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GUARDIANSHIP FOLLY: THE MISGOVERNMENT OF *PARENS PATRIAE* AND THE FORECAST OF ITS CRUMBLING LINKAGE TO UNPROTECTED OLDER AMERICANS IN THE TWENTY-FIRST CENTURY — A MARCH OF FOLLY? OR JUST A MASK OF VIRTUAL REALITY?*

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TABLE OF CONTENTS

I.	INTRODUCTION	5
II.	GUARDIANSHIP HISTORY AND THE DOCTRINE OF <i>PARENS PATRIAE</i> — MISGOVERNMENT AMOUNTING TO FOLLY	6
A.	Governmental Pursuit of Contrary Interests	6
	1. Greek Misgovernment	8
	2. Roman Misgovernment	10
	3. English Misgovernment	14
	4. American Misgovernment	19
	a. Colonial America to the Mid-1800s	19
	b. The Mid-Nineteenth Century	20
	c. The Mid-Twentieth Century	22
III.	SEVERAL DECADES OF EMPIRICAL RESEARCH PROJECTS, STUDIES, AND CHANGES IN LAWS	28
A.	General Overview	28
B.	Research, Studies, and Changes in Laws During the 1960s	29
	1. The 1961 Mentally Disabled and the Law Study	29
	2. The 1968 Mental Competency Study	31
	3. The Uniform Probate Code, Article V — Protection of Persons Under Disability and Their Property	34
C.	Research, Studies, and Changes in Laws During the 1970s	37
	1. California — The Frontier of State Reform in the 1970s	37
	2. State and Community Empirical Research and Studies Finding Glaring Governmental	

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	Perversity of the 1970s	39
3.	The UPC and Article V in the 1970s	40
4.	The 1978 Model Act of the ABA Commission on the Mentally Disabled	41
D.	Research, Studies, and Changes in Laws During the 1980s	43
1.	The 1981 Findings of a National Study of Public Guardianship and the Elderly	44
2.	The 1982 Uniform Guardianship and Protective Proceedings Act	45
3.	The 1986 National Conference of the Judiciary on Guardianship Proceedings for the Elderly	46
4.	The Associated Press Exposé of 1987	47
5.	The 1988 ABA Conference “Wingspread” National Guardianship Symposium	48
6.	The 1989 AARP Public Policy Institute Conference and Monograph — Aging and the Law: Looking into the Next Century	50
7.	Congressional Hearings and Reports Addressing Guardianship Issues	52
E.	Research, Studies, and Changes in Laws During the 1990s	53
1.	The National Judicial College and ABA Commis- sions on Legal Problems of the Elderly and Mentally Disabled 1991 Examination of Court- Related Needs of the Elderly and Persons with Disabilities	53
2.	The 1991 Guardianship Monitoring Project	54
3.	United States Senate Special Committee on Aging Workshops — Roundtable Discus- sions on Guardianship	57
4.	The 1993 Country-Wide Survey of Public Guardianship	58
5.	The 1993 National Probate Court Standards Addressing Guardianship and Conservatorship	60
6.	The 1994 ABA Senior Lawyers Division	

	Task Force on Guardianship Reform Recommendations for Revision of the Uniform Probate Code Article V	61
7.	The 1994 National Study of Guardianship Systems: Findings and Recommendations	62
8.	Recommendations of the 1995 White House Conference on Aging	65
IV.	A CRUMBLING LINKAGE FOR OLDER AMERICANS IN THE TWENTY-FIRST CENTURY	66
A.	The Complicated Process of Adjudications	70
1.	Two Views of the Guardianship Adjudication Process	70
a.	Proposal for Change — A Bifurcated Entry	71
(1)	Nearly Obvious Cases of Incapacity — Administrative Treatment	72
(a)	Case Study: The Nearly Obvious Incapacity of John Doe	72
(2)	Almost Obvious Cases of Capacity — Judicial Treatment	73
(a)	Case Study: The Almost Obvious Capacity of Sallie Doe	73
B.	Crumbling Linkage in Guardianship Administration	77
1.	Guardianship Monitoring	77
a.	Two Parts of the Answer to Guardianship Monitoring	78
(1)	Nonprofit Organizations and Trained Volunteers	78
(2)	National Database and Uniformity of Process	79
b.	What Is Left Unanswered in Monitoring	80
(1)	Increasing Numbers of Poor, Unprotected Older Americans with No Family or Close Friends	80
2.	Nonprofit Guardianship Programs	82
a.	Wisconsin Guardianship Support Center	82
b.	The Cathedral Foundation	83

c.	Silver Key Senior Services	83
d.	Pro-Seniors, Inc.	84
e.	Corporation of Guardianship, Inc.	85
3.	State Offices of Public Guardianship: The Tougher the Law, the More Expensive the Process	86
V.	CONCLUSION	87

I. INTRODUCTION

The older Americans' army of advocates numbers in the hundreds of thousands. Professor John J. Regan,¹ a consummate visionary and one of many advocates instantly recognized and distinguished by tireless efforts and superior skills, often wrote and spoke about society's future laws, particularly those affecting older Americans.² Regan dedicated ardent professional examination and personal advocacy in, *inter alia*, the legal areas of guardianships and conservatorships.³ He left us sounding an alarm. Regan's alarm warned of inevitable failures in the linkages between judicial administration of guardianships and conservatorships and the older Americans who constitute the vast majority of individuals placed within those guardianships and conservatorships.⁴

This Article examines those linkages against the backdrop of

1. John J. Regan, the Jack and Freda Dicker Distinguished Professor of Health Care Law at Hofstra University School of Law, and authority on the elderly's legal rights, died, too soon, on September 1, 1995. See *John J. Regan, Ex-Priest, Expert on Elderly Rights*, CHI. TRIB., Sept. 10, 1995, available in 1995 WL 6244342.

2. See, e.g., JOHN J. REGAN, TAX, ESTATE & FINANCIAL PLANNING FOR THE ELDERLY (1995); John J. Regan, *Protecting the Elderly: The New Paternalism*, 32 HASTINGS L.J. 1111 (1981); John J. Regan, *Protective Services for the Elderly: Commitment, Guardianship, and Alternatives*, 13 WM. & MARY L. REV. 569 (1972).

3. See *Roundtable Discussion on Guardianship: Workshop Before the Senate Special Comm. on Aging Hearings on S. 102-820*, 102d Cong. 21-31 (1992) (statement of John J. Regan) [hereinafter *Roundtable 102-820*]. Like similar writings, the term "guardianship" in this Article includes the broad spectrum of words and language used across the country to describe surrogate decisionmaking for another person through court appointment that transfers the power over the 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. See Erica F. Wood & N.E.H. Hull, *Guardianship of the Elderly: A Primer for Attorneys*, 1990 A.B.A. COMM. ON LEGAL PROBS. ELDERLY 2-3.

4. See *Roundtable 102-820*, *supra* note 3, at 21-23.

the *parens patriae*⁵ doctrine, coupled with the historical march of folly and misgovernment of guardianship⁶ of the “collective governments” of Greece, Rome, England and America.⁷ This Article analyzes several decades of empirical research and studies of changes in laws that only created a mask of virtual reality. Regan's 1992 description of major administrative problems in guardianship law is discussed.⁸ The Article concludes with a dire forecast of “too little, too late” for America's World War II baby-boomers as they enter the twenty-first century. Similar to their effect on the American educational system, the poor, unprotected old boomers will exacerbate, overwhelm, and break the ailing “legally dead” system.⁹ However, unlike the educational system, America's guardianship system does not have a sound foundation upon which to rebuild and accommodate the huge population. The American guardianship system is a joke. Although some progress has been made, it is doubtful that the third millennium will begin with either a comprehensive system or an organized network in place able to solve the guardianship problems and serve the masses.

II. GUARDIANSHIP HISTORY AND THE DOCTRINE OF

5. *Parens patriae* traditionally refers to the state's role as sovereign and guardian of legally disabled persons. BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).

6. The ultimate folly has been defined as nuclear war. *See generally* BARBARA W. TUCHMAN, *THE MARCH OF FOLLY: FROM TROY TO VIETNAM* (1984). This Article parallels Tuchman's analysis of governments' historical follies pursuing policies contrary to self-interest, with the folly of guardianship's misgovernment. *See also* Sally Balch Hurme, *Steps to Enhance Guardianship Monitoring*, 1991 A.B.A. COMM. ON LEGAL PROBS. ELDERLY 5-7.

7. *See generally* TUCHMAN, *supra* note 6, at 5. “Collective governments” is applied in two equally appropriate ways in the guardianship 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. Hereafter, in this Article, the term “collective governments” refers to the Greek, Roman, English, and American governments.

8. *See Roundtable 102-820, supra* note 3, at 21-23.

9. *Cf. Fred Bayles & Scott McCartney, Declared “Legally Dead” by a Troubled System*, AP SPECIAL REPORT: GUARDIANS OF THE ELDERLY, AN AILING SYSTEM, Sept. 20, 1987, at 1 [hereinafter the AP Report] (quoting Dr. Dennis Koson, a Florida law and psychiatry expert, who stated that the guardianship process declares wards “legally dead”). The Associated Press Special Report contains several articles that are referred to throughout this Article.

PARENS PATRIAE — MISGOVERNMENT AMOUNTING TO
FOLLY

This section summarizes the historical application of the guardianship process. It examines the application of laws against elements that define misgovernment, focusing specifically on the collective governments. This section concludes that guardianship remains a march of folly, particularly when focused on the person of the citizens served and protected.

A. Governmental Pursuit of Contrary Interests

Although the ultimate folly does not cloud guardianship, governments historically pursue guardianship policies that are contrary to the citizens' self interests.¹⁰ Guardianship policies, the bane of the collective governments, span the globe and the centuries, functioning under monarchy, oligarchy, and democracy.¹¹ Scorned through the ages by those who lost civil rights and independence, guardianship policy assumed many different forms. Although most were condemned at the time as counter-productive, better alternatives remained unutilized in favor of implemented policies driven by groups or bureaucrats.¹²

10. Cf. TUCHMAN, *supra* note 6, at 4–6. In this context, guardianship meets Tuchman's description of folly's three elements. First, its counter-productivity must have been foreseeable at the time to avoid unfairly judging the past by the present. *See id.* at 5. “[A]ll policy is determined by the mores of its age.” *Id.* Second, a feasible alternative must have been available. *See id.* Third, the questioned policy should survive an individual ruler, which is too frequent and individual to be generalized, and be that of a group exceeding a single political lifetime. *See id.* Tuchman concludes, however, that [c]ollective government or a succession of rulers in the same office, as in the case of the Renaissance popes, raises a more significant problem. . . . Folly's appearance is independent of era or locality; it is timeless and universal, although the habits and beliefs of a particular time and place determine the form it takes. It is unrelated to type of regime: monarchy, oligarchy and democracy produce it equally. Nor is it peculiar to nation or class.

Id. at 5–6. Tuchman queries, “Why do holders of high office so often act contrary to the way reason points and enlightened self-interest suggests? Why does intelligent mental process seem so often not to function?” *Id.* at 4; *see also* Winsor C. Schmidt, *Commentary: Revising Revisionism in Guardianship: An Assessment of Legal Reform of Decisional Incapacity*, in *OLDER ADULTS' DECISION-MAKING AND THE LAW* 270 (Michael Smyer et al. eds., 1996). Guardianship research reveals a “contemporary example of oppressive authority necessitating application and implementation of a rights shield.” *Id.* at 271.

11. *See infra* text accompanying notes 10–174 for a discussion of governmental treatments of guardianship; *supra* note 6 and accompanying text.

12. *See generally* AMERICAN BAR FOUNDATION REPORT ON THE RIGHTS OF THE MEN-

Guardianship is a compelling form of intervention when coupled with *parens patriae*,¹³ a concept designed to protect personal and financial well-being by allowing government invasion of individual autonomy.¹⁴

Beginning with the collective governments, *parens patriae* is a good example of government acting contrary to reason while seeking to implement guardianship policy. Does it rise to and qualify as folly? Possibly. It is helpful to consider the various governmental forms that often combine to result in a folly such as misgovernment: (1) historically prevalent tyranny or oppression; (2) excess ambition, such as the Athenian attempt to conquer Sicily, or the German attempt to rule by a master race; (3) incompetence or decadence, such as the Roman Empire, the Romanovs, or China's last imperial dynasty; and (4) folly or perversity, defined as the pursuit of policy contrary to self interest.¹⁵

1. Greek Misgovernment

Guardianship law's ancient precursors patterned taboos and tribal customs.¹⁶ Before the Golden Age of Greece, the dominant belief was that supernatural powers imposed punishment, causing mental disability and demon-possession.¹⁷ The cure was magic, with demon exorcisms utilizing bizarre and brutally inhumane treat-

TALLY ILL, THE MENTALLY DISABLED AND THE LAW (Samuel J. Brakel & Ronald S. Rock, eds., Univ. of Chicago Press rev. 2d ed. 1971) [hereinafter Brakel & Rock]. The revised edition by Brakel and Rock adds the quantitative and qualitative dimensions of the problem and comprises a seminal work that this article examines. *See id.* at xiii.

13. *See* Terry Carney, *Civil and Social Guardianship for Intellectually Handicapped People*, 8 MONASH U. L. REV. 199, 205 n.30 (1982) (citing *Eyre v. Shaftsbury*, 2 P. Wms. 103, 24 Eng. Rep. 659 (1722)); *see also* Richard Neugebauer, *Treatment of the Mentally Ill in Medieval and Early Modern England: A Reappraisal*, 14 J. HIST. BEHAV. SCI. 158, 159 (1978) (discussing the English Crown's late 13th through early 17th century paternal treatment of mentally disturbed incompetents).

14. *See* *Legal Issues in State Mental Health Care: Proposals for Change*, 2 MENTAL DISABILITY L. REP. 439, 444 (1978).

15. *See* TUCHMAN, *supra* note 6, at 5. Tuchman defines folly as policy that is counter-productive to self-interest. *See id.*

16. *See generally* Brakel & Rock, *supra* note 12, at 1 n.1 (citing JOHN BIGGS, JR., *THE GUILTY MIND* 3-34 (1955) and ALBERT DEUTSCH, *THE MENTALLY ILL IN AMERICA* 1-12 (2d ed. 1949)). For example, Egypt took mentally disabled persons to the temples for treatments, which included incantations, threats, and herbs and oils administered by priest-physicians. *See id.*

17. *See id.*

ments, such as crushing the body or removing skull sections to release the evil spirit.¹⁸ Greece was instrumental in dispelling the supernatural theory and recognizing mental disability as a natural phenomena.¹⁹

Advocates of the medical theory suggested that the mentally disabled deserved a comfortable, clean and well-lighted confinement.²⁰ However, attempts at a humane legal approach proved unsuccessful. Although the view of mental disability slowly transformed from a religious one to one recognized as a medical problem, guardianship remained a vehicle to control assets and finances.²¹

Throughout the Athenian age, guardianship's misgovernment embraced famous, infamous, and common citizens equally.²² Sophocles' incompetency inquisition is only one example. Seemingly unable to manage his affairs, Sophocles faced his son in court.²³ The

18. *See id.*

19. *See id.* Hippocrates (460–370 B.C.), the father of medicine and subsequent Greek physicians and philosophers, attempted medically-based classification of mental disabilities. *See id.*

20. *See* Brakel & Rock, *supra* note 12, at 1.

21. *See id.*; *see also* RICHARD C. ALLEN ET AL., MENTAL IMPAIRMENT AND LEGAL INCOMPETENCY 3 (1968).

22. *See generally* Brakel & Rock, *supra* note 12; EDITH HAMILTON, THE GREEK WAY (1964) (providing comprehensive information relating to Greek life).

23. *See* HAMILTON, *supra* note 22, at 66; *see also* ALLEN ET AL., *supra* note 21, at 8. As Athens' tremendous stream of life passed away, an adult Sophocles resigned to the decline of Athens' high hopes and failure of heroic endeavor. *See* HAMILTON, *supra* note 22, at 157–58. The Athenian march of folly sought to conquer all of Greece. Unfortunately, Athens birthed the world's freedom only to destroy it. *See id.* at 158. Greece turned on the powerful and tyrannical Athens, and Sophocles lived to see Sparta at her gates. *See id.* Athenian life stood at death's door alongside a depressed and debilitated Sophocles. *See id.* at 157–58 (recounting Sophocles' old age struggle). “Gods then were men and walked upon the earth.” *Id.* at 158.

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, gentleness. 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. “This is the spirit of Sophocles” *Id.*

“aged tragedian”²⁴ presented his sole defense to his alleged incompetency when he stood before the jurors and read from a play he had just written.²⁵ 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 griefs within,
 Envy and faction, strife and sudden death.
 And last of all, old age, despised,
 Infirm, unfriended.²⁶

“Those great words did not fall on deaf ears. The case was dismissed, the complainant fined, and the defendant allowed to depart in honor and triumph”²⁷ It was a “literal instance of poetic justice”²⁸ noted one author who concluded that “[s]o dramatic a climax would be unique in any era of civilization.”²⁹

If Sophocles had not convinced the jurors that he was not demon-possessed, the legal process would have condemned him to its Greek perversity. Although the Greek democratic misgovernment of guardianship, based on taboo and custom, was condemned as counter-productive at the time, medical alternatives offered were foregone in favor of policies implemented by a group or by bureaucrats. Greek misgovernment of guardianship assumed a march of folly.

2. *Roman Misgovernment*

24. HAMILTON, *supra* note 22, at 66.

25. *See id.*; *see also* ALLEN, *supra* note 21, at 8.

26. HAMILTON, *supra* note 22, at 158.

27. ALLEN, *supra* note 21, at 8. “Judge a man who could write such poetry not competent in any way? Who that called himself Greek could do that? Nay: dismiss the case; fine the complainant; let the defendant depart honored and triumphant.” HAMILTON, *supra* note 22, at 66.

28. ALLEN, *supra* note 21, at 8.

29. *Id.*

Influenced by Greece, Rome's misgovernment of guardianship received more extensive treatment, and many current organized guardianship structures originated from the Roman Empire.³⁰ This section discusses the laws of the Roman Empire, from the classical law to the law later developed through legislation, including that of Justinian.

For the purposes of this Article, the law of the Roman Empire begins with the fundamental law of the Roman XII Tables, enacted in 449 B.C.³¹ That comprehensive collection of rules was the first expressed legislation of the Roman state affecting private law.³² The XII Tables provide an early reference to guardianship, stating “[i]f 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.”³³

As time passed, two powerful groups governed the application of the XII Table laws: the Pontiffs³⁴ and the empowered jurists.³⁵ The jurists developed the *alieni juris* concept, which considered the Roman citizen's power to be contractually bound.³⁶ Women required their *tutor's* authority to be contractually bound.³⁷ This consideration as *manus* and bondage of women was the initial concept of

30. See generally Brakel & Rock, *supra* note 12, at 1–13.

31. See *id.* at 1; see also W.W. BUCKLAND, A TEXTBOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN 1–2 (2d ed. Cambridge Univ. Press 1932).

32. See BUCKLAND, *supra* note 31, at 1. The XII Tables were framed by specifically appointed officers called *Decemviri*, enacted by the *Comitia Centuriata*. See *id.*; see also Brakel & Rock, *supra* note 12, at 1.

33. Brakel & Rock, *supra* note 12, at 1 (citing Bruns, *Fontes Juris Romani Antiqui* 23–24 (Editio alterata aucta amendata, 1871)).

34. See BUCKLAND, *supra* note 31, at 2. The Pontiffs were priestly officers of the Roman Empire with the power to alter the XII Table laws through binding interpretation and formulation. See *id.* Their office gave the Pontiffs a great deal of power to govern and misgovern. See *id.*

35. See *id.* at 20. Certain jurists were authorized by the Emperor to respond under seal. See *id.* at 22. The jurist's response would be binding in those cases in which they were issued. See *id.* The Emperor himself was bound by responses which were unopposed by opinion and indexed. See *id.*

36. See BUCKLAND, *supra* note 31, 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 72 (6th ed. 1990); see also *infra* note 40 for a definition of *sui juris*.

37. See BUCKLAND, *supra* note 31, 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 1518 (6th ed. 1990).

disability.³⁸

Civil status was civil capacity³⁹ and *sui juris*⁴⁰ was considered with the principles of *capitis deminutio*.⁴¹ *Capitis deminutio*, which encompassed three legal degrees, maxima, media (or minor), and minima,⁴² had effect from a sort of civil death, like an “annihilation,” to those individuals with diminished capacity.⁴³

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.⁴⁴ The Roman law applied to various defects under guardianship, both *tutela* or *cura*.⁴⁵

Guardianship's universal nature was uniquely evidenced in Rome's XII Tables and treated as civil law.⁴⁶ The governing principle that everyone *sui juris* under puberty with property or exceptions must have a *tutor* extended the *potestas* concept.⁴⁷ The *potestas* was artificially extended for a male child until he founded his own *potestas*.⁴⁸ Women required perpetual *tutela* since they could never have such power or authority.⁴⁹ Practical reasoning for this was that

38. See, e.g., BUCKLAND, *supra* note 31, at 134. *Manus* indicates power or control (as in physical coercion) and is often used interchangeably with *potestas*. See BLACK'S LAW DICTIONARY 965 (6th ed. 1990); see also *infra* note 47 for a definition of *potestas*.

39. See BUCKLAND, *supra* note 31, at 35. “*Caput* is civil capacity.” *Id.* *Caput* means a person's civil status. See BLACK'S LAW DICTIONARY 212 (6th ed. 1990).

40. *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 1434 (6th ed. 1990).

41. See BUCKLAND, *supra* note 31, at 134.

42. 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.

43. See *id.* at 135–36.

44. See *id.* at 142.

45. See *id.* The *tutela* form of guardianship continues to the age of puberty. See BLACK'S LAW DICTIONARY 1517 (6th ed. 1990). *Cura* is guardianship in civil law which began at puberty and ended at the completion of the 25th year. *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 31, at 142.

46. See BUCKLAND, *supra* note 31, at 142.

47. See *id.* at 142. *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 1168 (6th ed. 1990).

48. See BUCKLAND, *supra* note 31, at 142.

49. See *id.*

tutela was more for the guardian's benefit than the child's.⁵⁰ 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.⁵¹

Similar to current law, the Roman Empire law restricted the appointment of *tutors*. For example, the law prohibited appointment of slaves, hostile aliens, and intermediate citizens.⁵² In addition, a woman could not be a *tutor* unless the father died with no prior appointment of a *tutor*, the woman promised not to remarry, and the magistrate appointed her.⁵³

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*.⁵⁴ However, since lunacy was regarded as curable, it was a ground for temporary excuse but not a disqualification.⁵⁵ 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*.⁵⁶ This may explain why most families ascribed a declaration of lunacy, thus keeping the property's ownership interest out of the *tutor's* control.

The XII Tables recognized *cura furiosi*, lunatics capable of lucid moments, and gave their paternal family guardianship.⁵⁷ Similar protection was also extended to all cases of mental incapacitation, even when permanent.⁵⁸ 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.⁵⁹

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 con-

50. *See id.*

51. *See id.* at 142–43.

52. *See id.* at 150–53.

53. *See id.* at 150–51.

54. *See* BUCKLAND, *supra* note 31, at 151.

55. *See id.* “A curator is appointed meanwhile, . . . a tutor is appointed.” *Id.* at 151 n.14.

56. *See supra* notes 54–55 and accompanying text.

57. *See* BUCKLAND, *supra* note 31, at 168.

58. *See id.*

59. *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.*

trary to the manner of one acting carefully in his own interest.⁶⁰ Yet, the entitlement to sell without any requirement to consider the ward's interests resulted in an inefficient system. Inherent conflict between ward and *tutor* made it difficult to apply to the ward's personal needs.

Constantine tried to correct the problem by forbidding the *tutor* to sell urban or suburban property or valuable movables except under justifiable circumstances.⁶¹ 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.⁶² Constantine held the *tutor* liable for interest if he unreasonably delayed or used the money personally.⁶³ The change in the *tutela* concept applied these administrative rules to the ward's interest.⁶⁴ The ward's interest then assumed a primary role, but the interest was almost unreasonably safeguarded.⁶⁵

Contracts, however, remained more personal in nature.⁶⁶ In early classical law, the *tutor's* contract was his own and enforceable only by or against him.⁶⁷ The ward had neither right nor liability, but the *tutor's* liability could come before the tribunal.⁶⁸

The *tutor's* administrative care varied throughout Roman history.⁶⁹ The *tutor's* infamous actions were restricted only for gross negligence, which was a difficult evidentiary matter to prove.⁷⁰ At one time the *tutor* was required to manage the ward's property with the same care he maintained for his own affairs.⁷¹ Some text, disputed among lawyers, imposed liability for all negligence.⁷² Acts resulting from the *tutor's* plunder were void and a cause of action existed for

60. *See id.* at 154.

61. *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.*

62. *See* BUCKLAND, *supra* note 31, at 154.

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

64. *See id.* at 154.

65. *See id.*; *see also* Brakel & Rock, *supra* note 12, at 2.

66. *See* BUCKLAND, *supra* note 31, at 155.

67. *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.*

68. *See id.* at 155.

69. *See id.* at 156.

70. *See* BUCKLAND, *supra* note 31, at 156–57.

71. *See id.* at 157.

