



## Legislative style and judicial discretion: The case of guardianship law

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### ABSTRACT

The criteria for appointment of a guardian, and the powers that the guardian will be given depend upon how a particular political entity balances respect for the individual's right to autonomy on the one hand, against society's desire to protect those who cannot manage their own affairs, on the other. In recent decades, the balance has tipped from concern about protection to concern about autonomy. This shift, in turn, has resulted in an evolution in the linguistic style of the laws enacted. This article examines many different guardianship statutes from around the United States, demonstrating that subtle linguistic maneuvers in the style of drafting affects the degree of discretion given to decision makers. Using advances in the psychology of concepts and categories, the article demonstrates the descriptive inadequacy of the classical distinction of rules versus standards in legislative drafting, and adds prototype-based laws and laws dependent upon enriched mental models to types of laws that legislators employ. The goal of the article is to build a self-conscious awareness of the tools available to policy-makers in their efforts to hone legislation in this important area of mental health law.

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### 1. Introduction

Guardianship laws are everywhere, but they are not uniform. Why not? The criteria for appointment of a guardian, and the powers that the guardian will be given depend upon how a particular political entity balances respect for the individual's right to autonomy on the one hand, against society's desire to protect those who cannot manage their own affairs, on the other. In recent decades, the balance has tipped from concern about protection to concern about autonomy. This shift, in turn, has resulted in an evolution in the style of laws drafted.

One way of ensuring that guardians are not appointed except for those individuals who are seriously incapacitated, is to write laws that set down specific criteria for the appointment and empowering of guardians. Thus, we have seen a shift from standards, based largely on an individual's diagnostic status, to detailed rules based on how well the individual is able to function in his or her own. This shift in legislative style has been observed in the scholarly literature (Kapp, 1998). However, by limiting the discussion to rules versus standards, the literature has missed some important nuances in the various techniques that legislatures use to regulate the discretion that resides in the decision makers, generally judges, and consequently, has failed to take notice of several important devices available to balance flexibility and the protection of rights.

Using examples from various state guardianship statutes in the United States, this article introduces two additional devices that legislatures use to control judicial discretion: prototype rules, and

rules structured as mental models. The former tells decision makers what to do in the ordinary situation, but gives them discretion to deviate from the norm when the facts so demand. For instance, a law may say that a person alleged to be disabled has the right to attend any proceedings except for good cause shown. Mental models present decision makers with examples from which they can form a good picture of what the legislature had in mind, but leaves it to them to decide the adequacy of the goodness of fit. Many laws provide lists of circumstances in which they apply, modified by a phrase like "including but not limited to..." Such nonexclusive lists created laws that give guided discretion, in which the decision maker is given a sense of the kinds of situations in which the law should apply. With specific rules, rules based on mental models, prototype rules and broad standards all available to lawmakers, it is possible to legislate with some degree of subtlety the desired balance between autonomy and protection.

In part 2 of this article, I briefly set forth the core issues in the development of adult guardianship law. Part 3 discusses the four styles of legislating, and the cognitive structures that underlie them. Part 4 illustrates how different guardianship laws use each of these devices to achieve differing levels of judicial discretion in making decisions about whether a guardian should be appointed and, if so, how much authority over the ward the guardian should be granted. Part 5 is a brief conclusion.

### 2. The tension in adult guardianship legislation

Rules and standards governing the appointment of guardians for adults have been a matter of some controversy for several decades. I will not explore the issues in great detail here, but touch on them in

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order to demonstrate the relationship between legislative styles on the one hand, and policy goals on the other.

In part as a reaction to press reports of elderly individuals being taken advantage of by guardians that should never have been appointed (see, e.g., Grant & Quinn, 1998), concerted efforts have been made, especially in the 1980s and 1990s to specify the conditions under which a guardian may be appointed, to enhance the procedures for judicial appointment, and to limit the powers of guardians to those needed for the well-being of the disabled individual.<sup>1</sup> Without question, one of the most important developments has been the substitution of particular functional disabilities for the earlier status-related criteria as findings required before a guardian may be appointed.<sup>2</sup> Other developments include requiring an interdisciplinary team to examine the individual to decrease the likelihood that a guardian is appointed based on a perfunctory evaluation of an individual's state of affairs based largely on representations by the party petitioning for a guardian; enhancing procedural requirements to ensure that the respondent has an opportunity to state objections to the guardianship, and has the right to petition to have the guardian removed; determining if there is a less restrictive alternative to guardianship and, if not, tailoring the guardianship so that it leaves the disabled individual with as much autonomy as his condition allows; and monitoring the disabled individual and the work of the guardian after the guardian has been appointed to reduce the likelihood of overreaching, abuse, or downright corruption.<sup>3</sup> Additional changes and adjustments occur in various states annually.

The goals of these reforms are to ensure that guardians are appointed only for those elderly and disabled people who need the assistance of a guardian, and that once a guardian is appointed the individual maintains whatever autonomy is possible. Procedures for the appointment of guardians are directed toward maintaining the individual's dignity throughout, while guarding against overreaching.

Nonetheless, some of these reforms have produced some skepticism, (see Barnes, 1992; Frolik, 1998). To take one example, consider the requirement that the alleged incapacitated person attend the hearing. The result has been significant delays in the provision of protection because of scheduling problems that result from having to bring some individuals with severe mental and/or physical incapacities to court. Moreover, it is not at all clear how the dignity of such individuals is protected by compelling them to be placed on display, more as an evidentiary exhibit than as a person whose individualism is being protected. Neither the expense nor the preservation of dignity improves when these proceedings are conducted at bedside in a hospital or nursing facility (Frolik, 1998: 348).

