian, the conveyance was void unless five years from full age lapsed. *See id.* at 154 n.8. Constantine allowed one year. *See id.*

113. *See id.* at 154.

114. *See id.* at 154 n.12.

115. *See id.* at 154.

116. *See id.*; *see also* BRAKEL & ROCK, *supra* note 41, at 2.

117. *See* BUCKLAND, *supra* note 72, at 155.

118. *See id.* For example, if *A* lent *B*'s money, *B* acquired a condition but *B* did not acquire any potential subsidiary obligations. *See id.* at 156. This was also true if *A* was *B*'s *tutor* and it was not beneficial. *See id.*

119. *See id.* at 155.

120. *See id.* at 156.

121. *See id.* at 156-57.

122. *See id.* at 157.

123. *See id.*

124. *See id.*

125. *See id.* at 156, 157 n.5.

126. *See id.* at 156.

3. GUARDIANSHIP AND ENGLISH CULTURE

Transition to English guardianship came through the decay of the Western empire during the fifth century, following the law of Germanic tribes.[127] The *visigothic* code, drafted between 466 and 485 A.D. and followed in Spain and France, declared "all persons who are insane from infancy or in need from any age whatever, and remain so without intermission, cannot testify or enter into a contract, and if they should do so, it would have no validity."[128]

During the Middle Ages, legal treatment of mentally disabled people returned to custom and religion, fostering beliefs of demon possession and exorcism of the afflicted.[129] People concocted more elaborate ceremonies and antidotes that were more inhumane and tortuous than before.[130] As in Greek and Roman periods, the law was more concerned with the control and protection of the property, rather than with the disabled person.[131] In fact, little or no attention was given to the wards of the guardianships.[132]

Between 1250 and 1290 A.D., English consideration of guardianship began when the statute *dePraerogativa Regis* was enacted.[133] It stated:

> A king . . . as the political father and guardian of his kingdom, has the protection of all his subjects, and their lands and goods, and he is bound, in a more peculiar manner, to take care of those who, by reason of their imbecility and want of understanding, are incapable of taking care of themselves.[134]

Brakel and Rock explained that the English law divided people with mental disabilities into two classes:

> [T]he idiot and the lunatic, the former being a person who "hath no understanding from his nativity" and the latter "a person who

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127. *See id.* at 2.
128. *Id.* at 2 n.9.
129. *See id.* at 2.
130. *See id.*
131. *See id.*
132. *See* ALLEN, *supra* note 70, at 3; Barbara A. Cohen et al., *Tailoring Guardianship to the Needs of the Mentally Handicapped Citizens—The Historical Basis and Development of Guardianship Laws*, 6 MD. L. FORUM 91 (1976); Peter M. Horstman, *Protective Services for the Elderly: The Limits of Parens Patriae*, 40 MO. L. REV. 215, 219-20 (1975). With this background, it is understandable that the development of the law was primarily in terms of protection of property and that few guidelines were developed with respect to the guardian's duties to the person of a ward. *See generally* THE LEGAL RIGHTS OF HANDICAPPED PERSONS (Robert L. Burgdorf, Jr. ed., 1980).
133. *See* BRAKEL & ROCK, *supra* note 41, at 2.
134. Cohen et al., *supra* note 132, at 92 (quoting N.N. KITTRIE, THE RIGHT TO BE DIFFERENT: DEVIANCE AND ENFORCED THERAPY 58 (1973)).

> hath had understanding, but . . . has lost the use of his reason." The King granted the custody of the lands of "natural fools" (idiots); after providing the fool with necessaries a king could retain the profits from the land. After the fool's death, the land returned to the rightful heirs. However, the land that was held by the lunatics was held by the king, and all profits therefrom applied to the maintenance of the lunatic and their households. Any excess returned to such persons if they became of right mind. Guardianship of the property of the idiot was profitable for the guardian; on the other hand managing the property of a lunatic was a duty and no profit could be generated.[135]

Numerous writers and cases[136] cite *Beverly's Case*[137] as a case that first expounded on and explained the development of the law of insanity in England. The renowned Lord Coke explained that acts performed by a person *non compos mentis* in a court of record should bind him and his heirs forever, while acts done outside a court of record should be binding for life.[138] He further explained that the punishment of a person *non compos mentis* was no example to others.[139] The four types of persons in the generic term *non compos mentis* included: (1) the idiot or natural fool; (2) he who was of good and sound memory, and by the visitation of God has lost it; (3) lunatics, those who are sometimes lucid and sometimes *non compos mentis*; and (4) those who, by their own acts, deprive themselves of reason, such as the drunkard.[140] Lord Coke determined that the King was given custody over

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135. *See* BRAKEL & ROCK, *supra* note 41, at 2.

136. *See* ALLEN, *supra* note 70, at 8; MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL § 2.02, at 34 (1988 & Cum. Supp. 1995); Horstman, *supra* note 132, at 218-19; *see also* BRAKEL & ROCK, *supra* note 41, at 2.

137. 4 Co. 123b, 76 Eng. Rep. 1118 (K.B. 1603).

138. *See* BRAKEL & ROCK, *supra* note 41, at 2-3. *Non compos mentis* is defined as a general term embracing all varieties of mental infirmity. *See* BLACK'S LAW DICTIONARY, *supra* note 24, at 1051.

139. *See Beverly's Case*, 4 Co. at 124a.

140. *See id.* at 125a. Lord Coke further compared civil and common law that protected the idiot and his inheritance. *See id.* As in the laws of the Roman Empire, all acts performed by a person *non compos mentis* without the accord of his tutor were void in the civil law. *See id.* Coke noted that the common law was defective because it lacked any similar provision. *See id.* He pointed out that the law of England provided a tutor in the form of the king. *See id.* Any transfer of property made by the idiot could be voided by action of the king. *See id.* The King could even void gifts or transfers made by the idiot before he was adjudged incompetent. *See id.*

The case also concluded that those who became *non compos mentis* later in life, as distinguished from persons who were born idiots, were also protected by the King. *See id.* The King was accountable to lunatics when lucid. *See id.* Transfers made by lunatics during nonlucid moments were subject to attack in the same manner as those made by idiots. *See id.*

the afflicted person as well as his lands.[141] However, protection of the afflicted person occurred only if there were available proceeds from the lands to care for his needs.[142]

When a person was thought to be an idiot, the Chancellor, upon petition, issued a writ *de idiota inquirendo* which was tried by a jury.[143] The writ and the procedure employed in the case of lunacy were similar in nature to the writ *de idiota inquirendo*, and juries, simply to avoid heavy exactions by the King, often found for lunacy where idiocy would have been a more accurate finding.[144] When the impecunious *non compos mentis* could not enjoy the privilege of having his sanity determined by a jury, the royal authority was petitioned for lasting confinement on the singular circumstance that the petitioner could not bear such additional expense.[145] Lindman and McIntyre write that the monetary burden probably explains the development of detention procedures.[146]

> If one held property, he was able to pay the expenses incurred in the inquiry as to his sanity. Likewise, such an inquiry was necessary to assure the proper administration of the applicant's affairs, while the proceeds from his holdings would pay the cost of administration and provide for his maintenance. On the other hand, those who were not persons of wealth did not require an administrator for their affairs, and there was no method of compensating the nearest relative for their support.[147]

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141. *See id.* at 126a.

142. *See* BRAKEL & ROCK, *supra* note 41, at 4.

143. *See Beverly's Case*, 4 Co. at 126a. A writ *de idiota inquirendo* was the method under English Common Law of determining an individual's mental status. *See id.*

144. *See* PERLIN, *supra* note 136, at 34; *see also* BRAKEL & ROCK, *supra* note 41, at 6 (there is no indication that this care ever constituted a drain on the King's treasury).

145. *See* PERLIN, *supra* note 136, at 34-35 & n.24. Kittrie notes that we "must not ignore the resultant political and economic advantages" to the king under such a procedure: "The assumption of the new function not only permitted the king to supervise the management and transfer of the property of the insane but also allowed him to reap the profits of the estates under his guardianship." KITTRIE, *supra* note 134, at 59; *see also* State *ex rel.* Hawks v. Lazaro, 202 S.E.2d 109, 117-20 (W. Va. 1974) (use of parens patriae authority frequently not benevolently motivated, the doctrine has been "suspect from the earliest times"); BRAKEL & ROCK, *supra* note 41, at 9 (the distinction may be of such significance that it may explain the development of detention procedures).

146. *See* THE MENTALLY DISABLED AND THE LAW 9 (Frank T. Lindman & Donald M. McIntyre, Jr. eds., U. Chi. Press 1961) [hereinafter LINDMAN & MCINTYRE].

147. *Id.* at 7 n.12 (citing 17 Edw. 1, c. 9; 1 Holdsworth, *A History of English Law* 473 (7th ed. 1956)). If an incompetent were determined by the jury to be a lunatic, the chancellor committed him to the care of some friend, who received an allowance with which to care for him. The incompetent's heir was generally made the manager of the estate, although, according to Blackstone, "to prevent sinister prac-

Since the thirteenth century, the Crown's exercise of its royal prerogative relating to subjects unable to protect themselves was not so benevolent. The more attractive revenue-raising dimension diluted the protective-welfare intent.[148] Additionally, while the Crown was expected to protect both the person and property from exploitation, dependents had no right to maintenance by the Crown.[149] For those not mentally ill, but retarded, the Crown was entitled to receive and to retain the revenues and profits generated by their property.[150]

During the centuries that followed, the royal benevolent prerogative was modified and adapted so that the Crown discharged its responsibility to agencies or private citizens appointed as guardians or curators.[151] This particular institutional process continues in England today in the form of private committees of the estate or the person,[152] depleting the estate and discarding the person's personal well-being. In the sixteenth century, a formal Court of Awards and Liveries was established to act as a central administrative unit.[153] The Court of Awards and Liveries fell out of favor and jurisdiction was passed to the Court of Chancery.[154] Later the jurisdiction passed to the administrative adjunct of the court, the master of lunacy and the Office of Public Trustee.[155]

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tices" he was not given the custody of the incompetent. For the custody of the estate, the heir was responsible to the Court of Chancery, to the recovered lunatic, or to his administrator. *See id.* at 9 (citing 1 Blackstone, *Commentaries* 303-07 (9th ed. 1783)). The practices of persons charged with the custody of an incompetent and his property gradually developed into a set of customs, rules, and standards for the proper management of a lunatic's property. *See id.*

148. *See* BRAKEL & ROCK, *supra* note 41, at 3-4.

149. *See* Carney, *supra* note 34, at 205-06; *see also id.* at 206 n.35 (this is the basic historical concept in all states).

150. *See* Carney, *supra* note 34, at 205-06.

151. Recent statutory changes in several states are similar to this model. *See, e.g.*, FLA. STAT. ch. 744.702 (1997); N.C. GEN. STAT. §§ 35A-1270 to -1273 (1995); VA. CODE ANN. §§ 32.1-130 to -132 (Michie 1996).

152. *See* Carney, *supra* note 34, at 206 n.34. The procedures (a petition for an inquisition) and the powers and responsibilities of a committee of the person are detailed in N.A. HEYWOOD ET AL., HEYWOOD AND MASSEY'S LUNACY PRACTICE 26-29, 31, 103, 134-35, 557-58, 572-73, 586 (4th ed. 1911).

153. *See* Carney, *supra* note 34, at 206.

154. *See id.*

155. It is noted that this is akin to state public guardianship agencies created by statute in many states and operated from central administrative offices. *See, e.g.*, 755 ILL. COMP. STAT. ANN. 5/11a (West 1992 & Supp. 1998); ALASKA STAT. § 44.21.410 (LEXIS Law Pub. 1998); N.J. STAT. ANN. §§ 3B:1-1 to 3B:13-31 (West 1983 & Supp. 1998).

4. GUARDIANSHIP AND AMERICAN CULTURE

American guardianship is tracked in three stages: (a) from Colonial America to the mid-1800s; (b) from the mid-1800s to the early 1960s; and (c) from the early 1960s to the present. Guardianship in America primarily echoes detention and commitment laws affecting mentally ill and deficient citizens.[156] State detention and commitment laws evolved as mental health advocates impressed rights of due process for detainees.[157] The process and changes of these laws were the frontier for guardianship advocates to observe and follow.[158]

a. Guardianship in America from Colonial America to the Mid-1800s One fact that remains consistent from Colonial America to present day is the unpleasant prospect of supporting, supervising, and controlling an indigent incompetent.[159] Colonial America expected families, the primary social unit, to care for their own.[160] In some areas, rudimentary communal facilities cared for the orphaned or mentally disabled.[161] Thus, the typical durably unemployed, mentally disabled, homeless person became part of a transient monolithic mass, drifting from town to town to survive.[162]

Early accounts of community aid to the mentally disabled occurred in Pennsylvania and Massachusetts,[163] but were in no way a product of the judicial process.[164] However, when derangement and violence were apparent, judicial action became available committing mentally disabled persons to locked wards without societal objection.[165] Detention for the nonviolent remained a problem for commu-

156. *See* BRAKEL & ROCK, *supra* note 41, at 4.
157. *See id.* at 5.
158. *See id.* at 250-52.
159. *See id.* at 4.
160. *See id.*
161. *See id.*
162. *See id.* A drifter was so labeled whether mentally or physically disabled, or simply lazy. Townspeople feared that they would have to support this monolithic mass. The Protestant work ethic which applied work and industry to morality aimed the sanction of the laws at these indigent, mentally disabled people who underwent ridicule and whippings. *See id.* at 4, 10. This is all too familiar in American communities today.
163. *See id.* at 4 (describing the accounts of two individuals, poor and "bereft" of natural senses, for whom the Pennsylvania and Massachusetts communities, respectively, provided).
164. *See generally Developments in the Law: Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190 (1974).
165. *See generally* Hugh Alan Ross, *Commitment of the Mentally Ill: Problems of Law and Policy*, 57 MICH. L. REV. 945, 955-56 (1959).

nities. Application of the parens patriae[166] doctrine resolved the problem by granting states the power to act and protect the welfare of mentally ill persons.[167] Family members usually initiated detention for other family members succumbing to lunacy.[168] Legislative direction under the parens patriae doctrine emerged as the responsible way America dealt with mentally incompetent persons, supplemented by the family's immediate obligation to care for the person until need for a judicial order.[169] Existing statutes defined the lunatics, the furiously mad, or those extremely disordered in their senses.[170] The law left exceptions for the family or the Chancellor to provide for lunatics under separate care and protection,[171] representing legislative use of asylums primarily for violent persons, while others were cared for privately.[172]

Similar to current guardianship laws, the procedures for commitment *non compus mentis* were accomplished on a physician's certification or a justice of the peace warrant.[173] Those charged *non compus mentis* sometimes had a right to a jury, adequate notice as necessary, and the opportunity to examine witnesses and be examined as in any other suit.[174]

b. Guardianship in America During the Mid-Nineteenth Century The concept of hospitals to serve both the mentally ill and poor sick citizens began in the late eighteenth century.[175] Virginia erected the first hos-

166. *See supra* text accompanying notes 33-40 (discussion of the parens patriae doctrine).

167. *See* PERLIN, *supra* note 136, at 38 n.42 (Before such institutes were created, colonial laws focused on the parens patriae doctrine. A 1702 Connecticut Act provided for the care of those incapable of caring for themselves. The incompetent's hometown or current domicile was charged with overseeing the care and safety of the incapacitated incompetent person.). For other colonial legislation affecting the "insane," see HENRY M. HURD, THE INSTITUTIONAL CARE OF THE INSANE IN THE UNITED STATES AND CANADA 81, 92 (1973).

168. *See supra* text accompanying notes 33-40 (discussion of the parens patriae doctrine).

169. *See* PERLIN, *supra* note 136, at 38.

170. *See* BRAKEL & ROCK, *supra* note 41, at 6 n.29 (citing New York Laws of 1788, ch. 31). This New York statute authorized two or more justices to direct by warrant the apprehension for safe keeping of the furiously mad and dangerous. *See id.*

171. *See id.* at 6.

172. *See id.*

173. *See id.*

174. *See id.* at 6 n.30 (citing Stafford v. Stafford, 1 Mart. 551 (La. Sup. Ct. 1823)).

175. *See id.* at 5.

pital devoted to the mentally disabled[176] in Williamsburg. It remained the only facility of its kind until 1824, when Kentucky established the Eastern Lunatic Asylum.[177]

In addition to statutes and procedures providing a semblance of due process, the common-law writ of habeas corpus was available to test the confinement and detention of mentally incompetent persons.[178] For example, in 1845 Josiah Oakes sought his release from a Massachusetts asylum alleging his family had him committed illegally.[179] In *Oakes,* the court acknowledged private institutions and the courts' necessary use of them, particularly for restraining insane persons exhibiting danger to themselves or others.[180] However, the court also recognized that necessity creates a limitation of the law[181] and concluded that the proper limitation is restraint only as long as that restraint is necessary.[182] The *Oakes* decision identified elements necessary to determine the propriety of detention.[183] It established more precise common-law rules reflecting advances in medical science as well as society's view of mental disability.[184]

History follows the law's progress through judicial decisions affecting mentally disabled persons and through the work of noted physicians of the time.[185] By the turn of the last century, the development of laws affecting the rights of the mentally disabled depended on (1) medical knowledge of the cost of care and treatment, (2) acknowledgment by politically organized communities regarding their responsi-

176. *See id.* Kentucky established the Eastern Lunatic Asylum in 1824. *See id.*
177. *See id.*
178. *See id.* at 6; *see also* PERLIN, *supra* note 136, at 39.
179. *See* BRAKEL & ROCK, *supra* note 41, at 6 (citing Matter of Josiah Oakes, 8 Law Rep. 123 (Mass. 1845)). Misgovernment of commitment and guardianship truly spans the ages. One hundred and thirty years later in 1971, Kenneth Donaldson sought his release from the Chattahoochie Asylum in Florida on the ground that he had been illegally committed by his family and detained for more than 14 years by the state. *See* O'Connor v. Donaldson, 422 U.S. 563, 564 (1974).
180. *See* BRAKEL & ROCK, *supra* note 41, at 7.
181. *See* LINDMAN & MCINTYRE, *supra* note 146, at 12. The question became whether a patient's own safety, or that of others, required his restraint for a certain time, and whether restraint was necessary for, or conducive to, his restoration. *Id.*
182. *See id.* (citing Matter of Josiah Oakes, 8 Law Rep. 123 (Mass. 1845)).
183. *See id.*
184. *See id.*
185. *See* ALBERT DEUTSCH, THE MENTALLY ILL IN AMERICA: A HISTORY OF THEIR CARE AND TREATMENT FROM COLONIAL TIMES (2d ed. Columbia Univ. Press 1949); *see also* LINDMAN & MCINTYRE, *supra* note 146, at 13; PERLIN, *supra* note 136, at 43. Mrs. E.P.W. Packard and Miss Dorothea Lynde Dix are also cited for their heroic endeavors to bring the situation of those involuntarily committed to the concern of the public and for attempting to create more appropriate hospitals for the mentally ill. *See* LINDMAN & MCINTYRE, *supra* note 146, at 13.

bility to care for the mentally disabled, and (3) the legal profession's awareness of social remedies.[186]

c. Guardianship in America During the Mid-Twentieth Century American misgovernment of guardianship remained invisible in the decades between the end of the nineteenth century and the middle of the twentieth century. Institutional systems for the mentally ill and the developmentally disabled flourished countrywide, producing a visible account of the minimal effort required to commit the mentally ill and disabled.[187] The parens patriae doctrine also flourished.[188] Change in the mental health process did not begin to occur until the 1960s.[189]

By the 1960s, the commitment process bound both the mentally ill and the incapacitated.[190] A product of the popularity of institutional confinement and commitment enacted during the latter part of the nineteenth century, the process constituted the basic legislative pattern enforced at the time.[191] An understanding of the 1990s guardianship movement should begin with a review of the commitment process's 1960s movement. A basic analysis of due process for people with mental disabilities at that time begins with a review of procedural and substantive rights in involuntary civil commitment hearings.[192] Three cases mark the beginning: *Jackson v. Indiana*,[193] *Lessard v. Schmidt*,[194] and *O'Connor v. Donaldson*.[195]

In *Jackson v. Indiana*,[196] the Supreme Court held that, at a minimum, a state's commitment process must provide a reasonable relationship between the duration of a defendant's commitment and the

186. *See* LINDMAN & MCINTYRE, *supra* note 146, at 13. This was true for the Greeks over 2000 years ago, and true for the Americans today. *See supra* note 53 and accompanying text.

187. This may be the beginning of the manufacture of madness. *See generally* THOMAS S. SZASZ, THE MANUFACTURE OF MADNESS (Dell Pub. 1970).

188. See *supra* text accompanying notes 33-40 (discussion of parens patriae doctrine).

189. *See* A.F. Johns, *Guardianship Folly*, *supra* note 21, at 22.

190. *See id.*

191. *See* LINDMAN & MCINTYRE, *supra* note 146, at 13.

192. *See generally* Johns, *Guardianship and Conservatorship*, *supra* note 25. A portion of that treatment has been revised, updated, and modified to fit the context of this article.

193. 406 U.S. 715 (1972).

194. 349 F. Supp. 1078 (E.D. Wis. 1972).

195. 422 U.S. 563 (1975).

196. 406 U.S. 715.

purpose of the commitment.[197] The Court found Indiana's process violative of the Equal Protection and Due Process Clauses because it allowed indefinite commitment of criminal defendants solely on account of the defendants' incompetency to stand trial.[198]

Due process violations were also found in *Lessard v. Schmidt*,[199] the first federal decision regarding the constitutionality of a state's civil commitment proceedings.[200] In *Lessard*, the defendant was placed in emergency detention at a mental health center on an ex parte commitment order.[201] After multiple medical examinations and several months of detention, a trial court finally declared her mentally ill.[202] The federal court found that the Wisconsin statute violated due process and ordered implementation of safeguards to protect the public from misuse.[203] The court recognized that an order for civil commitment was far more serious than a court-authorized medical decision and, therefore, required additional due process protection.[204]

In *O'Connor v. Donaldson*,[205] the U.S. Supreme Court recognized the rights of mentally ill persons who pose no danger to themselves or to the community.[206] Under Florida's involuntary commitment statute, the *O'Connor* defendant spent over fourteen years in a mental hospital despite the acknowledged fact that he posed no danger to himself or others.[207] The Supreme Court emphasized that the mere existence of mental illness alone is insufficient grounds to confine a

197. *See id.* at 738 (a court-ordered psychiatric examination of the nonverbal, hearing-impaired defendant showed the defendant was incapable of understanding the nature of the charges, could not participate in his own defense, and was unlikely to regain these abilities).

198. *See id.* at 730-31.

199. 349 F. Supp. 1087.

200. *See* PERLIN, *supra* note 136, at 86 n.304 (citing Thomas K. Zander, *Civil Commitment in Wisconsin: The Impact of* Lessard v. Schmidt, 1976 WIS. L. REV. 503-09).

201. *See Schmidt*, 349 F. Supp. at 1082. *See generally* PERLIN, *supra* note 127. The Perlin text provides comprehensive analysis of involuntary civil commitment and substantive rights. *See* PERLIN, *supra* note 127.

202. *See Schmidt*, 349 F. Supp. at 1082.

203. *See* PERLIN, *supra* note 136, at 81 n.271 (commenting that the trial judge must have based his decision that Lessard was mentally ill because: (1) she had one conviction for making annoying telephone calls in the past; and (2) that she stated that the National Education Association was infiltrated by communists).

204. *Schmidt*, 349 F. Supp. at 1082.

205. 422 U.S. 563 (1975).

206. *See id.* at 573-76.

207. *See id.* at 564. The Court found no constitutional bases for involuntarily confining such persons if they are not dangerous and are capable of living freely. *See id.* at 576. Even though the state has a proper interest in providing care and assistance,

person to a mental health facility.[208] The argument that a mentally impaired person's standard of living is actually increased through state confinement failed on merit. The Supreme Court found such an argument "established the constitutional boundaries of the 'right to liberty.'"[209] The Court found that incarceration was not the least restrictive means by which the state could provide assistance to the less fortunate.[210]

The development of due process rights in incompetency hearings was modeled after the widespread changes to commitment laws spawned by this trilogy of catalytic cases. Following *Jackson, Lessard* and *O'Connor,* all fifty states retooled their commitment laws to include adequate due process safeguards.[211] Commitment hearings now require adequate notice to the defendant[212] and to family members, where relevant.[213] Defendants should be informed of the right to be present at a commitment hearing;[214] the right to appeal a commitment order;[215] and the right to be heard, present evidence, and cross-

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> the mere presence of mental illness does not disqualify a person from preferring his home to the comforts of an institution. Incarceration is rarely if ever a necessary condition for raising the living standards of those capable of surviving safely in freedom, on their own or with the help of family or friends.

Id. at 575.

208. *See id.* at 575.

209. *Id.* at 576.

210. *See id.* at 575-76. The Court also rejected the argument that incarceration was appropriate to protect its citizens from exposure to persons with mental disabilities. *See id.* at 575 ("Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty.").

211. *See generally* PERLIN, *supra* note 136.

212. *See, e.g.*, CAL. WELF. & INST. CODE § 5208 (West 1998); FLA. STAT. ch. 394.467(3) (1998); 405 ILL. COMP. STAT. ANN. 5/3-705, 5/3-706 (West 1993); N.J. STAT. ANN. § 30:4-21.13 (West 1997); N.Y. MENTAL HYG. LAW § 9.31(b) (McKinney 1996).

213. *See, e.g.*, FLA. STAT. ch. 394.467(3); 405 ILL. COMP. STAT. ANN. 5/3-706; *see also In re* Detention of Dydasco, 959 P.2d 1111 (Wash. 1998).

214. *See, e.g.*, N.J. STAT. ANN. § 30:4-27.14.

215. *See, e.g.*, 405 ILL. COMP. STAT. ANN. 5/3-816; VA. CODE ANN. § 37.1-67.6 (Michie 1996); *In re* Judicial Commitment of FBSR, 715 So. 2d 675 (La. Ct. App. 1998); *In re* Guzik, 617 N.E.2d 1322 (Ill. App. Ct. 1993). An order finding an individual to be a person subject to involuntary admission pursuant to the Illinois Mental Health and Developmental Disabilities Code, 405 ILL. COMP. STAT. ANN. 5/3-600, is a nonfinal order of adjudication for the purpose of perfecting an appeal under either Supreme Court Rule 301 or 304(b)(1) where the court continues the matter for the presentation of a social assessment report, a treatment plan, and the entry of a "final order" of commitment; thus, an appeal from such an order is premature and the appellate court lacks jurisdiction unless the appeal is properly perfected. *See Guzik*, 617 N.E.2d at 1322.

examine witnesses.[216] While significant progress in this area of due process is obvious, there is a need for constant vigilance and advocacy against erosion of and noncompliance with the protections achieved.[217]

III. Constitutional Procedures in Guardianship

A wealth of evidence conflicts with Andrews's contention that there is a constitutional crisis in guardianship based on a lack of statutory initiative on the part of the states.[218] The evidence is presented in the form of a thorough examination of the pertinent cases that rebut Andrews's constitutional analysis. The evidence is also presented in the form of analysis and charts showing that a substantial number of states have overhauled their guardianship statutes, many well in advance of the intense interest generated over the last decade.[219]

Andrews begins his section on "Constitutional Procedures" by asserting that "[g]uardianship laws must address these and other fac-

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216. *See, e.g.*, FLA. STAT. ch. 394.467(3); N.J. STAT. ANN. § 30:4-27.14; *see also In re* Coconino County, 862 P.2d 898 (Ariz. Ct. App. 1993); *In re* Commitment of D.M., 712 A.2d 1277 (N.J. Super. Ct. App. Div. 1998). The requirement of ARIZ. REV. STAT. ANN. § 36-539(B) (1993) that two or more witnesses acquainted with a patient for whom civil commitment is sought testify regarding the patient's alleged mental disorder can be met with the testimony of medical personnel other than the two physicians whose testimony is also required, so long as the personnel are acquainted with the patient at the time of the mental disorder. Furthermore, by stipulation of the parties, the written reports may be accepted in lieu of testimony. *See Coconino County*, 862 P.2d at 899.

217. Others who have examined the current plight of people with mental illness or disability have expressed their concern for the abdication of the hard fought protections gained. One such writer, John Parry, editor-in-chief of the *Mental and Physical Disability Law Reporter*, gave a disheartened constitutional perspective on involuntary commitment of people with mental illness or disability in the 1990s. As Parry contended, there still must be a push to

> incorporate constitutional principles in statutes, regulations, and policy directives affecting civil commitment and to ensure that minimum constitutional requirements are understood and achieved consistently while implementing laws. Everyone involved in the civil commitment process should understand what the Constitution requires and be encouraged to initiate action when those requirements are violated. The gap between the law and actual practice is well documented. Narrowing that gap, particularly with respect to fundamental constitutional principles, should be a major objective of any civil commitment system.

John Parry, *Involuntary Civil Commitment in the 90s: A Constitutional Perspective*, 18 MENTAL & PHYSICAL DISABILITY L. REP. 320, 326 (1994).

218. *See* Andrews, *supra* note 1, at 86 ("[M]any other states allow inadequate laws to remain in the statute books.").

219. *See infra* note 387 and accompanying text; *see also* Exhibits A-H.

tors 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."[220] Andrews then explains that his conclusions have no basis in any state or U.S. Supreme Court decision, and that his analysis proceeds "by principle and analogy."[221]

Earlier in his note, Andrews declares that "[t]oo often, state courts are forced to rewrite guardianship statutes to pass constitutional muster."[222] Andrews provides the citation of two cases[223] to support his argument of statutory constitutional infirmity.[224] However, neither case declares the state's guardianship statute unconstitutional—just the opposite.[225] A review of the facts in each case used by Andrews provides an understanding of the constitutional analysis of each court.