72. *See id.*

damages.⁷³ Property gifts by the *tutor*, and transactions between the *tutor* and his ward, were void.⁷⁴ However, the *tutor's* administration was limited to property and the ward's other necessities fell within the curator's functions.⁷⁵

Even with the Roman Empire's elaborate system, the *tutors* and the curators seemingly exercised their powers in ways that more often served their own interests than those of their incompetent or disabled wards. In the Author's opinion, the Roman legal process condemned citizens *sui juris* to its perversity. The Roman oligarchy's misgovernment of guardianship, based on the self interests of those who controlled the citizens, was condemned as counter-productive at the time. Yet, available alternatives that could better serve Roman citizens were foregone in favor of policies driven by a group or by bureaucrats. Like the Greeks, the Roman Empire misgoverned guardianship in a march of folly.

3. *English Misgovernment*

Guardianship arrived in England as a result of the Western empire's decay during the fifth century. After that era, Western Europeans followed the law of the Germanic tribes, while Eastern Europe followed Roman law.⁷⁶ Spain and France followed the Visigothic Code (the "Code"), which was drafted between 466 and 485 A.D. and patterned after Roman law.⁷⁷ The Code prohibited any person uninterruptedly insane from infancy or thereafter from testifying or entering into a valid contract.⁷⁸

The Middle Ages returned legal treatment of mentally disabled individuals to the religious conception of demon possession and exorcism.⁷⁹ The elaborate ceremonies and antidotes were more inhumane and tortuous than those of earlier periods.⁸⁰ Personal welfare

73. *See id.*

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

75. *See* BUCKLAND, *supra* note 31, at 156.

76. *See* Brakel & Rock, *supra* note 12, at 2.

77. *See id.* at 2 n.9.

78. *See id.* at 2 (citing The Visigothic Code 2.5.10, in SCOTT, THE VISIGOTHIC CODE 67 (1910)).

79. *See id.* at 2; *see also* Peter M. Horstman, *Protective Services for the Elderly: The Limits of Parens Patriae*, 40 MO. L. REV. 215, 220 (1975) (stating that mentally disabled persons were often treated as social outcasts, and driven out of the city).

80. *See* Brakel & Rock, *supra* note 12, at 2.

received little or no attention, a mimic of Greek and Roman periods, while the laws emphasized control and protection of the property.⁸¹

Between 1255 and 1290 A.D., England's concept of guardianship began with the enactment of the statute *de Praerogativa Regis*,⁸² which gave the king power to protect his subjects, and their lands and goods.⁸³ The king was further bound to care for imbeciles and others lacking understanding and ability to care for themselves.⁸⁴

The English law divided individuals with mental disabilities into two classes: (1) the idiot or natural fool, who lacked understanding from birth, and (2) the lunatic or frail of wit, who at one time had understanding but lost it.⁸⁵ The king had custody of the idiot's land and could retain the profits from the land after providing the idiot with necessities.⁸⁶ After the idiot's death, the land returned to the "right heirs."⁸⁷ The king held the lunatic's land and applied all of the land's profits to maintain the mentally ill persons and their households.⁸⁸ Excess profits were returned to the lunatic once he or she regained capacity.⁸⁹ Thus, guardians profited from managing an idiot's property, but no profit resulted from the duty to manage a lunatic's property.⁹⁰

81. *See id.* at 2. Although medieval England delegated guardianship to the lord of the manor, whose duties included proprietary *and* personal interests, the main justification was proprietary so that the mentally disabled neither became a public burden nor wasted their assets. *See id.* at 250; *see also* ALLEN, *supra* note 21, at 3 (stating that the laws primarily protected property, assuming that few necessary guidelines regarding duties toward the mentally disabled's person because the guardian would have the person's best interest at heart); Barbara A. Cohen et al., *Tailoring Guardianship to the Needs of the Mentally Handicapped Citizens*, 6 U. MD. L.F. 91, 92 (1976) (pointing out that Roman law emphasized protection of the mentally disabled's property over protection of the person); Horstman, *supra* note 79, at 219-20 (stating that the mentally disabled ward's property, but not person, has always been cared for).

82. *See* Brakel & Rock, *supra* note 12, at 2.

83. *See id.*

84. *See id.*

85. *See id.*

86. *See id.*

87. *See id.* The term "right heirs" distinguished preferred heirs, who had priority in the estate, from the general heirs who would inherit if the preferred heir or his line failed. *See* BLACK'S LAW DICTIONARY 724 (6th ed. 1990).

88. *See* Brakel & Rock, *supra* note 12, at 2.

89. *See id.*

90. *See* Brakel & Rock, *supra* note 12, at 2; *see also* ALLEN, *supra* note 21, at 2 (describing the lunatic's guardianship as "a novel and noteworthy thing" because it actually considered the lunatic's interests).

Beverley's Case,⁹¹ decided in 1603, first expounded on and explained England's development of insanity law.⁹² The renowned Lord Coke explained that acts performed by a person *non compos mentis*⁹³ in a court of record should bind him and his heirs forever, while acts done outside a court of record may bind for his life or forever.⁹⁴ In addition, the punishment of the *non compos mentis* individual could not be an example to others.⁹⁵ Lord Coke also determined that the king's custody over the afflicted's body extended to their lands.⁹⁶ However, protection of the afflicted's person occurred only if there were available proceeds from the lands to care for his or her needs.⁹⁷

Under the process, the chancellor, upon petition, issued a writ *de idiota inquirendo*, which involved a jury trial similar to the lunacy writ and procedure.⁹⁸ In the interim, relatives cared for the *non compos mentis*.⁹⁹ To avoid heavy exaction by the king, juries

91. 76 Eng. Rep. 1118 (K.B. 1603).

92. See Brakel & Rock, *supra* note 12, at 2.

93. See *Beverley's Case*, 76 Eng. Rep. at 1121. Four types of persons included in the generic term *non compos mentis* were: (1) the idiot or natural fool; (2) those who once had sound memory, but lost it "by the visitation of God"; (3) the lunatic, who had periods of lucidity and periods of lunacy; and (4) those who lack reason due to their own actions, such as the drunk. *Id.* at 1122; see also Brakel & Rock, *supra* note 12, at 3. These categories of *non compos mentis* recognized by Lord Coke represent a significant effort by the common law to make clinical distinctions among handicap statuses of the mentally disabled. See MICHAEL L. PERLIN, MENTAL DISABILITY LAW — CIVIL AND CRIMINAL 34 (1989).

94. See *Beverley's Case*, 76 Eng. Rep. at 1121; see also Brakel & Rock, *supra* note 12, at 3.

95. See *Beverley's Case*, 76 Eng. Rep. at 1124. The reasoning behind non-punishment of the *non compos mentis* for felony, murder, or petit treason was the person's lack of ability to form intent. See *id.* at 1121. However, killing the King, high treason, was punishable. See *id.* Lord Coke further compared civil and common law that protected the idiot and his inheritance. See *id.* at 1122-27; see also Brakel & Rock, *supra* note 12, at 3. Common law did not contain civil law's provision that all acts performed by a person *non compos mentis* without the accord of his *tutor* were void. See Brakel & Rock, *supra* note 12, at 3. The law of England provided a *tutor* in the form of the King. See *id.* The King could void any transfer of property made by the idiot, including gifts or transfers made by the idiot before he was adjudged incompetent. See *id.* The King also protected the lunatics, who became *non compos mentis* later in life, could void the lunatic's transfers made during non-lucid moments, and remained accountable to the lunatic when they were lucid. See *id.*

96. See *Beverley's Case*, 76 Eng. Rep. at 1124.

97. See Brakel & Rock, *supra* note 12, at 3. "There is no indication that this care ever constituted a drain on the king's treasury." *Id.*

98. See *id.*

99. See *id.* at 4; see also PERLIN, *supra* note 93, at 35.

often found lunacy even if idiocy was more appropriate.¹⁰⁰ Lunatics were committed to the care of a friend who received an allowance for the care.¹⁰¹

Alternatively, the petitioner could request lasting confinement of the *non compos mentis*, without benefit of a jury trial, if the *non compos mentis* had no money, the condition was permanent, and the petitioner could not afford the additional expense.¹⁰² The alternative solution could explain later development of detention procedures.¹⁰³ One owning property could afford the expenses incurred in the necessary inquiry to determine his sanity.¹⁰⁴ The inquiry assured that the applicant's affairs were properly administered and that the proceeds from his holdings paid the administration and maintenance costs.¹⁰⁵ On the other hand, less wealthy individuals did not require an administrator for their affairs, and no method existed to compensate the nearest relative for their support.¹⁰⁶

Since the thirteenth century, the Crown's exercise of its royal prerogative relating to subjects unable to protect themselves was not so benevolent. Although the idiot could expect the Crown to protect both his or her person and property from exploitation, no duty extended to maintain the idiot's dependents.¹⁰⁷ The more attractive revenue-raising dimension diluted the protective welfare intent and

100. See Brakel & Rock, *supra* note 12, at 3 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES 303–07 (9th ed. 1783)).

101. See PERLIN, *supra* note 93, at 34–35. Typically, the chancellor named the incompetent's heir as manager of the estate because it was in the heir's interest to properly manage the estate; however, "to prevent sinister practices," the heir was not given the physical custody of the incompetent. See 1 WILLIAM BLACKSTONE, COMMENTARIES 295 (9th ed. 1783); see also Brakel & Rock, *supra* note 12, at 3. The heir was responsible to the Court of Chancery, to the recovered lunatic, or to his administrator. See 1 WILLIAM BLACKSTONE, COMMENTARIES 295 (1st Eng. ed. 1966); see also Brakel & Rock, *supra* note 12, at 3–4. These practices gradually developed into a set of customs, rules, and standards to manage the lunatic's property. See *id.* at 4.

102. See Brakel & Rock, *supra* note 12, at 4 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES 305 (9th ed. 1783)); see also *State ex rel. Hawks v. Lazaro*, 202 S.E.2d 109, 117–20 (W. Va. 1974) (pointing out that *parens patriae* authority is frequently not benevolently motivated and the doctrine has been "suspect from the earliest times"); PERLIN, *supra* note 93, at 34–35 & n.24.

103. See Brakel & Rock, *supra* note 12, at 4.

104. See *id.*; see also 1 WILLIAM BLACKSTONE, COMMENTARIES 292, 294 (9th ed. 1783).

105. See Brakel & Rock, *supra* note 12, at 4.

106. See *id.*

107. See Carney, *supra* note 13, at 205–06; see also Neugebauer, *supra* note 13, at 160.

the Crown received and retained revenues and profits generated by property owned by retarded, but not mentally ill, individuals.¹⁰⁸ The *non compos mentis*, however, fared better than the idiot because the Crown did not claim any revenue of the estate, yet was obligated to maintain and protect the person and his family according to his degree and station.¹⁰⁹

In later centuries, the royal benevolent prerogative has been modified and adapted.¹¹⁰ Instituted before 1540, and surviving until today, the Crown's responsibility was discharged.¹¹¹ Agencies or private citizens appointed as guardians or curators, and private committees of the estate or of the person, depleted the estate and discarded the person.¹¹² When the sixteenth century Court of Awards and Liveries administration fell out of favor, jurisdiction passed first to the Court of Chancery, and eventually to the administrative adjunct of the court, the master of lunacy, and the Office of Public Trustee.¹¹³

In the Author's view, the English legal process became subject to all of the perversities previously noted in the history of other countries. England appeared to condemn idiots and imbeciles to its perversity. It was in the Crown's self-interest and on those who legislatively controlled the citizens to mismanage guardianship.¹¹⁴ The English process, condemned as counter-productive, rejected alternatives that could better serve the English citizens in favor of policies implemented and driven by a group or by the bureaucrats. Like Greece and Rome, guardianship in the British Empire was misgoverned — a march of folly.

108. See Carney, *supra* note 13, at 206.

109. See Neugebauer, *supra* note 13, at 160.

110. See Carney, *supra* note 13, at 206.

111. See *id.*

112. See *id.* See generally N. ARTHUR HEYWOOD ET AL., HEYWOOD & MASSEY'S LUNACY PRACTICE (4th ed. 1911) (detailing the inquisition procedures, powers, and responsibilities of a committee of the person). Similar models have been implemented through recent statutory changes in several states. See, e.g., DEL. CODE ANN. tit. 12, § 3991-97 (1995); FLA. STAT. § 744.702 (1995); N.C. GEN. STAT. § 35A-1270-1273 (1995).

113. See Carney, *supra* note 13, at 206-07. This is akin to state public guardianship agencies created by statute in many states and operated from central administrative offices. See, e.g., ALASKA STAT. § 44.21.410 (Michie 1993); 755 ILL. COMP. STAT. ANN. 5/11a-5 (West 1993).

114. For a discussion of the English government's self-interest in guardianship management, see *supra* notes 76-114 and accompanying text.

4. American Misgovernment

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. American governance primarily echoes detention and commitment laws affecting mentally ill and deficient citizens. State detention and commitment laws evolved as advocates impressed on society due process rights for detainees. The process and changes of these laws were the frontier for guardianship advocates to observe and follow.

a. Colonial America to the Mid-1800s

One fact that remains consistent from Colonial America to present day is the unpleasant prospect of supporting an indigent incompetent.¹¹⁵ Colonial America expected families, “the primary social unit,” to care for their own.¹¹⁶ Secondary communal facilities cared for the orphaned and the friendless.¹¹⁷ Thus, the durably unemployed, mentally disabled, homeless person became a transient “monolithic mass,” drifting from town to town to survive.¹¹⁸

Early accounts of non-judicial community aid to the mentally disabled occurred in Pennsylvania and Massachusetts, but the goal was aid to the family, not to the disabled person.¹¹⁹ However, when derangement and violence were apparent, community action changed to judicial action and mentally disabled persons were committed without objection.¹²⁰

115. See Brakel & Rock, *supra* note 12, at 4.

116. See *id.*

117. See *id.*

118. See *id.* A drifter was so labeled whether mentally or physically disabled, or simply lazy. See *id.* Townspeople feared that they would have to support this monolithic mass, and thus made no attempt to assist. See *id.* The Protestant work ethic, which equated work and industry to morality, aimed the sanction of the laws at these indigent, mentally disabled people who underwent ridicule and whippings. See *id.* This Author asks: “Is this familiar?”

119. See *id.* That text described separate accounts in Pennsylvania and Massachusetts communities, where community support aided a father and brother, respectively, building small houses to care for the mentally disabled family member. See *id.* The Massachusetts community also provided maintenance expenses. See *id.* The two people were poor and “bereft” of natural senses. See *id.*

120. See Brakel & Rock, *supra* note 12, at 4–5. A 1788 New York statute allowed justices to safely lock up the “furiously mad” and dangerous, but the statute was intended for violent persons. See *id.* at 6. See generally Hugh Alan Ross, *Commitment of the*

Detention for the nonviolent presented a legal or philosophical quandry. Application of the *parens patriae* doctrine resolved the problem by granting states the power to act and protect the welfare of mentally ill persons.¹²¹ Family members usually initiated detention for other family members succumbing to lunacy.¹²² Legislative direction under the *parens patriae* doctrine emerged as the responsible way America dealt with mentally incompetent persons, supplemented with the family's immediate obligation.¹²³ The existing statutes defined the lunatics, the furiously mad, or those extremely "disordered in their senses."¹²⁴ The law left exceptions for the family or the Chancellor to provide for lunatics under separate care and protection, representing legislative use of asylums primarily for violent persons while others were cared for privately.¹²⁵

Similar to current guardianship laws, the procedures for commitment *non compos mentis* were accomplished on one physician's certification, or a justice of the peace warrant.¹²⁶ Those charged *non compos 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.¹²⁷

b. The Mid-Nineteenth Century

The concept of hospitals to serve both the mentally ill and poor sick citizens developed in the late-eighteenth century. In the late-1700s, Virginia erected the first hospital exclusively devoted to the mentally disabled.¹²⁸ The Williamsburg hospital remained the on

Mentally Ill: Problems of Law and Policy, 57 MICH. L. REV. 945, 955 (1959) (relating a comprehensive discussion of the commitment process and policies).

121. See PERLIN, *supra* note 93, at 38 n.42. Before the creation of institutions, 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 town of current domicile was charged with overseeing the care and safety of the incapacitated incompetent person. See *id.*

122. See Brakel & Rock, *supra* note 12, at 5.

123. See *id.* at 6.

124. See *id.* *supra* note 120 and accompanying text (regarding New York laws of 1788).

125. See Brakel & Rock, *supra* note 12, at 6.

126. See *id.*

127. See *id.*; see also *Stafford v. Stafford*, 1 Mart. 551, 552-53 (La. 1823) (holding that under civil law one must be provided notice and opportunity to cross examine before being deprived of the right to administer his own affairs).

128. See PERLIN, *supra* note 93, at 38. However, 22 years prior, a Philadelphia state

ly such facility until 1824, when Kentucky established the Eastern Lunatic Asylum.¹²⁹

In addition to statutes and procedures providing a semblance of due process, the common law writ of *habeas corpus* tested the confinement and detention of mentally incompetent persons.¹³⁰ For example, in 1845, Josiah Oakes sought his release from a Massachusetts asylum alleging his family had him committed illegally.¹³¹ In *Oakes*, the court acknowledged the existence of private institutions and the courts' necessary use of them, particularly for restraining insane persons exhibiting danger to themselves or others.¹³² However, the court also recognized that necessity creates a limitation upon the law and concluded that the proper limitation is restraint only as long as necessary.¹³³ The *Oakes* decision identified elements necessary to determine the propriety of detention.¹³⁴ It established more precise common-law rules reflecting advances in medical science, as well as society's view of mental disability.¹³⁵

History is mirrored through the judicial decisions and the work of noted physicians affecting mentally disabled persons.¹³⁶ By the turn of the last century, the development of law affecting the rights of the mentally disabled depended on (1) medical knowledge of the cause, care, and treatment needed by the mentally disabled, (2)

hospital had accommodations specifically for mental patients. *See id.*; *see also* Brakel & Rock, *supra* note 12, at 5.

129. *See* Brakel & Rock, *supra* note 12, at 5.

130. *See id.* at 6; *see also* Perlín, *supra* note 93, at 44.

131. *Matter of Josiah Oakes*, 8 Law Rep. 123 (Mass. 1845); *see also* Brakel & Rock, *supra* note 12, at 6–7; PERLÍN, *supra* note 93, at 44. *Oakes* was early America's most important civil commitment case. *See* PERLÍN, *supra* note 93, at 44. *Oakes*, an elderly man, became engaged to a young woman of questionable character shortly after his wife's death. *See* 8 Law Rep. at 123; *see also* Brakel & Rock, *supra* note 12, at 4. One hundred thirty years later, in 1971, Kenneth Donaldson sought release from the Chattahoochee 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, 564–65 (1974). *O'Connor* clearly illustrates how mismanagement of commitment and guardianship truly spans the centuries.

132. *See Oakes*, 8 Law Rep. at 123.

133. *See id.* at 125.

134. *See* Brakel & Rock, *supra* note 12, at 7.

135. *See id.*

136. Mrs. E.P.W. Packard and Miss Dorothea Lynde Dix are cited for their heroic endeavors to bring to the attention of the public a concern for those involuntarily committed, and for attempting to create more appropriate hospitals for the mentally ill. *See* Brakel & Rock, *supra* note 12, at 7–8; *see also* PERLÍN, *supra* note 93, at 43 nn.69–70.

acknowledgment by politically organized communities of the responsibility of care for the mentally disabled, and (3) the legal profession's awareness of social remedies.¹³⁷

c. The Mid-Twentieth Century

American misgovernment of guardianship remained invisible during the decades between the end of the nineteenth century and the middle of the twentieth century. Institutions for the mentally ill and the developmentally disabled were numerous and flourished country-wide. Only a minimal effort was required to commit the mentally ill and disabled.¹³⁸ As a result, the plight of these individuals was kept from the sight of the general public. The *parens patriae*, with all its previously discussed weaknesses, flourished as well. Change did not begin to occur until the 1960s.

By the 1960s, the commitment process bound both the mentally ill and the incapacitated. 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.¹³⁹ An understanding of the 1990s guardianship movement begins with a review of the 1960s commitment process 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.¹⁴⁰ Three cases mark the beginning: *Jackson v. Indiana*,¹⁴¹ *Lessard v. Schmidt*,¹⁴² and *O'Connor v. Donaldson*.¹⁴³

In *Jackson v. Indiana*,¹⁴⁴ the United States Supreme Court held

137. See Brakel & Rock, *supra* note 12, at 8. The historical records cited in the authorities used for this work demonstrate that what was true for the Greeks over 2000 years ago is true for the Americans today.

138. If you build it, they will come. If they don't, then commit them. In this Author's opinion, commitment of the mentally ill is the beginning of "the manufacture of madness." See generally THOMAS S. SZASZ, *THE MANUFACTURE OF MADNESS* (1970).

139. See Brakel & Rock, *supra* note 12, at 8.

140. See generally A. FRANK JOHNS, *Guardianship and Conservatorship*, in *ADVISING THE ELDERLY CLIENT* § 34 (Louis A. Mezzullo & Mark Woolpert eds., 1994) (The Johns text has been revised, updated, and modified to fit the context of this Article.); PERLIN, *supra* note 93 (Perlin's text provides a comprehensive analysis of involuntary civil commitment and substantive rights).

141. 406 U.S. 715 (1972).

142. 349 F. Supp. 1078 (E.D. Wis. 1972).

143. 422 U.S. 563 (1975).

144. 406 U.S. 715 (1972).

that, at a minimum, a state's commitment process must provide a reasonable relationship between the duration of a defendant's commitment and the purpose of the commitment.¹⁴⁵ The Court found Indiana's process violated 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.¹⁴⁶

Due Process violations were also observed in *Lessard v. Schmidt*,¹⁴⁷ the first federal decision regarding the constitutionality of a state's civil commitment proceedings.¹⁴⁸ In *Lessard*, the defendant was placed in emergency detention at a mental health center on an *ex parte* commitment order.¹⁴⁹ After multiple medical examinations and several months of detention, a trial court finally declared the defendant mentally ill.¹⁵⁰ The federal court found the Wisconsin statute violated due process and ordered implementation of safeguards to protect the public from misuse.¹⁵¹ 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.¹⁵²

In *O'Connor v. Donaldson*, the United States Supreme Court recognized the rights of mentally ill persons who posed no danger to themselves or to the community.¹⁵³ Under Florida's involuntary commitment statute, the *O'Connor* defendant spent over fourteen years in a mental hospital, despite the acknowledged fact that he

145. See *id.* at 738. In *Jackson*, a court-ordered psychiatric exam of the non-verbal, 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. See *id.* at 718–19.

146. See *id.* at 730–31.

147. See *Lessard*, 349 F. Supp. at 1103.

148. See PERLIN, *supra* note 93, at 86 n.304 (quoting Thomas K. Zander, *Civil Commitment in Wisconsin: The Impact of Lessard v. Schmidt*, 1976 WIS. L. REV. 503, 559).

149. See *Lessard*, 349 F. Supp. at 1081. *Lessard* was a class action contesting the validity of Wisconsin's civil commitment procedures. See *id.* at 1082.

150. See *id.* at 1081–82.

151. See *id.* at 1103–04; see also PERLIN, *supra* note 93, at 81 n.271 (quoting *Lessard*, 349 F. Supp. at 1096–97 n.27, which states that the trial judge must have based his decision that *Lessard* was mentally ill on his belief that she had one conviction for making annoying telephone calls in the past, and her statement that the National Education Association was infiltrated by communists, a belief, right or wrong, shared by others not threatened by commitment).

152. See *Lessard*, 349 F. Supp. at 1088–90.

153. See *O'Connor*, 422 U.S. at 576.

posed no danger to himself or others.¹⁵⁴ The Supreme Court emphasized that the mere existence of mental illness alone is insufficient grounds to confine a person to a mental health facility.¹⁵⁵ The argument that a mentally impaired person's standard of living is actually increased through state confinement failed on merit.¹⁵⁶ The Court found that incarceration was not the least restrictive means by which the state could provide assistance to the less fortunate.¹⁵⁷ The Supreme Court found that such an argument established the constitutional boundaries of the "right to liberty."¹⁵⁸

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.¹⁵⁹ Commitment hearings now require adequate notice to the defendant, and to family members when relevant.¹⁶⁰ The individual should be informed of the right to be present at a commitment hearing,¹⁶¹ the right to appeal a commitment order,¹⁶² and the right to be heard, present evi-

154. *See id.* at 566–68. O'Connor repeatedly demanded his release; he insisted he posed no threat, was not mentally ill, and the hospital was not treating his alleged illness. *See id.* at 565. The Court found no constitutional basis 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, mental illness alone does not disqualify a person from preferring his home to the comforts of an institution. *See id.* at 575. Incarceration is rarely necessary, if ever, for raising the living standards of those capable of surviving safely in freedom, on their own or with the help of family or friends. *See id.*

155. *See id.* at 575.

156. *See id.*

157. *See id.* The Court also rejected the argument that incarceration was appropriate to protect its citizens from the exposure to persons with mental disabilities. *See id.* at 575; *see also* John Parry, *Involuntary Civil Commitment in the 90s: A Constitutional Perspective*, 18 MENTAL & PHYSICAL DISABILITY L. REP. 320, 324, 326 (1994) (discussing and defining "least restrictive alternative").

158. *O'Connor*, 422 U.S. at 576.