How well are all of these reforms working as a general matter? We really do not know. If all and only those in need of guardianship are obtaining that level of protection at a level that meets their needs and maintains their dignity and sense of self, then the system is working perfectly. Somewhat less ambitiously, if the mandatory appointment of counsel for the allegedly incapacitated person has resulted in less overreaching without deterring individuals from seeking guardians for those in need because of expensive and cumbersome procedural hurdles, then the reforms will have produced sufficiently positive results at the margins to justify them. If, in contrast, the reforms have led to a significant increase in the failure to protect society's most vulnerable people, while stemming abuse for only a few individuals, then society is probably no better off.

I will assume for the remainder of this article that the reforms of the past quarter century have done more good than harm. I make this assumption in the absence of hard data. However, we do know

that the reforms have not led to a rash of reports from the press of individuals in need of protection not getting it because of inappropriately difficult standards or because of onerous procedures that well-intentioned petitioners decide not to combat. Moreover, experienced judges, notwithstanding an inevitable rate of error, develop expertise over time, which they hone as they receive reports that give them at least a broad sense of how each case has progressed during each reporting period.

I further assume that most scholars and practitioners in the area of adult guardianship share the basic set of goals of protecting the vulnerable without overreaching, which means that disagreements occur chiefly at the margins. And that brings me to the contribution that I wish to make in this article. Different states will wish to balance the ratio of protection of autonomy to protection of the individual's wealth and health somewhat differently. (American Bar Association, 2011) To do so, they use similar-looking, but quite different legislative techniques, each of which presents the judge with different levels of discretion, based on differentially-defined legislative standards. I turn to these legislative styles in the next section.

### 3. Four styles of legislative drafting

As we have just seen, the universally-acknowledged tension in guardianship law is between protecting the rights of the individual to make decisions for him or herself, on the one hand, and making sure that individuals who need guardians get them, on the other. This is exactly the sort of tension that is likely to manifest itself in a choice between rules and standards. Statutes that set general standards, more or less saying that those who need the assistance of a guardian should be given such assistance and those who do not need such assistance should not, leaves to the decision maker virtually total discretion as to when someone should have a guardian appointed. In contrast, rule-like attempts to list all of the circumstances in which a guardian should be appointed leaves less up to the decision maker, but may either leave out some important instances or include some that should not provoke guardianship in all cases. Other statutes are drafted as laws that deal with the prototypical case, and laws that help the decision maker develop enriched mental models without cutting off discretion entirely. I will give some illustrations of each of these, but first I will characterize these four styles of legislating more fully.

#### 3.1. Rules and standards: the classic dichotomy

Those who write statutes are typically faced with a dilemma. By drafting laws that incorporate broad standards, they recognize the need for the law to be responsive to a future whose events are uncertain, but they fail to constrain decision makers substantially. This can create problems for a society that wishes to govern itself under a rule of law, such as when a criminal statute is drafted so vaguely that it is not clear in advance what conduct is proscribed and what conduct is allowed. In contrast, statutory drafters draft statutes in a rule-like manner that attempts to leave much less to chance. Here, the apparent precision of the statute presents its enforcer with more information, but the law leaves the interpreter with insufficient flexibility to deal with novel situations. As HLA Hart said fifty years ago:

[By relying on precise rules, w]e shall thus indeed succeed in settling in advance, but also in the dark, issues which can only reasonably be settled when they arise and are identified. We shall be forced by this technique to include in the scope of a rule cases which we would wish to exclude in order to give effect to reasonable social aims, and which the open textured terms of our language would have allowed us to exclude, had we left them less rigidly defined. The rigidity of our classification will thus war with our aims in having or maintaining the rule. (Hart, 1961: 127).

Hart's point was not new, even then. Aristotle had noted in the *Nicomachean Ethics* that precise rules lead to the application of laws

<sup>1</sup> These efforts are discussed in a great deal of literature on adult guardianship during this period. See, e.g., Johns (1999); Frolik (1998); Hurme (1995); Tor (1993); Griffith (1991); and Hommel, Wang, and Bergman (1990).

<sup>2</sup> See below for discussion of New Mexico's revised statute as an example.

<sup>3</sup> This summary captures a fair amount of what the literature describes about the path of the law. See, e.g., Hurme (1995: 145). For discussion of recent developments in the monitoring of guardians, see Karp and Wood (2007).

in unwanted situations, making it necessary to have judges to exercise appropriate discretion to avoid injustice.<sup>4</sup> Aristotle's solution, however, raises another question. When the decision maker exercises discretion consistent with what he or she knows the law to be about, the result may be controversial. Not only may there be disagreement about the problem the law was directed to solve, but the application of the law in the particular circumstances of the case may be subject to debate as well, (see Solan, 2010: 10). Of course, in some cases, such discretion will be universally welcomed. Steven Winter (1999) illustrates this phenomenon with the bus driver who ejects a passenger because of a law that bans animals from the bus on the theory that people are animals. Along similar lines, Richard Posner (2008) writes of the prosecutor who is himself prosecuted for possessing child pornography when the only reason he has the child pornography is to prosecute the pornographer who created it.

Of course, there is no such bus driver and no prosecutor will be imprisoned for prosecuting a child pornographer. But if there is no such bus driver then we really do interpret even rule-like laws consistent with their purpose, regardless of how precise they may appear on their face.

In describing the difference between rules and standards, Hart used the expression "open textured." This is a fair description of what we mean by a standard. Standards and rules look exactly the same in their structure:

No driver shall drive unreasonably fast. No driver shall exceed 65 miles per hour.

The first sentence sets a standard, the second establishes a rule, even though their syntax is identical. Thus, in a sense, a standard is nothing more than a rule, at least one of whose elements insufficiently determined by language construed outside of context. The difference, as Russell Korobkin (2000) points out, is that in deciding whether a driver has violated the first law, it is necessary to evaluate the facts – that the driver was driving at 90 miles per hour – in terms of the law's purpose, in this case, to enhance road safety. Thus, if the driver was rushing a heart attack victim to the hospital, there would be no need to use some kind of exception to forgive the driver, since he did not violate the standard in the first place, assuming that he handled his vehicle with skill. With a set speed limit, in contrast, the judge has a choice between making an exception to the law for cases of emergency, or applying the law unjustly to include a situation that the enacting legislature would most likely have excluded, or at least hope that a judge hearing such a case would have the sense to exclude.