A. *In re Guardianship of Hedin*

In *Hedin*,[226] the Iowa Supreme Court was presented with an appeal involving the restoration of capacity to a ward who had previously voluntarily sought guardianship.[227] The ward appealed from a district court denial of his petition to remove his sister as guardian and terminate the guardianship.[228] The ward preserved several issues for the supreme court's review.[229] First, the ward contended that the Iowa guardianship statute was unconstitutional under the federal and Iowa Constitutions because it denied him due process and, under the Iowa Constitution, the enjoyment of his liberty interest.[230] He also maintained that the statute was unconstitutionally vague and overbroad.[231] Second, the ward argued that, in a voluntary guardianship termination proceeding, the guardian had to establish that the guardi-

220. Andrews, *supra* note 1, at 93.
221. *Id.*
222. *Id.* at 86.
223. *See id.* (citing *In re* Guardianship of Hedin, 528 N.W.2d 567 (Iowa 1995), and *In re* Conservatorship of Foster, 535 N.W.2d 677 (Minn. Ct. App. 1995)).
224. *See* Andrews, *supra* note 1, at 86.
225. *See supra* Parts III.A-B.
226. *See Hedin*, 528 N.W.2d at 570; *see also In re* Conservatorship of Leonard, 563 N.W.2d 193 (Iowa 1997); *In re* Barry Bear v. Woodward State Hosp. Sch., 576 N.W.2d 303 (Iowa Ct. App. 1998); *In re* Guardianship & Conservatorship of Teeter, 537 N.W.2d 808 (Iowa Ct. App. 1995).
227. *See Hedin*, 528 N.W.2d at 569.
228. *See id.*
229. *See id.*
230. *See id.*
231. *See id.*

anship should continue by clear and convincing evidence.[232] Additionally, the ward maintained that, in such a proceeding, the burden of persuasion shifted to the guardian.[233] Third, the ward believed that the court should terminate the guardianship because it was no longer necessary and not in the ward's best interests.[234] Last, the ward argued that the guardian should be removed from her guardianship role.[235]

Early on, the Iowa Supreme Court noted that the district court identified the fighting issue at trial.[236] It was not that the ward wanted his capacity restored, but that he wanted to marry his girlfriend.[237] Showing a probable risk of irreparable harm to the ward, the guardian applied for, and received, a temporary injunction prohibiting the ward from marrying until a hearing was held to establish whether the ward had the capacity to contract to marry.[238] After examining the issues before it, the district court concluded that continuation of the guardianship was in the ward's best interests.[239]

The facts on which the district court based its decision were summarized in the supreme court's decision.[240] Curtis, mildly mentally retarded, functioned mentally at the age of a child between eight and eleven.[241] He lived on his parents' farm in northwest Iowa until he was twenty.[242] After being trained in a supported employment kitchen, Curtis's teachers and family agreed to his transition into the community to work and live independently.[243] Unable to handle independent living, Curtis returned to the family farm after only a few months and continued living on the farm until 1986.[244] The parents moved out of state, and Curtis was offered three living options: (1) live with his parents in Las Vegas, (2) live with his sister in another city, or (3) stay in northwest Iowa.[245] Curtis chose to live in northwest Iowa in a supervised living environment for adults with physical,

232. *See id.*
233. *See id.*
234. *See id.*
235. *See id.*
236. *See id.* at 569-70.
237. *See id.*
238. *See id.*
239. *See id.*
240. *See id.*
241. *See id.*
242. *See id.*
243. *See id.*
244. *See id.*
245. *See id.*

emotional, and mental disabilities.[246] He agreed with his family that he would voluntarily submit to guardianship and that his sister would be his guardian.[247]

Curtis expressed a desire to live more independently and was supported by the professional staff at the residence.[248] The staff recommended that Curtis live either in his own apartment or rent a subsidized apartment with continued assistance from the staff.[249] Initially the guardian objected, but changed her position when she was shown that Curtis was showing progress, was listening to advice, and would benefit from making his own life decisions.[250] Curtis developed a serious relationship with a woman whom he testified he would like to marry.[251] The woman, who was also under guardianship, suffered from such physical and mental disabilities that she did not testify at trial because it would have had an adverse impact on her well-being.[252] The guardian limited visitation between Curtis and his girlfriend, requiring staff supervision.[253]

First, the Iowa Supreme Court, acknowledging that it ordinarily reviews such a case de novo,[254] did not find new facts because of the new incompetency test standard of proof and burden of persuasion declared in its opinion.[255] It then addressed the issues raised on appeal, concluding that the Iowa guardianship law provided an appropriate frame for imposing, modifying, and terminating guardianship except in two areas.[256] The areas identified by the court were not part of the law that was written in the statute, but a clarification of standards by which the lower courts would apply the law.[257] The court, finding that the statute lacked sufficient objective standards outlining when a guardianship should be opened, modified, or terminated, instructed the lower court to:

> [M]ake a finding of incompetency only if the ward's or proposed ward's decision making capacity is so impaired that the ward is unable to care for his or her personal safety or to attend to and

246. *See id.*
247. *See id.*
248. *See id.*
249. *See id.*
250. *See id.* at 570-71.
251. *See id.* at 571.
252. *See id.*
253. *See id.* at 570-71.
254. *See id.* at 581.
255. *See id.*
256. *See id.* at 570.
257. *See id.*

> provide for such necessities as food, shelter, clothing, and medical care, without which physical injury or illness may occur. Credible evidence of third-party assistance produced from any source must be considered in this determination. Second, in determining whether guardianship is to be established, modified, or terminated, the district court must consider whether a limited guardianship is appropriate.[258]

Then the court found that the standard of proof at all three stages of the proceedings was too low and raised it to a level of clear and convincing evidence.[259] It further found that the burden of persuasion was on the wrong party and, instead, placed it on the party petitioning for guardianship, keeping it with the guardian during any subsequent modification or termination proceeding.[260] The court further found that where the ward petitions to terminate the guardianship, the ward must make a prima facie showing that the ward has some decision-making capacity.[261] Once this prima facie showing is made, the burden shifts to the guardian to prove the ward's incompetency by clear and convincing evidence.[262]

To make clear its affirmation and support of the constitutionality of Iowa's guardianship law, the Iowa Supreme Court ended with a strong declarative summary:

> Almost twenty years ago, the Task Panel on Legal and Ethical Issues of the President's Commission on Mental Health gave, in part, the following recommendation on what it believed due process required in guardianship proceedings:
>
> 4. Guardianship.
>
> Recommendation 1.
>
> (a) State guardianship laws should be revised to provide (1) increased procedural protections including but not limited to, written and oral notice, the right to be present at proceedings, appointment of counsel and a clear and convincing evidence standard as the burden of proof; a comprehensive evaluation of functional abilities conducted by trained personnel; and a judicial hearing which employs those procedural standards used in civil actions in the courts of general jurisdiction of any given State; (2) a definition of incompetency which is understandable, specific and relates to functional abilities of people; (3) the exercise of guardians' powers within the constraints of the right to

258. *Id.* at 582-83.
259. *See id.*
260. *See id.* at 583. *But cf. In re* Guardianship of Hughes, 715 A.2d 919, 922 (Me. 1998) (holding that the preponderance of evidence standard satisfied due process in guardianship proceeding for a 78-year-old person with mental illness).
261. *See Hedin*, 528 N.W. 2d at 583.
262. *See id.*

> least restrictive setting, with no change made in a person's physical environment without a very specific showing of need to remove a person to a more restrictive setting; and (4) a system of limited guardianships in which rights are removed and supervision provided only for those activities in which the person has demonstrated an incapacity to act independently. (b) Public guardianship statutes should be reviewed for their effect in providing services to persons in need of but without guardianship. Report of the Task Panel on Legal and Ethical Issues to the President's Commission on Mental Health, 20 ARIZ. L. REV. 49, 76 (1978).
>
> Our guardianship law—together with the way we have interpreted it in this opinion—meets substantially all of this recommendation. In the way it treats mentally disabled persons, society has come full circle from the medieval concept of complete control to the humane modern use of the least restrictive alternative.[263]

B. *In re Conservatorship of Foster*

Andrews also cited *Foster*[264] to support his contention of a continuing constitutional crisis in guardianship of the elderly.[265] However, *Foster* does not constitute such support and, as such, is used erroneously.

In *Foster*, the Minnesota Supreme Court, affirming decisions from both a trial court (in part) and the appeals court, addressed the right to privacy and procedural due process in incompetency.[266] Here, as in *Hedin*, the court did not attack the *constitutionality* of the Minnesota guardianship statute, but its *application*.[267] In fact, the court found the statute and rules so strong that the public conservator was granted authority to act under the power and direction of the statute and rules without having to return to the court for an order to administer neuroleptic medication to the ward.[268]

Addressing the issue of incompetency, the supreme court declared:

> While we have noted that "a patient's right to privacy might conceivably be violated if the treatment decision rested solely upon the unfettered discretion of the commissioner or the commissioner's surrogates," our primary concern has been "that intrusive

263. *Id.*
264. *In re* Conservatorship of Foster, 535 N.W.2d 677 (Minn. Ct. App. 1995), *aff'd*, 547 N.W.2d 81 (Minn. 1996). The Minnesota Supreme Court decision in this case was probably not available to Andrews at the time that he wrote his note.
265. *See* Andrews, *supra* note 1, at 86 n.62.
266. *See Foster*, 547 N.W.2d at 85.
267. *See id.*
268. *See id.* at 88.

> therapy should not be authorized by persons engaged in providing direct care to a patient."[269]

The court then determined that Holly Ann Foster suffered from mental retardation, mental illness, and physical disabilities.[270] Living in a community-based group home with three other developmentally disabled residents, Foster's primary disability was considered mental retardation in the moderate to severe range.[271] Additionally, Foster had schizo affective disorder, a major mental illness similar to schizophrenia, and vision impairment.[272] Foster, who had started taking neuroleptic medication to make her violent hallucinations almost nonexistent, was in danger of having her behavior symptoms escalate and recur if the medication was abruptly removed.[273]

In 1994, a County Bureau of Social Services program manager petitioned for appointment as Foster's public conservator.[274] The petition alleged that Foster was incapable of exercising certain powers over her personal care, including consenting to medical care, and requested that the commissioner be given power to make decisions in those areas.[275] Specifically, the petition requested that the commissioner have power to consent on Foster's behalf in regards to the neuroleptic medication as a form of medical treatment.[276]

Finding Foster incapable of exercising the power to consent to necessary medical or other professional care or treatment, the district court appointed the commissioner as public conservator for Foster, granting the commissioner the general power to consent to necessary medical care.[277] The lower court, however, withheld the power of the conservator to consent to neuroleptic medication without a court order, finding insufficient evidence that neuroleptic medication was in Foster's best interests or that Foster was incompetent to give informed consent to treatment with such medication.[278]

The supreme court agreed with the appeals court that the safeguards in applicable statutes regarding appointment of a public conservator, and in administrative rules regarding a public conservator's

269. *Id.* at 88-89 (quoting *In re* Blilie, 494 N.W.2d 877, 883 (Minn. 1993)).
270. *See id.* at 83.
271. *See id.*
272. *See id.*
273. *See id.*
274. *See id.* at 84.
275. *See id.*
276. *See id.*
277. *See id.*
278. *See id.*

authority to consent to neuroleptic medication, were sufficient to protect the conservatee's constitutional rights.[279] The court addressed what it determined was a question of law relating to construction of statutes and constitutional provisions, requiring no deference to the lower court's conclusions.[280] As found in other cases challenging statutory validity,[281] the supreme court acknowledged a statutory presumption of validity, directing Foster to establish beyond a reasonable doubt that the statute violated her claim that the statutory and administrative procedures failed to adequately protect her from being deprived of her fundamental right to privacy and bodily integrity without due process of law.[282]

The supreme court applied the standard three-part balancing test[283] to determine whether the process adequately balanced:

> (1) the private interest affected by the government's action; (2) the risk that the process provided will result in an erroneous deprivation of the private interest and the probable value of additional or substitute procedural safeguards; and (3) the state's interest in the procedures provided, including the administrative burden and expense the additional procedures sought would require.[284]

After a thorough analysis, the supreme court concluded that the State, acting as parens patriae, could make decisions regarding mental health treatment on behalf of an incompetent person unable to make such decisions on his or her own behalf, but the extent of the State's intrusion would be limited to reasonable and necessary treatment.[285] The court further reasoned that the public conservator had the authority to consent to the use of neuroleptic medication when governed by such rigorous statutory and regulatory procedures.[286] It declared that the additional procedural safeguards imposed by the trial court provided little additional value and were largely duplicative of a comprehensive statutory and administrative system that fairly, efficiently, and effectively safeguarded the rights of the conservatee and ensured a high degree of reliability.[287]

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279. *See id.*
280. *See id.* at 85 (citing *In re* Blilie, 494 N.W.2d 877, 881 (Minn. 1993)).
281. *See id.* (citing *In re* Schmidt 443 N.W.2d 824, 826 (Minn. 1989)).
282. *See id.*
283. *See id.* at 87 (citing Mathews v. Eldridge, 424 U.S. 319 (1976); Heddan v. Dirkswager, 236 N.W.2d 54, 59 (Minn. 1983) (adopting the *Mathews* analysis)).
284. *Id.*
285. *See id.*
286. *See id.* at 88.
287. *See id.* at 89.

Analysis of the above cases finds no constitutional crisis over what was written in the guardianship statutes in Iowa and Minnesota. That does not mean vigilance and advocacy should wane in the struggle to overcome the old roots of the parens patriae doctrine that have a way of reemerging even when statutorily replaced.[288] Some guardianship judges and officials having jurisdiction over guardianship continue sitting on benches as if on thrones, exercising powers under the doctrine of parens patriae years after the statutes dictate otherwise.[289] Having been on the bench for a long period and having seen enough of guardianship adjudications and appointment of guardians,[290] they hold on to those "old roots," believing they have the right to arbitrarily dictate the process or adjudication and exercising nonconformity with statutory mandates and procedural rules.[291]

A substantial number of state guardianship statutes, codes, and laws have been tested over time to determine if they are constitutional.[292] Rather than concentrating on the sufficiency of statutes, attention and vigilance should be given to the overintrusive and arbitrary application by officers of the court. *In re Estate of Milstein v. Ayers*,[293] is a recent example of this need for attention in this area.

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288. From the deeply embedded roots of the doctrine of parens patriae, the seeds of excessive power will continue to come back, sprouting in agencies and bureaucracies controlling people under guardianship, attempting to mediate or repeal protections and spreading bad seeds anew. It is like the seeds of the "baobab."

> Now there were some terrible seeds on the planet that was the home of the little prince; and these were the seeds of the baobab. The soil of that planet was infested with them. A baobab is something you will never, never be able to get rid of if you attend to it too late. It spreads over the entire planet. It bores clear through it with its roots. And if the planet is too small, and the baobabs are too many, they split it in pieces . . .
>
> "It is a question of discipline," the little prince said to me later on. . . . "You must see to it that you pull up regularly all the baobabs, at the very first moment when they can be distinguished from the rose-bushes which they resemble so closely in their earliest youth." "It is very tedious work," the little prince added, "but very easy."

ANTOINE DE SAINT-EXUPERY, THE LITTLE PRINCE 20-21 (Harcourt Brace & Co., 1943).

289. *Cf.* W. Sherman, *Savage Guardians*, LONGEVITY, June 1989, at 41; *see also* Denise M. Topolnicki, *The Gulag of Guardianship*, MONEY, Mar. 1989, at 140.

290. *See supra* note 18 and accompanying text.

291. *See, e.g.*, Estate of Milstein v. Ayers, 955 P.2d 78 (Colo. Ct. App. 1998).

292. *See, e.g., In re* O.S.D., 672 P.2d 1304 (Alaska 1983).

293. 955 P.2d 78.

C. *In re Estate of Milstein v. Ayers*

In Letty Milstein's involuntary guardianship proceeding, her attorney petitioned the court for guidance due to Milstein's inability to meaningfully participate in her representation.[294] In classic parens patriae style, the probate court exercised extrastatutory powers. First, on its own motion, the probate judge appointed a guardian ad litem for Milstein in place of legal counsel without a hearing, effectively dismissing Milstein's private attorney who neither sought to withdraw, nor served necessary notice or information with the court.[295] Second, several weeks before a permanent orders hearing and without prior notice to all interested parties including Milstein's adult children, the probate judge met ex parte with Milstein in her home and took her statement in lieu of testimony in the presence of a court reporter, the guardian ad litem, and a medical expert.[296] Based on the court's ex parte interview of Milstein, it issued several orders in which it found Milstein incompetent and lacking legal capacity to engage counsel, and excluded Milstein and her purported attorney from appearing at the permanent orders hearing.[297] Third and finally, after the permanent orders hearing, the probate court entered orders finding Milstein incapacitated and appointed a permanent guardian, a conservator, and a guardian ad litem.[298] Milstein and her son, as an interested person, appealed.[299]

Under the applicable Colorado statute,[300] the Colorado Appellate Court found that Milstein had a right to counsel at all stages of the incapacity proceedings.[301] Further, the appeals court reasoned that Milstein retained this right despite the guardian ad litem's appointment because a guardian ad litem and independent counsel represent such differing interests that the guardian could not be an adequate substitute for private counsel.[302] Although the guardian ad litem acts as a special fiduciary who makes informed decisions for the individual, the court defined the representation by counsel as the sole method in which the individual's legal interests are represented in an

294. *See id.* at 80.
295. *See id.*
296. *See id.* at 81.
297. *See id.*
298. *See id.*
299. *See id.*
300. *See id.* at 82.
301. *See id.* at 83.
302. *See id.*

advocacy role.[303] In addition, the court recognized that "under the Colorado Probate Code, §15-10-11, *et seq.*, C.R.S. 1997, the son is an interested person" whose rights include the ability to limit the powers of the guardian in court proceedings.[304] The son also had standing because the probate court order had a negative effect on his ability to have personal contact with the individual deemed incapacitated, and he had demonstrated a substantial relationship with the individual who had difficulty asserting her own rights.[305]

The appellate court commented about the protective, but overreaching, actions of the probate judge:

> We recognize that the probate judge was motivated to conduct such an interview by her concern for [Letty's] welfare, by [Letty's] deteriorated physical and mental condition, and by the court's desire to evaluate [Letty] without the undue influence of third parties. Nevertheless, we are unaware of any authority in the Probate Code allowing an interview under such circumstances. *Cf. S. S. v. Wakefield*, 764 P.2d 70 (Colo. 1988) (disapproving judge's ex parte communication with mother in dependency and neglect proceeding). Importantly, the information obtained during the probate court's interview of [Letty] related directly to the [Letty's] alleged incapacity, which was the ultimate issue later to be determined at the permanent orders hearing.
>
> We therefore reject the contention that information obtained during the probate judges' interview with [Letty] may serve as justification for denying [Letty] the right to retain her own counsel.[306]

Thus, the Colorado guardianship statute was not at issue, only its application by the probate judge. Although the conclusion in *Milstein* may seem to support the premise of Andrews's note, it does not go so far as to confirm that there still exists a constitutional crisis in guardianship.[307] That is because there have been too many statutory gains over the past decade to be ignored; gains that have delivered widespread constitutional procedural due process protections to those alleged to be incompetent and in need of guardianship. It does confirm, however, that judges will exercise powers beyond those statutorily granted.

In all fairness to many judges and officials, they often have good reason to continue their local habits and practices. The "good reason"

303. *See id.* (citing Department of Insts. v. Carrothers, 821 P.2d 891 (Colo. App. 1991), *aff'd on other grounds*, 845 P.2d 1179 (Colo. Sup. Ct. 1993)).
304. *Id.* at 81 (citing COLO. REV. STAT. § 15-14-304(4)).
305. *See id.* (citing Augustin v. Barnes, 626 P.2d 625 (Colo. 1981)).
306. *Id.* at 84.
307. *See id.* at 86; *see also infra* note 388 and accompanying text.

is found in the thinking of many state legislatures, commissions, legal scholars, and organizations not inclined to completely root out the doctrine of parens patriae.[308] They rely on the strength of history to argue that experienced judges, adhering to sound but informal advocacy principles that protect the rights of alleged incompetent persons, are able to reduce the exorbitant costs of time, money, and emotion associated with the more formal, complex adversarial principles of many of the guardianship reform laws enacted over the last decade.[309]

IV. State Movement Toward Statutory Due Process Protections in Guardianship

A. Early State Statutory Movement Toward Constitutional Protections in Guardianship and Conservatorships

Andrews leaves the distinct impression in his note that there has been little or no effort by the states to address due process deficiencies in guardianship statutes, contending that "current guardianship statutes hastily disavow the rights of an elder with minimal constitutional oversight."[310] While citing no case law to support his point, Andrews further leads the reader to believe that it has actually been the courts that have been "forced to rewrite guardianship statutes that are unconstitutionally vague."[311] States have for decades revised and amended their guardianship statutes to meet due process requirements. Before examining the extent of the progress across the states in developing procedural due process protections since 1987, consider what had already been accomplished before the "brouhaha" brought on by the Associated Press exposé.[312]

California[313] led several other states[314] and the nation in resolving many of the constitutional infirmities associated with guardian-

308. *See supra* note 287 and accompanying text.

309. See A.F. Johns, *Guardianship Folly, supra* note 21; *see also* Susan G. Haines & John J. Campbell, *Defects, Due Process and Protective Proceedings,* COLO. LAW., Apr. 1998, at 39, 41 (Colorado court may appoint emergency or temporary guardian with no notice or hearing for any specified period of time).

310. Andrews, *supra* note 1, at 76.

311. *Id.* at 108.

312. *See* Frolik, *supra* note 18, at 351.

313. *See infra* notes 334-35, and 340 and accompanying text.

314. Andrews used the Associated Press report as one of his primary sources, but never mentioned AP's singling out of California as the best state in addressing and protecting the rights of unprotected older adults in guardianship and conservatorship.

ship.[315] A collective of states followed with their adoption of the Uniform Probate Code, including Article V on Guardianship and Conservatorship which began a modification of the doctrine of parens patriae with elements of constitutional procedural due process protections.[316] Many of these same states are recognized in later years for going even further with reform by implementing the Uniform Guardianship and Protective Proceedings Act (UGPPA), restructuring accountability and the monitoring of guardians, and statutorily creating public guardianship programs and review processes.[317]

1. CALIFORNIA—ONE OF THE FIRST IN THE FRONTIER OF GUARDIANSHIP REFORM IN 1977

In the late 1970s, California gained singular recognition for enacting wide-sweeping and large-budgeted guardianship laws.[318] The California guardianship laws are unique and complex.[319] They authorize three distinct but overlapping statutory systems for dealing with persons or affairs. The first system is a Probate Code guardianship for persons declared incompetent by a court.[320] Lanterman-Petris-Short (LPS) conservatorship is the second system that provides a

315. *See* N.H. REV. STAT. ANN. §§ 464-A:1 to -A:44 (1992 & Supp. 1998); VT. STAT. ANN., tit. 14, §§ 2601-3096 (1989 & Supp. 1998); N.C. GEN. STAT. §§ 35A-1101 to -1361 (1995); KAN. STAT. ANN. §§ 59-3001 to -3038 (1994 & Supp. 1998); 755 ILL. COMP. STAT. ANN. 5/11a-1 to -22 (West 1992 & Supp. 1998); MINN. STAT. ANN. §§ 525.539-.6198 (West 1975 & Supp. 1999); MD. CODE ANN., EST. & TRUSTS §§ 13-201 to -222, 13-704 to -710 (1991 & Supp. 1997); D.C. CODE ANN. §§ 21-2001 to -2077 (1997); N.J. STAT. ANN. §§ 3B:12-1 to -66 (West 1983 & Supp. 1998); MASS. GEN. LAWS ANN. ch 201, §§ 6-51 (Law. Co-op. 1994 & Supp. 1998); and ARIZ. REV. STAT. §§ 14-5301 to -5607 (West 1995 & Supp. 1998). The guardianship statutes of California, Maryland, New Hampshire, Minnesota, and the UGPPA will be reviewed in this section.

316. *See* 8 U.L.A. 1 (West 1998) (certifying the UPC in effect in the following states—Alaska (1973), Arizona (1974), Colorado (1974), Florida (1975), Hawaii (1976), Idaho (1972), Maine (1981), Michigan (1979), Minnesota (1975), Montana (1975), Nebraska (1977), New Mexico (1976), North Dakota (1975), South Carolina (1987), South Dakota (1995), and Utah (1977)); *see also* D.M. English, *The Uniform Guardianship and Protective Proceedings Act—How Uniform Is It?, Part I*, NAELA Q., Summer 1993, at 1, 1 (explaining that the Uniform Laws Commission has recognized 14 jurisdictions that have enacted the UPC Article V and UGPPA); D.M. English, *The Uniform Guardianship and Protective Proceedings Act—How Uniform Is It?, Part II*, NAELA Q., Fall 1993, at 22, 22-28 (Professor English is credited for having authored, and shepherded, the 1994 recodification of South Dakota's guardianship statute through the South Dakota legislature, certified as a UPC state.).

317. *See infra* note 364-69 and accompanying text.

318. *See* Bayles & McCartney, *supra* note 16.

319. *See* J. Regan, *supra* note 9.

320. *See* CAL. PROB. CODE §§ 1460-1462 (West 1998).

conservatorship for a person "who is gravely disabled as a result of mental disorder or impairment by chronic alcoholism."[321] "Gravely disabled" is defined as "a condition in which a person, as a result of mental disorder, is unable to provide for his basic personal needs for food, clothing, or shelter."[322] This process is used chiefly by professional personnel at an agency already providing comprehensive evaluation or at a facility providing intensive treatment.[323] The third system is in the form of a Probate Code conservatorship for an adult who is "unable properly to provide for his personal needs for physical health, food, clothing or shelter," or is "substantially unable to manage his own financial resources, or resist fraud or undue influence or for whom a guardian could be appointed. . . ."[324] No finding of mental disorder is required for this type of conservatorship.[325] No declaration of incompetency is made, unlike a guardianship finding.[326]

The hallmark of the California revisions was its statewide system of monitoring and reviewing guardians.[327] The 1977 code created investigators appointed by the court who, as officers of the court, have no beneficial interest in the proceedings.[328] The investigator's duties do not end once the conservatorship is in place.[329]

More than a decade before the Associated Press exposé or the Wingspread Symposium,[330] California statutorily directed investigators to communicate with, assess, and deal with persons subject to conservatorship proceedings.[331] Investigators were charged with the responsibility of knowing the law, informing the proposed conservators and conservatees of their rights and duties, and describing the impact and effect of what a conservatorship will do.[332]

During the same period, several other states, who were not a part of the UPC/Article V collective, were also advancing constitutional due process protections in their statutory guardianship

321. CAL. WELF. & INST. CODE § 5350.
322. § 5008(h)(1).
323. *See* § 5352.
324. CAL. PROB. CODE § 1801(a), (b).
325. *See id.*
326. *See id.*
327. *See generally* § 1454.
328. *See* § 1454(a).
329. *See id.*
330. *See* A.F. Johns, *Guardianship Folly*, *supra* note 21, at 48-50.
331. *See id.* at 38.
332. *See id.*

processes.[333] Of those states, this article reviews Maryland, New Hampshire, and Minnesota.

2. MARYLAND'S 1977 ADULT PROTECTIVE SERVICES ACT

California was not alone in the guardianship reform frontier. In 1977, Maryland was guided into guardianship reform by a group led by the late professor John Regan,[334] credited for having drafted most of the new law[335] that implemented sweeping revisions of guardianship in the Adult Protective Services Act.[336] Significant to this article's analysis are the important due process rights added to guardianship adjudications, including rights to notice, to counsel, to be present at the hearing, and to the burden of proof based on the higher standard of clear and convincing evidence.[337] The statute also created a review board in each political entity where a public guardian existed.[338] Although the Maryland statute has been revised since 1977, the primary structure and the specific procedural due process protections provided through the adjudication of the guardianship of the person are a credit to those at the forefront advocating reform in guardianship.

3. NEW HAMPSHIRE'S 1979 REVISION OF ITS GUARDIANSHIP LAW

New Hampshire implemented wholesale revision of its guardians and conservators laws in 1979.[339] The New Hampshire law declared adversarial procedural protections for those against whom proceedings were initiated to establish mental competence.[340] The New Hampshire statute provided notice to the opposed ward in reasonable language and appropriate sized print, and specifically requiring that the notice contain information regarding the rights of the proposed ward in the proceeding, including the right to oppose the proceeding, to attend the hearing, to present evidence, and to be represented by counsel.[341] The New Hampshire statute also provided

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333. *See id.* at 42-43.
334. *See supra* note 9.
335. *See* Joan O'Sullivan & Diane Hoffmann, *The Guardianship Puzzle: Whatever Happened to Due Process?*, 7 MD. J. CONTEMP. LEGAL ISSUES 11, 19 (1995-96).
336. *See id.*
337. These rights are reserved only for adjudications of guardianship of the person. MD. CODE ANN., EST. & TRUSTS §§ 13-201, -704 (1991 & Supp. 1997).
338. MD. CODE ANN., FAM. LAW § 14-401 (1991).
339. *See* N.H. REV. STAT. ANN. § 464 (1992 & Supp. 1998).
340. *See id.*
341. *See* § 464-A:5(I).

that the proposed ward would have an attorney, and the right to counsel was declared to be absolute and unconditional.[342]

In regards to the hearing, New Hampshire provided for the proposed ward to attend the hearing with waiver of personal attendance accomplished only by petition or by the counsel filing a written statement declaring an expressed desire not to attend the hearing, along with a physician's affidavit.[343] In addition, the New Hampshire law stated that a medical affidavit could only be used during the hearing to show that the proposed ward was unable to attend the hearing.[344] New Hampshire specifically declared that, as a matter of conducting the hearing, the Rules of Evidence would apply, no hearsay evidence would be admissible, and a presumption of capacity would exist with a burden of proof on the petitioner to prove the allegations of incompetence beyond a reasonable doubt.[345] A burden beyond a reasonable doubt in an adjudication of capacity was and is unique compared to most states' burdens of either a preponderance of evidence standard or clear and convincing evidence standard.[346] New Hampshire further distinguished itself by requiring that the court establish findings in the record based on evidence beyond a reasonable doubt that there was no available alternative resource suitable with respect to the incapacitated person's welfare, safety, and rehabilitation and, thus, guardianship was appropriate.[347]

4. MINNESOTA'S 1980 REVISION OF ITS GUARDIANSHIP LAW

In 1980, Minnesota joined California and New Hampshire in the frontier of guardianship reform. Minnesota changed the procedures and circumstances for guardian and conservator appointment, clarifying their powers and duties and providing minors with access to guardianship or conservatorship.[348]

The acknowledgement of the right to be represented by counsel in the proceeding, either appointed by the court or chosen by the proposed ward or conservatee, was a significant change to Minnesota

342. *See* § 464-A:6.
343. *See* § 464-A:8(I).
344. *See* § 464-A:8(II).
345. *See* § 464-A:8(IV).
346. *See generally* Guardianship Chart Exhibit "H" Conduct and Results of Guardianship Proceedings.
347. *See* N.H. REV. STAT. ANN. § 464-A:9(c).
348. *See* MINN. STAT. §§ 525.011, .541-.542, .55 (West 1976 & Supp. 1996).

law.[349] Minnesota made clear that counsel was to defend the rights of the proposed ward by providing counsel with the full right of subpoena, mandating that the proposed ward be fully consulted before the hearing, providing adequate time to prepare for the hearing, and requiring counsel to represent the person throughout the proceedings until released by the court.[350]

Minnesota also mandated due process rights, including the proposed ward's attendance at the hearing, the right to summon and cross-examine witnesses, the right to apply the rules of evidence, and the right to have the higher standard of clear and convincing evidence apply in the hearings.[351] Minnesota also required that the hearing be recorded and that the court make specific findings of fact, declare separate conclusions of law, and direct entry of an appropriate judgment.[352]

In an attempt to assure that restrictions on the ward would be limited to the extent that they apply based on the ward's inability to exercise individual rights, the statute specifically declared that the court could enumerate its findings as to which legal rights the proposed ward was incapable of exercising.[353] This is one of the earlier statutes that constructed the concept of limited guardianship without specifically declaring it.