159. *See*, for example, Parry, *supra* note 157, at 330–36 for a table of statutes of all 50 states and the District of Columbia. The table presents key statutory elements for extended involuntary commitment. *See id.*

160. *See, e.g.*, CAL. WEL. & INST. CODE § 5208 (West 1984); FLA. STAT. § 394.467(2)(b) (1995); 405 ILL. COMP. ANN. STAT. 5/3–705 to 5/3–706 (West 1993); N.J. STAT. ANN. § 30:4-41 (West 1981).

161. *See, e.g.*, N.J. STAT. ANN. § 30:4-41 (West 1981).

162. *See, e.g.*, 405 ILL. COMP. STAT. ANN. 5/3-816 (West 1993); VA. CODE ANN. § 37.1-67.6 (Michie 1990); *see also In re Guzik*, 617 N.E.2d 1322, 1327 (Ill. App. Ct. 1993). In *Guzik*, the appellant filed an appeal notice after finding that she should be subject to

dence, and cross-examine witnesses.¹⁶³

The standards of proof applicable to involuntary commitment were clarified and strengthened. A person may be committed on the basis of mental illness only upon a showing that he is both incapable of providing for his basic physical needs and unable to protect himself from harm.¹⁶⁴ In addition, a commitment order should require a showing of clear and convincing evidence that the individual is a threat to himself or others and that no less restrictive means of protection exist.¹⁶⁵ If a probate court's order of discharge is appealed, the person should not remain confined during the appeal period.¹⁶⁶

The poor implementation of these comprehensive due process procedures is another characteristic shared by commitment and incompetency laws. Despite the good intentions and high visibility of these statutory changes, the positive effect in the mentally ill individual's quality of life has been limited. For example, while the laws attempt to save the mentally ill from incarceration in mental institutions, the protections lose their power when the circumstances are alleged to be urgent or an emergency.¹⁶⁷

involuntary admission, but before the final disposition of the court. *See id.* at 1326. The court held that an appeal from such an order is nonfinal and premature; thus, the appellate court lacks jurisdiction unless the appeal is properly perfected. *See id.* at 1327.

163. *See, e.g.*, FLA. STAT. § 394.467(3) (1995); *see also In re Coconino County*, 862 P.2d 898, 901 (Ariz. Ct. App. 1993). The requirement of Arizona Statute § 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. *See id.* Furthermore, by stipulation of the parties, the written reports may be accepted in lieu of testimony. *See id.*

164. *See* FLA. STAT. § 394.467(1) (1995); *In re Interdiction of F.T.E.*, 594 So. 2d 480, 483-84 (La. Ct. App. 1992).

165. *See F.T.E.*, 594 So. 2d at 485-87; *see also* FLA. STAT. § 394.467(1); Parry, *supra* note 157, at 330-36.

166. *See* Georgia Mental Health Inst. v. Brady, 436 S.E.2d 219, 223 (Ga. 1993) (holding that continued confinement during appeal of a probate court order of discharge is unconstitutional under *Vitek v. Jones*, 445 U.S. 480 (1980), which held civil commitment massively curtails liberty, and under *O'Connor v. Donaldson*, 422 U.S. 563 (1975), which held that state-imposed involuntary confinement of the mentally ill person after a finding that the person poses no danger to themselves or others and can live alone safely violates due process).

167. *See, e.g., In re Herman*, 619 A.2d 958, 959 (D.C. 1993). In *Herman*, the court held that under the District of Columbia statutory provisions for emergency hospitalizations, D.C. Code §§ 21-524, 24-525, the trial court should focus on the person's present mental condition and whether probable cause is supported by likelihood of harm to the person or others if not immediately detained. *See id.* Next, the court should consider

These negative side effects afflict two distinct groups — wrongly-committed persons seeking discharge, and persons in need of treatment who are not considered dangerous.¹⁶⁸ The process of reevaluation, and the opinions of direct care staff as to whether or not to discharge committed patients, becomes more subjective. Unfortunately, a patient's objections to this subjective process are often used against the patient during treatment and reevaluation.¹⁶⁹

possible defects in the application, its reliability and integrity, but should not terminate proceedings and release the person based solely on the application). *See id.* *See generally In re Lowery*, 428 S.E.2d 861 (N.C. Ct. App. 1993). Under North Carolina General Statutes § 122C-276(d), a patient initially committed voluntarily on a short term basis can be disadvantaged should the state seek involuntary commitment when the patient requests discharge. *See Lowery*, 428 S.E.2d at 863. The statute affords the patient the same due process rights granted at the initial hearing but not a “repetition of every occurrence surrounding the initial hearing.” *Id.* Since a voluntary commitment proceeding requires examination by a single physician, and an involuntary commitment proceeding requires two physician exams, a patient whose initial hearing is for voluntary commitment on a short term basis may be involuntarily committed at a rehearing on a long term basis with minimal due process protections. *See id.* An involuntary commitment order will remain in effect until the patient reaches a level of competency in which he or she is no longer a danger to himself or to others. *See id.* at 863–64. An incapacitated person may be held in custody without judicial proceeding if no guardian or other authorized person exists with authority to act in an emergency. *See, e.g.*, CAL. WELF. & INST. CODE §§ 5150, 5151 (West 1984); FLA. STAT. § 394.463 (1995); 405 ILL. COMP. STAT. ANN. 5/3-603 (West 1993); N.Y. MENTAL HYG. LAW §§ 9.39, 9.45 (McKinney 1996). Under urgent circumstances, a person with suicidal tendencies or who wanders from his or her care-givers may be subject to intervention or to proper medical treatment. *See also* N.Y. MENTAL HYG. LAW § 9.39(a) (McKinney 1996); UNIF. GUARDIANSHIP & PROTECTIVE ACT § 2-208, 8 U.L.S. 493 (1993).

168. *See supra* note 167 for a discussion of *In re Lowery*, 428 S.E.2d 861 (N.C. Ct. App. 1993). *See generally* Robert C. v. Wack, 635 N.Y.S.2d 426 (1995).

169. *See* THOMAS S. SZASZ, THE MYTH OF MENTAL ILLNESS (1961) (comprehensively analyzing society's treatment of mental illness); *see also* CAL. WELF. & INST. CODE § 5250 (West 1984) (providing time limitations on certification for intensive treatment and grounds for certification); FLA. STAT. § 394.469(1) (1995). The individual may be reevaluated on a regular basis by the professional staff at the institution where he or she is committed. *See, e.g.*, 495 ILL. COMP. STAT. ANN. 5/3-814 (West 1993). The individual can always petition to seek release if he or she believes that his or her sanity has returned to a level that is acceptable and not dangerous. *See, e.g.*, CAL. WELF. & INST. CODE § 5275 (West 1984); 405 ILL. COMP. STAT. ANN. 5/3-900 (West 1993); N.Y. MENTAL HYG. LAW § 9.33(c) (McKinney 1996). Such a petition for release would usually be heard by the court that issued the original commitment order. *See, e.g.*, CAL. WELF. & INST. CODE § 5276 (West 1984); 405 ILL. COMP. STAT. ANN. 5/3-901 (West 1993); *see also In re Jeffers*, 606 N.E.2d 727 (Ill. App. Ct. 1992). In *Jeffers*, the court held that, under Illinois Statute 5/2-107.1, a psychotropic medication may be administered to an involuntary patient against his or her will if the evidence establishes that the patient suffers from a serious mental illness that has caused deterioration of the patient's ability to function, the symptoms of the illness have existed for a long period, less restrictive treatments

The roadblocks to discharge have not created a simultaneous lessening of the restrictions to receiving governmental assistance. Mentally ill or mentally disabled persons can fall through the governmental and legal safety nets if they are not determined dangerous to themselves or to the public. The reduction of patient populations in mental institutions and hospitals across the country literally forced patients needing some form of assisted living out onto the streets without proper support.¹⁷⁰ Similar to the Colonial period's monolithic mass of drifters, today's homeless, jobless transients are ignored or forced from public view.¹⁷¹

Others who have examined the current plight of people with mental illness or disability are also concerned. John Parry's consti-

have not worked, benefits of the medication will outweigh the harm, and the patient lacks the capacity to make a reasoned decision about the medication. *See Jeffers*, 606 N.E.2d at 731–32. Under those circumstances, approved administration of medication does not require the trial court to find that the patient's guardian will act according to what the patient's wishes would be if the patient were competent. *See id.* at 730. Furthermore, the patient's ability to understand the options available and to give a purportedly non-deluded reason for refusing the medication does not show that the patient has the ability to make a reasoned decision. *See id.*; *see also In re Blilie*, 494 N.W.2d 877, 881–83 (Minn. 1993). In *Blilie*, the court held that, pursuant to Minnesota Statute § 253B.03, it is constitutional to administer neuroleptic medication to an incompetent patient without court review if the patient does not object, or a court-appointed guardian ad litem appointed gives written, informed consent and a multidisciplinary treatment review panel composed of disinterested persons gives written approval. *Blilie*, 494 N.W.2d at 881. The procedural safeguards apply equally to mentally retarded and mentally ill patients who face intrusive treatment procedures. *See id.* at 883; *see also In re Guardianship of Austin*, 615 N.E.2d 411, 416–17 (Ill. App. Ct. 1993). In *Austin*, the court held that Illinois Statute 5/2-107.1(g) requires a petition, hearing, and court order before a guardian can authorize the administration of psychotropic medication. *See Austin*, 615 N.E.2d at 417. Even when the ward does not refuse consent, the Office of State Guardian must present evidence regarding the intended effect of the medication, how the medication would ameliorate the symptoms in a ward's diagnosis, and any alternatives to continued medication, and a trial court may properly limit the use of psychotropic medications for a disabled ward to what was in use and approved at the time of the hearing on the petition for limited guardianship. *See id.* at 416–17.

170. The Author observes that even before *Jackson*, *Lessard*, and *O'Connor*, Lindman and McIntyre noted a reversal of the population trend in state mental hospitals, and the advocacy efforts of community mental health agencies and organizations that provided services to further reduce mental institution populations in the larger hospitals. *See Brakel & Rock*, *supra* note 12, at 8 n.40.

171. This Author recalls an example of the literal exercise of police power which was the subject of a news headline. The exposé described the predicament of a mentally ill, homeless transient who, supposedly through an act of benevolence, was given a one way bus ticket to the opposite coast by a police officer who explained he was only trying to help.

tutional perspective on involuntary commitment of people with mental illness or disability in the 1990s¹⁷² is disheartening. Mr. Parry advocates a push to narrow the gap existing between the letter of the law and its actual implementation.¹⁷³ To achieve this objective, all factions involved in the commitment process must be educated in the constitutional principles and requirements so that implementation of these principles does not violate the rights of the mentally ill and disabled.¹⁷⁴

American legal process through the mid-twentieth century condemned mentally ill or disabled citizens to its perversity. Similar to other ages and other governments, American democracy's misgovernment of guardianship was commingled with the perceived need to hospitalize or restrain the disabled, either for their own good or to protect others. Like the other collective governments, American guardianship procedures have been condemned by knowledgeable commentators as counter-productive at the time; yet, available alternatives to better serve the American citizens were foregone in favor of policies driven by a group or by bureaucrats. Through the mid-twentieth century, American guardianship can only be viewed as a misgoverned march of folly.

III. SEVERAL DECADES OF EMPIRICAL RESEARCH PROJECTS, STUDIES, AND CHANGES IN LAWS

A. General Overview

The 1960s began a series of significant empirical research projects and studies. Viewed together, in the Author's opinion, they comprise a striking composite of how far changes in the laws have come, and how implementation of those changes has gone virtually nowhere. The changes are analogous to the technological wizardry of virtual reality. Once you have the mask over your eyes, you see where you are going as if you are actually there — but you have gone nowhere. If seeing is believing, then you believe that you have gone as far as the images in the mask have taken you. Similarly, the guardianship-law changes over the past several decades have created a mask of virtual reality. The changes in law mask the real-

172. *See generally* Parry, *supra* note 157.

173. *See id.* at 326.

174. *See id.*

world reality, and provide those looking through the mask the opportunity to see where they are going as if they were actually going there — but they have gone nowhere. Yet, since seeing is believing, those looking through the mask believe that the real world is implementing, monitoring, and enforcing rights, procedures, and public and private programs that benefit vulnerable and unprotected older Americans under guardianship's intrusive intervention. They can go only as far as the mask of images will take them — in reality, nowhere.

The last half of the twentieth century brought many substantive and procedural changes affecting individuals with mental illnesses and other disabilities. The processes already in place for commitment and guardianship were joined, and were often indistinguishable.

B. Research, Studies, and Changes in Laws During the 1960s

Several of the broad-based studies of the 1960s had their aegis in the 1940s, when the American Bar Association (ABA) created committees and sections having specific interests in incompetency and guardianship.¹⁷⁵ A recommendation presented to the ABA Board of Governors suggested that a special committee examine the adequacy of the laws that safeguard mentally disabled individuals, and draft and submit appropriate legislation if the committee found that the safeguards did not work.¹⁷⁶

Many studies began with demographic analysis and exposés of mentally ill and disabled individuals in hospitals and psychiatric confinement, and forecast the twenty-first century growth explosion of elder Americans.¹⁷⁷

175. See *infra* note 176.

176. The writings of Brakel and Rock, *supra* note 12 (and Lindman and McIntyre previously, and Brakel, Parry, and Weiner subsequently), are the culmination of the studies funded by the American Bar Association from the 1950s to the early 1960s. See Brakel & Rock, *supra* note 12, at xvi, xvi n.10 (citing Judge Frank L. McAvinchey Address, The Not-Quite-Incompetent Incompetent, at the ABA Section on Real Property, Probate and Trust Law Meeting (Aug. 28, 1956), in ABA Section of Real Property, Probate and Trust Law Proceedings, Part I, at 18 (1956); ABA Section on Real Property, Probate and Trust Law: *Index to Publications of the Section, 1934–1955* (1956)); see also SAMUEL BRAKEL ET AL., MENTAL DISABILITY AND THE LAW (3d ed. 1985).

177. See, e.g., Lawrence A. Frolik & Alison P. Barnes, *An Aging Population: A Challenge to the Law*, 42 HASTINGS L.J. 683 (1991).

1. *The 1961 Mentally Disabled and the Law Study*

The Mentally Disabled and the Law Study examined the California, Illinois, Michigan, New York, and Pennsylvania statutes, and included a Draft Act governing hospitalization of the mentally ill.¹⁷⁸ The initial study showed only that the problems presented were much more complex and required further comprehensive examination in order to present accurate application of the law to the mentally disabled.¹⁷⁹ The second, expanded study analyzed, described, and categorized statutes and court decisions affecting the mentally disabled individuals' rights.¹⁸⁰ Treatises and other written literature were also reviewed and charts developed to examine the Draft Act and statutes from the then forty-eight states and the District of Columbia.¹⁸¹ The goal was to confirm the written status of the law.¹⁸²

In 1961, *The Mentally Disabled and the Law Study* was published, with subsequent revised editions.¹⁸³ The study devoted chapters to an examination of "historical trends, voluntary admission to hospitals, involuntary hospitalization, release and separation from mental institutions, the rights of hospitalized patients, eugenic sterilization, domestic relations, incompetency, personal and property rights, sexual psychopathy, and criminal 'insanity' or irresponsibility."¹⁸⁴ The study examined statutory provisions, created reference tables comparing the manner in which the legislatures of the fifty states and the District of Columbia, and the authors of the Draft

178. See Brakel & Rock, *supra* note 12, at xvi. Printed copies of the Draft Act are no longer available; however, the full text is set out in Brakel & Rock, *supra* note 12, at app. A. See *id.* at xix, 454.

179. See *id.*

180. See *id.*

181. See *id.* at xvi-ii.

182. See *id.* at xvii.

183. Two separate but related field studies were performed. *Hospitalization and Discharge of the Mentally Ill* studied civil hospitalization practices in seven states. See Brakel & Rock, *supra* note 12, at xvii n.19 (citing RONALD S. ROCK ET AL., HOSPITALIZATION AND DISCHARGE OF THE MENTALLY ILL (1968)). The corresponding study, *Mental Disability and the Criminal Law*, compared the mental illness/criminal justice relationship in five states and the District of Columbia. See *id.* at xvii & n.20 (citing ARTHUR R. MATTHEWS, JR., THE MENTALLY DISABLED AND THE CRIMINAL LAW (1970)). The value of the original report is evident by observing that subsequent articles or monographs concerning laws governing mentally ill individuals frequently rely on the report. See *id.* at xvii.

184. *Id.* at xvii.

Act, dealt with the rights of mentally disabled persons.¹⁸⁵ In this Author's opinion, the tables, when examined against the tables of current research, provide an interesting flow of changes in the attention given to the judicial administrative process of dealing with mentally ill individuals, incompetent individuals, and those individuals under guardianship.

The Mentally Disabled and the Law Study offered four noteworthy conclusions and recommendations. First, the study concluded that the statutes should clearly show that a determination of incompetency is an issue separate from hospitalization, although hospitalization may be introduced as evidence in the determination of the competency question.¹⁸⁶ Second, the study concluded that competency determinations should be more discriminating and should distinguish between functions that the incompetent should not and may not perform and functions that the incompetent retains.¹⁸⁷ Third, hospitalized patients not formally adjudicated incompetent may be subjected to certain administrative limitations on competency.¹⁸⁸ Certain safeguards should be observed, such as (1) a showing of need for the patient's welfare or for orderly hospital administration, (2) the recording of such restrictions together with the proof of need, and (3) giving the patient an opportunity to challenge the restrictions.¹⁸⁹ Fourth, the patient's legal status as competent or incompetent should be clarified when the patient is discharged.¹⁹⁰

2. *The 1968 Mental Competency Study*

Concurrent with the American Bar Association's studies, mental health professionals examined administrative protection for mentally incompetent citizens.¹⁹¹ The National Institute of Mental Health issued a three-year grant to the George Washington University Institute of Law, Psychiatry and Criminology for the *Mental Competency Study*.¹⁹² After preliminary planning in the summer of

185. *See id.* at xviii.

186. *See* Brakel & Rock, *supra* note 12, at 265.

187. *See id.*

188. *See id.*

189. *See id.*

190. *See id.*

191. *See generally* VIRGINIA LEHMANN, GUARDIANSHIP AND PROTECTIVE SERVICES FOR OLDER PEOPLE (Geneva Mathiasen ed., 1963).

192. *See* ALLEN ET AL., *supra* note 21, at xiii. Henry Weihofen, Professor at the Uni-

1961, the proposal to study mental competency law was submitted in 1962 to the National Institute of Mental Health.¹⁹³

The scope of the *Mental Competency Study* included an examination of pertinent situations relating to an individual's legal incompetence.¹⁹⁴ These situations included the ability to manage business or financial affairs, including entering into a simple contract or convey real property; execute wills; marry; divorce; retain custody of children; drive a car; receive benefits, annuities or other income; prosecute or defend legal actions; practice a profession; vote; or hold office.¹⁹⁵

The study's four phases included library research, field studies that examined the law, analysis of the field studies, and preparation of the final report.¹⁹⁶ The *Mental Competency Study* chose states that reflected a variety of laws and procedures used to determine competency.¹⁹⁷ The study summarized the state laws and (1) indicated how many different statutory procedures were utilized in determining competency, (2) analyzed the relationship between hospitalization and competency, (3) indicated whether conservatorship statutes existed, (4) indicated whether or not there were statutes appointing a guardian ad litem, and (5) indicated whether the statute required either medical certificates or the actual testimony

versity of New Mexico Law School, conceived the idea during his tenure as a visiting law professor at George Washington University. *See id.* Professor Weihofen was joined by Elyce Zenoff Ferster, former counsel to both the American Medical Association and the Senate Judiciary Subcommittee on Constitutional Rights, and Associate Director of the American Bar Foundation's Project of the Rights of the Mentally Ill. *See id.* Professor Richard C. Allen, who held a joint appointment at Washburn University School of Law and the Menninger School of Psychiatry, succeeded Weihofen. *See id.*

193. *See ALLEN ET AL.*, *supra* note 21, at 15. The study's purpose was to provide data to be examined by the director and staff and used in drafting a model statute under the sponsorship of the National Institute of Mental Health. *See id.* The essential data would be used to prepare a model statute to complement the Draft Act Governing Hospitalization of the Mentally Ill. *See id.* *See also supra* notes 177–89 and accompanying text for a discussion of the Draft Act. The revolution of hospitalization through tranquilizing drugs, shorter average hospital stays, and increased voluntary and temporary admission spurred questions concerning incompetency laws. *See ALLEN ET AL.*, *supra* note 21, at 15. Questionable issues included, *inter alia*, the general and specific legal effect of hospitalization of the mentally ill, the effect of release from a mental hospital, desirability of registers of mentally ill persons, and procedural problems in incompetency adjudication. *See id.*

194. *See ALLEN ET AL.*, *supra* note 21, at 15.

195. *See id.*

196. *See id.* at 15–16.

197. *See id.* at 16.

of medical professionals.¹⁹⁸ After considering additional factors, the *Mental Competency Study* focused its examination upon the competency laws of the following states: California, Colorado, Maryland, Massachusetts, New Jersey, New York, North Carolina, Ohio, Texas; the District of Columbia's laws were also analyzed.¹⁹⁹ The findings and recommendations summary included categories for hospitalization and competency, as well as several subcategories.²⁰⁰

The guardianship section is significant to this Article. The recommendations of the *Mental Competency Study* are mirrored in recommendations produced in the studies of later decades.²⁰¹ The terminology recommendations are particularly important because terminology has been targeted as arcane, imprecise, and vague.²⁰² In addition, the study's recommendations addressing appointment and supervision of guardians since appointment, supervision, and monitoring, are mirrored and targeted as primary issues in later

198. *See id.* at 16–17.

199. *See* ALLEN ET AL., *supra* note 21, at 17. The published text specifically detailed the headquarters personnel and the field personnel, research tool preparation, including questionnaires and reports, data analyzation methods, and noted the other factors considered. All of this was done in order to assist others who might do empirical research projects in the future. *See id.* at 18–29.

200. *See* ALLEN ET AL., *supra* note 21, at 4. The report summary included subcategories as follows: “Hospitalization and Incompetency Merged in Law; Separation of Hospitalization and Incompetency in Law; ‘De Facto’ Incompetency: Laws and Regulations Restricting the Jural Activities of ‘Competent’ Patients; Other Activities of Patients; and Separation of Hospitalization and Incompetency — The Law in Transition.” *See id.* at xxiii. “Guardianship” with subcategories of “Terminology, Definitions, Procedures, Appointment and Supervision of Guardians and Restoration; Estate Planning, with subcategories of Legal Alternatives to Formal Guardianship, Ad Hoc Determinations of Incompetency, The Criteria of Competency, Specific Areas of Determination.” *Id.* at xxiii–iv; *see also id.* at 228–58.

201. *See infra* notes 226–446 and accompanying text for a discussion of subsequent decades studies.

202. *See* ALLEN ET AL., *supra* note 21, at 235–36. The *Mental Competency Study* made many recommendations about the use or choice of terminology in guardianship matters, and the study determined that the generic term “incompetent” best describes “the class of persons for whom a guardian may be appointed.” *Id.* at 234. However, because of the negative stereotype invoked by this term, a legal or statutory definition should describe such individuals as “[p]ersons for whom a guardian may be appointed.” *Id.* The term “ward” is sufficient after an appointment has been made. *See id.* The study notes that nationwide uniformity of a term for an appointed fiduciary (*e.g.*, “guardian”) is unrealistic and unlikely to occur. *See id.* at 235. The terms “mental illness or disorder” and “mental retardation” best describe the impairment necessary to warrant appointment of a guardian, and will help guard against involuntary appointment under lesser conditions such as age or alcoholism. *See id.* at 236.

studies in later decades.²⁰³

3. *The Uniform Probate Code, Article V — Protection of Persons Under Disability and Their Property*²⁰⁴

The Uniform Probate Code (UPC) is a creation of the National Conference of Commissioners on Uniform State Laws.²⁰⁵ Promulgated in 1969, the UPC resulted from a continuing review and study of probate laws.²⁰⁶ In 1971, Idaho was the first state to pass the UPC.²⁰⁷ Through 1995, fifteen other jurisdictions followed Idaho's lead, although many of them have made significant amendments or initial revisions from UPC Article V.²⁰⁸

203. *See id.* at 234–48. The *Mental Competency Study* also made recommendations for guardianship appointment, supervision, and discharge after the ward's restoration. *See id.* at 245–48. After emphasizing the importance of the appointment process, the study recommended that courts consider the preference and needs of the ward, the opinions of expert witnesses, and the petitioner's choice in making its guardian selection. *See id.* at 246. The study urged research into the actual operation of guardianships, the different needs of special wards, the appropriate use of personal guardians, and the feasibility of partial guardianships. *See id.* Supervision efforts by the proper courts must be sufficiently funded and staffed to insure compliance with financial accountability statutes, provide periodic court inquiries into the ward's condition and develop guidelines for guardian performance and supervision. *See id.* at 246–47. Achieving that goal may require the hiring of additional social workers, or the active pursuit of state welfare office resources. *See id.* at 247. Restoration proceedings should mirror appointment proceedings, but with the additional guarantee of an attorney or guardian ad litem present to represent the ward seeking discharge and final accounting. *See id.* The study also recommends the creation of a system which allows a state agency to act as guardian when there is no available guardian or where the estate is small. *See id.* at 248.