Moreover, as various scholars have suggested, we might expect to find a continuum between rules and standards, depending upon how "open textured" the statutory terms are (Korobkin, 2000: 30; Schauer, 1991: 650–51; Sunstein, 1995: 961). For example, by adding to the standard that in deciding what is reasonable, a court must consider traffic conditions, the weather, the proximity to a school zone and the reasons that the driver was driving quickly, the standard of "reasonableness" can quickly become very rule-like, with the analysis of various elements that make up the definition of "reasonableness" replacing case by case analysis.<sup>5</sup> Once again, the more a legislature resorts to such definition to reduce judicial discretion, the more likely the law is to become underinclusive, overinclusive, or both. Thus, there are tradeoffs in placing a particular rule at any particular place on the rules/standards continuum, with legislatures having to decide which balance to reach in enacting each particular law.

As we will see below in connection with various guardianship statutes, even the most rule-like laws devolve into standards at the

margins. For now, though, consider New Jersey's stalking statute, which reads:

A person is guilty of stalking, a crime of the fourth degree, if he purposefully or knowingly engages in a course of conduct directed at a specific person that would cause a reasonable person to fear bodily injury to himself or a member of his immediate family or to fear the death of himself or a member of his immediate family.<sup>6</sup>

In some ways, the statute is as rule-like as it gets. Criminal statutes are typically organized into elements that the government must prove. The elements are separately necessary and together sufficient to create criminal liability. In a typical fashion, this crime has a set of elements, definable in Boolean terms: To be found guilty of stalking, a person must:

1. a. purposefully or
  - b. knowingly
2. engage in a course of conduct directed at a specific person
3. that would cause a reasonable person
  - a. to fear bodily injury
    1. to himself or
    2. to a member of his immediate family or
  - b. to fear the death of
    1. himself or
    2. a member of his immediate family.

Notwithstanding its formal, rule-like structure, however, the statute leaves a great deal in the discretion of the decision maker. This is because terms like "reasonable person" are classic denotations of a standard as opposed to a rule. In addition, what it means "to fear bodily injury" is open to interpretation. How much bodily injury must a person fear? Is a neighbor who is recurrently a little too comfortable on a skateboard a stalker? And the statute does not tell us how much conduct constitutes "a course of conduct." The problem goes beyond the rules/standards distinction. The difficulty with expressions like "course of conduct" is not that they are not specific, but rather that we do not seem to use necessary and sufficient conditions to determine whether one has occurred. Rather, we look at such things as how much the conduct varies from one occurrence to another, how many times the conduct has occurred so far, and whether it is likely to continue. We then combine these, and probably other considerations in some manner of which we do not have conscious control to see whether the behavior is a good enough match with our concept of "course of conduct." In other words, we have some kind of mental model of "course of conduct" that is neither a rule nor a standard. We turn to these mental models below.

### 3.2. Prototypes and mental models

I turn to two additional approaches to legislative drafting: legislation by enriched mental models of the concepts that are the subject of the statute, and legislation by prototypes. These are neither rules nor standards. Rather, they reflect ways in which we judge the goodness of fit between new experiences and categories we have already formed.

Traditionally, linguists and philosophers of language assumed that to know the meaning of an expression was to know the set of conditions under which that expression is true. Sometimes called the "classical" approach to word meaning, the goal for each concept is to define the concept with conditions that are, in sum, both necessary and sufficient for the concept to obtain. This definitional approach to meaning fits nicely with a legal system that regulates conduct by promulgating rules. If we can articulate the elements of a crime or tort, that is, all

<sup>4</sup> Aristotle.

<sup>5</sup> As we will see in the next section, making this list nonexclusive creates a rule based on enriched mental models, since it is up to the decision maker to decide whether items not included in the list are close enough to those that are.

<sup>6</sup> N.J. Stat. Ann. 2C:12-10(b) (2012). For discussion of how such laws impact on jury deliberation, see Solan (2010), ch. 7.

and only the conditions under which the crime or tort has occurred, then we can govern ourselves in an orderly fashion. (see Solan, 2005). Jury instructions are typically structured in just this way. They present a legally-relevant concept, such as proximate cause, or reasonable doubt, or kidnapping, and then attempt to define the concept.

Beginning in the 1970s, linguists and psychologists began to discover problems with the definitional approach to word meaning. First, it fails to explain the intuition that some things seem to be better members of a category than are others. In early experiments, the psychologist Eleanor Rosch found that people always consider, for example, “bed” to be a better example of furniture than, say, “piano” (Prinz, 2004; Rosch, 1975). Second, definitions have trouble capturing the fact that our concepts get fuzzy at the margins. To stay with furniture, when does a chair get wide enough to become a love seat, and when does an elongated love seat become a sofa? Third, some concepts, such as “game,” as Wittgenstein told us, seem to be better described as family resemblance categories. It is almost impossible to tell what makes a game a game. Yet, we know a game when we see one (Wittgenstein, 1953: 31–32).

We can account for these observations if we claim that people conceptualize not in terms of necessary and sufficient conditions, but rather in terms of mental models based on the goodness of fit between what they are experiencing on the one hand, and categories they have formed based on past experience on the other. Among the things that our models contain is information about prototypical instances of a category. When I say “swimming pool,” you probably envision what looks to you like a typical swimming pool. When I say “doberman pinscher,” you envision one. These pictures in our minds are schematic, and no doubt are part of what it means to have the concept. Similarly, furniture or fruits are more likely to evoke typical examples of these categories than unusual or equivocal ones. These are also part of our mental models.