All states in the frontier of guardianship reform[354] expressly declared concern for protecting those rights that the ward or conservatee might exercise. More often, the declarations within the context of the limited guardianship concept were found in legislative preambles and legislative intent.[355] Specific statutory directives directing courts to specifically find facts during the hearing which would allow limited guardianship were rare.[356] However, with the creation of the UGPPA, the idea of limited guardianship was considered in several states across the country.[357]

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349. *See* § 525.55(2).
350. *See* § 525.5501.
351. *See* § 525.551(1).
352. *See id.*
353. *See id.*
354. *See* A.F. Johns, *Guardianship Folly, supra* note 21, at 45.
355. *See, e.g.*, N.C. GEN. STAT. § 35A-1201 (1995).
356. *See* A.F. Johns, *Guardianship Folly, supra* note 21, at 45.
357. *See id.* at 46 n.301.

5. THE UGPPA

During the mid 1970s, the American Bar Association's Committee on the Mentally Disabled began an effort that promoted revision of the UPC Article V to include "limited guardianship" and avoid an asserted "overkill" implicit in standard guardianship proceedings.[358] ABA divisions and the National Conference of Commissioners took objection and barred the recommended revisions to the UPC for years, contending that "typical" guardianship legislation was sufficient.[359] However, many UPC states began amending their statutes to include some form of limited guardianship.[360] The states did not use consistent language.[361] In fact, two states and the District of Columbia opted to adopt the model guardianship statute designed by the ABA Commission on the Mentally Disabled,[362] instead of amending their legislation to conform with the work of the National Conference of Commissioners.[363]

In the wake of opposition, the National Conference of Commissioners adjusted its attitude and philosophy on limited guardianship. It restructured UPC Article V to include explicit language relative to the concept of limited guardianship and incorporated the limited guardianship philosophy into all other parts to provide internal consistency and to accommodate the limited guardianship concept.[364] The work was produced in 1982 as a stand-alone act entitled The Uniform Guardianship and Protective Proceedings Act.[365] Alternatively, with the modifications to Article V, it was offered as a component part to the UPC.[366] Of the fifteen states that have enacted the UPC, several have incorporated the limited guardianship revisions into their

358. *See generally* 1982 UGPPA (occurring in part because a finding of *non compos mentis* or incompetence has been the traditional threshold for the appointment of a guardian. As a result, in consequence of the appointment of a guardian, all personal legal autonomy is stripped from the ward invested in the appointing court and guardian. The call for "limited guardianship" was a call for more sensitive procedures and for appointments fashioned so that the authority of the protector would intrude only to the degree necessary on the liberties and prerogatives of the protected person.).

359. *See id.*

360. *See id.* at 441.

361. *See id.*

362. *See ABA Commission on the Mentally Disabled Model Guardianship Act Statute*, 2 MENTAL DISABILITY L. REP. 444 (1998) (identifying Alaska, New Mexico, and the District of Columbia).

363. *See id.*

364. *See* 1982 UGPPA (Prefatory Note).

365. *See id.*

366. *See id.*

laws.[367] Still, a significant majority of the states are not considered UPC states. Only one state, Alabama, has enacted the UGPPA as a stand-alone statute.[368] Recent attention given to revising and restructuring the UGPPA[369] may cause its acceptance in other states, creating a uniformity in the statutory structure of guardianship and conservatorship that has eluded national efforts.

B. State Movement Toward Constitutional Protections in Guardianship Adjudications of Incompetency Prompted by the Associated Press Exposé

1. THE ASSOCIATED PRESS NATIONAL EXPOSÉ—"DECLARED LEGALLY DEAD"

On September 20, 1987, headlines splashed across the front pages of America's newspapers announcing "Declared 'Legally Dead': Guardian System is Failing the Ailing Elderly!"[370] After extensive research, and the examination of 2200 probate, guardianship, and conservatorship estate files, the Associated Press published its findings in metropolitan and community newspapers across America.[371] Along with the national, syndicated study, many of the metropolitan areas in which the series ran reported detailed accounts of guardianship in their local areas.[372]

The Associated Press provided statistics regarding the cases studied. It found that only 16% of the cases contained reports on the condition of wards after guardianships were granted, 48% were missing annual financial accountings, and 13% contained no entries after the opening of the guardianship.[373] The report further described a system that was troubled and dangerously burdened, putting elderly lives in the hands of others with little or no evidence of need, and regularly failing to guard against abuse, theft, and neglect.[374] The report specifically identified problems including the lack of resources to adequately monitor the activities of guardians and the financial and personal status of their wards, little or no guardian training, little or no awareness of guardianship alternatives, and the lack of due pro-

367. *See supra* note 316, *infra* notes 431-33 and accompanying text.
368. *See* ALA. CODE §§ 26-2A-1 to -160 (Michie 1992 & Supp. 1998).
369. *See infra* notes 431-33 and accompanying text.
370. *See* Bayles & McCartney, *supra* note 16.
371. *See id.*
372. *See id.*
373. *See id.*
374. *See id.*

cess.[375] The Associated Press and local reporters chronicled anecdotal evidence of abuses in a dysfunctional system.[376] The more gruesome and painful cases took center stage and were the strength of the indictments to follow.[377]

Andrews ends his report on the Associated Press exposé with the conclusion that the study mentioned no hopeful statistics regarding the protection of elderly wards' rights.[378] Actually, one slant on the report[379] promoted a generally optimistic conclusion.

2. ABA DIVISIONS AND THE NATIONAL CONFERENCE OF COMMISSIONERS' RESPONSE TO THE ASSOCIATED PRESS EXPOSÉ

Although concluding that guardianship across America was a failure, the Associated Press acknowledged the high percentage of guardianship and conservatorship cases that were reasonably served.[380] This was sufficient reason for advocates representing the ABA to argue that the "so-called"[381] guardianship system worked. At the first of two subsequent Senate Special Committee on Aging Roundtable Discussions, Jack Lombard, representing the ABA Real Property, Probate, and Trust Section, stated:

> Unfortunately, you know, the Associated Press report gets a lot of indictment of the system, but really if you read it, it says the system for the most part works well. It works, people are honest, and they're discharging their responsibility, and that really is the message we should be getting to people.[382]

At the second Senate Special Committee on Aging Roundtable Discussion, Lombard echoed the comments that John Pickering, Chair of the ABA Commission on Legal Problems of the Elderly, had shared with those attending the workshop:

> [T]here is something that we all in this area lose sight of. And it's something that's said in the AP [Associated Press] study. The AP study says that the system generally works well. Yes, there are abuses. There always will be abuses. . . . The courts are always there to take care of bad cases. . . .

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375. *See id.*
376. *See id.*
377. Many of the individuals noted in the Associated Press report were subsequently brought before the Pepper Commission in Washington to tell their stories to Congress.
378. *See* Andrews, *supra* note 1, at 81.
379. *See infra* note 382 and accompanying text.
380. *See* Bayles & McCartney, *supra* note 16.
381. *See supra* note 2.
382. *Roundtable Discussions*, *supra* note 9, at 94.

> And John [Pickering] is also right, you don't build your procedures through bad cases. You build your system on the basis that most human beings have the right intention to take care of individuals, and thank God for it. . . . Don't get your system so complex that the whole thing breaks down.[383]

At the first Senate Special Committee on Aging Roundtable Discussions, Pickering chronicled the work of both the ABA Commission on Legal Problems of the Elderly, and its sister commission, the ABA Commission on Mental and Physical Disability Law, with support from the ABA Real Property, Probate, and Trust Section:

> [W]e have conducted two national conferences on guardianship problems, which are now ABA policy—the first was in 1986, the second in 1988—calling for substantial reforms in the State guardianship process. You have had handed out to you this morning from our staff reports on legislation in 1991 and so far in 1992. We have studies going back to 1988. Following those two ABA conferences and resulting recommendations, there has been considerable impetus for reform in the States. We're looking at how that goes along.[384]

Even though the ABA position was that, on the whole, the guardianship system worked, by 1994, the ABA Senior Lawyers Division organized the Task Force on Guardianship Reform to revise the UGPPA.[385] Those recommendations were the basis on which the National Conference of Commissioners appointed a committee to revise the UGPPA.[386]

3. STATE LEGISLATIVE RESPONSE TO THE ASSOCIATED PRESS EXPOSÉ

In his statements, Pickering was referring to an eruption of legislative activity that began in response to the heightened awareness gained from the countrywide investigation published in the Associated Press exposé.[387]

a. Ten Years of Guardianship Reform In 1988, twenty-eight states introduced as many as 100 guardianship bills, passing as many as twenty-three in eighteen states:[388]

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383. *Innovative Approaches to Guardianship: Workshop Before the Senate Special Committee on Aging*, 103d Cong. 61 (1993) (comments of Jack Lombard).
384. *Roundtable Discussions*, *supra* note 9, at 89.
385. *See* A.F. Johns, *Guardianship Folly*, *supra* note 21, at 61.
386. *See id.*
387. *See Roundtable Discussion*, *supra* note 9, at 89.
388. *See* ERICA WOOD, COMMISSION ON LEGAL PROBLEMS OF THE ELDERLY, ABA, STATE ADULT GUARDIANSHIP LEGISLATION: DIRECTIONS OF REFORM, at 1988 (1988-1997).

1. Guardianship Study Committees. Florida, Rhode Island, Oklahoma (task force), and Virginia created Guardianship Study Committees to further examine issues;[389]
2. Comprehensive Guardianship Revision. Oklahoma,[390] Indiana,[391] and Michigan[392] enacted comprehensive revisions in their guardianship processes; and
3. Significant Guardianship Amendments. Arizona,[393] Colorado,[394] and Utah[395] amended a number of important aspects of the guardianship process in each state.

Every year since 1988, Erica F. Wood, a guardianship expert with the ABA Commission on Legal Problems of the Elderly, has chronicled continuing legislative guardianship reform by the states.[396] In a uniform approach, Wood analyzes each year's new or amended guardianship laws in terms of: (1) procedural due process; (2) determination of incapacity; (3) nature of court order; and (4) guardian accountability.[397]

Each year, Wood has recognized a growing list of states making comprehensive revisions to guardianship laws: 1988—Oklahoma, Indiana, and Michigan; 1989—Florida, New Mexico, North Dakota, and Ohio; 1990—Washington; 1991—New York; 1992—Rhode Island, Tennessee, and Pennsylvania; 1993—Texas and South Dakota; 1994—West Virginia; 1995—Oregon; 1996—Washington; and 1997—Virginia.[398]

The most significant state changes over the last ten years have occurred in Florida, New York, Texas, South Dakota, West Virginia,[399] Tennessee, Washington, and Virginia.[400] Following Florida and New

389. *Id.* (referencing information compiled from Commerce Clearinghouse Legislative Search System).
390. *See* OKLA. STAT. ANN. tit. 30, §§ 1-101 to 5-101 (West 1991 & Supp. 1999).
391. *See* IND. CODE ANN. § 29-3-1-1 to -15 (West 1994 & Supp. 1998).
392. *See* MICH. COMP. LAWS ANN. §§ 700.401-.499 (West 1995 & Supp. 1998).
393. *See* ARIZ. REV. STAT. §§ 14-5305 to -5315, -5407 (West 1995 & Supp. 1998).
394. *See* COLO. REV. STAT. §§ 15-14-301 to -315 (Supp. 1996).
395. *See* UTAH CODE ANN. §§ 75-5-301 to -316 (Michie 1993 & Supp. 1998).
396. *See* WOOD, *supra* note 388, at 1988.
397. *See id.*
398. 1998 may be no different. Earlier this year, the National Conference of Commissioners on Uniform State Laws offered the 1997 revisions of the Uniform Guardianship and Protective Proceedings Act to the ABA House of Delegates at its midwinter convention. *See infra* notes 435-39 and accompanying text.
399. Although West Virginia's overhaul of its guardianship law is not reviewed here, it is recognized as a significant accomplishment. *See* WOOD, *supra* note 388, at 1994.
400. *See id.* at 1992. *See generally* Hurme, *supra* note 22, at 143.

York, Texas, South Dakota, and Virginia are examples of comprehensive statutory changes in guardianship laws, ushering in new eras of guardianship in these states.[401]

i. Texas's New Era in Guardianship Beginning in 1993 The 1993 overhaul of the adult guardianship law brought Texas reform of what was described as "an outmoded and antiquated guardianship system" that allowed the appointment of a guardian—who received total control over a person and that person's property—simply by walking into the office of the local probate judge.[402]

Erica Wood highlighted the major components of the new law:

> **Right to Counsel.** [T]he court must appoint an "attorney *ad litem*" in every case, "to represent and advocate" on behalf of the respondent, [TEX. PROB. CODE ANN. § 601(1)], [and] the court may appoint a "guardian *ad litem* " . . . "to determine what action will be in the best interests" of the respondent. [TEX. PROB. CODE ANN. § 645.] Attorneys *ad litem* must be certified (or have experience prior to September 1, 1993).
>
> **Definition of Incapacity**. . . . An "incapacitated individual" . . . is defined to include
>
> > "an adult individual who, because of a physical or medical condition, is substantially unable to provide food, clothing, or shelter for himself or herself, to care for the individual's own physical health, or to manage the individual's own financial affairs." [TEX. PROB. CODE ANN. § 601(13).]
>
> The court's determination "must be evidenced by recurring acts or occurrences within the preceding six-month period and not by isolated instances of negligence or bad judgment." [TEX. PROB. CODE ANN. § 684(b).]
>
> **[Court Investigator.]** Before the hearing, a "court investigator" appointed by the probate court must examine the circumstances of the respondent and determine whether an alternative less restrictive than guardianship might be appropriate. [TEX. PROB. CODE ANN. § 648A.] The attorney *ad litem* must be provided with the medical, psychological and intellectual testing records of the respondent. [TEX. PROB. CODE ANN. § 686.] The petitioner must present to the court a letter from a physician stating that "in the opinion of the physician, [the respondent] is incapacitated, and

401. The summaries reviewed in this article were written by Erica Wood, American Bar Association Commission on Legal Problems of the Elderly. They are included only for the purpose of supporting the author's thesis that most states have in fact passed legislation that addresses constitutional procedural and substantive safeguards of unprotected elderly persons. They are not intended to be comprehensive analyses of the enactments in the states of Texas, South Dakota, and Virginia.

402. *See* WOOD, *supra* note 388, at 1993 (quoting JIM GUIBERTEAU, CURRENT DEVELOPMENTS IN PROBATE AND TRUST LEGISLATION AND CASE LAW (1993)).

generally defin[ing] the extent of the incapacity." [TEX. PROB. CODE ANN. § 687(a).]

[Court Visitor.] In addition to a court investigator, the court must have a "court visitor program," which the court investigator is to supervise. In each case, the court *may* appoint a court visitor to evaluate the respondent and provide a written report. [TEX. PROB. CODE ANN. § 648.] Thus, in a given case, the respondent could have an attorney *ad litem*, guardian *ad litem*, court investigator and court visitor. While the first clearly is an advocate, it will be challenging to sort out the latter three roles.

Limited Guardianship. [The Texas Code now embraces] "limited guardianship" [as] a relationship in which the court order assigns the guardian only those duties and powers that the ward is incapable of exercising. . . . The concept of tailoring the guardianship to the individual ["limited guardianship"] is the centerpiece of the [Act, as] emphasized in the [Act's] policy statement, TEX. PROB. CODE ANN. § 602], and explicitly set out in the [court's order that must] "contain findings of fact and specify . . . the specific powers and limitations or duties of the guardian." [TEX. PROB. CODE ANN. § 693(b).] Moreover, a ward "retains all legal and civil rights and powers except those designated by court order as specifically granted to the guardian." [TEX. PROB. CODE ANN. § 675.]

[Monitoring.] [The Act] bolsters guardianship monitoring . . . [by increasing] the monitoring responsibility of probate courts . . . [requiring the court] to "review annually each guardianship to determine whether the guardianship should be continued, modified or terminated" [TEX. PROB. CODE ANN. § 123A]; . . . by ensuring the filing of annual accountings by specifying that the letters of guardian expire one year and 120 days after issuance, and may be renewed only on receipt and approval of the accounting [TEX. PROB. CODE ANN. § 659]; . . . by requiring detailed and explicit reporting by the guardian of the person [TEX. PROB. CODE ANN. § 743]; . . . and by allowing the ward or any person interested in the ward's welfare to petition the court by "informal letter" for a modification or termination of the guardianship.

Certification and Education. The [Act] requires "private professional guardians" to be certified by the court, but excludes attorneys and "corporate fiduciaries" such as trust companies and banks. [TEX. PROB. CODE ANN. §§ 697 & 601(22).] The [Act] also amend[ed] the Texas Government Code to mandate that the Supreme Court provide judicial instruction, . . . and the state bar provide attorney instruction . . . relating to guardianship, and to needs of the elderly and persons with disabilities.[403]

ii. South Dakota Joined Other UGPPA States in 1993 Emphasizing basic concepts similar to New York, South Dakota organized its Guardi-

403. *Id.* (emphasis added).

anship and Conservatorship Act[404] in conformity with the UGPPA. After five years of legislative advocacy, the statute paralleled the UGPPA, drawing a distinction between a "guardian" appointed to make personal care decisions and a "conservator" appointed to manage property.[405]

In the same 1993 manuscript,[406] Wood highlighted similar components of the South Dakota Act:

> **Alternatives to Guardianship.** The Act stresses the use of alternatives less restrictive than guardianship (durable powers of attorney both for health care and for property management, family health care consent, representative payees, revocable trusts, adult protective services, and respite and financial counseling services) throughout each phase of the process. Moreover, the Act explicitly strengthens the role of the durable power of attorney by providing that a guardian or conservator may not revoke such a power without express authorization from the court . . . ; and that a petitioner who knows of the existence of a durable power of attorney must so state in the petition and attach a copy. [S.D. CODIFIED LAWS § 29A-5-305.]
>
> **Limited Guardianship.** The new Act provides that a request for limited guardianship or conservatorship may be initiated upon the filing of a petition, and must include the specific areas of protection and assistance needed. [S.D. CODIFIED LAWS § 29A-5-305(11).] [Even if there is no request for limited guardianship,] the professional evaluation report may trigger consideration of a limited guardianship or conservatorship. [The court's order] must determine "the type [of guardianship or conservatorship], and the specific areas of protection, management and assistance to be granted." [S.D. CODIFIED LAWS § 29A-5-306.] The Act specifies that after appointment, a protected person "retain[s] all rights which have not been granted to the guardian or conservator." [S.D. CODIFIED LAWS § 29A-5-118.]
>
> **Participation in Decision Making.** The . . . Act requires that a protected person's views be taken into account both in the court's selection of a guardian or conservator, . . . and in the guardian or conservator's decision-making. . . . If the protected person is incapable of participation, the guardian or conservator must consider his/her views expressed and values developed prior to appointment.
>
> **Procedural Due Process.** Under [the] Act, the *notice* must state the legal effect of appointment, and inform the respondent of the right to appear at the hearing and to oppose appointment. [S.D. CODIFIED LAWS § 29A-5-308.] Both the petition and evaluation report must address the respondent's ability to *attend the hearing* [S.D. CODIFIED LAWS § 29A-5-306]; and the court may hold the

404. *See id.*
405. *See id.*
406. *See id.*

> hearing at a "convenient place . . . including the place where the person alleged to need protection is located." [S.D. CODIFIED LAWS § 29A-5-312.] An *attorney* must be appointed for respondent if he/she requests it, desires to contest the petition, or if the court determines that an attorney is otherwise needed [S.D. CODIFIED LAWS § 29A-5-312.] . . . .
>
> **Functional Determination of Incapacity.** The Act does not define "incapacity" but instead refers to a "protected person," and provides that:
>
> > "A guardian may be appointed for an individual whose ability to respond to people, events, and environments is impaired to such an extent that the individual lacks the capacity to meet the essential requirements for his health, care, safety, habilitation or therapeutic needs without the assistance or protection of a guardian." [S.D. CODIFIED LAWS § 29A-5-303.]
>
> [In order] to focus . . . on the particular needs [of the individual], . . . the Act requires that a "professional evaluation report" be filed with each petition, signed by a physician, psychiatrist or licensed psychologist. [S.D. CODIFIED LAWS § 29A-5-306.]
>
> **Accountability of Guardians and Conservators.** The new Act requires a guardian to file an annual personal status report with the court, and outlines the content of the report, including current condition of the protected person, living arrangements, services provided, summary of guardian visits and activities, and recommendation regarding need for continued guardianship. [S.D. CODIFIED LAWS § 29A-5-403.] Conservators must file annual accountings, but the law permits the court, upon petition, to allow less frequent or no accountings if the expense or burden outweighs the benefit and protection. [S.D. CODIFIED LAWS § 29A-5-408.][407]

iii. Virginia's 1997 Changes in Guardianship Reform Andrews could have easily targeted Virginia as a primary example of one of those "states allowing inadequate laws to remain,"[408] because its antiquated guardianship law was on the books through 1997 after Andrews published his note.[409]

As a citizen of that state, and a guardianship legislative advocate for the ABA Commission on Legal Problems of the Elderly, Erica Wood knows from where she writes about Virginia guardianship leg-

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407. *Id.*

408. *See* Andrews, *supra* note 1, at 86.

409. He could have also focused on Mississippi, Arkansas, Kentucky, Missouri, Louisiana, Nevada, Wisconsin, and Wyoming (states that have not been identified with guardianship reform) to assess whether or not they meet constitutional muster.

islation.[410] Through a series of town meetings and code revisions, Wood played an integral role with several groups and committees that shepherded needed changes in the Virginia guardianship system.[411] Even with the intensive and complex reform efforts, the mishmash of confusing and duplicative provisions relating to guardianship and conservatorship was not revised until 1997. Introduction of comprehensive legislation occurred in 1996, culminating in successful enactment during the 1997 session of the Virginia legislature.[412]

Wood highlighted the basic components of the new Virginia guardianship law that was effective at the beginning of 1998:[413]

> **Unified Procedure and Definition of Incompetency.** [Replacing three] often confusing sections of the [Virginia] Code [VA. CODE ANN. §§ 37.1-128.02, 37.1-128.1 and 37.1-132 (Michie 1997) (Repealed as of January 1, 1998)] with a single section and a single procedure . . . [the Act triggers the] [a]ppointment of a surrogate [when there is asserted] a "lack of capacity to meet the essential requirements for health, care, safety or therapeutic needs" or to "manage property or financial affairs." The person for whom a surrogate is appointed is titled a "respondent" prior to the hearing and an "incapacitated person" after appointment. . . . The [Act] also eliminates the separate procedure for the sale of real property of an individual under guardianship.
>
> **Guardian/Conservator.** In current Virginia law, the term "guardian" covers both personal and property management. The [Act defines] a person with responsibility for another person's property as "conservator," and a person with responsibility for another person's personal affairs as "guardian." This differentiation clarifies roles, and follows the Uniform Probate Code, as well as terminology in many other states. [VA. CODE ANN. § 37.1-134.22.]
>
> **Petition.** [The new law] significantly expands the information provided in a petition for guardianship or conservatorship. It requires information concerning the location of the respondent, the functional condition of the person, the name and address of any agent named under a durable power of attorney or advance directive, the type of guardianship or conservatorship requested including any limitations, the name of the proposed guardian or conservator and relationship to the person, and other similar information to assist the court. [VA. CODE ANN. § 37.1-134.8(B)(1)-(10).]

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410. *See* WOOD, *supra* note 388, at 1997 (when specific parts of the new Act are mentioned, reference is made to the recodified Virginia Code sections and subsections not available to Wood at the time she published her writing).

411. *See id.*

412. *See id.* (referencing Virginia Session Laws, S.B. 408).

413. *Id.*

> **Respondent Evaluation Report.** The [new law] strengthens evaluation of the condition of the respondent. Prepared by a physician, psychologist, community services board, community mental health clinic, or state facility or hospital in which the person is located, an evaluation report describes the respondent's functional impairments, evaluates his/her mental and physical condition, and includes a prognosis. It also provides information about any medications taken by the respondent and the effect these may have on his/her actions, demeanor, and participation at the hearing. [VA. CODE ANN. § 37.1-134.11(A)-(D).]
>
> **Guardian *Ad Litem* Duties.** . . . [The new law] requires a guardian *ad litem* to personally visit the respondent, advise him/her of hearing rights (as in current law), recommend whether independent counsel should be appointed, investigate the petition and evidence, file a report addressing relevant areas of concern, and personally appear at all court proceedings. Major areas of concern the guardian *ad litem* must address include whether a guardian or conservator is needed, the extent of duties and powers to be authorized, the suitability of the proposed guardian or conservator, and proper residential placement of the respondent. The bill requires guardians *ad litem* to receive special educational materials concerning their duties. [VA. CODE ANN. § 37.1-134.9(B)-(C).]
>
> **Personal Status Reports.** . . . Perhaps the most controversial part of the [new law is] a requirement for guardians to file an annual report with Social Services. The report briefly outlines the person's mental, physical, and social condition, living arrangements during the reporting period, the services provided, a summary of the guardian's visits, a statement as to whether the guardian agrees with a current treatment plan, and a recommendation as to the continued need for guardianship. The [new law] requires the guardian to "maintain sufficient contact with the incapacitated person to know of his capabilities, limitations, needs and opportunities," and to visit "as often as necessary."[414]

The Virginia law also has a novel notice provision:

Notice.[415] Notice to the respondent must be at a minimum of fourteen-point type, stating briefly the purpose of the proceedings; must inform the respondent of the right to be represented by counsel pursuant to the law; and must include the following statement in conspicuous, bold print:

> WARNING
>
> AT THE HEARING YOU MAY LOSE MANY OF YOUR RIGHTS. A GUARDIAN MAY BE APPOINTED TO MAKE PERSONAL DECISIONS FOR YOU. A CONSERVATOR MAY BE APPOINTED TO MAKE DECISIONS CONCERNING YOUR PROP-

414. *See* VA. CODE ANN. § 37.1-137.2 (Michie 1999).

415. Notice was not summarized by Wood; it is included here because of the novel language and requirement for a warning to the alleged incompetent person.