204. In 1966, a Special Committee to revise the Model Probate Code (formed by the American Bar Association Section of Real Property, Probate and Trust Law), together with the Uniform Probate Code Committee (formed by the National Conference of Commissioners on Uniform State Laws), and a Reporting Staff for the Uniform Probate Code (headed by Professor William J. Pierce), considered a "First Tentative Draft of Revised Part IV, Model Probate Code, entitled 'Protection of Persons Under Disability and Their Property.'" *See* William F. Frachter, *Toward Uniform Guardianship Legislation*, 64 MICH. L. REV. 983–84 (1966); *see also* ABA Comm. on the Mentally Disabled, *Legal Issues in State Mental Health Care: Proposals for Change*, 2 MENTAL DISABILITY L. REP. 441 (1978); Report of ABA Comm. on Problems Relating to Persons Under Disability, *Conservatorship: Present Practice and Uniform Code Compared*, 5 REAL PROP. PROB. & TR. J. 507 (1970).

205. *See* UNIF. PROBATE CODE, 8 U.L.A. 1 (1983 & Supp. 1996) [hereinafter UPC]; *see also* Frachter, *supra* note 204, at 983.

206. *See* UPC, *supra* note 205, at 431.

207. *See id.* at 1, 432.

208. *See id.*

Part three of UPC Article V (Article V) addresses incapacitated persons.²⁰⁹ UPC § 5-303 includes three mandatory designations or appointments: (1) counsel, who may have guardian ad litem powers and duties as well as ability to represent the respondent in any case in which he or she does not have counsel of choice; (2) designation of a visitor; and (3) the designation of a physician.²¹⁰

Consistency and continuity of language is the hallmark of any uniform legislation or code. The UPC endeavored to remedy arcane and inconsistent language in guardianship statutes from state to state.²¹¹ UPC Article V applied the then-current language to the guardianship concept, thus eliminating the arcane and embarrassing terms brought into modern American jurisprudence from the previous ages and the other collective governments. The “incapacitated person” framework supplied substantive grounds for appointment of a guardian for reasons other than minority or old age.²¹² The

209. *See id.* §§ 5-301 to 5-312. Within part three, the most important components include § 5-303, Procedure for Court Appointment of a Guardian of An Incapacitated Person; § 5-304, Notice in Guardianship Proceeding; and § 5-309, General Powers and Duties of Guardian. In this Author's opinion, the writers placed guardianship (protection of the person) in Article V primarily to address minors, and wrote it as if an afterthought, using language and structure from the part covering minors. The Author recognizes this historical consistency with Roman law where the governing principle was that everyone *sui juris* under puberty must have a tutor, especially if there was property. *See supra* notes 40–47 and accompanying text for a discussion of *sui juris*.

210. *See* UPC, *supra* note 205, § 5-303 cmt. The mandatory roles of physician and visitor may be filled by the same qualified person. *See id.* The three mandatory designations are the result of an effort to insure proper evaluation of the merits of a petition for guardianship and help avoid improper removal of an individual's liberty. *See id.*

211. While statutory terminology and the semantics of incompetency are crucial, they are more often imprecise, confusing, and applied unequally.

The cliché, 'it's all a question of semantics' is a facile and inaccurate — albeit a convenient — explanation for the vagaries of human interaction. Yet, one is tempted to apply it to the problems and confusion that abound in the area of determinations of civil incompetency. By sheer weight of numbers, the terms which must be contended with pose a formidable communications barrier.

ALLEN ET AL., *supra* note 21, at 32.

Language is crucial to mental disability law. Yet the definitions of many terms and phrases used in the field are imprecise or disputed. One statute may define a term one way, while a related statute defines it somewhat differently. Health care professionals and advocates often disagree among themselves about the definitions of even the most fundamental concepts such as “mental illness,” “mental retardation,” “disability,” and “handicapped.” In addition, many terms — including “insanity” and “competency” — have different connotations in law than in medicine.

Id. at 1.

212. *See* UPC, *supra* note 205, § 5-103, cmt.; *id.* § 5-306(b).

definition of incapacitated person moves the threshold consideration from that of dealing with incompetence. The term includes any individual impaired due to “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 such individual lacks] sufficient understanding or capacity to make or communicate responsible decisions.”²¹³ Although this definition is an improvement, it does not ascribe a test of function. A commendable first start, the UPC gives leeway to the subjectiveness of professionals and others.

Article V covers guardianships for both minors and adults, and protective proceedings for property.²¹⁴ It provides terminology continuity in “typical” guardianship legislation, and addresses and incorporates many recommendations of concurrent empirical research and studies.²¹⁵

In particular, UPC § 5-303 constructs elaborate procedures including personal notice, and avoids the determination of “incompetence” by ascribing a new standard of “incapacitated person.”²¹⁶ This procedure dealt with guardianship of the person and allowed very limited authority over a ward's estate without a conservatorship.²¹⁷ Section 5-304 requires careful and specific notice requirements, even though state laws rarely contained notice requirements at the time of the 1969 initial publication.²¹⁸ Notice of the proceeding must be served personally on the allegedly incapacitated person as well as on the person's spouse or adult children, if there is no spouse.²¹⁹ If the allegedly incapacitated person has neither adult children nor a spouse, notice must be served on the person's parents, if living.²²⁰ Additional notice must be served on those who may already be serving in a fiduciary capacity, or on those having care and custody of the person.²²¹ If the initially identified persons are unavailable or cannot be served, then the nearest adult relative, if any, or any

213. *Id.* § 5-103(7).

214. *See id.* §§ 5-101 to 5-105.

215. *See id.* § 5-103.

216. *See id.* § 5-103(7).

217. *See UPC, supra* note 205, §§ 5-401 to 5-431 (addressing protection of minors' and disableds' property).

218. *See id.* § 5-304; *see also* AP Report, *supra* note 9.

219. *See UPC, supra* note 205, § 5-304(a)(1).

220. *See id.*

221. *See id.* § 5-304(a)(2).

other person directed by the court, shall be served with notice of the hearing.²²²

UPC § 5-309 globally declares the guardian's powers and duties as responsibility to care for, maintain custody, and control the ward; however, the guardian is not liable to third persons for the ward's actions.²²³ In the Author's opinion, historical prejudice is evidenced with the section declaring that the incapacitated adult's guardian's duties, powers, and responsibilities are identical to those of a minor's, as described in the UPC Article V section exclusively addressing minority.²²⁴

In this Author's opinion, the UPC effort was commendable. However, many of the states that initially adopted the UPC have strayed further and further away from its specific construction.²²⁵

C. Research, Studies, and Changes in Laws During the 1970s

Compared to the amount of research and study accomplished in the 1960s, 1980s, and 1990s, very little was done during the 1970s. In the 1970s, the concern focused on involuntary commitments arranged under the guardianship power.²²⁶ In subsequent years, many states specifically denied or carefully controlled guardians' authority

222. *See id.* § 5-304(a)(3), (4).

223. *See id.* § 5-309.

224. *See* UPC, *supra* note 205, § 5-309 cmt.

225. *See, e.g.*, ALASKA STAT. §§ 13.26.005–13.26.320 (Michie 1996); D.C. CODE ANN. §§ 21-2001–21-2077 (1981); N.M. STAT. ANN. §§ 45-5-101 to 45-5-433 (Michie 1995). The Author finds it interesting that Alaska, New Mexico, and the District of Columbia draw heavily from the Model Act drafted by the ABA Commission on the Mentally Disabled.

226. *See In re Guardianship of Austin*, 615 N.E.2d 411 (Ill. App. Ct. 1993) (holding that under the Probate Act, 110 1/2 ILL. STAT. ANN. 11a-14.1, the court may limit the placement options of the Office of State Guardian as guardian to placement of the ward in shelter care or a higher level of care, where the evidence does not demonstrate that the placement ordered by the court is not necessitated by the ward's physical and mental limitations). Many states require an automatic release from commitment at the end of 180 days unless the condition of the individual is still considered dangerous and new judicial proceedings have been initiated. *See, e.g.*, FLA. STAT. § 394.467(3)(e) (1995); 405 ILL. COMP. STAT. ANN. 5/3-813, 5/3-815 (West 1993); N.Y. MENTAL HYG. LAW § 9.33(b) (McKinney 1996); VA. CODE ANN. § 37.1-67.3 (Michie 1990). The individual can always petition to seek release if he or she believes that his or her sanity has returned to a level that is acceptable and not dangerous. *See, e.g.*, CAL. WELF. & INST. CODE § 5275 (West 1984); 405 ILL. COMP. STAT. ANN. 5/3-900 (West 1993); N.Y. MENTAL HYG. LAW § 9.33(c) (McKinney 1996). Such a petition for release would usually be heard by the court that issued the original commitment order. *See, e.g.*, CAL. WELF. & INST. CODE § 5276 (West 1984); 405 ILL. COMP. STAT. ANN. 5/3-901 (West 1993).

to commit their wards to restricted environments such as medical or psychiatric residential settings.²²⁷

During the 1970s, the UPC, with its Article V on guardianship and conservatorship, gained acceptance.²²⁸ As more states followed, the commissioners and promoters of the law were optimistic that most, if not all, of the states would enact the UPC. However, although many states have adopted selected acts incorporated within the UPC, few have enacted the entire Code.²²⁹

1. California — *The Frontier of State Reform in the 1970s*

In the 1970s, California received singular recognition for enacting sweeping guardianship laws and well-budgeted institutional support from the state.²³⁰ The unique and complex California guardianship laws authorize three distinct but overlapping statutory systems for dealing with persons or affairs.²³¹ First, California has a Probate Code guardianship for persons declared incompetent by a court.²³² Second, California's Lanterman-Petris-Short conservatorship is for individuals gravely disabled as a result of mental disorder or impairment by chronic alcoholism.²³³ This process is used chiefly by professional personnel at an agency already providing comprehensive evaluation or at a facility providing intensive treatment.²³⁴ Third, California has a Probate Code conservatorship for adults who either cannot properly provide physical health, food, clothing, or shelter for themselves, or who are "substantially unable" to manage their own finances, "resist fraud or undue influence," or for whom a guardian could be appointed.²³⁵ No finding of mental disorder is required for this third type of conservatorship, and unlike a guardianship finding, there is no declaration of incompetency.²³⁶

227. See generally *supra* note 226.

228. See Brakel and Rock, *supra* note 12, at 34.

229. See UPC, *supra* note 205, at 3-4.

230. See generally AP Report, *supra* note 9, at 5 (stating that California's guardianship system, established in the 1970s, is one of the most advanced nationwide).

231. See REGAN, *supra* note 2, § 16.04.

232. See CAL. PROB. CODE § 1460-67 (West 1991 & Supp. 1996).

233. See CAL. WELF. & INST. CODE § 5008 (West Supp. 1996). A "gravely disabled" person is one who, due to a mental disorder, cannot provide himself or herself with basic personal needs for food, clothing, or shelter. See *id.* § 5008(h)(1)(A).

234. See *id.* § 5352 (West 1984).

235. See CAL. PROB. CODE § 1801 (West 1991).

236. See *id.*

The hallmark of the California revisions is its state-wide system to monitor and review guardians.²³⁷ The 1977 code created court-appointed investigators, who are officers of the court, have no beneficial interest in the proceedings, and whose duties do not end once the conservatorship is in place.²³⁸

More than a decade before the Associated Press Exposé,²³⁹ or the Wingspread Symposium,²⁴⁰ California statutorily directed investigators to communicate, assess, and deal with persons involved in conservatorship proceedings.²⁴¹ Investigators were charged with the responsibility to know the law, inform the proposed conservators and conservatees of their rights and duties, and describe the impact and effect of what a conservatorship will do.²⁴² Obviously an expensive system, California creatively mixed the financing for the system in a formula of state and local funds, adding a unique assessment against the estates of conservatees.²⁴³

Investigators conduct annual reviews and must provide certified reports to the court, all other parties in interest, and others under court order.²⁴⁴ At the heart of the investigative function is a determination of whether conservators act in the best interest of conservatees.²⁴⁵ In addition, the investigator must determine and report whether the conservatee's condition requires modification, revocation, limitation, or termination.²⁴⁶

For the vast majority of other states, very little legislative change occurred in the 1970s. Judges and clerks rendered decisions that appear to be arbitrary on review, and some families took advantage of their members as in ages past.²⁴⁷ Even with California's legislative changes, some research results found that the actual

237. See, e.g., AP Report, *supra* note 9.

238. See CAL. PROB. CODE § 1454(a) (West 1991).

239. See AP Report, *supra* note 9.

240. See *infra* notes 316–33 and accompanying text for a description and discussion of the Wingspread Symposium held at the Johnson & Johnson Center, Racine, Wisconsin.

241. See CAL. PROB. CODE §§ 1850–1853 (West 1991).

242. See *id.*

243. See *id.* § 1851.5.

244. See *id.* §§ 1850–1851.

245. See *id.*

246. See *id.*

247. See generally John J. Regan, *Protecting the Elderly: The New Paternalism*, 32 HASTINGS L.J. 1111 (1981).

implementation of protections, and delivery of advocacy on behalf of those under guardianships function, produced results no differently than in the past.²⁴⁸ Financial abuse is sometimes greater in public guardianship when there is a successor guardian involved.²⁴⁹

2. *State and Community Empirical Research and Studies Finding Glaring Governmental Perversity of the 1970s*

Some local research of the 1970s is noteworthy. The landmark Alexander and Lewin empirical research, published in 1972, involved over 400 guardianships.²⁵⁰ The conclusions were mostly negative, resulting in failure in most cases.²⁵¹ The authors concluded that, although the system of "Estate Management by Preemption" was formulated to protect the incompetent from making unsound financial decisions or from fraud, in practice the system has been utilized by third parties to protect their own interests.²⁵² State hospitals seeking reimbursement may institute proceedings.²⁵³ Co-owners of property, heirs, trust beneficiaries, and dependents may commence incompetency proceedings to protect their own interests.²⁵⁴

In the same year, Regan wrote similar criticisms regarding protective services for the elderly.²⁵⁵ While the form of guardianship process with procedural due process rights was enhanced, Regan still warned about the real problems to come more than twenty years later.²⁵⁶

248. See Lawrence Friedman & Mark Savage, *Taking Care: The Law of Conservatorship in California*, 61 S. CAL. L. REV. 273, 281 (1988).

249. See Winsor C. Schmidt, Jr., *Public Guardianship Issues for New York: Insights from Research*, 6 (3) ELDER L. ATT'Y 31 (1996) (citing Kathleen H. Wilber & Sandra L. Reynolds, *A Comprehensive Study of Los Angeles County's Conservatorship Program: Implications for Reforming State and Local Practice* 56-57 (Andrus Gerontology Ctr. 1995)).

250. See Winsor C. Schmidt, Jr., *Guardianship of the Elderly in Florida*, FLA. B.J., Mar. 1981, at 190 (citing GEORGE J. ALEXANDER & TRAVIS H.D. LEWIN, *THE AGED AND THE NEED FOR SURROGATE MANAGEMENT* (1972)).

251. See *id.*

252. See *id.*; see also ALEXANDER & LEWIN, *supra* note 25, at 135.

253. See Schmidt, *supra* note 250, at 190; see also ALEXANDER & LEWIN, *supra* note 250, at 135.

254. See Schmidt, *supra* note 250, at 190; see also ALEXANDER & LEWIN, *supra* note 250, at 135.

255. See generally John J. Regan, *Protective Services for the Elderly: Commitment, Guardianship, and Alternatives*, 13 WM. & MARY L. REV. 569 (1972).

256. See *Roundtable 102-820*, *supra* note 3.

In 1971, the Benjamin Rose Institute conducted a uniquely designed study involving high-risk intervention that provided protective services and judicial support on the thesis that it would enhance the wards' quality of life, slow deterioration, or prevent death.²⁵⁷ The study was noteworthy in that it proved just the opposite. The experimental group's institutionalization and death rates exceeded those of a parallel control group receiving no services.²⁵⁸

3. *The UPC and Article V in the 1970s*

During the mid-1970s, the ABA's Committee on the Mentally Disabled began an effort that promoted revision of the Uniform Probate Code Article V to include "limited guardianship" to avoid an asserted "overkill" implicit in standard guardianship proceedings.²⁵⁹ UPC spokespersons and the National Conference of Commissioners objected and temporarily barred recommended UPC revisions, contending "typical" guardianship legislation was sufficient.²⁶⁰

However, many of the UPC states began amending statutes to include some form of limited guardianship, but the states utilized inconsistent language.²⁶¹ Alaska, New Mexico, and the District of Columbia amended their legislation to adopt the model guardian-

257. See Schmidt, *supra* note 250, at 190, 193 n.20 (citing Margaret Blenkner et al., *A Research and Demonstration Project of Protective Services*, 52 SOC. CASE WORK 384 (1972)). Blenkner and her associates performed a study through the Benjamin Rose Institute in Cleveland, Ohio. See *id.* at 190.

258. See Schmidt, *supra* note 250, at 190.

259. See UPC, *supra* note 205, at 431-33. This proposal was created in part because a finding of *non compos mentis* or incompetence had been the traditional guardianship threshold. See *id.* Consequently, guardianship stripped the ward of all personal legal autonomy. See *id.* "Limited guardianship" required sensitive procedures and appointments designed to provide only the necessary intrusion on the liberties and prerogatives of the ward. See *id.*

260. See *id.*

261. See *id.* at 441; see also ABA Comm. on the Mentally Disabled, *Legal Issues in State Mental Healthcare: Proposals for Change — Model Guardianship Statute*, 2 MENTAL DISABILITY L. REP. 444 (1978) [hereinafter *ABA Model Statute*] (comparing the Illinois definition of incompetent which includes "insanity, mental illness, retardation, old age, physical incapacity, or imperfection or deterioration of mentality" to the extent that the person cannot manage himself or herself or their estate, to the California definition which includes "any person, whether insane or not, who by reason of old age, disease, weakness of mind, or other cause" cannot care for himself or herself or their estate and as a result is likely to be "deceived or imposed upon by artful and designing persons." *Id.* at 444-45 (quoting 3 ILL. STAT. ANN. § 112 (West Supp. 1976) and CAL. PROB. CODE § 1460 (West Supp. 1976)).

ship statute designed by the ABA Commission on the Mentally Disabled rather than to conform with the National Conference of Commissioners.²⁶² To not be left behind, the National Conference of Commissioners changed course, and developed what was to be the Uniform Guardianship and Protective Proceedings Act.²⁶³ The Commissioners politically saw the proverbial “writing on the wall” that many UPC states believed in the “limited guardianship” philosophy as a less intrusive approach to guardianship and protective proceedings.

4. *The 1978 Model Act of the ABA Commission on the Mentally Disabled*

The ABA's Commission on the Mentally Disabled prepared and organized recommendations for model legislation for the states' use as an option to UPC Article V.²⁶⁴ The ABA Model Guardianship Statute (ABA Model Statute) highlights limited guardianship and other alternatives to better serve mentally disabled American citizens who need protective guardianship laws, and applies the laws with greater sensitivity toward enhancing autonomy and retaining as many individual rights as possible.²⁶⁵

Of interest are several parts designed to benefit alleged incompetent persons or wards under guardianship control. The ABA Model Statute has its strength in guardianship of the person. Like the criteria for civil commitment, it attempts to be more precise with definitions.²⁶⁶ Additionally, the ABA Model Statute attempts to redirect conclusory medical opinions that tend to subjectively apply standards, by offering functionally based criteria to challenge views and the capabilities of the proposed ward considered in light of recent behaviors.²⁶⁷ The ABA Model Statute also attempts to set time limits that gain judicial review for restoration to capacity, and requirements for delivery of appropriate treatment and rehabilita-

262. See *ABA Model Statute*, *supra* note 261, at 449.

263. See UNIF. GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT prefatory note, 8A U.L.A. 431 (West 1982 & Supp. 1996).

264. See *ABA Model Statute*, *supra* note 261, at 444, 449–57 (for the Suggested Statute on Guardianship). Alaska, New Mexico, and the District of Columbia drew heavily from this model.

265. See *id.* at 444.

266. See *id.*

267. See *id.* at 451–52, 455.

tion services.²⁶⁸

The lack of distinction between personal guardianship and property guardianship often results in the ward losing control over assets and financial interests.²⁶⁹ The mix of person and property creates different qualifications for personal guardianship and for property guardianship. The ABA Model Statute emphasizes and prioritizes the person. Above all, the ABA Model Statute addresses the historical “all or nothing” problem implicit in statutory guardianship mandates, where the ward lost all legal rights.²⁷⁰ The ABA Model Statute offers the limited guardianship concept to provide more careful, surgically applied intervention so that the butchering of the quality of life and the exercise of rights of those under guardianship are diminished.²⁷¹

The ABA Model Statute also directs infusion of procedural due process protections previously nonexistent or vague in most guardianship laws. Important examples include (1) construction of procedural due process safeguards to thwart devious institutionalization of elderly persons by anxious prospective heirs, and (2) appointment of state officials to facilitate access to wards' estates to reimburse the state, not to protect assets for individual benefit.²⁷²

Even though only a few states have enacted the ABA Model Statute, its impact is evidenced through many of its provisions being utilized around the country.²⁷³

268. See *id.* at 456–57; see also *id.* at 445 (quoting John Pickering, *Limitations on Individual Rights in California Incompetency Proceedings*, 7 U.C. DAVIS L. REV. 457, 472 (1974) (restoring capacity is difficult and rare and it has been suggested that perhaps the guardianship order of appointment should include the phrase “until death do you part”)).

269. See generally *ABA Model Statute*, *supra* note 261, at 444.

270. See *id.* at 445. Even when the ward is still able to make some personal decisions such as place of residence, ability to travel, modest financial transactions and consent to medical treatment, these are all lost. The ward also loses basic rights such as the right to vote, to drive, and to marry, even though still capable of exercising those rights. See *id.*

271. See *id.* at 444–47.

272. See *id.* at 445. In addition to the typical procedural aspects such as notice, counsel, mandatory judicial proceedings and right to jury trial, personal guardianship proceedings require multidisciplinary pre-hearing investigations to evaluate the ward's social, economic, mental, and physical conditions, as well as consider potential alternatives to guardianship that would benefit the ward. See *id.* The court would receive the evaluation report, and the ward would have an opportunity to respond. See *id.*

273. See UPC, *supra* note 205, at 1–4.

D. Research, Studies, and Changes in Laws During the 1980s

In the 1980s, the concern with the guardianship process was its lack of consistent procedural due process and safeguards. In 1987, the Associated Press published a series of articles about guardianship that splashed across the headlines of America.²⁷⁴ Of paramount concern was procedural due process and rights accorded respondents in guardianship hearings or trials.²⁷⁵ Dozens of states answered the call for change by amending or rewriting their guardianship laws to provide, at a minimum, notice and procedural due process when guardianship petitions and the adjudication of incompetence are placed in the judicial forum.²⁷⁶

In terms of visibility, the 1980s differed from the 1970s. The difference was initially realized with Winsor C. Schmidt's published findings of the national examination of public guardianship,²⁷⁷ followed by the 1987 Associated Press exposé headlines.²⁷⁸ The end of the decade saw a flurry of federal congressional hearings and proposed federal legislation, but resulted in neither federal guardianship law nor a federal definition of incompetence in the guardianship context.²⁷⁹ Although the 1980s seemed to initiate real change at a time guardianship needed a significant overhaul, in the Author's opinion, research and analysis concludes otherwise.²⁸⁰

274. See, e.g., AP Report, *supra* note 9; Fred Bayles & Scott McCartney, *Declared Legally Dead: Guardianship System Is Failing the Ailing Elderly*, RECORD, Sept. 20, 1987, at A1; see also *Forgotten Files, Forgotten People*, RECORD, Sept. 21, 1987, at A4; *Protecting Those Unable to Cope*, RECORD, Sept. 21, 1987, at B1; *Wards Are Vulnerable in Busy Court System*, SAN DIEGO UNION TRIB., Sept. 22, 1987, at D-1.

275. See AP Report, *supra* note 9, at 2.

276. See *id.*

277. See Winsor C. Schmidt, Jr., *Quantitative Information About the Quality of the Guardianship System*, in *GUARDIANSHIP: THE COURT OF LAST RESORT FOR THE ELDERLY AND DISABLED* 186–88 (Winsor C. Schmidt, Jr. ed., 1995).

278. See AP Report, *supra* note 9.

279. See Schmidt, *supra* note 277, at 182 (citing H.R. 372, 101st Cong. (1989); H.R. 5275, 100th Cong. (1988); H.R. 5266, 100th Cong. (1988)); see also Schmidt, *supra* note 250, at 191, 194–95 nn.49–51.

280. See *infra* notes 358–446 and accompanying text. See generally Lawrence A. Frolik, *Plenary Guardianship: An Analysis, a Critique and a Proposal for Reform*, 23 ARIZ. L. REV. 599, 601 (1981).

1. *The 1981 Findings of a National Study of Public Guardianship and the Elderly*

Between 1979 and 1980, a national study assessed public guardianship to determine whether it assisted or hindered the elderly in securing access to their rights, benefits, and entitlements.²⁸¹ The study examined thirty-four states to provide demographic characteristics of the wards of the public guardians.²⁸² Demographics showed the great majority of the elderly wards were low income females over age sixty-five placed in nursing homes and mental hospitals.²⁸³

Focusing on six states in the field research, the study found the wards of public guardians sometimes received little personal attention.²⁸⁴ Courts routinely granted absolute guardianships, rarely utilizing partial or limited guardianships.²⁸⁵ The study found court review duty-based, and also found guardianships were initially sought, not out of concern for the ward but out of the necessity to manage medical consents.²⁸⁶ The study found dozens of wards under the guardianship of single private individuals.²⁸⁷ Information was more often missing than found in the files, and the severely disturbed wards were indistinguishable from those who were intact and competent to make decisions.²⁸⁸ The extent to which expert evaluations and recommendations about the wards related to their individual needs and conditions was indeterminable.²⁸⁹ In addition, it seemed that the frequency of establishment of guardianships depended solely on the wards' inability to care for medical needs and

281. See William G. Bell et al., *Public Guardianship and the Elderly: Findings from a National Study*, 21 GERONTOLOGIST 194 (1981) (detailing a study conducted by William G. Bell, Winsor C. Schmidt, Jr., and Ken L. Miller).