This is not to say that necessary and sufficient conditions play no part in conceptualization. In acquiring new concepts, we automatically search for unique features that make this category different from others. If the male and female of a species of bird differ only with respect to their tail plumage, then we have no trouble saying so. The presence of the plumage is both necessary and sufficient to define the sex of the bird. Experiments by psychologist Douglas Medin (1989) show that we do indeed use such information in conceptualizing.

Moreover, not only do we use rule-like features as part of our conceptualizations, but prototypes are not sufficient to account for some aspects of our concepts. For example, while people are willing to say that an ostrich is a poor example of a bird, whereas a robin is a good example, when later asked whether birds are a graded category, people answer in the negative. While ostriches may be atypical exemplars, they are birds through and through, (see Armstrong, Gleitman, and Gleitman, 1983 for discussion). Furthermore, prototype theory must confront the “pet fish” problem. The prototypical pet is a dog; the prototypical fish is a trout; but the prototypical pet fish is a guppy or a goldfish. Thus, there must be more to concepts than their prototypes because when we combine concepts the prototypes do not account for the meaning of the new, combined concept, (see Connolly, Fodor, Gleitman, & Gleitman, 2007; Fodor & Lepore, 1996).

It seems, then, that our concepts contain information about salient features in addition to information about defining features, with continuing debate about the roles that these features play, along with other conceptual elements, such as our intuitive causal theories of the world. Murphy (2004) provides an excellent summary and analysis of the various theories under current debate and, perhaps more importantly, a good sense of the many issues that have now been resolved. The breadth of information that we use is important in the legislative context, because it enables lawmakers to write laws with different kinds of conceptual features in mind.

Finally, our models typically contain information about what is in a concept, and not what is not part of the concept. This is not always the case, but it is typically true, as experiments by Johnson-Laird and

his colleagues indicate, (see Johnson-Laird, 1983). This fact is part of what makes Rene Magritte’s famous painting of a pipe, with the caption, “this is not a pipe” (*Ceci n’est pas une pipe*) so strange. We do not usually think in terms of what a thing is not. Although we are able to do so, experimentation shows it to be harder, a fact that is routinely recognized by experts in English composition, and in those who advocate for clearer jury instructions.

To illustrate from an everyday example, Webster’s Third New International Dictionary, one of the leading dictionaries of American English usage, defines the word “chair” as follows: “[a] usu[ally] movable seat that is designed to accommodate one person and typically has four legs and a back and often has arms.” Note that there is only one necessary condition: “A seat that is designed to accommodate one person.” All of the other conditions are described as typical, usual or something that occurs often. They are prototypical features – not definitional ones. Taken together, these features create a mental model, since they are both non-exclusive and individually paradigmatic of the concept. (For discussion of the ramifications of this approach to definition, see Solan & Tiersma, 2005: 22).

Now let us see how this view of concepts – a model-driven one – can play a role in decisions about how to legislate. While my ultimate focus will be on guardianship statutes, first consider the famous 1931 case, *McBoyle v. United States*, decided by the U.S. Supreme Court.<sup>7</sup> *McBoyle* had stolen an airplane and flew it from one state to another. A statute made it a crime to transport a motor vehicle across state lines. The issue in the case was whether an airplane should be considered a motor vehicle for purposes of the statute. The statute contained its own definition: “The term ‘motor vehicle’ shall include an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails.”<sup>8</sup> Writing for a unanimous Supreme Court, Justice Oliver Wendell Holmes, wrote:

No doubt etymologically it is possible to use the word to signify a conveyance working on land, water or air, and sometimes legislation extends the use in that direction... But in everyday speech ‘vehicle’ calls up the picture of a thing moving on land. ... So here, the phrase under discussion calls up the popular picture. For after including automobile truck, automobile wagon and motor cycle, the words “any other self-propelled vehicle not designed for running on rails” still indicate that a vehicle in the popular sense, that is a vehicle running on land, is the theme. It is a vehicle that runs, not something, not commonly called a vehicle, that flies. Airplanes were well known in 1919, when this statute was passed; but it is admitted that they were not mentioned in the reports or in the debates in Congress. It is impossible to read words that so carefully enumerate the different forms of motor vehicles and have no reference of any kind to aircraft, as including airplanes under a term that usage more and more precisely confines to a different class.<sup>9</sup>

Holmes’s words are a remarkable tribute to the mental model as a means of conceptualization. Although it is clear enough that an airplane is a type of vehicle, the “picture” that enters one’s mind when one thinks of that word is a type of schematic land vehicle, which excludes airplanes – at least it did in 1931. And the examples that the Congress included in its non-exclusive list of vehicles supports that everyday conceptualization. By making it part of the statute, the legislature gave the courts guided discretion as to which of the things in the world that might be considered vehicles should count as such in construing the statute.<sup>10</sup> As Holmes notes, in this instance the

<sup>7</sup> *McBoyle v. United States*, 283 U.S. 25 (1931).

<sup>8</sup> National Motor Vehicle Theft Act of 1919, 18 U.S.C. Section 408 (1931).

<sup>9</sup> 283 U.S. at 26–27.

<sup>10</sup> The procedure of construing a disputed event as having to have a character similar to that of the enumerated entries in a non-exclusive list is called *ejusdem generis*, and is widely accepted by the courts as a canon of construction. For a recent application, see *Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 586 (2008).

concept's prototype, that is, its use in "everyday speech" matches the concept that the legislature intended to be applied. But that needs not always be the case.

Next consider the following criminal statute from New Jersey that defines "weapon." The statute begins with a rule: a weapon is "anything readily capable of lethal use or of inflicting serious bodily injury."<sup>11</sup> This, of course, produces a tautology. Any time a victim is seriously hurt by "anything" then he was hurt by a weapon, since the injury itself shows ipso facto that the thing was capable of inflicting serious bodily injury. The only inquiry is whether it was readily capable of doing so. But the statute goes on. It creates an enriched mental model by adding the words "includes, but is not limited to", and then giving examples of an extended vision of a typical weaponry.<sup>12</sup> Thus, the statute tells us to reason from the bottom up. If the potential weapon reminds us closely enough of the statutory examples, then it counts as a weapon for purposes of the statute.