> ERTY AND FINANCES. THE APPOINTMENT MAY AFFECT CONTROL OF HOW YOU SPEND YOUR MONEY, HOW YOUR PROPERTY IS MANAGED AND CONTROLLED, WHO MAKES YOUR MEDICAL DECISIONS, WHERE YOU LIVE, WHETHER YOU ARE ALLOWED TO VOTE, AND OTHER IMPORTANT RIGHTS[416]

The summaries above are representative of the thesis of this article, and simply make the point that significant positive movement, change, and reform in guardianship has been made in state legislatures across the country over the last two decades.

b. Refining Guardianship Reform Wood points out that as the revised state guardianship laws have matured over the last ten years, many states have recognized the need for refinement and have gone back and amended aspects of their revised processes, including selection, qualification, powers, and duties of guardians.[417] For example, in 1996, nine states "fine-tuned" their previously revised guardianship statutes by revisiting guardian qualifications, duties, and authority, and five states focused on guardianship of last resort.[418] In 1997, three states addressed the regulation of private guardianship providers, and two states addressed determination of incapacity.[419] Even the Uniform Laws Commission "fine-tuned" the UGPPA with major revisions approved by the ABA House of Delegates.[420]

i. Washington State Advances Procedural Safeguards and Guardian Ad Litem Practice Beyond Initial Guardianship Reform In his note, Andrews is highly critical of the difficulties that surfaced in the state of Washington regarding guardianship in the spring of 1995.[421] However, nothing was mentioned by Andrews of the recodification of Washington's guardianship law in 1990.[422] Nor did Andrews mention the fact that, in less than one year, there was an immediate Washington state legislative response to the problems that surfaced in 1995, culminating in statutory revisions that targeted procedural safeguards, the least restrictive alternative, and the function and practice of guardians ad

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416. VA. CODE ANN. § 37.1-134.10(D).
417. *See* WOOD, *supra* note 388, at 1996.
418. *See id.*
419. *See id.*
420. *See infra* notes 435-39 and accompanying text.
421. *See* Andrews, *supra* note 1, at 76 n.2 (citing 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).
422. *See* WASH. REV. CODE ANN. §§ 11.88.005-.92.190 (West 1998).

litem.[423] By March of 1996, the Washington law was revised, and its passage was chronicled in Wood's annual report on state adult guardianship legislation.[424]

Wood explained that in 1990, when Washington implemented its statewide system, there was mandatory appointment of guardians ad litem, including court-approved training.[425] However, implementation strained under charges of impropriety and overreaching against guardians ad litem who became too involved, lacked independence, and handpicked attorneys for proposed wards.[426]

Wood summarized the three areas of reform:

> **Guardian *Ad Litem* Practice.** . . . [A] series of safeguards [are mandated in the revision] to ensure . . . qualified and objective [guardians *ad litem* are] advancing the best interests and maximizing the autonomy of alleged incapacitated persons. First, the measure requires the court to (1) select guardians *ad litem* "in a system of consistent rotation, except in extraordinary circumstances." [WASH. REV. CODE ANN. § 11.88.090(3)).] The court must include in the order of appointment from the registry an explanation of any deviation from selecting the next name on the rotation list. Eligibility for the registry requires a background statement including level of education, training and experience as a guardian *ad litem*, criminal history, evidence of specialized knowledge, and the number of times the applicant has been removed for failure to perform guardian *ad litem* duties. On appointment, a similar statement, noting any apparent conflict of interest, must be filed with the court and served on all parties. Any party then may request a hearing to remove the guardian *ad litem*.
>
> Second, . . . the Department of Social and Health Services must convene an advisory group [which includes the Washington State Bar Association] to develop a model training program, updated biennially.
>
> Third, a guardian *ad litem* needing additional time to finalize the report to the court must petition for a postponement of the hearing or, with the consent of all parties, a change in the filing deadline. If a guardian *ad litem* fails to file the report in a timely manner, the hearing must be continued. All parties may file responses to the report. The guardian *ad litem* must appear in person at all hearings on the petition unless all parties provide a written waiver. Finally, the court may remove the guardian *ad litem* or reduce the fee for failure to perform his/her duties. . . .
>
> **Procedural Protections.** In combination with [the safeguards controlling guardians *ad litem*, the 1996 revisions added] procedural

423. *See id.*
424. *See* WOOD, *supra* note 388, at 1996.
425. *See id.*
426. *See id.*

> due process protections for the respondent, [including] . . . the right to be represented by counsel "of their choosing," and the court must pay such counsel at public expense if the respondent is unable to pay. The [revisions also add] . . . the right to testify and present evidence at the hearing; . . . the right to choose the physician that prepares the medical report; . . . [and the selection of a health care professional if the respondent opposes the health care professional selected by the guardian *ad litem*.]
>
> **Guardianship Alternatives.** . . . [The 1996 revisions included a third part respecting] "any alternative arrangements" respondent may have chosen, thus bolstering the respondent's autonomy. The petition must include a description of any such arrangements—including trusts, powers of attorney and any guardian nominations in a power of attorney. . . . [T]he guardian *ad litem* must investigate [the arrangements, and] if the guardian *ad litem* recommends against alternatives [the] report must give "specific findings as to why such arrangements are contrary to the best interest of the alleged incapacitated person." [WASH. REV. CODE ANN. § 11.88.090(4)(f)(iv)).] . . . . [Most important], any alternative arrangement made before the filing of the petition remains effective unless there is a finding of abuse, neglect, abandonment or exploitation; or unless the court finds otherwise following notice to all parties and a hearing.[427]

In several parts of his manuscript,[428] and in five different footnotes,[429] Andrews uses one 1995 news article decrying the Washington state guardianship difficulties to generalize that "many states allow inadequate laws to remain on the books."[430] That was not true in 1995, or in 1997 when Andrews's note was published. Legislative initiatives year after year over the last decade stand in stark contrast.

ii. Fine Tuning Advances in Guardianship Reform There were at least eleven states known to be involved in guardianship reform prior to 1987,[431] seventeen states became involved in guardianship reform by enacting Article V of the UPC or the UGPPA, with another six doing the same in the last several years.[432] Thus, at least thirty-four states have taken action to reform their statutes in order to provide constitutional procedural protections with substantive, direct statutory revisions.[433]

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427. *Id.*
428. *See* Andrews, *supra* note 1, at 76-77, 79, 85.
429. *See id.* at 76 nn.2 & 3, 77 n.6, 79 n.16, 85 n.60.
430. *Id.* at 86 (no citations to any states that have inadequate laws).
431. *See infra* note 478, Exhibit "B."
432. *See id.*
433. *See id.*

iii. The 1997 Revision of the UGPPA[434] In 1993 and 1994, the ABA Senior Lawyers Division Task Force on Guardianship Reform moved recommendations through channels for the National Conference of Commissioners on Uniform State Laws to consider and examine.[435] For several years, the drafting committee worked diligently to finalize recommendations to the ABA House of Delegates for the Revised UGPPA.[436] After numerous amendments, the Revised UGPPA was approved utilizing more consistent language and a more practical format, infusing into the text provisions that addressed current problems in guardianship.[437] An immediate change that was developed through the recommendations of the Senior Lawyers Division Task Force,[438] and presented in previous drafts by the drafting committee in 1995, was that the sections dealing with guardians of incapacitated persons were removed from Article II (where it was Part II) and reorganized as a stand-alone Article III for Guardians of Incapacitated Person.[439]

Substantively, the Revised UGPPA provides greater specificity in the role of the visitor. Namely, the visitor should: (1) determine the respondent's views about the proposed guardian; (2) recommend the proposed guardian's powers and duties; (3) describe the proposed guardianship and its likely scope and duration; and (4) advise the respondent of the respondent's rights, including the right to retain and consult with an attorney at the respondent's own expense and the right to request a court-appointed attorney.[440] The Revised UGPPA gives the court discretion to order a professional evaluation of the re-

434. This article will only provide summary comment of Article 1—General Provisions and Article 3—Guardianship of Incapacitated Person of the 1997 UGPPA. For a more thorough analysis, see David M. English & Rebecca C. Morgan, *The Uniform Guardianship and Protective Proceedings Act of 1997*, NAELA Q., Spring/Summer 1998, at 3.

435. *See* A.F. Johns, *Guardianship Folly*, *supra* note 21, at 61.

436. *See supra* note 434.

437. Again, it is noted that this article will only provide summary comment of Article 1—General Provisions and Article 3.

438. *See infra* note 439 and accompanying text.

439. All future references to 1982 UGPPA § 2-201 to -218 are renumbered as §§ 301-318 of Article 3, 1997 UGPPA. Hopefully, this change highlights the increased importance that guardianship of the person has taken, so that at least in format it has parity with conservatorship and protection of property.

440. *See* 1977 UNIFORM GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT § 305(c) (West Supp. 1998) [hereinafter 1997 UGPPA]. The comment to the section makes clear the role of the visitor as the information gathering arm of the court.

spondent.[441] However, it is mandatory if requested by the respondent.[442]

For the first time, the Revised UGPPA limits access to any professional evaluation. In a new section,[443] all professional evaluations must be sealed upon filing with the court and not made a part of the public record of the proceeding. They are available to the court, the respondent, the petitioner, the visitor, their attorneys, and any other person the court decides should have access based upon a showing of need.[444] It is clear that the evaluations are not to be considered as evidence and not exposed to a jury if impaneled.[445]

The Revised UGPPA section on notice[446] clearly sets a threshold for jurisdiction by declaring that failure to serve the respondent with the petition and notice of hearing is jurisdictional.[447] If the respondent is served, then jurisdiction attaches.[448] The Revised UGPPA also directs the petitioner to give notice of the hearing to all other persons named in the petition, but failure to do so is not jurisdictional.[449] When persons named in the petition, other than respondent, are not served with the petition and notice of hearing, jurisdiction will still attach.[450]

The section on priorities for appointing a guardian has been shuffled around in the Revised UGPPA.[451] In addition to the appointment of a current guardian acting for the respondent in the current jurisdiction or elsewhere, the Revised UGPPA sets as a second priority anyone named by the respondent in a durable power of attorney, with the qualification that respondent had to have had sufficient capacity at the time to express a preference, or an agent appointed by the respondent under a power of attorney for health care.[452] Further down the priority list come the spouse of the respondent or person nominated

441. *See* § 306.
442. *See* § 306 (Advisory Comm. Note).
443. *See* § 306.
444. *See id.*
445. This author agrees that professional evaluations should be specifically sealed from view by the court if there is no jury. The judge may be just as prejudiced by evaluations at a time when rebuttal would not be available to the opposing party.
446. *See* 1997 UGPPA § 309.
447. *See id.*
448. *See id.*
449. *See id.*
450. *See id.*
451. *See* § 310.
452. *See id.*

by will, an adult child of the respondent, or a parent of the respondent.[453] Added to the priorities is anyone with whom the respondent was residing for more than six months before the filing of the petition.[454]

The section on findings and order of appointment,[455] aligns itself with express declarations of the principle of limited guardianship. The Revised UGPPA provides that the court, whenever feasible, shall confer upon a guardian only those powers necessitated by the ward's limitations and demonstrated needs, and shall make appointive and other orders that will encourage the development of the ward's maximum self-reliance and independence.[456] Coupled with the new definition of incapacitated person, this section expressly directs the court to consider functional abilities and limitations of the person for whom the guardianship is ordered.[457]

The duties of the guardian section[458] mandates that the guardian exercise power only as necessitated by the ward's limitations, encourages participation in decisions by the ward to the extent possible, and encourages the ward to act on the ward's own behalf and develop or regain capacity to manage personal affairs.[459] The guardian must consider the express desires and personal values of the ward to the extent known and otherwise act in the ward's best interest, exercising reasonable care, diligence, and prudence.[460]

The powers section adds to the usual powers relating to the control of the ward's financial estate and to obtaining, when consistent with court orders, custody of the person of the ward.[461] The guardian is granted the power to consent to medical or other care, to treatment or service for the ward, and to marriage of the ward.[462] If reasonable, the guardian may also delegate to the ward certain responsibilities for decisions affecting the ward's well-being.[463] One limitation on the guardian's powers is that, if the ward made a power of attorney for health care, it may not be revoked by the guardian without court or-

453. *See id.*
454. *See id.*
455. *See* § 311.
456. *See id.*
457. *See id.*
458. *See* § 314.
459. *See* § 314(a).
460. *See id.*
461. *See* § 315.
462. *See* § 315(a)(4)-(5).
463. *See* § 315(a)(b).

der.[464] Additionally, the agent's decision takes priority over that of the guardian unless the power of attorney has been revoked by court order.[465]

The Revised UGPPA provides the creation of a new section on guardianship monitoring.[466] Obviously aware of the interest by advocacy groups, the drafting committee specifically required a report by the guardian within sixty days of appointment.[467] In addition, the committee provided, in detail, what must appear in the report, including a plan for future care and recommendations as to future needed guardianship or changes in guardianship.[468] The Revised UGPPA also provides that the court be given the discretion to appoint a visitor to review the report, to interview the ward or the guardian, and to make other investigative inquiries as the court directs.[469] The Revised UGPPA further provides that there be mandated through the courts a system of monitoring guardianships, including the filing and review of annual reports.[470]

V. A Brief Statutory Review of Guardianship Among the States and District of Columbia: The Lantern on the Stern Shines Through the States on Guardianship Reform

Andrews's premise that nothing has been done to address constitutional infirmities allegedly existing across America has no support. America has a "lantern on the stern"[471] to measure how far it has come in guardianship reform. It is in the form of empirical research chronicling state statutory changes over the last four decades. For the purpose of this article, the empirical research gathered in *The Mentally Disabled and the Law*[472] study published in 1962 is the beginning.[473]

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464. *See* § 316(c).
465. *See* § 316 cmt.
466. *See* § 317.
467. *See* § 317(a).
468. *See id.*
469. *See* § 317(b).
470. *See* § 317(c). This is a significant directive, and may be difficult for states considering the adoption of the 1997 UGPPA in the future because of the significant commitment of budgetary dollars and manpower that such modifications would require.
471. *See supra* note 31 and accompanying text.
472. LINDMAN & MCINTYRE, *supra* note 146, at 230-34 tbl.VIII-A.
473. Several of the broad-based studies of the 60s had began in the 40s when the American Bar Association created committees and sections having specific in-

The empirical research examines the fifty states and the District of Columbia in several categories representing the full panoply of guardianship processes: (1) Initiation of Guardianship Proceedings; (2) Notice in Guardianship Proceedings; (3) Conduct and Results of Guardianship Proceedings; and (4) Guardianship Monitoring.[474] The research was first formatted in exhibits and updated in the revised 1971 edition of the study.[475] It was then again revised in the American Bar Foundation's third edition of the report in 1985.[476] In 1991, Sally Hurme updated and revised the exhibits as a part of the research she directed in accountability and monitoring of guardianships and conservatorships, reflecting the movement that had come from reform.[477]

Most recently, Hurme again updated the charts through March 1998, to reflect all statutory changes in guardianship and conservatorship across the country. The charts of 1993 and 1998 are shown in exhibits to this article to provide readers with specific documentation of the changes made in that period of time. The changes are significant when examined over these five years, even more significant over the span of several decades.[478]

The analysis that follows parallels several of the areas targeted by Andrews and Wood, with specific review of those issues pertinent

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terests in incompetency and guardianship. There was presented to the ABA Board of Governors a recommendation that a special committee examine the adequacy of the laws that at the time safeguarded people with mental disabilities. The special committee was to submit drafts of appropriate legislation if it were found that the safeguards were not working. *See* BRACKEL & ROCK, *supra* note 41, at xvi n.10 (citing address by Judge McAvinchey, The Not Quite Incompetent Incompetent, presented to the ABA Section on Real Property, Probate and Trust Law (Aug. 28, 1956), *in* ABA Section of Real Property, Probate and Trust Law Proceedings, Part I, at 18; ABA Section on Real Property Probate and Trust Law: *Index to Publications of the Section, 1934-1955* (1956)).

474. *See id.* at 218-29.

475. SAMUEL BRAKEL ET AL., THE MENTALLY DISABLED AND THE LAW (American Bar Found. rev. 3d ed. 1985).

476. BRAKEL & ROCK, *supra* note 41.

477. *See* SALLY B. HURME, STEPS TO ENHANCE GUARDIANSHIP MONITORING (1991) (Appendix Guardianship Charts, Exhibits C-H). These charts were updated by Ms. Hurme and published in this author's manuscript for the 1993 Symposium of the National Academy of Elder Law Attorneys. *See* A.F. Johns, *Advanced Guardianship Issues*, FIFTH ANNUAL NAELA SYMPOSIUM, § 17 (1993). They have been updated by Ms. Hurme through March 1998, and reprinted with permission.

478. *See* Exhibit "A" States Involved in Guardianship Reform 1977-97; Exhibit "B" States Not Recognized for Guardianship Reform 1977-97 (It is noted that by this author's identification of some states, it should not be inferred that those states have not revised their state statutes on guardianship, only that they have not been recognized in doing so. Given the benefit of the doubt, many of these states join the ones that are recognized to clearly show that significant, overwhelming procedural and substantive movement has been made to reform guardianship.).

to Andrews's concern for "constitutional muster": (1) initiating the process—parties applying, form of petition, impairment defined, type of notice required and in what time period; (2) conduct of hearing or determination of incapacity—is representation required, is presence required, is standard of proof defined, and is there a specific right to a jury trial; (3) nature of court order—is the order tailored; limited guardianship.[479]

A. Initiating the Process—Parties Petitioning, Impairment Defined, Type of Notice Required and in What Time Period

1. PARTIES PETITIONING

Andrews makes no mention of the first step in the process, namely identifying the parties that are able to file petitions to adjudicate the incompetence. As guardianship charts Exhibit "D" (1998) and Exhibit "G" (1993) reflect, all state guardianship and conservatorship statutes declare a broad array of those who may petition for a determination of incapacity and the appointment of a guardian: the proposed ward, the proposed ward's spouse, a relative of the proposed ward, an interested state or local agency, an interested public officer or government employee, or any other interested person or friend of the proposed ward.[480] Some states have made clear the difference between family members, companions, and friends.[481]

2. IMPAIRMENT DEFINED

Andrews contends that definitions of incapacity, and their application in cases, are where there will be policy and constitutional problems resulting in an unfair impact.[482] He then explains that he borrowed liberally from the Anderer manuscript to describe Anderer's oft-cited three factors for evaluating guardianship definitions.[483] Andrews, however, does not show the current trend in the states that addresses this issue, nor does he provide analysis as to whether the states' current definitions evidence a constitutional crisis.

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479. Although of great import in this author's opinion, guardian appointment, monitoring, and accountability are not reviewed in this article. *See* A.F. Johns, *Guardianship Folly*, *supra* note 21.

480. *See, e.g.*, CAL. PROB. CODE § 1820 (West 1998); N.Y. MENTAL HYG. LAW § 81.08 (McKinney 1996).

481. *See, e.g.*, CAL. PROB. CODE § 1820(a)(1), (5); MASS. GEN. LAWS ANN. ch. 201, § 6 (Law. Co-op. 1994 & Supp. 1998); MISS. CODE ANN. §§ 93-13-125, 131, 111 (1994); N.Y. MENTAL HYG. LAW § 81.06; TENN. CODE ANN. § 34-11-107 (1996).

482. *See* Andrews, *supra* note 1, at 100.

483. *See id.* at 100 n.117.

What he would have found is that the states are attempting to rid their statutes of arcane language and stereotypical definitions. As guardianship charts Exhibit "C" (1998) and Exhibit "F" (1993) reflect, all state guardianship and conservatorship statutes declare most every kind of impairment as sufficient to initiate the petition to adjudicate incapacity. In some states, there are specific statutory requirements regarding the contents of the petition for guardianship or conservatorship requiring, among other things, careful documentation of the impairment, and sometimes of the dysfunction caused by the impairment.[484]

3. NOTICE AND SERVICE OF PROCESS

Andrews makes no mention of notice, service of process, and timing requirements for initiating action. Most states that have revised their guardianship and conservatorship statutes have incorporated requirements of notice and service of process. In some way, alleged incapacitated persons must be given notice that a petition for guardianship or conservatorship has been filed against them, that they must respond within a certain time frame, and that they have certain rights that will be afforded them in the process.[485]

Often the statutes mandate notice requirements, but judges do not adhere to them. Similar to *Milstein*,[486] the Pennsylvania Superior Court in *Katic*,[487] made it clear that notice before hearing was mandated by the statute and could not be dispensed with by the lower court. The lower court had entered an order appointing a guardian, ex parte, without notice or hearing.[488] The appellate court declared that the lower court had no jurisdiction to hear the case.[489] The appellate court, in dicta, did explain that the lower court could determine the manner by which notice of the petition and hearing for appointment of guardian might be prepared and served on the required parties. However, to declare a guardianship by order with no notice

484. *See, e.g.*, CAL. PROB. CODE § 1821; FLA. STAT. ANN. § 744.334 (West 1997); N.Y. MENTAL HYG. LAW § 81.08; TEX. PROB. CODE ANN. § 614 (West Supp. 1999).

485. For the most recent example of notice, see *supra* notes 446-50 and accompanying text; *see also In re* Guardianship of Katic, 439 A.2d 1235 (Pa. Super. Ct. 1982).

486. Estate of Milstein v. Ayers, 955 P.2d 78 (Colo. Ct. App. 1998).

487. *In re* Guardianship of Katic, 439 A.2d 1235 (Pa. Super. Ct. 1982).

488. *See id.*

489. *See id.*

whatsoever was both a violation of constitutional due process and the statutory requirements of the Pennsylvania law.[490]

4. TIME REQUIREMENTS FOR NOTICE

As guardianship charts Exhibit "D" (1998) and Exhibit "G" (1993) reflect, most state guardianship and conservatorship statutes have specified the time in which notice of the guardianship hearing must be served on the AIP before the hearing is conducted. At the time Hurme first gathered information on notice among the states, there were still twenty state statutes that expressed nothing about the time frame for notice.[491] By 1998, there were only nine.[492] Statutes often identify an attorney, a guardian ad litem, or both, and require that person to represent the respondent's interests through the process. There are states that allow for notice to be waived.[493] Many states allow waiver of service of process and notice only if the AIP appears at the hearing, or the notice is confirmed by the AIP's attorney, guardian ad litem, or visitor.[494]

Service of process comes in many forms and is often less formal than in other judicial actions. However, most states still require the sheriff, or some officer of the court, to formally serve the petition and other documents on the respondent in order to establish the jurisdiction of the court to conduct a hearing and to determine the issues raised.[495]

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490. *Compare* Burma v. Stransky, 357 N.W.2d 82 (Minn. 1984) (error of attorney acting for proposed ward in failing to notify proposed ward's nearest kindred of guardianship proceedings did not deprive probate court of jurisdiction in that proceeding, because the central notice of such a proceeding is to the proposed ward), *with In re* Estate of Williams, 349 N.W.2d 247 (Mich. App. Ct. 1984) (Alleged incompetent person's daughter, who testified that her mother had been divorced from alleged incompetent before he was institutionalized and that she had taken her stepfather's name in order to be part of the family that had not been adopted, received notice of appointment of county public guardian but received no notice of hearing preceding the appointment. The failure to give the daughter notice was jurisdictional and could not be considered harmless error because it required the daughter to challenge the appointment after the fact and placed an undue burden of proof on the daughter.).

491. *See* Guardianship Chart Exhibit "D."

492. *See* Guardianship Chart Exhibit "G," listing Florida, Hawaii, Idaho, Iowa, Louisiana, Maryland, Michigan, Nebraska, and North Dakota.

493. *See* Guardianship Chart Exhibit "D," listing among several, ARK. CODE ANN. § 28-65-207(a)(2) (Michie Supp. 1997); D.C. CODE ANN. §§ 21-2032, 2043(d) (1981); IND. CODE ANN. § 29-3-6-1(4) (West 1994); R.I. GEN. LAWS § 33-17.1(f) (1995).

494. *See* Guardianship Chart Exhibit "D."

495. *See id.*

Some states have special requirements for notice to the respondent in guardianship proceedings.[496] For example, Pennsylvania,[497] New York,[498] West Virginia,[499] and Rhode Island[500] statutorily mandate notice in simple, clear language, in large type, and with an explanation of rights and consequences of the appointment of the guardian.[501] Another example is California requiring that if the petition is not filed by the proposed conservatee, a citation will be issued to the proposed conservatee stating the time and place of the hearing.[502] The citation must include a statement of the legal standards to be used in adjudicating the proposed conservatee's case, as well as a statement of the impact of a conservatorship on the proposed conservatee.[503] The citation must inform the proposed conservatee that he or she has a right to appear at the hearing, the right to oppose the petition, the right to counsel, and the right to a jury trial.[504]

B. Conduct of Hearing or Determination of Incapacity—Representation of AIP, Presence of AIP, Standard of Proof, and Jury Trial

1. REPRESENTATION OF AIP

Andrews contends that AIPs continue to "encounter massive deprivation of their rights and liberties without assistance of counsel."[505] Had Andrews reviewed the guardianship statutes across the country, he would have found how much that right has been expanded. The 1993 guardianship chart, Exhibit "G," Conduct and Results of Guardianship Proceedings, identified forty states with a statutory right to counsel.[506] By 1998, all fifty states recognized a right to counsel.[507] Usually, the court will appoint counsel to represent the

496. This is even true with the Illinois statute that was used as the standard by Andrews in his note. *See* Andrews, *supra* note 1, at 88 n.71; *see also* Spady v. Hawkins, 963 P.2d 125 (Or. Ct. App. 1998).

497. *See* 20 PA. CONS. STAT. ANN. § 5511(a) (West Supp. 1998).

498. *See* N.Y. MENTAL HYG. LAW § 81.07(b) (Consol. Supp. 1994).

499. *See* W. VA. CODE § 44A-2-6(d) (Supp. 1994).

500. *See* R.I. GEN. LAWS §§ 33-15-17.1(b), -47 (Supp. 1998).

501. *See* HURME, *supra* note 477, at 147.

502. *See* CAL. PROB. CODE § 1823(a) (West 1998).

503. *See* § 1823(b).

504. *See* § 1823(b)(5)-(7).

505. Andrews, *supra* note 1, at 92.

506. This includes appointment of guardian ad litem who must also be an attorney. *See* Guardianship Chart Exhibit "G."

507. *See* Guardianship Chart Exhibit "H;" *see, e.g.*, Wendland v. Superior Court of San Joaquin County, 56 Cal. Rptr. 2d 595 (Cal. Ct. App. 1996) (right to appointed counsel under CAL. WEL. & INST. CODE § 1471(b)).

AIP. If the AIP chooses other counsel, then the cost is borne by the AIP. In many states, if the AIP is adjudicated incompetent and has an estate, then the cost of appointed counsel is taxed against the ward's estate.[508]

Andrews's view of the role of the AIP's lawyer is too simplistic. He contends:

> The role of the lawyer in a guardianship proceeding is to represent the spoken wishes of the client, 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.[509]

Andrews goes further to express his opinion, with no citations to authority to support him:

> 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.[510]

Many states do not follow Andrews's notion that the standard should be different, and appointed counsel often have no choice but to advocate a "best interests" position on behalf of AIPs. In guardianship litigation, the role of the AIP's appointed counsel is often difficult. This was highlighted in the spring of 1994, when professors Joan O'Sullivan and Diane Hoffmann conducted a survey of guardianship in the state of Maryland.[511] Although the survey produced only mixed results,[512] the authors found that the guardianship process in Maryland seemed to break away from the written statute as the hearing approached, notably in the area relating to the attorney for the alleged disabled person.[513] O'Sullivan and Hoffmann concluded that the survey seemed to reflect that there was confusion over the attorney's role, the attorney's waiver of rights of the alleged disabled per-

508. *See, e.g.*, N.C. GEN. STAT. § 35A-1107 (1995).

509. Andrews, *supra* note 1, at 92.

510. *Id.* at 93.

511. *See* O'Sullivan & Hoffmann, *supra* note 335, at 19. At the time the article was written, O'Sullivan was visiting clinical professor of law and Hoffmann associate professor of law at the University of Maryland School of Law.

512. *See id.* at 36.

513. *See id.*

son, the absence or lack of testimony, and the failure to conform court orders to the facts proven by the petitioner.[514]

The authors believed that the findings reflected those of a national study of guardianship,[515] because, even though the statutes are on the books, "judges may often not agree with the need for due process reforms or may agree with them in theory, but fail to institute them due to practical considerations."[516] This again is the tension between competing doctrines. While the judges believe they know what is best and apply the doctrine of parens patriae in contradiction to statutory procedural process, the advocates of adversarial process, under express statutory procedural mandate, press for defending rights even in the absurdity.[517]

To further confound the role of counsel for the AIP, counsel appointed to represent the AIP may find that their role also includes that of guardian ad litem, requiring counsel to advocate the best interest of the AIP, rather than (or in addition to) defending the AIP's position. It is an overstatement to assert that taking the role of guardian ad litem is a "mistaken belief" or "self-perception" of defense counsel in guardianship proceedings, especially when there are many attorneys appointed with dual responsibilities imposed by statute.[518] Such convoluted, dual statutory directives often confuse and frustrate appointed counsel in exercising the appointment.[519] This may be one reason why many guardianship cases are not being fully contested or defended. When the roles of advocate and defender are mixed, AIPs do not distinguish the difference. Often, neither do attorneys.

Whether there is an appointed guardian ad litem (in lieu of appointed counsel), or counsel with guardian ad litem duties, it should be counsel's responsibility to explain to the AIP the difference be-

514. *See id.* at 37.

515. *See id.* at 43, 48; *see also* A.F. Johns, *Guardianship Folly*, *supra* note 21, at 62-65. *See generally* LAUREN BARRITT LISI ET AL., NATIONAL STUDY OF GUARDIANSHIP SYSTEMS: FINDINGS AND RECOMMENDATIONS (1994).

516. O'Sullivan & Hoffmann, *supra* note 335, at 48.

517. *See generally* Frolik, *supra* note 18.

518. *See* REGAN, *supra* note 38, ¶¶ 16-22.1 to -26 (In deference to Professor Regan, the operative word here is "appointed." In his text, Regan admonishes "defense counsel" generally. However, that includes appointed counsel.).

519. *Compare* previous UPC § 5-303 (permitting appointed attorneys for respondent to be granted powers and duties of a Guardian Ad Litem), *with* 1997 UGPPA § 3-304(b). *Compare* N.H. REV. STAT. ANN. § 464-A:6 (1992 & Supp. 1998) (right to counsel), *with* § 464-A:41 (appointment of Guardians Ad Litem) (New Hampshire clearly separates the roles of Guardian Ad Litem and appointed counsel for the respondent).

tween roles.[520] Even more, appointed counsel may have either a statutory or ethical duty to explain to the AIP that a position may be taken that actually joins in the process of imposing guardianship on the AIP and that the AIP has a right to acquire other counsel to oppose the process.[521]

While some courts have determined that AIPs do not have a right to appointed counsel (unless statutorily granted),[522] many courts have declared that the AIP has the right to acquire private counsel.[523] Although AIPs have the right to retain private counsel, they must also have the capacity to make the choice of private counsel.[524]

2. PRESENCE OF AIP AND APPEARANCE OF WITNESSES

Andrews jumps past the issue of the AIP appearing at the hearing to address compelling the appearance of witnesses. Even then, he makes short shrift of the right to compel witnesses.[525] This analysis first addresses the appearance of the AIP at the hearing and then the AIP as a witness. In the 1993 guardianship chart, Exhibit "G," Conduct and Results of Guardianship Proceedings, there are three categories under the column entitled "Appearance of Respondent": (1) mandatory attendance of respondent, (2) except when harmful, and (3) right to attend. At the time, eight states made no statutory reference to any category.[526] Even without an express statutory right, many of those states had the AIP appear as a matter of practice or

520. *See In re* Guardianship of K.M., 816 P.2d 71 (Wash. Ct. App. 1991) (examining the differing roles between guardian ad litem and counsel).

521. *See* Sharp v. Sharp, No. 96-CA-26, 1997 WL 52933 (Ohio Ct. App. Jan. 31, 1997) (unpublished opinion; Rule 2 of the Ohio Supreme Court applies); *see also In re* Lichtenstein, 652 N.Y.S.2d 682 (N.Y. Sup. Ct. 1996).

522. *See* Rud v. Dahl, 578 F.2d 674 (7th Cir. 1978); Mazza v. Pechacek, 233 F.2d 666 (D.C. Cir. 1956).

523. *See In re* Schiller, 372 A.2d 360 (N.J. Super. Ct. 1977); *In re* Guardianship of Deere, 708 P.2d 1123 (Okla. Ct. App. 1985); *In re* Rockwell, 673 S.W.2d 512 (Tenn. Ct. App. 1983); *see also* 1998 North Carolina State Bar Proposed Ethics Opinion 16 (rendered in a hotly contested guardianship adjudication of incompetence where the judge of guardianship denied appearance and representation by the respondent's chosen attorney, forcing the representation of the respondent by the guardian ad litem who had already declared a position against the respondent's position. The case is currently on appeal to North Carolina's Court of Appeals.).