282. See Schmidt, *supra* note 277, at 187; see also Bell et al., *supra* note 281, at 197.

283. See Schmidt, *supra* note 277, at 187; see also Bell et al., *supra* note 281, at 197, 199.

284. See Schmidt, *supra* note 277, at 187; see also Bell et al., *supra* note 281, at 198.

285. See Bell et al., *supra* note 281, at 199.

286. See Schmidt, *supra* note 277, at 187.

287. See *id.*; see also Bell et al., *supra* note 281, at 197. For example, an Arizona private attorney may have 50 wards at any time; and a Florida minister was found to have 95 wards. See *id.* at 200.

288. See Schmidt, *supra* note 277, at 187; see also AP Report, *supra* note 9, at 1, 7.

289. See Schmidt, *supra* note 277, at 187; see also Bell et al., *supra* note 281, at 200.

the feasibility of civil commitment or other alternative mechanisms.²⁹⁰

The public guardianship study concluded that services could be successfully based on at least four maxims. First, public guardians should be independent of any service-providing entity.²⁹¹ Second, public guardians who petition for adjudication of incompetence should not be allowed to serve as guardians.²⁹² Third, public guardians should be adequately staffed and funded so that no office carries more than 500 wards, with no individual staff member responsible for more than thirty wards.²⁹³ Finally, strict procedures should accompany public guardianships.²⁹⁴

2. *The 1982 Uniform Guardianship and Protective Proceedings Act*

Because the ABA Committee on Problems Relating to Persons Under Disability (subsequently the ABA Commission on the Mentally Disabled) in the 1970s asserted the need for limited guardianship, states reacted by initiating their own statutory language regarding limited guardianship.²⁹⁵ In addition, the ABA Commission on the Mentally Disabled formulated its own model statute, which gained acceptance when states chose it over the Uniform Probate Code with its Article V.²⁹⁶ In the wake of opposition, the National Conference of Commissioners adjusted its attitude and philosophy on limited guardianship. In 1982, the Commissioners produced a stand alone act entitled *The Uniform Guardianship and Protective Proceedings Act* (UGPPA).²⁹⁷ The UGPPA restructured UPC Article

290. See Schmidt, *supra* note 277, at 187.

291. See *id.* at 188. This maxim helps eliminate conflicts of interest. See *id.*

292. See *id.*

293. See *id.*

294. See *id.* Schmidt notes that New Hampshire and Tennessee used the 1981 findings to amend their guardianship statutes to adopt public guardianship programs based on the findings and recommendations of the study. See *id.*

295. See Committee on Legal Incapacity, *Limited Guardianship: Survey of Implementation Considerations*, 15 REAL PROP. PROB. & TR. J. 544, at 545, 553 (1980). At the time of the study, 16 states gave judicial discretion to limit guardian powers. Those states were Florida, Idaho, Illinois, Kentucky, Maine, Maryland, Michigan, New York, North Carolina, South Carolina, South Dakota, Texas, Virginia, Washington, West Virginia, and Wisconsin. See *id.* at 545 n.6. Six other states, specifically, Alaska, Connecticut, Delaware, Florida, Indiana, Oregon, Pennsylvania, and Tennessee, gave limited guardianship serious consideration during the 1979 legislative year. See *id.* at 545 n.8.

296. See UPC, *supra* note 205, at 1.

297. See UNIF. GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT § 5, 8 U.L.A.

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 accommodate the limited guardianship concept.²⁹⁸ Alternatively, with the modifications to Article V, it was offered as a component part to the UPC.²⁹⁹ Of the fifteen states that enacted the UPC, several have also incorporated the limited guardianship revisions into their laws.³⁰⁰ Still, a significant majority of states are not considered UPC states, and only Alabama enacted the UGPPA as a stand alone statute.³⁰¹

3. *The 1986 National Conference of the Judiciary on Guardianship Proceedings for the Elderly*

The ABA Commission on Legal Problems of the Elderly and the National Judicial College organized a 1986 national conference on guardianship proceedings for the elderly.³⁰² Twenty-eight probate and general jurisdiction judges, with specific expertise in guardianship matters, assembled from across the country to discuss the then-current problems of guardianship process and promote recommendations for enhancing court supervision of guardians and their activities.³⁰³ Paramount was the proposition that those with the power in the court system to require accountability and enforcement of laws should receive and review accountings and other reported information about the status and well being of wards under their control.³⁰⁴ Critical to the recommendations was the necessity for detailed procedures, and identification of personnel who would con-

429-510 (1983 & Supp. 1996) [hereinafter UGPPA].

298. *See id.* at 440-41.

299. *See id.* at 440.

300. *See id.* at 441-43.

301. *See* UGPPA, *supra* note 297, at 442. Page 442 cites the relevant sections of the Alabama Code, including ALA. CODE §§ 26-2A-8 and 26-2A-104.1 (Michie 1992) and § 26-2A-1 (defined as the Alabama Uniform Guardianship and Protective Proceedings Act). *See id.*

302. *See* AMERICAN BAR FOUNDATION, STATEMENT OF RECOMMENDED JUDICIAL PRACTICES, ADOPTED BY NATIONAL CONFERENCE OF THE JUDICIARY ON GUARDIANSHIP PROCEEDINGS FOR THE ELDERLY 3-5 (Erica F. Wood ed., 1986); ABA Comm. on the Mentally Disabled, *Legal Issues in State Mental Health Care: Proposals for Change*, 13 MENTAL DISABILITY L. REP. 271 (1989) [hereinafter *Proposals for Change*].

303. *See Proposals for Change*, *supra* note 302, at 274.

304. *See id.*

duct reviews and exact accountability of guardians.³⁰⁵

4. *The Associated Press Exposé of 1987*

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.³⁰⁶ On September 20, 1987, headlines splashing across the front pages of the papers announced “Declared ‘Legally Dead’: Guardian System is Failing the Ailing Elderly.”³⁰⁷ Along with the national syndicated study, many metropolitan areas in which the series ran reported detailed local accountings of guardianship.³⁰⁸

The Associated Press provided statistical accounting of the cases studied. The AP Report found that eighty-four percent lacked reports on the wards, condition subsequent to guardianship, forty-eight percent lacked annual financial accountings, and thirteen percent lacked entries subsequent to opening the guardianship.³⁰⁹ The report further described a troubled and “dangerously burdened system” that placed elderly lives under the control of others with little or no evidence of need.³¹⁰ In addition, the system did not guard against abuse, theft, and neglect.³¹¹ The report identified several problems, including: (1) the lack of resources to adequately monitor the guardians' activities and the financial and personal status of their wards; (2) little or no training of guardians; (3) little or no awareness of guardianship alternatives; and (4) the lack of due process.³¹²

The Associated Press and local reporters chronicled anecdotal evidence of abuses in a dysfunctional system.³¹³ The more gruesome and painful cases took center stage and were the strength of the

305. *See id.*

306. *See* AP Report, *supra* note 9, at 1.

307. *See* Fred Bayles & Scott McCartney, *Declared Legally Dead: Guardian System Is Failing the Ailing Elderly*, RECORD, Sept. 20, 1987, at A1; *see also* AP Report, *supra* note 9, at 1.

308. *See* AP Report, *supra* note 9, at 5–6.

309. *See id.* at 13. The article titled *Computer Database Developed by AP Analyzed Guardian Files*, details the results of computer generated analysis of several guardianship cases. *See id.*

310. *See* AP Report, *supra* note 9, at 1.

311. *See id.*

312. *See id.* at 23–24.

313. *See generally* AP Report, *supra* note 9, at 1–25.

media and political indictments to follow.³¹⁴ Even with the conclusion that guardianship was a failure, the Associated Press had to acknowledge the high percentage of guardianship and conservatorship cases that were reasonably served.³¹⁵

5. *The 1988 ABA Conference "Wingspread" National Guardianship Symposium*

In July 1988, the ABA Commissions on Legal Problems of the Elderly and on Mental Disability invited thirty-eight guardianship experts from across the country to participate in the National Guardianship Symposium, dubbed "Wingspread" after the conference center where it was conducted.³¹⁶ The attending experts were not exclusively legal professionals, but included doctors, aging network representatives, mental health experts, governmental officials, and others.³¹⁷ Wingspread's objective was the production of reform recommendations for the national guardianship "system."³¹⁸ While the Wingspread symposium examined the national guardianship system, in this Author's opinion, the word "system" should never have been used. It is far fetched, and a long reach, to call what is going on in guardianship in America a national system.

Wingspread first addressed, and encouraged serious consideration of, implementing guardianship alternatives.³¹⁹ Additionally, Wingspread called for clearly defined roles and performance standards to be communicated and monitored through a national inter-

314. *See id.* at 1. This Author personally observed that many of the individuals listed in the Associated Press report were subsequently brought before the Pepper Commission in Washington to tell their stories to Congress.

315. This was sufficient reason for defenders of the system, especially those connected with the ABA Real Property, Probate and Trust Law Section and National Conference of Commissioners, to argue that guardianship is, overall, successful. *See Innovative Approaches to Guardianship, Hearings on S. 102-22 Workshop Before the Senate Special Comm. on Aging*, 103d Cong. 1, 61 (1993) (statement of Jack Lombard, ABA). "I would just echo what John [Pickering] has said. Because there is something that we all in this area lose sight of. And it's something that's said in the AP study. The AP study says that the system generally works well." *Id.*

316. *See ABA Comm. on the Mentally Disabled, Guardianship — An Agenda for Reform*, 13 MENTAL DISABILITY L. REP. 271 (1989). The meeting, held at the Johnson & Johnson Center, Racine, Wisconsin, and the resulting recommendations, are hereinafter referred to as "Wingspread."

317. *See id.* at 275.

318. *See id.*

319. *See id.* at 277.

disciplinary group.³²⁰ For the national interdisciplinary group to function, Wingspread recommended the minimum requirement of a systematic data collection and evaluation process, which is collected and reviewed independently, with court corroboration.³²¹ The conferees also stressed screening cases to divert inappropriate cases and reduce costs.³²² Lastly, as a precursor to the actual guardianship process, the conferees recommended state-created “multidisciplinary guardianship alternative committees” to define and implement the Wingspread recommendations state-wide.³²³

As for procedural due process, Wingspread's recommendations included: (1) specific petition forms, (2) minimum due process safeguards, generally including the right to notice, and (3) the mandatory rights to counsel and hearings.³²⁴ The hearing rights included several factors: (1) the respondent's presence at the hearing; (2) compelled attendance, and direct- and cross-examination of witnesses; (3) presentation of evidence; (4) a clear and convincing evidentiary burden of proof; and (5) the respondent's ability to appeal any adverse orders or judgments.³²⁵ Another noteworthy recommendation required training for attorneys, and optional training for judges, with specific content construction for training and a model curriculum.³²⁶

Final consideration was given to public and private guardianship agencies. Wingspread asserted that public agencies are a last resort and should not directly provide housing, medical care, or social services.³²⁷ The proposed recommendations for public guardianship agency standards addressed basic training, qualifications and minimum service levels for staff.³²⁸ Wingspread also addressed the adequacy of public guardianship agencies' funding, as well as other organizations that receive public funds for guardianship services.³²⁹ They clearly specified that federal and state public benefit programs

320. *See id.* at 278.

321. *See id.* Data collected would include demographic information such as age, sex and financial status, as well as the guardians' decisions and consequences. *See id.*

322. *See* Wingspread, *supra* note 316, at 279.

323. *See id.* at 280.

324. *See id.* at 282–83.

325. *See id.* at 283.

326. *See id.* at 286.

327. *See id.* at 301.

328. *See* Wingspread, *supra* note 316, at 302.

329. *See id.*

should reimburse guardianship services.³³⁰

Wingspread further recommended that agency roles extend beyond the guardian to limit or terminate guardianships.³³¹ The recommended plan required employing and exploring alternative services, even if the ward is unable to pay.³³² Finally, the Wingspread conferees recommended agency autonomy and limited liability risk via implementation of operating policies in accordance with fiduciary duty, as well as limited liability impact through insurance, if available.³³³

6. *The 1989 AARP Public Policy Institute Conference and Monograph — Aging and the Law: Looking into the Next Century*

The AARP's Public Policy Institute sponsored a conference in November 1989 on future legal services for the elderly.³³⁴ The conference and its subsequent monograph provided a setting for a multidisciplinary congregation of experts from legal and aging communities to anticipate legal issues that would confront the elderly in the future.³³⁵ The conferees strove to identify the specific issues and goals, and develop the strategies required to expedite the evolution of current delivery systems and institutions.³³⁶ The goal was to develop a clear vision of what should emerge, rather than to predict where the changes will lead, and to map an appropriate plan of action.³³⁷ Offering a forum for opposing opinions, Part I of the monograph addressed social, legal, and demographic trends, and published articles that addressed aging in the twenty-first century and the implications for the legal profession.³³⁸ The monograph exam-

330. *See id.* at 303.

331. *See id.*

332. *See id.* at 304.

333. *See id.* This Author observed that many of the Wingspread Symposium recommendations are simply a restatement of those recommendations fostered by Lindman and McIntyre, originated by Allen, Ferster, and Weihofen back in the 1960s, and codified in the ABA Commission on Mental Disability Model Guardianship Statute, addressing many, if not all of the concerns already evident in the so-called ailing society.

334. *See* AGING AND THE LAW: LOOKING INTO THE NEXT CENTURY vii (Patricia R. Powers & Karen Klingensmith eds., 1989) [hereinafter POWERS & KLINGENSMITH].

335. *See id.*

336. *See id.*

337. *See* Thomas Walz, *Aging in the Twenty-First Century: Implications for the Profession of Law*, in POWERS & KLINGENSMITH *supra* note 334, at 3–15.

338. *See id.*

ined and assessed the impact on the elderly poor.³³⁹ However, the examination did not end with legal services promoting justice for the elderly into the twenty-first century.³⁴⁰ Each article was followed by the responses of three commentators.

Part II of the monograph addressed legal assistance for both present and future older persons.³⁴¹ The monograph included articles that surveyed the present and future legal services delivery system,³⁴² predicted the future of the legal delivery system,³⁴³ examined the requirements to meet the future legal services needs of older persons,³⁴⁴ and examined government and financial systems and their relationship to the delivery of legal services to the elderly.³⁴⁵

Part III of the monograph raised three broad questions concerning gerontology, law, and justice in the next century. First, it asked “[w]hich (if any) of the current or proposed systems of legal services delivery for the elderly will work when the numbers to be served have vastly expanded?”³⁴⁶ Second, it asked “[w]hat are some of the new trends in the law and the proposed agendas for the future and how will they affect the elderly, their agencies and elder law?”³⁴⁷ Third, the monograph asked “[s]hould the government and/or financing systems for delivery of legal services to the elderly be entirely restructured?”³⁴⁸

339. See Alan Houseman, *Trends in Poverty and Elderly Law: The Impact on the Elderly Poor*, in POWERS & KLINGENSMITH, *supra* note 334, at 17–54.

340. See Marvin Levine, *Beyond Legal Services: Promoting Justice for the Elderly into the Next Century*, in POWERS & KLINGENSMITH, *supra* note 334, at 55–79.

341. See generally POWERS & KLINGENSMITH, *supra* note 334, at 89–157.

342. See Dianna Porter & David Affeldt, *Legal Services Delivery Systems: An Overview of the Present and a Look at the Future*, in POWERS & KLINGENSMITH, *supra* note 334, at 89–111.

343. See Wayne Moore, *The Legal Delivery System of the Future: A Prediction*, in POWERS & KLINGENSMITH, *supra* note 334, at 113–19.

344. See John Tull, *Meeting the Future Needs of Older Persons for Legal Services: Can We Do It?*, in POWERS & KLINGENSMITH, *supra* note 334, at 121–37.

345. See Burton Fretz, *Should Government and Financing Systems for Delivery of Legal Services to the Elderly Be Restructured?*, in POWERS & KLINGENSMITH, *supra* note 334, at 139–50.

346. POWERS & KLINGENSMITH, *supra* note 334, at 193.

347. *Id.* at 195–98.

348. *Id.* at 198. Restructure or destruction? In this Author's opinion, Burton Fretz certainly did not have in mind the wholesale dismantling of legal services in America as has been part of the Republican Contract For America. See generally Fretz, *supra* note 345.

Regan participated in the conference to address unmet needs. He identified two specific needs: restructuring legal services for the poor elderly, as well as the larger need for surrogate decisionmaking and health care.³⁴⁹ Regan voiced his “skepticism” about whether the Legal Services Corporation and other providers focused specifically on the poor would be the ones to “gear up for the future” to meet the health care and other needs.³⁵⁰ Recognizing the enormous unmet need still existing, Regan emphatically asserted that the need must be met even if individuals have to pay private sector lawyers.³⁵¹ However, the private sector lawyers are often uneducated in public benefits.³⁵² Perhaps, Regan queried, the thinking needed to be turned toward linking the private and public bars.³⁵³

A primary thrust of the AARP conference was an examination of those who are invested in the legal system, and legal services as they are currently constructed.³⁵⁴ Many participants articulated an advocacy of empowerment that brought the public to forums and systems of justice without the need for attorneys.³⁵⁵

7. Congressional Hearings and Reports Addressing Guardianship Issues

In the late 1980s, several bills were introduced in the United States Congress that would have required states to implement legislation to protect the rights of allegedly incapacitated persons and wards under guardianship.³⁵⁶ The federal legislation focused on procedural due process protections related to the adjudication of incapacity and addressed concerns regarding the need for guardianship services in the form of guardian training, certification, qualification, accountability, and monitoring.³⁵⁷

E. Research, Studies, and Changes in Laws During the 1990s

349. See POWERS & KLINGENSMITH, *supra* note 334, at 209.

350. See *id.*

351. See *id.*

352. See *id.*

353. See *id.* at 209–10.

354. See generally POWERS & KLINGENSMITH, *supra* note 334.

355. See *id.*

356. See H.R. 1702, 101st Cong. § 2 (1989); H.R. 372, 101st Cong. § 2 (1989); H.R. 5266, 100th Cong. § 2 (1988); H.R. 5266, 100th Cong. § 2 (1988).

357. See *id.*

In the 1990s, both advocacy organizations and individual advocates focused concern on public guardianship accountability, monitoring, ethics, and standards.³⁵⁸ They also focused on statutory terminology and the semantics of incompetency, attempting to rectify laws that had been imprecise, confusing, and applied unequally.³⁵⁹

1. The National Judicial College and ABA Commissions on Legal Problems of the Elderly and Mentally Disabled 1991 Examination of Court-Related Needs of the Elderly and Persons with Disabilities

A winter 1991 conference reflected the coordinated efforts of the ABA's Commissions on the Mentally Disabled and on Legal Problems of the Elderly, the National Judicial College, the State Justice Institute, and the U.S. Administration on Aging.³⁶⁰ The conferees examined barriers to full access to justice, with special emphasis on the elderly and disabled persons who may have difficulty both in reaching judicial procedures and in fully participating in the judicial process.³⁶¹ With an eye toward the future, fourteen small working groups identified the major concerns and drafted recommendations on a wide range of issues, including physical and communications access, linkage, dispute resolution, stereotypes, education, case processing, court data, victims and witnesses, capacity determinations, and judicial review of surrogate decisionmaking.³⁶² After reviewing and modifying the draft recommendations, the full conference adopted its final recommendations.³⁶³ As to guardianships, the conferees promoted the doctrine of least restrictive alternative, and mandated that it should be impressed on all components of the judicial process.³⁶⁴

358. *See infra* notes 360–446 and accompanying text.

359. *See id.*

360. *See* AMERICAN BAR ASSOCIATION, COURT RELATED NEEDS OF THE ELDERLY AND PERSONS WITH DISABILITIES 1 (1991).

361. *See id.*

362. *See id.*

363. *See id.* at 1. This Article is concerned only with the sections addressing “Linkage of the State Judicial Systems with the Aging and Disability Networks,” “Determinations of Capacity and Surrogate Decision Making,” and “Judicial Administration.” *See id.* at 17–27, 121–38, 177–201; *see also id.* at 3–16 (providing a summary of the recommendations).

364. *See id.* at 9.

2. *The 1991 Guardianship Monitoring Project*

In 1991, the ABA Commissions on the Mentally Disabled and on the Legal Problems of the Elderly, joined with the State Justice Institute.³⁶⁵ Together, they examined existing questions about court supervision of guardianship cases since the hands off philosophy of the UPC Article V resulted in little ongoing supervision of guardianship cases in probate courts.³⁶⁶ Other issues examined included how courts monitor, the required amount of monitoring, monitoring personnel requirements, and how to finance the monitoring functions.³⁶⁷ The project was an eighteen-month study of monitoring practices in courts throughout the country beginning in 1989 and ending with the recommendations presented at the National Conference on Court Related Needs of the Elderly and Persons With Disabilities.³⁶⁸

Sally Hurme directed the project with a standard methodology. Similar to other extensive projects, current guardianship statutes in every state were analyzed, and individuals involved in guardianship cases in six jurisdictions across the country were interviewed to understand local practices.³⁶⁹ Additionally, a nationwide survey of guardianship practitioners sought information about local monitoring practices and suggestions for improvement.³⁷⁰

The diverse site visitations crossed the country, including San Mateo County, California; Prince Georges County, Maryland; Merrimack County, New Hampshire; Pima County, Arizona; Hennepin County, Minnesota; and the Twenty-Eighth Judicial District of Kansas.³⁷¹

From the statutory review and research, the project created an invaluable update of all the legislative charts in the 1985 treatise *The Mentally Disabled and the Law*.³⁷² When examined with the charts of previous studies, they show the flow of the law over the decades, and like a mask of virtual reality, create the illusion that

365. See AMERICAN BAR ASSOCIATION, STEPS TO ENHANCE GUARDIANSHIP MONITORING 71 (1991) (Sally Balch Hurme, Dir.) [hereinafter HURME].

366. See *id.* at 10–11.

367. See *id.* at 11.

368. See *id.*

369. See *id.* at 71.

370. See *id.*

371. See HURME, *supra* note 365, at 77–89.

372. See *id.* at 72. To review the updated charts, see *id.* at 92.

there is a guardianship system out there.³⁷³

However, the project recommended an invaluable ten-step process designed from what the researchers learned from surveys and site visits, to work in practical reality providing ways to implement guardianship monitoring based on the experience of other jurisdictions.³⁷⁴ The steps centered around court monitoring and involve

373. *See id.* at 92. These same charts were updated by Ms. Hurme, and published in a manuscript for the 1993 Symposium of the National Academy of Elder Law Attorneys. *See* A. Frank Johns, *Advanced Guardianship Issues*, 5th Ann. NAELA Symp. Manual § 19 (1993).

374. *See* HURME, *supra* note 365, at 1–3 (outlining the 10 steps). For a detailed discussion, *see id.* at 15–69. The first step required guardians to report the ward's personal and financial status to the court, or other judicially designated monitor, at least once annually. *See id.* at 1. "The guardian's written report on the ward's personal status should be designed to encourage some narrative responses that will provide the reviewer with a concise explanation of the ward's circumstances, the care the guardian is providing and the need to continue the guardianship." *Id.* Second, guardians should be required to file a written plan, within 60 days of appointment or within the inventory-filing period, of how the guardian proposes to improve the ward's well-being and projecting future plans to provide for the ward's care and resources. *See id.* The guardian's annual report should explain any deviations from the original report. *See id.* The court should provide the guardian with reporting and accounting forms, written instructions, training sessions and/or videos explaining the guardian's responsibilities. *See id.* In addition, samples of what the court considers to be satisfactorily prepared status reports and accountings would be helpful. *See id.* Fourth, there are several ways courts can enforce the statutory reporting requirements. For example, the court can establish "computer or tickler systems so [it] knows when the guardian's personal status reports and accountings are due or are late." *Id.* at 2. Also, the court should promptly notify the guardian when a personal status report or accounting is late. A show-cause order could be entered if the guardian does not respond promptly to the notice to file. *See id.* Routinely imposing monetary penalties payable from the guardian's funds for late filings of personal status reports or accountings will encourage compliance. *See id.* Copying state bar grievance committee with any delinquency notice sent to an attorney who is a guardian is another example. *See id.* Fifth, "[c]ourts can establish procedures to conduct effective review of personal status reports and accountings." *Id.* This can be accomplished in several ways. Court can designate "certain judges to be responsible for guardianship hearings and review procedures." *Id.* Designating someone to audit accountings and someone to review personal status reports is another. *See id.* Criteria should be established to review personal status reports and accountings. *See id.* The sixth step involves court-establishment of procedures to verify reports and accountings and investigate guardianship problems. *See id.* Someone is designated to "investigate complaints, verify information in personal status reports and accountings and periodically visit the ward." *Id.* Volunteers can monitor the ward's personal condition. *See id.* Personal status reports and accountings should be sent to interested persons so they can either verify or object to the guardian's court reports. *See id.* The seventh step requires courts, or some other judicially approved panel, to hold periodic hearings to determine if the guardianship is still necessary. *See id.* at 3. The court can establish the time for the hearing. *See id.* The ward's personal well-being can be reviewed when the court reviews accounts. *See id.* In addition, "a community-based board can review the ward's personal well-being." *Id.*

ment in the entire guardian/ward relationship through a series of required report filings by the guardian.³⁷⁵ Under the recommended process, the court or other judicially appointed monitor regularly received and reviewed the reports.³⁷⁶ The court would assist guardians, wards, and their respective attorneys through information disbursement and samples of adequate reports.³⁷⁷

The project strove to instigate discussion about current monitoring and possible enhancements among the bench, bar, court staff, legislature, and state and local agencies that serve the elderly and persons with disabilities.³⁷⁸ As a final piece, the project included a survey that could be returned to the publisher for current feedback.³⁷⁹ This Author notes the interesting observation that several of the jurisdictions surveyed had already been the focus of empirical

The eighth step provides for state and local funding agencies to provide the court with sufficient funding so the court can adequately monitor guardianship cases. *See id.* at 3. This will relieve disparity between counties with differing resources or populations. *See id.* Monitoring costs can be funded through fines implemented for late filing. *See id.* The ninth step requires state Bars “to establish clear ethical guidelines for the attorney representing the petitioner, guardian and ward.” *Id.* at 3. “The attorney for a client who is seeking to file a guardianship petition should fully inform the client of a guardian’s responsibilities and duties, including the duty to report and account to the court.” *Id.* The guardian’s attorney “should assist the guardian in fulfilling the guardian’s reporting requirements.” *Id.* The ward’s attorney “should assist the court in monitoring the ward’s well-being throughout the guardianship or until dismissed by the court.” *Id.* The tenth and final step requires courts to be aware of and encourage community groups and agencies that “monitor wards’ well-being.” *Id.*

375. *See generally* HURME, *supra* note 365, at 15–69.