The New Jersey statute is not a perfectly-drafted piece of legislation. The rule and the model do not say the same thing, so it leaves a fair amount of uncertainty even with the model. Should a paintball gun count as a weapon under the statute?<sup>13</sup> What about a plastic fork?<sup>14</sup> But these two cognitive styles are very much a part of the legislative repertoire. My point is that legislatures will be well-served to use model-like legislation when that is what they intend anyway. It means accepting less certainty than would be produced by a rule that actually works in all cases. But it means much better law than a rule that does not work because it is inherently underinclusive, overinclusive, or both. Note in this context that the use of broad standards can be discussed either in terms of rules or models. When embedded in a rule-like statute, the standard makes the statute appear to be vacuous, leaving the discretion to the decision maker. When seen in terms of a model, the broad standard is simply an impoverished model, with not very much information.

#### 4. Four approaches to guardianship law

Now let us turn to guardianship law. I will present guardianship statutes from several states, and discuss the differences among them in terms of the taxonomy I have developed here.

##### 4.1. Rule-driven statutes

###### 4.1.1. From standards to rules in new Mexico

Compare New Mexico's 1978 statute defining "incapacitated person,"

F. "[I]ncapacitated person" means any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication or other cause, except minority, to the extent that he lacks sufficient

understanding or capacity to make or communicate responsible decisions concerning his person or management of his affairs.<sup>15</sup>

with the 2012 version of the same law:

F. "incapacitated person" means any person who demonstrates over time either partial or complete functional impairment by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication or other cause, except minority, to the extent that the person is unable to manage the person's personal affairs or the person is unable to manage the person's estate or financial affairs or both;

G. "inability to manage the person's personal care" means the inability, as evidenced by recent behavior, to meet one's needs for medical care, nutrition, clothing, shelter, hygiene or safety so that physical injury, illness or disease has occurred or is likely to occur in the near future;

H. "inability to manage the person's estate or financial affairs or both" means gross mismanagement, as evidenced by recent behavior, of one's income and resources or medical inability to manage one's income and resources that has led or is likely in the near future to lead to financial vulnerability.<sup>16</sup>

The current version is much longer. That is because it retains the original statute's use of various statuses as necessary conditions for a finding of incapacity, but then adds rule-like definitions in two new sections that convert the standard like "to manage the person's personal affairs or the person is unable to manage the person's estate or financial affairs" from more or less a standard to more or less a rule. The move from standards to rules is one to be expected when a legislature is concerned that decision makers are abusing discretion. If followed, the new rule is designed to make it more difficult to meet the requirements needed to trigger guardianship. One would not, however, expect this change to manifest itself in the denial of guardianship. This is so for two reasons. For one thing, repeat players in the system are likely to adjust to the new law, perhaps changing the cohort of applicants at the margins, but not the distribution of results among those who do apply, (see *Priest & Klein, 1984*). For another, while the baseline of abuse of wards is disturbing, as noted earlier, there is in all likelihood a far greater baseline of neglect of the disabled, with most people applying for guardianship well on the right side of the line no matter where it is drawn.

###### 4.1.2. West Virginia – a rule-driven statute

The West Virginia approach is similar. Its goal is to establish replicable criteria for the appointment of a guardian.

44-1-4 Definitions "Guardian" means a person appointed by the court who is responsible for the personal affairs of a protected person, and, where the context plainly indicates, the term "guardian" shall mean or include a "limited guardian" or a "temporary guardian."

"Protected person" means an adult individual, eighteen years of age or older, who has been found by a court, because of mental impairment, to be unable to receive and evaluate information effectively or to respond to people, events, and environments to such an extent that the individual lacks the capacity:

- (A) to meet the essential requirements for his or her health, care, safety, habilitation, or therapeutic needs without the assistance or protection of a guardian; or
- (B) to manage property or financial affairs or to provide for his or her support or for the support of legal dependents without

<sup>11</sup> N.J. Stat. Ann. Section 2C:39-1 (2012).

<sup>12</sup> "Weapon" means anything readily capable of lethal use or of inflicting serious bodily injury. The term includes, but is not limited to, all (1) firearms, even though not loaded or lacking a clip or other component to render them immediately operable; (2) components which can be readily assembled into a weapon; (3) gravity knives, switchblade knives, daggers, dirks, stilettos, or other dangerous knives, billies, black-jacks, bludgeons, metal knuckles, sandclubs, slingshots, cesti or similar leather bands studded with metal filings or razor blades imbedded in wood; and (4) stun guns; and any weapon or other device which projects, releases, or emits tear gas or any other substance intended to produce temporary physical discomfort or permanent injury through being vaporized or otherwise dispensed in the air. N.J. Stat. Ann. Section 2C:39-1(r) (2012).

<sup>13</sup> The Supreme Court of New Jersey said yes to that question. See *In the Interest of G.C., 846 A.2d 1222* (N.J. 2004).

<sup>14</sup> Here, the Supreme Court of New Jersey said no. See *Connor v. Powell, 744 A.2d 1158* (N.J. 2000).

<sup>15</sup> This definition is still part of the New Mexico Law, in the section dealing with the capacity to participate in a court proceeding. See *N.M. Stat. Ann. Section 38-4-14* (2012).

<sup>16</sup> N.M. Stat. Ann. Section 45-5-101(F-H) (2012).

the assistance or protection of a conservator. A finding that the individual displays poor judgment, alone, will not be considered sufficient evidence that the individual is a protected person within the meaning of this subsection. “Protected person” also means a person whom a court has determined is a missing person.<sup>17</sup>

The West Virginia statute is very specific in the findings that a court must make in order to appoint a guardian. The legislature has gone out of its way to instruct the decision maker that it should not appoint guardians for those who do not use good judgment in managing their affairs, reducing the likelihood of overreaching. And the criteria relate to particular functions more than they do to particular statuses, in keeping with the typical legal reforms of the past several decades.