524. *See In re* Conservatorship Estate of Moehlenpah, 763 S.W.2d 249 (Mo. Ct. App. 1988).

525. *See* Andrews, *supra* note 1, at 98.

526. These are Delaware, Louisiana, Massachusetts, Michigan, North Carolina, North Dakota, Oklahoma, and Rhode Island.

rule.[527] It is significant, however, that twenty-one states had already provided for the right of the AIP to attend the hearing statutorily.[528]

Having given no comment on the right of AIP to appear at the hearing, Andrews does not address the pitfalls and difficulties if the AIP is present or appears. If the AIP appears, must the AIP testify? May the opposing counsel call the AIP to the stand? May the judge examine the AIP independently?[529] And what if the AIP chooses not to appear, or fails to appear when directed by the court or under order, or appears and refuses to answer?[530]

3. STANDARD OF PROOF

Andrews confronts the problem of proof in guardianship adjudications as if the states have not considered it. He dispenses with statutory analysis across the country by concluding that "[t]he elderly . . . are not always presumed competent, and the burden of proof is universally less strict."[531] Andrews races through a comment about the growing trend by states to raise the standard to reach his conclusion that there are not enough guardianship cases raising a constitutional equal protection issue about the standard of proof.[532] Andrews contends this is hardly surprising because there are a meager number of alleged incompetents "graced with counsel willing to follow the client's spoken wishes."[533] As shown in this analysis, the higher stan-

527. For example, even with nothing statutorily prescribing the appearance of the respondent, it is this author's experience that North Carolina judges of guardianship (clerks of superior court) informally control the practice of guardianship adjudications in each county. Invariably, the judges of many counties insist that either the petitioner, if a family member, or the guardian ad litem have the respondent at the hearing or be prepared to submit an attending doctor's affidavit confirming the mental or physical inability of the respondent to appear or be present at the hearing.

528. *See* Guardianship Chart Exhibit "H."

529. *See* FED. R. EVID. 608, 612-13; *see also* FED. R. EVID. 614 (Calling and Interrogation of Witnesses by Court). If the court calls the respondent to testify or interrogates the respondent, respondent's counsel must be sure to exercise his right to object under Rule 614(c) contemporaneously with the event or "at the next available opportunity when the jury is not present." JAMES WILLIAM MOORE ET AL., MOORE'S MANUAL: FEDERAL PRACTICE AND PROCEDURE ch. 4—*Witnesses*, at 4-46, n.31 (Matthew Bender & Co., Inc., 1992) (citing Stillman v. Norfolk & W. R.R., 811 F.2d 834, 839 (4th Cir. 1987) (failure of counsel to object to judges questioning of witnesses precluded review on appeal; the court's questioning was not so biased or notorious as to warrant review for plain error on appeal)).

530. *See* Hornaday v. Hornaday, 48 So. 2d 207 (Ala. Ct. App. 1950).

531. Andrews, *supra* note 1, at 94.

532. *See id.* at 96-97.

533. *Id. But cf.* Hendrix v. McGill, No. 01A01-9709-PB-00536, 1998 WL 205268 (Tenn. Ct. App. Apr. 29, 1998) (unpublished opinion; see Tenn. Ct. App. R. 11 &

dard and burden has not only been considered, but made a statutory requirement. In 1993, there were at least eighteen states with the statutorily declared higher standard of proof of clear, cogent, and convincing, and twenty-nine states along with the District of Columbia left the burden to court determination.[534] At least three states had distinctively different burdens of proof. New Hampshire required a standard beyond a reasonable doubt; Louisiana declared the subjective standard of to "the satisfaction of the judge"; Virginia declared the standard of proof "with the county commission"; and Wyoming declared "if allegations are proved."[535] By 1988, more than a dozen states statutorily mandated the higher standard of proof of clear, cogent, and convincing evidence in adjudications of incompetence.[536]

a. Preponderance or Greater Weight The lowest burden of proof is preponderance or the greater weight of the evidence. This standard has been applied to common-law guardianship where statutes have not been specific.[537] This lower burden of proof for incompetency hearings is partially based on the historical premise that only monetary interests are usually involved in guardianship proceedings. It is also based on the fact that "greater weight" has been the preferred description of the degree of proof required in ordinary civil cases, and that the assumption is that it is "no more serious . . . for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor."[538]

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12); Trimble v. Texas Dep't of Protective & Regulatory Serv., 981 S.W.2d 211 (Tex. Ct. App. 1998).

534. *See* Guardianship Chart Exhibit "H."

535. *See, e.g.*, N.H. REV. STAT. ANN. § 464-A:8(IV) (1992); LA. CIV. CODE ANN. art. 393 (West 1993); W. VA. CODE § 44-10A-1 (1998); WYO. STAT. ANN. § 3-2-104 (Michie 1997).

536. *See* Guardianship Chart Exhibit "E," *supra* note 475.

537. *See In re* Tillery, 481 So. 2d 386 (Ala. Ct. App. 1985); Golleher v. Horton, 715 P.2d 1225 (Ariz. Ct. App. 1975) (burden seems to be preponderance); *In re* Conservatorship of Buchanan, 144 Cal. Rptr. 241 (Cal. Ct. App. 1978) (focus on whether conservatee is able to provide for own needs); *In re* Guardianship of Hughes, 715 A.2d 919 (Me. 1998); *In re* Guardianship of Roe, 421 N.E.2d 40 (Mass. Ct. App. 1981); *cf.* Estate of Davis v. Treharne, 177 Cal. Rptr. 369 (Cal. Ct. App. 1981).

538. *In re* Winship, 397 U.S. 358, 371 (1970) (Harlan, Jr., J., concurring). Justice Harlan explained the trade-off as follows:

> Professor Wigmore, in discussing the various attempts by courts to define how convinced one must be to be convinced beyond a reasonable doubt, wryly observed: "The trust is that no one has yet invented or discovered a mode of measurement for the intensity of human belief. Hence there can be yet no successful method of com-

In addition to the state court decisions above, several other state court determinations set the lower burden of proof at a time when there was no statutory guidance.[539] As late as 1993, many other states neither had statutory declaration, nor case law that set the burden of proof one way or the other.[540]

b. Clear, Cogent, and Convincing Andrews was right about the need for the standard to be raised statutorily in guardianship hearings. Research has shown that intervention through incompetency proceedings statistically causes a higher rate of institutionalization or restricted residential placement.[541] Many states, however, have agreed that the burden of clear, cogent, and convincing proof—the standard required in civil commitment hearings—should be the burden of proof for incompetency hearings.

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municating intelligibly . . . sound method of self-analysis for one's belief." 9 J. Wigmore, Evidence 325 (3d ed. 1940).

> Notwithstanding Professor Wigmore's skepticism, we have before us a case where the choice of the standard of proof has made a difference: the juvenile court judge below forthrightly acknowledged that he believed by a preponderance of the evidence, but was not convinced beyond a reasonable doubt, that appellant stole $112 from the complainant's pocketbook. Moreover, even though the labels used for alternative standards of proof are vague and not a very sure guide to decision making, the choice of the standard for a particular variety of adjudications does, I think, reflect a very fundamental assessment of the comparative social costs of erroneous factual determinations.

Id. at 369-70.

539. *See* Bynes v. Scheve, 435 A.2d 1058 (D.C. Ct. App. 1981); *In re* Estate of Bennett, 461 N.E.2d 667 (Ill. App. Ct. 1984) (court weighs conflicting testimony); Estate of Malloy, 422 N.E.2d 76 (Ill. Ct. App. 1981); Harvey v. Meador, 459 So. 2d 288 (Miss. Ct. App. 1984) (seems to assert preponderance); *In re* Guardianship of Deere, 708 P.2d 1123 (Okla. Ct. App. 1985); Stangier v. Stangier, 421 P.2d 693 (Or. Sup. Ct. 1966) (seems to assert preponderance); Northern v. State Dep't of Human Servs., 575 S.W.2d 946 (Tenn. Sup. Ct. 1978).

540. These are Hawaii, Idaho, Indiana, Iowa, Maine, Montana, Nevada, New Jersey, North Dakota, Rhode Island, South Carolina, South Dakota, Washington, West Virginia, and Wyoming.

541. [Most of the] people in the entire population studied who were declared incompetent . . . spen[t] at least a portion of their time in a psychiatric ward. The conclusion is obvious. Not only is a person found to be incompetent bound to be deprived of his right to manage his property, but is very likely to lose his liberty in the process.

BURGDORF, *supra* note 132, at 550 (quoting *Hearings on Legal Problems Affecting Older Americans Before the Senate Special Comm. on Aging*, 91st Cong. 12 (1970) (testimony of G. Alexander and J. Lewin); *see also id.* (citing *In re* Grinker, 573 N.E.2d 536 (N.Y. 1991) (New York's highest court declared in a case of first impression that a court has no authority to authorize a conservator to place a ward in a nursing home)); GIDEON HOROWITZ & CAROL ESTES, PROTECTIVE SERVICES FOR THE AGED (1974); Horstman, *supra* note 132.

However, raising the burden can be a double-edged sword. The states that have opted for the higher burden of proof provide respondents with a higher defensive barrier over which petitioners must carry the burden of proof. In doing so, the states have done more than simply insure that fewer alleged incompetent adults wrongfully lose their individual rights. The states have also insured that more incompetent adults who should be protected will not be declared incompetent because petitioners may be unable to meet the higher level of proof. Is that as it should be? Most advocates answer "yes" and many courts have agreed. However, recent scrutiny may prove otherwise.[542]

By 1993, several state courts had already set the higher burden of proof.[543] Eighteen states[544] had statutorily required the highest civil standard for adjudicating incompetence—clear, cogent, and convincing. How courts have applied the burden in guardianship proceedings has been a slow educational process. For several years, the burden of clear, cogent, and convincing proof has been slow to affect the determination of incompetence in the states that have made the changes since 1993.[545]

The higher burden is supposed to minimize the risk of erroneous decisions. Yet, for the jury or the judge,[546] the statutorily imposed higher burden may not be explained or understood. When it is explained to jurors, the explanations have not been simple and lay oriented, discussing how there must be stronger evidence than "greater weight" or preponderance.[547] This has, at times, led to misunder-

542. *See supra* note 18 and accompanying text.

543. *See In re* O.S.D., 672 P.2d 1304 (Alaska 1983) (but not for determining specific powers and duties of the guardian.); *In re* Interdiction of Salzer, 482 So. 2d 166 (La. Ct. App. 1986); *In re* Forward, 447 N.Y.S.2d 286 (N.Y. App. Div. 1982); *In re* Conservatorship of Wargold, 575 N.Y.S.2d 230 (Sur. Ct. 1991) (clear and convincing evidence required for appointment of conservator in New York.); *In re* Guardianship of Corless, 440 N.E.2d 1203 (Ohio Ct. App. 1981); *In re* Caine, 415 A.2d 13 (Pa. Ct. App. 1980); *In re* Boyer, 636 P.2d 1085 (Utah Ct. App. 1981); *see also* Doob v. Atkinson, 500 S.E.2d 657 (Ga. Ct. App. 1998).

544. These are Alaska, Arkansas, Connecticut, Florida, Georgia, Kansas, Kentucky, Maryland, Michigan, Minnesota, Missouri, Nebraska, New Mexico, North Carolina, Texas, Vermont, Virginia, and Wisconsin.

545. North Carolina, one of the states, declared statutorily that it is more serious for there to be an erroneous verdict against the respondent, opting for the higher standard of proof for a determination of incompetency—clear and convincing. But most of the Clerks of Superior Court (North Carolina's judges of probate and guardianship) are nonlawyers and for years had done little to effectively apply the higher burden.

546. *See, e.g.*, N.C. GEN. STAT. § 35A-1112(d) (1995).

547. *See id.*

standings by jurors, ending in the wrong application of the standard by jurors.[548]

4. THE RIGHT TO A JURY

While Andrews directs attention to the right to a jury trial under the Sixth and Seventh Amendments of the U.S. Constitution, he concedes that, under statutory creation of probate and guardianship laws, it is not legally required.[549] He jumps from that preface to assert "[t]he 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."[550] Andrews also believes that "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."[551] Although Andrews seems to contend that there is a constitutional right to a jury trial in guardianship hearings,[552] at least one circuit court and one state court have differed.[553]

The right to a jury trial in guardianship proceedings lacks constitutional foundation.[554] Statutorily, there has been little movement to provide a right to jury trial. On careful examination of the charts appended to this article, there is actually a decline in the statutory right to jury trial. In the 1993 chart,[555] twenty-nine states provided either a mandatory jury trial, or a jury trial at the option of the AIP. The 1998 chart shows that there has actually been a reduction to twenty-seven states providing a statutory right to a jury trial.[556]

Case law of recent years only reflects examination of a statutory right to jury trial.[557] In Missouri, where the *Korman* decision was en-

548. *See In re* Guardianship of Edward S., No. 98-1304-FT, 1998 WL 420486, *passim* (Wis. Ct. App. July 28, 1998) (unpublished opinion; *see* WIS. R. CIV. P. 809.23(3)).

549. *See* Andrews, *supra* note 1, at 99-100.

550. *Id.* at 100. Andrews provides no citations or references to support his position.

551. *Id.*

552. *See id.*

553. *See* Ward v. Booth, 197 F.2d 963 (9th Cir. 1952); *In re* Conservatorship of Mary K., 234 Cal. App. 3d 265 (1991); *In re* Conservatorship of Larson, 255 Cal. Rptr. 520 (Cal. Ct. App. 1989) (ordered not published; see Cal. Rules of Court 976, 977, 979).

554. *See id.*

555. *See* Guardianship Chart Exhibit "H."

556. *See* Guardianship Chart Exhibit "E."

557. *See Mary K.*, 234 Cal. App. 3d at 265 (California appeals court upheld a conservatorship order, finding no statutory or constitutional errors in the fact that

tered, there has been a statutorily recognized right to jury trial prior to the time in which the 1993 chart was published.[558] In California, where the *Kinney* decision was entered, there has been a statutory right to jury trial since the changes occurred in 1977.[559]

VI. Conclusion

This article responds to the premise of Mark Andrews's note that there is a constitutional crisis in guardianship.[560] This article shows that there was no foundation or preface in Andrews's note that provided readers with a sense of the history behind guardianship—neither the ancient history spanning many centuries, nor the recent history spanning the last two decades. This article provided a foundation in the form of a brief cultural history of guardianship, reviewing the law of guardianship in the Greek, Roman, English, and American cultures.

This article then presented a wealth of evidence rebutting Andrews's contention that there is a constitutional crisis in guardianship based on a lack of statutory initiative on the part of the states.[561] The evidence in this article was presented in the form of a thorough examination of pertinent cases rebutting Andrews's constitutional analysis. The evidence was also presented in the form of analysis and charts showing a substantial number of states overhauling their guardianship statutes, many well in advance of the intense interest generated over the last decade.

While Andrews primarily examined the Associated Press exposé[562] and the flurry of congressional activity that occurred just after

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the attorney for the AIP waived her rights to a jury trial and a reading of her rights); *In re* Korman, 913 S.W.2d 416 (Mo. Ct. App. 1996) (lower court improperly circumvented a man's right to jury trial when it declared him incapacitated and appointed a guardian). *But cf.* Baumbach v. Kamp, 922 S.W.2d 411 (Mo. Ct. App. 1996); *In re* Kolocotronis, 919 S.W.2d 4 (Mo. Ct. App. 1996) (court affirmed that ward not entitled to jury trial to determine whether or not public administrator should be appointed successor guardian).

558. *See* MO. ANN. STAT. § 475.075(8) (West 1956 & Supp. 1990).

559. *See* CAL. PROB. CODE § 1823(b)(7) (West 1981 & Supp. 1990); *see also In re* Conservatorship of Kevin M., 56 Cal. Rptr. 2d 765 (Cal. Ct. App. 1996) (request for jury trial must be made within five days of hearing).

560. *See* Andrews, *supra* note 1, at 93-110 (under a section titled "Constitutional Procedures," Andrews identifies what purports to be 10 issues rising to constitutional crisis). *See id.*

561. *See id.* at 85-86 ("[M]any other states allow inadequate laws to remain on the statute books.")

562. *See* Bayles & McCartney, *supra* note 16.

the exposé hit newspapers across the country over a decade ago, this article provided an examination of the vast number of states that have overhauled their guardianship statutes. Although Andrews used Illinois's guardianship statute as a standard,[563] this article reviewed the guardianship laws of the states that have made changes, assessing their implementation and application in the judicial community.[564] This article then canvassed states that have revised or amended their guardianship laws over recent decades and provided a five-year statutory review of guardianship among the states and the District of Columbia.

The simple conclusion is that, although there are alarming areas in guardianship in which attention must be given in the years to come, those areas do not include constitutional due process or procedural rights in the guardianship process. Not that there is not more to do. Wood[565] and Frolik[566] agree that, although the laws have been changing, there still needs to be training and educating of judges, health, and mental health professionals to give up their old ways.[567] As asserted at the beginning of this article, there are alarms ringing over the need for guardians and for monitoring and accountability, but not over the constitutional procedures statutorily available for the initiation, notice, and conduct of hearings in which incapacity is adjudicated.

563. *See* Andrews, *supra* note 1, at 86.
564. *See supra* note 20.
565. *See* WOOD, *supra* note 388, at 1988.
566. *See* Frolik, *supra* note 18, at 351.
567. *See id.*

EXHIBIT "A"
STATES INVOLVED IN GUARDIANSHIP REFORM
1977-1997

1. California
2. New Hampshire
3. Vermont
4. Texas
5. Kansas
6. Minnesota
7. Maryland
8. District of Columbia
9. New Jersey
10. Massachusetts
11. Arizona (1973)
12. Hawaii (1976)
13. Idaho (1971)
14. Maine (1979)
15. Michigan (1978)
16. Montana (1974)
17. Nebraska (1974)
18. New Mexico (1975)
19. North Dakota (1973)
20. South Carolina (1986)
21. Utah (1975)
22. South Dakota
23. Florida
24. Ohio
25. Washington
26. New York
27. Rhode Island
28. Tennessee
29. Pennsylvania
30. West Virginia
31. Oregon
32. Washington
33. Virginia

EXHIBIT "B"
STATES NOT RECOGNIZED FOR GUARDIANSHIP REFORM
1977-1997[568]

1. Wisconsin (Wisconsin Statutes §§ 880.01 to 880.39)
2. Wyoming (Wyoming Statutes §§ 3-1-101 to 3-4-109)
3. Mississippi (Mississippi Code §§ 93-13-111 to 93-13-267)
4. Missouri (Missouri Statutes §§ 475.010 to 475.370)
5. Nevada (Nevada Revised Statutes §§ 159.013 to 153.215)
6. Kentucky (Kentucky Revised Statutes §§ 387.500 to 387.990)
7. Louisiana (Louisiana Civil Code Art. 389 to 426; Louisiana Civil Procedure Code Art. 4541 to 4557).
8. Illinois (Illinois Revised Statutes Chapter 110 1/2 ¶¶ 11a-1 to 11a-22)
9. Indiana (Indiana Code §§ 29-3-1-1 to 29-3-13-3)
10. Iowa (Iowa Code §§ 633.552 to 633.698)
11. Georgia (Georgia Code §§ 29-2-1 to 29-3-4, 29-5-1 to 29-5-13)
12. Connecticut (Connecticut General Statutes §§ 45a-644 to 45a-700)
13. Arkansas (Arkansas Code §§ 28-65-101 to 28-67-111)
14. Alaska (Alaska Statutes §§ 13.26.005 to 13.26.410)
15. North Carolina (North Carolina General Statutes §§ 35A-1101 to -1382)
16. Alabama (Alabama Code §§ 26-2-43 to 26-2-55, 26-2A-1 to 26-2A-160, 26-7A-1 to 26-7A-17)
17. Delaware (Delaware Code Annotated, title 12, §§ 3921-3923)
18. Colorado (Colorado Revised Statutes §§ 15-14-101 to 15-14-315)

568. It is noted that identification of the above states does not infer that the states have not revised their state statutes on guardianship, only that they have not been recognized in doing so. Given the benefit of the doubt, many of these states join the ones that are recognized to clearly show that significant, overwhelming procedural and substantive movement has been made to reform guardianship.

EXHIBIT "C"
Initiation of Guardianship Proceedings

STATE	COURT	LEGAL STATUS	INCLUDED IMPAIRMENTS						
			Mental Illness	Mental Deficiency	Physical Disability	Advanced Age	Alcoholism	Drug Addiction	Other
ALA. Code (1992 & Supp. 1996)	probate 26-2A-20(3)	incapacitated 26-2A-20-(8)	26-2A-20(8)	26-2A-20(8)	or illness 26-2A-20(8)	26-2A-20(8)	26-2A-20(8)	26-2A-20(8)	except minority 26-2A-20(8)
ALASKA Stat. (1985 & Supp. 1995)	superior 13.06.050 (5)	incapacitated 13.26.113(c) & alternatives to full guardianship unfeasible 13.26.113(f)							any except minority 13.26.005(4)
ARIZ. Rev. Stat. Ann. (1995 & Supp. 1995)	superior 14-1201(7)	incapacitated 14-5304 and necessary & desirable for continuing care & supervision	or disorder 14-5101(1)	14-5101(1)	or illness 14-5101(1)		14-5101(1)	14-5101(1)	any except minority 14-5101(1) functional impairments 14-5303(C)(2)
ARK. Code Ann. (Michie 1987 & Supp. 1995)	probate 28-65-107(a)	incapacitated 28-65-105 promote & protect well being	28-65-101(1)	28-65-101(1)	illness 28-65-101(1)		28-65-101(1)	28-65-101(1)	under majority 28-65-104(1) detained by foreign power or disappeared 28-65-104(2)
CAL. Prob. Code (West 1991 & Supp. 1997)	1418	unable to provide personal needs or manage finances 1801		deficit in functions 812					

Editor's Note: This chart does not purport to describe the current state of the law in this area. In the article to which this chart is appended, the author references this chart to illustrate the state of law during a particular period in history.

EXHIBIT "C" *Continued*
Initiation of Guardianship Proceedings

STATE	COURT	LEGAL STATUS	INCLUDED IMPAIRMENTS						
			Mental Illness	**Mental Deficiency**	**Physical Disability**	**Advanced Age**	**Alcoholism**	**Drug Addiction**	**Other**
COLO. Rev. Stat. (1989 & Supp. 1996)	district; probate in Denver 15-10-201(8)	incapacitated 15-14-303	15-14-101(1)	15-14-101(1)	or illness 15-14-101(1)		15-14-101(1)	15-14-101(1)	any except minority 15-14-101(1)
CONN. Gen. Stat. Ann. (West 1993 & Supp. 1996)	probate 45a-646, 45a-648	incapable of managing affairs or caring for self 45a-644 (c), (d)	45a-644(c),(d)	45a-644(c),(d)	or illness 45a-644(c),(d)		45a-644(c),(d)	45a-644(c),(d)	confinement 45a-644(c),(d)
DEL. Code Ann. (1995)	chancery 2 §3901(a)	disabled person 12 §3901(a)		mental incapacity 12 §3901(a)(2)	physical incapacity 12 §3901(a)(2)				inability to manage or care for person or property; victim of designing person 12 §3901(a)(2)
D.C. Code Ann. (1989)	superior 21-2011(2)	incapacitated 21-2011(11) unable to properly care for property							
FLA. Stat. Ann. (West 1986 & Supp. 1997)	circuit 744.102 (4)	incapacitated 744.331(6)							ability is limited to extent lacks capacity to manage 744.102(10)
GA. Code Ann. (1993 & Supp. 1997)	probate 29-5-1(a) 15-9-30	incapacitated 29-5-6(a)(3)	or disability 29-5-1-(a)(1)	mentally retarded 29-5-1(a)(1)	or illness 29-5-1(a)(1)		29-5-1(a)(1)	29-5-1(a)(1)	detention by foreign power 29-5-1(a)(2)
HAW. Rev. Stat. (1993 & Supp. 1995)	family 560:5-102	incapacitated 560:5-304	560:5-101(2)	560:5-101(2)	or illness 560:5-101(2)	560:5-101(2)	560:5-101(2)	560:5-101(2)	except minority 560:5-101(2)

EXHIBIT "C" *Continued*
Initiation of Guardianship Proceedings

STATE	COURT	LEGAL STATUS	INCLUDED IMPAIRMENTS						
			Mental Illness	Mental Deficiency	Physical Disability	Advanced Age	Alcoholism	Drug Addiction	Other
IDAHO Code (1979 & Supp. 1997)	district 15-1-201(6)	incapacitated 15-5-101(a)(1) legal, not medical, measured by functional limitations, has is or likely to suffer substantial harm due to inability to care	15-5-101(a)	15-5-101(a)	or illness 15-5-101(a)		15-5-101(a)	15-5-101(a)	except minority 15-5-101(a)
ILL. Ann. Stat. (Smith-Hurd 1992 & Supp. 1996)	Probate County Ct. 755 ILCS 5/11a-3 note 11	disabled 755 ILCS 5/11a-2	755 ILCS 5/11a-2(b)	developmentally disabled 755 ILCS 5/11a-2(a)	incapacity 755 ILCS 5/11a-2(a)		755 ILCS 5/11a-2(c)	755 ILCS 5/11a-2(c)	gambling, idleness, or debauchery 755 ILCS 5/11a-2(c)
IND. Code Ann. (Burns 1994 & Supp. 1996)	probate 29-3-1-3	incapacitated 29-3-2-3	or insanity 29-3-1-7.5(2)	29-3-1-7.5(2), developmental disability 29-3-1-7.5(3)	or illness 29-3-1-7.5(2)		29-3-1-7.5(2)	29-3-1-7.5(2)	other incapacity, confinement, duress, fraud, undue influence 29-3-1-7.5(2)
IOWA Code Ann. (West 1992 & Supp. 1997)	district 633.3(9) 633.10(3)	incapacitated 633.552(2), 633.566(2)							decision-making capacity so impaired that unable to care, for self, necessities, finances 633.552(2)
KAN. Stat. Ann. (1994 & Supp. 1995)	district 59-3006	incapacitated 59-3013 disabled 59-3006							
KY. Rev. Stat. Ann. (Baldwin 1984 & Supp. 1992)	district 387.520	disabled 387.590							

EXHIBIT "C" *Continued*
Initiation of Guardianship Proceedings

STATE	COURT	LEGAL STATUS	INCLUDED IMPAIRMENTS						
			Mental Illness	Mental Deficiency	Physical Disability	Advanced Age	Alcoholism	Drug Addiction	Other
LA. Civ. Code Ann. (West 1961 & Supp. 1996) Rev. Stat. Ann. (West 1993 & Supp. 1996)	probate 392 note 1 district CCP Art 4541	mentally incapacitated 389, 393 physical infirmity 422, RS9:1002	Insanity or madness 389		422		RS 9:1002		any infirmity 422
ME. Rev. Stat. Ann. (West 1981 & Supp. 1997)	probate 18-A §1-201(5)	incapacitated 18-A §5-304 necessary & desirable for continuing care & supervision	18-A#§5-101(1)	18-A#§5-101(1)	or illness 18-A §5-01(1)		18-A §5-101(1)	18-A §5-101(1)	except minority 18-A §5-101(1)
MD. Code Ann. (1991 & Supp. 1997)	circuit 13-105(b) 13-101(c)	13-706, unable to care for self 13-705, unable to manage property 13-201	disease 13-201(c)(1), 13-705(b)	disability 13-201(c)(1) R73(b)(1) 13-705(b)	13-705(b) disease 13-201 (c)(1)		13-201 (c)(1) R73(b)(1) 13-705(b)	13-201 (c)(1) R73(b)(1) 13-705(b)	Compulsory hospitalization, confinement, detention by foreign power, disappearance 13-201(c)(1)
MASS. Ann. Laws (Law. Co-op 1994 & Supp. 1996)	probate 20 §1	mentally ill, mentally retarded, or spendthrift 201§1	or mental weakness 201§1	mentally retarded 201 §1	or illness 201§1		excessive drinking 201 §8		spendthrift 201 §1, 201 §8
MICH. Comp. Laws Ann. (West 1995 & Supp. 1996)	probate 700.3	incapacitated 700.444(1) and necessary	700.8(2)	700.8(2)	or illness 700.8(2)		700.8(2)	700.8(2)	except minority 700.8(2)

EXHIBIT "C" *Continued*
Initiation of Guardianship Proceedings

STATE	COURT	LEGAL STATUS	INCLUDED IMPAIRMENTS						
			Mental Illness	Mental Deficiency	Physical Disability	Advanced Age	Alcoholism	Drug Addiction	Other
MINN. Stat. Ann. (West 1975 & Supp. 1996)	probate 525.011	incapacitated 525.551(5)(b)(1) in need of supervision & protection & no less restrictive alternatives 525.551 (5)(b)(2)(3)							lacks capacity to make decisions 525.54(2)
MISS. Code Ann. (1994)	chancery 93-13-121 93-13-123 93-13-125 93-13-131	incompetent 93-13-121 unsound mind 93-13-123, 125 drunkard or drug addict 93-13-131	in need of mental treatment 93-13-111	93-13-123 93-13-125		excluded 93-13-121	93-13-131	93-13-131	
MO. Ann. Stat. (Vernon 1992 & Supp. 1996)	probate Const. 1945, art. 5, §16	incompetent 475.079	475.010(4), (9)	475.010(4), (9)	any physical condition 475.010 (4), (9)				
MONT. Code Ann. (1995)	district 72-1-103 (7)	incapacitated and necessary to meet essential requirements for physical health or safety 72-5-316(1)	72-5-101 (1)	72-5-101 (1)	or illness 72-5-101(1)		72-5-101(1)	72-5-101(1)	except minority 72-5-101(1)
NEB. Rev. Stat. (1989 & Supp. 1998)	county 30-2209(5)	incapacitated 30-2620 and necessary or desirable for continuing care & supervision	30-2601(1)	30-2601(1)	or illness 30-2601(1)		30-2601(1)	30-2601(1)	except minority 30-2601(1)