376. *See id.*

377. *See id.*

378. *See id.* at 14.

379. *See id.* at back cover; *see also* Lawrence Friedman & Mark Savage, *Taking Care: The Law of Conservatorship in California*, 61 S. CAL. L. REV. 273 (1988). A San Mateo County, California study of 178 conservatorship cases concluded that they were a lifetime proposition for the wards. *See id.* at 277–78. The study asserted that overuse, not underuse, was the greater danger, even though underuse is difficult to measure. *See id.* at 285; *see also* Winsor C. Schmidt, *Quantitative Information About the Quality of the Guardianship System: Toward the Next Generation of Guardianship Research*, 10 PROB. L.J. 61 (1990). Schmidt suggested that the aspect of guardianship most needing reform is the “supply of guardians.” *See id.* at 74. Schmidt surveyed Florida’s 11 HRS district offices. *See id.* He found over 11,000 individuals needing public guardianship services, more than 6000 for whom petitions would be filed if there were services available, over 2000 incompetent adults without guardians, and countless other institutionalized clients. *See id.* The study documented “a rather substantial unmet need for guardianship” as well as the necessity to pursue alternatives. *See id.*; *see also* Winsor C. Schmidt, Jr. & Roger Peters, *Legal Incompetents’ Need for Guardianship in Florida*, in *GUARDIANSHIP*, *supra* note 277, at 19.

research in those areas.

3. *United States Senate Special Committee on Aging Workshops — Roundtable Discussions on Guardianship*

In 1992, in an effort to determine interest in pursuing the federal laws, the United States Senate Special Committee on Aging conducted a Roundtable discussion (Roundtable 102-22) to address the federal government's role in guardianship law, an area traditionally addressed by the states.³⁸⁰ Roundtable 102-22 examined three questions. First, it asked whether there was enough data to document abuses within the system and to make informed policy decisions about how to appoint and monitor guardians.³⁸¹ Second, assuming the problems could be documented, Roundtable 102-22 examined “the advisability and feasibility of federal intervention.”³⁸² Finally, since few federal funds flow directly to state courts administering guardianships, the Roundtable asked what “hook” for federal regulation may be designed to give the states an incentive to comply with the federal law.³⁸³

The next year, the Special Committee conducted a workshop that addressed innovative approaches to guardianship.³⁸⁴ The workshop forum highlighted successful guardianship approaches implemented across the country, specifically including those programs operating in Wisconsin, Florida, New Hampshire, Michigan, Arkansas, and Illinois.³⁸⁵

As the fire of the Associated Press headlines quelled in subsequent years, the prospect that any federal guardianship law would be forthcoming lost strength. Congress placed the proposed legislation on a back burner.³⁸⁶

380. See *Roundtable Discussion on Guardianship, Hearing on S. 102-22, Workshop Before the Special Committee on Aging, United States Senate*, 102d Cong. § 2, at 1 (1992) [hereinafter *Roundtable 102-22*] (statement of A. Frank Johns).

381. See *id.* at 4.

382. *Id.* at 5.

383. See *id.*

384. See *Innovative Approaches to Guardianship, Hearings on S. 103-3, Workshop Before the Special Committee on Aging, United States Senate*, 103d Cong. 1 (1993).

385. See *id.*

386. See *id.* The burner was turned off, and the legislation thrown off the stove when the Republicans gained control of Congress in 1994. This Author notes that the legislation before the 103d Congress was not resubmitted in the 104th Congress.

4. *The 1993 Country-Wide Survey of Public Guardianship*

A dozen years after the 1981 findings of the National Study of Public Guardianship of the Elderly, Sally Hurme, Charles Sabatino, and Dorothy Siemon, supported by the AARP/Legal Counsel for the Elderly and the ABA Commission on Legal Problems of the Elderly, analyzed the then-current status of public guardianship in the United States and suggested directions for reform and further study.³⁸⁷ Like other studies, an analysis of the fifty states' statutes on public guardianship produced charts identifying available public guardianship services in each state, and classifying the types, if any, of public guardianship programs.³⁸⁸ The study also conducted eleven state interviews, with extensive analysis of the programs in Alaska, Georgia, Idaho, Alabama, and Washington State, which represented the five models developed to classify states providing guardianship services.³⁸⁹

The first model was the “*Independent State Public Guardianship Agency*.”³⁹⁰ Seven states operate and fund an independent office of public guardian, but other factors such as “the location, funding source, staffing, statutory guidelines and population served” varied significantly.³⁹¹ The second, “*Government Agency also Providing Social Services*,” provided for a public guardian office within a preexisting state or county social service agency.³⁹² Even though the agency providing the guardianship services varies greatly, serious conflicts of interest exist because the programs are all housed in government departments that also provide social services to wards.³⁹³ The third model, “*Private Sector via Volunteers or by Contract*,” enabled county or state governments to contract with a “non-profit or for-profit organization or a volunteer board to provide guardianship services.”³⁹⁴ The fourth model, “*Government Employee*

387. See Dorothy Siemon et al., *Public Guardianship: Where Is It and What Does It Need?*, 27 CLEARINGHOUSE REV. 588 (1993).

388. See *id.* at 589; see also *id.* at 590–94 (displaying the charts produced).

389. See *id.* at 589

390. See *id.*

391. *Id.* at 589. The seven states with independent state agencies are Alaska, Delaware, Hawaii, Illinois, New Jersey, South Dakota, and Wyoming. See *id.* at 594.

392. See Siemon et al., *supra* note 387, at 589.

393. See *id.*

394. *Id.*

Not Providing Social Services,” allowed public employees to be public guardians, either as part of their duties or as a last resort in the absence of an outside individual.³⁹⁵ The public employees definition could include a “judge, sheriff, public fiduciary, or administrator.”³⁹⁶ The final model gave courts the option to use a method unrelated to the other four models or to public guardianship.³⁹⁷

In addition to reaffirming the same issues, problems, and proposed solutions found in the National Study,³⁹⁸ the authors also identified new ones. First, many public and private organizations providing guardianship services in the last resort provide guardianship of the person only, while private attorneys serve as guardians of the property as well, collecting fees for managing the wards' estates.³⁹⁹ Second, the public guardian's right to litigate for appropriate services is limited.⁴⁰⁰ In addition, it is difficult to find volunteers when the public guardianship programs are under-funded.⁴⁰¹ Another issue raised was the pressure to create guardianships that are driven by financial incentives, and nursing home concerns regarding liability.⁴⁰²

The authors formulated recommendations that focused on avoidance of guardianship through less restrictive alternatives, education, adequate funding, elimination of conflicts of interest, and implementation of national standards.⁴⁰³ Future research should

395. *See id.*

396. *Id.*

397. *See* Siemon et al., *supra* note 387, at 589.

398. *See* Bell et al., *supra* note 281.

399. *See* Siemon et al., *supra* note 387, at 596. This is true in other states as well. In North Carolina, for example, a public guardian can be appointed by the clerk of superior court, in the capacity of *ex officio* judge of guardianship, in the county of jurisdiction for a term of eight years. *See* N.C. GEN. STAT. §§ 35A-1270 to -1273 (1995). In this Author's experience, the clerks always appoint local attorneys, and the local attorneys rarely, if ever, take guardianships that do not have estates. This Author observes that public guardians do little, if anything, regarding the person of their wards, and once the estates of the wards are depleted, or the wards become too disruptive or difficult, the guardianships are transferred elsewhere.

400. *See* Siemon et al., *supra* note 387, at 596.

401. *See id.* at 599.

402. *See id.*

403. *See id.* The authors made several recommendations related to funding, education and outreach, standards and recruitment and training of guardians. *See id.* Public guardianship programs need proper funding to meet the states' statutory mandates and new programs must be funded to meet the increasing community need. *See id.* The Roundtable stressed, however, the need to refocus funding efforts away from guardian-

include ways to implement the recommendations.⁴⁰⁴

5. *The 1993 National Probate Court Standards Addressing Guardianship and Conservatorship*

Acknowledging that probate practice, jurisdiction, and court structure vary greatly among states, the National College of Probate Judges (NCPJ) and the National Center for State Courts (NCSC) formed the Commission on National Probate Court Standards (the Commission).⁴⁰⁵ The Commission undertook a two year project to “develop, refine, disseminate and promulgate” the National Probate Court Standards (NPCS) for courts exercising probate jurisdiction.⁴⁰⁶ Even though the UPC was adopted by fifteen states, and adopted in part or influenced reform in several other states, the NCPJ and the NCSC acknowledged that the UPC met resistance and that a need still existed for appropriate reform in the area.⁴⁰⁷

The NPCS specifically addressed guardianship and conservatorship. As to guardianship, the standards promoted uniform petitioning, early control and expeditious processing of cases.⁴⁰⁸ The standards also required a court visitor, the appointment of counsel and notice and hearing.⁴⁰⁹ However, with limited state support, little change occurred.

ship and toward less restrictive alternatives. *See id.* Nursing homes need to be educated on appropriateness and legal consequences of guardianships. *See id.* Public guardianship programs need to be unified to eliminate potential conflicts of interest and their guardian recruiting, training, and administrative efforts should be intensified. *See id.* Finally, the Roundtable also called for the creation of national minimal standards for services, monitoring, and financial accountability. *See id.*

404. *See* Siemon et al., *supra* note 387, at 599 n.51. The questions posed by the authors touched on several issues. The reoccurring theme of least restrictive alternative services was examined as well as the funding for such programs. *See id.* The liability and concerns of nursing homes were considered. *See id.* Funding sources for public guardianship services were explored, as was the best utilization of volunteers by public and private institutions. *See id.*

405. *See* Evans V. Bruster, *Foreword to Commission on National Probate Standards*, NATIONAL PROBATE COURT STANDARDS introduction (1993).

406. *Id.* The organizations acknowledged the National Conference on Commissioners on Uniform State Laws' work on probate laws reform, which culminated in the 1969 National Conference of Commissioners on Uniform State Laws and ABA-approved UPC. *See id.*

407. *See id.*

408. *See id.*

409. *See id.*

6. *The 1994 ABA Senior Lawyers Division Task Force on Guardianship Reform Recommendations for Revision of the Uniform Probate Code Article V*

In 1993 and 1994, the Senior Lawyers Division of the ABA organized a Task Force on Guardianship Reform (Task Force) to examine all sections of the UPC Article V and recommend changes.⁴¹⁰ The petitioning section recommended voluminous changes, including referral to counsel “of choice,” providing the court discretion to dispense with a professional evaluation, allowing the appointment of one or more visitors and expansion of the visitor's duties, and allowing the court to appoint a public or charitable agency as the principal visitor.⁴¹¹ The Task Force recommended that petitions be set in a minimum of fourteen-point type, and that a copy of the document accompany a notice of the hearing or filing.⁴¹² In addition, petitioner must give notices to the respondent and others.

The Task Force recommended that all family preferences have lower priority than those chosen by the ward if competent at the time, that conservators be given equal priority with guardians, and that last place preference be given to all care givers, not just relative care givers.⁴¹³ The Task Force recommended a clear separation between emergency appointments and substitute appointments.⁴¹⁴ In addition, emergency guardianship would require the appointment of counsel.⁴¹⁵ Immediate notice would be required for appointments made without prior notice and the court must hold a hearing no later than 72 hours following the request.⁴¹⁶ The Task Force further recommended an absolute prohibition against voluntary commitment by a guardian, and that a guardian must prove the necessity of continuing the guardianship and show that guardianship is more than appropriate.⁴¹⁷

The recommendations of the Task Force moved through differ-

410. See Notes of A. Frank Johns, Jr., Greensboro, North Carolina, from the Task Force on Guardianship Reform, organized by the Senior Lawyers Division of the ABA (1994) (on file with Author).

411. See *id.*

412. See *id.*

413. See *id.*

414. See *id.*

415. See *id.*

416. See Notes of A. Frank Johns, Jr., *supra* note 410.

417. See *id.*

ent levels of consideration within the ABA. It is currently in the final reading of the drafting process of the Uniform Laws Commission.⁴¹⁸

7. *The 1994 National Study of Guardianship Systems:
Findings and Recommendations*

In 1994, the Center for Social Gerontology⁴¹⁹ published the National Study of Guardianship Systems: Findings and Recommendations (Center Study).⁴²⁰ Funded by an Administration on Aging grant, and seeking to increase knowledge and understanding of the then current guardianship system, the Center set two priorities: (1) utilize research to increase national knowledge of the current system; and (2) develop a computerized system to assist courts in determining guardianship needs.⁴²¹ However, the finalized project explored only the feasibility, rather than the actual development, of the computerized system.⁴²²

Like other guardianship research projects, the Center Study examined and analyzed both previous and then-current research efforts. Out of twenty research studies identified, thirteen examined similar issues,⁴²³ and only one covered the entire nation.⁴²⁴ The Center Study included six of the twelve states previously studied.⁴²⁵

418. Interview with Professor Rebecca Morgan, Stetson University College of Law, St. Petersburg, Fla., Reporter for the Drafting Committee of the UGPPA Commission on Uniform Laws, in Tucson, Ariz. (Oct. 31, 1996).

419. In the Author's observation, the Center for Social Gerontology is long recognized for its work in the field of guardianship and alternative legal interventions. See, e.g., P.A. Hommel, *Guardianship and Alternative Interventions — A Compendium for Training and Practice* (Center for Social Gerontology 1986).

420. See Lauren Barritt Lisi et al., *National Study of Guardian Systems: Findings and Recommendations 1* [hereinafter *Center Study*] (Center for Social Gerontology 1994).

421. See *id.*

422. See *id.* at 2. The Center Study collected data from 10 states, analyzed 566 guardianship hearings and 726 guardianship files, and conducted telephone interviews with 228 guardianship petitioners. See *id.* at 3. The 10 states analyzed were California, Colorado, Florida, Indiana, Kansas, Michigan, Minnesota, New York, Oregon, and Washington. See *id.* at 7.

423. See *id.* at 4 n.9. A complete listing of 10 studies that examined practices in separate states can be found in Laurence Friedman & Mark Senage, *Taking Care: The Law of Conservatorship in California*, 61 S. CAL. L. REV. 273 (1988). See *Center Study* at 4 n.9.

424. See AP Report, *supra* note 9. The one study that covered the entire nation was the Associated Press Exposé. See *id.*

425. See *Center Study*, *supra* note 420, at 4–5. California, Colorado, Florida, Michi-

The Center Study resulted in fourteen findings and eight recommendations which consumed more than twenty-five pages of the report.⁴²⁶ The findings were grouped under categorical questions which addressed the following issues: (1) who guardianship affects,⁴²⁷ (2) factors which “trigger” guardianship petitions;⁴²⁸ (3) the “availability, utilization and effectiveness” of guardianship alternatives;⁴²⁹ (4) “the process for imposing guardianships;”⁴³⁰ and (5) the

gan, New York, and Washington were the six states which the Center Study re-examined. *See id.*; *see also* AP Report, *supra* note 9.

426. *See Center Study, supra* note 420, at 75–101. The findings and recommendations are as important as those offered 30 years earlier by Lindman and McIntyre, and Allen, Ferster and Weihofen. *See ALLEN ET AL.*, *supra* note 21. Also compare the Center Study findings and recommendations with the findings and recommendations of concurrent studies, particularly Sally Balche Hurme's work in *Steps to Enhance Guardianship Monitoring*. *See HURME, supra* note 365.

427. *See Center Study, supra* note 420, at 20. The Center Study created two sets of profiles of the persons affected by guardianship respondents and petitioners. The respondent profiles were divided between demographics and functional disabilities. *See id.* Unmarried white females made up the majority of respondents. *See id.* at 20–21. At the time of the petition, over 25% of respondents lived alone. *See id.* at 21. Almost 50% of respondents lived in the community and the remainder resided in nursing homes. *See id.* Most respondents had not progressed beyond high school and had estates of \$100,000 or less. *See id.* at 21, 28. Respondents suffered from significant cognitive impairments in their financial dealing and, to a lesser extent, their daily physical activities. *See id.* at 23. Petitioner profiles were categorized by individual and agency petitioners. *See id.* at 28–30. The most frequent individual petitioners were children of the respondents. *See id.* at 26. Seventy-one percent of these petitioners ranged in age from 41 to 70. *See id.* at 28. The majority were married, had higher educational credentials than respondents, and had household incomes of \$50,000 or less. *See id.* Eighty-five percent of the petitioners were involved with the care of the respondent at the time of the petition. *See id.* at 29. The majority of agency petitions were filed by social service agencies and were based on a need for a guardian. *See id.* at 30.

428. *See Center Study, supra* note 420, at 20. The Center Study found that petitions were most often filed in response to the need for improved financial management and better mental health or medical care. *See id.* at 31. Often a significant factor in the decision to file a petition relates to a need to change the respondents' living arrangements. *See id.*

429. *Id.* at 20. The study discovered that most respondents received financial assistance or offers of assistance. *See id.* at 34. Generally, family or friends provided this assistance through joint bank accounts or the power of attorney. *See id.* Seventy-five percent of respondents required assistance with their daily living activities, while only a third used in-home medical services. *See id.* at 36. Of the few respondents who had executed an advance directive, the majority chose living wills over powers of attorney for their health care matters. *See id.*

430. *Id.* at 20. Four of the study's findings related to guardianship hearings. The average time for a guardianship hearing was 15 minutes, unless the respondent or the respondent's attorney was present. *See id.* at 44. Under those circumstances, the average hearing length increased to 30 minutes. *See id.* Only one third of the respondents at-

impact of guardianship upon individuals.⁴³¹ Based on the findings of the Center Study, the directors and authors whispered a weak conclusion that there were implications for current and future policy and practice.⁴³² Not surprisingly, the implications led the authors only to declare the need for additional research and investigation into specific areas of the process.⁴³³ The Center Study made eight recommendations, while experiencing difficulty analyzing the data collected in 1990 and 1991 and delays in publishing the 1994 report.⁴³⁴

tended their own hearing. *See id.* at 49. Attorney representation increased the frequency of respondent participation. *See id.* at 51. Factors contributing to the absence of the respondent included unwillingness to attend, poor mental or physical health, or residence in a nursing home. *See id.* at 49, 51. The absence of the respondent rarely raised questions from those in attendance. *See id.* at 51. However, when the respondent did attend, he or she generally gave testimony. *See id.* at 53. Although over half of these respondents objected to receiving assistance, only 25% rejected the appointment of a guardian. *See id.* Although almost all respondents received some form of representation, only about a third of the respondents received assistance from an attorney. *See id.* at 47. Less than 25% of these attorneys were court appointed. *See id.* at 56. States with mandatory representation statutes had a larger percentage of court-appointed attorneys. *See id.* at 55. Examination of hearing transcripts suggested that attorneys are often unsure of their role and are torn between representing the client's best interest or the client's wishes. *See id.* at 58. The data reviewed by the study found no correlation between the petition outcome and the presence of an attorney for the respondent. *See id.* at 57.

431. *See Center Study, supra* note 420, at 50–53. The Center Study raised concerns regarding the liberal granting of guardianships and conservatorships. Such petitions are rarely denied and frequently grant broad unlimited powers. *See id.* at 64. The study created a guardian and conservator profile from its data. *See id.* at 66. Generally, the respondent knows the guardian or conservator. *See id.* In fact, 75% of the time the petitioner is the person appointed. *See id.* at 69. Generally, the petitioner had provided substantial care prior to the petition and was likely to continue that care after appointment. *See id.* at 71. Approximately 75% are individuals, as opposed to institutions or agencies. *See id.* at 68. Most individual guardians or conservators are the respondent's children. *See id.* at 67. Women are appointed more often than men. *See id.* Public or private social service agencies make up the majority of institutional appointees. *See id.* at 68. The remaining agency appointments are filled by law firms, banks, financial institutions, and attorneys. *See id.* In a majority of cases the granting of a guardianship petition resulted in a change in the respondent's living conditions. *See id.* at 71. Most often the respondent was moved to a nursing home or more restricted environment. *See id.*

432. *See id.* at 93.

433. *See Center Study, supra* note 420, at 93 n.163. The authors explain that this study was intended only to be a broad initial study. *See id.* The authors have developed a separate report that details areas in which further research is required. *See id.*

434. *See id.* at 93–102. The studies are similar. First, the Center Study recommended investigation and examination of barriers to implementation of guardianship alternatives. *See id.* at 93. In the meantime, the Study recommended educating and encouraging the public and service providers about the alternatives. *See id.* Second, the Center recognized the need for state courts to educate and provide resource materials to its

Although other research may be in progress, this Author notes an apparent gap in available research data from 1991 to the present. However, other authors have noted activity in legislatures and general assemblies across the country, as well as many statutory changes.⁴³⁵

8. *Recommendations of the 1995 White House Conference on Aging*

In February 1994, President Clinton called for a White House Conference on Aging to be held in 1995.⁴³⁶ In preparation, a comprehensive set of draft resolutions was presented for action in the White House Conference on Aging, scheduled for May 1995.⁴³⁷ Specifically, issue resolution development sessions (IRDS) analyzed the draft resolutions and presented them for approval, modification,

judges concerning adult guardianship adjudication. *See id.* at 96. Third, the Center Study recommended an ongoing training program at the state or local level for investigators, guardians ad litem, and attorneys of respondents. *See id.* at 97. The fourth recommendation was for courts to require more information about the functional status of the older person to ensure the most appropriate, least restrictive decisions. *See id.* at 98. The fifth recommendation directed courts to ensure respondents participate in the decisionmaking process to the utmost of their individual ability. *See id.* at 99. Sixth, the respondent's interests must be effectively represented by counsel whenever necessary. *See id.* at 100.

435. *See, e.g.,* Sally Balch Hurme, *Current Trends in Guardianship Reform*, 7 MD. J. CONTEMP. LEGAL ISSUES 143 (1995-96). Hurme focuses on legislative action between 1991 and 1995 in West Virginia, Tennessee, Texas, South Dakota, Delaware, New York, and Rhode Island. *See id.* at 146. Hurme notes that since 1988, guardianship laws in 10 other states have been substantially or completely revised. *See id.* Hurme listed the states and their statutes as follows: FLA. STAT. ANN. §§ 744.101 to 744.534 (West Supp. 1995); Ind. Code §§ 29-3-1-1 to 29-3-3-3 (Supp. 1994); OKLA. STAT. ANN. tit. 30, §§ 3-101 to 3-220 (West 1991); Mich. Comp. Laws § 700.401 (1994); N.M. STAT. ANN. §§ 45-5-11 to 45-5-502 (Michie 1994); N.D. CENT. CODE §§ 30.1-28-01 to 30.1-29-24 (1993); OHIO REV. CODE ANN. §§ 2111.01 to 2111.51 (Anderson 1994 & Supp. 1994); 20 PA. CONS. STAT. ANN. § 5511(a) (Supp. 1995); WASH. REV. CODE ANN. §§ 11.88.005 to 11.88.160, 11.92.035 to 11.92.185 (West 1987 & Supp. 1996). *Id.*

436. The Final Recommendations of the White House Conference on Aging; Resolution 65 (1995). Prior to the conference, the following steps were followed: (1) each preconference event provided a report summarizing its major recommendations; (2) the staff reviewed over 5000 recommendations from preconference reports, reducing the total by focusing on recommendations which were repeated in different events and which addressed major issues; (3) the resolutions produced from the synthesis were reviewed by steering committees in each of the four major issues of health, economic security, housing and quality of life; and (4) following the reviews by the steering committees, the resolutions were reviewed. *Id.*

437. The Final Recommendations of the White House Conference on Aging; Resolution 65 (1995).

amendment or rejection.⁴³⁸ Once synthesized by a steering committee, the IRDS were then reviewed for final form.⁴³⁹ The final set of resolutions were presented to the delegates for a vote to ratify the approved resolutions.⁴⁴⁰

Resolution 65 framed the legal issues addressing guardianship, setting ground rules for guardianship and then stating its resolve. First, it resolved to insure procedural due process protection and guardianship, including the proposed ward's right to adequate notice, to be represented by counsel, to be present, introduce evidence and otherwise participate at hearings.⁴⁴¹ Second, it resolved to support education and training efforts to inform guardians, judges, professionals and the general public about state guardianship guidelines as well as less restrictive options to the guardianship.⁴⁴² The third resolve required development of effective state and local systems to provide guardians of last resort for needy persons who lacked available relatives and friends.⁴⁴³ The conferees further resolved to emphasize a functional determination of incapacity rather than a strict medical diagnosis to identify those specific areas of personal and property management in which the proposed ward may need assistance, thereby enabling them to retain as much autonomy as possible.⁴⁴⁴ The fifth resolution was to establish court programs for, and to insure accountability of, guardians and financial transactions and personal decisions, through ongoing supervision of guardians.⁴⁴⁵ Finally, the conferees resolved to support the adoption of laws and court procedures that promote and encourage the use of the least restrictive level of guardianship.⁴⁴⁶

IV. A CRUMBLING LINKAGE FOR OLDER AMERICANS IN

438. *See id.*

439. *See id.*

440. *See id.*

441. *See id.*

442. *See* The Final Recommendations of the White House Conference on Aging; Resolution 65 (1995).