Of course, some of the concepts within the statute are themselves quite broad, making this to some extent a rule of standards. But the contrast between a true standards approach (see below) and the West Virginia approach is quite stark: the former makes it easy for decision makers to appoint guardians for those who need them; the latter makes it possible to appoint guardians, but only after specific findings that specifically limit the circumstances in which it is proper to do so. One focuses on ensuring protection for those in need of help, the other focuses on protecting the rights of individuals to continue to run their own lives.

#### 4.2. A standard-driven statute

Next, let us consider Tennessee’s guardianship statute, which remains standard-driven. As in many cases, the key provisions are in the definitions and in certain procedures. Tennessee defines a disabled person tautologically to mean someone who needs a guardian.

##### 34-11-101 Definitions

\* \* \*(7) “Disabled person” means any person eighteen (18) years of age or older determined by the court to be in need of partial or full supervision, protection and assistance by reason of mental illness, physical illness or injury, developmental disability or other mental or physical incapacity;

\* \* \*(10) “Guardian” or “co-guardian” means a person or persons appointed by the court to provide partial or full supervision, protection and assistance of the person or property or both of a minor.<sup>18</sup>

The statute provides only the most general standard for determining for whom a guardian should be appointed. I do not mean to suggest that this approach is bad in principle. But its success will depend heavily on how well the decision maker does in making intelligent choices with almost no legislative guidance. The statute shows little concern with the need to protect the individual’s autonomy, focusing instead on giving judges the leeway to protect the vulnerable.

Like many guardianship statutes, Tennessee has a provision requiring the court to use the least restrictive alternative in appointing guardians, and to make findings by clear and convincing evidence.<sup>19</sup> But nowhere does the code give the decision maker much help in determining when a person is disabled in such a way as to trigger the statute at all. This is precisely one of the concerns about guardianship law, and the Tennessee statute does very little to meet it.

Another common legislative method of demonstrating concern for the autonomy of the individual for whom a guardian is sought is the

appointment of a guardian ad litem for purposes of representing the individual’s best interests during the guardianship proceeding itself. Here, Tennessee begins with a rule-like pronouncement, but then allows so many exceptions, that it is not rule-like at all, much the way “no animals on the bus” is not rule-like in the sense that it does not literally mean what it says.

##### 34-11-107 Guardian ad litem

- (a) (1) Except as otherwise provided in this subsection, on the filing of a petition for the appointment of a fiduciary, the court shall appoint a guardian ad litem to represent the respondent. The court also may appoint a guardian ad litem to represent the interest of the minor or disabled person in any proceeding brought by the fiduciary. If the respondent is represented by an adversary counsel who has made an appearance for the respondent, no guardian ad litem shall be appointed.
- (2) The court may waive the appointment of a guardian ad litem if the petitioner or at least one (1) of the petitioners for the appointment is:
  - (A) A parent of the minor for whom a guardian is sought;
  - (B) A minor who has attained fourteen (14) years of age; or
  - (C) An adult respondent.
- (3) The court may waive the appointment of a guardian ad litem if the court determines such waiver is in the best interests of the minor or disabled person.

“Best interests of the minor or disabled person” is the classic language for establishing a standard. It says very little about what in the real world meets this requirement, leaving it up to the decision maker’s discretion based on unarticulated criteria.

In short, the Tennessee statute is an effective one when all of the parties involved are pretty much in consensus as to when a guardian is appropriate and there is not much of a problem of overreaching. But it does not do a very good job at protecting the rights to autonomy of elderly people with overzealous relatives trying to make their own lives easier or trying to protect their inheritance.

#### 4.3. Prototypes in guardianship laws

Prototype legislation uses languages such as “except for good cause shown,” or “unless justice demands.” It is more restrictive than legislation by standards, but permits the decision maker the discretion to deviate from the norm when the situation demands it. Often, the statute requires a showing of “good cause” to permit deviation from the prototype. Consider the following example from Illinois:

The court may appoint the public guardian as the guardian of any disabled adult who is in need of a public guardian and whose estate exceeds \$25,000.

The matter shall be set for hearing within 10 days unless the parties otherwise agree or unless for good cause shown the court determines that additional time is required.<sup>20</sup>

This statute conveys the message that the hearing should be conducted within 10 days unless unusual circumstances exist.

No state legislates by prototype alone, but many have provisions written in this style. Consider the following provision from Georgia:

The court may, for good cause shown, revoke the letters of guardianship of the public guardian, require additional security on the public guardian’s bond, or issue any other order as is expedient

<sup>17</sup> W. Va. Code Section 44A-1-4 (2012).

<sup>18</sup> Tenn. Code Ann. Section 34-11-101(7), (10) (2012).

<sup>19</sup> Tenn. Code Ann. Section 34-11-126 (2012).

<sup>20</sup> 755 Ill. Comp. Stat. 5/13.5 (2012).

and necessary for the good of any particular guardianship in the hands of the public guardian.<sup>21</sup>

This statute contains a very loose standard: “as is expedient and necessary for the good of any particular guardianship in the hands of the public guardian.” Thus, removing the public guardian is not the norm – it is a deviation from the prototype to take place only “for good cause shown.” However, the circumstances in which good cause is met are left entirely to the judge.

Other language also establishes a prototype and the grounds for deviating from it. Consider the following provision from the California Probate Code, which sets forth procedures to be followed, “unless otherwise ordered by the court.”

At the expiration of one year from the time of appointment and thereafter not less frequently than biennially, unless otherwise ordered by the court to be more frequent, the guardian or conservator shall present the accounting of the assets of the estate of the ward or conservatee to the court for settlement and allowance in the manner provided [by statute].<sup>22</sup>

Here, the law is more specific about how the parties should proceed in the event that the prototype is abandoned – reports may be ordered to be filed more frequently than the norm, but not less frequently than the norm.