EXHIBIT "C" *Continued*
Initiation of Guardianship Proceedings

STATE	COURT	LEGAL STATUS	INCLUDED IMPAIRMENTS						
			Mental Illness	Mental Deficiency	Physical Disability	Advanced Age	Alcoholism	Drug Addiction	Other
NEV. Rev. Stat. (1993 & Supp. 1995)	159.015	incompetent 159.054	159.019	or weakness of mind 159.019	disease 159.019	159.019			any other cause 159.019
N.H. Rev. Stat. Ann. (1992 & Supp. 1995)	probate 464-A:2(IV)	incapacitated 464-A:9(III)(a)-(c) necessary to continuing care & supervision, no available alternatives, least restrictive form of intervention							functional limitations 464-A:2(XI)
N.J. Stat. Ann. (1983 & Supp. 1996) N.J. Rules (1982)	superior 3B:12-25	incompetent 3B:12-25 R.4:83-1	3B:1-2 HR R:4:83-1	3B:1-2 R:4:83-1	or illness 3B:1-2		3B:1-2 R:4:83-1	3B:1-2	except minority 3B:1-2
N.M. Stat. Ann. (Michie 1995)	district 45-5-101	incapacity 45-5-304 and necessary or desirable for continuing care & supervision	45-5-101.F.	45-5-101.F.	or illness 45-5-101.F.		45-5-101.F.	45-5-101.F.	except minority 45-5-101.F.
N.Y. Mental Hyg. Law (McKinney 1996)	supreme ct. county cts. outside NYC 81.04	incapacitated and necessary to provide for personal needs and likely to suffer harm 81.02.2							functional limitations 81.02(c), (d)

EXHIBIT "C" *Continued*
Initiation of Guardianship Proceedings

STATE	COURT	LEGAL STATUS	INCLUDED IMPAIRMENTS						
			Mental Illness	Mental Deficiency	Physical Disability	Advanced Age	Alcoholism	Drug Addiction	Other
N.D. Cent. Code (1996)	district court 30.1-02-02(3)	incapacitated 30.1-28-04(2) and necessary or desirable for continuing care & supervision	30.1-26-01.1.	30.1-26-01.1.	or illness 30.1-26-01.1.			30.1-26-01.1.	except minority 30.1-26-01.1.
OHIO Rev. Code Ann. (Anderson 1994)	probate 2111.02	incompetent 2111.02(B)	2111.01(D)	mental disability; mentally retarded 2111.01(D)	or infirmity 2111.01(D)		substance abuse 2111.01(D)	substance abuse 2111.01(D)	
OKLA. Stat. Ann. (West 1991 & Supp. 1997)	district court 30 §1-115.A	incapacitated 30 §1-111(10) 30 §3-110	30 §1-111(10)	mental retardation or developmental disability 30 §1-111(10)	or illness 30 §1-111(10)		30 §1-111(10)	30 §1-111(10)	or similar cause 30 §1-111(10)
OR. Rev. Stat. (1990 & Supp. 1994)	probate 126.003 (2)	incapacitated 126.107(1)(a) necessary or desirable for continuing care & supervision							functional impairment 126.003(5)
PA. Cons. Stat. Ann. (1975 & Supp. 1996)	common pleas orphan's ct. 20 §711(6)	incapacitated 20 §5501 20 §5511(a), (b)							impaired abilities 20 §5501
R.I. Gen. Laws (1995)	probate 33-15-3	incapacity 33-15-1							total or partial incapacity 33-15-4
S.C. Code Ann. (Law. Co-op 1987 & Supp. 1995)	probate 62-1-302(a)(2)	incapacitated 62-5-304	65-5-101(1)	65-5-101(1)	or illness 65-5-101(1)	65-5-101(1)	65-5-101(1)	65-5-101(1)	except minority 65-5-101(1)

EXHIBIT "C" *Continued*
Initiation of Guardianship Proceedings

STATE	COURT	LEGAL STATUS	INCLUDED IMPAIRMENTS						
			Mental Illness	Mental Deficiency	Physical Disability	Advanced Age	Alcoholism	Drug Addiction	Other
S.D. Codified Laws Ann. (1984 & Supp. 1996)	circuit court 29A-5-104	protected person 29A-5-301							lacks capacity to meet essential requirements 29A-5-302
TENN. Code Ann. (1991 & Supp. 1995)	chancery, circuit, law & equity, or probate 34-4-102(1)	disabled 34-4-102 incapable of managing estate 34-4-203(a), 34-11-101(7)	34-4-110(2) mental weakness 34-4-203, 34-4-102(2), 34-11-101(7)	developmentally disabled 34-4-102(2) mental weakness 34-4-203, 34-11-101(7)	illness or injury 34-4-102(2) physical incapacity 34-4-203, 34-11-101(7)	34-4-102(2) 34-4-203			other mental or physical incapacity 34-4-102(2) 34-11-101(7)
TEX. Prob. Code Ann. (West 1980 & Supp. 1997)	county, probate court 601(7)	incapacitated person 601(13), 683							physical or mental condition unable to provide or manage 601(13)(B)
UTAH Code Ann. (1993 & Supp. 1997)	district 75-1-201 (5)	incapacitated 75-5-304 necessary or desirable for continuing care & supervision 75-5-304	75-1-201 (18)	75-1-201-(18)	or illness 75-1-201(18)		75-1-201(18)	75-1-201(18)	except minority 75-1-201 (18)
VT. Stat. Ann. tit. 14 (1989 & Supp. 1995); tit. 33 (1981 & Supp. 1995) VT. Rules of Probate Proc. (1986 & Supp. 1995)	probate 14 §3062 district 33 §3603	mentally retarded in need of supervision & protection 33 §3604 mentally disabled 14 §3068(f)	14 §3061(1)(B) 14 §3061(5)	mentally retarded 14 §3061 (1)(B) 14 §3061(4) mentally disabled 14 §3068 (f) 33 §3604					unable to manage personal care & finances 14 §3061(1)(C)

EXHIBIT "C" *Continued*
Initiation of Guardianship Proceedings

STATE	COURT	LEGAL STATUS	INCLUDED IMPAIRMENTS						
			Mental Illness	Mental Deficiency	Physical Disability	Advanced Age	Alcoholism	Drug Addiction	Other
VA. Code Ann. (Michie 1997)	circuit 37.1-134.7	incapacitated person 37.1-134.6							incapable of receiving or evaluating information or responding to people, events, environment to extent lacks capacity to meet essential requirements for health, safety, needs 37.1-134.6
WASH. Rev. Code Ann. (West 1987 & Supp. 1997)	superior 11.88.010(1)	incompetent 11.88.010(1)	11.88.010(1)	Developmental disability 11.88.010(1)		11.88.010(1)	11.88.010(1)	11.88.010(1)	risk of personal or financial harm 11.88.010 (1)
W. VA. Code (1986 & Supp. 1997)	44A-2-9	protected person							mental impairment unable to receive, evaluate, respond
WIS. Stat. Ann. (West 1991 & Supp. 1996)	circuit 880.02	incompetent 880.03 spendthrift 880.03		developmentally disabled 880.01(4)		880.01(4)			
WYO. Stat. (1985 & Supp. 1996)	district, probate 3-1-101 3-4-101	incompetent or mentally incompetent 3-2-101 developmentally disabled 3-4-105	3-1-101(a)(viii)	retardation 3-1-101(a)(viii)	disease 3-1-101(a)(vii)	3-1-101(a)(vii)	3-1-101(a)(vii)	3-1-101(a)(vii)	mental or physical impairment 3-4-101(a)(ii)(A)

Revised March 1998

EXHIBIT "D"
Notice in Guardianship Proceedings

STATE	APPLICATION	NOTICE OF PROCEEDING				
		Respondent	Relatives	Other	When	Waiver or Substitute Service
ALA. Code (1992 & Supp. 1996)	any person alleged incompetent 26-2A-102(a)	26-2A-50 26-2A-103(a)(1)	spouse, parents, adult children 26-2A-103(a)(1) nearest adult relative 26-2A-103(a)(3)	person having care or custody 26-2A-103(a)(2), 26-2A-103(a)(4)	14 days 26-2A-50(b)(1)	26-2A-51 26-2A-103(d)
ALASKA Stat. (1985 & Supp. 1995)	interested person alleged incompetent 13.26.105(a)	13.26.135(a)(1)	spouse, parents & adult children 13.26.135(a)(4) closest adult relative 13.26.135(a)(3)	person having care & custody 13.26.135 (a)(2)	upon appointment of visitor 13.26.107(a)(1)	
ARIZ. Rev. Stat. Ann. (1995 & Supp. 1995)	interested person alleged incompetent 14-5303(A)	14-5309(A)(1)	spouse, parents, & adult children 14-5309 (A)(1) closest adult relative 14-5309(A)(3)	person having care & custody 14-5309(A)(2)	14 days 14-5309(B), 14-1401	waiver ineffective unless present at hearing or confirmed by visitor 14-5309(B)
ARK. Code Ann. (Michie 1987 & Supp. 1995)	28-65-205(a)	if over 14 28-65-207(b)(1)	parents of minor, spouse, or nearest competent relative 28-65-207(b)(2), (3), (5)	any other person 28-65-207(b)(4)	20 days before hearing 28-65-207(c)(2)	28-65-207(a)(2)
CAL. Prob. Code (West 1991 & Supp. 1997)	spouse, relative, interested person or friend alleged incompetent 1820(a)(1), (5)	citation 1823(a); 1824	spouse & relatives 1822(b)(1), (2)	1822(c)-(g)	15 days before hearing 1822(a) citation within 15 days 1824	
COLO. Rev. Stat. (1989 & Supp. 1996)	interested person alleged incompetent 15-14-303(1)	15-14-309(1)(a)	spouse, parents & adult children 15-14-309(1)(a) closest adult relative 15-14-309(1)(c)	person having care & custody 15-14-309 (1)(b)	10 days 15-14-309(2), 15-14-405(1)	waiver ineffective unless present at hearing or confirmed by visitor 15-14-309(2)
CONN. Gen. Stat. Ann. (West 1993 & Supp. 1996)	any person 45a-646, 45a-648	45a-649(a)(1)(A)	spouse 45a-649(a)(1)(B) children, parents or brothers & sisters 45a-649(a)(1)(B)	person in charge of hospital, nursing home, or institution 45a-649(a) (1)(A), (2), (3)	7 days before hearing & within 30 days of application 45a-649(a)	
DEL. Code Ann. (1995)	any person R101	12 §#3901(c)		such others as ct. may deem desirable 12 §#3901(c)	reasonable 12 §3901(c)	

EXHIBIT "D" *Continued*
Notice In Guardianship Proceedings

STATE	APPLICATION	NOTICE OF PROCEEDING				
		Respondent	Relatives	Other	When	Waiver or Substitute Service
D.C. Code Ann. (1989)	any person alleged incompetent 21-2041(a)	21-2042(c)	21-2042(a)(3)	such others as ct. directs 21-2042(a)(4)	14 days before hearing 21-2031-(b)(1)	21-2032 21-2043(d)
FLA. Stat. Ann. (West 1986 & Supp. 1997)	adult 744.3201(1)	744.3215(1)(n) 744.331(1) 744.3371(1)	744.3371 next of kin in petition 744.331(1)	atty 744.331(1) atty & guardian 744.3371		see 48.021 for special process servers appointed by sheriff
GA. Code Ann. (1993 & Supp. 1997)	interested person, alleged incapacitated dep't human resources 29-5-6(a)(1)	29-5-6(b)(2)(A) personal service 29-5-6(d)(1)	spouse, adult children, or next of kin, 2 friends 29-5-6(b)(2)(C)	attorney & GAL 29-5-6(d)(1)	10 days before hearing 29-5-6(d)(1)	
HAW. Rev. Stat. (1993 & Supp. 1995)	interested person alleged incompetent 560:5-303(a)	560:5-309(a)(1), (b)	spouse, parents, & adult children 560:5-309(a)(1) closest adult relative 560:5-309(a)(3)	person with care & custody 560:5-309(a)(2)		waiver ineffective unless present at hearing or confirmed by visitor 560:5-309(b)
IDAHO Code (1979 & Supp. 1997)	interested person alleged incompetent 15-5-303(a)	15-5-309(a)(1)	spouse, parents, & adult children 15-5-309(a)(1) closest adult relative 15-5-309(a)(3)	person with care & custody 15-5-309(a)(2) person requesting 15-5-309(a)(4)		waiver ineffective unless present at hearing or confirmed by visitor 15-5-309(b)
ILL. Ann. Stat. (Smith-Hurd 1992 & Supp. 1996)	reputable person alleged incompetent 755 ILCS 5/11a-3(a)	755 ILCS 5/11a-10(e)		those whose names appear in petition 755 ILCS 5/11a-10(f)	14 days before hearing 755 ILCS 5/11a-10(e)	
IND. Code Ann. (Burns 1994 & Supp. 1996)	any person 29-3-5-1(a)	29-3-6-1(a)(4)(A)	spouse, parents & adult children 29-3-6-1(a)(4)(A) closely related 29-3-6(a)(4)(C)	person having care & custody 29-3-6-1(a)(4)(B) atty in fact under durable POA 29-3-6-1(a)(4)(D) any other person directed by ct. 29-3-6-1(a)(4)(E)	29-3-6-1(c)	29-3-6-1(a)(4)

EXHIBIT "D" *Continued*
Notice in Guardianship Proceedings

STATE	APPLICATION	NOTICE OF PROCEEDING				
		Respondent	Relatives	Other	When	Waiver or Substitute Service
IOWA Code Ann. (West 1992 & Supp. 1997)	any person alleged incompetent 633.522, 633.566, 633.557, 633.572	633.554 633.568		If a minor 633.554 633.568		
KAN. Stat. Ann. (1994 & Supp. 1995)	any person 59-3009	59-3012(a)	spouse or natural guardian 59-3012(a)	attorney & such others as ct. directs 59-3012(a)	5 days before hearing 59-3012(b)	to head of psychiatric hospital if hospitalized 59-3012(b)
KY. Rev. Stat. Ann. (Baldwin 1984 & Supp. 1992)	interested person alleged incompetent 387.530	387.550(2)		attorney & such others as ct. directs 387.550(2)	14 days before hearing 387.550(2)	
LA. Civ. Code Ann. (West 1961) & Rev. Stat. Ann. (West 1993 & Supp. 1996)	any stranger 391 every relation 390 Code Civ. Proc. art. 4543	Code Civ. Proc. art. 4544				
ME. Rev. Stat. Ann. (West 1981 & Supp. 1997)	any interested person alleged incompetent 18-A §5-303(a)	18-A §5-309(a)(1)	spouse, parents & adult children 18-A §5-309(a)(1) closest adult relative 18-A §5-309(a)(3)	person with care & custody 18-A §5-309(a)(2)	14 days before hearing 18-A §5-309(b)	waiver ineffective unless present at hearing or confirmed by visitor 18-A §5-309(b)

EXHIBIT "D" *Continued*
Notice In Guardianship Proceedings

STATE	APPLICATION	NOTICE OF PROCEEDING				
		Respondent	Relatives	Other	When	Waiver or Substitute Service
MD. Code Ann. (1991& Supp. 1997) MD Rules (Supp. 1989)	interested person alleged disabled R71(a)(2)	R2-124(b)	interested persons designated by ct. R74(b)	interested persons designated by ct. R74(b)		
MASS. Ann. Laws (Law. Co-op 1994 & Supp. 1996)	alleged incompetent for conservatorship 201 §16 parent, 2 relatives or friends, mental health dep't 201 §6 human service agency 201 §6A, 16B relative or public welfare dep't 201 §8	201 §§7, 9, 17	spouse of spendthrift 201 §9 heir apparent, spouse 201 §17	dep't of mental health or dep't of mental retardation 201 §7	7 days before hearing 201 §§7, 9, 17	conservatorship, if asserts in writing 201 §17
MICH. Comp. Laws Ann. (1995 & Supp. 1998)	interested person alleged incompetent 700.443	700.451(1)(a)	spouse, parents, & adults children 700.451(1)(a) closest relative 700.451(1)(d)	person having care or custody 700.451(1)(b) atty in fact under durable POA 700.451(1)(c)		ineffective unless present at hearing or confirmed by visitor 700.451(2)
MINN. Stat. Ann. (West 1975 & Supp. 1998)	any person 525.541	525.55(1)	spouse, parents, adult sibling, next children, of kin 525.55(1)	administrative head of hospital or institution; such others as ct. directs 525.55(1)	14 days before hearing 525.55(1)	
MISS. Code Ann. (1994)	interested party 93-13-125, 93-13-111 incompetent or guardian 93-13-121 relative or friend of unsound person 93-13-125, 131, 111	93-13-111			5 days prior to hearing 93-13-111	

EXHIBIT "D" *Continued*
Notice in Guardianship Proceedings

STATE	APPLICATION	NOTICE OF PROCEEDING				
		Respondent	Relatives	Other	When	Waiver or Substitute Service
MO. Ann. Stat. (Vernon 1992 & Supp. 1996)	any person 475.060	475.075(2)	spouse, parents, adult children, closest relative 475.075(2)	fiduciary 475.075(2)	reasonable time before hearing 475.075(2)	
MONT. Code Ann. (1995)	interested person alleged incompetent 72-5-315(1)	72-5-314(1)(a)	spouse, parents & adult children 72-5-314(1)(a) closest adult relative 72-5-314(1)(c)	person with care custody 72-5-314(1)(b)	14 days 30-2625(b)	waiver ineffective unless present at hearing or confirmed by visitor 72-5-314(2)
NEB. Rev. Stat. (1989 & Supp. 1995)	interested person alleged incompetent 30-2619(a)	30-2625(a)(1)	spouse, parents & adult children 30-2625(a)(1) closest adult relative 30-2625(a)(3)	person with care & control 30-2625 (a)(2)		waiver ineffective unless present at hearing or confirmed by visitor 30-2625(b)
NEV. Rev. Stat. (1993 & Supp. 1995)	159.044(1) any person alleged incompetent gov't agency, non-profit corp.	159.047(2)(a)(3)	spouse & adult children, or parent, brother, or sister 159.047(2)(a)(1)	person with care, custody or control 159.047(2)(a)(2)	20 days before hearing 159.0475(1)	
N.H. Rev. Stat. Ann. (1992 & Supp. 1995)	interested person alleged incompetent 464-A:4(I)	464-A:5(I)	464-A:5(IV)(a)	proposed guardian; director where patient is in institution 464-A:5(IV)(b) - (d)	14 days before hearing 464-A:5(I), (IV)	
N.J. Stat. Ann. (1983 & Supp. 1996) N.J. Rules (1982)		R.4:83-4(b)	spouse, adult children & parents R.4:83-4(a)	person with care or custody, & such others as ct. directs R.4:83-4(a)	20 days before hearing R.4:83-4(a)	ct. may, for good cause, shorten or dispense with notice R.4:83-4(a)

EXHIBIT "D" *Continued*
Notice In Guardianship Proceedings

STATE	APPLICATION	NOTICE OF PROCEEDING				
		Respondent	Relatives	Other	When	Waiver or Substitute Service
N.M. Stat. Ann. (Michie 1995)	interested person 45-5-303.A.	45-5-309.A.1	spouse, parent, adult children, nearest relative 45-5-309.A.2.	person with care & custody 45-5-309.A.	14 days 45-5-309.C.	
N.Y. Mental Hyg. Law (McKinney 1996)	alleged incapacitated, presumptive distributee, executor, administrator, trustee, person with whom resides, other concerned, chief officer of state facility 81.06	large type, plain language, in other than English if necessary 81.07(d)1.(i)	spouse, parents, adult children, adult siblings, person with whom resides 81.07(d)1.(ii)	at least 1 relative, person designed by alleged incapacitated, organization with demonstrated interest, attorney, court evaluator, dep't social services, state facility 81.07(d)1.(iii)	14 days 81.07(2)(i)	
N.C. Gen. Stat. (1995)	any person 35A-1105	35A-1109 35A-1211	relatives 35A-1109	guardian ad litem or counsel appointed by clerk 35A-1109	not less than 10 days 35A-1108	
N.D. Cent. Code (1996)	interested person 30.1-28-03(1)	30.1-28-09(1)(a), (2)	spouse, parents & adult children 30.1-28-09(1)(a) closest adult relative 30.1-28 09(1)(c)	person with care & custody 30.1-28-09(1)(b)		waiver ineffective unless present at hearing or confirmed by visitor 30.1-28-09(2)
OHIO Rev. Code Ann. (Anderson 1994)	interested party 2111.02	2111.04(A)(2)(a)(i)	next of kin 2111.04(A)(2)(b)		7 days before appointment 2111.04(A)	waiver prohibited 2111.04 (C)
OKLA. Stat. Ann. (West 1991& Supp. 1997)	interested party 30 §3-101.A	30 §3-110.A.1	spouse, adult children, parents, siblings 30 §3-110.A.2	Attorney 30 §3.110.A.2	10 days before hearing 30 §3-110.C.1	waiver prohibited 30 §3-106(B)
OR. Rev. Stat. (1990 & Supp. 1994)	interested person alleged incompetent 126.103(1)	126.127(1)(a)	spouse, parents, & adult children 126.127(1)(a) closest adult relative 126.127(1)(c)	person with care & custody 126.127(1)(b)	15 days 126.007 (1)	waiver not by person alleged incompetent 126.013

EXHIBIT "D" *Continued*
Notice in Guardianship Proceedings

STATE	APPLICATION	NOTICE OF PROCEEDING				
		Respondent	Relatives	Other	When	Waiver or Substitute Service
PA. Cons. Stat. Ann. (1975 & Supp. 1996)	interested person 20 §5511(a)	large type, simple language, purpose of proceeding 20 §5511(a)	all who are sui juris 20 §5511(a)	such others as ct. may direct 20 §5511(a)	20 days 20 §5511(a)	
R.I. Gen. Laws (1995)	any person 33-15-2	plain language, large type, hearing rights, consequences of appointment 33-15-17.1(a)	spouse & heirs 33-15-17.1	by publication 33-15-8 33-15-17.1	14 days to respondent 33-15-17.1.(a) 10 days to others 33-15-17.1(e)	file with court 33-15-17.1(f)
S.C. Code Ann. (Law. Co-op 1987 & Supp. 1995)	any person alleged incompetent 62-5-303(a)	62-5-309(a)	spouse, parents, adult children 62-5-309(a)(1) closest relative 62-5-309(a)(3)	person with care & custody, atty in fact under durable POA 62-5-309(a)(2)	20 days 62-1-401(a)	ineffectively unless present at hearing or to visitor 62-5-309(b)
S.D. Codified Laws Ann. (1984 & Supp. 1996)	alleged needing protection, relative, individual or facility caring for person 29A-5-305	must state legal effect of appointment 29A-5-308		those named in petition 29A-5-308	14 days 29A-5-308	prohibited 29A-5-308
TENN. Code Ann. (1991 & Supp. 1995)	interested person 34-12-104(a), 34-4-104(a) alleged incompetent 34-4-104(a), 34-4-203(a) friend or relative 34-4-203(a)	personal service mandated 4-14-105 34-4-204(a) 34-11-108(c)	certified mail to parent or guardian, if a minor; person most closely related 34-4-105 husband, wife, descendants, ascendants, & next of kin 34-4-204	person, institution or agency with care & custody 34-4-105	7 days before appointment 34-4-204 7 days before hearing 34-4-104(c)	to guardian ad litem if personal service would be a futile act 34-4-105(a)
TEX. Prob. Code Ann. (West 1980 & Supp. 1997)	any person 682	633(c)(1)	parents 633(c)(2) spouse 633(c)(4)	person with care or custody 633(c)(3) person ward designated 633(d)(5) Atty ad litem & GAL 633(c)(5)	10 days 633(f)	635

EXHIBIT "D" *Continued*
Notice in Guardianship Proceedings

STATE	APPLICATION	NOTICE OF PROCEEDING				
		Respondent	Relatives	Other	When	Waiver or Substitute Service
UTAH Code Ann. (1993 & Supp. 1997)	interested person alleged incompetent 75-5-303(1)	75-5-309(1)(a), (3)	spouse, parents, & adult children 75-5-309(1)(a) closest adult relative 75-5-309(1)(c)	person with care & custody 75-5-309(1)(b) testamentary guardian 75-5-309(1)(d)	10 days 75-1-401	waiver ineffective unless present at hearing or confirmed by visitor 75-5-309(3)
VT. Stat. Ann. tit. 14 (1989 & Supp. 1995); tit. 33 (1981 & Supp. 1988) VT. Rules of Probate Proc. (1986 & Supp. 1988)	interested person 14 §§3063, 3605 state's attorney 33 §3605	14 §3064(a) 33 §3607 VRPP 4(d)	spouse or nearest relative 14 §3064(a) VRPP 4(d) spouse or nearest relative 33 §3607	14 §3054 (a) VRPP 4(d) counsel, state's attorney, & such others as ct. directs 33 §3607	10 days before hearing 33 §3607	VRRP 4(d)(3)
VA. Code Ann. (Michie 1997	any person 37.1-134.8	personally served 37.1-134.10(B)	all adults named in petition, 37.1-134.10(c)		reasonable notice 37.1-134.10(A) 7 days to family 37.1-134.10(C)	respondent may not waive 37.1-134.10(A)
WASH. Rev. Code Ann. (West 1987 & Supp. 1997)	any person or entity 11.88.030(1)	if over 14 11.88.040(1); 11.88.030(4)(a)	parent of minor & spouse 11.88.040(2)	person with whom respondent resides 11.88.040 (3)	10 days before hearing 11.88.040	may be waived by all parties but respondent 11.88.040
W .VA. Code (1982 & Supp. 1997)		personal 44A-2-6			14 days before hearing	
WIS. Stat. Ann. (West 1991 & Supp. 1996)	any person relative or public official 880.07(1)	880.08(1),(2)	presumptive adult heirs 880.08(1)	existing guardian; counsel; person with custody 880.08(1)	10 days before hearing 880.08 (1), (2)	

Revised August 1997

EXHIBIT "E"
Conduct and Results of Guardianship Proceedings

STATE	HEARING	LEGAL REPRESENTATION		PRESENCE IN COURT			HEARING CLOSED TO PUBLIC	JURY TRIAL	STANDARD OF PROOF	MEDICAL EVIDENCE
		Right to Counsel Guardian ad litem		Mandatory Attendance Except when Harmful Right to Attend						
ALA. Code (1992 & Supp. 1998)	26-2A-135(b), 26-2A-102 shall appoint attorney, who may be GAL or counsel	26-2A-135(b)	26-2A-52	absence in best interest	26-2A-135(d)26-2A-135(d),	26-2A-102(c) at ward's request	26-2A-102(c)	26-2A-35	26-2-45	26-2A-102(b)
ALASKA STAT. (1985 & Supp. 1995)	13.26.106(a) entitlement, shall appoint Office of Public Advocacy if no funds 13.26.106(b)	13.26.109(c)	13.26.112		13.26.113	13.26.133(a) at ward's option	13.26.113(4) 13.26.113	13.26.133(a) (6) clear & convincing	13.26.113 expert & visitor	13.26.106
ARIZ. Rev. Stat. Ann. (1995 & Supp. 1995)	14-5303(B) shall appoint	14-5303(B)				14-5303(B) at ward's option	14-5303(B)	14-5303(B) clear & convincing	14-5304(A) functional assessment by physician, psychologist or RN	14-5303
ARK. Code Ann. (Michie 1987 & Supp. 1995)	28-65-213(a)	28-65-213(a)(1)	at court's discretion	28-65-211 (b)(3)		28-65-213(a)(5)		clear & convincing	28-65-213(b) sworn statement by 1 or more qualified medical witnesses	28-65-211(b)(1)
CAL. Prob. Code (West 1991 & Supp. 1997)	1822	1823(b)(6)	1033	1825(a)	1825(c)	1823(b)(5)		1823(b)(7)	clear & convincing	1801(e) medical evidence & specific impairments

Editor's Note: This chart does not purport to describe the current state of the law in this area. In the article to which this chart is appended the author references this chart to illustrate the state of law during a particular period in the past.