443. *See id.*

444. *See id.*

445. *See id.*

446. *See id.*

THE TWENTY-FIRST CENTURY

In the Author's knowledge about the past, no society has ever sustained support for and protection of, its mentally ill or disabled citizens. Unless America begins a significant initiative to address and fund alternatives to the guardianship process as a system, it will not change. Against the backdrop of the history of guardianship through the ages, and the demographic and empirical research and studies in the second half of the twentieth century, the forecast for the twenty-first century is bleak.

Bleakness comes after the mask of virtual reality is removed, and practical reality reveals that so little has actually been accomplished in the last generation to construct the needed guardianship foundation and structure capable of serving the wave of unprotected, poor baby boomers in the next century. History repeats itself and those currently under some form of guardianship face the likelihood that their interests are not first.⁴⁴⁷ Since this is especially true for poor, older Americans today, one can only imagine a guardianship process overwhelmed by so many more in the twenty-first century.⁴⁴⁸

As shown in past cultures, the poor and disabled with no income or assets are left alone to their own demises unless the community fears them. When fear enters the equation, they are controlled for the community's own protection. If assets are part of the equation, their assets are not left alone, but are coveted in estates over which bureaucrats and professionals may struggle, and from which families and friends may pillage.⁴⁴⁹ In these instances, those who exact our country's guardianship laws often do so in ways that are "nasty, brutish, and short."⁴⁵⁰

447. See *supra* notes 250–58 and accompanying text.

448. See Haya El Nasser & Andrea Stone, *Study: 2020 Begins Age of the Elderly*, USA TODAY, May 21, 1996, at 4A. As baby boomers head into old age, projections released by the U.S. Census Bureau show that the elderly population will surge in every state. See *id.*

449. Unprotected, old people may qualify as poor and even be eligible for means-tested governmental benefits, but still have income of a certain level, and exempt assets that may be of moderate value. For example, in this Author's experience, because the homestead is an exempt asset, a person with \$800 per month income and a house worth \$150,000 may still be considered impoverished.

450. Clifton B. Kruse, Jr., 1995 President of the National Academy of Elder Law Attorneys, is a mentor to many. During his presidential tenure, Kruse wrote President's messages that were both visionary and inspiring. In one such message, Kruse examined whether elders have a duty to die. See Clifton B. Kruse, Jr., *Disposable Humanity — Do*

The maxim that only the strong survive is the current creed. Physical, intellectual, or financial strength dictates survival. Protection against the risks of life costs more than the American community today will pay. The righteous call to serve the least of our own is relegated to a trickle of private and benevolent intervention. In the twenty-first century, what is only “little attention” will become microscopic.

This is the reason for Regan's warning. Regan witnessed how America's political and social redirection compromised the integrity

Elders Have a Duty to Die?, 8 NAT'L ACAD. ELDER L. ATTY'S Q.J. 3-4 n.1 (1995) (confronting former Colorado Governor Richard Lamm's suggestion, “arguably misinterpreted by the popular press” that “there is a moral duty to die when one reaches a certain degree of decrepitude”). Kruse's introduction into the message declares:

The loss of biographical status, the disappearance of importance as persons, is a reality in this country's community of frail elders — the congregation that elder law attorneys are dedicated to professionally serve.

Professor David Lyons, in his essays on law, justice, and political responsibility, collectively entitled, *Moral Aspects of Legal Theory*, suggests that “[f]ar more often than not, law has served oppressive, unjust, [and] inhumane social arrangements [While law is not] . . . inherently evil, [it serves] injustice as well as justice.” We define “justice” to mean the satisfaction of values that we personally admire, however idiosyncratic such values may appear when measured by populist ethics and politics.

In defining the purpose of law, Lyons observes that some writers posture “. . . that life without law would be nasty, brutish and short. The trouble [with that argument] is that life [is] like that for [many older persons currently] living under [our country's] Law.

Id. at 3 (footnotes omitted).

The elders' values — the desire to be independent, to be cared for in their own homes (their place of familiar security), and their desire to leave something of theirs behind — an inheritance for those that follow them — social immortality for the donors, are ruptured when elders are economically dependent, i.e., when they have insufficient funds for necessary long-term care. These desires, not politically recognized as deserved, are secondary to national mores seen as more worthy. Frailty resulting in social and economic unproductivity make near moribund persons who are considered valueless, politically unimportant. Quality of life issues, including the recognition of the importance of responsibly satisfying such persons' reasonable end-life expectations, are unnoticed. While the government in passing recognition of humanity may design “. . . a plethora of [institutional] regulations [to] ensure that bedpans are counted and clocks are punched, no one [in government] seems to know how to measure quality of life, let alone produce it, for frail elders[,]” whose vitality as social persons has ended.

We are not necessarily experiencing an abandonment of human values as a new phenomenon. American towns in the colonial period “weaned out,” denied settlement for persons anticipated as dependents and who had little to contribute. Frail older persons were perceived as unworthy of care. . . .

See id. at 4 (footnotes omitted).

of public agencies, private organizations and foundations that previously expanded social support, awareness and concern via programs to reach unprotected, poor, older Americans. Even without America's redirection, those who study the needs of older Americans and the guardianship process find little real progress across America's communities.

As a witness before the Senate Aging Committee's Roundtable Discussion on Guardianship, Regan identified five areas of judicial administration of guardianship in which there are major problems, four of which are significant to guardianship.⁴⁵¹ First, there are problems with adjudications and judges' arbitrary manner of waiving adversarial rules.⁴⁵² Those judges routinely exercise their powers out of convenience and the process becomes little more than *parens patriae* administrative bureaucracy.⁴⁵³ Another problem area is the haphazard monitoring once the guardian is appointed.⁴⁵⁴ As Regan noted, most state laws provide for oversight in the annual financial or personal status reports; but the real problem lies in court oversight of compliance with the terms of existing laws.⁴⁵⁵ The third significant issue is changing demographics and the inherent problem of elderly incapacitated individuals with no available and willing family or close friends to serve as guardians.⁴⁵⁶ Perhaps, Regan queried, creating some form of public guardianship could solve the problem.⁴⁵⁷ The final issue is the unavoidable expense, time and money involved in promulgating and enforcing stronger guardianship laws.⁴⁵⁸ Regan noted the irony that "the tougher the law, the more expensive the process."⁴⁵⁹ The consequence is a tendency for guardianships to be established only where there are substantial

451. See *Roundtable 102-22*, *supra* note 380, at 21 (statements of John Regan). The fifth area was actually an aside that addresses the topic of surrogate decisionmaking. See *id.* at 23. Regan asked if steps were necessary to improve access to competent surrogate decisionmaking for people who are incapacitated. See *id.* Regan noted that he was "not referring just to guardianship, but to a wider range of alternative mechanisms for empowering persons of good will to act with legal authority on behalf of disabled persons." See *id.* This Article does not reach this issue.

452. See *id.* at 27.

453. See *id.*

454. See *id.* at 28.

455. See *id.*

456. See *id.*

457. See *Roundtable 102-22*, *supra* note 380, at 28.

458. See *id.* at 29.

459. *Id.*

estates.⁴⁶⁰ Most of the time, only informal property and personal management and decision making are provided.⁴⁶¹ The disabled person's next of kin, friends, neighbors, or service providers render aid by default, often assisting without any legal authority and with important gaps in the necessary powers.⁴⁶²

A. The Complicated Process of Adjudications

As demonstrated in this Article, the king imparted his benevolence to his subjects whether they wanted or needed it.⁴⁶³ Likewise, some probate judges, and other adjudicators and officials having jurisdiction over guardianship sometimes sit as if on thrones exercising their powers under the doctrine of *parens patriae*.⁴⁶⁴ Some judges who have been on the bench for many terms may believe that they know it all, having seen enough of guardianship adjudications and appointment of guardians. With that knowledge, they appear to believe they have a right to dictate arbitrarily the process of adjudication, exercising nonconformity with statutory mandates and procedural rules. As the “parent of all citizens,” this appears to be done in the nature of advocating the best interests of the allegedly incompetent person (AIP).

1. Two Views of the Guardianship Adjudication Process

There are two primary views of how the guardianship adjudication process should work. The first view upholds *parens patriae* that fosters informality, with Rules of Civil Procedure and Rules of Evidence waived.⁴⁶⁵ The forum is one of advocacy for the best interests

460. *See id.*

461. *See id.*

462. *See id.*

463. *See supra* notes 76–114 and accompanying text.

464. From what is known of history, they should have every right. *Parens patriae* is time-honored and grants broad powers to intervene in the both respondents' and wards' lives to protect the afflicted. Justice Lewis Brandeis' heed in 1928 to guard liberty when the government's purposes are “beneficent” is still timely. Justice Brandeis warned that zealous men who mean well but lack understanding create the greatest danger. *See Olmstead v. United States*, 227 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

465. *See* Lawrence A. Frolik & Melissa C. Brown, *Adult Guardianship and Conservatorship*, in *ADVISING THE ELDERLY OR DISABLED CLIENT* 17-8 (1992 & Cum. Supp. 1995) (suggesting waiving the right to a jury trial when incompetent is unrepresented or when judge is experienced in guardianship proceedings).

of the AIP, rather than the formality and rules of an adversarial forum. At times the concept may be pursued and applied in modified form (as in the case of not having a jury) on the premise that an experienced judge may better decide the issue of incapacity than a jury.⁴⁶⁶ The second view is that the judicial forum fosters formal rules by which the adversarial contest is won or lost through zealous advocacy.⁴⁶⁷

There are many cases when incapacity is clear and judicial notice could be taken that the AIP cannot manage affairs, or make informed decisions about the risks of life. In such cases, the informal, *parens patriae* advocacy in the best interest format is appropriate. However, there are many other cases when incapacity is not clear. In these cases, paternalistic intervention denies AIPs parity to defend against the allegations.⁴⁶⁸

a. Proposal for Change — A Bifurcated Entry

With two clearly distinct views of guardianship adjudication process and two clearly distinct categories of AIPs in the guardianship adjudication process, such a division warrants a proposal: the guardianship system should have a bifurcated administrative filing or entry process followed by an administrative or judicial hearing. The process would be based on qualitative and quantitative elements normed to set a threshold for jurisdictional entry into the adversarial forum of a higher trial court. If a case does not break the threshold based on the weighted or normed elements, then the case would be heard administratively with informality based on the *parens patriae* doctrine. If the case does break the threshold, then the case would be judicially processed as formal, adversarial litigation.

At the petition stage, the petitioner or the petitioner's attorney

466. *See id.*

467. *See* REGAN, *supra* note 2, at 16–21 (stating that guardianship proceedings are as adversarial as criminal proceedings and should be similarly defended by respondent's counsel).

468. *See Roundtable 102-22, supra* note 380, at 97 (comments of Joan O'Sullivan) (stating that the Maryland statute has mandatory representation, but judges' and attorneys' attitudes treat hearing as a nonadversarial, administrative proceeding). *But see id.* at 98 (response by Judge Field Benton defending the temporary guardianships he has created as petitions by social services which are only quasi-adversarial and can be done quickly).

would have to aver facts and circumstances constituting the qualitative and quantitative elements to be analyzed and normed.⁴⁶⁹ In the Author's opinion, some, but not all, of the pertinent and necessary facts and circumstances include (1) a sworn declaration whether anyone contests the assertion that the AIP is incompetent; (2) certification that all parties who would be subject to such a hearing, and all parties who have any interest in such a hearing regarding the AIP, have been informed of the petition's filing and whether any of them object; and (3) two affidavits of professionals from different disciplines that confirm whether functional and medical debilitation are so severe that they impact substantially on life and daily experiences.

(1) Nearly Obvious Cases of Incapacity — Administrative Treatment

(a) Case Study: The Nearly Obvious Incapacity of John Doe

John Doe never initiated an action that would divert guardianship intervention and he is now a victim of later stage Alzheimer's disease. At no time does John connect with reality, nor does he understand where he is. John's children see him often, but he is not capable of recognizing them. Although John has a moderate estate, it requires considerable work. However, there is no one with the legal authority to perform certain fiduciary requirements. John also needs in-home or other health care services. However, the potential providers require a person with legal authority to grant John's informed consent before allowing John to have access to such services.

John's family petitioned for guardianship averring that no one objected to the adjudication and appointment of a guardian, that all

469. Although this Article addresses older Americans, the system must function and serve a broader array of people with disabilities, including developmental disabilities. The administrative function could begin in the school system through which they matriculated. At the age of 18, the school would submit the Individualized Education Plan (IEP), with the then-current psychological and educational evaluations, along with the affidavit of one or both parents to a court clerk. (See 20 U.S.C. §§ 1400 to 1409 (1994) for a statutory definition of the IEP in the Individuals with Disabilities Education Act (IDEA)). A court investigator would then interview and observe the AIP in his or her educational setting and home. The parents, school personnel, and court investigator, with the IEP and evaluations would then develop a limited guardianship by which the student would transition into community and vocational or supported employment. However, if the IEP, evaluations, and other facts and circumstances break the elemental threshold, then the case would move to the judicial forum for trial.

parties in interest had been notified and did not object, and that two professionals had confirmed John's severe mental loss. John's case met the administrative process elements. Because the elemental judicial threshold was not met, John's case, and other cases like his, should go directly to an administrative forum. The administrative process would include a visitor, investigator, or examiner who reviews documents, contacts parties involved and confirms the petitioner's certification. Additionally, if there is no dispute over the appointment of a guardian or conservator for the AIP, then the visitor, examiner or investigator confirms that fact in a report to the administrative forum. Efficiently, without excessive expense or loss of time, the protections available through the process pass to the ward. If, however, the administrator, visitor, investigator or examiner find otherwise, or if there is opposition between parties subject to, or in interest of, a hearing related to the AIP, then the process labels the case adversarial. Formal rules then apply and the case is transferred to the trial level court to allow the adversarial process to take its course.

Those who advocate informality, promoted by judicial economy, cost-effectiveness and timeliness, often do so in good faith and with good intentions. However, the cost, the AIP's freedom, is high. The AIP loses his or her day in court to examine, cross examine and confront those seeking to remove autonomy, independence, democratic rights and control over place and assets. As in the above facts, there are those who are so physically and mentally debilitated that the cost is reduced to the so-called "Blue Light Special."

(2) *Almost Obvious Cases of Capacity — Judicial Treatment*

(a) Case Study: The Almost Obvious Capacity of Sallie Doe

For the past two years, Sallie Doe has been through the wringer. She lost her husband after a long illness. Her granddaughter, who has been her care provider, took advantage of her power of attorney and spent tens of thousands of dollars on everyone and everything except Sallie. Sallie's sons and daughters want to place her in a nursing home where she does not belong. At age eighty-seven, blind in one eye and very frail, Sallie needs assistance to get through the day. However, although she is often confused, she is not incompetent. Her own doctor says that she does not need a guardian and, with the appropriate support network, the quality of her life

and independence could be maintained while living in her home. Her son and daughters acquired an evaluation from a psychiatrist who saw Sallie just after her husband died. From that one encounter, the psychiatrist wrote a short affidavit declaring that Sallie, because of her age and her frailty, was incompetent and needed a guardian to manage her affairs. With that affidavit, the son and daughters filed a petition to adjudicate Sallie incompetent.

Sallie's case meets the elements for breaking the threshold of judicial process. The petitioner must swear that there is a contest as to the assertion of the AIP's incompetence. There cannot be a certification from all parties in interest and subject to the hearing, but they all agree that the petition is appropriate, and the affidavits asserting functional or medical debilitation are in conflict. Sallie's case breaks the elemental threshold for litigating the capacity of the AIP and fighting to protect her autonomy and individual rights.

There are those cases where the "almost obvious competent" AIP has not acted to access alternatives to the guardianship process. There are other cases where the AIP has acted, for example by executing health care and durable powers of attorney, but a family member (other than the attorney-in-fact) asserts incapacity and files a petition. The situation may be such that AIPs do have times of disorientation or confusion. However, the AIP may know enough to know what is going on, and may want to fight the guardianship intrusion. Because the AIP is usually old and frail, those who deal with the AIP assume the AIP must be protected, even when the AIP does not want it and has already planned for protection.

This is where informality does not work. *Parens patriae* administrative treatment of older Americans is driven by the Greek, Roman, English and American misgovernment of ages past, and America's obsession and glorification of youth. This breeds invisible, invidious discrimination, surfacing in all areas of government and society.⁴⁷⁰ A large number of those who serve the elderly, includ

470. See Jan Ellen Rein, *Preserving Dignity and Self-Determination of the Elderly in the Face of Competing Interest and Grim Alternatives: A Proposal for Statutory Refocus and Reform*, 60 GEO. WASH. L. REV. 1818, 1844-45 (1992). Rein exposes the double standard often applied to the elderly through guardianship proceedings. See *id.* at 1844. On one hand, financial decisions made by an elderly person will often be questioned and used as the impetus for guardianship proceedings while the same decision made by a person 20 years younger may be declared unwise but harmless. See *id.* Similarly, drug misuse by the elderly is often "punished" by guardianship, whereas similar conduct by a

ing professionals, are ageist,⁴⁷¹ labeling older Americans incapacitated based on age alone. Advocates for the elderly will always bristle at the notion that the elderly are dumped in a vat of old age, and by their association with age alone considered disabled or incompetent.⁴⁷² In the Author's observation, that is what historically occurred under the *parens patriae* doctrine. Even though currently most statutes do not reference age as a basis for determining incapacity, practical reality in courts, public agencies and the AIPs' families is the continuing desire to do good by intervening and protecting helpless old people, whether they want help or not.⁴⁷³

Those strongly opposing such paternalism assert that legal ethics command a zealous adversarial defense of the AIP's liberties and freedoms.⁴⁷⁴ Often, there is no attorney, or (probably worse) the attorney is directed by the court, or by statute, to wear the hats of both the attorney and the guardian ad litem.⁴⁷⁵ The attorney/guardian ad litem is often court-appointed and thus knows the court's philosophical bent toward the "we know what to do" paternalism. The appointed person is forced to turn into a "Jekyll and Hyde," burying his or her attorney side, while promoting the AIP's best interests, often siding with the petitioners seeking the protec-

younger person is often treated as a crime. *See id.* at 1845.

471. *See* ERICA WOOD & AUDREY K. STRAIGHT, EFFECTIVE COUNSELING OF OLDER CLIENTS — THE ATTORNEY-CLIENT RELATIONSHIP 5 (1995). This "how to" monograph explains how attorneys and other professionals react to and serve elderly people as if incompetent solely because of age. This has been defined as ageism, a term, Wood writes, that was coined by Robert Butler in 1975. *See id.*

472. *See* Rein *supra* note 470, at 1845–46. Society feels at liberty to intrude upon elders in ways it never would intrude upon younger individuals. *See id.* at 1845. The underlying assumptions are so "subliminal" and "pervasive" that American culture is often unaware of them and would be shocked at the realization. *See id.* at 1846. This is evidenced as many families who love their elders allow "impersonal surrogate managers" to replace families, and nursing homes replace family homes as society deals with those whom it unconsciously views as "useless, unproductive, and inconvenient." *See id.*

473. *See, e.g.,* DEL. CODE ANN. tit. 12, § 3901 (1996); FLA. STAT. § 744.102 (1995); N.M. STAT. ANN. § 45-5-101 (Michie 1995).

474. *See* Vicki Gottlich, *The Role of the Attorney for the Defendant in Adult Guardianship Cases: An Advocate's Perspective*, 7 MD. J. CONTEMP. LEGAL ISSUES 191, 221 (1995–96) (stating that without representation, a defendant incurs unnecessary restrictions on liberty and self-autonomy). *But see* Frederick R. Franke, Jr., *Perfect Ambiguity: The Role of the Attorney in Maryland Guardianships*, 7 MD. J. CONTEMP. LEGAL ISSUES 223, 237 (1995–96) (stating that guardianship is nonadversarial and a zealous advocate is only appropriate in "atypical circumstance[s]").

475. *See, e.g.,* N.C. GEN. STAT. § 35A-1107 (1995). The guardian ad litem must be an attorney. *See id.*

tion of guardianship.⁴⁷⁶

In this Author's experience, it is clear that neither approach is right all the time. Individualized application of an informal administrative process, or a formal judicial process, should be available through the proposed bifurcated system noted above. Noncontested cases would be objectively diverted to an informal docket and handled in summary fashion.

The doctrine of *parens patriae* functions informally. Informality usually brings lower costs in time, money, and emotion. Again, the higher price is exacted in different forms. This is why it is sometimes very difficult to determine which is more expensive, paternalism or zealous defense.

Litigation in the American judicial system taxes the participants' money, time, and emotion, not unlike the guardianship process. The money it takes to pay for full blown guardianship litigation often exhausts the parties' funds, and frequently exhausts the AIP's funds that would have otherwise sustained the AIP's quality of life until the end. The time it takes to try a guardianship case, with discovery, motions and a jury, puts the parties, often the entire family, in purgatory. The waiting is like an infection, festering resentment and animosity that scars the participants for life. It is never forgotten. The emotional cost is evidenced as AIPs often spend sleepless nights, despairing and completely heart broken over what is being done to them. They feel victimized, criminalized and penalized. As the weeks, even months, pass and the day in court remains distant, AIPs become willing to do anything to end it, and even give up. This Author notes an unforgettable AIP who exemplified one beyond the jurisdictional reach of *parens patriae*. The night before the trial, the AIP, emotionally spent and believing that she had already lost all autonomy, independence, and any semblance of happiness, was found dead — cause unknown, maybe a broken spirit.

The tough laws are expensive. However, funding is possible through a creative mix of sources like that designed in California

476. Again, Professor Regan spoke to the point. See *Roundtable Discussion on Guardianship*, *supra* note 3, at 107 (comments of Professor Regan). The ABA ethics rules concerning counsel's role in dealing with a disabled person are very unclear, as well as the potential conflicts of interest between a disabled person and the well-meaning family. Regan felt that counsel's role in mental health proceedings in court is also very unclear if addressed at all. See *id.*

twenty years ago.⁴⁷⁷ Additionally, if guardianship diversion alternatives were ever properly supported, many of the unprotected older Americans would not need to go through the court process. First, however, the states and the courts must dismiss those cases where AIPs have taken alternative measures, but for other reasons petitions are still filed. That could be accomplished with the bifurcated system that requires facts and circumstances that must break a certain qualitative and quantitative threshold before allowing entry, and by using the information in the education system to administratively serve students with developmental disabilities.

B. Crumbling Linkage in Guardianship Administration

1. *Guardianship Monitoring*

Even with its problems, California still leads the way in delivering guardianship monitoring. In the Author's opinion, it delivers results that have court investigators actually protecting the interests of conservatees, and it has funded the cost with a mix of public and private dollars that sustain the necessary staff to accomplish its monitoring goals.⁴⁷⁸ However, almost twenty years after the California monitoring system began, few other states have actually provided the necessary funding and staffing.⁴⁷⁹ Most states provide little or no oversight of the guardians' actions, reviewing only accountings and reacting to petitions or other accusations.⁴⁸⁰ Most states offer no proactive oversight that determines whether the quality of the lives of wards or conservatees are maintained, let alone enhanced.⁴⁸¹

Since her 1991 study,⁴⁸² Sally Balch Hurme has tracked new guardianship legislation, noting that all new statutes, except Delaware's, require the filing of annual accountings and personal

477. See CAL. PROB. CODE §§ 1850–1851 (West 1991).

478. See *id.*

479. See generally Siemon, *supra* note 387.

480. See *id.*

481. See *id.*

482. See HURME, *supra* note 365.

status reports by both guardians of the person and of the estate.⁴⁸³ This Author finds, however, that none of this new legislation authorizes sufficient funding for investigative staffs who would monitor the status of the guardianship cases. However, the legislation indicates there is a trend toward a proactive investigative approach which assures that guardianship is necessary for the wards, and that the wards are not being disserved by it.⁴⁸⁴ Hurme reminds us that historically, factions of the ABA and other organizations stood strongly behind the assertion that the court system is not a place for delivery of social services.⁴⁸⁵ Monitoring and enforcement would be, in their collective assertive opinion, an extension of social services that the court system would be powerless to handle in terms of volume and expertise.⁴⁸⁶

Hurme cites New York and Texas as state systems mandating greater specificity in monitoring through reports, and detailing specific training requirements for guardians, court evaluators and examiners.⁴⁸⁷ However, as with public guardianship and other research mentioned below, thorough examination of guardianship monitoring has not been done since Hurme's work in 1991.⁴⁸⁸

483. See Hurme, *supra* note 435, at 143, 184. Hurme recognizes New York, Rhode Island, South Dakota, Tennessee, Texas, and West Virginia as the states in recent years that have added monitoring requirements. See *id.* at 184 n.225. She identified Delaware as the exception. See *id.* at 184.