#### 4.4. Model-driven statutes

Enriched mental models constrain decision makers more than do broad standards but less than prototypes. Such statutes give them a good idea of what it is the legislature had in mind when it drafted the statute. But they do not pretend to decide all cases once and for all. The need for discretion at the margins is admitted in advance. Such laws may contain some specific rule-like elements, but will also contain examples of what the legislature has in mind, with phrases like, “including but not limited to...,” and “among other things.” Illustrative is the following statute from Oklahoma:

After a hearing on the petition, the court may:

- a. appoint a temporary guardian and order involuntary protective services including, but not limited to, authorization for medical and/or psychological treatment and evaluations, and residential placement subject to the provisions of subsection G of this section.<sup>23</sup>

The law does not specify all and only those services that should count as “protective,” but neither does it leave the decision up to chance. Rather, by providing a non-exclusive list, it gives the decision maker a sense of what the legislature had in mind. The general term – “included but not limited to” – is then construed in the light of the specific examples, as described earlier.

Consider another provision of the Oklahoma guardianship law:

##### Section 1-114. Powers of court

A. In all cases the court making the appointment of a guardian has exclusive jurisdiction to control such guardian in the management and disposition of the person and property of the ward.

B. The court has jurisdiction over guardianship proceedings, and has the following powers, which must be exercised in the manner prescribed by statute, to:

1. appoint and remove guardians for minors and for incapacitated and partially incapacitated persons;

2. issue and revoke letters of guardianship;
3. control the conduct of guardians with regard to the care and treatment provided to their wards;
4. control the conduct of guardians with regard to the management of the financial resources of their wards, including but not limited to the power to:
  - a. compel guardians to submit plans, reports, inventories and accountings to the court,
  - b. compel payment and delivery by guardians of property belonging to their wards,
  - c. order the payment of debts, the sale of property, and order and regulate the distribution of property which has been placed under the control or management of a guardian, and
  - d. settle the accounts of guardians.<sup>24</sup>

Interestingly, this part of the law is rule-like in its structure. It contains a list of specifically delineated powers from the court, which, as a group, appear to be fully inclusive. Nonetheless, one of those powers – the supervision of the guardian’s control of the ward’s finances – is written as a model, structured as a non-exclusive list that contains many examples, to guide the decision maker in determining the kind of control that is appropriate for a guardian to exercise.

This style of drafting constrains, but does not handcuff decision makers. It is commonplace to lawyers, as Peter Tiersma (2006) points out, but far less so in legislation than in other domains. The advantage of this approach is that it takes the pretense of scientific decision making out of the judicial process without total legislative abdication through resort to general standards. The apparent disadvantage of this approach is that it never tries to create a rule of law whose applicability is clear from the beginning. How concerned one should be with this disadvantage will depend on how successful one can be with the other legislative styles in comparison to that one.

Let us now look at another statute that contains some model-driven provisions. Florida’s is a good example.

744.102. Definitions“*Incapacitated person*” means a person who has been judicially determined to lack the capacity to manage at least some of the property or to meet at least some of the essential health and safety requirements of such person.

- (a) To “manage property” means to take those actions necessary to obtain, administer, and dispose of real and personal property, intangible property, business property, benefits and income.
- (b) To “meet essential requirements for health or safety” means to take those actions necessary to provide the health care, food, shelter, clothing, personal hygiene, or other care without which serious and imminent physical injury or illness is more likely than not to occur.<sup>25</sup>

This statute is complex in its style. With respect to property, it is rule-like. Guardians to manage property are to be appointed only when an individual cannot do the things enumerated in the statute. With respect to personal care, the rule is written as a model. It contains necessary conditions (“without which serious and imminent physical injury or illness is more likely than not to occur”), and a non-exclusive list of salient examples of care (“health care, food, shelter, clothing, personal hygiene, or other care”). As for members of the list, while they are not all enumerated, they must be “necessary” to reduce the likelihood of physical injury or illness. The result, in my opinion, is a sophisticated piece of legislation that gives the decision maker a great deal of guidance, but leaves open the very real possibility

<sup>21</sup> Ga. Code Ann. Section 29-10-9 (2012).

<sup>22</sup> Cal. Prob. Code Section 2620(a) (2012).

<sup>23</sup> Okla. Stat. 43A Section 10-108(F)(1) (2012).

<sup>24</sup> Okla. Stat. 30 Section 1-114 (2012).

<sup>25</sup> Fla. Stat. Section 744.102 (2012).

that he or she will have to make decisions concerning novel situations.

In contrast, the procedures called for under the Florida statute are very rule-like. They require that notice be given to the individual, that the court make very specific findings of fact, and many other such things. There are virtually no exceptions. This approach of guided discretion comes very close to the way that we conceptualize in everyday life. In my opinion it strikes the best kind of balance between the competing goals of guardianship law.

Many guardianship statutes contain some model-driven language, even if the entire statute cannot fairly be characterized as such. Below are a few of many available examples of this legislative style:

Duties of guardian ad litem (Michigan)....

- (c) Explaining to the individual the hearing procedure and the individual's rights in the hearing procedure, including, but not limited to, the right to contest the petition, to request limits on the guardian's powers, to object to a particular person being appointed guardian, to be present at the hearing, to be represented by legal counsel, and to have legal counsel appointed for the individual if he or she is unable to afford legal counsel.<sup>26</sup>

Eligibility as guardian (New York)

(a) 1. Any individual over eighteen years of age, or any parent under eighteen years of age, who is found by the court to be suitable to exercise the powers necessary to assist the incapacitated person may be appointed as guardian, including but not limited to a spouse, adult child, parent, or sibling.<sup>27</sup>

Once again, this style of legislation is most often integrated into a statutory scheme that also contains rule-like and standard-like provisions. The flexibility in distributing authority to courts to exercise discretion, then, is both flexible and subject to legislative control when the lawmakers are aware of these potential variations in legislative style.