EXHIBIT "E" *Continued*
Conduct and Results of Guardianship Proceedings

STATE	HEARING	LEGAL REPRESENTATION		PRESENCE IN COURT			HEARING CLOSED TO PUBLIC	JURY TRIAL	STANDARD OF PROOF	MEDICAL EVIDENCE
		Right to Counsel Guardian ad litem		Mandatory Attendance Except when Harmful Right to Attend						
COLO. Rev. Stat. Ann. (1989 & Supp. 1996)	15-14-303(2) right to retain or court appoint	15-14-303(2)(a) not required	15-14-309(2) See 15-14-314, 15-14-407			15-14-303(4) at ward's option	15-14-303(4)	15-14-303(4)	clear & convincing 15-14-303 (Supp. n. 6)15-14-303(3) physician 15-14-303(2)	visitor
CONN. Gen. Stat. Ann. (West 1993 & & Supp. 1996)	45a-649 shall appoint in any proceeding	45a-649(b)(2)				45a-49(b)(2)		clear & convincing	45a-650(c)	statement by 1 or more physicians 45a-650(a)
DEL. Code Ann. (1995)	12-3901(c)	12-3901(c)								
D.C. Code Ann. (1989)	21-2054(a) shall appoint	21-2041(h)	21-2033(a) unless good cause shown	21-2041(h)		at ward's option	21-2041(h)	21-2023(a)		21-2041(d)
FLA. Stat. Ann. (West 1988 & Supp. 1997)	744.331(4) shall appoint	744.331(2)(a) 744.3215(1)(l)	744.391 waived or good cause	744.331(5) (b)				clear & convincing	744.331(6) examining committee	744.331(3) (a)
GA. Code. Ann. (1993 & Supp. 1997)	29-5-6(d)(1) right to court appointment unless retained	29-5-6(b)(2)(B)	29-5-6 (b)(2)(D) may be waived for good cause; record reflect reason	29-5-6(e)(1)		at ward's option for good cause	29-5-6(e)(1)	29-5-6(e)(3) clear & convincing	29-5-6(e)(4)	physician or psychologist 29-5-6(c)(1)

EXHIBIT "E" *Continued*
Conduct and Results of Guardianship Proceedings

STATE	HEARING	LEGAL REPRESENTATION		PRESENCE IN COURT			HEARING CLOSED TO PUBLIC	JURY TRIAL	STANDARD OF PROOF	MEDICAL EVIDENCE
		Right to Counsel Guardian ad litem		Mandatory Attendance Except when Harmful Right to Attend						
HAW. Rev. Stat. (1993 & Supp. 1995)	560:5-303(b)	560:5-303(b)	court determines & shall appoint GAL 560:5-303(b)		560:5-303(b)	560:5-407(c)	permissive 560:5-303(b)	560:1-306(a)	physician & family ct. officer	560:5-303(b)
IDAHO Code (1979 & Supp. 1997)	15-5-303(b) shall appoint attorney with GAL duties	15-5-303(b)	When not represented 15-5-303(b)			15-5-303(c)at ward's option	15-5-303(c)		physician & visitor	15-5-303(b)
ILL. Ann. Stat. (Smith-Hurd 1992 & Supp. 1996) 755 ILCS	5/11a-10	appointed if requested or respondent adverse to GAL 5/11a-11(a)			or ward refuses 5/11a-11(a)	at ward's option	5/11a-11(a)	5/11a-11(a)		5/11a-11(e)
IND. Code Ann. (West 1994 & Supp. 1996)	29-3-5-1(c) 29-3-5-1(c)		29-3-2-3(a)	29-3-5-1(d) impossible, impractical, threat to health, safety	29-3-4-1(d)			29-3-5-1(e)		
IOWA Code Ann. (West 1992 & Supp. 1997)		633.561	Iowa R.Civ.P. 14			633.561(2)	633.570	633.555	clear & convincing 633.551A 633.561(1) 633.570	
KAN. Stat. Ann. (1994 & Supp. 1995)	59-3008	shall appoint at all stages 59-3010(a)(3)		finding that would be injurious to welfare	59-3010(a)(2)	59-3013 persons not necessary may be excluded	59-3013	59-3013clear & convincing	59-3013 physician or psychologist, psychological testing 59-3010(a)(6),	59-3011(a)(1)

EXHIBIT "E" *Continued*
Conduct and Results of Guardianship Proceedings

STATE	HEARING	LEGAL REPRESENTATION		PRESENCE IN COURT			HEARING CLOSED TO PUBLIC	JURY TRIAL	STANDARD OF PROOF	MEDICAL EVIDENCE
		Right to Counsel Guardian ad litem		Mandatory Attendance Except when Harmful Right to Attend						
KY. Rev. Stat. Ann. (Baldwin 1984 & Supp. 1992)		387.550	shall appoint 387.560(1)		387.570(3)	waived if serious risk of harm 387.570(3)		at ward's option 387.570(2)	mandatory 387.570(1)	clear & convincing 387.570(5) physician, psychologist & social worker 387.540(1)
LA. Civ. Code Ann. (West 1961 & Supp. 1996) LA. Rev. Stat. Ann. (West 1993 & Supp. 1996)	CCP Art. 4546	shall appoint CCP Art. 4544, 4545						to the satisfaction of judge	393	393
ME. Rev. Stat. Ann. (West 1981 & Supp. 1995)	18-A §5-303(b) shall appoint attorney, GAL or visitor	18-A §5-303(b) appointment when necessary	18-A §5-304(b)			18-A §5-303(c) at ward's request	18-A §5-303(c)		physician or licensed psychologist	18-A §5-303(b)
MD. Ann. Code (1991 & Supp. 1997) MD. Rules (Supp. 1989)	R77(b)(2)shall appoint	13-705(d)				13-705(e) at ward's option	13-705(e) not in protective proceedings 13-211	ward's option in guardianship 13-705(e) clear & convincing	13-705	2 physicians R73(b)(1)
MASS. Ann. Laws (Law. Co-op 1994 & Supp. 1996)	201-7		201-34	201-6	201-6 unless extraordinary				physician or psychologist 201-6, 201-6A	
MICH. Comp. Laws Ann. (West 1995 & Supp. 1996)	700.443(2)of choice 700.443(7)	shall appoint 700.443a(3)	700.443(2)			700.443(6)	at ward's request 700.443(8)	700.443(7)clear & convincing	700.444(1) physician	700.443(3)
N.C. Gen. Stat. (1995)	35A-1212	35A-1107 35A-1130(c)	if no attorney 35A-1107			at ward's option	35A-1112(a)	35A-1110clear, cogent & convincing	35A-1112(d) multi-disciplinary evaluation 35A-1111	35A-1212

EXHIBIT "E" *Continued*
Conduct and Results of Guardianship Proceedings

STATE	HEARING	LEGAL REPRESENTATION		PRESENCE IN COURT			HEARING CLOSED TO PUBLIC	JURY TRIAL	STANDARD OF PROOF	MEDICAL EVIDENCE
		Right to Counsel Guardian ad litem		Mandatory Attendance Except when Harmful Right to Attend						
N.D. Cent. Code (1998)	30.1-29-07(2) 30.1-28-03(3) may appoint, duties of GAL	30.1-29-07(2) 30.1-28-03(3) 30.1-29-07(2)	30.1-28-03(3)	30.1-28-03(7) good cause	30.1-28-03(7)		at ward's request 30.1-28-03(7)		clear & convincing 30.1-29-07(2) (b) physician & visitor	30.1-28-03(5)
OHIO Rev. Code Ann. (1994)	2111.02(C)	2111.02(A) if under legal disability	2111.23						physician or other qualified person	2111.031
OKLA. Stat. Ann. (West 1991 & Supp. 1997)	30 §3-109 right to counsel	30 §3-106.A.7		for good cause	30 §3-106.B	30 §3-106.A	at ward's request 30 §3-106.A.8		clear & convincing 30 §3-111 physician, psychologist social worker other report	30 §3-108.B.
OR. Rev. Stat. (1990 & Supp. 1994)	126.127(3)(d) court may appoint	126.103(2) 126.127(3)(a)				126.103(8) upon request	126.103(8)		clear & convincing 126.107 physician & visitor	126.103(3), (4)
PA. Cons. Stat. Ann. (1975 & Supp. 1996)	20 §5511(a)	20 §5511(a)	20 §5511 (a)	20 §5511(a)	20 §5511 (a)(1)	unless ward objects	20 §5511(a) upon objection	20 §5511(a) clear & convincing	20 §5511(a) 20 §5511(d)	physician
R.I. Gen. Laws (1995)	33-15-5 appoint attorney if respondent contests	33-15-7(d), (e) GAL shall be appointed	33-15-7(1)			33-15-5(1)			clear & convincing 33-15-5(3) professional to assess functional capacity	33-15-5(5)
S.C. Code Ann. (Law. Co-op. 1987 & Supp. 1995)	62-5-303(b)	shall appoint, may have powers of GAL 62-5-303(b)	62-5-303(b)			62-5-303 (b) at ward's request	62-5-303(b)		physician & 1 other	62-5-303(b)

EXHIBIT "E" *Continued*
Conduct and Results of Guardianship Proceedings

STATE	HEARING	LEGAL REPRESENTATION		PRESENCE IN COURT			HEARING CLOSED TO PUBLIC	JURY TRIAL	STANDARD OF PROOF	MEDICAL EVIDENCE
		Right to Counsel Guardian ad litem		Mandatory Attendance Except when Harmful Right to Attend						
S.D. Codified Laws Ann. (1984 & Supp. 1996)	29A-5-312 must appoint if requested, contested or needed 29A-5-117	29A-5-309 at court's discretion	29A-5-117	29A-5-312 for good cause	29A-5-312	29A-5-308 on ward or court motion	29A-5-312	29A-5-312	clear & convincing 29A-5-312	
TENN. Code Ann. (1991 & Supp. 1995)	34-4-205 shall appoint adversary counsel if not attorney of record 34-4-106(a)	34-4-213 may appoint if advisable 34-4-106(a) shall appoint 34-4-205(a)	34-11-107		34-4-107(4)			34-4-101(7)	physician from list submitted by adversary counsel 34-4-1 2 reputable physicians	34-4-205(2)
TEX. Prob. Code Ann. (West 1980 & Supp. 1997)	644 must appoint attorney ad litem to advocate	646 may appoint GAL	645	685			685 on request	643, 685(b) clear and convincing	684(a)(1)	687 letter from physician
UTAH Code Ann. (1993 & Supp. 1997)	75-5-303(2) shall appoint attorney	75-5-303(2), (4)		75-5-303(4) only if 4th stage Alzheimer, coma, profound retardation	75-5-303(4)	no jury if closed hearing requested	75-5-303(4)	75-5-303(4) clear & convincing 75-5-303	decision note physician & visitor	75-5-303(2)
VT. Stat. Ann. tit. 14 (1989 & Supp. 1995)	14-3064(a) 14-3068	shall appoint, court maintains pro bono list 14-3065(a),(c)	14-3066			14-3068(a) on ward's motion	14-3068(a)	clear & convincing	14-3068(f) mental health professional 14-3067 mental retardation professional	33-3606
VA. Code Ann. (Michie 1997)	convenient place 37.1-134.13	counsel of choice or appoint 37.1-134.12	petition, represent interests of respondent 37.1-134.9		37.1-134.13 clear & convincing	37.1-134.13 physician or psychologist or professional skilled in condition alleged	37.1-134.11			

EXHIBIT "E" *Continued*
Conduct and Results of Guardianship Proceedings

STATE	HEARING	LEGAL REPRESENTATION		PRESENCE IN COURT			HEARING CLOSED TO PUBLIC	JURY TRIAL	STANDARD OF PROOF	MEDICAL EVIDENCE
		Right to Counsel Guardian ad litem		Mandatory Attendance Except when Harmful Right to Attend						
WASH. Rev. Code Ann. (West 1967 & Supp. 1997)	11.88.030	shall appoint if unable to afford 11.88.045(1) (a)	11.88.090 11.88.040	good cause	11.88.040	11-88-045	permissive 11.88.040	11.88.045 (3)	clear, cogent & convincing 11.88.045(3) physician's report 11.88.045	(4)
W.VA. Code (1982 & Supp. 1997)	court or mental hygiene commissioner at convenient place 44A-2-9 mandated functions	44A-2-7	none	or not possible or refuses	44A-2-9	44A-2-9		clear & convincing	44A-2-9	licensed physician or psychologist 44A-2-3
WIS. Stat. Ann. (West 1991 & Supp 1996)	880.08 shall appoint counsel if requested, contested, or necessary	880.33(2)(a) shall appoint 880.33	(2)(a), (c)	880.08(1) GAL certifies why unable to attend	880.08(1)		880.33	(2)(a)clear & convincing	880.33(4) physician or licensed psychologist	880.33
WYO. Stat. (1985 & Supp. 1996)	3-2-103		3-1-108			3-4-104(b)	3-4-104(b)	3-2-103	preponderance 3-2-104	

Revised March 1998

EXHIBIT "F"
Initiation of Guardianship Proceedings

STATE	COURT	LEGAL STATUS	INCLUDED IMPAIRMENTS						
			Mental Illness	Mental Deficiency	Physical Disability	Advancing Age	Alcoholism	Drug Addiction	Other
ALA. Code (1975 & Supp. 1988)	probate 26-2A-20(3)	incapacitated 26-2A-20(8)	26-2A-20(8)	26-2A-20(8)	or illness 26-2A-20(8)	26-2A-20(8)	26-2A-20(8)	26-2A-20(8)	except minority 26-2A-20(8)
ALASKA Stat. (1985 & Supp. 1989)	superior 13.06.050(5)	incapacitated 13.26.113(c) and alternatives to full guardianship unfeasible 13.26.113(f)							any except minority 13.26.005(4)
ARIZ. Rev. Stat. Ann. (1975 & Supp. 1988)	superior 14-1201(7)	incapacitated 14-5304 and necessary & desirable for continuing care & supervision	of disorder 14-5101(1)	14-5101(1)	or illness 14-5101(1)		14-5101(1)	14-5101(1)	any except minority 14-5101(1) incapacities fn.8 880.01 (4), (8)
ARK. Code Ann. (Michie 1987 & Supp. 1989)	probate 28-65-107(a)	incapacitated 28-65-105 desirable to protect interests of incompetent	28-65-101(1)	28-65-101(1)	or illness 28-65-101(1)		28-65-101(1)	28-65-101(1)	under majority 28-65-104(1) detained by foreign power or disappeared 28-65-104(2)
CAL. Prob. Code (West 1981 & Supp. 1990)	1418								
COLO. Rev. Stat. (1987 & Supp. 1988)	district; probate in Denver 15-10-201(8)	15-14-302(2) and necessary & desirable for continuing care & supervision	15-14-101(1)	15-14-101(1)	or illness 15-14-101(1)	15-14-101(1)	15-14-101(1)	15-14-101(1)	any except minority 15-14-101(1)
CONN. Gen. Stat. Ann. (West 1981 & Supp. 1989)	probate 45-70b(a), 45-322	incapable of managing affairs or caring for self 45-70d(c)	45-20a(c), (d)	45-20a(c), (d)	or illness 45-20a(c), (d)	45-20a(c), (d)	45-20a(c), (d)	45-20a(c), (d)	confinement 45-20a(c), (d)
DEL. Code Ann. (1987 & Supp. 1989)	chancery 12 §3914(a)	unable to manage & care for person & property 12 §3914(a)	specifically excluded 12 §3914(a)		12 §3914(a)	12 §3914(a)			mental infirmity 12 §3914(a)

EXHIBIT "F" *Continued*
Initiation of Guardianship Proceedings

STATE	COURT	LEGAL STATUS	INCLUDED IMPAIRMENTS						
			Mental Illness	Mental Deficiency	Physical Disability	Advancing Age	Alcoholism	Drug Addiction	Other
D.C. Code Ann. (1989)	superior 21-2011(2)	incapacitated 21-2011(11) unable to properly care for property							
FLA. Stat. Ann. (West 1986 & Supp. 1990)	circuit 744.102(15)	incapacitated 744.331							ability is limited to extent lacks capacity to manage 744.102(10)
GA. Code Ann. (1986 & Supp. 1988)	probate 29-5-1(a)	incapacitated 29-5-6-(a)(3)	or disability 29-5-1(a)(1)	mentally retarded 29-5-1(a)(1)	or illness 29-5-1(a)(1)	29-5-1(a)(1)	29-5-1(a)(1)	29-5-1(a)(1)	detention by foreign power 29-5-1(a)(2)
HAW. Rev. Stat. (1985 & Supp. 1999)	family 560:5-102	incapacitated 560:5-304	560:5-101(2)	560:5-101(2)	or illness 560:5-101(2)	560:5-101(2)	560:5-101(2)	560:5-101(2)	except minority 560:5-101(2)
IDAHO Code (1979 & Supp. 1988)	district 15-1-201(6)	incapacitated 15-5-304 necessary & desirable for continuing care & supervision	15-5-101(a)	15-5-101(a)	or illness 15-5-101(a)	15-5-101(a)	15-5-101(a)	15-5-101(a)	except minority 15-5-101(a)
ILL. Ann. Stat. (Smith-Hurd 1978 & Supp. 1990)	probate county ct. 110 1/2 §11-4 Fn. 4	disabled 110 1/2 §11a-2(b), 3(a), 12(b)	110 1/2 §11a-2(b)	developmentally disabled 110 1/2 §11a-2(b)	incapacity 110 1/2 §11a-2(a)	mental deterioration 110 1/2 §11a-2(a)	110 1/2 §11a-2(a)	110 1/2 §11a-2(c)	gambling, idleness, or debauchery 110 1/2 §11a-2(c)
IND. Code Ann. (Burns 1989 & Supp. 1990)	probate & mental health division of municipal ct. & juvenile 29-3-1-3 29-3-2-1 (c), d)	disabled 29-3-1-4	or insanity 29-3-1-4(2)	29-3-1-4-(2)	or illness 29-3-1-4(2)	senility or old age 29-3-1-4(3)	29-3-1-4(2)	29-3-1-4(2)	other incapacity 29-3-1-4(2)
IOWA Code Ann. (West 1966 & Supp. 1989)	district 633.3(9) 633.10(3)	incompetent 633.3(22) incapable of caring for self 633.552(2) 633.566(2)	633.552(2) 633.566(2)		633.552(2) 633.566(2)				other incapacity 633.552(2) 633.566(2)
KAN. Stat. Ann (1983 & Supp. 1988)	district 59-3006	incapacitated 59-3013 disabled 59-3006							

EXHIBIT "F" *Continued*
Initiation of Guardianship Proceedings

STATE	COURT	LEGAL STATUS	INCLUDED IMPAIRMENTS						
			Mental Illness	Mental Deficiency	Physical Disability	Advancing Age	Alcoholism	Drug Addiction	Other
KY. Rev. Stat. Ann. (Baldwin 1983 & Supp. 1992)	district 387.582	disabled 387.590							
LA. Civ. Code Ann. (West 1952) & Rev. Stat. Ann. (West 1965 & Supp. 1969)	judge of domicile or residence 392; RS 9:1003	mentally incapacitated 389, 393 physical infirmity 422 RS9:1002	insanity or madness 389	imbecility 389	422		RS 9:1002		any infirmity 422
ME. Rev. Stat. Ann. (West 1981 & Supp. 1988)	probate 18-A §1-201(5)	incapacitated 18-A § 5-304 necessary & desirable for continuing care & supervision	18-A §5-101(1)	18-A §5-101(1)	or illness 18-A §5-101(1)		18-A §5-101(1)	18-A §5-101(1)	except minority 18-A §5-101(1)
MD. Code Ann. (1984 & Supp. 1991)	circuit 13-105(b) 13-101(b)	13-706	disability or other weakness 13-201(c)(1) R73(b)(1) 13-705(b)	disability 13-201(c)(1) R73(b)(1) 13-705(b)	disease 13-201 (c)(1) R73(b)(1) disability R73(b)(1) 13-705(b)		13-201(c)(1) R73(b)(1) 13-705(b)	13-201(c)(1) R73(b)(1) 13-705(b)	compulsory hospitalization, confinement, detention by foreign power, disappearance 13-201(c)(1)
MASS. Gen. L. (1981 & Supp. 1989)	probate 201 §1	mentally ill mentally retarded, or spendthrift 201 §1	or mental weakness 201 §1	mentally retarded 201 §1	conservator-ship 201 §1	conservator-ship 201 §1	excessive drinking or spendthrift 201 § 8		spendthrift 201 §1
MICH. Comp. Laws Ann. (1980 & Supp. 1990)	probate 27.5003(7)	incapacitated 27.5444 and necessary 27.5484	27.5008	27.5008	or illness 27.5008		27.5008	27.5008	except minority
MINN. Stat. Ann. (West 1976 & Supp. 1989)	probate 525.011	incapacitated 525.551(5)(b)(1) in need of supervision & protection & no less restrictive alternatives 525.551(5)(b)(2)(3)							

EXHIBIT "F" *Continued*
Initiation of Guardianship Proceedings

STATE	COURT	LEGAL STATUS	INCLUDED IMPAIRMENTS						
			Mental Illness	Mental Deficiency	Physical Disability	Advancing Age	Alcoholism	Drug Addiction	Other
MISS. Code Ann. (1973 & Supp. 1989)	chancery 93-13-121 93-13-123 93-13-125 93-13-131	incompetent 93-13-121 unsound mind 93-13-123, 125 drunkard or drug addict 93-13-131	in need of mental treatment 93-13-111			excluded 93-13-121	93-13-131	93-13-131	
MO. Ann. Stat. (Vernon 1956 & Supp. 1990)	probate const. 1945, art. 5, § 16	incompetent 475.090 475.078	475.010(4)	475.010(4)	any physical condition 475.010(4)				
MONT. Code Ann. (1989 & Supp. 1990)	district 72-1-103(7)	incapacitated 72-5-316(1) and necessary to meet essential requirements for physical health or safety 72-5-316(1)	72-5-101(1)	72-5-101(1)	or illness 72-5-101(1)		72-5-101(1)	72-5-101	except minority 72-5-101
NEB. Rev. Stat. (1985 & Supp. 1988)	county 30-2209(5)	incapacitated 30-2620 and necessary or desirable for continuing care & supervision	30-2601(1)	30-2601(1)	or illness 30-2601(1)	30-2601(1)	30-2601(1)	30-2601(1)	except minority 30-2601(1)
NEV. Rev. Stat. (1986 & Supp. 1988)	159.015	incompetent 159.054	159.019	or weakness of mind	disease 159.019	159.019			any other cause 159.019
N.H. Rev. Stat. Ann. (1983 & Supp. 1989)	probate 464-A:2(IV)	incapacitated 464-A:9(111)(a) necessary to continuing care & supervision, no available alternatives, least restrictive form of intervention 464-A:9(111)(b)-(d)							
N.J. Stat. Ann. (1983 & Supp. 1989) N.J. Rules (1992)	superior 3B:12-25 county or superior R.4:83-1	incompetent 3B:12-25 R.4:83-1	insanity, lunacy, or unsound mind R.4:83-1 3B:1-2	idiocy R.4:83-1 3B:1-2	or illness 3B:1-2		3B:1-2 R.4:83-1	3B:1-2	

EXHIBIT "F" *Continued*
Initiation of Guardianship Proceedings

STATE	COURT	LEGAL STATUS	INCLUDED IMPAIRMENTS						
			Mental Illness	Mental Deficiency	Physical Disability	Advancing Age	Alcoholism	Drug Addiction	Other
N.M. Stat. Ann. (Michie 1978 & Supp. 1989)	district 45-5-302	incapacity 45-5-10(F) and necessary or desirable for continuing care & supervision 45-5-304	45-5-101(F)	45-5-101(F)	or illness 45-5-101(F)		45-5-101(F)	45-5-101(F)	
N.Y. Mental Hyg. Law (McKinney 1988 & Supp. 1992)	supreme ct., & county cts, outside NYC 81.04	incapacitated and necessary to provide for personal needs and likely to suffer harm 81.02							
N.C. Gen. Stat. (1987 & Supp. 1988)	clerk of superior ct. 35A-1103 35A-1203	incompetent from want of understanding to manage own affairs 35A-1101(7) 35A-1120	35A-1101(7)	mentally retarded 35A-1101(7)	diseases, injury 35A-1101(7)		inebriety 35A-1101(7)	inebriety 35A-1101(7)	cerebral palsy, autism, epilepsy 35A-1101(7)
N.D. Cent. Code (1976 & Supp. 1989)	clerk of superior ct. 30.1-28-1 et seq.	incapacitated 30.1-28-04(2) and necessary or desirable for continuing care & supervision	30.1-28-01(1)	30.1-28-01(1)	or illness 30.1-28-01(1)	30.1-28-01(1)		30.1-28-01(1)	except minority 30.1-28-01(1)
OHIO Rev. Code Ann. (Anderson 1978 & Supp. 1989)	probate 2111.02	incompetent 2111.02	2111.01(D)	mental disability or infirmity, mentally retarded 2111.01(D)	or infirmity 2111.01(D)		substance abuse 2111.01(D)		improvidence 2111.01(D)
OKLA. Stat. Ann. (West 1978 & Supp. 1990)	district court 30 §1-115	incapacitated 30 §1-111(12) 30 §3-110	30 §1-111(12)	mental retardation or developmental disability 30 §1-111(12)	or illness 30 §1-111(12)		30 §1-111(12)	30 §1-111(12)	or similar cause 30 §1-111(12)
OR. Rev. Stat. (1987 & Supp. 1988)	probate 126.003(2)	incapacitated 126.107(1) necessary or desirable for continuing care & supervision 126.098							

EXHIBIT "F" *Continued*
Initiation of Guardianship Proceedings

STATE	COURT	LEGAL STATUS	INCLUDED IMPAIRMENTS						
			Mental Illness	Mental Deficiency	Physical Disability	Advancing Age	Alcoholism	Drug Addiction	Other
PA. Cons. Stat. Ann. (1975 & Supp. 1992)	common pleas orphan's ct. 20 §711(6)	incapacitated 20 §5501 20 §5511	20 §5501	or mentally retarded 20 §5501		20 §5501	inebriety 20 §5501	20 §5501	
R.I. Gen. Laws (1984 & Supp. 1992)	probate 33-15-8	incapacity 33-15-8	mental disability 33-15-8		33-15-8				disability 33-15-44
S.C. Code Ann. (Law. Co-op 1987 & Supp. 1988)	probate 62-1-302(2)	incompetent 21-19-10 mentally retarded 21-19-200							
S.D. Codified Laws Ann. (1984 & Supp. 1988)	circuit 30-27-5 county board of mental retardation 27B-6-1	incompetent 21-19-10 mentally retarded 21-19-200	30-27-6						for any cause mentally or physically incompetent
TENN. Code Ann. (1984 & Supp. 1992)	chancery, circuit, law & equity, or probate 34-4-102 county, probate or chancery 34-4-203 34-4-103	disabled 34-4-110 incapable of managing estate 34-4-203(a)	34-4-110(2) mental weakness 34-4-203	developmentally disabled 34-4-102(2) mental weakness 34-4-203	illness or injury 34-4-102(2) incapacity 34-4-203	34-4-102(2) 34-4-203			
TEX. Prob. Code Ann. (West 1980 & Supp. 1990)	county judge 415 county ct. 111 county probate 130 B	incompetent 109(c) incapacitated 130(A) unsound mind or habitual drunkard 418, 114	unsound mind 114(a), 418 condition 130A	condition 130A	condition 130A		habitual drunkard 114(a), 418		necessary to receive funds from gov't source 114(a)
UTAH Code. Ann. (1978 & Supp. 1990)	district 75-1-201 (5)	incapacitated 75-5-304 necessary or desirable for continuing care & supervision 75-5-304	75-1-201(18)	75-1-201(18)	or illness 75-1-201(18)		75-1-201(18)	75-1-201(18)	except minority 75-1-201(18)

EXHIBIT "F" *Continued*
Initiation of Guardianship Proceedings

STATE	COURT	LEGAL STATUS	INCLUDED IMPAIRMENTS						
			Mental Illness	Mental Deficiency	Physical Disability	Advancing Age	Alcoholism	Drug Addiction	Other
VT. Stat. Ann. tit. 14 (1974 & Supp. 1988); tit. 33 (1981 & Supp. 1988) VT. Rules of Probate Proc. (1986 & Supp. 1988)	probate 14 §3062 district 33 §3603	mentally retarded in need of supervision & protection 33 §3604 mentally disabled 14 §3068(f)	14 §3061(1)(B)	mentally retarded 14 §3061(1)(B) mentally disabled 14 §3068(f) 33 §3604					
VA. Code Ann. (Michie 1984 & Supp. 1992)	circuit 37.1-128.02(A)	incompetent 37.1-128.02(A) incapacitated 37.1-128.1(A) incapable of taking care of self or handling & managing estate 37.1-128.02(A) 37.1-132	37.1-128.02(A) 37.1-128(A)	mentally retarded 37.1-128.02(A) 37.1-128(A)	37.1-132				or impaired health 37.1-132
WASH. Rev. Code Ann. (West 1987 & Supp 1989) 1990 S.B. 6868	superior 11.88.010(1)	incompetent 11.88.010(1) disabled 11.88.010(2)	11.88.010(1), (2)	developmentally disabled 11.88.010 (1), (2)		senility 11.88.010(1), (2)	11.88.010(1), (2)	11.88.010(1), (2)	other mental incapacity 11.88.010(1), (2)
W.VA. Code (1986 & Supp. 1989)	county commission 27-11-1(a)	incompetent 27-11-1(d)							
WIS. Stat. Ann. (West 1988 & Supp. 1989)	circuit 880.02	incompetent 880.03 spendthrift 880.03		developmentally disabled 880.01(4)		880.01(4)			
WYO. Stat. (1987 & Supp. 1989)	district 3-1-101 3-4-101	incompetent or mentally incompetent 3-2-101 developmentally disabled 3-4-105	3-1-101 impairment 3-4-101	retardation 3-1-101 impairment 3-4-101	disease 3-1-101 impairment 3-4-101	3-1-101	3-1-101	3-1-101	

EXHIBIT "G"
Notice in Guardianship Proceedings

STATE	APPLICATION	NOTICE OF PROCEEDING				
		Respondent	Relatives	Other	When	Waiver or Substitute Service
ALA. Code (1975 & Supp. 1988)	any person alleged incompetent 26-2A-102(a)	26-2A-50 26-2A-103(a)(1)	26-2A-103(a)(1) 26-2A-103(a)(3)	26-2A-103(a)(2) 26-2A-103(a)(4)	14 days 26-2A-50(b)(1)	26-2A-51 26-2A-103(d)
ALASKA Stat. (1985 & Supp. 1989)	interested person alleged incompetent 13.26.105(a)	13.26.135(a)(1)	spouse, parents & adult children 13.26.135(a)(4) closest adult relative 13.26.135(a)(3)	person having care & custody 13.26.135(a)(2)	upon appointment of visitor 13.26.107(a)(1)	
ARIZ. Rev. Stat. Ann. (1975 & Supp. 1988)	interested person alleged incompetent 14-5303(A)	14-5309(A)(1)	spouse, parents, & adult children 14-5309(A)(1) closest adult relative 14-5309(A)(3)	person having care & custody 14-5309(A)(2)		waiver ineffective unless present at hearing or confirmed by visitor 14-5309(B)
ARK. Code Ann. (Michie 1987 & Supp. 1989)	28-65-205(a)	If over 14 28-65-207(b)(1)	parents of minor, spouse, or nearest competent relative 28-65-207(b)(2), (3), (5)	any other person 28-65-207(b)(4)	20 days before hearing 28-65-207(c)(1)	20-65-207(a)(2)
CAL. Prob. Code (West 1981 & Supp. 1990)	interested person or friend alleged incompetent 1820(a)(1), (5)	citation 1823(a)	spouse & relatives 1822(b)(1), (2)	1822(c)-(g)	15 days before hearing 822(a) citation within 30 days 1824	
COLO. Rev. Stat. (1987 & Supp. 1988)	interested person alleged incompetent 15-14-303(1)	15-14-309(1)(a)	spouse, parents & adult children 15-14-309(1)(a) closest adult relative 15-14-309(1)(c)	person having care & custody 15-14-309(1)(b)		waiver ineffective unless present at hearing or confirmed by visitor 15-14-309(2)
CONN. Gen. Stat. Ann. (West 1981 & Supp. 1989)	45-322	45-70c(a)(1)(A)	spouse 45-70c(a)(1)(B) children, parents or brothers & sisters 45-70c(a)(2)(F)	person in charge of hospital, nursing home, or institution 45-70c(a)(1)(A), (2), (3)	7 days before hearing * within 30 days of application 45-70c(a)	
DEL. Code Ann. (1987 & Supp. 1989)	any person alleged incompetent 12 §3914(a)	12 §3941(b)		such others as ct. may deem desirable 12 §3914(b)		notice waived if petitioner also respondent 12 §3914(b)
D.C. Code Ann. (1989)	any person alleged incompetent 21-2041(a)	21-2042(a)(1)	21-2042(a)(3)	such others as ct. directs 21-2042(a)(4)	14 days before hearing 21-2031(b)(1)	21-2032 21-2043(d)