484. See *id.* at 185–88. Hurme notes that the sources of conflict regarding monitoring are not clear, but that a possible cause is the philosophy of the National Conference of Commissioners on Uniform State Laws, and the Real Property, Probate and Trust Section of the ABA that advocated for a “hands off” position on the premise that courts should not be involved in the day-to-day administration of decedents' estates. See *id.* at 183. “The court's role is to be wholly passive until some interested person invokes its power to secure resolution of a matter.” *Id.* (quoting UNIF. PROBATE CODE § III cmt., 8 U.L.A. 220 (1983)). “Thus under the original UPC, the guardian, like the probate administrator, received little supervision until filing the final accounting.” *Id.*

485. See *id.* at 183.

486. See *id.*

487. See Hurme, *supra* note 435, at 186–87. Many recommendations have been placed in legislation, as shown in the passage of new legislation and specifically referring to states like New York, South Dakota, and Texas. See *id.* at 185–87. However, in this Author's opinion, the mask of virtual reality is all there is, leading us to believe the illusion that guardianship monitoring is being implemented and works to serve the interests of wards and conservatees.

488. Telephone Interview with Sally Balch Hurme, Staff Attorney, AARP Department of Legal Counsel for the Elderly, Washington, D.C. (June 4, 1996). In a telephone interview with Sally Hurme, the Author asked whether or not she had any data, other communication, or feedback regarding the implementation of the recommendations in

a. Two Parts of the Answer to Guardianship Monitoring

(1) Nonprofit Organizations and Trained Volunteers

One part of the answer is to train and supervise volunteers in the private, nonprofit sector. One of the visible successes across the country for guardianship monitoring came from a private nonprofit source. The AARP/LCE (American Association of Retired People/Legal Counsel for the Elderly) initiated a project in 1988 that trained and supervised volunteer monitors in several model jurisdictions.⁴⁸⁹ The National Guardianship Monitoring Program worked on a collaborative basis with courts.⁴⁹⁰ Upon selection, training in volunteer management for the court staff was conducted, along with the training of the volunteers.⁴⁹¹ The training included oral presentations, as well as written materials, and encourages volunteer participation through use of sample cases and forms.⁴⁹² The volunteers served as court visitors, court auditors, and records researchers.⁴⁹³ Mary Twomey, program director, believes that the volunteers made a significant impact on the volume of work handled by courts.⁴⁹⁴ The program served over thirty jurisdictions, reviewed over 11,000 files, conducted over 7000 audits and visited more than 5000 wards.⁴⁹⁵ It was a practical answer to compliance and enforcement.

(2) National Database and Uniformity of Process

Steps to Enhance Guardianship Monitoring. Hurme acknowledged that she has little follow-up information, formal or otherwise, that would confirm the implementation of the guardianship monitoring recommendations. *See id.*

489. Telephone Interview with Mary Twomey, National Director of National Guardianship Monitoring Program of AARP, Washington, D.C. (May 2, 1996). As of the summer of 1997, the Author was informed that the project will be discontinued.

490. *Id.*

491. *Id.*

492. *Id.*

493. *Id.*

494. When interviewed by the Author, Twomey noted even more successes and progress with the National Monitoring Program. However, when asked if there was any involvement through her program, or through the AARP in finding and training volunteers as guardians, she acknowledged that there was no connection between her program and that concern.

495. Telephone Interview with Mary Twomey, *supra* note 489.

Another part of the answer to guardianship monitoring has been known for years. Ingo Keilitz, associated with the National Center of State Courts, argued the need for a national guardianship database.⁴⁹⁶ Keilitz also agrees with Schmidt and other researchers who found insufficient research on social, economic, legal, and systemic factors affecting the rates at which guardianship files are created in the courts.⁴⁹⁷

A database for the states or the federal government would provide empirical data by which caseloads could be more carefully forecast.⁴⁹⁸ If the numbers of wards are known, then necessary funding could provide for sufficient staff, the cost of training and enforcement.⁴⁹⁹ A national database could provide consistent, uniform forms, so that the same kinds of facts and circumstances could be gathered across the country.⁵⁰⁰

The day when a database system becomes reality still appears distant. The database can only be realized through a national effort because so many states are still in the dark when it comes to statistics regarding guardianship. In 1993, this Author organized a grant source, together with the Corporation of Guardianship, Inc., a local non-profit guardianship organization, and the National Center for State Courts, to conduct empirical research on guardianship and to frame a model database in North Carolina.⁵⁰¹ The final link was to seek the blessing of the North Carolina Supreme Court and its Administrative Office of the Courts (AOC).⁵⁰² The response was de-

496. See *Innovative Approaches to Guardianship*, *supra* note 384, at 48 (statement of Ingo Keilitz). According to Keilitz, the Associated Press reporters were astonished to find that there was no data on state guardianship, and nothing existed on a nationwide basis. See *id.* Keilitz made the obvious point that neither the federal government nor the individual states know how many individuals are subject to annual guardianship proceedings annually. See *id.* at 48–49. The federal government and states are also unaware of how the guardianship case-loads correlate with population, particularly the elderly population. See *id.* at 49. They also have no idea how they compare when adjusted for population in different states, different jurisdictions and according to different administrative structures. See *id.*

497. See *id.* at 48–49 (statement of Ingo Keilitz); see also Schmidt, *supra* note 277; *Center Study*, *supra* note 420. The study initially proposed funding the construction of a national database, but was modified to only research and analysis. See *id.* at 1.

498. See *Innovative Approaches to Guardianship*, *supra* note 384, at 48–49 (statement of Ingo Keilitz).

499. See *id.*

500. See *id.*

501. See Corporation of Guardianship, Inc. (on file with Author).

502. See *id.*

spairing. Writing for then-Chief Justice James Exum, the AOC director respectfully declined with the excuse that guardianship was not high enough on their agenda, and more importantly, that documentation of records and files relating to guardianship could not be retrieved from any computer networks and would be too difficult to accumulate by hand.⁵⁰³

b. What Is Left Unanswered in Monitoring

(1) *Increasing Numbers of Poor, Unprotected Older Americans with No Family or Close Friends*

In Regan's comment on the increasing numbers of unprotected, older Americans, he stated that in many cases elderly persons outlive their immediate and extended family.⁵⁰⁴ Neighbors, churches, and others who would support them fade away and there are no persons available and willing to serve as guardians. Regan continued:

Visit any nursing home and you will see many such persons totally dependent on the staff or the administration of the facility for all types of surrogate decisionmaking. The question — and it's a hard one — is whether some form of public guardianship needs to be created to protect the interest of these dependent elderly.

I realize that public guardianship is a dirty word, has a bad reputation in many communities and deservedly so. I'm not suggesting that a new bureaucracy be created which substitutes one form of oppression for another. What troubles me, however, is the growing number of disabled elderly who are ripe for abuse and exploitation because they simply have no one to look out for their interests. That's the problem. I don't know precisely what the solution is.⁵⁰⁵

Regan made that statement knowing better than most the tension between professional dominance and patient prerogatives. In a commentary written for publication in 1996, Regan posed whether “legal mechanisms designed to protect the incapacitated and to empower those with capacity sometimes subvert the goals and instead

503. *See id.*

504. *See Roundtable 102-22, supra* note 380, at 22.

505. *Id.*

promote the interests of the protectors."⁵⁰⁶ It causes one to pause in embracing public guardianship agencies as the answer.

If public guardianship is part of the answer to the problem of serving masses of unprotected older Americans in the twenty-first century, then one safeguard should be to vest the power and control of such agencies in private nonprofit organizations that may only serve small numbers of people in small geographic areas. Additionally, the models and the operations should be grass-roots, driven from the bottom up. There is no need for top-heavy administration through state agencies that are too expensive and politically driven. The money and the process should be decentralized, with umbrella oversight for quality assurance in the form of human rights committees.⁵⁰⁷

The 1993 study by Charles Sabatino, Sally Hurme, and Diane Siemon provides the most current information.⁵⁰⁸ At that time, progress was noted in the changes of laws and in several of the programs surveyed. But the recommendations and questions for future research are telling. America is just not moving and building for what everyone laboring in this field knows is coming.⁵⁰⁹

2. Nonprofit Guardianship Programs

506. John J. Regan, *Commentary: Protection and Empowerment of the Elderly: Whose Needs Does the Law Really Serve?*, in OLDER ADULTS' DECISION-MAKING AND THE LAW 79 (Michael Smyer et al. eds., 1996).

507. Telephone Interview with Alan Bogutz, Bogutz & Gordon, in Tucson, Arizona (May 5, 1996). Alan Bogutz, a pioneer advocate in elder law, explained that Arizona has a strong guardianship system that provides guardians. Since Arizona has only 15 counties, there is not as much conflict or competition among the political and administrative fiefdoms. He also said diversion and guardianship alternatives have had an impact such that the number of guardianship filings have actually declined in his state. However, on a national perspective, Bogutz agreed that finding, training and monitoring guardians who would serve indigent older Americans will not be easy in the coming years.

508. *See supra* notes 387-409 and accompanying text. It is encouraging that in March 1997, as this article neared completion, The Center for Social Gerontology, Inc., Ann Arbor, Michigan, received a significant grant to examine public guardianship issues across several states. *See* Letter from Penelope A. Hommel to A. Frank Johns (Mar. 27, 1997) (on file with Author).

509. This Author recalls the time when Atlanta was finishing its work in preparation for the 1996 Olympics. According to news reports and the Author's observations, it took years and hundreds of millions of dollars for Atlanta to be ready for the onslaught of an estimated two million additional people visiting Atlanta in a three week period. It is an easy analogy to guardianship. America began too late, with too little resources to prepare for the onslaught of the boomers in the next century.

In the field, private non-profit guardianship programs seem to be effective, both with advocacy and with resource utilization. Several private non-profit public guardianship programs are noteworthy: (1) the Wisconsin Guardianship Support Center; and (2) the Florida Urban Jacksonville Cathedral Foundation; and (3) the Colorado Silver Key Senior Services of Colorado Springs; (4) the Ohio Pro Seniors, Inc. of Cincinnati; and (5) the North Carolina Corporation of Guardianship, Inc.

a. Wisconsin Guardianship Support Center

In 1991, the Center for Public Representation, a nonprofit public interest law firm in Wisconsin, contracted with the state to create the Wisconsin Guardianship Support Center.⁵¹⁰ Its mission is to improve the supply and quality of volunteer guardians.⁵¹¹ The Wisconsin Center conducts two training programs annually.⁵¹² Operating a toll-free telephone service, it provides “information, advice, and case consultation to guardians, family members, wards, health care providers, attorneys and social service agencies.”⁵¹³ In addition, it publishes a quarterly newsletter circulated to thousands of subscribers, who also receive standardized statewide materials for recruiting and training guardians.⁵¹⁴

Wisconsin's system for addressing decisionmaking by incapacitated elderly included four approaches.⁵¹⁵ First, it increased availability and use of financial and health care advance planning directives, thus avoiding the need for guardianship.⁵¹⁶ Second, the number and quality of volunteer guardians was increased.⁵¹⁷ The guardianship system was reformed “to ensure more due process in hearings and increase court training, supervision and monitoring” of appointed guardians.⁵¹⁸ Finally, once the system was reformed, individuals who had not executed advance directives, but who need

510. *See Innovative Approaches to Guardianship, supra* note 384, at 9 (testimony of Betsy J. Abramson).

511. *See id.* at 10.

512. *See id.*

513. *Id.*

514. *See id.*

515. *See id.* at 9.

516. *See Innovative Approaches to Guardianship, supra* note 384, at 10.

517. *See id.*

518. *Id.*

guardianship, were required to enter the system.⁵¹⁹

b. The Cathedral Foundation

Teresa Barton, representing the Cathedral Foundation, explained the diverse program which “delivers vital community-based social services to elderly individuals in Duval County, Florida.”⁵²⁰ Some of its projects include protective counseling services, Meals on Wheels, home based support services, corporate guardianship including mandatory training, and a corporate program that locates appropriate resources for distant aging relatives.⁵²¹ The Cathedral Foundation focuses on alternatives to guardianship. While programs like in-home support services have served over twelve hundred elderly persons, the guardianship program has only served thirty individuals directly and another thirty indirectly.⁵²²

c. Silver Key Senior Services

Silver Key Senior Services, serving the Colorado Springs area, is a nonprofit organization very similar to Duval County, Florida's Cathedral Foundation.⁵²³ Silver Key primarily delivers its services through volunteers that include professionals, such as lawyers, doctors, and dentists who contribute countless hours of their time.⁵²⁴ The services provided include Meals on Wheels, transportation, home care, as well as home maintenance and homemaker companion and respite services, social services with case management, counseling, outreach, legal services, dental and medical care, prescription assistance, health appliance loans and emergency groceries.⁵²⁵

519. *See id.*

520. *Innovative Approaches to Guardianship*, *supra* note 384, at 18 (statement of Teresa K. Barton).

521. *See id.*

522. *See id.* at 18, 20.

523. Although not a participant in the U.S. Senate workshop, Silver Key Senior Services is well recognized. *See Advocate for the Elderly Receives NAELA President's Award*, NAELA NEWS, May/June 1996, at 19. Millicent Kraushaar, President-Executive Director, has served the organization since 1971. *See id.* Kraushaar was presented the 1996 National Academy of Elder Law Attorneys President's Award by Clifton B. Kruse, Jr., its president. *See id.*

524. *See id.*

525. *See id.*

Volunteers also staff the recently established guardianship/conservatorship service.⁵²⁶ The guardianship/conservatorship service aids persons who need it for health reasons and have no interested family or close friends available for appointment.⁵²⁷

d. Pro-Seniors, Inc.

Pro-Seniors, a nonprofit organization founded in 1975 in Cincinnati, Ohio, provides free legal and long-term care assistance to older adults.⁵²⁸ Dedicated to helping older Americans maintain independence through their empowerment, the organization protects their interests by helping them access resources.⁵²⁹ Pro-Seniors offers a legal hotline, legal help, advocacy regarding long term care complaints and other intervention services. It also prepares volunteers and trains and assists other organizations to become guardians or to exercise their guardianship duties responsibly.⁵³⁰ Pro-Seniors is recognized for its legislative advocacy that acquired funding to provide in-home services to older Americans, primarily to divert the need for their displacement to more restricted environments or for guardianship intervention.⁵³¹

Gregory French, Executive Director of Pro-Seniors and nationally recognized for his advocacy in serving older Americans, stated that the hallmark of Pro-Seniors, Inc. is its ability to serve those people who are not otherwise served by professionals, including attorneys.⁵³² The organization continues to do its best work for older Americans when it successfully acquires annual legislative funds for the in-home health services that allow older Americans to stave off restrictive intervention that ends in residential settings or guardianships.⁵³³ The program is so visibly beneficial to older Americans that it almost funds itself.⁵³⁴

526. *See id.*

527. *See id.*

528. Telephone Interview with Greg French, Executive Director of Pro Seniors, a nonprofit organization, in Cincinnati, Ohio (June 2, 1996).

529. *Id.*

530. *Id.*

531. *Id.*

532. *Id.*

533. Telephone Interview with Greg French, *supra* note 528.

534. *Id.*

e. Corporation of Guardianship, Inc.

The North Carolina based Corporation of Guardianship, Inc., is a nonprofit organization serving last resort guardianship needs of older Americans and other disabled adults.⁵³⁵ In existence since 1979, the Corporation of Guardianship, Inc. not only provided guardianship services for more difficult persons, including those who are indigent, but it has been dedicated to providing alternative sources and opportunities by which older Americans might manage their affairs, execute appropriate legal documents, including health care and durable powers of attorney, and maintain autonomy and independence without jeopardizing their quality of life.⁵³⁶

The Corporation of Guardianship, Inc. has served more than 750 persons in guardianship situations, and has initiated more than 1000 intakes, referrals and interventions.⁵³⁷ The Corporation of Guardianship provides case management, bill paying services, extended family intervention and contact, assistance in acquiring legal documents and powers and representative payee programs.⁵³⁸ Its hallmark is that it receives no governmental funding, and no categorical budgeted assistance from North Carolina's General Assembly.⁵³⁹ At the same time, the organization does not turn down any referrals, unless there is a conflict of interest or the case load for staff has become greater than the ratio of staff to client imposed within the organization.⁵⁴⁰

Mary Ann Davis, Executive Director of the Corporation of Guardianship, stated that in the last couple of years the number of referrals has increased, while the access to volunteers and other organized assistance has decreased.⁵⁴¹ Ms. Davis advised that restructure of the public guardian component of the North Carolina Statute and the creation of uniform database by which guardianships may be accounted are necessary to properly handle the needs

535. The Author created the Corporation of Guardianship, Inc., and notes his own bias stemming from 8 years in support of, and in advocacy for, its goals and objectives.

536. Interview with Mary Ann Davis, Executive Director of Corporation of Guardianship, Inc., in Greensboro, N.C. (June 3, 1996).

537. *Id.*

538. *Id.*

539. *Id.*

540. *Id.*

541. Interview with Mary Ann Davis, *supra* note 536.

of older Americans in North Carolina in the next several years.⁵⁴² She has very little hope that North Carolina will rise to the occasion.⁵⁴³

3. *State Offices of Public Guardianship: The Tougher the Law, the More Expensive the Process*

The lack of identification of state offices or public guardianship programs is neither to slight them, nor to infer that they should not be a component of the answer addressing the guardianship needs of older Americans. They must be a part of the answer if the overwhelming needs of unprotected, older Americans are to be met. There is the obvious *caveat* — public guardianship programs must be properly funded and carefully controlled.

However, state-run systems tend to have difficulty sustaining sufficient funding.⁵⁴⁴ Those that are not well funded may succumb to excessive power, becoming easy prey for misgovernment and the distorted need to manufacture incapacity in order to build case loads and sustain the illusion of virtual reality. This is chief among the forces affecting political folly. When the guardianship programs are within, or controlled by, government, they are in that risky, paramount territory of folly where power over others is sought.

Regardless of who or what offers appropriate guardianship services in the future, there is an insufficient foundation on which to build programs and train individuals to serve the rising tide of old boomers in the next millennium.

V. CONCLUSION

One objective of this Article is to summarize guardianship through the ages, and in many forms of government. The historical summary visualizes why changing the concept and the process of guardianship is so difficult. No principle or process so embedded in

542. *Id.*

543. *Id.*

544. *See, e.g.*, CAL. PROB. CODE § 1851.5 (West 1991) (stating the estate of the conservatee shall be assessed for investigation costs, and costs incurred by the county for investigation costs shall be reduced by any assessments actually collected during the year); 755 ILL. COMP. STAT. ANN. 5/11a-13 (West 1994) (stating no cost may be taxed or charged by a public office, or by the Office of the State Guardian, in a guardianship appointment or subsequent proceeding).

legal doctrine and culture as *parens patriae* can be easily rooted out.

Grown over the ages, the doctrine of *parens patriae* has deep and broad root structures in the guardianship process. The doctrine of *parens patriae* is like the two crepe myrtles that once flowered in magnificent, vibrant fuchsia in front of this Author's law office. Planted over twenty-five years earlier by Roy Booth, the senior partner of the firm, the trees were large, luscious, and splendid when in bloom, but dark and a bother when not. They obstructed visibility of the firm's building. After Booth's retirement, the younger lawyers decided to remove the crepe myrtles. Not only were the crepe myrtles cut down, but the primary roots were dug up. Invariably, however, when the grass gets long, sprouts of the crepe myrtles re-emerge from the deeply embedded root system.

Similarly, joined with legal doctrine and culture is the perpetual intervention of those who would benefit from exercising control over others. Together, they will forever sprout, reemerging from the deeply embedded root system of the doctrine of *parens patriae* and excessive power.

Another objective of this Article is to bring together important research projects and studies, looking at them in one place. Viewed together, the issues, findings and recommendations generally follow the same arrangement and sing the same chorus or refrain, confirming a primary element of Tuchman's definition of misgovernment — that alternatives are known and available by which to better serve the citizens. Through the eyes of various authors, the reader is provided the opportunity to review and compare the issues, findings and recommendations. All of the authors generally confirm that we have known for a long time what to do. Why have we not done it?

Some may say that change has occurred, not only in the law but in its application. While the direct response is that they are still wearing their masks of virtual reality, it is acknowledged that there is movement. But the premise of this article is that the overwhelming volume of twenty-first century citizens needing services will not be served because enough has not been done. Enough has not been done to sustain the autonomy and the individual rights of those who could choose guardianship alternatives, and enough has not been done in constructing access to guardians, training of guardians and the monitoring of guardians in the future.

Writers of our time have voiced the same concern.⁵⁴⁵ Professor Rein's eloquent and thorough article addressed what courts ought to do, and ought not to do.⁵⁴⁶ Rein asserts that the use of guardianships to protect the financial interests or mental well-being of third parties over the objections of the proposed ward goes beyond the state's *parens patriae* power.⁵⁴⁷ Before a court may interfere with the fundamental liberty interests protected by the *parens patriae* concept, statutory safeguards should be in place which require a clear and convincing showing of the necessity of such action.⁵⁴⁸ To justify a ward's involuntary confinement, the third party or societal interests must be of the highest magnitude.⁵⁴⁹

This Article focuses on the guardianship needs of older Americans as the twenty first century approaches. The premise asserted is that guardianship has been historically misgoverned to the extent that it is a march of folly. It also asserted that the changes in laws are a mask of virtual reality, hiding what is actually being done in the process, and done to older Americans caught in it. Since all significant research in guardianship has been based on data that ended in 1991, any movement or direction must be taken in blind faith. However, the conclusions drawn from analysis of data five years ago were fearful. Practical reality suggests that if conclusions could be drawn today, they would reveal worse conditions, not better.

In the epilogue of *The March of Folly*, titled "A Lantern on the Stern," Tuchman comments about how so many in government are induced to folly because of excess power.⁵⁵⁰ She cites Plato for the assertion that "too much power given to anything, like too large a

545. See generally Peter Margulies, *Access, Connection, and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Capacity*, 62 *FORDHAM L. REV.* 1073 (1994); Rein, *supra* note 470; Paul R. Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 3 *UTAH L. REV.* 515, 545 (1987); Paul R. Tremblay, *Impromptu Lawyering and Defacto Guardians*, 62 *FORDHAM L. REV.* 1429 (1984).

546. See Rein, *supra* note 470.

547. See *id.* at 1870.

548. See *id.*

549. See *id.* 1870 n.254. Rein opines that a court should give considerable weight to the ward's objections when the only threat is to a third party's inheritance or tax saving plan. See *id.* Only when the third party is threatened with poverty or substantial financial risk should the ward's objections be overridden. See *id.* However, this exercise by the court still does not understate its *parens patriae* power. See *id.*

550. See TUCHMAN, *supra* note 6, at 381.

sail on a vessel . . . is dangerous; moderation is overthrown.⁵⁵¹ She also warns that mental stagnation, which is the controlled maintenance of ideas created by rulers and policy makers, is fertile ground for folly.⁵⁵² Tuchman laments

learning 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.⁵⁵³

Excessive power under the doctrine of *parens patriae* existed through the ages. It exists today in America. From the deeply embedded roots of the doctrine of *parens patriae*, the seeds of excessive power sprout in agencies and bureaucracies controlling people under guardianship, and will grow in the form of public guardianship. As Regan noted, public guardianship has a bad reputation. It is not unlike the persistent “baobab.”⁵⁵⁴

The growth of the public guardianship “baobabs” will make the situation worse if not carefully controlled. The current so-called guardianship system, recognized as the protective link to unpro-

551. *Id.* at 382.

552. *See id.* at 383. Mental standstill has three stages: (1) fixing principles and boundaries governing a political problem; (2) becoming rigid as dissonances and failing function begin to appear; and (3) pursuit of failure that enlarges damage until collapse. *See id.*

553. *Id.* at 383.

554. *See* ANTOINE DE SAINT-EXUPERY, *THE LITTLE PRINCE* 21 (Katherine Woods trans., 1943).

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.

Id.

tected older Americans, is minuscule in size, if not illusory, and infested with the wrong roots. Under the weight of the massive numbers of the next elder generation, the “boomer”⁵⁵⁵ of guardianship's illusory system will make it crumble. Those in control must remove their masks of virtual reality in order to work in practical reality. They must root out the sprouts with bad reputations and replace them with seeds that will sprout the beginnings of a good guardianship system,⁵⁵⁶ one that will have a sound foundation.

555. Boomer, or boomer is what America experiences as the generation of Americans born during the decades of the 1940s and 1950s pass through life's cycles.

556. Some extremists would lament that “good guardianship system” is an oxymoron.