#### 4.5. Combining drafting styles to achieve an integrated result

Finally, let us see what happens when a legislature uses several of these drafting styles in the same law to achieve various amounts of control and guided discretion. In this regard, the South Dakota statute is rich with examples. Consider the following provision, which deals with whether and when a guardian must post a bond. This law contains all for styles of legislation: A rule, a prototype, a mental model and a standard.

Section 29A-5-111. Filing acceptance – Necessity of bond[Rule] The appointment of a guardian or conservator does not become effective nor may letters of guardianship or conservatorship issue until the guardian or conservator has filed an acceptance of office and any required bond.[Prototype] The court may not require the filing of a bond by a guardian except for good cause shown.[Mental Model] The court shall determine whether the filing of a bond by a conservator is necessary. In determining the necessity for or amount of a conservator's bond, the court shall consider:

- (1) The value of the personal estate and annual gross income and other receipts within the conservator's control;
- (2) The extent to which the estate has been deposited under an arrangement requiring an order of court for its removal;
- (3) Whether an order has been entered waiving the requirement that

accountings be filed and presented or permitting accountings to be filed less frequently than annually;

- (4) The extent to which the income and receipts are payable directly to a facility responsible for or which has assumed responsibility for the care or custody of the minor or protected person;
- (5) Whether a guardian has been appointed, and if so, whether the guardian has presented reports as required;
- (6) Whether the conservator was appointed pursuant to a nomination which requested that bond be waived; and
- (7) Any other factors which the court deems appropriate.

[Standard] Any required bond shall be with such surety and in such amount and form as the court may order. The court may order additional bond or reduce bond whenever it considers such modification to be in the best interests of the minor, the protected person, or the estate.<sup>28</sup>

I do not mean to imply that all laws must be written to achieve these different degrees of flexibility within the same statute. Nonetheless, this particular provision illustrates beautifully how much control a legislature has over the degree of discretion that it wishes to delegate to decision makers.

## 5. Conclusion

Why is it so hard to write good guardianship laws? The problem is that we expect too much of them. Legislatures aware of this fact resort to drafting broad statutes whose standards are simply too low to reduce discretion sufficiently to guarantee protection of the rights of disabled individuals. On the other hand, the concern over the past several decades with a small but ugly series of abuses by guardians drive home the need for some kind of legislative control over the appointment of guardians for adults. In this article, using many provisions from actual statutes as illustrations, I have provided a taxonomy for legislatures to use in drafting laws that grant more or less discretion, and different kinds of discretion, to decision makers. The styles include hard-and-fast rules, broad standards, prototype rules, and enriched mental models.

As the illustrations used in this article suggest, different styles of legislation tend to be more appropriate for different aspects of guardianship law. For example, deadlines tend to be written either as hard-and-fast rules, or as prototype rules, modified by such language as "unless justice demands otherwise." This kind of language gives judges the flexibility to deviate from the norm in exceptional situations, while establishing norms that should be adhered to in most instances. The risks of sticking with a strict rule is that it will be inappropriate in some cases, and injustice will be done, or that the judge will simply ignore it anyway in the interests of justice, diminishing the value of the rule of law. By using a prototype, the judge grants this desirable flexibility at the expense of reducing predictability and adding some cost to the decision making process. With these tradeoffs, it should not be surprising that we find statutes in both legislative styles. What is most important for our purposes, is that legislators and other policy makers become aware that these are actual choices, and that their underlying sets of values and concerns should drive which style to use in a particular law.

It makes little sense, however, to use either of the other two devices in most instances of legislated time limits. Standards allow too much flexibility. "A reasonable time" or "as much time as is reasonably necessary" would be very difficult to administer and could lead to expensive disputes about cases at the margins. Thus, standards are not a good idea in these instances, and are not generally used. Similarly, mental models, while giving decision makers a good idea of the circumstances in which a deadline should be adhered to, seem useful only when that level of flexibility is relevant. In most cases involving time limits, that is simply not the case.

<sup>26</sup> Mich. Comp. Laws Section 700.5305 (2012).

<sup>27</sup> N.Y. Mental Hyg. Law Section 81.19 (2012).

<sup>28</sup> S.D. Codified Laws Section 29A-5-111 (2012).

The balance of considerations is quite different when it comes to such matters as the powers that guardians might be granted. A standard might specify that guardians be empowered to do what is necessary to ensure adequate protection of the disabled person's well-being. Such an approach will be far more acceptable in a culture that values protection over autonomy, and trusts in the integrity of the individuals likely to take on the task. A rule, in contrast, might list the powers that a judge may choose to assign to a guardian, thereby limiting the ways in which the individual's autonomy can be reduced. Prototype rules are less likely here, since there is no set of "ordinary" powers that guardians must have. Mental models, on the other hand, give decision makers a sense of the kinds of powers a guardian might be given, without limiting those powers as much as a rule would do. Different cultures – both legal and social – will be more or less comfortable with one of these approaches, and with different combinations of them (Carney, 2012).

The same holds true for determining the circumstances under which a guardian should be appropriate. The more rule-like the law, the less discretion delegated to the decision maker. The more standard-like, the more flexibility, but at the expense of increased opportunity for abuse. Here, mental models can serve a very important function, guiding the decision maker while allowing for individual circumstances to play an appropriate role as well.

Thus, I do not advocate for any one style. Guardianship is not a one-size-fits-all endeavor. Nor, for that matter, do I take a strong position on where the balance between the protection of an individual's right to autonomy and the protection of that same individual's physical and financial well-being should lie. This most important issue is both subtle at the margins, and highly culture-dependent. I do hope, however, to have provided a legislative tool box that will assist in creating a conscious awareness of the possibilities for reaching an appropriate balance in any jurisdiction confronting the issue of the best way to protect society's most vulnerable adult population.

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