EXHIBIT "G" *Continued*
Notice in Guardianship Proceedings

STATE	APPLICATION	NOTICE OF PROCEEDING				
		Respondent	Relatives	Other	When	Waiver or Substitute Service
FLA. Stat. Ann. (West 1986 & Supp. 1990)	adult 744.320(1)	744.331(4)	one or more members of family 744.331(4)	such persons as ct. may direct 744.331(4)		see 48.021 for special process servers appointed by sheriff
GA. Code. Ann (1986 & Supp. 1988)	interested person alleged incompetent dep't human resources 29-5-6(a)(1)	29-5-6-(d)(1)		attorney 29-5-6(d)(1)	10 days before hearing 29-5-6(d)(1)	
HAW. Rev. Stat. (1985 & Supp. 1988)	interested person alleged incompetent 560:5-303(a)	560:5-309(a)(1)	spouse, parents, & adult children 560:5-309(a)(1) closest adult relative 560:5-309(a)(3)	person with care & custody 560:5-309(a)(2)		waiver ineffective unless present at hearing or confirmed by visitor 15-5-309(b)
IDAHO Code (1979 & Supp. 1988)	interested person alleged incompetent 15-5-303(a)	15-5-309(a)(1)	spouse, parents, & adult children 15-5-309(a)(1) closest adult relative 15-5-309(a)(3)	person with care & custody 15-5-309(a)(2)		waiver ineffective unless present at hearing or confirmed by visitor 15-5-309(b)
ILL. Ann. Stat. (Smith-Hurd 1978 & Supp. 1990)	reputable person alleged incompetent 110 1/2 §11a-3(a)	110 1/2 §11a-10(e)		those whose names appear in petition 110 1/2 §11a-10(f)	14 days before hearing 110 1/2 §11a-10(e), (f)	
IND. Code Ann. (Burns 1989 & Supp. 1990)	29-3-5-1(a)	29-3-6-1(4)(a)	spouse, parents & adult children 29-3-6-1(4)(a)	person having care & custody 29-3-6-1-(4)(b) any other person directed by ct. 29-3-6-1(4)(c)		29-3-6-1(4)
IOWA Code Ann. (West 1966 & Supp 1989)	any person alleged incompetent 633.522, 633.566, 633.556, 633.572	633.554 633.568		if a minor 633.554 633.568		
KAN. Stat. Ann (1983 & Supp. 1988)	any person 59-3009	59-3012	spouse or natural guardian 59-3012	attorney & such others as ct. directs 59-3012	5 days before hearing 59-3012(B)	to head of psychiatric hospital if hospitalized 59-3012(B)
KY. Rev. Stat. Ann. (Baldwin 1983 & Supp. 1992)	interested person alleged incompetent 387.530	387.550(2)		attorney & such others as ct. directs 387.550(2)	14 days before hearing 387.550(2)	
LA. Civ. Code Ann. (West 1952) & Rev. Stat. Ann. (West 1965 & Supp 1989)	any stranger 391					
ME. Rev. Stat. Ann (West 1981 & Supp. 1988)	any interested person alleged incompetent 18-1 §5-303(a)	18-A §5-309(a)(1)	spouse, parent & adult children 18-A §5-309(a)(3) closest adult relative 18-A §5-309(b)	person with care & custody 18-A §5-309(a)(2)	14 days before hearing 18-A §5-309(b)	waiver ineffective unless present at hearing or confirmed by visitor 18-A §5-309(b)

EXHIBIT "G" *Continued*
Notice in Guardianship Proceedings

STATE	APPLICATION	NOTICE OF PROCEEDING				
		Respondent	Relatives	Other	When	Waiver or Substitute Service
MD. Code Ann. (1984 & Supp. 1991)	interested person alleged incompetent R71(a)(2)	interested persons designated by ct. R74(b)	interested persons designated by ct. R74(b)	interested persons designated by ct. R74(b)		
MASS. Gen. L. (1981 & Supp. 1989)	alleged incompetent for conservatorship 201 §16 parent, 2 relatives or friends, mental health dep't 201 §6 human service agency 201 §6A, 16B relative or public welfare dep't 201 §8	201 §§7, 9, 17	spouse of spendthrift 201 §9 heir apparent 201 §17	dep't of mental health or dep't of mental retardation 201 §7	7 days before hearing 201 §§7, 9, 17	conservatorship, if asserts in writing 201 §17
MICH. Comp. Laws Ann. (1980 & Supp. 1990)	interested person alleged incompetent 27.5443	27.5451	spouse, parents, & adult children 27.5451	27.5451(b)		ineffective unless present at hearing or confirmed by visitor 27.5451
MINN. Stat. Ann. (West 1976 & Supp. 1989)	525.542	525.55(1)	spouse, parents, adult children, sibling, next of kin 525.55(1)	administrative head of hospital or institution; such others as ct. directs 525.55(1)	14 days before hearing 525.55(1)	
MISS. Code Ann. (1973 & Supp. 1989)	interested party 93-13-125 93-13-111 incompetent 93-13-121 guardian of incompetent 93-13-121 relative of friend of unsound person, drunkard or drug addict 93-13-123, 125, 131, 111	9-13-11		5 days prior to hearing 93-13-111		
MO. Ann. Stat. (Vernon 1956 & Supp. 1990)	475.060	475.075(2)	spouse, parents, one closest relative 475.075(2)		reasonable time before hearing 475.075(2)	
MONT. Code Ann. (1989 & Supp. 1990)	interested person alleged incompetent 72-5-315(1)	72-5-314(1)(a)	spouse, parents & adult children 72-5-314(1)(a) closest adult relative 72-5-314(1)(c)	person with care custody 72-5-314(1)(c)		waiver ineffective unless present at hearing or confirmed by visitor 72-5-314(2)

EXHIBIT "G" *Continued*
Notice in Guardianship Proceedings

STATE	APPLICATION	NOTICE OF PROCEEDING				
		Respondent	Relatives	Other	When	Waiver or Substitute Service
NEB. Rev. Stat. (1985 & Supp. 1988)	interested person alleged incompetent 30-2619(a)	30-2625(a)(1)	spouse, parents & adult children 30-2625(a)(1) closest adult relative 30-2625(a)(3)	person with care & control 30-2625(a)(2)		waiver ineffective unless present at hearing or confirmed by visitor 30-2625(b)
NEV. Rev. Stat (1986 & Supp. 1988)	159.044 alleged incompetent 30-2619(a)	159.047	souse & adult children, or parent, brother, or sister 159.047(2)(a)(1)	person with care, custody or control 159.047(2)(a)(2)	20 days before hearing 159.0475(1)	
N.H. Rev. Stat. Ann. (1983 & Supp 1989)	interested person alleged incompetent 464k-A:4(1)	464-A:5(1)	464-A:5(IV)(a)	proposed guardian; director where patient is in institution 464-A:5(IV)(a)	14 days before hearing 464-A:5(1), (IV)	
N.J. Stat. Ann. (1983 & Supp. 1989) N.J. Rules (1982)		R.4:83-4(b)	spouse, adult children & parents R.4:83-4(a)	person with care or custody, & such others as ct. directs R.4:83-4(a)	20 days before hearing R.4:83-4(a)	ct. may, for good cause, shorten or dispense with notice R.4:83-4(a)
N.M. Stat. Ann. (Michie 1978 & Supp. 1989)	interested person alleged incompetent 45-5-303(A)	45-5-309(A)(1)	45-5-309(A)(2)	person with care & custody 45-5-309(A)(3)		waiver ineffective unless present at hearing or confirmed by visitor 45-5-309(B)
N.Y. Mental Hyg. Law (McKinney 1988 & Supp. 1992)	alleged incapacitated, presumptive distributee, executor, administrator, trustee, person with whom alleged incapacitated resides, other concerned, chief officer of state facility 81.06	large type, plain language, in other than English if necessary 81.07	spouse, parents, adult children, adult siblings, person with whom resides 81.07(d)	at least one relative, person designated by alleged incapacitated, organization with demonstrated interest, attorney, court evaluator, dep't social services, state facility 81.07(d)	14 days 81.07(2)(f)	
N.C. Gen. Stat. (1987 & Supp. 1988)	35A-1105	35A-1109	spouse, adult children, or next of kin, or persons acting in loco parentis 35A-1109	guardian ad litem or counsel appointed by clerk 35A-1109	not less than 10 days 35A-1108	
N.D. Cent. Code (1976 & Supp. 1989)	interested person alleged incompetent 30.1-28-03(1)	30.1-28-09(1)(a)	spouse, parents & adult children 30.1-28-09(1)(a) closest adult relative 30.1-28-09(1)(c)	person with care & custody 30.1-28-09(1)(b)		waiver ineffective unless present at hearing or confirmed by visitor 30.1-28-09(2)
OHIO Rev. Code Ann. (Anderson 1978 & Supp. 1989)	interested party 2111.02	2111.04(B)(1)	next of kin 2111.04(B)(2)		3 days before appointment 2111.04	waiver prohibited 2111.04(B)(2)

EXHIBIT "G" *Continued*
Notice in Guardianship Proceedings

STATE	APPLICATION	NOTICE OF PROCEEDING				
		Respondent	Relatives	Other	When	Waiver or Substitute Service
OKLA. Stat. Ann. (West 1976 & Supp. 1990)	interested person 30 §3-101	30 §3-110	30 §3-110	30 §3-110	10 days before hearing 58 §851	waiver prohibited 30 §3-106(B)
OR. Rev. Stat. (1987 & Supp. 1988)	interested person alleged incompetent 126.103(1)	126.127(1)	spouse, parents, & adult children 126.127(1) closest adult relative 126.127(3)	person with care & custody 126.127(2)	before hearing 126.103(2) 126.007(1)	waiver not by person alleged incompetent 126.013
PA. Cons. Stat. Ann (1975 & Supp. 1992)	interested person 20 §5511(a)	large type, simple language, purposes of proceeding 20 §5511(a)	all who are sui juris 20 §5511(a)	such others as ct. may direct 20 §5511(a)		
R.I. Gen. Laws (1984 & Supp. 1992)	relative, friend or director or public welfare 33-15-8	33-15-17.1 plain language, large type, hearing rights, consequences of appointment	by publication; next of kin of minor 33-15-17.1	by publication 33-15-8 33-15-17.1	upon filing petition 33-15-8 15 days before any action 33-15-17	33-15-9
S.C. Code Ann. (Law. Co-op 1987 & Supp. 1988)	for mentally retarded with consent of parents 21-19-200 for incompetent interested person 21-23-20	62-5-405(a)	62-5-309(a)(1) 62-5-405(a)			
S.D. Codified Laws Ann. (1984 & Supp. 1988)	other person, relative, secretary of social services 30-27-11 responsible individual 27B-6-1 alleged incompetent if over 14 30-27-11	30-27-15	such relatives as ct. directs 30-27-15	person with care & custody & such others as ct. directs 30-27-15	manner & method to be determined by ct. 30-27-15	may be dispensed with for minor with good cause 30-27-15
TENN. Code Ann. (1984 & Supp. 1992)	interested person 34-12-104(a), 34-4-104(a) alleged incompetent 34-4-104(a), 34-4-203(a) friend or relative 34-4-203(a)	personal service mandated 4-14-105 34-4-204	certified mail to parent or guardian, if a minor; person most closely related 34-4-105 husband, wife, descendants, ascendants, & next of kin 34-4-204	person, institution or agency with care & custody 34-4-105	7 days before appointment 34-4-204 7 days before hearing 34-4-104(c)	to guardian ad litem if personal service would be a futile act 34-4-105(a)

EXHIBIT "G" *Continued*
Notice in Guardianship Proceedings

STATE	APPLICATION	NOTICE OF PROCEEDING				
		Respondent	Relatives	Other	When	Waiver or Substitute Service
TEX. Prob. Code Ann. (West 1980 & Supp. 1990)	interested person 415, 111, 130(c) county officer 415 alleged incompetent 130(c)	notice by posting 418, 420, 130(E) by citation 130(c); 130E(b) service 130E(c)	notice by posting 418, 420, 130E(c)(a) parents, first degrees			citation not required if judged unsound or drunkard within prior 6 months 130(d)
UTAH Code Ann. (1978 & Supp. 1990)	interested person alleged incompetent 75-5-303(1)	75-5-309(1)(a)	spouse, parents & aduit children 75-5-309(1)(a) closest adult relative 75-5-309(1)(c)	person with care & custody 75-5-309(1)(b) testamentary guardian 75-5-309(1)(d)		waiver ineffective unless present at hearing or confirmed by visitor 75-5-309(2)
VT. Stat. Ann. tit. 4 (1974 & Supp. 1988); tit. 33 (1981 & Supp. 1988) VT. Rules of Probate Proc. (1986 & Supp. 1988)	interested person 14 §§3063, 3065 state's attorney 33 §3065	14 §3064(a) 33 §3607 VRPP 4(d)	spouse or nearest relative 14 §3064(a) VRPP 4(d) spouse or nearest relative 33 §3607	14 §3054(a) VRPP 4(d) counsel, state's attorney, & such others as ct. directs 33 §3607	10 days before hearing 33 §3607	
VA. Code Ann. (Michie 1984 & Supp. 1992)	37.1-128.02(A), 37.1-128.1(a)	readily understandable 37.1-128.02 37.1-128.1, 132	immediate family member 37.1-132		reasonable notice 37.1-128.02(A) 37.1-128.1(A) 5 days to family 37.1-132	
WASH. Rev. Code Ann. (West 1987 & Supp. 1989)	interested person or entity 11.88.030(1)	if over 14 11.88.040(1)	parent of minor & spouse 11.88.040(2)	person with whom respondent resides 11.88.040(3)	10 days before hearing 11.88.040	may be waived by all parties but respondent 11.88.040
W.VA. Code (1986 & Supp. 1989)		27-11-1(b)	spouse or adult next of kin 27-11-1(b)		10 days before hearing 27-11-1(b)	
WIS. Stat. Ann. (West 1988 & Supp. 1989)	any person relative or public official 880.07(1)	880.08(1),(2)	presumptive adult heirs 880.08(1)	existing guardian; counsel; person with custody 880.08(1)	10 days before hearing 880.08(1), (2)	
WYO. Stat. (1987 & Supp. 1989)	interested party 3-2-101 3-4-102	3-2-102 3-4-103	spouse & children or parents 3-2-102	custodian 3-2-102 proposed guardian 3-4-103	10 days before hearing 3-4-103	may be waived for good cause 3-2-102 3-4-103

EXHIBIT "H"
Conduct and Results of Guardianship Proceedings

STATE	HEARING	LEGAL REPRESENTATION		PRESENCE IN COURT			HEARING CLOSED TO PUBLIC	JURY TRIAL	STANDARD OF PROOF	SUPPORTING EVIDENCE	
		Right to Counsel	Guardian ad litem	Mandatory Attendance	Except when Harmful	Right to Attend				Court Medical Certification	Ordered Examination
ALA. Code (1975 & Supp. 1988)	26-2A-135(a)	26-2A-135(d)	26-2A-52		26-2A-135(d)	26-2A-135(d)		26-2A-135	26-2A-45		26-2A-102(b)
ALASKA Stat. (1985 & Supp. 1989)	13.26.106(a)	13.26.126(b) 13.26.109(c)	13.26.112	13.26.109(a) on court order		13.26.114	13.26.113(4) at ward's option	13.26.113(a)(6)	13.26.113 clear & convincing		13.26.106(c) expert & visitor
ARIZ. Rev. Stat. Ann. (1975 & Supp. 1988)	14-5303(B)	14-5303(B)				14-5303(B)	14-5303(B) at ward's option	14-5303(B)		14-5303 report includes function assessment	14-5303 physician, psychologist, or RN
ARK. Code Ann. (Michie 1987 & Supp. 1989)	28-65-213(a)	28-65-213(a)(1)		57-615(b) at court's discretion		28-65-213(a)(5)			28-65-213(b) clear & convincing	28-65-211(b)(1) sworn testimony or evidence of 1 or more qualified medical witnesses	28-65-211(b)(1)
CAL. Prob. Code (West 1981 & Supp. 1990)	1822	1823(b)(6)	1455	1825(a)	1823(c)	1823(b)(5)		1823(b)(7) see 1457		1825(b) if unable to attend hearing	1826 if unwilling or unable to attend hearing
COLO. Rev. Stat. (1987 & Supp. 1988)	15-14-303(2)	15-14-303(2)(a)	15-14-309(2) not required see 15-14-314 15-14-407			15-14-303(4)	15-14-303(4) at ward's option	15-14-303(4)			15-14-303(3) physician 15-14-303(2)
CONN. Gen. Stat. Ann. (West 1981 & Supp. 1989)	45-70c(a)	45-70c(b)(2)				45-70c(b)(2)			45-70d(c) clear & convincing	45-326 at least 3 representativ es from appropriate disciplines	45-70d(a)
DEL. Code Ann. (1987 & Supp. 1989)	12-3914(b)										
D.C. Code Ann. (1989)	21-2041(d) 21-2054(a)	21-2041(h)	21-2033(a)			21-2041(h)	21-2041(h) at ward's option	21-2023(a)			21-2041(d)

EXHIBIT "H" *Continued*
Conduct and Results of Guardianship Proceedings

STATE	HEARING	LEGAL REPRESENTATION		PRESENCE IN COURT			HEARING CLOSED TO PUBLIC	JURY TRIAL	STANDARD OF PROOF	SUPPORTING EVIDENCE	
		Right to Counsel	Guardian ad litem	Mandatory Attendance	Except when Harmful	Right to Attend				Court Medical Certification	Ordered Examination
FLA. Stat. Ann. (West 1986 & Supp. 1990)	744.331(4)	744.331(2)	744.331(1)	744.331(4) waived for good cause					744.331(4) clear & convincing	744.331 (2)(c) if applicant alleged incompetent	744.331(5)(a) examining committee
GA. Code Ann. (1986 & Supp. 1988)	29-5-6(d)(1)	29-5-6(b)(1)(B)	29-5-6(b)(1)(D)	29-5-6(e)(1) may be waived for good cause			29-5-6(e)(1) at ward's option	29-5-6(e)(3)	29-5-6(e)(4) clear & convincing	29-5-6(c)(1) physician or applied psychologist	29-5-6(c)(1) physician or applied psychologist
HAWAII Rev. Stat. (1985 & Supp. 1988)	560:5-303(b)	560:5-303(b)	560:5-303(b)			560:5-303(b)		560:5-303(a)			560:5-303(b) physician & family ct. officer
IDAHO code (1979 & Supp. 1988)	15-5-303(b)	15-5-303(b)	15-5-303(b) named when ward is unrepresented			15-5-303(b)	15-5-303(b) at ward's option				15-5-303(b) physician & visitor
ILL. Ann. Stat. (Smith-Hurd 1978 & Supp. 1990)	110 1/2, 11a-10(a)	110 1/2, 11a-11(a)	110 1/2, 11a-10(a)	110 1/2, 11a-11(a)			110 1/2, 11a-11(a) at ward's option	110 1/2, 11a-11(a)		110 1/2, 11a-9(a) report	110 1/2, 11a-9(b), 11(c)
IND. Code Ann. (Burns 1989 & Supp. 1990)	29-3-5-(c)		29-3-2-3	20-3-5-1(d)	29-3-4-1(d)(2)			29-3-5-1(c)			
IOWA Code Ann. (West 1988 & Supp. 1989)		633.561(1)	Iowa R. Civ. P. 14			633.561(2)		633.555			
KAN. Stat. Ann. (1983 & Supp. 1988)	59-3010(A)(1) 59-3008	59-3010(A)(3)			59-3010(A)(2)	59-3013	59-3013 persons not necessary may be excluded	59-3013	59-3013 clear & convincing		39-3011(A)(1) investigation 59-3011(B)(5) 59-3010(A)(6) psychological testing
KY. Rev. Stat. Ann. (Baldwin 1983 & Supp. 1992)	387.550	387.560		387.050(3)	387.570(3)		387.570(2) at ward's option	387.570(1) mandatory	387.570(5) clear & convincing		387.540(1) physician, psychologist & social worker
LA. Civ. Code Ann. (West 1952 & Supp. 1990) Rev. Stat. Ann. (West 1965 & Supp. 1989)	CCP Art. 4546	CCP Art. 4544, 4545							Art. 393 to the satisfaction of judge		Art. 393

EXHIBIT "H" *Continued*
Conduct and Results of Guardianship Proceedings

STATE	HEARING	LEGAL REPRESENTATION		PRESENCE IN COURT			HEARING CLOSED TO PUBLIC	JURY TRIAL	STANDARD OF PROOF	SUPPORTING EVIDENCE	
		Right to Counsel	Guardian ad litem	Mandatory Attendance	Except when Harmful	Right to Attend				Court Medical Certification	Ordered Examination
ME. Rev. Stat. Ann. (West 1981 & Supp. 1988)	18A 5-303(b)	18A 5-303(b)	18A 5-303(b) appointment when unrepresented			18A 5-303(b)	18A 5-303(b) at ward's request				18A 5-303(b) physician or licensed psychologist
MD. Ann. Code (1964 & Supp. 1989) MD. Rules (Supp. 1989)	13-705 Rule R77(c)(2)	13-705(e)				13-705(e)	13-705(e) at ward's option	13-211 not in protective proceedings 13-705(e) At ward's option in guardianship hearings See Rule R77(b)(1)	13-705 clear & convincing	R73(b)(1) 2 physicians rule	
MASS. Gen. L. (1981 & Supp. 1989)	201-7		201-34							201, 6A, 6B clinical team	201, 6, 6A physician or psychologist
MICH. Comp. Laws Ann. (1980 & Supp. 1990)	330.1614(1)	330.1615(1), (2)	330.1616				330.1617(3)	330.1617(1)	330.613(4) clear & convincing		39/5443(2) physician & visitor
MINN. Stat. Ann. (West 1976 & Supp. 1989)	525.55(1)	525.55(2)				525.55(1)			525.551(3) clear & convincing		
MISS. Code Ann. (1973 & Supp. 1989)	93-13-121		93-13-255	93-13-131 drunkards and addicts						93-13-125 director of hospital where confined	93-13-121
MO. Ann. Stat. (Vernon 1958 & Supp. 1990)	475.075(1)	475.075(8), (3)				475.075(8)	475.075(8)	475.075(8)	475.075(7) clear & convincing		
MONT. Code Ann. (1989)	72-5-315(2)	72-5-315(2)	72-5-315(2)			72-5-315(4)	72-5-315(4) at ward's option	72-5-315(4)	72-5-316(1) court's satisfaction		72-5-315(3) physician & visitor
NEB. Rev. Stat. (1985 & Supp. 1988)	30-2619(b)	30-2619(d), (b)	30-2619(b)			30-2619(b)	30-2619(b) at ward's option		30-2620 clear & convincing		30-2619(c) physician & visitor
NEV. Rev. Stat (1986 & Supp. 1988)	159.047	159.048(4)		§1754(3) SB4073-A unless medically unable		159.048(3)					

EXHIBIT "H" *Continued*
Conduct and Results of Guardianship Proceedings

STATE	HEARING	LEGAL REPRESENTATION		PRESENCE IN COURT			HEARING CLOSED TO PUBLIC	JURY TRIAL	STANDARD OF PROOF	SUPPORTING EVIDENCE	
		Right to Counsel	Guardian ad litem	Mandatory Attendance	Except when Harmful	Right to Attend				Court Medical Certification	Ordered Examination
N.H. Rev. Stat. Ann. (1983 & Supp. 1898)	464-A:5(I)	464-A:5(I) 464-A:6	464-A:41	464-A:8(II)	464-A:8(II)	464-A:5(I)	464-A:8(VII) unless ward requests otherwise		464-A:8(III) beyond a reasonable doubt		
N.J. Stat. Ann. (1983 & Supp. 1989); N.J. Rules(1982)	38.12-5	4.83-4	38.12-4			4.83-5		38.12-24 on ward's option		R 4.83-2(b), (c) 2 reputable physicians	R 4.83-4(b)
N.M. Stat. Ann. (Michie 1978 & Supp. 1989)	45-5-303(C)	45-5-303(C)	45-5-303(C) 45-5-303.1	45-5-303(F)	45-5-303(F)(2)		45-5-303(J) at ward's option	45-5-303(K) at ward's option	45-5-303(H) clear & convincing		45-5-303(B) physician & visitor
N.Y. Mental Hyg. Law (McKinney 1988 & Supp. 1992)	81.11	81.10 court evaluator assists court in determining if needed	81.09 court evaluator	81.11(c) required at court or where residing	81.11(c)(2) completely unable to participate	81.11	81.13(c) only if good cause	81.11(f) any party	18.12 clear & convincing		
N.C. Gen. Stat. (1987 & Supp. 1988)	35A-1212	35A-1107 34A-1130(c)	35A-1107				35A-1112(a) at ward's option	35A-1110	35A-1112(d) clear, cogent, & convincing		35A-1111 35A-1212 multi-disciplinary evaluation
N.D. Cent. Code (1976 & Supp. 1989)	30.1-29-07(2)	30.1-29-07(2)	30.1-29-07(2) 30.1-28-07(3)				30.1-28-03(7)				30.1-28-03(2) physician & visitor
OHIO Rev. Code Ann. (Anderson 1978 & Supp. 1989)	2111.04	2111.02	2111.23 if under legal disability								2111.031 physician or other qualified person
OKLA. Stat. Ann. (West 1976 & Supp. 1990)	58-851										30-3-108 physician, psychologist, social worker, other report
OR. Rev. Stat. (1987 & Supp. 1988)	126.103(2)	126.103(2) court may appoint				126.103(5)	126.103(5) upon request				126.103(3), (4) physician & visitor
PA. Cons. Stat. Ann. (1975 & Supp. 1992)	20-5111(a)		20-5111(a)	20-5111	20-5111(a)(i)		20-5111(a) unless ward objects	20-5111(a)			20-5111(c) physician
R.I. Gen. Laws (1984 & Supp. 1992)	33-15-17.1(b)	33-15-7	33-15-7							33-15-8	33-15-4 functional assessment

EXHIBIT "H" *Continued*
Conduct and Results of Guardianship Proceedings

STATE	HEARING	LEGAL REPRESENTATION		PRESENCE IN COURT			HEARING CLOSED TO PUBLIC	JURY TRIAL	STANDARD OF PROOF	SUPPORTING EVIDENCE	
		Right to Counsel	Guardian ad litem	Mandatory Attendance	Except when Harmful	Right to Attend				Court Medical Certification	Ordered Examination
S.C. Code Ann. (Law. Co-op. 1987 & Supp. 1988)	62-5-303(b)	62-5-303(b)	62-5-303(b)			62-5-303(b)	62-5-303(b)				
S.D. Codified Laws Ann. (1984 & Supp. 1988)	30-27-14		30-26-2 at court's discretion	30-27-17 at court's discretion						30-27-5.2	30-27-5.1 may order physical or mental exam
TENN. Code Ann. (1984 & Supp. 1992)	34-4-204	34-4-106(a) 34-4-213 attorney ad litem	34-3-207 34-4-106(a) 34-4-204(b) must appoint		34-4-107(4)	34-4-106(b)		34-4-106(b)			34-4-1 physician selected from list of 3 submitted by adversary counsel 34-4-205 2 reputable physicians
TEX. Prob. Code Ann. (West 1980 & Supp. 1990)	417	130G(b), (a)	417	130G(a)	130G(a)		130G(b)	130G(a)	130G(c) clear & convincing		130G(f) physician's report & other evaluation
UTAH Code Ann. (1978 & Supp.1990)	75-5-303(2)	75-5-303(2)	75-5-303(2)			75-5-303(2)	75-5-303(2) no jury allowed at closed hearing	75-5-303(2)			75-5-303(2) physician & visitor
VT. Stat. Ann. tit. 14 (1974 & Supp. 1988)	14-3064(a)	14-3065(a), (c) shall be appointed court maintains pro bono list	14-3066			14-3068(a)	14-3068(a) on ward's option		14-3068(f) clear & convincing		14-3067 mental health professional 33-3608 comprehensive evaluation by mental retardation professional
VA. Code Ann. (Michie 1984 & Supp. 1989)	37.1-128.02(A) 37.1-128.1(A)		37.1-128.02(B) 37.1-133.1			37.1-128.02(A), (B)		37.1-128.02(A)	37.1-128.02(A) 37.1-128.1(A) clear & convincing		37.1-128.02(A) 37.1-128.1(A) 37.1-132 comprehensive evaluation
WASH. Rev. Code Ann. (West 1987 & Supp. 1989)	11.88.030	11.88.045	11.88.090	11.88.040			11.88.040	11.88.045			11.88.045(3) physician's report

EXHIBIT "H" *Continued*
Conduct and Results of Guardianship Proceedings

STATE	HEARING	LEGAL REPRESENTATION		PRESENCE IN COURT			HEARING CLOSED TO PUBLIC	JURY TRIAL	STANDARD OF PROOF	SUPPORTING EVIDENCE	
		Right to Counsel	Guardian ad litem	Mandatory Attendance	Except when Harmful	Right to Attend				Court Medical Certification	Ordered Examination
W.VA. Code 1986 & Supp. 1989)	44-10A-3					44-10A-3			44-10A-1 to the satisfaction of the county commission		27-11-1(d)
WIS. Stat. Ann. (West 1988 & Supp. 1989)	880.08	880.33(2)(a)	880.33(2)(a), (c)			880.08(1)		880.33(2)(a)	880.33(4) clear & convincing		880.33 physician or licensed psychologist
WYO. Stat. (1987 & Supp. 1989)	3-2-103		3-1-108			3-4-104(b)	3-4-104(b)	3-2-104 If allegations are proved 3-4-104 preponderance of evidence (limited guardian)			